

# THE CASE LAW OF THE CONSTITUTIONAL COURT OF THE REPUBLIC OF CROATIA CONCERNING MIGRATION AND ASYLUM ISSUES

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## ABSTRACT

*This study analyses the case law of the Constitutional Court of the Republic of Croatia on migration and asylum issues initiated after Croatia acceded to the European Union. After the introduction (Sec.1), the study provides an overview of the relevant sources of migration and asylum laws (Sec. 2). The central part of the study (Sec. 3) analyses the legal reasoning of the Constitutional Court, which shows the change in its approach towards applying more significant standards of protection guaranteed by the EU Law and the Convention for the Protection of Human Rights and Fundamental Freedoms, especially regarding the principle of ex nunc evaluation of the and the duty to ensure that the receiving third country is safe. The study also shows that further improvements in practice are required, as indicated by the cases against Croatia lodged before the European Court of Human Rights and other international human rights bodies concerning the issue of illegal pushbacks (Sec. 4). The study ends with main conclusions relating to the Constitutional Court's role in safeguarding asylum seekers' human rights as guaranteed by the EU law and the European Convention (Sec. 5). The conclusion is that the Constitutional Court follows the applicable case law of the Court of Justice of the EU and the European Court of Human Rights. However, in some cases there seems to have been a lack of opportunity for asylum seekers to exhaust legal remedies against the decisions or actions taken by Croatian public authorities and ultimately access the Constitutional Court.*

## KEYWORDS

*asylum seekers  
international protection  
Constitutional Court  
Republic of Croatia  
European Convention on Human Rights  
European Union law*

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## 1. Introduction

This study analyses the case law of the Constitutional Court of the Republic of Croatia (hereinafter, Constitutional Court) regarding migration and asylum issues, specifically cases in which third-country nationals or stateless persons, that is, persons who are not citizens of the European Union (EU), seek international protection in Croatia.

Croatia became an EU member on 1 July 2013. As a new EU member state, it was not initially a destination for transit immigrants. However, given that the number of migrants worldwide is constantly growing, it is realistic to expect Croatia to eventually face the problem of a larger number of asylum seekers. Regarding the statistics, in 2014 there were 453 asylum seekers in Croatia. In the same year, 16 persons were granted asylum and 10 had subsidiary protection.<sup>2</sup> In 2022, the procedure for Croatia's entry into the Schengen Zone was completed, and it became a Schengen State on 1 January 2023. The year 2022 was also marked by a large influx of registered irregular migrants in Croatia and the largest number of applications for international protection, 12,827. In the same year, 21 people were granted asylum. In the first three months of 2023, Croatia received 7,884 requests for international protection. This trend is evident in other European Union (EU) countries as well. In 2022, EU countries received the most applications for international protection since 2016. This increase may be explained by the removal of COVID-19-related restrictions, conflicts, and food insecurity in many regions. Additionally, secondary movements within the EU and a significant number of applications by nationals from visa-free countries who arrived legally also contributed.<sup>3</sup> Moreover, approximately four million people who benefited from temporary protection were fleeing Ukraine.<sup>4</sup>

In this context, it is important to consider the Constitutional Court's approach when dealing with migration and asylum issues. In 2014, Lalić Novak conducted research on whether the Constitutional Court and administrative courts promote higher standards of protection for asylum seekers.<sup>5</sup> Research related to the period before Croatia's accession to the EU shows that the Constitutional Court developed certain standards for the protection of asylum seekers regarding the right to procedural fairness.<sup>6</sup> However, the Constitutional Court did not significantly influence the development of the Croatian asylum system, which can be explained by the relatively small number of constitutional complaints initiated in these matters.<sup>7</sup>

2 | Statistical data is available on the website of the Ministry of Interior [Online]. Available at: <https://mup.gov.hr/pristup-informacijama-16/statistika-228/statistika-traziteljimedjunarodne-zastite/283234> (Accessed: 30 June 2023).

3 | European Union Agency for Asylum, 2023.

4 | *Ibid.* See Council Implementing Decision (EU) 2022/382 of 4 March 2022 establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Art. 5 of Directive 2001/55/EC, and having the effect of introducing temporary protection, OJ L 71, 4.3.2022.

5 | Novak, 2014, pp. 939–959.

6 | *Ibid.*, 956.

7 | *Ibid.*

This study examines cases initiated after Croatia's accession to the EU. The review of the relevant sources and case law stems from an analysis of 15 cases decided by the Constitutional Court between 2014 and 2022.<sup>8</sup> This study demonstrates and analyses the legal reasoning of the Constitutional Court that shows the change in its approach towards applying greater standards of protection guaranteed by the EU law and the Convention for Human Rights and Fundamental Freedoms (hereinafter, European Convention or Convention).<sup>9</sup> However, the study also shows that further improvements in practice are required, as indicated by cases against Croatia lodged before the European Court of Human Rights (hereinafter: ECtHR). This study discusses all the constitutional issues examined in the case law of the Croatian Constitutional Court concerning migration and asylum issues. Croatia is the EU's newest Member State, and only a few constitutional issues have been raised. Specifically, the Constitutional Court has never dealt with the question of EU and member states competencies or the boundaries of their competencies. These issues have never been discussed in migration and asylum cases, or in general. The Constitutional Court has never linked migration or asylum issues with constitutional identity. As the analysis shows, the main role of the Constitutional Court has so far been related to safeguarding the human rights of asylum seekers, as guaranteed by the EU law and the European Convention.

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## 2. Relevant Sources of Immigration and Asylum Law

Under the Constitution of the Republic of Croatia (hereinafter, the Constitution), courts administer justice according to the Constitution, the Acquis of the EU, international treaties, laws (legislative acts), and other valid sources of law.<sup>10</sup> The Constitution, in accordance with the legal tradition of continental Europe, established the Constitutional Court, which, among other things, decided on constitutional complaints against individual decisions taken by state bodies, bodies of local and regional self-government, and legal persons vested with public authority where such decisions violate human rights and fundamental freedoms. This Sec. explains the main sources of immigration and asylum law that the Constitutional Court applies when deciding on constitutional complaints.

Pursuant to the Constitutional Act on the Constitutional Court of the Republic of Croatia, if other legal remedies are provided against the violation of constitutional rights, a constitutional complaint may be lodged only after this remedy has

8 | Table of cases is given at the end of this study.

9 | Convention for Human Rights and Fundamental Freedoms, Official Gazette (hereinafter: OG) – International Treaties no. 18/97, 6/99 – consolidated text, 8/99 – correction, 14/02, 1/06 and 13/17.

10 | See Arts. 115 and 141c of the Constitution of the Republic of Croatia, OG no. 56/90, 135/97, 113/00, 28/01, 76/10 and 5/14. The consolidated text of the Constitution of the Republic of Croatia as of 15 January 2014 edited and translated by the Constitutional Court of the Republic of Croatia is available at: <https://usud.hr/en/the-constitution> (Accessed: 30 June 2023). Hereinafter, the numbering from this consolidated text will be used.

been exhausted.<sup>11</sup> In asylum cases, the exhaustion of legal remedies occurs as follows: The Ministry of Interior decides upon its application for international protection. An appeal cannot be submitted against the decision of the Ministry, but an administrative dispute can be initiated before the administrative court.<sup>12</sup> Against the judgment of the administrative court for rejecting or dismissing the action for the annulment of the Ministry's decision, an appeal may be filed with the High Administrative Court of the Republic of Croatia.<sup>13</sup> A constitutional complaint may be submitted within 30 days of receiving the decision of the High Administrative Court.<sup>14</sup> The Constitutional Court shall initiate proceedings in response to a constitutional complaint even before all legal remedies have been exhausted in two situations: (1) when the court of justice does not decide within a reasonable time about the rights and obligations of the party, or about the suspicion or accusation for a criminal offence, or (2) in cases where the disputed individual acts grossly violate constitutional rights and it is completely clear that grave and irreparable consequences may arise for the applicant if Constitutional Court proceedings are not initiated.<sup>15</sup>

### | 2.1. Constitution

According to the case law of the Constitutional Court, in cases where the application for international protection was dismissed or rejected by the competent public authority as well as their action and appeal in administrative disputes, asylum seekers in their constitutional complaints mostly claimed violation of the constitutional right to life and the prohibition of torture, humiliation, and degradation, and inhuman treatment in connection with the constitutional right to asylum, as well as violation of the constitutional right to a fair trial. In certain cases, they alleged a violation of the constitutional prohibition on the expulsion of foreigners legally residing in the Republic of Croatia. In addition, in some cases, they claimed that they had been discriminated against and that their right to access a lawyer during their stay in the reception centre for foreigners had been violated. The relevant provisions of the Constitution are as follows:

1. Each person has a right to live. There should be no capital punishment in the Republic of Croatia (Art. 21).
2. No one may be subjected to any form of ill treatment without their consent to medical or scientific experiments (Art. 23, para. 1).

11 | Art. 62, para. 2 of the Constitutional Act on the Constitutional Court of the Republic of Croatia, OG no. 99/99, 29/02, 49/02 – consolidated text. The Constitutional Act is available in English on the website of the Constitutional Court [Online]. Available at: [https://usud.hr/sites/default/files/dokumenti/The\\_Constitutional\\_Act\\_on\\_the\\_Constitutional\\_Court\\_of\\_the\\_Republic\\_of\\_Croatia\\_consolidated\\_text\\_Official\\_Gazette\\_No\\_49-02.pdf](https://usud.hr/sites/default/files/dokumenti/The_Constitutional_Act_on_the_Constitutional_Court_of_the_Republic_of_Croatia_consolidated_text_Official_Gazette_No_49-02.pdf) (Accessed: 30 June 2023).

12 | Art. 32 of the Act on International and Temporary Protection, OG no. 70/15, 127/17 and 33/23.

13 | See Art. 66a of the Administrative Disputes Act, OG no. 20/10, 143/12, 152/14, 94/16, 29/17 and 110/21.

14 | Art. 64 of the Constitutional Act on the Constitutional Court of the Republic of Croatia.

15 | *Ibid.*, Art. 63, para. 1.

3. Foreign citizens and stateless persons may be granted asylum in the Republic of Croatia unless they are prosecuted for non-political crimes and activities, contrary to the fundamental principles of international law. No alien legally residing in the territory of the Republic of Croatia shall be expelled or extradited to another state, except in cases where decisions made in compliance with international treaties or laws are enforced (Art. 33).
4. Anyone shall be entitled to have their rights and obligations or suspicion or accusation of a criminal offence decided upon fairly and within a reasonable time by an independent and impartial court established by law (Art. 29, para. 1).
5. All persons in the Republic of Croatia shall enjoy rights and freedoms, regardless of race, colour, gender, language, religion, political or other opinions, national or social origin, property, birth, education, social status, or another status. All persons shall be equal before the law (Art. 14).
6. Human liberty and personality are inviolable. No one shall be deprived of liberty, nor shall liberty be restricted, except when specified by law upon which a court shall decide (Art. 22).
7. Any person arrested or detained shall have the right to appeal to a court, which must decide the lawfulness of the arrest without delay (Art. 24, para. 3).

## 2.2. *European Convention of Human Rights and the Case Law of the European Court of Human Rights*

The European Convention is the most relevant international legal act for the Constitutional Court of the Republic of Croatia. The Croatian constitutional legal order accepts a legal monism system. Under Art. 134 of the Constitution, international treaties which have been concluded and ratified in accordance with the Constitution, which have been published and entered into force, shall be a component of the domestic legal order of the Republic of Croatia and shall have primacy over domestic law. According to this constitutional provision, international treaties in force in the Republic of Croatia enjoy supra-legislative status, but in relation to the Constitution, they retain a sub-constitutional status. However, as Omejec points out, the case law of the Croatian Constitutional Court shows that international treaties actually enjoy a quasi-constitutional status in the Croatian constitutional legal order because they serve as standards for the review of the national legislation, particularly of the acts of Parliament.<sup>16</sup>

When an individual (a physical or legal person) files a constitutional complaint before the Constitutional Court, he or she may argue that the court and public authorities have violated his or her constitutional rights by denying the rights he or she enjoys based on an international treaty.

The Constitutional Court regularly refers to ECtHR case law irrespective of the state against which the judgment was passed. Therefore, it accepts that the judgments of the ECtHR extend beyond the boundaries of the particular cases.<sup>17</sup> The

<sup>16</sup> | Omejec, 2009, p. 2.

<sup>17</sup> | See Ofak, 2020, pp. 688–706.

binding effect of the case law of the ECtHR for the whole judiciary was emphasised by the Constitutional Court in its Decision on 23 January 2013:

[...] the domestic case law must be built to observe the international legal obligations that for the Republic of Croatia arise from the Convention. It must be in conformity with the relevant legal reasoning and case law of the ECtHR because, for the Republic of Croatia, they represent binding standards of international law.<sup>18</sup>

In asylum cases, the Constitutional Court examined constitutional complaints regarding the violation of the following rights and freedoms guaranteed by the European Convention: the right to life (Art. 2), the prohibition of torture (Art. 3), the right to liberty and security (Art. 5), the right to an effective legal remedy (Art. 13), and the prohibition of discrimination (Art. 14).

### **2.3. European Union Law and the case law of the Court of Justice of the European Union**

The Constitution prescribes the application of EU Law in the following way (Art. 141c):

The exercise of the rights ensuing from the European Union Acquis Communautaire shall be equal to the exercise of rights under the Croatian legal order.

All the legal acts and decisions accepted by the Republic of Croatia in European Union institutions shall be applied in the Republic of Croatia in accordance with the European Union Acquis Communautaire.

Croatian courts shall protect individual rights based on the European Union Acquis Communautaire.

State bodies, local and regional self-government bodies, and legal persons vested with public authority shall apply European Union law directly.

As Rodin pointed out, Art. 141c can be understood as a legal norm which implicitly prescribes the direct effect and supremacy of the EU law over Croatian law.<sup>19</sup> Croatian courts, including the Constitutional Court, are obligated to protect subjective rights under the EU Acquis Communautaire (Art. 141c, para. 3). This provision acknowledges the direct effect of the EU Law on the Croatian legal system. Art. 141c, para. 4 of the Constitution prescribes a direct administrative effect. Administrative authorities, including municipal authorities and other legal persons vested with public authority, shall be under the same obligation as the National Court to apply the direct-effect doctrine.<sup>20</sup>

Regarding the question of the hierarchy of the EU law over the Croatian Constitution, there has so far been only one mention of this issue in cases concerned with the constitutionality of the popular initiative referendum related to the separation of supporting and non-core activities in the public sector (outsourcing) and

18 | U-III-3304/2011, decision of 23 January 2013, para. 32.

19 | Rodin, 2011, p. 89.

20 | Ibid., pp. 89–90.

the monetisation of Croatian highways. In its decision, the Constitutional Court concluded that a referendum was not allowed because the text of the referendum question proposed by the organising committee was not in accordance with the Constitution.<sup>21</sup> Regarding the issue of compliance of the referendum question with the EU law, the Constitutional Court assessed that it was unnecessary to examine it because the Constitution, by legal force, is higher than the EU law.<sup>22</sup> Thus, by declaring that the referendum question was incompatible with the Constitution, examining its compatibility with the EU law was unnecessary. The Constitutional Court did not explain the supremacy of the Croatian Constitution over EU law. Horvat Vuković (2019) stressed that ‘such a laconic rejection of the supremacy of EU law’ can be considered ‘a reckless failure of the Court to clarify the limits of the effects of EU law in the context of preserving the specific Croatian constitutional identity’.<sup>23</sup>

According to the results of one study that investigated the application of the Charter of Fundamental Rights of the European Union (hereinafter Charter)<sup>24</sup> before the Constitutional Court,<sup>25</sup> it can be observed that the Constitutional Court directly applied the EU law in the proceedings initiated by a constitutional complaint in a limited number of cases, mostly concerning migrations or asylum.<sup>26</sup> Majić’s (2021) research showed that in certain cases where the applicants referred to the Charter but omitted to substantiate their claims and point out to any of the rulings of the Court of Justice of the EU (hereinafter: CJEU), the Constitutional Court had not conducted an enquiry into the application of the EU law on its own motion.<sup>27</sup> However, in a later case, the Constitutional Court changed its approach to applying the Charter and EU Law directly on its own motion. In the landmark case *Oral*, the Constitutional Court found a violation of Art. 141c of the Constitution when the court failed to directly implement ‘the Dublin *acquis* of the European Union’, that is, the common European system of asylum protection.<sup>28</sup> As Majić (2021) points out, following this new development of applying the Charter *proprio motu*, the Constitutional Court had to solve the dilemma of how to deal with complaints in which the European Convention and the Charter were applicable, especially in cases where the standards of protection afforded to an individual by the EU law were not the same as those afforded by the Convention.<sup>29</sup> In a subsequent landmark decision, *X. Y.*,<sup>30</sup> the Constitutional Court examined the equivalence of standards of protection afforded to asylum seekers by the EU law and the Convention and applied the

21 | U-VIIR-1159/2015, decision of 8 April 2015, para. 46.

22 | *Ibid.*, para. 45.

23 | Horvat Vuković, 2019, p. 262.

24 | Charter of Fundamental Rights of the European Union, OJ C 326, 26.10.2012, pp. 391–407.

25 | See Majić, 2021, pp. 198–222.

26 | *Ibid.*, pp. 207–209. These cases are addressed in Sec. 3 of this study.

27 | Majić, 2021, pp. 207–208. See, for instance, U-III-6958/2014, decision of 27 February 2018.

28 | U-III-208/2018, decision of 10 July 2018, para. 22. The case are explained in Sub-Sec. 3.2.

29 | Majić, 2021, p. 209.

30 | U-III-424/2009 and U-III-1411/2009, decision of 17 December 2019.

higher standards pursuant to the case law of the ECtHR concerning the *ex nunc* evaluation of an asylum application.<sup>31</sup>

#### | 2.4. *International and Temporary Protection Act*

Before Croatia's accession to the EU, the procedure for granting asylum protection was prescribed by the Asylum Act.<sup>32</sup> The Asylum Act remained valid until the new Act on International and Temporary Protection (AITP) entered into force in 2015.<sup>33</sup> This Act prescribes the principles, conditions, and procedures for international protection and temporary protection; the status, rights, and obligations of asylum seekers, asylees, foreigners under subsidiary protection, and foreigners under temporary protection; and the conditions and procedures for the revocation and cessation of asylee status and subsidiary and temporary protection.<sup>34</sup>

31 | Majic, 2021, pp. 211–213. The case is explained in Sub-Sec. 3.2.

32 | Asylum Act, OG no. 79/07, 88/10, 143/13.

33 | Act on International and Temporary Protection, OG no. 70/15. This Act has so far been amended twice (OG no. 127/27 and 33/23). English version of the Act is available at: <https://www.refworld.org/pdfid/4e8044fd2.pdf> (Accessed: 30 June 2023). However, this consolidated version does not include the latest amendments to the Act from 2023.

34 | Pursuant to Art. 2 of the AITP, under this Act the following EU Directives are transposed into the Croatian legal order: Council Directive 2001/55/EC of 20 July 2001 on minimum standards for providing temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof (OJ L 212, 7.8.2001), Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification (OJ L 251, 3.10.2003), Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted, Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast), (OJ L 180, 29.6.2013), and Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast) (OJ L 180/96, 29.06.2013). Furthermore, this Act regulates the application of the following EU regulations: Commission Regulation (EC) No. 1560/2003 of 2 September 2003 laying down detailed rules for the application of Council Regulation (EC) No. 343/2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national (OJ L 222, 5.9.2003), Regulation (EU) No. 603/2013 of the European Parliament and of the Council of 26 June 2013 on the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of Regulation (EU) No. 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes, and amending Regulation (EU) No. 1077/2011 establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice (recast), (OJ L 180, 29.6.2013), Regulation (EU) No. 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast), (OJ L 180 29.6.2013), Commission Implementing Regulation (EU) No. 118/2014 of 30 January 2014

Art. 6 of the AITP prescribes the principle that prohibits expulsion or return (non-refoulement). It is forbidden to expel or return a third-country national or stateless person to a country:

1. In which his/her life or liberty is threatened on account of his/her race, religious or national affiliation, membership in a particular social group, or political opinion or
2. In which they could be subjected to torture, inhuman or degrading treatment, or
3. Which could extradite them to another country, whereby the principle of non-refoulement would be undermined.

An asylum shall be granted to applicants who are outside the country of their nationality or habitual residence and have a well-founded fear of persecution due to their race, religion, nationality, affiliation with a certain social group, or political opinion, as a result of which they are not able or do not wish to accept the protection of that country (Art. 20). Subsidiary protection shall be granted to an applicant who does not meet the conditions to be granted asylum if justified reasons exist to indicate that if returned to his/her country of origin, he/she would face a real risk of suffering serious harm and who is unable or, owing to such risk, is unwilling to avail themselves of the protection of that country. Serious harm assumes the threat of death by penalty or execution, torture, inhuman or degrading treatment or punishment, and serious and individual threats to the life of the civil population due to arbitrary generalised violence in situations of international or internal armed conflict (Art. 21). The AITP further states the reasons for persecution, such as race, religion, nationality, ethnicity, political opinion, and belonging to a certain social group, including sexual orientation or gender identity (Art. 22). According to the AITP, acts of persecution must be sufficiently serious in nature or repeated that they constitute a serious violation of fundamental human rights, in particular the rights from which derogation cannot be made under Art. 15, para. 2 of the European Convention, such as acts of physical or emotional violence, including sexual violence, discriminatory measures, judicial prosecution, or punishment which is disproportionate or discriminatory (Art. 23).

Art. 24 prescribes the principle of 'sur place' according to which a well-founded fear of being persecuted or a real risk of suffering serious harm may be based on events which took place after the applicant left the country of origin, including the activities the applicant has engaged in after he/she left the country of origin. Acts of persecution or serious harm may be committed by state bodies, parties, or organisations that control the state or a significant part of the state territory, or non-state actors, if it is shown that state bodies, parties, or organisations that

amending Regulation (EU) No. 1560/2003 laying down detailed rules for the application of Council Regulation (EC) No. 343/2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national (OJ L 39, 8.2.2014) and Regulation (EU) 2021/2303 of the European Parliament and of the Council of 15 December 2021 on the European Union Agency for Asylum and repealing Regulation (EU) No 439/2010 (OJ L 468, 30.12.2021).

control a significant part of the state territory, including international organisations, are unable or unwilling to provide protection against persecution or serious harm (Art. 25). While assessing the application, the AITP contains provisions concerning internal resettlement according to which the possibility of internal resettlement to a specific part of the country of origin is also established, where the applicant does not have a well-founded fear of persecution or of suffering serious harm or may receive effective protection from persecution or from suffering serious harm. Internal resettlement is possible if the applicant can travel to that part of the country safely and lawfully, gain admittance, and reasonably expect to settle there (Art. 27).

Rules regarding the assessment of facts and circumstances specify that the applicant is obliged to cooperate with the Ministry, furnish all available documentation, and present true and accurate information relating to his/her identity, age, nationality, family, country, address of previous residence, former applications, travel routes, identification and travel documents, and reasons for applying for protection. Furthermore, when assessing the application, the Ministry of Interior has the duty to collect and consider all the relevant facts and circumstances, especially taking into consideration:

1) Relevant statements and evidence presented by the applicant, including information about whether they were or could be exposed to persecution or the risk of suffering serious harm

2) Current facts about the country of origin and, if necessary, the country through which he/she travelled, including the laws and regulations of that country and how they are applied, as contained in various sources, especially those of the United Nations High Commissioner for Refugees (hereinafter, UNHCR), the European Union Agency for Asylum (previously the European Asylum Support Office; EASO) and other organisations dealing with the protection of human rights, and

3) The position and personal circumstances of the applicant, including factors such as gender and age in order to assess whether the procedures and acts to which he/she was or could be exposed would amount to persecution or serious harm.

The fact that the applicant has already been exposed to persecution, serious harm, or the threat of such persecution or harm is a serious indication of the applicant's well-founded fear of persecution or the risk of suffering serious harm, unless good reasons exist to consider that such persecution or serious harm will not be repeated (Art. 28).

Art. 29 specifies benefit of the doubt according to which the applicant's statement shall be deemed to be credible in the part in which certain facts or circumstances are not supported by documentation if:

1. The general credibility of the applicant's statement has been established
2. The applicant has made an effort to support his/her application with documentation
3. All relevant elements available to him/her were lodged with a satisfactory explanation regarding the lack of other relevant elements
4. It is established that the applicant's statements are consistent and convincing, and do not contradict the specific and general information available which is relevant for deciding on an application, and

5. The applicant requested international protection as soon as possible or has justified why he/she did not do so.

If the application has been rejected or the procedure is discontinued, the applicant may lodge a subsequent application supported by the relevant facts and evidence which arose after the decision became enforceable or which the applicant for justified reasons did not present during the previous procedure related to meeting the conditions for approval of international protection. The admissibility of the subsequent application shall be assessed based on the facts and evidence it contains and in connection with the facts and evidence already used in the previous procedure (Art. 47).

### | 2.5. Other Sources

Under Art. 115, para. 3 of the Croatian Constitution, courts administer justice according to the Constitution, legislative acts, international treaties, and other valid sources of law. Thus, there are no restrictions on the legal sources that courts can apply to their judgments. Furthermore, Art. 3 of the Constitution prescribes the highest values of the constitutional order which form the basis for its interpretation: freedom, equal rights, national and gender equality, peace-making, social justice, respect for human rights, inviolability of ownership, conservation of nature and the environment, the rule of law, and a democratic multiparty system. These fundamental values are considered part of the general principles that allow courts to prevent unacceptable consequences of applying the law in a manner contrary to the principles. In addition to the principles that are explicitly prescribed in the Constitution, the Constitutional Court also acknowledges the existence of implicit principles derived from domestic constitutional law, foreign constitutional case law (in particular, the case law of the German Federal Constitutional Court), and European and international law, including soft law such as the opinions, reports, and studies of the Venice Commission.<sup>35</sup> Additionally, the decisions of the Committee of Ministers of the Council of Europe delivered in proceedings for the execution of the ECtHR judgments may also be considered a source of law concerning the compatibility of national laws with the standards guaranteed by the European Convention.<sup>36</sup>

In migration and asylum cases, as shown in Sec. 3, there have been no cases where the Constitutional Court took account of the case law of other countries.<sup>37</sup> Regarding the documents and case laws of other organisations, the Constitutional

35 | Constitutional Court of the Republic of Croatia, Role of Constitutional Courts in upholding and applying constitutional principles, Answers to the Questionnaire for the XVIIth Congress of the Conference of European Constitutional Courts, Batumi, 29 June to 1 July 2017, p. 4 [Online]. Available at: <http://www.confconstco.org> (Accessed: 30 June 2023). See also Ofak, 2020, p. 704.

36 | Majic, 2021, p. 214.

37 | For cases regarding the principle of tax equality, as well as the requirement for the precision of the legal norm where the Constitutional Court considered the case law of the German Federal Constitutional Court please see: Constitutional Court of the Republic of Croatia.

Court considers reports published by the European Council on Refugees and Exiles (ECRE) (Sub-Sec. 3.5).

### 3. The Impact of the Constitutional Court's Case Law in Migration and Asylum Issues

Out of the 15 cases of constitutional complaints of asylum seekers that the Constitutional Court has decided in the period from 2014 to 2022,<sup>38</sup> this Sec. analyses the most important ones, that is, 'flagship' decisions, which contain crucial legal reasonings of the Constitutional Court regarding the resolution of asylum applications.

#### | 3.1. Initial case law of not applying EU law on its own motion

As mentioned in Sub-Sec. 2.3., the Constitutional Court decided not to conduct enquiries into the application of the EU Law on its own motion in cases where applicants omitted to substantiate their claims regarding violation of the EU migration and law and point out to any of the judgments of the CJEU. In the case of S. A. K., the asylum seeker complained of an inability to access free legal assistance and to have the costs of legal representation reimbursed, referring to Art. 47 of the Charter which guarantees the right to an effective remedy and to a fair trial. Since he failed to specify any judgment by the CJEU, the Constitutional Court briefly concluded that the applicant's case did not raise any relevant questions regarding the potential violation of the right to an effective remedy and a fair trial, as prescribed by the Charter.<sup>39</sup>

This method was pursued in an internationally known tragic case of the death of a six-year-old Afghan child, M. H., who was hit by a train after allegedly having been denied the opportunity to seek asylum by the Croatian authorities and ordered to return to Serbia via the tracks. Her family members lodged several constitutional complaints, *inter alia*, regarding the lack of an effective investigation into M. H.'s death.<sup>40</sup> The Constitutional Court examined their complaints under the procedural limb of Art. 2 (right to life) of the European Convention) and found that the investigation of M. H.'s death had been effective. The Constitutional Court

38 | U-III-684/2014, decision of 19 October 2016; U-III-6958/2014, decision of 27 February 2018; U-III-4880/2015, decision of 14 February 2019; U-III/2729/2016, decision of 16 November 2016; U-III-3862/2016, decision of 26 May 2022; U-III-4940/2017, decision of 29 March 2018; U-III-208/2018, decision of 10 July 2018; U-III-4865/2018, decision of 4 March 2021; U-III Bi-1385/2018, decision of 18 December 2018; U-III-2556/2019, decision of 24 March 2021; U-III-424/2019, decision of 17 December 2019; U-III-2556/2019, decision of 24 March 2021; U-III Bi-665/2019 decision of 4 March 2021; U-III-557/2019 decision of 11 September 2019 and U-III-5963/2020 decision of 14 October 2021.

39 | U-III-6958/2014, para. 8.

40 | U-III Bi-1385/2018, decision of 10 July 2018 and U-III Bi-665/2019, decision of 4 March 2021.

also found no breach of Art. 2 of the Convention in its substantive aspect, in that it had not been proven that the state authorities were responsible for the death of M. H. Applicants lodged applications before the ECtHR.<sup>41</sup> In its judgment, the ECtHR held that there had been:

1. A violation of Art. 2 concerning the investigation into the death of the Afghan family's daughter
2. A violation of Art. 3 (prohibition on inhuman and degrading treatment) with respect to applicant children
3. No violation of Art. 3 concerning adult applicants
4. A violation of Art. 5, para. 1 (right to security and liberty) with respect to all applicants
5. A violation of Art. 4 of Protocol No. 4 of the Convention (prohibition of collective expulsions of aliens) with respect to the applicant mother and her five children, and
6. A violation of Art. 34 (right of individual petition) with respect to all applicants.

The Court found that the investigation into the death had been ineffective, the applicant children's detention had amounted to ill treatment, and the decisions around the applicants' detention had not been dealt with diligently. It also held that some applicants had suffered collective expulsion from Croatia and that the State had hindered the effective exercise of the applicants' right of individual application by restricting access to their lawyer.<sup>42</sup> Unlike the ECtHR, the Constitutional Court did not observe that the case was governed by the Directive 2013/32/EU on common procedures for granting and withdrawing international protection and the Directive 2013/33/EU laying down standards for the reception of applicants for international protection.<sup>43</sup>

As Majic (2021) observed, the follow-up cases in asylum and migration cases show a new approach by the Constitutional Court to directly apply the relevant EU law.<sup>44</sup>

### 3.2. *New approach to applying EU law on its own motion*

In the Case Oral, the applicant was a Turkish citizen who had been granted asylum by the Swiss Federation.<sup>45</sup> He was detained in Croatia on an arrest warrant issued by the Turkish Republic. As he was already granted asylum in a country that adopted the Dublin Association Agreement,<sup>46</sup> the applicant complained that the order of his extradition to the Turkish Republic had violated Art. 31 of the Croatian

41 | M.H. and Others v. Croatia, applications nos. 15670/18 and 43115/18, judgment of 18 November 2021.

42 | Ibid. Registrar of the Court, Press Release, Multiple violations concerning Afghan family whose daughter died at Croatian border, ECHR 348 (2021), available at: <https://hudoc.echr.coe.int/> (Accessed: 30 June 2023).

43 | M.H. and Others v. Croatia, paras. 85–88.

44 | Majic, 2021, p. 208.

45 | U-III-208/2018.

46 | See Swiss State Secretariat for Migration, 2023.

Constitution which prohibited the extradition of individuals who reside lawfully in Croatia or the EU. In addition, he argued that his extradition would contravene the principle of non-refoulement in connection with his right to life and the prohibition of torture and degrading treatment. Although he did not refer to the application of the EU law, the Constitutional Court applied the principle of mutual trust between member states participating in the Dublin system—that is, the common European asylum protection system. The Constitutional Court cited the relevant case law of the CJEU<sup>47</sup> and the ECtHR.<sup>48</sup> It concluded that the principle of mutual trust, through Art. 141c of the Constitution, requires the Croatian state authorities, including judicial authorities, to respect decisions on the recognition of refugee status and appropriate protection made by the competent authorities of other countries participating in the common Dublin system—in this case, the Swiss Confederation. The Constitutional Court also pointed out that in proceedings whose outcomes depend on the correct application of the EU Law, domestic courts are obliged to respect the fundamental rights of the participants in the proceedings, as determined by the Constitution.<sup>49</sup>

In the absence of the case law regarding the boundaries of competences between the CJEU and the Constitutional Court, it appears from the current case law that the Constitutional Court acts as a guard supervising compliance with the EU Law, interpreted in accordance with the judgments of the CJEU.

### | 3.3. Principles of equivalence and effectiveness

The Constitutional Court also applied the EU law on its own motion in Case X. Y.<sup>50</sup> The case concerned an Iraqi national whose application for asylum and his subsequent application were rejected. The applicant complained, inter alia, that his right to an effective legal remedy had been violated because an appeal lodged against the judgment of the first-instance administrative court did not have a suspensive effect, and that he would be deported to Iraq without having his appeal finally decided by the High Administrative Court. First, the Constitutional Court established that according to the case law of the ECtHR,<sup>51</sup> Art. 13 of the European Convention neither obliges states to establish a two-level court system, nor does it generally guarantee the right to appeal against the decisions of the courts of the first instance, and thus does not guarantee the right to a suspensive appeal.<sup>52</sup> Second, the Constitutional Court verified that according to the case law of the CJEU,<sup>53</sup> an appeal lodged in the court of the second instance does not need to have

47 | C-411/10 N. S. v Secretary of State for the Home Department and C-493/10 M. E., A. S. M., M. T., K. P., E. H. v Refugee Applications Commissioner, Minister for Justice, Equality and Law Reform, judgment of 12 December 2011.

48 | M.S.S. v. Belgium and Greece, application no. 30696/09, judgment of 21 January 2011 and Tarakhel v. Switzerland, application no. 29217/12, judgment of 4 November 2014.

49 | U-III-208/2018, paras. 23–27.

50 | U-III-424/2009 and U-III-1411/2009.

51 | A.M. v. the Netherlands, application no. 29094/09, judgment of 5 July 2016.

52 | U-III-424/2009 and U-III-1411/2009, para. 125.

53 | C-180/17 X and Y v Staatssecretaris van Veiligheid en Justitie, judgment of 26 September 2018.

an automatic suspensive effect. Finally, the Constitutional Court referred to the principles of equivalence and effectiveness. It pointed out that the settled case law of the CJEU establishes that procedural rules governing actions to safeguard the rights which individuals derive from the EU law must not be any less favourable than those governing similar domestic actions (principle of equivalence) and must not be framed in such a way as to render impossible in practice or excessively difficult the exercise of rights conferred by the legal order of the EU (principle of effectiveness).<sup>54</sup>

The Constitutional Court concluded that the AITP provides more favourable protection to foreigners who are international or subsidiary protection applicants. In contrast to the general rules of the Administrative Disputes Act, the AITP provides for the automatic suspensive effect of a lawsuit initiating an administrative dispute against the Ministry's decision. Moreover, for situations in which this lawsuit does not have an automatic suspensive effect (when a subsequent request is rejected for procedural reasons), applicants have the right to submit a proposal for a suspensive effect. Therefore, the legal remedies provided by the AITP guarantee more favourable protection to asylum seekers, by enabling them to legally reside in the Republic of Croatia during the entire duration of the first-instance administrative dispute, in contrast to the Foreigners Act, which, due to the application of the general rules of the Administrative Disputes Act, does not contain a rule on the automatic suspensive effect of the lawsuit. Thus, foreigners who do not seek international protection in the Republic of Croatia do not have the right to a lawsuit with an automatic suspensive effect, either against decisions establishing that their legal stay has ended or against expulsion decisions. The Constitutional Court assessed that there was no violation of the right to an effective legal remedy as guaranteed by the Charter, secondary EU Law and Croatian Law implementing the EU Law in this particular case.<sup>55</sup>

#### | **3.4. Principle of *ex nunc* evaluation of the circumstances and the benefit of the doubt**

In Case A. B., an Iraqi woman claimed in a subsequent application for international protection that she was a victim of genital mutilation and domestic violence, including rape. The Administrative Court in Zagreb and the High Administrative Court did not believe her claims of shame and discomfort, which she cited as the reasons that prevented her from making allegations of domestic violence in the initial application for international protection.<sup>56</sup> In its decision to accept the constitutional complaint, the Constitutional Court explained the principle of *ex nunc* evaluation of circumstances as follows:

In cases of providing international protection, since the state has the obligation under Article 3 of the Convention not to expose an individual to the risk of ill-treatment, the existence of this risk must be assessed according to the facts that were known or

54 | *Ibid.*, paras. 34–35.

55 | U-III-424/2009 and U-III-1411/2009, paras. 144–146.

56 | U-III-557/2019, decision of 11 September 2019.

should have been known to the competent state authorities at the time of making the decision on the application for international protection. The assessment of the facts must focus on the foreseeable consequences of returning the applicant for international protection to the country to which he is to be returned, assessing the general situation in that country and the applicant's personal situation. If it is established that there is a danger that the person, in the country to which he/she should be returned, would be subjected to treatment contrary to Article 23, para. 1 of the Constitution, or Article 3 of the Convention, regardless of whether this danger arises from the general situation, personal situation or a combination of both situations, such expulsion will lead to a violation of these provisions. The competent authorities, therefore, are obligated to consider not only the evidence proposed by the applicant for international protection but also all other evidence relevant to the case being examined. The assessment of this danger should be strict (compare with the case of *J.K. v. Sweden*, §§ 83, 85-87).<sup>57</sup>

Regarding the application of the benefit of the doubt, the Constitutional Court established the following:

In principle, it is the duty of applicants for international protection to submit evidence in support of the validity of their claims. However, due to the particularity of the situation in which they find themselves, it is often necessary to apply the benefit of the doubt when evaluating the credibility of their statements and submitted documents. However, if there are strong reasons to doubt the accuracy of the claims made, it is up to the applicant for international protection to provide a satisfactory explanation for the alleged inaccuracies. Even if the testimony of the international protection applicant appears unconvincing on some details, this does not necessarily undermine the overall general credibility of his claim (compare with *J.K. v. Sweden*, § 91 and § 93 and *F.G. v. Sweden*, § 120).<sup>58</sup>

By applying the principle of the benefit of the doubt to the applicant's situation, the Constitutional Court acknowledged that interviews with victims of domestic violence require great sensitivity and understanding of the complexity of the psychological effects of such abuse from those who conduct these interviews. Moreover, these facts must be considered combined with the cultural context of the applicant's situation and the environment from which she comes, in which women are treated differently than men, and which is indicated, among other things, by the genital mutilation that the applicant suffered and due to which she falls under the 'vulnerable group'. These reasons explain why the applicant could not speak openly about her psychological trauma in front of the two men who conducted the interview. The Constitutional Court determined that the competent courts were obliged to evaluate her testimony in the context of all these facts, with the benefit of doubt. Additionally, the applicant proposed a series of evidence on the circumstances of her personal situation, including the credibility of the statements.

57 | *Ibid.*, para. 5.6.

58 | *Ibid.*, para. 5.7.

However, the Administrative Court in Zagreb rejected all of her evidentiary proposals, making it impossible to prove the merits of the application. In this way, the applicant was deprived of effective guarantees of a fair procedure that protected applicants from arbitrary expulsion for international protection, which resulted in the violation of her rights guaranteed by Art. 23, para. 1 of the Constitution and Art. 3 of the Convention.<sup>59</sup>

Concerning the application of the principle of *ex nunc* evaluation of the circumstances, Case X. Y. should be mentioned again. In this case, as Majic observed, the Constitutional Court applied the principle of *ex nunc* evaluation, consulted the relevant country reports, and thus examined on its own motion the applicant's allegations as to the specific risks he would face if deported and, finally, the possibility of removing the risk by internal relocation.<sup>60</sup> Having conducted a detailed *ex nunc* evaluation of the circumstances, the Constitutional Court found no reason why the applicant could not return to any other area of Iraq outside of Baghdad, which would be the most favourable and safest for him, according to his choice.

### 3.5. Duty to ensure that the third country is 'safe'

In addition to complaints about the death of their family member, M. H., the Afghan family, filed further constitutional complaints concerning the dismissal of their asylum applications in Croatia.<sup>61</sup> Based on Art. 3 of the Convention, their main argument was that they would be removed from the territory of the Republic of Croatia, despite clear indications that they would not have access to an appropriate asylum procedure in the Republic of Serbia that could protect them from expulsion or return (*refoulement*). In its decision to accept their complaints, the Constitutional Court stressed that the prohibition of inhuman or degrading treatment was one of the most important values in democratic societies. Regarding the expulsion of foreigners, if there are reasonable grounds to believe that the person in the receiving state would face a real risk of exposure to treatment contrary to Art. 3 of the Convention, the individual may not be removed to that country. The Constitutional Court also pointed out that the ECtHR in its case law established that national authorities applying the 'safe third country' principle have the obligation to thoroughly examine the relevant conditions in the third country, particularly the access and reliability of its asylum system. In principle, general deficiencies of the asylum system that are well documented in authoritative reports, particularly by the UNHCR, Council of Europe, and EU bodies, are considered known. The expelling state cannot simply assume that the asylum seeker will be treated in the receiving third country in accordance with Convention standards, but must first check how the authorities of that country apply their asylum legislation in practice.<sup>62</sup>

59 | *Ibid.*, para. 5.10–5.14.

60 | Majic, 2021, p. 212. U-III-424/2009 and U-III-1411/2009, paras. 60–108.

61 | U-III/4865/2018, U-III-837/2019 and U-III-926/2019, decision of 4 March 2021.

62 | *Ibid.*, para. 21. The Constitutional Court cited the following case law of the ECtHR: *M.S.S. v. Belgium and Greece and F.G. v. Sweden*, application no. 43611/11, judgment 23.3.2016.

As the disputed decision regarding the removal of the applicant to the Republic of Serbia was not related to the situation in Afghanistan or to the assessment of the merits of the applicant's asylum request, the Constitutional Court's task was not to examine whether the applicants were exposed to the risk of abuse in their country of origin. The Constitutional Court, in its decision in case X. Y.,<sup>63</sup> established that it would analyse the situation in the country to which the migrants are returning if they are still in the Republic of Croatia. To determine the state of rights and treatment of migrants and seekers of asylum and international protection, the Constitutional Court reviewed the report of the Belgrade Center for Human Rights 'The Right to Asylum in the Republic of Serbia 2019', which was based on relevant data from the UNHCR and the amended reports on the state of asylum in Serbia in 2019 available on the ECRE website.<sup>64</sup>

The Constitutional Court stated that an effective system had not yet been established in the Republic of Serbia that would enable asylum applicants who are removed from the Republic of Croatia to submit an asylum application in that country promptly. The authorities in the Republic of Serbia use methods to prevent the asylum seekers to apply for international protection, including prosecution through misdemeanour courts. According to available data, even though the asylum system is regulated satisfactorily at the normative level, it is difficult for asylum seekers to join the system of asylum and international protection in the Republic of Serbia. Thus, there are no adequate procedural guarantees that applicants, when they return to Serbia, will not be threatened by automatic refoulement, that is, an automatic return to Bulgaria.<sup>65</sup>

The Constitutional Court established that the Ministry of Interior and the administrative courts, when assessing the situation in the Republic of Serbia, limited themselves to the normative framework and the number of approved applications for asylum and international protection without checking the relevant reports of bodies and non-governmental organisations dealing with the protection of refugees on the actual treatment of persons returning from Croatia to Serbia and whether they are threatened with automatic refoulement. In addition, these authorities failed to establish all the decisive circumstances surrounding the status of the applicant in the Republic of Serbia (and, before that, in Bulgaria).<sup>66</sup> The Constitutional Court accepted the applicant's allegations that in the administrative and judicial proceedings, it was not established with sufficient certainty that the Republic of Serbia was a safe European third country and that the Republic of Croatia did not fulfil its procedural obligations from Art. 3 of the Convention regarding their return to the Republic of Serbia.<sup>67</sup>

63 | U-III-424/2009 and U-III-1411/2009. See previous Sec.

64 | European Council on Refugees and Exiles (ECRE), Asylum Information Database (AIDA) [Online]. Available at: <https://asylumineurope.org/reports/> (Accessed: 30 June 2023).

65 | U-III/4865/2018, U-III-837/2019 and U-III-926/2019, para. 24.

66 | *Ibid.*, para. 24.

67 | *Ibid.*, para. 25.

## 4. Cases against Croatia before the European Court of Human Rights

In addition to the abovementioned case,<sup>68</sup> in which the ECtHR established violations of the European Convention, a violation was established in the Daraibou case.<sup>69</sup> This case concerned a fire that broke out in the basement of a police station, which at the time had acted as an illegal migrant detention centre. Three migrants detained in the room died in the fire, and the applicant, who was also a detained migrant, suffered severe injuries. The ECtHR noted that the search to which the migrants were subjected before being placed in the premises of the police station was not thorough. Although two lighters were taken from them after the search, another lighter and burned cigarette stubs were found in the room where they were located. The ECtHR found serious deficiencies in how detainees were monitored during their stay at the police station. Furthermore, the applicant, referring to a handwritten note from the criminal file written by an unidentified person, claimed that the building in which he was detained did not have a usage permit or evacuation plan in the case of fire. However, local authorities have never examined this issue. All the aforementioned circumstances suggest that the police station building and its staff were poorly prepared to deal with the fire on their premises. Consequently, the ECtHR found that the state authorities did not provide the applicant with sufficient and reasonable protection of his life and body, as required by Art. 2 of the Convention. Therefore, the material aspect of the art. was violated.<sup>70</sup>

Regarding the thoroughness of the investigation, the ECtHR found that several questions remained unanswered, such as those related to the search and surveillance of detainees and the adequacy of the space in which they were detained. The procedures carried out were only related to the narrow question of the possible criminal or disciplinary responsibility of individual police officers and did not deal with the more extensive question of the existence of institutional deficiencies that allowed tragic accidents to occur. As a result, the ECtHR concluded that the domestic authorities did not apply provisions that guaranteed respect for the right to life and did not deter similar life-threatening behaviour in the future. Thus, the procedural aspects of Art. 2 of the Convention were violated.<sup>71</sup>

Daraibou's case also shows the deficiencies in the system of legal remedies available in Croatia. The Croatian Government submitted that the applicant had failed to exhaust an effective domestic remedy because he had never lodged a constitutional complaint before addressing the ECtHR. The applicant stressed that he could not lodge a constitutional complaint, because there had been no final decision regarding his rights or obligations. He never had the status of a victim but rather that of a suspect in criminal enquiries. The ECtHR assessed that at the time

68 | M.H. and Others v. Croatia.

69 | Daraibou v. Croatia, application no. 84523/17, judgment of 17 January 2023.

70 | *Ibid.*, paras. 86–93.

71 | *Ibid.*, paras. 105–113.

of lodging his application, a constitutional complaint did not constitute an effective remedy for the positive obligations of the state under Art. 2 of the Convention.<sup>72</sup>

In recent times, several cases against Croatia are pending before the ECtHR. The case of N.O. against Croatia was a continuation of the Oral case decided by the Constitutional Court.<sup>73</sup> Although the Constitutional Court accepted his constitutional complaint, and in the end, he was released from detention, the applicant lodged an application before the ECtHR. Under Art. 5, para. 1 (f) of the Convention, the applicant complained that the domestic authorities failed to act with the required diligence in that they had been informed of his refugee status in Switzerland from the outset and yet kept him in detention for a protracted period, intending to extradite him to Turkey. He also complained, invoking Art. 6, para. 1, about the domestic authorities' failure to reimburse him for the costs of his legal representation in the extradition proceedings, despite his persistent requests.<sup>74</sup>

Reports of pushbacks and violent police practices at the Croatian border have been documented since 2017 and were continued until 2022.<sup>75</sup> In three applications against Croatia pending before the ECtHR, the applicants complained, under Art. 3 of the Convention, that by summarily returning them to Bosnia and Herzegovina without any assessment of the risk they would face in that country, the Croatian authorities exposed them to dire living conditions and a dysfunctional asylum system, which must have been known to the Croatian authorities. They further complained that they had been expelled from Croatia to Bosnia and Herzegovina with a group of foreigners without reviewing their situation. They also complained that they had been transported without access to any procedure or remedy to challenge their removal.<sup>76</sup>

In 2022, a Rohingya child submitted complaints against Croatia and Slovenia to the UN Child Rights Committee regarding multiple violations of the Convention on the Rights of the Child.<sup>77</sup> He was repeatedly pushed back from Croatia to Bosnia and Herzegovina and was subjected to violence. He was subjected to a 'chain' push-back in Slovenia, forcibly returned first to Croatia by Slovenian authorities and then onwards to Bosnia and Herzegovina by Croatian authorities.<sup>78</sup> Furthermore, as the ECtHR noted in the M.H. case, on 12 July 2019 the Federal Administrative

72 | *Ibid.*, paras. 65–71.

73 | U-III-208/2018.

74 | N.O. against Croatia, application no. 3745/18 lodged on 17 January 2018, communicated on 1 February 2022.

75 | See ECRE Reports for Croatia [Online]. Available at: <https://asylumineurope.org/reports/country/croatia/> (Accessed: 30 June 2023) and case of M.H. and Others v. Croatia, paras. 103–115.

76 | S.B. against Croatia, application no. 18810/19, lodged on 1 April 2019, A.A. against Croatia, application no. 18865/19, lodged on 1 April 2019 and A.B. v. Croatia, application no. 23495/19, lodged on 26 April 2019, all communicated on 26 March 2020.

77 | European Center for Constitutional and Human Rights [Online]. Available at: <https://www.ecchr.eu/en/case/pushbacks-un-child-rights-croatia-slovenia/> (Accessed: 30 June 2023).

78 | ECRE, Country Report: Croatia, 2022 Update, p. 16. [Online]. Available at: <https://asylumineurope.org/wp-content/uploads/2023/06/AIDA-HR-2022-Update.pdf> (Accessed: 30 June 2023).

Court of Switzerland suspended the transfer of a Syrian asylum seeker to Croatia because of the prevalence of summary returns at the Croatian border with Bosnia and Herzegovina. The court acknowledged the increasing number of reports that the Croatian authorities denied access to asylum procedures and that many asylum seekers were being returned to the border with Bosnia and Herzegovina, where they were forced to leave the country.<sup>79</sup> Cases against Croatia before the ECtHR are of constitutional importance because they demonstrated lack of constitutional protection for asylum seekers and deficiencies in filing constitutional complaints. The Constitutional Court should deal with the issue of illegal pushbacks by using its competence to monitor compliance with the Constitution and law and report to the Croatian Parliament on detected violations thereof (Art. 125, Indent 5 of the Constitution).

## 5. Conclusion

The analysis of the case law of the Constitutional Court concerning migration and asylum issues regarding cases initiated after Croatia's accession to the EU showed that the issue of boundaries of competences between the EU and the Member States was never raised. Additionally, there were no cases in which the Constitutional Court linked migration or asylum issues with constitutional identity.

The essence of the Constitutional Court's role in migration and asylum law is to serve as the guardian of human rights guaranteed by the Croatian Constitution, European Convention, and the EU law. The first main finding concerns the application of the EU law. The Constitutional Court demonstrated its willingness to apply the EU Charter of Fundamental Rights and secondary EU Law on its motion. This new approach stems from the application of Art. 141c of the Constitution which prescribes the direct effect of the EU Law. Croatian courts are obligated to protect subjective rights under the EU *Acquis Communautaire* (Art. 141c, para. 3). Under this constitutional provision, the Constitutional Court applied the principle of mutual trust which requires Croatian state authorities, including judicial authorities, to respect decisions on the recognition of refugee status and appropriate protection provided by the competent authorities of other countries participating in the common Dublin system (Case Oral, Sub-Sec. 3.2). In addition, although it did not directly refer to Art. 141c of the Constitution, the Constitutional Court also applied in its own motion the principles of equivalence and effectiveness developed in the case law of the CJEU (Case X. Y., Sub-Sec. 3.3). The second main finding is that the Constitutional Court regularly referred to the case law of the ECtHR, regardless of the state against which the application was lodged. As follows from the flagship cases, the Constitutional Court applies the standards of protection guaranteed by the European Convention concerning the principle of *ex nunc* evaluation of the circumstances (cases A. B. and X. Y., Sub-Sec. 3.4) and the duty to

ensure that the receiving third country is safe (cases M.H. and X.Y., Sub-Sec. 3.5.). Thus, the conclusion is that the Constitutional Court provides a higher standard of protection for the rights of asylum seekers in conformity with the relevant case law of the ECtHR. Since pursuant to Art. 31 of the Constitutional Act on the Constitutional Court, the decisions of the Constitutional Court are binding to all state authorities, including the public authorities and the administrative courts that deal with migration and asylum cases, it is expected that they will respect the new case law of the Constitutional Court and align their actions and decisions with it. Specifically, this means directly applying the EU law and the standards of protection guaranteed by the European Convention as demonstrated by the Constitutional Court. It is possible that the new practice will lead to an increase in the number of approved applications owing to the prohibition of the return of asylum seekers to unsafe countries.

There have been no cases considering the case law of other countries in migration and asylum issues, although there is a possibility that the Constitutional Court referred to foreign constitutional case law (in particular, the case law of the German Federal Constitutional Court) in other issues (regarding the principle of tax equality and the requirement for the precision of the legal norm).

However, cases against Croatia initiated before the ECtHR and other international bodies for the protection of human rights indicate deficiencies in respecting the rights of seekers of international protection pursuant to international human rights conventions. In some of these cases, it was not possible for asylum seekers to submit legal remedies against the decisions or acts of Croatian public authorities and reach the Constitutional Court. Considering that against all individual acts of public authorities, there must be judicial review of their legality (Art. 19, para. 2 of the Constitution), and given that against all individual decisions of state bodies and other public authorities, there must be the possibility of protection before the Constitutional Court in cases of alleged violation of constitutional rights (Art. 125, indent 4 of the Constitution), the lack of efficient legal remedies raises serious constitutional concerns. If these issues continue to appear in practice, the Constitutional Court should not stay silent and should activate its duty to monitor compliance with the Constitution and law and report detected violations to the Croatian Parliament.

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