



European
Court
of Human
Rights

Dialogue between judges



Dialogue between judges

Proceedings of the Seminar
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Françoise Tulkens

Judge of the European Court
of Human Rights

THE EUROPEAN CONVENTION ON HUMAN RIGHTS BETWEEN INTERNATIONAL LAW AND CONSTITUTIONAL LAW

Mr President, distinguished members of the judiciary, ladies and gentlemen, colleagues and friends,

The seminar at which we are gathered this afternoon is of particular – I would say even historic – importance and your presence in such large numbers shows that you are well aware of this. We are here firstly, and above all, to pay *tribute* to our dear President Luzius Wildhaber, the first president of the “new” European Court of Human Rights, which came into being on 1 November 1998. This is why the working group in charge of preparing the seminar (composed of Judges Elisabet Fura-Sandström, Vladimiro Zagrebelsky, Lech Garlicki and myself) decided to choose a topic that is directly related to President Wildhaber’s academic, scientific and judicial concerns. We will thus have the arduous task of speaking under his enlightened scrutiny.

To counterbalance this, the seminar remains dedicated – as in 2005 and 2006 – to the context and purpose of the *dialogue between judges*, a dialogue that, in our opinion, is more essential now than ever. On one side of the Atlantic, President Rosalyn Higgins of the International Court of Justice has discussed this topic in a recent article bearing the evocative and provocative title “A Babel of Judicial Voices?”

Ruminations from the Bench¹. On the other side of the Atlantic, President Claire L’Heureux-Dubé of the Supreme Court of Canada has referred to developments that have led judges to regard themselves as engaged in a global dialogue on fundamental rights which may contribute to creating a *jus commune* of human rights².

¹ International and Comparative Law Quarterly, vol. 55, October 2006, p. 791.

² “The Importance of Dialogue: Globalization and the International Impact of the Rehnquist Court”, 34 Tulsa Law Journal 15 (1998).

How should this afternoon's debate be introduced? You will find on your desk a list of certain observations and questions that we have submitted to our speakers in connection with our chosen topic.

At the outset an *initial observation* has to be made that immediately makes things more complex, and therefore more interesting: given the purpose and nature of the European Convention on Human Rights, it does not easily fall into any traditional category.

On the one hand the Convention is of course a treaty, but, as the Court has been saying for a long time, it is not a treaty in the classic sense of the term because it goes beyond the framework of reciprocity between States and creates a network of objective obligations that are collectively guaranteed. This specificity is not merely one of form, but also a substantive one that is reflected in the interpretation of the rights and freedoms guaranteed by the Convention. However, the Convention must also be interpreted in the light of the Vienna Convention on the Law of Treaties of 23 May 1969 and, I believe, more particularly Article 31 § 3 (c), which provides that there shall be taken into account, together with the context, "any relevant rules of international law applicable in the relations between the parties". The Court is amenable to this idea that the Convention cannot be interpreted in a vacuum and has often based its reasoning on other sources of international law, as, for example, in the judgment of 4 February 2005 in *Mamatkulov and Askarov v. Turkey* concerning the binding nature of interim measures³, or in the judgment of 10 May 2001 in *Cyprus v. Turkey* regarding the obligation to exhaust domestic remedies⁴.

On the other hand, it is broadly accepted – and this cannot be over-emphasised – that the object of the Convention is to be directly applicable in the domestic law of the member States. Today, in almost all the member States of the Council of Europe, the domestic judicial authorities, when ruling on rights and freedoms, refer to the European Convention on Human Rights and the national constitution in parallel.

The fact that the European Convention on Human Rights belongs *both* to the sphere of international law and to that of constitutional law evidently raises many questions, some of which are technical and others more fundamental.

So, does the fact that the rights guaranteed by the European Convention are enshrined in an international treaty mean that they must be interpreted differently from equivalent rights and liberties that are protected by national constitutions? This question gives rise to a series of many others. Can international treaties be interpreted in such a way as to impose more obligations on States than they are prepared to accept? More specifically, to what extent does the sovereignty principle admit of an interpretation that goes beyond the original intention of the treaty and modifies the substance of the obligations to which the States initially committed themselves?

3 [GC], nos. 46827/99 and 46951/99, § 124, ECHR 2005-I.

4 [GC], no. 25781/94, §§ 93 et seq., ECHR 2001-IV.

While similar questions may be raised regarding national constitutions and their interpretation, the methods differ between constitutional law and international law. To an extent, it may appear easier – or more natural – to regard national constitutions as "living instruments" and accordingly to allow them greater latitude in interpretation or, to be more precise, judicial reinterpretation of the rights guaranteed.

Conversely, however, the rights guaranteed by the European Convention on Human Rights can often be found in substance in national constitutions but formulated in general terms. In the process of application of the provisions of the Convention, this general language has to be translated into specific principles and rules that are capable of solving each individual case submitted to the Court. While this does not of course mean that the Court can neglect the text of the Convention, it probably does allow it greater creativity.

The Convention is now fifty-six years old and the Court's case-law has been evolving for forty years, alongside profound changes that have occurred in Europe over recent decades. A substantial body of case-law has been progressively built up and the true import of the Convention probably now lies more in this case-law than in the text of the Convention itself. The Convention has become a pan-European instrument for the protection of human rights and, in many countries, has made it possible to achieve a level of respect for fundamental rights that would have been hardly imaginable in 1950, when the Convention was drafted. It would probably not have survived if it had not been regarded as a living instrument that has to be interpreted in line with developments in the society in which we live. In turn, however, many national constitutions have also largely developed in the same way. Where these constitutions have been conceived as legal instruments and the avenues of constitutional justice have been opened to individuals, the text thereof has been enriched and transformed by virtue of the case-law of the national constitutional and supreme courts. This has resulted in, among other things, an increasing similarity between the methods of interpretation of the Convention by the European Court of Human Rights and those used by the domestic courts in respect of their constitution.

In the *final analysis*, should the European Convention on Human Rights be perceived more as an expression of international law or rather as resembling constitutional law as applied by the constitutional courts? Or is it more subtle than that: might it not lie somewhere between the two?

These, among others, are questions that we have put to our colleague, Judge Lucius Caflisch, now a member of the International Law Commission of the United Nations, to Mr Jorge Rodríguez-Zapata Pérez, a judge of the Spanish Constitutional Court, and to Professor Jochen A. Frowein, Director Emeritus of the Max-Planck-Institut for Comparative Public Law and International Law and former Vice-President of the European Commission of Human Rights. Thank you, gentlemen, for accepting our invitation. Each of your twenty-minute contributions will be followed by a debate with the audience that I hope will be as open and fruitful as possible.

As usual, the working languages of the seminar will be English and French. I extend my thanks to the interpreters, who will allow us to avoid the Tower of Babel syndrome.

Before we begin, I would like to express our thanks again to Roderick Liddell, who has played a pivotal role in organising this seminar, and to Alice Bouras, who has been a magnificent help to us.

Lastly, you all have before you the booklet containing the contributions at the Dialogue between judges seminar in 2006, which was devoted to the topic of execution and effects of the judgments of the European Court of Human Rights. My sincere thanks go to Josette Tanner and her team, who have put this very fine booklet together. They have already promised us their assistance with the 2007 edition, so that we will be able to keep a record of our proceedings.

I now give the floor to Judge Zagrebelsky, who will introduce our first speaker.



Vladimiro Zagrebelsky

**Judge of the European Court
of Human Rights**

It is my pleasure to introduce Lucius Caflisch, who is going to talk to us about the relationship between international law and the European Court of Human Rights.

Our speaker is certainly highly qualified to talk to us about this subject: a former judge of the Court and a professor of international law, he has recently been elected as a member of the United Nations International Law Commission.

We have asked him to address an important subject and, I would say, one that is crucial for us and for our Court, which was set up by an international treaty, is attached to an international institution – the Council of Europe – yet hears and determines cases with an increasingly strong and direct influence on the domestic law of European countries. A court that is not really external to these countries, moreover, but is situated rather at the centre of the jurisdictional and judicial system of the Europe Region. In what sense is it an international court?

My dear colleague, you have the floor for twenty minutes!



Lucius Caflisch

**Member of the United Nations
International Law Commission
Former judge of the European Court
of Human Rights**

INTERNATIONAL LAW AND THE EUROPEAN COURT OF HUMAN RIGHTS

1. INTRODUCTION

This short address concerns the relationship between the European Court of Human Rights and general international law. This relationship can be viewed from two angles: the contribution made by international practice to human rights protection and, conversely, the application of general international law within the framework of human rights protection, particularly by the Court. I shall confine my observations to the second angle¹.

Like any court, the European Court of Human Rights has a natural tendency to want exclusively or primarily to apply “its” law – the European Convention on Human Rights (hereafter “the Convention”) and its Protocols – to such an extent that it might have been thought to lose sight occasionally of the fact that the Convention itself is governed by international law and, in particular, the Law of Treaties. There is nothing surprising about this tendency towards excessive specialisation; it can be observed among professors and practitioners of public international law. Thus, specialists in international commercial law would have us believe that the subject forms a separate branch of public international law whose mysteries are accessible to them alone; certain criminalists would like to dissociate international criminal law from general international law; and some “human rightists” would like to do likewise regarding their area of predilection, while forgetting that it is precisely international

¹ For further studies devoted to this subject, see J.A. Frowein, “Probleme des allgemeinen Völkerrechts vor der Europäischen Kommission für Menschenrechte”, in *Festschrift für Hans- Jürgen Schlochauer*, de Gruyter, Berlin, 1981, pp. 289-300; J.G. Merrills, *The Development of International Law by the European Court of Human Rights*, Manchester University Press, 1993, pp. 69-97 and 423-57; L. Caflisch and A.A. Cançado Trindade, “Les Conventions américaine et européenne des droits de l’homme et le droit international général”, *Revue générale de droit international public*, vol. 108, 2004, pp. 5-62; and the annual column of G. Cohen-Jonathan and J.-F. Flauss, “Cour européenne des Droits de l’Homme et droit international général”, *Annuaire français de droit international*, vol. XLVI, 2000, pp. 614-42, vol. XLVII, 2001, pp. 423-57, vol. XLVIII, 2002, pp. 675-93, vol. XLIX, 2003, pp. 662-83, vol. L, 2004, pp. 778-802, and vol. LI, 2005, pp. 675-98.

instruments – treaties – that underpin their activities. These centrifugal tendencies have become so marked that the United Nations International Law Commission has resolved to look into the issue of “fragmentation” of public international law².

I am among those who consider that, despite the particularities of such and such a branch of international law, these areas have common roots and that the principles governing them are supplemented by the general rules of international law. This is, moreover, a reality that is being better and better understood at the European Court of Human Rights. Firstly, because the cases brought before it throw up an increasing number of general problems of international law, to the point where, towards the end of my term of office in Strasbourg, hardly a week went by without at least one or more general questions of public international law arising. Another reason is that from 1998 the Court was presided by a former professor of constitutional and international law and includes among its number some specialists in the latter discipline. Lastly, and above all, it will be noted that the Court’s judges, as a whole, have demonstrated the open-mindedness necessary to acknowledge that the Convention, which is the founding text of the Court, cannot be interpreted and applied separately from its base.

Let us now look at a number of instances in which the Court has had occasion to examine questions of general international law.

2. THE LAW OF TREATIES

The Convention and its Protocols are international treaties governed by the Law of Treaties and, in particular, the rules codified by the Vienna Convention on the Law of Treaties of 23 May 1969 (hereafter “the VC”)³. That being so, the Court applies, with minor deviations, Articles 31 and 32 of that convention relating to the interpretation of treaties. These are routine operations which do not call for extensive commentary⁴. Other rules of the Law of Treaties are also invoked by the Court: the *Pacta sunt servanda* rule (Article 26 of the VC), for example, which prevents States from escaping their Convention obligations by entering into subsequent treaties containing contrary provisions, such as agreements transferring to a supranational organisation powers relating to human rights guaranteed by the European Convention. Article 26 of the VC is linked to Article 27, which provides that a Contracting State may not invoke the provisions of its internal law as justification for its failure to perform its treaty obligations. It is to give effect to this fundamental rule that Article 2 of the American Convention on Human Rights of 1969⁵ enjoins States Parties to adopt such legislative or other measures as may be necessary to give effect to the exercise of the rights or freedoms referred to in the convention. There is no analogous provision in the European Convention, which explains why, until recently, certain States Parties had not incorporated the Convention into their

² On this point see, very recently, Report of the International Law Commission, 58th Session, 1 May-9 June and 3 July-11 August 2006, United Nations, General Assembly, Official Records, 61st Session, Supplement no. 10 (A/61/10), pp. 419-43.

³ United Nations Treaty Series, vol. 1155, p. 331.

⁴ See, in this connection, L. Caflisch and A.A. Cançado Trindade, *op. cit.*, pp. 9-22.

⁵ For the text of this convention, see *Human Rights in International Law – Collected texts* (2nd edition), Strasbourg, Council of Europe Publications, 2001, p. 473.

domestic legal order and had therefore had to apply the rules of their own human rights protection law. Fortunately, the content of these rules has broadly covered that of the substantive rules of the European Convention, so the failure to incorporate it into domestic law has not had dire consequences.

A further subject that concerns both the European Convention and the Law of Treaties is that of reservations. Article 75 of the American Convention of 1969 provides: “[t]his Convention shall be subject to reservations only in conformity with the provisions of the Vienna Convention”, more specifically Articles 19 et seq. thereof. This would appear to be a relatively liberal approach inasmuch as, in theory, Article 19 of the VC allows reservations to be formulated on condition that they are compatible with “the object and purpose” of the treaty in question. Liberal in appearance only, however, since in the area of international protection of human rights the point of incompatibility with the object and purpose of the treaty will rapidly be attained, in theory from the moment when the reservation significantly infringes one or more substantive rights guaranteed by the treaty. Another interesting point is that the compatibility of a reservation with the convention will be assessed not by the States Parties themselves but by the Inter-American Court of Human Rights in the context of actual cases brought before it.

The European system appears even stricter: Article 57 of the Convention authorises a State to make a reservation in respect of a provision of the Convention only “to the extent that any law then in force in its territory is not in conformity with the provision”. Accordingly, reservations of a general character are not permitted; they must refer to specific provisions of the Convention. Furthermore, the reasons given for the reservation must be that a law then in force is not in conformity with the Convention provision in question. Lastly, reservations must be accompanied by specific lists of the domestic laws rendering them necessary. As is the case with the American Convention, the validity of reservations is assessed by the Court itself in the context of actual cases brought before it and not by the Contracting States, which, here again, has put an end to the ritual of individual declarations of acceptance or rejection with the attendant doubts and uncertainties.

In conclusion, it will therefore be noted that the Court applies the general rules of the Law of Treaties in the areas mentioned above and in many others, such as competing obligations under international law, termination of treaties, or the scope of application of those treaties. With regard to reservations, the Court operates a system which deviates from the – less efficient – one provided for in the Vienna Convention.

3. IMMUNITY OF STATES AND DIPLOMATIC AND CONSULAR REPRESENTATIONS

A) GÉNÉRALITÉS

The immunity of States from jurisdiction and execution is an old issue of international law: in some matters at least a foreign State cannot be brought before the municipal courts. At the international level the issue can be presented from a number of angles, including the following three.

(i) Diplomatic representatives and consular officials who, in order to be in a position to carry out their duties, must be exempt from the jurisdiction of municipal courts in other States. This requirement has given rise to customary rules codified in two treaties: the Vienna Conventions of 18 April 1961 and 24 April 1963 on Diplomatic and Consular Relations⁶.

(ii) The principle of the sovereign equality of States, enshrined in Article 2 § 1 of the Charter of the United Nations, which prohibits the courts of one State from judging the conduct of another State. The latter and its property thus enjoy immunity from jurisdiction and execution, this being currently governed by the Convention on Jurisdictional Immunities of States and their Property of 2 December 2004⁷.

(iii) The theoretically absolute immunity of inter-governmental organisations, which was recognised in *Beer and Regan* and *Waite and Kennedy v. Germany*⁸, but will not be discussed here.

(B) IMMUNITY OF DIPLOMATIC AND CONSULAR REPRESENTATIONS: BUILDINGS AND STAFF

Many problems have arisen in the new democracies relating to private property that was nationalised after the Second World War and then sold or leased by the nationalising State to foreign diplomatic missions or consular agencies. After the collapse of the socialist system, the former property owners or their heirs often requested restitution on the basis of Article 1 of Protocol No. 1 to the Convention⁹. Given the immunity granted to the representations or agencies in question by the Vienna Conventions of 1961 and 1963 on Diplomatic and Consular Relations, restitution of the property is not possible, at least where title has passed to the foreign State or as long as the foreign representation or agency has secured a lease. The only possible remedy will be the payment of compensation.

A particularly interesting case that is currently pending before the European Court of Human Rights concerns the nationalisation of property by Romania in 1952¹⁰. After 1990 the property was claimed by the former owner’s heir, who obtained judgment in his favour in the Romanian courts. The judgment could not be executed, however, as the property in question had been leased by the Romanian State to the Peace Corps, an American governmental agency. Admittedly, the lease had expired, but the tenancy had continued de facto. The question which arises here is whether the Peace Corps carries on activities that can be regarded as “diplomatic” within the meaning of Article 3 § 1 of the Vienna Convention on Diplomatic Relations of 1961, falling outside the jurisdiction of the receiving State in accordance with Article 22 § 3¹¹. If they can, the Romanian Government will be unable to enforce the judgment as long as the organisation remains on the

6 United Nations Treaty Series, vol. 500, p. 95, and vol. 596, p. 261.

7 United Nations, General Assembly, Resolution 59/38 of 2 December 2004.

8 [GC], no. 28934/95, 18 February 1999, and [GC], no. 26083/94, judgment of the same date, ECHR 1999-I.

9 Protocol of 20 March 1952, European Treaty Series no. 9.

10 *Hirschhorn v. Romania*, application no. 29294/02 of 24 July 2002.

11 Article 22 § 3 provides: “The premises of the mission, their furnishings and other property thereon and the means of transport of the mission shall be immune from search, requisition, attachment or execution.”

premises. If they cannot, the Convention on Jurisdictional Immunities of States and their Property of 2 December 2004, which is supposed to codify existing law, will apply, as it will be a tacitly renewed lease in favour of a foreign State. The question would then be whether Articles 13 or 19 of this convention might not give the United States immunity from jurisdiction¹².

The applicant in *Cudak v. Lithuania*¹³ is a telephone receptionist at the Polish embassy in Lithuania who was recruited locally. She alleged that she had been sexually harassed by a member of the diplomatic staff of the embassy, which had ultimately led to her dismissal. She pursued her case right up to the Supreme Court of Lithuania, which refused to entertain it, despite Article 6 § 1 of the Convention, on the ground of immunity from jurisdiction covering foreign diplomatic representations. If this case – which was subsequently brought before the European Court – is not disposed of by a friendly settlement, the applicant might well be successful under Article 6 § 1 of the Convention, as she is an employee of Lithuanian nationality recruited locally and a member of the administrative and technical staff (see Article 11 of the above-mentioned convention of 2004¹⁴). Employment contracts entered into locally with nationals of the receiving State are exempt from the immunity covering the sending State and its diplomats. The reason for this is very simple: on a practical level, the only courts to which the employee can apply are those of the host State. Admittedly, she could also apply to the courts of the sending State, but this would be more complicated for her and, what is more, the prospects would be unpromising, given the hostility she would be likely to encounter in the courts of that State.

These are some of the conflicts that have pitted human rights against immunity of States or of diplomatic and consular representations. There have been many others, as illustrated by the cases of *Al-Adsani v. the United Kingdom*, *McElhinney v. Ireland* and *Fogarty v. the United Kingdom*¹⁵ which, as they are well known, will not be examined here.

(C) CONCLUSION

The relationship between immunity of States and human rights is an *important preoccupation* of the European Court of Human Rights in the area of public international law. Generally speaking, the Court navigates with circumspection in these uncharted waters, *while scrupulously respecting the general rules of public international law*.

12 Article 13 provides that a foreign State cannot invoke immunity from jurisdiction in a proceeding which relates to any right or interest in, or its possession or use of, immovable property situated in the State of the forum. Under Article 19, “[n]o post-judgment measures of constraint, such as attachment, arrest or execution, against property of a State may be taken in connection with a proceeding before a court of another State” without the former’s consent.

13 (dec.), no. 15869/02, 2 March 2006.

14 Under this Article, a State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to a contract of employment between the State and an individual for work to be performed, in whole or in part, in the territory of that other State, unless the employee has been recruited to perform particular functions in the exercise of governmental authority.

15 [GC], no. 35763/97, [GC], no. 31253/96, and [GC], no. 37112/97, judgments of 21 November 2001, ECHR 2001-XI.

4. INTERNATIONAL RESPONSIBILITY

(A) GENERAL POINTS

Normally the rules relating to responsibility apply, in international law, where a subject of international law alleges that the organs of another subject have caused it injury by engaging in conduct contrary to international law. The same is true in the field of human rights, except that an individual who claims to have sustained injury can, after exhausting domestic remedies, complain directly to an international court. The individual accordingly acquires the status, in this specific area, of a subject of public international law. In the context of international responsibility, problems have arisen especially in connection with imputability and reparation. As the first problem is relatively well known¹⁶, I shall concentrate on the second.

(B) REPARATION

While it is of course important from a practical point of view, the question of reparation is not particularly interesting in the context of the Convention. Article 41 provides, as we know, that “if the internal law of the [respondent] High Contracting Party allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party”. As can also be seen from the case-law on Article 1 of Protocol No. 1, which protects private property, *restitution is often impossible and just satisfaction is not always comprehensive*.

Article 63 § 1 of the American Convention is more explicit and, accordingly, more interesting. It asks the Inter-American Court of Human Rights to rule that the injured party be ensured the enjoyment of his right that was violated and to rule, if appropriate, that the consequences of the measure or situation be remedied and that “fair compensation” be paid to the injured party. The open-ended wording of this provision has allowed the Inter-American Court to envisage a broad range of compensatory measures, including rehabilitation of victims whose “life plan” has been damaged by the violation found (see *Loayza Tamayo v. Peru*, Reparations¹⁷). In the same spirit, the court recently decided (see *Cantoral Benavides v. Peru*, Reparations¹⁸) that an applicant who had been a torture victim should be provided by the respondent State with the means and opportunity to complete his training at a learning institution of recognised academic excellence.

16 See J.-P. Costa, “Qui relève de la juridiction de quel(s) Etat(s) au sens de l’article 1^{er} de la Convention européenne des Droits de l’Homme?”, in *Libertés, justice, tolérance. Mélanges en hommage au Doyen Gérard Cohen-Jonathan*, Bruylant, Brussels, 2004, vol. I, pp. 483-500; J.-P. Costa, “L’Etat, le territoire et la Convention européenne des Droits de l’Homme”, in M.G. Kohen (ed.), *Promoting Justice, Human Rights and Conflict Resolution through International Law. Liber Amicorum Lucius Caflisch*, Nijhoff, Leiden, 2007, pp. 179-95; L. Caflisch, “‘Jurisdiction’ under Article 1 of the European Convention on Human Rights”, in *International Law of the XXIst Century. For the 80th Anniversary of Professor Igor I. Lukashuk*, Promeni, Kyiv, 2006, pp. 560-83.

17 Inter-American Court of Human Rights, judgment of 27 November 1998, Series C (*Resoluciones y Sentencias*) no. 42, § 147.

18 Inter-American Court of Human Rights, judgment of 3 December 2001, Series C (*Resoluciones y Sentencias*) no. 88, § 80.

(C) CONCLUSION

Having regard to the case-law of the Inter-American Court, and also to developments in general international law, the question of reparation does not appear to have progressed much at European level. Perhaps this regrettable delay is partly offset by the fact that, contrary to what appears to be the case on the American continent, the European mechanism has a well-oiled execution of judgments system.

5. GENERAL CONCLUSION

I hope to have shown, despite the short time available to me, that the European Court of Human Rights functions on the basis of treaties governed by public international law and that it is more and *more frequently required to resolve problems governed by general international law*. In my view, it has been right not to avoid examining these problems and should continue down this track. Public international law and human rights *form a whole* and often a case can be disposed of only by having regard to *both*. In this address I have touched on a number of spheres relating to human rights in which general issues of international law regularly arise. There are many others: territorial and extra-territorial jurisdiction, the law of armed conflict, protection of private property, State succession, the legal nature of interim measures, to cite but a few. The subject of my address therefore merits further reflection.



Lech Garlicki

**Judge of the European Court
of Human Rights**

Mr President, it is a great pleasure to introduce as the next speaker Professor Jorge Rodríguez-Zapata Pérez, a judge of the Spanish Constitutional Court since 2002.

Professor Rodríguez-Zapata is not only a distinguished constitutional judge, but also a very experienced scholar and practitioner. He started his professional career in the *Consejo de Estado* in 1978, at the same time also being involved, within the Ministry of Constitutional Development, in the process of implementation of the 1978 Constitution. From 1983 to 1986 he held the position of *letrado* within the Constitutional Court, and in 1989 he was appointed Vice- President of the Joint Commission for Protection of Intellectual Property.

In 1985 Judge Rodríguez-Zapata was appointed to the position of Professor of Constitutional Law and, since then, he has published seven books and over sixty articles on problems of constitutional and administrative law. His scholarship has won much recognition at international level.

This combination of academic involvement and practical activities places Professor Rodríguez-Zapata in a unique position to offer us information on how the European Convention on Human Rights is understood and applied in Spain. As is well known, the Spanish Constitutional Court is among the most successful constitutional courts in Europe. The closeness of the text of the 1978 Constitution to the text of the Convention and the openness of the Spanish Constitutional Court towards the ideas and standards developed within the Strasbourg system make our guest a particularly well-qualified member of today's panel.

Professor Rodríguez-Zapata, the floor is yours.



Jorge Rodríguez-Zapata Pérez

Judge of the Spanish
Constitutional Court

THE DYNAMIC EFFECT OF THE CASE-LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS AND THE ROLE OF THE CONSTITUTIONAL COURTS

I. INTRODUCTORY REMARKS

I must start by thanking the European Court of Human Rights and its President, Jean-Paul Costa, in my own name and on behalf of my Chief Justice and my fellow colleagues, for their kind invitation. It is a great pleasure for me to be here today and to address this outstanding audience.

II. THE CONVENTION: INTERNATIONAL OR CONSTITUTIONAL LAW?

1. The European Convention on Human Rights came into being on 4 November 1950. In 1950 the Convention was an international treaty under international law.

The separation between international law and municipal law was very clear fifty-six years ago, in the cold-war era.

International law was clearly an inter-State law that applied only to States and international organisations, while internal law applied to individuals, who were a “*domaine réservé*” or fell under the “*domestic jurisdiction*” of sovereign States (Article 2 § 7 of the Charter of the United Nations).

Legal theory and international practice did not consider individuals as subjects of international law during that period, as they had neither immediacy nor *locus standi* in the field of the Law of Nations (*Völkerrechtsunmittelbarkeit*).

Few were those (apart from Jessup) who saw human rights law as an exception to the Law of Nations as an inter-State law.

The interpretation of rules of international law – applicable to States – was accordingly quite different from that of the rules of municipal law, applicable to individuals.

2. The European Convention on Human Rights has been in operation for nearly fifty years, and an impressive body of case-law has been developed by its institutions.

The Report of the Group of Wise Persons to the Committee of Ministers of the Council of Europe of 15 November 2006 considered that the judicial control mechanism based on the European Court, whose jurisdiction is binding on all the States Parties to the Convention, and also on the right of individual application, enshrined in Articles 34 and 35 of the Convention, represents today an essential part of European legal culture in the field of human rights.

So do constitutional courts today in continental Europe. Since the events of 1989, constitutional courts have become a new essential factor in European legal culture.

Some of them are required to examine individual applications for the direct protection of human rights. Such is the case with the Spanish *recurso de amparo* or the German *Verfassungsbeschwerde*.

The Wise Persons’ report suggests that the protection mechanism confers on the European Court of Human Rights a “‘constitutional’ mission” to “lay down common principles and standards relating to human rights and to determine the minimum level of protection which States must observe” (Report of the Group of Wise Persons, § 24).

We share this mission in European constitutional courts, even if we are dealing with domestic fundamental rights guaranteed in our own internal constitutions.

Finally, fundamental rights are also safeguarded within the European Union. In accordance with the jurisprudence of the European Court of Justice, Article 6 (2) of the Treaty on European Union stipulates that “[t]he Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms ... and as they result from the constitutional traditions common to member States, as general principles of Community law”. The Charter of Fundamental Rights, which was solemnly proclaimed in December 2000 in Nice, still has the status of a legally binding declaration; in the event of the entry into force of the Treaty establishing a Constitution for Europe, it would become binding as Part II of that Treaty.

3. In my view, it is possible to assert today that things have changed with regard to the original situation in 1950, when the Convention came into being.

Let us consider the recognition of the right of individual application to the European Court of Human Rights and its concomitant effect on the international guarantee of individual fundamental rights embodied in treaties.

In the 1950s the European Convention on Human Rights and the right of individual application to the European Commission of Human Rights did not constitute a clear exception to the rule that individuals cannot be regarded as subjects of international law, since the Commission was considered to act as a “filter” between individuals and international law.

In fact, it was the European Commission of Human Rights and not the applicant State or the individual who had the right to lodge an application with the European Court of Human Rights.

Since Protocol No. 11 came into force, ordinary people have been able to lodge an application directly with the Court (created by and operating on the basis of a source of international law), and this is significant for the change in question.

The Convention, as an international treaty applied daily to individual cases, takes the same shape and is considered by domestic judges as constitutional law.

The Convention and its case-law constitute today a “*jus commune*” of the Contracting States to the Convention for the Protection of Human Rights and Fundamental Freedoms.

Is this a change due to an authentic transformation in international law itself or is it an evolution of comparative constitutional law?

4. From the standpoint of international law, I can see that the case-law of the European Court of Human Rights has had a dynamic effect that clearly goes beyond the normal effect that the Convention can or could have as a source of international law.

Let me give a few examples to illustrate this.

Supreme Courts world-wide consider judgments of the European Court in Strasbourg as relevant case-law.

It can be seen from the *Constantine and Benjamin Hilaire v. Trinidad and Tobago* judgment of 21 June 2002 of the Inter-American Court of Human Rights (in San José, Costa Rica), on the death penalty, that the European Convention on Human Rights is part of a global common law.

Many municipal courts also refer to judgments of the European Court of Human Rights in support of the *ratio decidendi* of cases, even where they are not themselves bound by the Convention.

The Supreme Court of the United States, in its *Atkins v. Virginia* judgment of 20 June 2002, on the death penalty for mentally retarded persons, or in *Lawrence et al. v. Texas* of 26 June 2003, on intimate homosexual relations between adults as a criminal offence, referred to the judgment of the European Court of Human Rights in *Dudgeon v. the United Kingdom*¹.

In Spain, decisions nos. 64/2001 (of 17 March 2001) and 2/2003 (of 19 February 2003) of the Constitutional Court referred to the Fifth Amendment to the United States Constitution and the prohibition of double jeopardy and to Protocol No. 7 to the European Convention on Human Rights, even though Spain is not a party to this Protocol and it is not binding on us. This is important: even though Spain is not a party to this Protocol and it is not binding on us.

¹ 22 October 1981, Series A no. 45.

This shows that the dynamic effect of the Convention goes beyond the normal effectiveness of an international treaty under international law: it has had an evident *erga omnes* effect.

Nevertheless, the Convention in itself continues to be an international treaty. The reforms introduced by Protocol No. 14 support this view. A dynamic or evolutive interpretation has its limits. This limitation is illustrated by Johnston and *Others v. Ireland*², in which the Court declared that the right to marry enshrined in Article 12 of the Convention did not include a corresponding, but crucially different, right to divorce that is now well recognised in most member States (see M.J. Beloff, “What does it all mean?”, in Lammy Betten (ed.), *The Human Rights Act 1998 – What it means*, Kluwer Law International, The Hague, 1999, p. 41). Treaty interpretation must not amount to treaty revision. Interpretation must respect the language of the treaty concerned.

The great international lawyer, Kunz, used the term “international law by analogy” to define the nature of rules which govern the relationship between member States acting inside a single federal system. Regarding international human rights, is it possible today to talk about “constitutional law by analogy” to describe the impact of the Strasbourg Court’s case-law on our municipal systems?

These considerations lead me to support the Group of Wise Persons’ suggestion that it would be useful to introduce a number of mechanisms, like advisory opinions, by which the national courts could apply to the European Court of Human Rights with a view to cooperating with Strasbourg and fostering dialogue between courts that enhances the aforementioned European Court’s “constitutional role”.

III. THE PERMEABILITY OF NATIONAL LEGAL SYSTEMS TO HUMAN RIGHTS LAW

Let me now make a further point. Perhaps the great change between 1950 and the present time should be seen, from the standpoint of municipal law, in the evolution of constitutional law in Europe and world-wide in the 1980s and 1990s.

In all States Parties to the Convention, the national courts should recognise a strong interpretative obligation to construe domestic law in such a way as to render it consistent with the legal norms governing international fundamental rights.

In my country this obligation stems directly from the 1978 Constitution itself.

The Convention was incorporated into the Spanish legal order on 4 October 1979, by virtue of Article 96 § 1 of our Constitution.

Following a moderate monistic approach – traditional in our legal order since the sixteenth century – all international treaties automatically become effective in our domestic law from the very moment they come into force in the international

² Judgment of 18 December 1986, Series A no. 112.

order, and can affect individuals directly (provided of course that their norms are self-executing). The formal publication of the treaty in the Official Gazette is the only precondition for its integration into our domestic legal order.

Thus was the European Convention on Human Rights adopted. From that point of view, the Convention ranks lower than the Constitution but higher than ordinary laws, because no law in our legal system can be interpreted in a sense that conflicts with Spanish international obligations.

Furthermore, the force of the Convention is additionally enhanced and strengthened by Article 10 § 2 of our Constitution, which provides that fundamental rights enshrined in the Constitution must be construed in conformity with human rights treaties ratified by the Kingdom of Spain, and so – among others, but especially – the European Convention on Human Rights.

In the first years of our Constitution, a substantial part of certain fundamental rights was construed in accordance with the jurisprudence of the European Court of Human Rights. A meaningful part of our right to a fair trial (Article 24 of the Spanish Constitution) has been interpreted in accordance with Article 6 of the Convention.

IV. THE DIALOGUE BETWEEN CONSTITUTIONAL COURTS AND STRASBOURG

Let me describe some of the techniques that our Constitutional Court adopts in its daily work to cooperate in this respect, going beyond the international law mechanism established in the Convention itself.

1. The execution of the judgments of the European Court of Human Rights is, of course, an important question. Full execution of the judgments helps to enhance the prestige of the European Court and the effectiveness of its action, and has the effect of limiting the number of applications submitted to it.

The Group of Wise Persons has suggested that a new Convention text should be introduced placing an explicit obligation on States Parties to introduce domestic legal mechanisms so as to redress the damage resulting from any violation of the Convention, and especially those resulting from structural or general shortcomings in a State's law or practice.

The relationship between the European Court of Human Rights and the Spanish Constitutional Court has been a harmonious one, as we have the tool of the aforementioned Article 10 § 2 of the Constitution and we pursue the same goal of the protection of human rights.

Anyone wishing to lodge an application with the Strasbourg Court must first apply to the Spanish Constitutional Court, which offers remedies that normally prevent parties from continuing the dispute in Strasbourg.

The Strasbourg jurisprudence is followed by our court, which has quashed judgments of lower courts that conflict with it and prevented parties from continuing the dispute in Strasbourg. Of course, national courts will give no less protection than the Strasbourg Court if there is a likelihood that decisions restricting human rights will be overruled in Strasbourg. In line with the position adopted by the German Constitutional Court in 2004 in connection with the *Görgülü* case³, our court is also prepared to support Strasbourg case-law.

As an example, let us consider the case of *Sáez Maeso v. Spain* (no. 7837/01), in which the European Court of Human Rights, in a judgment of 9 November 2004, found a violation of Article 6 § 1 of the Convention, on the ground that “the courts’ particularly rigorous interpretation of a procedural rule deprived the applicant of the right of access to a court whereby his appeal on points of law could be examined”.

In judgment 248/2005, delivered by the Constitutional Court on 10 October 2005, I wrote the following as rapporteur:

“When exercising its power of review of decisions taken by the lower courts in this field, the Constitutional Court must take account of the international treaties referred to in Article 10 § 2 of the Spanish Constitution, whose provisions ‘constitute valuable hermeneutic criteria for determining the meaning and scope of the fundamental liberties and rights recognised by the Constitution’, and must therefore be taken into consideration ‘to confirm the meaning and scope of the specific fundamental rights that are enshrined ... in our Constitution’ (see STC nos. 292/2000, of 30 November 2000, FJ 8, with reference to the Treaty of Nice EDJ 2000/40918, and 53/2002, of 27 February 2002, FJ 3 EDJ 2002/2904) for our own constitutional doctrine makes references to the European Convention for the Protection of Human Rights and Fundamental Freedoms which in the end raise the jurisprudence of the Strasbourg Court to the rank of criterion for the determination of common minimum rules of interpretation (see Declaration no. 1/2004, of 13 December 2004, FJ 6, and the jurisprudence mentioned in it).

...

... Nor should it be overlooked that the facts of the case present clear similarities with the case of *Sáez Maeso v. Spain* (EDJ 2004/152246) on which the European Court of Human Rights delivered judgment on 9 November 2004. In that case, which concerned a decision in which the Administrative Division of the Supreme Court had dismissed an appeal that had originally been declared admissible on the ground that the pleadings lodged in support of the appeal did not refer to section 95 (1) LJCA of 1956 (EDL 1956/42) on which the appeal submissions were based, the Court held that there had been a violation of Article 6 § 1 of the Convention (EDL 1979/3822). ...”

The Strasbourg position was not the ratio decidendi of our judgment, but it was closely followed. We followed the Strasbourg case-law, overruling our previous criteria, without dissenting opinions, and the Third Chamber of the Supreme Court changed its approach immediately.

3 *Görgülü v. Germany*, no. 74969/01, 26 February 2004.

2. The main problem in the context of this dialogue is *how to deal with national court decisions which have been found by the European Court to be incompatible with the requirements of the Convention*.

The problem can only be solved by the national courts because, on account of the separation of powers, only courts can review court decisions.

Within the national legal systems, courts may review a decision only if they are empowered to do so by the rules of procedure. Subject to very few exceptions in which proceedings may be reopened, by definition only decisions that are final – and therefore not amenable to appeal on the domestic level – can be brought before the Strasbourg Court. The principle of legal certainty (Article 9 of the Constitution) entails that a judicial decision cannot be questioned when it is *res judicata*. An individual application to Strasbourg is admissible only if all domestic remedies have been exhausted; and this means that a national decision has to be final before reaching the European Court of Human Rights.

If the European Court finds that the decision breaches the Convention, two principles are in conflict: on the one hand, the member State, through its organs (here, through its judiciary), has to repair the violation; on the other hand, the judiciary has to respect the principle of certainty, that is to say, it cannot set aside the finality of a decision in order to remedy the violation. Such a review must be permissible under the procedural system.

In its judgment of 6 December 1988 in *Barberà, Messegué and Jabardo v. Spain*⁴, the European Court of Human Rights found that there had been a violation of the right to a fair trial guaranteed by Article 6 § 1 of the Convention, whereas neither the Supreme Court nor the Constitutional Court had found a violation of the corresponding right enshrined in Article 24 § 1 of the Spanish Constitution.

The Constitutional Court held, in judgment no. 245/1991 delivered on 16 December 1991 in the *Barberà (Bultó)* case, that the national criminal courts had to take up a case if the European Court came to the conclusion that the national decision was not in line with the Convention.

The Constitutional Court considered that an obligation to reopen the proceedings could not be derived from the Convention, and that the Spanish ordinary courts were justified in refusing to apply the national provision of the Code of Criminal Procedure on reopening proceedings in a case where the European Court of Human Rights had declared a national decision incompatible with the Convention. However, it reiterated that, in accordance with Article 10 § 2 of the Spanish Constitution, the fundamental rights enshrined in it must be interpreted in conformity with the human rights guaranteed by international instruments ratified by Spain.

The Constitutional Court also declared that a violation of Article 6 § 1 of the Convention constituted a violation of the corresponding provision of the Spanish Constitution (Articles 24 § 2 and 10 § 2).

4 Series A no. 146.

Noting that the decision of the criminal court (imprisonment) in breach of Article 6 § 1 of the Convention was still being executed despite the European Court's judgment, it concluded that this constituted a continuing violation of the right to liberty as laid down in the Constitution. The Constitutional Court therefore quashed the decisions of the Supreme Court and the Audiencia Nacional and sent the case back for a new trial.

This decision was the outcome of appeal proceedings for the protection of fundamental rights. By ruling that the decision under review was unconstitutional and quashing it, the Constitutional Court opened the way for new proceedings. This cannot be regarded as a reopening of the case within the meaning of the Code of Criminal Procedure, but, to all intents and purposes, that is exactly what it was.

Last but not least, the Constitutional Court also called on Parliament to remedy the situation by law, but the situation has not yet been resolved.

This case was the subject of a fierce debate.

Judgment no. 240/2005 (to which I appended a concurring opinion), delivered on 10 October 2005 following the judgment of the European Court of Human Rights in *Riera Blume and Others v. Spain*⁵ delivered on 14 October 1999, and judgment no. 197/2006, with a dissenting opinion by Pablo Pérez Tremps, delivered on 3 July 2006, follow the same trend.

3. There has been a clear dialogue between the European Court of Human Rights and the Spanish Constitutional Court regarding the principle of equality of arms – an inherent part of the wider right to a fair hearing as guaranteed by Article 6 § 1 of the Convention.

The case of *Ruiz-Mateos v. Spain*⁶ raised the question of compliance with certain guarantees arising from the concept of a fair hearing in the context of an examination of a preliminary ruling by the Spanish Constitutional Court (question of conformity of the law with the Constitution, referred by the ordinary court to the Constitutional Court).

In that case the European Court found that there had been a violation of Article 6 § 1 with regard to the fairness of the proceedings before the Constitutional Court.

The decisive factor in the Court's finding of a violation lay in the fact that Counsel for the State (*Abogado del Estado*) had had advance knowledge of the *Ruiz-Mateos* family's arguments and was consequently able to comment on them in the last instance before the Constitutional Court, whereas the applicants had not had a similar opportunity to reply to his remarks (*loc. cit.*, p. 26, §§ 65 and 67).

In the judgment of 27 April 2004 in *Gorraiz Lizarraga and Others v. Spain*⁷, which concerned the building of a dam in Itoiz (Navarra), the European Court stated that the case clearly differed from *Ruiz-Mateos*, where there had been an expropriation by legislative decree aimed at the applicants alone.

5 No. 37680/97, ECHR 1999-VII.

6 Judgment of 23 June 1993, Series A no. 262.

7 No. 62543/00, ECHR 2004-III.

In decision no. 48/2005 of 3 March 2005, the Spanish Constitutional Court accepted the judgment of the European Court and held, *contra legem*, that individuals should be granted *locus standi* in cases involving a review of the constitutionality of legal rules where the dispute concerned an expropriation or a seizure that derived directly from an individual law.

The new Constitutional Court Reform Bill now recognises this possibility.

V. CONCLUSION

In the 1930s the great Russian constitutional lawyer, Boris Mirkin-Guetzevich, called for the unity of external and internal public law. Article 7 of the Spanish Constitution of 1931 did not achieve this goal. The European Convention on Human Rights is achieving it in the Council of Europe's field of activity.



Elisabet Fura-Sandström

Judge of the European Court
of Human Rights

Professor Frowein was a long-standing member of the European Commission of Human Rights, who served from 1973 to 1993 (as Vice-President from 1981), at a time when the European Convention on Human Rights really came into its own and became a significant and relevant part of international and constitutional law, or, as Professor Frowein puts it, "Sleeping Beauty was kissed to life".

He was Director of the Max-Planck-Institut for Comparative Public Law and International Law in Heidelberg from 1981 to 2002, and is now more active than ever as master of his own time (the term "retired" is too misleading when applied to Professor Frowein).

Many of you will be pleased to learn that the 3rd edition of his commentary on the Convention, published by Engel Verlag (*Europäische MenschenrechtsKonvention, EMRK- Kommentar, Frowein/Peukert, N.P. Engel Verlag, 2. Auflage, 1996*), will be released in mid-2007.

Professor Frowein's topic this afternoon is "The transformation of constitutional law through the European Convention on Human Rights". We are all impatiently looking forward to learning more about this fascinating transformation. Is it really happening and, if so, is it a welcome development?

So, please Professor Frowein (or should I say "Prince Charming"?), the floor is yours.



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THE TRANSFORMATION OF CONSTITUTIONAL LAW THROUGH THE EUROPEAN CONVENTION ON HUMAN RIGHTS

1. INTRODUCTION

Only five years after the end of the Second World War, putting a stop to the complete disregard for human rights that had held sway in one of the larger European countries and in the occupied territories, the governments of European countries agreed on a European Bill of Rights. They resolved, as the governments of like-minded European countries with a common heritage of political traditions, ideals, freedom and the rule of law, to take the first steps towards the collective enforcement of certain of the rights set out in the Universal Declaration adopted by the General Assembly of the United Nations in 1948.

The Convention was obviously a response to the totalitarian ideologies prevailing in national socialism, but also to the communist ideology and practice governing the Soviet Union and the European countries behind the Iron Curtain. But was the Convention intended to be more than such a response and a clarification of the fundamental principles which were well recognised in the constitutional structures of the free European States? If the Convention was to be seen only as a general instrument providing for an emergency system should totalitarian regimes take over western European countries, its importance might have been limited to the cases brought against Greece during the regime of the colonels or against Turkey after the military coup¹. If, however, the Convention was to be seen as a bill of rights for the free part of Europe, such a bill of rights would have to have an impact on the legal systems of the member States.

How far that impact would go was certainly not foreseen in 1950 or 1953, when the Convention came into force. France and Britain were proud of their uninterrupted tradition of safeguarding fundamental rights in their legal orders. They did not expect the European Convention to go further than their internal systems. Of course, France was reluctant to ratify the Convention for other reasons. Britain ratified it at an early date, and it was stated that the Convention would not change anything in its legal order.

With hindsight we could say that the establishment of the European Commission and Court of Human Rights as judicial organs to enforce the Convention partook of what is called "*List der Vernunft*" in German, a certain ruse of reason, not fully understood by the drafters. If you really intend such a bill of rights to become operative, and you establish judicial organs, this must have consequences. A lot can be said for the view that the Commission was not clearly seen as a judicial organ by those drafting the Convention. However, from the very beginning the members of the Commission understood that their authority could only derive from a judicial interpretation of the Convention.

Let me now turn to the transformation of constitutional principles through the Convention, a transformation which may well be termed revolutionary when compared to the constitutional tradition of many States. I refer to judicial control of legislation, to full judicial review of administrative decisions, to guarantees of an open democratic process, to the role of proportionate legislation and to full recognition of the dignity of the individual. I shall briefly address each of these issues.

2. JUDICIAL CONTROL OF LEGISLATION

We are aware of the French and British tradition, which was against judicial control of legislation as developed by the United States Supreme Court. Of course, Germany, after the terrible experience of national socialism, had opted for such judicial control extending to legislation in 1949. Austria had renewed its commitment to that principle, which had already existed, although in a limited way, since 1920, and Italy, again to a limited degree, had accepted such judicial control on the basis of its post-war constitution. But it is quite clear that in 1950 or 1953 the majority of western European countries did not recognise the possibility of judicial control of legislation.

It is quite unlikely that member States realised the consequences of what they had done in establishing judicial organs to control observance of the European Convention on Human Rights. When the Belgian Government argued in the "*Belgian linguistic case*" that the matter mainly belonged to Belgium's *domaine réservé*, the Court replied that the Convention and its Protocol related to matters normally falling within the domestic legal order of the Contracting States, and that they were international instruments whose main purpose was to lay down certain international

¹ See Yearbook of the European Convention on Human Rights, vol. 11, p. 691, and vol. 12, II; and Decisions and Reports 35, p. 143, and 44, p. 31.

standards to be observed by the Contracting States in their relations with persons under their jurisdiction². This had to mean of course that legislation too fell under the supervision of the European Commission and Court of Human Rights.

In the 1970s the Court had to decide several cases where this became quite clear. In the *Marckx* case, where the Court found that Belgian family legislation was not in line with Article 8 as far as the family relationship between a mother and her child born out of wedlock was concerned, the Court tried to explain its jurisdiction. It stated that it was not required to undertake an examination in abstracto of the legislative provisions complained of. Rather, its role was to inquire whether or not their application to the applicants complied with the Convention. The Court then continued³:

“Admittedly, it is inevitable that the Court’s decision will have effects extending beyond the confines of this particular case, especially since the violations found stem directly from the contested provisions and not from individual measures of implementation ...”

Strangely enough it was the German Government which, in the *Axen* case, disputed the Court’s jurisdiction, arguing that what the Court would have to undertake was an abstract review of the compatibility with the Convention of a rule of domestic law, whereas the Convention did not provide for a review of this kind. The Court answered that its sole task was to determine whether the manner in which the contested legislation had been applied was in conformity with Article 6 of the Convention. It added that the fact that such a determination could have consequences for other cases that also concerned the operation of the Act in issue did not mean that the determination would be the result of an abstract review of the Act’s compatibility with the Convention⁴.

It was consequently clear that Convention law required a judicial control of legislation, at least by the European Court of Human Rights. The nature of the Convention as a subsidiary mechanism would then have as a logical consequence that national courts should first address the issue, before the matter came before the European Court of Human Rights. Of course, we must not forget that at the time not all European States were automatically subject to the jurisdiction of the Commission and Court.

Only in inter-State cases did the Commission have full jurisdiction; individual cases required special recognition by the country concerned, which also had to recognise the jurisdiction of the Court. Fortunately, more and more countries accepted these rules and it therefore became necessary for States to amend their constitutional systems where judicial control of legislation did not exist. This was a slow process, but led to a rather significant transformation of constitutional principles. In France, the Netherlands and Belgium, the courts accepted that necessity after a while.

2 Case “relating to certain aspects of laws on the use of languages in education in Belgium” (preliminary objection), judgment of 9 February 1967, Series A no. 5, p. 19.

3 *Marckx v. Belgium*, judgment of 13 June 1979, Series A no. 31, p. 25.

4 *Axen v. Germany*, judgment of 8 December 1983, Series A no. 72, p. 11

The British Human Rights Act of 1998 is a good example of these consequences. Since 2000 the House of Lords has in fact been able to review legislation, although it cannot annul it. In Switzerland, where federal legislation cannot be reviewed on the basis of the Constitution, the Federal Tribunal has recognised that it is a consequence of the Convention that the Court has the power to review legislation on the basis of the Convention. This rule applies now in many European countries. It is unfortunate that in Germany, where judicial review of legislation plays such a prominent role in the Constitution, the Constitutional Court still does not accept full control on the basis of the Convention. However, recent case-law shows that it is willing to become more active in this regard and to review German court decisions which are in violation of Convention law. The pilot-judgment procedure developed by the European Court of Human Rights is a good example of the enormous importance of judicial review of legislation by Convention law⁵.

3. JUDICIAL REVIEW OF ADMINISTRATIVE DECISIONS

When the Convention was being drafted, between 1948 and 1950, or when it came into force in 1953, full judicial review of administrative decisions was far from generally accepted in Europe. For a long time Article 6 of the Convention was seen by many as not applying to the normal field of administrative law. In a slow process, the Court clarified that this important provision had automatic consequences for judicial review of administrative decisions, a matter of constitutional importance and constitutional rank in many countries. It is now settled case-law that Article 6 applies to all individual rights which are not political rights in a narrow sense and do not belong to some special areas, for instance, tax legislation.

The judicial review required by Article 6 must include both the factual and the legal issues of the case. Several of the member States had to reform their systems of judicial review of administrative acts to include the review of the facts and not just the law. On the other hand there is no requirement for the possibility of a full *de novo* review, as formulated in American law. In particular, the discretion of the administrative authority is fully in line with Convention law and this discretion must not be controlled by the judicial decision unless it is claimed that the limits of the discretion have been overstepped and therefore the decision has become illegal.

It is a fine line which needs to be drawn here, and the case-law may not yet be fully settled. The *Van Marle and Others* judgment of 1986, in which I had the honour to represent the Commission before the Court, is certainly still good law. The Court held that an assessment evaluating the knowledge and experience required for carrying on a profession under a particular title is akin to a school or university examination and is so far removed from the exercise of the normal judicial function that the safeguards in Article 6 cannot be taken as covering resulting disagreements⁶. It is probably more important to say that this is not a matter where a dispute concerning rights arises.

5 See *Broniowski v. Poland* [GC], no. 31443/96, ECHR 2004-V.

6 See *Van Marle and Others v. the Netherlands*, judgment of 26 June 1986, Series A no. 101, pp. 11 et seq.

It is clear that judicial review of administrative acts must make it possible to annul the administrative decision. As the recent case-law, concerning the United Kingdom and Poland for example, shows, the line between sufficient judicial review under Article 6 and a violation is not always easy to predict⁷. However, development of the need for efficient judicial review of administrative decisions as a consequence of Article 6 of the Convention is certainly a great achievement of the Convention jurisprudence.

4. GUARANTEES OF AN OPEN DEMOCRATIC PROCESS

Under the Statute of the Council of Europe all member States are already bound to have a democratic constitutional system. In 1950 or 1953 it was not evident that the case-law of the Convention institutions would contribute to clarifying what a democratic system really meant. The case-law concerning Article 10 shows that the constitutional system in member States did not always guarantee that the opposition would be free to criticise the government, including in a harsh or provocative manner. Starting with the *Lingens* case, the Convention institutions made it clear that political criticism was of the utmost importance in a democratic society⁸. The role of the press as a “watchdog” was underlined throughout the cases. The difficulty for a journalist to find out what really happened where public authorities were not willing to disclose their practices was taken into account by both Commission and Court⁹.

Responsible criticism even where a journalist is unable to fully prove the facts must be protected in a democratic system. This led to an important constitutional transformation in many countries.

The Convention does not harmonise electoral systems. This had to be underlined when the Liberal Party in Britain brought a well-argued application before the European Commission of Human Rights¹⁰. However, there are certainly

limits to the way an electoral system may create advantages or disadvantages for the voters. I remain convinced that in the case of *Mathieu-Mohin and Clerfayt* concerning the Belgian electoral system the Court should have found a violation, as the Commission did¹¹. There seems to be a tendency by the Court to apply stricter rules now that so many newly established democracies have become members of the system. I personally find this preferable.

7 See, for example, *Tsfayo v. the United Kingdom*, no. 60860/00, 14 November 2006, and *Potocka and Others v. Poland*, no. 33776/96, 4 October 2001, ECHR 2001-X.

8 *Lingens v. Austria*, judgment of 8 July 1986, Series A no. 103.

9 See *Thorgeir Thorgeirson v. Iceland*, judgment of 25 June 1992, Series A no. 239.

10 *The Liberal Party, Mrs R. and Mr P. v. the United Kingdom*, no. 8765/79, Commission decision of 18 December 1980, Decisions and Reports 21, pp. 211, 223 et seq.

11 *Mathieu-Mohin and Clerfayt v. Belgium*, judgment of 2 March 1987, Series A no. 113.

5. THE NEED FOR PROPORTIONATE LEGISLATION AS A BASIS FOR RESTRICTIONS OF FREEDOM

Article 4 of the French Declaration of the Rights of Man of 1789 includes the essential constitutional principle according to which the limits of freedom must be laid down by legislation: “*Ces bornes ne peuvent être déterminées que par la loi.*” In principle such a rule was recognised in most, if not all, Convention countries. But in practice it was not always applied. I still remember vividly the discussion I had with the legal counsel of the Home Office in London when a friendly settlement in the famous case of *Malone* was being discussed¹². The legal counsel told me, and I am sure he was right, that many more secret telephone tapings took place in Germany than in Britain. However, this could not of course vindicate the lack of any basis in legislation for the limitation of personal freedom in that respect in the United Kingdom. By strict adherence to the requirement of democratic legislation as a condition for the limitation of the Convention freedoms set out in Articles 8 to 11, the Convention institutions contributed to confirming an old constitutional principle prevailing in democratic countries.

Modern dangers, including terrorism, may make the problem addressed here even more relevant. Newspaper reports according to which the London police are trying to establish a register of potential criminals on the basis of a person’s general profile are a good example. Should we not require that our elected representatives, in an open process, reach a conclusion on the extent to which the police may use data concerning a person to establish such a profile?

In this area in particular the need for judicial review of legislation seems obvious at the present time. The judgment by the House of Lords concerning the provisions in British anti-terrorist legislation is an excellent example of review on the basis of Convention law. The Human Rights Act in the United Kingdom came into force when the time was already ripe. I remember saying in 1993 that I would no longer accept invitations to discuss the internal applicability of Convention law in the United Kingdom because I had done so three or four times and I saw no sense in repeating myself. I had always been convinced that as soon as the House of Lords was given that competence we would witness very important developments. This has already been the case.

6. FULL RECOGNITION OF THE INDIVIDUAL AND OF INDIVIDUAL DIGNITY

The dignity of the human person is an underlying principle of Convention law. Article 3 in particular, as the Court has stated, is a full recognition that State organs may never disregard human dignity even where important public interests are at stake. In that context the principle of proportionality gains its real importance. As the Israeli Supreme Court has so convincingly stated, the democratic State bound by the rule of law can fight terrorism only with one hand tied behind its back and not with unlimited means like the terrorists.

12 *Malone v. the United Kingdom*, judgment of 2 August 1984, Series A no. 82.

7. THE TRANSFORMATION OF EASTERN EUROPE

Let me finally mention the constitutional transformation of central and eastern Europe and the influence the European Convention on Human Rights has had in that respect. One only has to read the constitutions of the new member States to find out to what extent their bills of rights are influenced by Convention law. Moreover, the courts in many of these member States have already established the importance of Convention case-law for their internal legal systems.

I shall never forget the situation I encountered when I visited Bucharest during the process of accession by Romania to the Council of Europe. The then Procurator-General, whose office showed where the real power lay in comparison with the President of the Constitutional Court or the Supreme Court, tried to convince me that the system prevailing under communism in Romania was really superior to the European one. According to him, the central power of the Procurator-General to give orders to the courts guaranteed that the law was fully applied in a unified manner. It took a while to explain why such an approach was in clear contradiction to the very fundamental principles of the rule of law and the independence of courts.

The role of the established system of Convention law in the transformation of the eastern European systems can hardly be overstated. Of course, recognising principles is not sufficient to render satisfactory the actual legal situation in some of the countries concerned. Judgments concerning Russia and Ukraine in particular have demonstrated this until very recently. However, the role played by the European Convention on Human Rights in the process of transformation of the constitutional systems in central and eastern Europe seems to be without precedent.

8. CONCLUSIONS

Let me draw some conclusions from what I have tried to explain. I have always been of the opinion that the European Convention on Human Rights, although of course a treaty concluded under international law, must be seen as much more than a normal international treaty. Otherwise, it could not have reached its aim of becoming a constitutional instrument of European public order, as the Court rightly stated, adopting a formula used by the Commission.

This character must be reflected in the interpretation of the Convention provisions. The Convention is a living instrument. This is no different from the bills of rights in many of our constitutional systems, which are interpreted by constitutional or other courts. I have never liked the notion of a dynamic interpretation of the Convention provisions. This conveys the wrong idea that there is a certain dynamism in the role of the interpreter and of the judge. I do not believe that this is correct. However, a proper analysis of what the Convention is about and the recognition that it must be applied to circumstances which are frequently quite different from the ones prevailing when it was drafted clearly show that it is not the drafters' intention which must prevail.

In that connection, some of the dissenting opinions of the famous international lawyer and judge of the European Court of Human Rights, Sir Gerald Fitzmaurice, fully illustrate the problem. He dissented forcefully in the *Tyrer* case as well as in the *Marckx* case. His idea was to limit the Convention to outlawing what had happened under national socialism in Germany and during the Second World War in occupied territories. Viewed in this way, the Convention would not have had much influence.

I remember clearly how the *Tyrer* case¹³ was hotly disputed in Britain after it was decided. About ten years later it was my feeling that the correct approach of the Commission and Court was generally recognised. How can one interpret degrading treatment as being limited to a specific understanding in time, even if it were easy to find out what that understanding really was? Normally it is not easy to establish a consensus on the nature of a specific view existing at a specific time.

Notions such as “inhuman” or “degrading”, not to mention torture, cannot be tied to a specific period. It is precisely the task of the interpreter and of the judge to make a proper analysis of the specific situation. The discussions concerning the practices of the United States in Iraq show how dangerous it is to seek cover behind distinctions borrowed from earlier events and lose sight of the real meaning of provisions like the third Article common to the Geneva Conventions, to take one example.

The judges responsible for this event today have given a few explanations on their thoughts. Let me pick one sentence: “As voluntary limitations of national sovereignty, international treaties should not be construed in a manner which imposes more obligations on a State than that State intended to accept.” I do not believe that this is a satisfactory principle for interpreting a convention like the European Convention on Human Rights. I do not think it is even appropriate for interpreting the United Nations Charter, as many examples can show. However, the Convention is a sort of constitution for the European member States as far as fundamental rights are concerned. This must be taken into account when interpreting its rules and, although criticism is certainly possible in many respects, I believe that the case-law of the Commission and the Court have taken the right approach, by and large, in their interpretation of the Convention.

¹³ *Tyrer v. the United Kingdom*, judgment of 25 April 1978, Series A no. 26.

SOLEMN HEARING OF THE EUROPEAN COURT OF HUMAN RIGHTS ON THE OCCASION OF THE OPENING OF THE JUDICIAL YEAR



Luzius Wildhaber

**Former President of the
European Court of Human Rights**

SPEECH GIVEN ON THE OCCASION OF THE OPENING OF THE JUDICIAL YEAR, 19 JANUARY 2007

Mr Chairman of the Committee of Ministers, Ministers, Presidents, Excellencies, Mr Secretary General, dear colleagues and friends, ladies and gentlemen, I am here because the time has come to say “au revoir” and to thank you from the bottom of my heart for your collegiality, your faithfulness and your friendship.

It has been my immense privilege to preside over the unique institution which is the European Court of Human Rights for over eight years. A privilege not only because it is a passionately interesting job, because the variety, diversity and richness of the cases that reach us is fantastic, because I have had the pleasure of working in a richly diverse multicultural environment with congenial, committed and enthusiastic colleagues, but above all because of what this Court represents for hundreds of millions of Europeans and beyond. The Court is often described as the jewel in the Council of Europe’s crown, but it is more than that. It is the symbol, and indeed the practical expression, of an ideal, an aspiration for a society in which the marriage of effective democracy and the rule of law provides the basis for political stability and economic prosperity, while allowing the self-fulfilment of individuals. The European Convention on Human Rights offers a model for an international community bound together by respect for common standards and their collective enforcement. It is the legacy of the twentieth century, with its battlefields and its camps, to the twenty-first century, with its new challenges and fears. The rights and freedoms it guarantees are both timeless and universal.

I therefore believe that it would be hard to overestimate the importance of this Court. But the system set up by the European Convention on Human Rights is not confined to the work of one body. Its effectiveness depends necessarily on the active participation of the other branches of the Council of Europe and on the governments of the member States working together in the Committee of Ministers. More than that, it also and above all depends on the active and positive participation of the national authorities, particularly the judicial authorities, many of which are represented here today. That is a message I have repeated throughout my term of office, and I have had the great privilege and pleasure of visiting practically all the

national supreme and constitutional courts which are our partners in this system. My colleagues and I have advocated a continuous dialogue between these courts and Strasbourg and I am delighted that today's seminar was so well attended. This shows the high level of interest and involvement of national judges and, frankly, that is how it should be. It is your Convention as much as it is ours – it is also your heritage to preserve and nurture and to turn into a living reality which will help and profit the citizens and inhabitants of your countries.

Together we have undertaken and accomplished much during these last eight years, and the Court is now firmly established on the map of Europe. Despite certain initial difficulties, we managed to merge the former Commission with the former Court. We have fought the good fight against what Lord Woolf of Barnes identified as an eightfold rise in the number of cases since 1998, and have come off quite well. I firmly believe, in fact, that we have acquitted ourselves very well. We have constantly striven to rationalise our working methods and reorganise our priorities, and thus raise our productivity, but the quality of our judgments has not suffered as a result. It is broadly recognised, likewise, that our Court is well managed and has a good working atmosphere.

Our case-law, which has always rejected a sterile positivism, preferring to adhere to the doctrine of the living instrument, is a beacon and a symbol visible from well beyond the frontiers of Europe. As I have already mentioned, we have maintained a living dialogue with our colleagues in the national supreme and constitutional courts and in other international courts, and my visits to those courts, almost always in the company of the national judge, have been a priority for me. The Court has adopted guidelines on judges' attendance and their official journeys and will soon, I very much hope, adopt its code of ethics. The list of accomplishments I could mention is a long one, but I will stop there.

Over these eight years the Court has undergone some sweeping changes. "Change" had been our catchword all along. From the beginning in 1998, we were faced with a dramatically rising caseload and the need to adapt working methods. I would like to pay tribute to my colleagues and to the members of the Registry for their efforts and their openness to change, for their willingness to support the complete computerisation of what we might call our "production lines". We should not be complacent, however. More needs to be done. The time taken to process and adjudicate substantial cases is still too long, in some cases unacceptably long, and this undermines the credibility of the system. We were aware early on that the Convention mechanism must continue to evolve. Today we are still aware that it has to continue to evolve. In this respect too efforts have been made, notably the elaboration and adoption of Protocol No. 14 and more recently the Wise Persons exercise. One conclusion from all this activity is that no one has yet discovered the miracle cure, undoubtedly because ultimately the answer lies mostly in the domestic legal systems and to change them is inevitably a slow and lengthy process. In the meantime the Strasbourg machinery has to be made more efficient, and that is what Protocol No. 14 is designed to achieve. As you know, we are waiting for one more ratification – that of the Russian Federation – for it to come into force. I can only stress that the Protocol would have an important contribution to make in enabling the Court to confront the growing volume of cases, while helping to limit the increase in costs. One of the underlying aims of Protocol No. 14, and above

all the accompanying recommendations and resolutions, is to redress the balance between the international machinery and domestic authorities by strengthening the principle of subsidiarity. Again, the idea is that citizens should be able to vindicate their rights in the national courts; however well organised, international protection of human rights can never be as effective as a well-functioning national system of protection.

Everything would seem to plead for a rapid entry into force of Protocol No. 14. The Court is ready for it, the necessary draft rules have been adopted, the working methods have been adjusted, and this has helped to achieve substantial increases in productivity. We should not have to wait for any further evolution as a result of the Wise Persons' report; we should move forward now.

In my last official act as President of the Court, in a speech to the Ministers' Deputies, I therefore made a plea to the authorities of the Russian Federation to play the game, to be fully part of the Convention system and to give the Court the tools it needs to pursue its drive to increase the efficiency of its processes. Protocol No. 14 is in no way a revolutionary text, but it does offer practical solutions for certain problems, notably the single-judge mechanism for clearly inadmissible cases and the three-judge committee for repetitive cases. The Wise Persons' report builds on such measures and assumes their implementation.

Allow me one final, important question which may appear deceptively simple. How do we see a European Court of Human Rights? What is it and what should it be? Should it be an instrument of European integration? Should it do the job of non-governmental organisations? Should it be what I sometimes call a "fighting machine" for human rights or for certain theories concerning human rights? Should it espouse a political role and if so, what sort of role? Should it, as some American writers would put it, be the defender of the "system", which must presumably mean that the Court should defend the ruling class or governmental system of each member State? These questions would surely deserve elaborate answers, and there is no time for that. But I would give a deceptively simple answer and say that a court should be just that and no more than that: it should be a court. It should, in total independence and impartiality and in orderly, fair and foreseeable procedures decide the issues for which it is competent. If it assigns to itself other roles, if it is less than independent and succumbs to governmental pressures, it cannot really fulfil its beneficial functions and will lose first its credibility and then its usefulness. It is granted that the European Court of Human Rights decides social conflicts and will therefore not always be able to please everybody, and it will not always be popular with governments. But that is unavoidable, and accepting that is an inescapable part of belonging to the community of democratic States.

Ladies and gentlemen, looking back over my time as President and as judge, there are so many rich and vivid memories: of my colleagues and friends, of the important cases, of my visits to national courts, of my meetings with fellow judges from throughout the Council of Europe countries. I am ever so grateful for all these memories, for all the support I have been given, for the friendship with which I have been privileged. Of course it is a wrench to leave the Court, but I do so with a sense that we have done the very best we could with the limited resources available to us. I am also confident that I have handed over responsibility to a new

President who is perfectly capable of taking on this mission, whose wide experience in the judicial and other domains particularly qualify him for the post and for whom I have the highest respect as a judge and a person.

Obviously, I would not like to hand over my duties and office to a French judge without doing so in French. Dear Jean-Paul, we all know that you are an experienced judge, quick of thought, with a clear and elegant style, but at the same time precise and lucid, with sound common sense. You have proved yourself at the Court, and before that in the course of a brilliant and impressive career in France. I also know your qualities as a human being and a friend, and am grateful for them. My colleagues and I have placed our trust in you, and it only remains for me to wish you (and Brigitte) good fortune, success and good health, for your own well-being and for the Court's.



Jean-Paul Costa

**President of the European Court
of Human Rights**

SPEECH GIVEN ON THE OCCASION OF THE OPENING OF THE JUDICIAL YEAR, 19 JANUARY 2007

Mr Chairman of the Committee of Ministers, Minister, Presidents, Excellencies, Monsieur le Préfet, Secretary General, Deputy Secretary General, dear colleagues and friends, ladies and gentlemen, I wish to thank you all, on behalf of the Court, for attending in such numbers today this official opening of the judicial year at the European Court of Human Rights. The presence of such a large audience, and the high offices held by its individual members, honour my colleagues and myself. They reflect the respect and esteem in which our Court is held, throughout Europe and even beyond our continent, and they encourage and reassure us at a delicate moment in its already fifty-year-old history.

Today's ceremony has special significance, first of all because it coincides with the departure of my predecessor, President Luzius Wildhaber, who reached at midnight last night the age-limit fixed for judges by the Convention which governs our institution.

To begin with, and I perform this duty with pleasure and sincerity, I wish to pay the homage he deserves to Luzius Wildhaber. He was elected judge in respect of Switzerland in 1991 and became the Court's President in 1998, thanks to the confidence placed in him by his peers, as expressed by very comfortable majorities then and on two subsequent occasions. Luzius Wildhaber's accession to the presidency coincided with the entry into force of Protocol No. 11, which effected a thoroughgoing reform of our system. During his successive terms of office it has faced an increase which some have described as exponential. The number of new applications has multiplied by six in eight years, and is now running at around 40,000 per year. Thanks to the untiring efforts of the judges and Registry staff, and also to the additional resources provided to the Court by the member States of the Council of Europe, the Court has been able to cope, even though the current number of pending cases – nearly 90,000 – has reached a level beyond which growth threatens to become unmanageable. I will return to that point.

Luzius Wildhaber has presided over and directed this Court with competence and wisdom, with firmness and humanity, with brio and efficiency. In particular, he has done everything he could, personally, and with no little success to make our institution better known among all national judicial systems and all State authorities,

including those in the countries which have entered the European human rights protection system most recently. Through his action he has considerably increased awareness throughout Europe of exactly what is at stake behind such protection. For that, and for many other aspects of his activity during his time in Strasbourg, I wish to thank him and give him the credit which is his due. Luzius Wildhaber will leave behind him in history the memory not only of an eminent judge and jurist but also of a great President. I know, or rather am beginning to appreciate even more, that to succeed him is an honour and will not be an easy task.

Ladies and gentlemen, according to our tradition, this ceremony provides an opportunity to retrace the activity of the Court over the previous year. I will do that fairly briefly, in order to devote most of my remarks to the prospects for the future.

I know that statistics can be tedious. Therefore, I shall limit myself to giving you some figures in order to provide a picture of the considerable judicial activity carried out during the year 2006. More than 39,000 applications were registered or, to be more precise, were allocated to a decision body, in other words required a judicial decision. Nearly 30,000 were finally disposed of by a decision or a judgment. The difference shows an unfortunate “deficit”, amounting to almost 10,000 applications. The number of pending cases, at the beginning of 2007, is practically 90,000, over 65,000 of which have been allocated to a decision body. A comparison with the year 2005 shows a growth in the overall number of new applications of 13%. The number of cases pending at the end of the year increased by 12%. Those figures are alarming, the more so because there is a persistent pattern of growth over the years, even if some progress has been made in reducing the deficit.

Faced with such a situation, the Court, of course, has not remained inactive. In 2006 the number of cases terminated rose by 4%, but the number of judgments delivered increased by around 40%, reflecting the Court’s policy of concentrating more resources on meritorious cases. In the last two years, the total number of terminated applications has risen by 40%, whilst, obviously, the financial and human resources provided to the Court, even if growing, have not been increased in anything like the same proportion.

In fact, our Court endeavours to increase its efficiency continuously, by rationalising and modernising its functioning. The Registry has carried out a restructuring of the Divisions, and has started the implementation of some of the steps recommended by Lord Woolf of Barnes in his report drawn up at the end of his management study of the Court in 2005. A specialised unit has been set up within the Registry in order to deal with the backlog, which consists of the oldest applications. Finally, on 1 April 2006 we established a fifth Section of the Court, the creation of which has reduced the number of judges in each Section, and the number of judges who are sitting as substitutes in each case, and has naturally increased the number of cases dealt with by every judge. I should add that very significant efforts have been made by the judges and the staff in order to ensure that the Court is ready to operate within the context of Protocol No. 14 as soon as it comes into force. Those efforts have targeted the working methods and the Rules of Court. According to a provisional assessment, without any increase in resources,

the application of Protocol No. 14 will enable the Court to increase its productivity by at least 25%. This already shows that, although it cannot suffice by itself, the Protocol is indispensable to us. I will come back to it later.

Activity of such intensity as regards the quantitative aspects of our work has not, I believe, diminished the quality of the judgments given by the Court. Even if, as with any court, some decisions may be criticised (and of course our judgments are not all unanimous), it seems to me that observers all concur that the quality and the impact of the rulings given in Strasbourg deserve respect. Some of our judgments, again in 2006, have settled new issues or concerned a wide range of member States.

Let me give just a few examples from our recent case-law.

The case of *Sørensen and Rasmussen v. Denmark*¹ gave the Court the opportunity to consider social rights. The Court held that clauses in employment contracts providing for a trade union monopoly, in other words clauses providing for a “closed shop”, were in breach of the negative freedom of association, specifically applied to trade unions, violating Article 11 of the Convention.

In *Giniewski v. France*², the Court found a violation of freedom of expression, in so far as the author of an article in a daily newspaper had been convicted of defamation, even if the sanctions were very moderate. The article expressed the opinion that the doctrine of the Catholic Church on Judaism might have led to contemporary anti-Semitism, thus indirectly resulting in the concentration camps.

In its judgment in *Sejdovic v. Italy*³, the Court found to be contrary to the principles of a fair trial the fact that an accused person had been judged in absentia, although it had not been shown that he had been attempting to evade justice or had unequivocally waived his right to defend himself in person, no possibility having been offered to him to have a court decide again on the criminal charge against him.

In *Stec and Others v. the United Kingdom*⁴, having considered that the creation of welfare benefits, even without contributions by the beneficiary, generated a proprietary interest falling within the ambit of Article 1 of Protocol No. 1, concerning protection of property, the Court found that the advantage given to women by the British legislation was not contrary to the prohibition of discrimination under Article 14 of the Convention taken in conjunction with Protocol No. 1. In reaching that conclusion, the Court made reference in particular to a ruling by the European Court of Justice, deeming it necessary to give “a specific weight to the highly persuasive value of the conclusion reached by the ECJ”.

Like the earlier case of *Broniowski v. Poland*⁵, the case of *Hutten-Czapska v. Poland*⁶ gave the Court the opportunity to deliver a pilot judgment. This procedure, which in my opinion is hopeful for the future, consists of finding the existence of a

1 [GC], nos. 52562/99 and 52620/99, 11 January 2006.

2 No. 64016/00, 31 January 2006.

3 [GC], no. 56581/00, 1 March 2006.

4 [GC], nos. 65731/01 and 65900/01, 12 April 2006.

5 [GC], no. 31443/96, ECHR 2004-V.

6 [GC], no. 35014/97, 19 June 2006.

systemic violation (in the instant case of Article 1 of Protocol No. 1), then of holding that the State, while retaining the choice of the means, must secure in its legal order a mechanism which will redress the systemic violation. In *Hutten-Czapska*, the problem concerned the rent-control system, and the operative paragraphs of the Court's judgment held that Poland had to maintain a fair balance between the interests of landlords and the general interests of the community, in accordance with the standards of protection of property rights under the Convention.

Finally, in *Jalloh v. Germany*⁷, the Court – very divided in its votes – gave a judgment whereby it held that Article 3 of the Convention had been breached. A public prosecutor had ordered that emetics be administered by a doctor to the applicant, who was suspected of having swallowed a tiny bag containing drugs. As a result, the applicant vomited, regurgitated the bag, and was eventually convicted of drug trafficking. The Court found that the applicant had been subjected to inhuman and degrading treatment contrary to Article 3.

Those examples, among many others I could have mentioned, show that the huge quantity of cases that the Court must cope with does not prevent it from giving very important and carefully drafted rulings. Despite the absence of an *erga omnes* effect, its judgments influence judges and lawmakers in all States Parties, and do contribute to harmonising European standards in the field of rights and freedoms. In this respect, I would like to pay tribute to the domestic courts, which apply more and more readily – and sometimes even anticipate – the Strasbourg case-law, thus making judicial cooperation a reality.

I shall now turn to what I regard as the essential question: What role does our Court play? What are its future prospects?

To my mind the European Court of Human Rights occupies a crucial position, through its very existence and thanks to its case-law, in the slow, gradual improvement in human rights protection. For me, the most important Convention Article is the first: "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention." The High Contracting Parties are the forty-six member States, but I hope that in the near future the European Union will also become a High Contracting Party. The fact that progress has broken down on the Treaty establishing a Constitution for Europe is a regrettable historical accident but, firm believer as I am in the European ideal, I am well aware that progress in European construction is not always even and sometimes comes to a temporary standstill. However, as Galileo said about our planet, "Eppur, si muove" – "And yet it does move" – so Europe keeps moving and always ends up going forward, and not just judicial Europe.

It is primarily for the member States of the Council of Europe to secure respect for the rights and freedoms of persons, whether nationals or aliens, within their jurisdiction for the purposes of Article 1, which I have just cited. Might I be accused of optimism, of fastidiously ignoring brutal reality perhaps, if I say that on the whole, since the signature of the Convention in 1950, this obligation to respect human rights has been discharged more and more satisfactorily? Dictatorships have

⁷ [GC], no. 54810/00, 11 July 2006.

disappeared and given way to democratic regimes in the south of our continent; the Berlin Wall has fallen and the Iron Curtain has been lifted, more than fifteen years ago already. Despite serious conflicts such as the war in the former Yugoslavia, the Kurdish and Chechen problems, despite terrorism, which as long ago as 1978 the Court described as a serious violation of human rights which States have a duty to combat, in the long term and on the whole barbarism is in retreat, democracy is moving forwards, human rights are flourishing.

This process is largely due to the States themselves and their peoples. But, without forgetting the contribution of public opinion, which is increasingly international, non-governmental organisations, the press and Bar associations, how can the essential contribution of our Court be denied? The Court did not spring into existence spontaneously; it was called into being by the Convention (and therefore by the States), whose Article 19 is the echo or mirror of Article 1 – "To ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention ..., there shall be set up a European Court of Human Rights ..."

Its decisions, whether rejecting an application or finding against a State, are authoritative and trace the demarcation line between what is tolerable and what is not. We – and my colleagues and I are proud of this – are the institution which has the duty and the power to cry "Stop!", and we do so by virtue of the solemn undertaking freely given by the States. I find it admirable incidentally that they have given such an undertaking, inasmuch as in doing so they are accepting that justice must take precedence over State interest.

Pascal said: "Justice without force is powerless; force without justice is tyrannical", but he went on to say: "Justice and force must therefore be brought together; and to that end let what is just be strong or let what is strong be just." It seems to me that the text signed in Rome on 4 November 1950, the Convention, constitutes a wager which I hesitate to call Pascalian, and it is this: to ensure, by abandoning sovereignty, that European justice in the field of human rights is strong, which means respected.

But before being strong, justice still has to be just. And I sometimes hear it said that our Court is not just, that its decisions are not legal but political. I myself have heard this accusation on the occasion of various official visits, and experience has taught me that when one explains the true state of affairs calmly the accusation tends to fade away – the accusers desist. I vigorously proclaim my innocence, and I believe all my colleagues would also plead not guilty. In a world that is itself politicised as much as it is mediated, the men and women who make up our Court give justice through their arduous but very honest labours, justice which is based on Law, which is not an exact science, and on fairness, which is an essentially subjective concept. I deny that they give political decisions, or that they practise I know not what double or triple standards, because that is quite simply untrue. Our judgments, as I have said, are open to criticism. We may make mistakes, but we do not give way to any kind of politicisation.

Lastly, I turn to the future of the Strasbourg Court. I note first of all that it is now universally known and respected, even far beyond the shores of Europe, "old Europe". But its future depends on its effectiveness. If it lacked effectiveness, it would lose its credibility, its moral and legal authority and, ultimately, its *raison d'être*. That

effectiveness certainly depends on us, who are doing everything that ingeniousness and energy can accomplish to find pragmatic ways of cutting down our lengthening list. But it also depends on you. It depends on national courts and authorities, which are primarily responsible for application of the European Convention on Human Rights. The more remedies are applied at national level the less the flood of applications to Strasbourg will be justified, not to mention the indispensable prevention of violations by amending legislation and changing practices.

Let us not be under any illusions: the spring will not run dry anytime soon. But between a spring running dry and a tsunami there is plenty of room for the principle of subsidiarity to make effective progress.

The future of our Court also depends on you, the representatives of the States. I do not intend to speak here and now – for this is neither the time nor the place – of the budgetary and human resources that are indispensable for the Council of Europe and the Court alike, which are both, together – though I am sure there is no need to remind you of this – pillars of greater Europe, and of a still greater Europe. But I am thinking of Protocol No. 14, and in the longer term of the follow-up to the Wise Persons' report.

It was the member States who decided that Protocol No. 14 was needed. It followed on from the work of the Evaluation Group set up by the interministerial conference in Rome as far back as November 2000, whose report was produced in September 2001. These initiatives formed part of a process that President Wildhaber called a "reform of the reform", because it rapidly became clear that Protocol No. 11 would no longer be sufficient to ensure the effectiveness of the system.

Protocol No. 14 was drawn up as a result of intergovernmental work. It was completed and opened for signature as long ago as 13 May 2004. Since then the forty-six member States have signed it and forty-five have ratified it. Only one name is still missing, and that is all the more surprising because the highest authorities of the State in question have declared themselves in favour of our Court and its reinforcement. I will not repeat Cato's phrase "Delenda est Carthago", as it is not a question of destroying but of consolidating and building, but I will repeat – and go on repeating – "Protocol No. 14 must be brought into force". And the sooner the better. I firmly believe that this categorical imperative, as Kant might have called it, is also a decision based on practical reason, to mention another concept he discussed. And so I hope – I am sure – that reason will prevail.

Rapid ratification would be all the more logical because at the Third Council of Europe Summit, in May 2005 in Warsaw, the heads of State and government decided to set up a Group of Wise Persons, charged with making proposals on the medium- and long-term future of the Court and the European human rights protection system. The Group's terms of reference even required the Wise Persons to examine in their report the initial effects of the application of Protocol No. 14! But their report has already been produced, and was officially submitted, two days ago, by its Chairman Mr Gil Carlos Rodríguez Iglesias, former President of the Court of Justice of the European Communities, to the Committee of Ministers of the Council of Europe, and the Ministers' Deputies unanimously praised its quality and breadth. I myself thank the eleven Wise Persons for their work and their proposals,

on which our Court will give its opinion. But at the risk of repeating myself I would point out that the Wise Persons' report presupposes Protocol No. 14; it is in no way a substitute for it, still less a "Plan B" (if I may use such a term).

As you can see then, the Court is confronted with difficult problems, particularly in terms of managing its timetable, which are creating regrettable uncertainty, including uncertainty about the personal situation of my colleagues.

That being said, over and above these technical difficulties, which can be solved, especially if Protocol No. 14 quickly comes into force, it is the future of the system which is at stake. This system is based on a unique mechanism, namely direct access for 800 million people to an international court charged with ensuring as a last resort the protection of their most fundamental rights.

I personally am in favour of the right of individual petition, for which a hard battle had to be fought, and am therefore in favour of retaining it.

But let us not shrink from the truth. I have laid too much emphasis in the past on the principle of reality, looking beyond appearances, not to realise now that, without far-reaching reforms – some would say radical reforms – the flood of applications reaching a drowning court threatens to kill off individual petition *de facto*. In that case, individual petition will become a kind of *catoblepas*, the animal which, according to ancient fable, used to feed on its own flesh!

In 2006 the Court gave more than 1,500 judgments on the merits, which is almost twice as many in a single year as all the judgments delivered by the former Court in nearly forty years, from 1960 to 1998! But that high number must not hide from view the fact that nearly 95% of adjudications in 2006 took the form not of judgments on the merits but of decisions in which the Court ruled applications inadmissible or struck them out of its list. Does it redound to the glory of a court which has high ambitions and heavy responsibilities to dismiss so many applications as being entirely without foundation? Does ruling on the merits of only one out of every twenty complaints constitute effective defence of human rights? As things stand at present, our Court cannot do otherwise. Let us all strive to make sure that in the future things will be different. And let us start by giving the instruments we need the requisite legal force for them to be able to produce their positive effects.

Ladies and gentlemen, I know that I have spoken at some length. But since January is the month for good wishes, allow me, before I conclude, firstly to convey to all of you on behalf of all my colleagues and myself my best wishes for 2007, and secondly to express the fervent hope that the greatest system for the protection of rights and freedoms which exists in the world can find a new lease of life and emerge from its present difficulties – with your assistance, I repeat – composed and strengthened.

One of the slogans in May 1968 in France was: "Be realistic, demand the impossible!" It is, on the contrary, because I believe it is possible that I consider my wish to be realistic.

Thank you for your attention.

PHOTOS



PREVIOUS DIALOGUES BETWEEN JUDGES

- Dialogue between judges - 2006
- Dialogue between judges - 2005