President Costa, members of the Court, distinguished colleagues,

Ladies and Gentlemen,

I understand the topic of this seminar as it is addressed to me and my fellow judges from national courts here today as how we see the relationship between the European system of human rights protection and those national courts in which we sit. We are told that the Convention is ours! This is a good slogan, but to make it real requires efforts from us, and, Mr President, I would also say efforts from you. You have often spoken of the need for partnership in this context, a sharing of responsibilities. I would like to say that in Croatia we take this offer seriously and that we are willing to assume our role in guaranteeing the rights set out in the Convention at national level.

This is what is meant when we talk about having a subsidiary system. A key element in this respect is the margin of appreciation which your Court has recognised for national authorities since the earliest days of the Convention. In the broadest terms, the margin of appreciation leaves the States Parties an area of freedom in respect of policy making within the sphere of the Convention rights. However, the margin left to the States Parties is not a margin of pure discretion. It is not mere deference to a national legislator, but something more. We need to understand it in substantive terms[1].

For the Contracting States, this implies a duty to constantly balance its policies and measures with the requirements of the Convention. Even within the margin of appreciation, it has to make sure that its measures protect and promote human rights as much as possible.

The margin of appreciation doctrine embodies the proportionality principle which is required by the Convention. However, it is **broader** then the proportionality principle and represents a "frame of reference" within which different levels of intensity of judicial review is possible. Such levels of intensity range from "rationality review" as in the Rasmussen case (Rasmussen v. Denmark, 28. 11. 1984, Series A 87) where it is sufficient that the national regulator demonstrates a rational basis for passing the contested legislation, to more strict levels of scrutiny, where "compelling state interest", or "weighty reasons" (e.g. Abudulaziz et al. v. UK, 28. 5. 1985 Series A 94) should be demonstrated in order to justify a national measure.

The breadth of national regulatory playground depends on both, European Court of Human Rights and national courts.

On the part of the European Court of Human Rights, the understanding of the margin of appreciation means respect for a certain level of diversity and political choice that can be exercised by national legislature.

As the Court has pointed out, a number of factors have to be taken into account when determining the breadth of the margin of appreciation to be enjoyed by a State. Thus for example with respect to Article 8 and the protection of private and family life where a particularly important facet of an individual's existence or identity is at stake, the margin

[1] George Letsas, Two Concepts of the Margin of Appreciation, 26 Oxford Journal of Legal Studies 4 (2006)

allowed to the State will be restricted (see, for example *Christine Goodwin v. the United Kingdom* [GC], no. 28957/95, § 90, ECHR 2002-VI).

At the same time, and this was the subject of the seminar held here two years ago, we know that where there is no consensus within the Member States of the Council of Europe, either as to the relative importance of the interest at stake or as to the best means of protecting it, particularly where the case raises sensitive moral or ethical issues, the margin will be wider (*X., Y. and Z. v. the United Kingdom,* judgment of 22 April 1997, *Reports of Judgments and Decisions* 1997-II, § 44; *Frette v. France,* no. 36515/97, § 41, ECHR 2002-I).

In other words, the margin will be wider in cases where there are no coordinated policies common to the States Parties and in areas where national values are deeply entrenched and form part of the national culture. For example, concepts of national security (Sunday Times case) or pornography (Handyside case) traditionally enjoy a wide margin of appreciation. Where a regulatory goal or policy is perceived as "common" or European, the margin of appreciation narrows.

Very often in the exercise of the margin of appreciation national courts will be called upon to strike a balance between competing private and public interests or Convention rights. In this context Strasbourg has recognized a wider margin (see *Odièvre,* §§ 44-49 and *Frette* § 42).

Moreover, within the national legal systems, the courts of the States Parties cannot give a *carte blanche* to the legislators simply because they are entitled to a certain margin of appreciation. It is the national courts that exercise the important supervisory function which precedes, and is primary to, the one exercised by the European Court of Human Rights. To be able to exercise that function national courts need the courage to confront the legislature and to balance regulatory (public) interests against rights of individuals. In doing so, national courts are guided by the Convention and the case law of the European Court of Human Rights. In other words, the margin of appreciation left to the States Parties is subject to judgment and fine adjustment by the national courts.

The margin of appreciation does not always entail balancing. There are instances of clear violation of the Convention which *prima facie* make national regulation contrary to the Convention. Examples would be arbitrary discrimination on grounds like ethnicity or sex.

The real province of the margin of appreciation doctrine is in cases that involve regulatory judgment: the fine tuning of national regulatory interests and protection of individual rights.

Once a regulatory goal is within a margin of appreciation, the balancing/diversity approach is not a threat to the effectiveness of human rights protection. On the contrary – by not viewing national interest and fundamental rights as mutually exclusive, judges ensure that the Convention is realistically and practically applied, thus making it “ours”.

The title of this seminar seeks to define the relationship between the national courts and the Strasbourg court and I have said that the margin of appreciation is an important element in ensuring that national authorities acquire ownership of the Convention.

A separate issue arises for the Member States of the EU and for candidate countries for EU accession, like Croatia. The relationship between national courts and EU law has to

be defined in different terms. There is for example no inherent margin of appreciation, at least in the same sense, with regard to the implementation of Union legislation. On the other hand, Member States may have a margin of discretion when applying human rights standards in the context of Union law.

We therefore need to consider the relationship between the requirements of the Convention and EU fundamental rights guarantees, established not only by the case law of the European Court of Justice, but now also by the EU Charter of Rights which has become legally binding under the Treaty of Lisbon.

The plurality of standards of protection of fundamental rights calls for an increasing cooperation and dialogue between high courts – a discussion the Croatian Supreme Court is eager to join.

Croatia has now acquired considerable experience with the Convention. The advent of EU law as a binding body of rules and principles in the national context is a new challenge for us, as for other new or future Member States. In my view, meeting that challenge can only improve the quality of human rights protection as well as the level of compliance with the Convention.

However, there are grey areas that need to be further clarified. What happens if certain regulatory interests fall within the margin of appreciation as defined by the European Court of Human Rights, but still run against European Union law? For example, what if protection of certain values, such as the right to freedom of expression or the right to a private life run against exercise of one of the market freedoms, such as in the *Schmidberger*, *Familiapress* or *Omega* cases? Is the margin of appreciation under the Convention a valid justification for departure from State's obligations under the law of the European Union? Or is it the law of the European Union which has to be brought in terms with the Convention?

This dilemma needs to be resolved in practical terms by the national courts, giving due respect to the requirements of the three legal systems – national legal system, the system of the Convention and the system of EU law. In doing so, to use the expression often employed by European Court of Justice (e.g. in the *Promusicae* case), "a fair balance needs to be struck" between interests of protection of human rights and those of the market freedoms.

To conclude the issue of margin of appreciation, this means that it is not enough for courts to find that a certain margin of appreciation exists, and that therefore the legislator/agency was justified in its actions. The court needs to actually balance the interests pursued by the measure with the Convention right interfered with, taking into account the legitimacy of the goals pursued, methods of regulation, the necessity of the measure, its costs and benefits for the social good. This is not an easy task, even for the highest courts of the States Parties to the Convention. But it needs to be done, and it is us who need to do it.

In this sense, the level of judicial protection of Convention rights could benefit from the introduction of binding EU fundamental rights law and the requisite procedural mechanisms for its enforcement – a task not only for legislators, but also for courts of

Contracting/Member States. As I mentioned previously, this would not lead to conflicts between EU and ECHR law, but indeed to cross-pollination and mutual strengthening.

A new element is this connection is the future accession of the European Union to the Convention. I understand that the discussions on this are ongoing. What is important for those of us who have responsibility for ensuring the protection of human rights at national level is that the European system remains coherent both structurally and substantively. Divergent interpretation of fundamental rights by the two international jurisdictions would complicate our task and weaken the overall protection. We must not have two competing systems. At the same time the potential involvement of two international courts presents a threat to procedural economy. There are therefore risks which need to be avoided, but on the whole accession must be welcomed as an opportunity to strengthen the coherence of European human rights protection and therefore to reinforce the stability and security of the continent as a whole.

Another important aspect of national ownership of the Convention is the question of national remedies/ national enforcement.

Today, the Convention is embedded into the legal systems of all States Parties. However, models of national application of the Convention are different. The Convention, being an International Treaty, requires *bona fide* implementation, but that does not necessarily entail an automatic obligation on the part of the States to make it directly enforceable by national courts. The indirect approach, according to which the Convention guarantees are transformed into national legislation is also possible. **In either case, national courts have a responsibility to extend protection to Convention rights.** Where the Convention is directly applicable, the courts will base their decisions directly on the Convention. Where the Convention is transformed into national law, national courts will have to interpret national law in accordance with the Convention, but their decisions will be based in presumptively compatible national law.

When we speak about effective enforcement of the Convention, a clear difference needs to be drawn between legislative implementation and judicial enforcement.

National legislation might guarantee, for example, a procedural possibility to make a claim that a Convention right has been violated. Parties might, for example, have the option of challenging the legality of an administrative act before a court, appeal to the decision of that court etc. Those procedural mechanisms may even satisfy the requirement of a domestic remedy under Article 13 ECHR. However, legislative guarantees are often not enough in the absence of commitment on the part of national courts to apply them effectively and to broaden the protected area. Courts have to be not only legally entitled, but also willing and able to actually enter into the necessary analysis.

The role of the highest courts, whether supreme or constitutional, is of paramount importance. They have the responsibility to apply the Convention, as interpreted by the European Court of Human Rights within the national legal system and to encourage national courts to apply it directly, when deciding disputes falling within their jurisdiction. I imagine that Croatia is not the only Convention country in which the lower courts are reluctant to apply the Convention and, even more so, to follow the Strasbourg case-law. Of course it is important in this context that the courts be given the means to do

so in the form of access to the relevant and leading judgments in a language which they understand. In addition to having already all decisions and judgments against Croatia translated and put on the net we are also working to ensure that more translations of Grand Chamber judgments and some other important judgments are available in the Croatian language. But it is also necessary for the higher courts to give the right lead and to send the right signals to the courts below. The impulse must come from above if we want the lower courts to be involved and they must feel confident that their application of Convention law will not subsequently be disavowed by a superior court less open to Strasbourg influences.

I am pleased that there are signs that Croatian courts are starting to take the Convention seriously. In its 2008 judgment in Marušić case, the Administrative Court broadened the scope of judicial review and extended the protection of the right to freedom of expression under the Constitution and under the Convention to cover protection against University bodies. In this way the Administrative Court extended the scope of application of an existing judicial remedy to an area of protection where it was not applicable before (judgment of November 21, 2008).

In addition to legislative implementation of the Convention, effective judicial protection of human rights guarantees, whether those under the Convention, those under the national Constitution, or those under the EU Charter of Fundamental Rights, requires that parties have an actual, practical and effective possibility of asserting those rights and obtaining relief. In this respect, the law of the European Union has long recognised the need for effective judicial control. Thus in the *Johnston* case ((1986) ECR 1651) or *Peterbroeck* ((1995)ECR I-4599), referring to Article 6 and 13 ECHR the ECJ held that it was for the national Courts to provide effective judicial protection when they enforced individual rights under the EU law.

Providing effective judicial protection may entail setting aside (by the courts) national legal rules that are an obstacle to providing such legal protection. There is nothing, in principle, to preclude the same reasoning being applied in case of the Convention, at least in those legal systems like the Croatian which regard the Convention as a part of the national legal order. The Convention forms part of national law under the Constitution (Art. 139) and has legal status superior to ordinary legislation. There is nothing to prevent the Croatian ordinary courts from applying the guarantees of the Convention directly, including the guarantee to an effective legal remedy.

Once again, the role of national courts is crucial. The Convention is a subsidiary means of protection, and as has been noted by Laurence R. Helfer, its subsidiarity follows from the exhaustion of domestic remedy rule and the corresponding obligation to provide an effective legal remedy. It is well established that an effective legal remedy is one which is "in principle capable of providing an effective and sufficient means of redressing the wrongs for which, on the international plane, the Respondent State is alleged to be responsible" (European Commission of Human Rights in the *Nielsen* case, Application 343/57 Schouw Nielsen v. Denmark, Yearbook II (1958-59) p. 412, 442-444). Such legal remedies may comprise regular legal remedies, which are otherwise applicable within a national legal system, or specific legal remedies, such as the claim for violation of right to trial within reasonable time, introduced under Art. 27 of the Croatian Law on Courts.

In Croatia I emphasise that we are deeply committed to making the Convention work within our system so we do embrace the slogan which is the title of this seminar. However, that does not mean that every Strasbourg decision is greeted with joy and enthusiasm. We may for example, and many of my fellow national judges here today may recognise this feeling, be concerned with some of the practical consequences of decisions made on grounds of principle in Strasbourg, perhaps without always taking into account the problems faced in the day-to-day functioning of the administration of justice. I am thinking for example of the case of *Maresti* v. Croatia, which followed the Zolotukhin v. Russia Grand Chamber judgment, raising the issue of *ne bis in idem* in connection with consecutive sanctions for petty public order offences and criminal offences. I am thinking too for example of the possible implications of *Micallef* case on the ease and speed with which interlocutory proceedings can be conducted. I do not contest the application of the principles – but at national level we do have an obligation of effectiveness which is of course reinforced by your scrutiny from another angle. We have to look for workable solutions.

Mr President it has been a great honour for me to address this seminar. I congratulate the European Court of Human Rights for everything that it has achieved over the last fifty years and I look forward to further cooperation and dialogue with you and with the representative of other European judiciaries. We all have a common goal encapsulated in the notion of the rule of law within a democratic framework. The Convention is the primary tool that we use to pursue that goal. It is indeed “ours”!