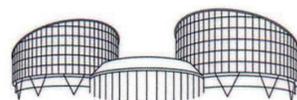


# Dialogue between judges



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

1959 • 50 • 2009

# Dialogue between judges

Proceedings of the Seminar  
30 January 2009

**Fifty years of the European Court  
of Human Rights viewed  
by its fellow international courts**

Strasbourg, 2009

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# TABLE OF CONTENTS

## Proceedings of the Seminar

<b>Jean-Paul Costa</b>	5
President of the European Court of Human Rights	
<b>Françoise Tulkens</b>	7
Judge of the European Court of Human Rights	
<b>Patrick Robinson</b>	11
President of the International Criminal Tribunal for the former Yugoslavia	
<b>Vassilios Skouris</b>	17
President of the Court of Justice of the European Communities	
<b>Paolo Carozza</b>	26
President of the Inter-American Commission on Human Rights	

## Speech given on the occasion of the opening of the judicial year, 30 January 2009

<b>Jean-Paul Costa</b>	34
President of the European Court of Human Rights	
<b>Rosalyn Haggins</b>	42
President of the International Court of Justice	
<b>Rachida Dati</b>	48
Garde des Sceaux	
<b>PHOTOS</b>	51



## Jean-Paul Costa

President of the European Court of Human Rights

### WELCOME SPEECH

Ladies and gentlemen, dear friends,

It gives me, my colleagues and the members of the Registry who are present today great pleasure to welcome you to this seminar, held, as is our tradition, on the same date as the official opening of the Court's judicial year, which this year coincides with the Court's 50<sup>th</sup> anniversary.

We welcome you all, and are especially pleased to see so many of you.

Our Court seeks to be receptive to the judicial world at international and European level. We participate in many meetings with other international courts, meetings which are always useful and rewarding. To cite only the most recent example, last December the bodies of the three regional human rights mechanisms, namely the Inter-American Commission on and Court of Human Rights, the African Commission and Court of Human and Peoples' Rights and the European Court of Human Rights, met here for the first time to celebrate the 60<sup>th</sup> anniversary of the Universal Declaration of Human Rights. Together we attempted to assess the impact of the Universal Declaration, and compared our experiences and trends in our case-law.

Along the same lines, the theme of today's seminar to mark the Court's 50<sup>th</sup> anniversary quickly became clear.

In celebrating this important date, it seemed appropriate to bring together all those friends from other courts with whom close ties have been developed over the years, and to strengthen these relationships.

Another aim of this seminar is to examine together the place of the Convention in international law and the interaction between our different systems.

Among other consequences, the increased number of international courts has resulted in a situation where, at the beginning of the twenty-first century, international human rights law is applied by various judicial bodies, such as the International Court of Justice or the Court of Justice of the European Communities, which are frequently required to examine cases with a human rights dimension, and courts within the United Nations system or regional institutions.

This dialogue between the various courts must be frank, which is what led us to entitle today's seminar "Fifty years of the European Court of Human Rights viewed by its fellow international courts".

It is for you to tell us, in all sincerity, how you perceive these first fifty years. Rest assured that we await your verdict, or at the least your opinion, with great interest.

Before handing the floor to my friend and colleague Françoise Tulkens, allow me to welcome the speakers, Patrick Robinson, President of the International Criminal Tribunal for the former Yugoslavia, Vassilios Skouris, President of the Court of Justice of the European Communities, and Paolo Carozza, President of the Inter-American Commission on Human Rights. However, I should also like to pay tribute to our guest of honour today, Dame Rosalyn Higgins, who, for a few more days, presides over the International Court of Justice. Lady Higgins has been both a brilliant academic and a lawyer, and the author of numerous authoritative books. She was the first woman to be elected as a judge at the International Court of Justice, of which she has been a member for thirteen years and which she has presided over with distinction for the last three years. Before leaving office, you have accepted our invitation to attend this Court's ceremony to mark the new judicial year. In so doing, you crown the relationships you have sought to develop with other courts, and especially with the Strasbourg Court. Please accept our profound thanks!

I wish to thank my colleagues, Judges Isabelle Berro-Lefèvre, Egbert Myjer and Sverre Erik Jebens, who supported Françoise Tulkens in preparing today's event, and all the members of the Registry who, under the authority of Roderick Liddell, Director of Common Services, provided invaluable assistance.

I hand the floor to my friend and colleague Françoise Tulkens.



## Françoise Tulkens<sup>1</sup>

Judge of the European Court  
of Human Rights

### INTRODUCTION TO THE SEMINAR

President, distinguished judges, ladies and gentlemen, dear colleagues and friends,

Fifty years of the European Court of Human Rights viewed by its fellow international courts: that is the theme we have chosen for our seminar this afternoon. On 21 January 1959 the Consultative Assembly of the Council of Europe organised the first election of judges to what was the first independent, international court for the protection of human rights. The 50<sup>th</sup> anniversary of the European Court of Human Rights is an opportunity both to take stock of the progress achieved over those fifty years and to contemplate, together, the future evolution of the system of human rights protection set up by the European Convention on Human Rights – of which next year, in 2010, we will be celebrating the 60<sup>th</sup> anniversary.

An aspect that we considered it essential to examine was the place of the Convention in international law and the relationship between our Court and its fellow international courts. There are evidently a certain number of underlying questions. Since the middle of the twentieth century, the spread of international law into different fields has led to the establishment of a number of courts whose task it is to ensure that such expansion is effective. Some fear that this has generated a risk of fragmentation of international law. In a report dating from 2006 the International Law Commission observed: "On the one hand, fragmentation does create the danger of conflicting and incompatible rules, principles, rule-systems and institutional practices. On the other hand, it reflects the expansion of international legal activity into new fields and the attendant diversification of its objects and techniques. Fragmentation and diversification account for the development and expansion of international law in response to the demands of a pluralistic world."<sup>2</sup>

<sup>1</sup> On behalf of the Organising Committee, composed of Françoise Tulkens, Egbert Myjer, Sverre Erik Jebens, Isabelle Berro-Lefèvre, Judges of the European Court of Human Rights, Roderick Liddell, Patrick Titiun, Leif Berg, Mario Oetheimer, Stéphanie Klein, members of the Registry of the European Court of Human Rights.

<sup>2</sup> Report of the International Law Commission, 58<sup>th</sup> Session, 1 May-9 June and 3 July-11 August 2006, United Nations General Assembly, Official Records, 61<sup>st</sup> Session, Supplement no. 10 (A/61/10), p. 405 (see [http://untreaty.un.org/ilc/reports/2006/2006\\_report.htm](http://untreaty.un.org/ilc/reports/2006/2006_report.htm)).

One solution to this problem is to be found, in the view of the International Law Commission, in the “principle of harmonisation”, according to which “when several norms bear on a single issue they should, to the extent possible, be interpreted so as to give rise to a single set of compatible obligations”<sup>3</sup>.

It goes without saying that international human rights law is also subject to this “globalisation”, as different judicial entities, applying different instruments, adjudicate issues concerning fundamental rights. This phenomenon can clearly be seen in the action of specialised bodies such as the institutions of the Inter-American human rights protection system, hence the importance of your presence here today, President Carozza. I am very grateful to you for being here.

But it also extends beyond that. In his book of 2007, Professor Bedi shows how and to what extent the jurisprudence of the International Court of Justice (ICJ) has developed and strengthened human rights law<sup>4</sup>. President Higgins has played a leading role in this development. You have kindly accepted, Dame Rosalyn Higgins, to give an address at the solemn hearing this evening and we did not want to impose on you by asking you to give another speech this afternoon. But please feel free to react to the observations that will be exchanged and to join in our discussions, in the spirit, if not the form, of your famous article from 2006, “A Babel of Judicial Voices? Ruminations from the Bench”<sup>5</sup>.

Furthermore, it was some time ago now – 1974 – that the Court of Justice of the European Communities (ECJ) first found that it could not uphold measures which were incompatible with fundamental rights and identified as a source of such rights international human rights treaties on which member States had collaborated or of which they were signatories<sup>6</sup>. Since then the ECJ has frequently been faced with human rights questions<sup>7</sup>, and this will increasingly be the case. President Skouris, you are, in the literal sense of the term, an *amicus curiae*, a “friend of the Court”, caring but demanding. We will listen to your comments, as always, with great interest.

Lastly, international criminal justice, which appeared “on the horizon as a barely perceptible dawn”, to quote the philosopher Jaspers, has brought together human rights and humanitarian law under one roof. In this connection, we look forward to hearing the views of President Patrick Robinson of the International Criminal Tribunal for the former Yugoslavia.

In order to ensure that this diversification of human rights law does not result in potentially damaging fragmentation, but on the contrary reinforces the common principles on which it is based, we believe that it is necessary for the international bodies concerned to engage in a continuing and permanent dialogue

on fundamental rights – a dialogue that should contribute to the development of a true “common law” of human rights. This can be achieved by a process of interaction, as the different international courts learn from and assimilate each other’s case-law.

The European Court of Human Rights is, more than ever, keen to play its part in this process. In its *Demir and Baykara v. Turkey* judgment of 12 November 2008, the Grand Chamber observed that “in defining the meaning of terms and notions in the text of the Convention, [it] can and must take into account elements of international law other than the Convention [and] the interpretation of such elements by competent organs ...”<sup>8</sup>. In our Court’s very first case, *Lawless v. Ireland*<sup>9</sup>, the European Commission of Human Rights – to which we owe a lot – relied on the practice of the ICJ so that the Court could take cognisance of the applicant’s written observations. In recent years there have been more frequent references to the ICJ’s case-law. Thus, in the inter-State case of *Cyprus v. Turkey*<sup>10</sup>, the Court relied on the ICJ’s advisory opinion in the Namibia case<sup>11</sup> to find that the inhabitants of the “Turkish Republic of Northern Cyprus” could be required to exhaust the remedies available to them. In *Mamatkulov and Askarov v. Turkey*<sup>12</sup>, the Court cited the case-law of the ICJ and the Inter-American Court of Human Rights to affirm that preservation of the asserted rights of the parties, faced with a risk of irreparable damage, represented an essential objective of interim measures in international law. In *Al-Adsani v. the United Kingdom*<sup>13</sup>, the Court cited the judgment of the International Criminal Tribunal for the former Yugoslavia in *Prosecutor v. Furundzija*<sup>14</sup> to confirm that the prohibition on torture was to be regarded as having the status of a peremptory norm or *jus cogens*. The Court has also sought guidance from European Union law and the case-law of the ECJ. In *Christine Goodwin v. the United Kingdom*<sup>15</sup> our Court reconsidered its interpretation of Articles 8 and 12 of the Convention, referring, inter alia, to a 1996 judgment of the ECJ in which it had equated discrimination based on a sex change with discrimination based on sex<sup>16</sup>. In *Stec and Others v. the United Kingdom*<sup>17</sup>, the applicants’ case relating to sex-based differences in eligibility for certain social security benefits had first been decided by the ECJ. We found that there had been no violation of the Convention, observing that “particular regard [was to] be had to the strong persuasive value of

3 Ibid., p. 408.

4 S.R.S. Bedi, *The Development of Human Rights Law by the Judges of the International Court of Justice*, Hart Publishing, Oxford & Portland, 2007.

5 R. Higgins, “A Babel of Judicial Voices? Ruminations from the Bench”, *International and Comparative Law Quarterly*, vol. 55, October 2006, pp. 791 et seq.

6 See Case 4/73 *J. Nold, Kohlen-und Baustoffgroßhandlung v. Commission of the European Communities* [1974] ECR 491.

7 For a recent example, see Joined Cases C-402/05 P and C-415/05 P *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council and Commission* (2008), not yet reported.

8 [GC], no. 34503/97, §§ 76 and 85, to be reported in ECHR 2008.

9 14 November 1960, Series A no. 1.

10 [GC], no. 25781/94, §§ 92 et seq., ECHR 2001-IV.

11 Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, ICJ Reports 1971, p. 16.

12 [GC], nos. 46827/99 and 46951/99, §§ 116 and 123, ECHR 2005-I.

13 [GC], no. 35763/97, § 60, ECHR 2001-XI.

14 *Prosecutor v. Furundzija*, Case no. IT-95-17/1-T, judgment of 10 December 1998, *International Legal Materials*, vol. 38 (1999), p. 317.

15 [GC], no. 28957/95, ECHR 2002-VI.

16 Case C-13/94 P v. S. and Cornwall County Council [1996] ECR I-2143.

17 [GC], nos. 65731/01 and 65900/01, § 58, ECHR 2006-VI.

the ECJ's finding on this point". More generally, the Court has also acknowledged the growing importance of international cooperation and of the consequent need to ensure the proper functioning of international organisations<sup>18</sup>.

In conclusion, international human rights law in the twenty-first century is a complex network of overlapping systems of law. Although those systems have their own internal logic, they cannot remain oblivious of each other. As it enters its second half-century, the European Court of Human Rights seeks to show that it has recognised this need. Just as our Court maintains a regular dialogue with the domestic Supreme Courts<sup>19</sup>, so we wish to pursue and strengthen our links with other international courts and engage with them in an open and direct exchange of views, as we will be doing this afternoon.



## Patrick Robinson

**President of the  
International Criminal Tribunal  
for the former Yugoslavia**

Excellencies, dear colleagues,

On behalf of the International Criminal Tribunal for the former Yugoslavia (hereafter "the Tribunal" or "the ICTY"), let me offer my congratulations to the European Court of Human Rights (hereafter "the Court") on the celebration of its 50<sup>th</sup> anniversary. I also congratulate the Court for convening this seminar to consider the interaction between itself and other international courts and to discuss the modern-day phenomenon of what the discussion paper calls overlapping systems of law, but which I prefer to call overlapping branches of international law.

Today, there are many branches of international law, some of the more significant being the law of the sea, international economic law, environmental law, human rights law, international humanitarian law and international criminal law.

The development of different branches of international law is inevitable. And it is not something of which we need be frightened. It is merely a reflection of the multifaceted character of modern society. It is evidence of the organic nature of international law and its ability to respond to the specific needs and challenges faced by the international community.

I will in the time allocated address, first, the relationship between the ICTY and the Court and then consider the argument that the exponential growth of different branches of international law is leading to a dangerous fragmentation of international norms.

In trying persons for serious violations of international humanitarian law, the Tribunal's work frequently comes into contact with other branches of international law, notably, the area of law that the Court has done so much to develop over the last fifty years – human rights law. There is scarcely a proceeding before the Tribunal in which the Court's jurisprudence is not cited. A measure of the status and influence of the Court is that its cases are often cited as though they are binding on the Tribunal, when, in fact, they are only of persuasive authority. In fact, one even hears the contention that the Tribunal's over-reliance on the case-law of the Court has hindered the development of a coherent human rights law more tailored to the needs of international criminal proceedings. That contention raises the larger question of the application of human rights law as reflected in the International Covenant on Civil and Political Rights (hereafter "the ICCPR") and the European Convention on Human Rights (hereafter "the Convention") to the work of the Tribunal. It is often said that an adjustment in the application of

<sup>18</sup> See, for example, *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi (Bosphorus Airways) v. Ireland* [GC], no. 45036/98, §§ 152-53, ECHR 2005-VI.

<sup>19</sup> See *Dialogue between judges*, European Court of Human Rights, Council of Europe, 2005, 2006, 2007 and 2008.

those instruments is needed for the work of the Tribunal because these instruments were drafted for national jurisdictions and not for international courts. I am happy that the Tribunal has not adopted that approach, which in my view would in most cases lead to an abridgement of the rights of the accused. In fact, the Tribunal has expressly confirmed the application of the fair trial requirements in the Convention and the ICCPR to its proceedings<sup>1</sup>. When differences arise between the Tribunal and the Court in their treatment of a particular issue, they are usually narrow and stem from the fact that criminal courts deal with individual culpability and not with State responsibility.

The report of the Secretary-General of the United Nations attached to the Statute of the Tribunal adopted in 1993 makes it clear that the Tribunal “must fully respect internationally recognised standards with respect to the rights of the accused at all stages of its proceedings” and notes that those rights “are, in particular, contained in Article 14 of the International Covenant on Civil and Political Rights”<sup>2</sup>. The Secretary-General might also have added Article 6 of the Convention since the rights stipulated in the Court’s regional instrument, which predates the ICCPR, are generally the same as those guaranteed in the latter. Of course, these rights are also to be found in the 1969 American Convention on Human Rights and in the 1981 African Charter on Human and People’s Rights. This normative convergence reflects the rapid development of human rights law following the end of the Second World War.

Constraint of time will only allow for a few examples of the interaction between the Tribunal’s work and international human rights law.

Perhaps the best example of the influence of the Court and international human rights law in general is the Tribunal’s rule on provisional release, or bail. Rule 65 of the Rules of Procedure and Evidence originally stated that “release may be ordered by a Chamber only in exceptional circumstances”, coming, therefore, close to a system of mandatory pre-trial detention. The main justification was the seriousness of the crimes over which the Tribunal has jurisdiction as well as its lack of a police force and its consequential reliance on domestic enforcement mechanisms.

This provision was amended in 1999 so as to remove the clear contradiction that existed with customary international law which, as reflected in international human rights instruments and the jurisprudence of their supervisory bodies, requires that pre-trial detention should remain, to quote the European Court of Human Rights, “an exceptional departure from the right to liberty”<sup>3</sup>. Likewise, Article 9 § 3 of the ICCPR states that it “shall not be the general rule that persons awaiting trial shall be detained in custody”.

Since then, the Tribunal’s change of perspective on this question has been quite remarkable and there is no doubt in my mind that this was in large measure due to the influence of international human rights law.

Another area of interaction between the work of the Court and that of the Tribunal is the length of pre-trial detention. Human rights law requires that an accused person be tried within a reasonable time<sup>4</sup>. According to the Court’s case-law, there is no maximum length of pre-trial detention implied under Article 5 § 3 of the Convention. This position is understandable to the extent that it would be impossible, given the diversity of Contracting States’ legal systems, as was noted early on by the Court, to translate the concept of “reasonable time” “into a fixed number of days, weeks, months or years, or into various periods depending on the seriousness of the offence”<sup>5</sup>. The Court has accordingly sanctioned periods of pre-trial detention that many would regard as long. The length of pre-trial detention is a particularly sensitive issue for the Tribunal, which is faced with very serious crimes that are complex and difficult to investigate, factors which have tended to contribute to relatively long periods of pre-trial detention<sup>6</sup>. However, the Tribunal accepts that this in no way derogates from the principle that keeping an accused who enjoys the presumption of innocence in detention for an overly long period of time should be avoided at all costs.

Another particularly sensitive procedural issue in which the European Court’s case-law has been considered is self-representation<sup>7</sup>. The ICTY has upheld the statutory right of the accused to defend himself in person at both the trial and, recently, appellate levels<sup>8</sup>. While the Tribunal’s decision to allow Slobodan Milošević to represent himself remains the most well-known precedent, we currently continue to have several accused who have opted for self-representation. This does not mean, however, that this right is unqualified, and the Tribunal’s jurisprudence has recognised that, as expressed by the European Court, a court may “override th[e] wishes [of an accused] when there are relevant and sufficient grounds for holding that this is necessary in the interests of justice”<sup>9</sup>. Recently, the Tribunal adopted a new rule which codifies the law on this issue by empowering a Chamber, if it is in the interests of justice, to instruct the Registrar to assign a counsel to represent the interests of an accused<sup>10</sup>.

Clearly, the contribution of the Court to the development of customary norms on standards of criminal procedure has been invaluable for the Tribunal. In general, in determining the fair trial rights of an accused person, the Tribunal always has recourse to the work not only of the Court, but of other international human rights bodies as well as courts in national jurisdictions.

1 In the *Janković* case, the Tribunal held that fair trial requirements include those under Article 14 of the ICCPR and Article 6 of the Convention; see *Prosecutor v. Gajko Janković*, Case no. IT-96-23/2-PT, Decision on Referral of Case under Rule 11 bis, with Confidential Annex, 22 July 2005, § 62.

2 Report of the Secretary-General, UN Doc. S/25704, 3 May 1993, § 106.

3 See *Ilijakov v. Bulgaria*, no. 33977/96, § 85, 26 July 2001.

4 Article 5 § 3 of the Convention and Article 9 § 3 of the ICCPR.

5 See *Stögmüller v. Austria*, 10 November 1969, pp. 39-40, § 4, Series A no. 9.

6 Vojislav Šešelj, for example, was transferred in February 2003 and his trial commenced in November 2007.

7 See *Prosecutor v. Slobodan Milošević*, Case no. IT-54-T, Reasons for Decision on the Prosecution Motion Concerning Assignment of Counsel, 4 April 2003, §§ 18-22; *Prosecutor v. Momčilo Krajišnik*, Case no. IT-00-39-A, Decision on Momčilo Krajišnik’s Request to Self-Represent, on Counsel’s Motions in Relation to Appointment of *Amicus Curiae*, and on the Prosecution Motion of 16 February 2007, 11 May 2007, § 13.

8 *Ibid.*

9 See *Croissant v. Germany*, 25 September 1992, § 29, Series A no. 237-B.

10 See Rule 45 *ter*, ICTY Rules of Procedure and Evidence.

But the stream has not only flowed one way. The Court and other international judicial institutions have relied on the jurisprudence of the Tribunal. Thus, the Tribunal's decision in the *Furundzija* case, which affirmed the *jus cogens* nature of the prohibition of torture<sup>11</sup>, has been widely cited, including by the Court in the *Al-Adsani* case<sup>12</sup>. The fact that international judges have time and again resisted any attempt at weakening the prohibition of torture<sup>13</sup> is testament to the solidity of the norm, which itself results from our collective efforts and the increasing cross-fertilisation existing between international courts<sup>14</sup>. Another example of the reliance on the Tribunal's work is the interesting treatment of the Tribunal's findings by the International Court of Justice ("the ICJ") in the case concerning the *Application of the Convention on the Prevention and Punishment of Genocide*<sup>15</sup>. The ICJ invariably deferred to the Tribunal's findings of fact, for example in relation to the circumstances of the Srebrenica massacre; it also relied on the Tribunal's legal analyses in many areas, for instance on the distinction between ethnic cleansing and genocide, or the specific intent required for the crime of genocide<sup>16</sup>.

I now turn to the second part of this presentation. There has been much debate about the fragmentation of international law resulting from the operation of different branches, and concerns have been expressed that such fragmentation may lead to incoherence in the law. In addressing this question, the International Law Commission has made proposals for a solution based on what it calls the principle of harmonisation<sup>17</sup>. However, it seems to us that the problem is exaggerated and that what is needed is mutual respect, deference in appropriate cases and an open-minded and good faith application by each branch of international law of its rules. A branch should not allow notions of its so-called independence and self-containment to prevent it from borrowing from and being influenced by other branches of international law. For example, should it become necessary in a case before the Tribunal to ascertain what the precautionary principle is, it is obvious that the Tribunal would defer to the understanding of that principle as it has been developed in international environmental law. Moreover, in some cases, differences between branches should either be significantly reduced or not exist at all. Thus, in any branch, customary international law will apply unless there is a specific rule derogating therefrom. Secondly, a peremptory norm of general international law (*jus cogens*) will apply irrespective of the branch involved. For instance, the prohibition of torture, which the Tribunal has said constitutes a *jus cogens* norm<sup>18</sup> – a finding that has been endorsed by the Court itself – is a peremptory norm applicable to

any branch. Thirdly, the conventional regime of any branch will fall to be interpreted in accordance with the provisions of the 1969 Vienna Convention on the Law of Treaties (hereafter "the Vienna Convention") because, in general, the provisions of that convention reflect rules of customary international law.

The influence of general international law through the Vienna Convention is evident in many branches with respect to the interpretation of treaties. Very early in the life of the Tribunal, it was determined that the Tribunal's Statute was to be interpreted as a treaty, and therefore in accordance with the provisions of the Vienna Convention<sup>19</sup>. An even clearer example is the Dispute Settlement Understanding of the World Trade Organisation (WTO), Article 3 of which expressly provides that it is to be interpreted in accordance with customary rules, which in effect means the provisions of the Vienna Convention. The decisions of the WTO Panels and Appellate Body are replete with references to the Vienna Convention, in particular Articles 31 and 32.

Of course, within the framework of commonality described one may find differences between the various systems as to what constitutes a rule of customary international law or *jus cogens*. There may even be differences within the same branch of international law. For example, in international criminal law, a relatively new branch of international law which has grown tremendously in the last fifteen years, we find an important difference as to the concept of joint criminal enterprise, which is an essential tool in the Tribunal's handling of collective criminality. However, in the Lubanga case, a pre-trial Chamber of the International Criminal Court (ICC) explicitly rejected the application of the concept of joint criminal enterprise, reasoning that the ICC Statute contains a much more differentiated regime of forms of individual and joint responsibility than the ICTY Statute<sup>20</sup>.

Where two systems arrive at a different conclusion about an issue, the so-called conflict may be explained by the legal technique of distinguishing the issue for resolution in each system. An example of this is the treatment by the Tribunal and the ICJ of the question whether the acts of genocide carried out in Srebrenica by Bosnian Serb armed forces were attributable to the Federal Republic of Yugoslavia. In the *Tadić* case<sup>21</sup>, the Tribunal applied the "overall control" test instead of the "effective control" criterion used by the ICJ<sup>22</sup>. But recently, the ICJ preferred to follow its own case-law and applied the test of effective control in determining the responsibility of Serbia for the crimes committed in Srebrenica. In its view, the question which the Tribunal was called upon to decide was not one of State responsibility but whether or not the armed conflict was international<sup>23</sup>. Another example may be found in the *Kunarac* case, where the Tribunal held that the requirement of the presence of a State official or any other authority-wielding person for torture under the United

11 See *Prosecutor v. Furundzija*, Case no. IT-95-17-1-T, judgment of 10 December 1998, § 144.

12 *Al-Adsani v. the United Kingdom* [GC], no. 35763/97, § 30, ECHR 2001-XI.

13 See also, for example, on diplomatic assurances in extradition cases, *Saadi v. Italy* [GC], no. 37201/06, § 138, to be reported in ECHR 2008.

14 See, for example, the Court's judgment in *M.C. v. Bulgaria*, no. 39272/98, ECHR 2003-XII.

15 ICJ, *Application of the Convention on the Prevention and Punishment of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* (hereafter "the Genocide case"), judgment of 26 February 2007, § 190, referring to, inter alia, *Prosecutor v. Krstić*, Case no. IT-98-33-T, judgment of 2 August 2001, § 562, and *Prosecutor v. Stakić*, Case no. IT-97-24-T, judgment of 31 July 2003, § 519, with respect to the distinction between ethnic cleansing and genocide.

16 *Ibid.*, §§ 188-89 on specific intent, and § 190 on ethnic cleansing and genocide.

17 See Report of the International Law Commission, 58th Session, Chapter 12, "Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law", 2006, p. 408.

18 See *Furundzija*, cited above, § 144.

19 See *Prosecutor v. Duško Tadić*, Case no. IT-94-1-A, appeals judgment of 15 July 1999, § 300.

20 Decision on Confirmation of Charges, *Lubanga*, PTC I, 29 January 2007 (ICC-01/04-01/06), §§ 334-37.

21 Appeals judgment cited above, § 145.

22 *Ibid.*; ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) (merits)*, judgment of 27 June 1986, §§ 105-15.

23 See the *Genocide case*, cited above, § 404; see also A. Cassese, "The Nicaragua and Tadić Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia", *European Journal of International Law*, vol. 18, 2007, pp. 649-68, criticising the ICJ's position on that issue.

Nations Convention against Torture is inapplicable in determining individual criminal responsibility under the Tribunal's Statute<sup>24</sup>. My point is not that there may not be differences between various branches of international law; it is, rather, to borrow a famous line of Mark Twain, that reports of fragmentation leading to incoherence are greatly exaggerated.

Let me conclude by emphasising that the question which is discussed today is not only of doctrinal interest. Greater interaction and cross-fertilisation are above all crucial to ensure that domestic courts are not faced with a legal conundrum when applying international law, and seminars like this one offer an opportunity to discuss issues relating to different branches of international law. At the end of the day, our work as international lawyers is to ensure the further consolidation of international norms, clarify their interpretation and contribute to the rule of law.

I thank you for your attention and look forward to your comments and questions.



## Vassilios Skouris

**President of the Court of Justice  
of the European Communities**

President Costa, members of the Court, dear colleagues and friends,

Allow me first of all, President Costa, to express my very warm thanks on behalf of the many members of the Court of Justice of the European Communities here today for your kind invitation to this seminar, organised to mark the 50<sup>th</sup> anniversary of the European Court of Human Rights.

Our two Courts have grown up together and been nourished by the same spirit of unification and peace that was behind the idea of Europe right from the outset. It is barely noticeable today that the Court of Justice, "Europe's elder daughter", was the first to advocate that spirit, so great is the unceasingly renewed interest it takes in your Court and its case-law. We can therefore only hope that the two Courts will continue to pursue and foster this dialogue in order to build together this edifice of justice so dear to the founders of Europe.

This seminar therefore gives me an excellent opportunity to talk about the preeminent role of the Convention for the Protection of Human Rights and Fundamental Freedoms and its interpreters in the area of the protection of fundamental rights in Europe. I think it can be said, without any question, that this unique system of protection of fundamental rights has a considerable influence on the legal order of the European Union.

### THE NEED FOR CONSISTENCY IN THE CASE-LAW

These two systems of protection, which are superimposed moreover on the national systems, are complementary in function and interdependent in terms of their rule-making powers. This is why we need to nurture constantly the dialectical relations necessary to ensure the harmonious coexistence of our respective case-law. And, undoubtedly, one of the essential elements of this coexistence is of course consistency in the case-law. This is all the more essential in that, where it is expressed in an area affecting the protection of fundamental rights, it also touches upon the major concerns of men and women of our time. Clearly, no one would understand why courts with jurisdiction in the area of protection of human rights would adopt – or base their decisions on – divergent legal approaches.

I can therefore say, with unfeigned joy, that the European Convention on Human Rights has been, and remains, the beacon that guides our institutions in their mission of human rights protection. This has partly been achieved as a result of the remarkable work done by the institutions set up to interpret and ensure compliance with the Convention. I would like to add here that respect for the teachings that

<sup>24</sup> See *Prosecutor v. Dragoljub Kunarac, Radomir Kovač and Zoran Vuković*, Case no. IT-96-23-T & IT-96-23/1-T, judgment of 22 February 2001, § 496.

emerge from the text of the Convention as interpreted by your Court has always been a leitmotiv for the Court of Justice when giving rulings in cases raising questions relating to the protection of fundamental rights.

## “SPECIAL SIGNIFICANCE” OF THE CONVENTION

The leitmotiv that I have just mentioned has manifested itself in the case-law of the Court of Justice in the form of a famous and now well-known statement. It has said – and I quote – that “... fundamental rights form an integral part of the general principles of law whose observance the Court ensures. For that purpose, the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or to which they are signatories. In that regard, the European Convention on Human Rights has special significance”<sup>1</sup>.

This “special significance” or, more generally, the Court of Justice’s attachment to respect for fundamental rights as they result from the Convention and the interpretation thereof, however self-evident this attachment may appear today, has nonetheless developed in an interesting way over the past decades. Let me therefore comment briefly on how it developed in the early stages, from which we can see the contribution made by the institutions of the Council of Europe to the protection of fundamental rights within the European Union.

Initially, the Court of Justice was reluctant to examine acts of Community law from the standpoint of fundamental rights. This initial reluctance can be seen in the cases brought before the Court of Justice during the 1950s by applicants challenging decisions of the High Authority of the ECSC that allegedly violated fundamental rights recognised by the Constitution of their State. The approach to

these applications taken by the Court of Justice was that it was not its task to decide whether there had been a violation of rules of domestic law, whether they be of a constitutional nature or not<sup>2</sup>.

This approach started to give rise to a number of difficulties, however, in so far as, on account of the extension of Community powers, new fields of activity, which overlapped with fundamental rights, were brought within the Community’s jurisdiction. Nearly forty years ago now the Court of Justice initiated a series of rulings that took account of fundamental rights. In the case of *Stauder*, in which a ruling was given in 1969, concerning the compatibility of a decision of the Commission of the European Communities with the general principles of Community law in force at the time, it seized the opportunity to state that “the provision at issue contained nothing capable of prejudicing the fundamental human rights enshrined in the general principles of Community law and protected by the Court”<sup>3</sup>.

In the *Internationale Handelsgesellschaft* judgment<sup>4</sup>, which was delivered one year later, two points are particularly noteworthy. Firstly, the Court of Justice expressed its concern in this judgment that the uniform application of Community law would be undermined if Community measures were to be examined from the standpoint of fundamental rights guaranteed by domestic legal orders. Secondly, the Court of Justice nonetheless examined the regulations in question from the point of view of fundamental rights. It pointed out, however, that “the validity of such measures can only be judged in the light of Community law”, and that “the validity of a Community measure or its effect within a Member State cannot be affected by allegations that it runs counter to ... fundamental rights as formulated by the Constitution of a Member State ...”. In order to still be able to exercise its supervision, the Court of Justice considered that an examination should be made as to “whether or not any analogous guarantee inherent in Community law has been disregarded”. In doing so, it considered that respect for fundamental rights formed an integral part of the general principles of law protected by the Court of Justice, and concluded that “protection of such rights, whilst inspired by the constitutional traditions common to the Member States, must be ensured within the structure and objectives of the Community”.

The sources of inspiration or norms of reference for the protection of fundamental rights were extended by the *Nold* judgment. Thus, in addition to the “common constitutional traditions”, recognition was extended to “international treaties for the protection of human rights on which the Member States have collaborated or to which they are signatories, [which] can supply guidelines which should be followed within the framework of Community law”<sup>5</sup>.

1 Very recently: ECJ, judgment of 3 September 2008, Cases C-402/05 P and C-415/05 P *Kadi and Al Barakat International Foundation v. Council and Commission*, not yet published in the European Court Reports (ECR), § 283. See also ECJ, judgment of 26 June 2007, Case C-305/05 *Ordre des barreaux francophones et germanophones e.a.* [2007] ECR I-5305, § 29; judgment of 18 January 2007, Case C-229/05 P *PKK and KNK v. Council* [2007] ECR I-439, § 76; judgment of 14 December 2006, Case C-283/05 *ASML* [2006] ECR I-12041, § 26; judgment of 12 September 2006, Case C-479/04 *Laserdisken* [2006] ECR I-8089, § 61; judgment of 27 June 2006, Case C-540/03 *Parliament v. Council* [2006] ECR I-5769, § 35; judgment of 14 October 2004, Case C-36/02 *Omega* [2004] ECR I-9609, § 33; judgment of 25 March 2004, Case C-71/02 *Karner* [2004] ECR I-3025, § 48; judgment of 10 July 2003, Cases C-20/00 and C-64/00 *Booker Aquaculture and Hydro Seafood* [2003] ECR I-7411, § 65; judgment of 12 June 2003, Case C-112/00 *Schmidberger* [2003] ECR I-5659, § 71; judgment of 22 October 2002, Case C-94/00 *Roquette Frères* [2002] ECR I-9011, § 23; judgment of 15 October 2002, Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P *Limburgse Vinyl Maatschappij e.a. v. Commission* [2002] ECR I-8375, § 167; judgment of 6 March 2001, Case C-274/99 P *Connolly v. Commission* [2001] ECR I-1611, § 37; judgment of 28 March 2000, Case C-7/98 *Krombach* [2000] ECR I-1935, § 25; judgment of 18 December 1997, Case C-309/96 *Annibaldi* [1997] ECR I-7493, § 12; judgment of 29 May 1997, Case C-299/95 *Kremzow* [1997] ECR I-2629, § 14; Opinion 1/94 of 15 November 1994 (accession to the Convention), [1994] ECR I-5267, § 33; judgment of 28 October 1992, Case C-219/91 *Ter Voort* [1992] ECR I-5485, § 34; judgment of 18 June 1991, Case C-260/89 *ERT* [1991] I-2925, § 41; judgment of 17 October 1989, Case 85/87 *Dow Benelux v. Commission* [1989] ECR 3137, § 24; judgment of 21 September 1989, Cases 46/87 and 227/88 *Hoechst v. Commission* [1989] ECR 2859, § 13.

2 ECJ, judgment of 4 February 1959, Case 1/58 *Stork v. High Authority* [1959] ECR 43; judgment of 1 April 1965, Case 40/64 *Sgarlata e.a. v. Commission* [1965] ECR 279.

3 ECJ, judgment of 12 November 1969, Case 29/69 *Stauder* [1969] ECR 419.

4 ECJ, judgment of 17 December 1970, Case 11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125.

5 ECJ, judgment of 14 May 1974, Case 4/73 *Nold* [1974] ECR 491.

Even if the Court of Justice does not formally refer to it in this judgment, special reference to the Convention appears evident. The Convention was expressly mentioned for the first time in the *Rutili* judgment<sup>6</sup>, delivered in 1975, that is, shortly after all the member States of the European Community at the time had ratified the Convention. In that judgment it is noted that certain “limitations placed on the powers of Member States ... are a specific manifestation of a more general principle, enshrined in Articles 8, 9, 10 and 11 of the Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 [and] ratified by all the Member States ...”.

Since then, the Court of Justice has made the Convention its main source of reference, or – dare I say – its preferred source, stressing that it “is of particular significance”. It was in the *Hoechst v. Commission* judgment of 1989 that this expression appeared for the first time<sup>7</sup>, even if, in substance, it can be found in earlier judgments<sup>8</sup>.

The subsequent case-law of the Court of Justice in the area of fundamental rights corresponds to a “deepening” period in which two main components of the Community notion of fundamental rights can be identified. On the one hand, fundamental rights as guaranteed by the constitutional traditions common to the member States and by the international instruments concerning human rights, particularly the Convention, are recognised and promoted as general principles of Community law. On the other hand, respect for these rights is binding both on the Community institutions and organs in the exercise of their powers and on the member States when they implement Community law<sup>9</sup>. By having regard to the general principles of law, and referring more and more clearly to the Convention, the Court of Justice has established over the years a veritable case-law catalogue of human rights, which compensates, at least in part, for the gaps in the constitutive treaty and the non-accession of the Community to the Convention.

With regard to the embodiment of the protection of fundamental rights in the Community treaties, it was not until the Single European Act of 1986 that an explicit reference was made to this in primary law. It is interesting to note, however, that even then the Convention featured among the sources cited. Indeed, the Contracting Parties declared their determination “to work together to promote democracy on the basis of the fundamental rights recognised in the constitutions and laws of the Member States, in the Convention for the Protection of Human Rights and Fundamental Freedoms and the European Social Charter, notably freedom, equality and social justice ...”<sup>10</sup>.

The basic provision in force today in this connection, namely, Article 6 of the Treaty on European Union, which is imbued with the same spirit, provides: “The Union shall respect fundamental rights, as guaranteed by the European

6 ECJ, judgment of 28 October 1975, Case 36/75 *Rutili* [1975] ECR 1219, § 32.

7 ECJ, judgment of 21 September 1989, Cases 46/87 and 227/88 *Hoechst v. Commission* [1989] ECR 2859, § 13.

8 ECJ, judgment of 15 May 1986, Case 222/84 *Johnston* [1986] ECR 1651, § 18.

9 ECJ, judgment of 13 July 1989, Case 5/88 *Wachauf* [1989] ECR 2609; judgment of 18 June 1991, Case C-260/89 *ERT* [1991] ECR I-2925.

10 Preamble.

Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law.”<sup>11</sup>

## THE BOSPHORUS AIRWAYS CASE-LAW

The efforts made by both the judicial and political bodies of the European Community in the area of fundamental rights – efforts I have just outlined – have brought remarkable results. They have contributed to finding a solution to a problem with which your Court was being increasingly frequently confronted, namely, how to deal with applications brought by applicants complaining of an act of a member State of the European Union transposing or applying a measure of Community law.

The problem can be outlined very quickly. The Convention does not, on the one hand, prohibit Contracting Parties from transferring sovereign power to an international organisation in order to pursue cooperation in certain fields of activity. On the other hand, a Contracting Party is also responsible under the Convention for all acts and omissions of its organs regardless of whether the act or omission in question was a consequence of domestic law or of the necessity to comply with international legal obligations.

Indeed, the Convention system is based on the idea of *external* supervision of the acts of Contracting Parties in conformity with an instrument of international law. An internal review, however sophisticated it may be, cannot therefore be a substitute for the minimum requirements of external supervision of the protection of fundamental rights both regarding the acts of the member States when applying Community law and the acts of the institutions.

The case which gave rise to the leading judgment in which your Court provided a solution to this issue concerned the impounding of an aircraft by the Irish authorities pursuant to a Community regulation implementing the sanctions regime adopted by the United Nations against the former Republic of Yugoslavia<sup>12</sup>. The airline charter company incorporated in Turkey, Bosphorus Airlines, argued, among other things, that the way in which Ireland had applied the sanctions regime amounted to a violation of Article 1 of Protocol No. 1 to the Convention. Your Court found that the impugned interference was not the result of an exercise of discretion by the Irish authorities, either under Community or Irish law, but rather amounted to compliance by the Irish State with its legal obligations flowing from Community law. Regarding the justification for impounding the aircraft, your Court accepted that compliance with Community law by a Contracting Party constituted a legitimate general-interest objective of considerable weight. Your Court also recognised that absolving Contracting States completely from their Convention responsibility in the field of activity in question would be incompatible with the purpose and object of the Convention<sup>13</sup>.

11 Paragraph 2 of Article 6.

12 *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi (Bosphorus Airways) v. Ireland* [GC], no. 45036/98, ECHR 2005-VI.

13 *Ibid.*, §§ 150 and 154.

So, in reconciling both these positions, your Court considered that State action taken in compliance with such legal obligations had to be deemed justified as long as the relevant organisation was considered to protect fundamental rights, as regards both the substantive guarantees offered and the mechanisms controlling their observance, in a manner which could be considered “at least equivalent to that for which the Convention provides”<sup>14</sup>. In such a situation, the presumption would be that a State had not departed from the requirements of the Convention when it did no more than implement legal obligations flowing from its membership of the organisation. However, any such presumption could be rebutted if, in the circumstances of a particular case, it was considered that the protection of Convention rights had been manifestly deficient. In such cases, the interest of international cooperation would be outweighed by the Convention’s role as a “constitutional instrument of European public order” in the field of human rights<sup>15</sup>.

In the circumstances of the *Bosphorus Airways* case, your Court found that the protection of fundamental rights by Community law could be considered to be, and to have been at the relevant time, “equivalent” to that of the Convention system. Consequently, the presumption arose that Ireland had not departed from the requirements of the Convention when it implemented legal obligations flowing from its membership of the European Community<sup>16</sup>. So, having regard to the nature of the interference, to the general interest pursued by the impoundment and by the sanctions regime and to the fact that the Supreme Court was bound to comply with the Court of Justice’s ruling, your Court considered that there had been no dysfunction of the mechanisms of control of the observance of Convention rights. Your Court therefore concluded that the protection of the applicant company’s Convention rights could not be said to have been manifestly deficient. Consequently, the relevant presumption of Convention compliance by the respondent State had not been rebutted and the impoundment of the aircraft had not given rise to a violation of Article 1 of Protocol No. 1<sup>17</sup>.

The finding in this judgment, following a detailed analysis of the relevant case-law of the Court of Justice, that the protection of fundamental rights afforded by Community law is “equivalent” to that provided by the Convention mechanism, and the presumption that it is therefore compatible with the Convention, can be seen as a sign of confidence and recognition, particularly as in a very recent decision<sup>18</sup> your Court held that this presumption applied not only to the measures taken by a Contracting State when implementing legal obligations flowing from its accession to the European Union, but also to the procedures followed within the Union, including the procedure before the Court of Justice of the European Communities and the question whether those proceedings afforded equivalent guarantees of fairness.

14 Ibid., § 155.

15 Ibid., § 156.

16 Ibid., § 165.

17 Ibid., §§ 166-67.

18 *Coöperatieve Producentenorganisatie van de Nederlandse Kokkelvisserij U.A. v. the Netherlands* (dec.), no. 13645/05, to be reported in ECHR 2009.

Now, however much of an honour this sign of confidence may be for our Court, it is also a reminder of a responsibility. The *Bosphorus Airways* case-law ought to encourage the Community bodies not to abandon their efforts and to ensure the real and effective protection of fundamental rights in all spheres falling within the powers of the European Union. More specifically, this case-law should encourage them to ensure, with all due care, that this protection is provided in the new fields of activity of the European Union, such as those relating to freedom, security and justice<sup>19</sup>.

The Treaty of Lisbon is significant in this context as it further reinforces the European Union’s attachment to fundamental rights. This Treaty provides for the European Union’s – long-awaited – accession to the Convention. It also recognises the Charter of Fundamental Rights of the European Union as a binding document having the same legal value as the Treaties<sup>20</sup>.

## THE CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

With the Charter, fundamental rights in the European Union have become more visible and more transparent for citizens, thus dissipating, I hope, any difficulties in identifying them. The Charter provides substantial legal certainty by going beyond the existing judicial system and affording improved protection. Incorporation of the Charter into the Treaty and, subsequently, its legally binding nature will not only allow courts to use this new instrument as a criterion of interpretation, but also guide and limit the exercise of the Union’s powers, thereby reinforcing the legitimacy of the Union. The Charter, with the enumeration of rights it contains, tells citizens in plain terms that they have rights they can assert against the Union. Furthermore, by codifying these rights into a single text, it gives a specific content to the fundamental rights referred to in paragraph 2 of Article 6 of the Treaty on European Union<sup>21</sup>.

The transformation of the Charter into a binding legal instrument means that the member States now have three sources of protection of fundamental rights: the national constitutions, the Convention and the Charter. For some of them, this multiplicity of sources and systems of protection may create tension and confusion, which, in the long term, may prejudice legal certainty – which is one of the main aspirations of the Charter – and erode fundamental rights to the detriment of citizens.

I believe these fears are exaggerated, however. First of all, whenever our two Courts have had occasion in the past to examine similar cases, this has not given rise to significant conflicting court decisions. Moreover, with regard to identifying and enshrining fundamental rights in the Charter, it should be pointed out that these rights are based on the actual text of the Convention and that, further, the Preamble to the Charter provides for the obligation, when interpreting these rights,

19 See Vassilios Skouris, “Koordination des Grundrechtsschutzes in Europa – die Perspektive des Gerichtshofes der Europäischen Gemeinschaften”, speech given at the 3rd European Jurists’ Forum in Geneva, 2005.

20 Article 6 of the Treaty on European Union (in the version deriving from the Treaty of Lisbon).

21 See Vassilios Skouris, “La protection des droits fondamentaux dans l’Union européenne dans la perspective de la ratification du Traité de Lisbonne”, speech given at a seminar organised by the Instituto di Diritto Internazionale in Milan, 17 December 2007.

to have regard to your Court's case-law. As I have already said, there is no doubt that the Court of Justice firmly intends to follow your Court's interpretation of these rights. It is therefore highly unlikely that the transformation of the Charter into a legally binding document will upset relations between the two systems of protection of fundamental rights.

In any event, I should emphasise that the horizontal provisions of the Charter tend to preclude any disparities between the rights and freedoms recognised by the Convention and those embodied in the Charter. These provisions should ensure maximum homogeneity of interpretation. They translate the determination to provide for consistency between the two instruments and to bring the systems of protection of fundamental rights together. The Charter sets out to establish a level of Community protection at least equivalent to that guaranteed by your Court. Nevertheless, the Charter is neither an exclusive source of fundamental rights nor an alternative to the Convention, but a complementary source<sup>22</sup>.

With or without the Charter, the risks of divergences in interpretation of the rights examined by your Court and by the Court of Justice will always be present of course, but certainly not exacerbated.

We could conclude that, with the Charter, the two Courts and their respective systems of protection of fundamental rights will continue to coexist without any insurmountable difficulties, thus affording satisfactory and effective protection. Indeed, harmonisation of the systems of protection of human rights and intensive efforts to ensure convergence will help reduce and eliminate conflicting outcomes. I am convinced, and experience has constantly borne this out, that cooperation between courts whose task is to ensure the protection of fundamental rights and, in particular, cooperation between the European Court of Human Rights and the Court of Justice will stop up the remaining gaps.

## FUNDAMENTAL RIGHTS REAFFIRMED

Having referred at the beginning of my speech today to the now time-honoured expression in the case-law of the Court of Justice of "special significance" of the Convention for the protection of fundamental human rights within the European Union, I would like to conclude by referring to another one, which comes from a recent decision of the Court of Justice. It is directly in line with this case-law, but adds a further element regarding the interconnectedness of the various reference sources, in particular between the Convention and the Charter.

The decision first retraces the legal foundations of the fundamental right in issue in the case in question, reiterating the two main sources of inspiration and reference norms for the protection of fundamental rights in the European Union, namely, the common constitutional traditions and the Convention. It goes on to say that the fundamental right in question has moreover been "reaffirmed" by the Charter. Concerning, to cite just one example, the principle of effective judicial protection, the decision reads as follows: "According to settled case-law, the principle

<sup>22</sup> See Marc Fischbach, "Une Charte pour l'Union européenne, un nouveau défi pour la protection des droits fondamentaux en Europe ?", in *Codex*, no. 5/2000, p. 162.

of effective judicial protection is a general principle of Community law stemming from the constitutional traditions common to the Member States, which has been enshrined in Articles 6 and 13 of the Convention, this principle having furthermore been reaffirmed by Article 47 of the Charter ..."<sup>23</sup>

Whilst the provisions of the Charter "reaffirm" the rights already embodied in the Convention, they are not, however, limited to that. They also reaffirm the fundamental role and importance of the Convention as such, and the role and importance of its interpreters for the protection of fundamental rights at the level of the European Union. Thus has the path we have already travelled been carved out, as has the one that we have yet to travel together.

Thank you.

<sup>23</sup> ECJ, judgment of 3 September 2008, Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation v. Council and Commission*, not yet reported in ECR, § 335. See also ECJ, judgment of 13 March 2007, Case C-432/05 *Unibet* [2007] ECR I-2271, § 37, and judgment of 14 February 2008, Case C-450/06 *Varec* [2008] ECR I-581, § 48 (the latter judgment in respect of the right to respect for private life; see Articles 8 of the Convention and 7 of the Charter: "One of the fundamental rights capable of being protected in this way is the right to respect for private life, enshrined in Article 8 of the ECHR, which flows from the common constitutional traditions of the Member States and which is restated in Article 7 of the Charter of Fundamental Rights of the European Union, proclaimed in Nice on 7 December 2000 (OJ C 364, p. 1)").



## Paolo Carozza

### Président of th Inter-Americaan Commission on Human Rights

It is an honour not only to be among such notable representatives of international tribunals here on the podium, but even more so to be among the many distinguished jurists in the audience today. That presence itself gives some of the most significant testimony to the achievement of the European Court of Human Rights. It is also particularly gratifying for me to be here on behalf of the Inter-American Commission on Human Rights to celebrate and reflect on fifty years of the Court's work, because this year also marks the 50<sup>th</sup> anniversary of our Commission. Although, of course, the American Convention on Human Rights and the Inter-American Court of Human Rights came later, when we look at the European and Inter-American regional systems as a whole, we can see a history that has in fact run parallel, and in important ways been intertwined, since the adoption of the American Declaration in 1948.

In the half-century of both of our respective institutions, however, it has largely been the case that the human rights issues we have confronted have been very different, dramatically so in fact. While the member States of the Council of Europe largely consolidated a common constitutional space, the Americas – tragically – were fraught with the perennial crisis and collapse of democracy and the rule of law, and in some places and periods witnessed systematic repression by criminal regimes.

And yet, despite the dramatic differences in the real experiences of the States and peoples of our systems since 1959, there have been a large number of interconnections between the two, some well-known and others much less so. Time is too short to present here a comprehensive catalogue of these relationships, but I would like to highlight just a few of them, not only to look retrospectively at what has been achieved together but also in order to then speculate about the possible avenues of rapprochement of our regional systems in the coming decades, and how our collaboration might fruitfully continue and grow.

The historical influences have, not surprisingly, flowed primarily westwards, from Europe across the Atlantic. Some of the most obvious ones have had to do with the structural aspects of the Inter-American human rights system. For instance, the Inter-American Commission – although originally established by a resolution of the General Assembly of the Organization of American States and not by a treaty – was consciously inspired by and modeled after the now-defunct European Commission, even if in the subsequent years it evolved to acquire its own distinctive mandates

and methods<sup>1</sup>. Similarly, in the drafting of the American Convention on Human Rights in 1967, the Inter-American Juridical Committee fashioned their proposed structures and procedures for the Inter-American institutions in large part on the model of the American Convention's elder sister in Europe<sup>2</sup>.

Interestingly, one notable actor in the special Inter-American conference responsible for drawing up the draft treaty was René Cassin, who was present as an invited expert (and who worked alongside others who were familiar with the European human rights system as well). Cassin made several interventions comparing the proposals to the European system and suggesting parallels, although he also saw the opportunity as an occasion to correct, or avoid, some of the minor difficulties that had arisen in Europe and sometimes proposed different approaches as a result<sup>3</sup>. He set out, in exemplary fashion, the methods and virtues of a genuine comparison of the systems, not only sharing the accumulated wisdom of his own experience but also engaging in a self-reflective criticism based on his encounter with a different reality.

Thus, in certain respects through the benefit of comparison and contrast with the European experience, the Inter-American system was able to take some small steps beyond what was then the European framework. For instance, while the right of individual petition was still optional in the European system at the time, the Inter-American system incorporated individual access to the system as a necessary feature for the protection of human rights, overcoming the objections based on the ideas of State sovereignty that had held sway in Europe in 1950<sup>4</sup>. Going even further, the American Convention broadened *locus standi* to bring a petition beyond the idea of victims, to any person or group<sup>5</sup>. Similarly, the American Convention codified many of the practical achievements and developments of the Inter-American Commission, especially regarding working methods and tools, thus confirming its substantial difference from its European counterpart<sup>6</sup>.

Such structural and procedural interplay between the systems has continued to be a source of fruitful reflection and comparison, not only at the Convention level but also in the rules of procedure of the Inter-American Commission and Court. The major reforms in 2001, which sought to give greater participation rights to

1 See Jo M. Pasqualucci, "The Inter-American Human Rights System: Establishing Precedents and Procedure in Human Rights Law", *University of Miami Inter-American Law Review*, vol. 26, p. 297, at p. 309.

2 See I/A Court H.R., Report on the Work Accomplished during its Fifteenth Session (Special): 9-20 January 1967, OEA/Ser.L/V/II.16, Doc.20 (26 July 1967) (hereinafter "IACHR 15th Session Report").

3 *Conferencia Especializada Interamericana sobre Derechos Humanos*, San José, Costa Rica, 7-22 November 1969, *Actas y Documentos*, OEA/Ser.K/XVI/1.2, *Secretaría General de la Organización de los Estados Americanos*, Washington DC, 1973 (reprinted 1978), p.341, at pp.433-34.

4 See Article 44 of the American Convention on Human Rights, 22 November 1969, 1144 UNTS 123 (hereinafter "the American Convention"), and (former) Article 25 § 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, 213 UNTS 221 (hereinafter "the European Convention").

5 *Ibid.*

6 See Article 41 of the American Convention.

representatives of the victims before the American Court, were clearly adopted with European experience in mind, and the current discussions about further reforms are also being carried out in the light of comparative experience and reflection<sup>7</sup>.

Turning to the substantive law, the influence of Europe on the norms and jurisprudence of the Inter-American human rights system are multiple. In the drafting of the American Convention, for example, the protection of the “right to rights” was advocated by direct reference to Protocol No. 1 to the European Convention<sup>8</sup>. Even more significant, however, has been the ongoing influence of the jurisprudence of the European Court in many areas of Inter-American human rights law. Let me mention two particularly illuminating examples, among many others.

First, we can see this influence in connection with due process and the reasonable length of time for legal proceedings. For instance, in *Genie Lacayo*, the Inter-American Court established its first interpretation of the concept of reasonable length of proceedings included in Article 8 of the American Convention<sup>9</sup>. The Court’s analysis took its point of departure, entirely, from the method of analysis utilised by the European Court to interpret Article 6 of the European Convention. European analysis of this question, a particularly vexing one for the Americas, remains a vital point of reference for us.

Second, in the area of freedom of expression, European human rights decisions have greatly influenced the evolution of the Inter-American jurisprudence. In Advisory Opinion OC-5, the Inter-American Court took its concept and discussion of “public order” from early European jurisprudence<sup>10</sup>. Later, the Inter-American Court similarly turned to its European counterpart in interpreting the requirement of “necessity” pertaining to restrictions on freedom of expression<sup>11</sup>. In *“The Last Temptation of Christ”* case, in relation to the “democratic standard”, the Inter-American Court relied directly on European precedents<sup>12</sup>.

Other jurisprudential examples abound, and attest to a consistent regard from the Americas for the ongoing work of the European Court, and esteem for its decisions. However, in view of the limited time that remains, rather than catalogue other examples I prefer to turn to the future. What are the likely contours of future interchange between our two systems? In the most recent phase of development of both the European and the Inter-American systems, I believe that we have entered into a period providing even greater opportunities for cross-fertilisation, where legal

and institutional experience might not only continue to flow westwards, but also where the Inter-American system might begin to find ways to repay its decades of indebtedness to Europe.

First, we are facing dauntingly similar structural and procedural challenges – especially when the Inter-American system is seen as a functional whole and one does not only focus on its Court. Case backlogs and delays, as we all know, threaten to undermine the credibility of the regional institutions. On each side of the Atlantic, we are pressing for and experimenting with ways to address these problems, and have much to learn from one another<sup>13</sup>.

Even more interesting avenues for mutual interchange arise out of the evolution of the substantive human rights issues that each of our systems has begun to face in its current stage of development.

As membership in the Council of Europe has expanded dramatically, so has the range and gravity of some of the human rights violations that reach the European Court – large-scale and comparatively frequent violations of the right to life, for example<sup>14</sup>.

And, as is well known, our institutions have a well-developed body of jurisprudence addressing such violations, examining such questions as standards of evidence and proof, the reach of State responsibility for non-governmental or para-governmental actors, and the definitions of victims entitled to reparation, for instance<sup>15</sup>. It is reasonable to think that our experience could be a quite helpful reference point for the European Court, and an important point of comparison in seeking common standards across the human rights systems. In parallel, the European system today is facing challenges to compliance that are notably more acute than at any other time in its history<sup>16</sup>; again, this phenomenon is lamentably familiar to the Inter-American system. In response, the Inter-American bodies, and especially the Court, have made great and important advances in the law of remedies, ones that should be of great interest not only to the European Court but also to those other organs of the Council of Europe that are involved in the

7 See, for example, A.A. Cançado Trindade, “Current State and Perspectives of the Inter-American System of Human Rights Protection at the Dawn of the New Century”, *Tulane Journal of International and Comparative Law*, vol. 8, 2000, p. 5, at pp. 40-46.

8 See IACHR 15th Session Report, pp. 56-57.

9 See I/A Court H.R., *Case of Genie Lacayo v. Nicaragua*, Series C no. 30, §§ 77 and 81 (29 January 1997) (citing, *inter alia*, the European Court’s judgment in *Motta v. Italy*, 19 February 1991, §§ 24 and 30, Series A no. 195-A).

10 See I/A Court H.R., Advisory Opinion OC-5/85, *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism* (Articles 13 and 29 of the American Convention), Series A, § 69 (13 November 1985) (citing *Austria v. Italy*, no. 788/60, Commission decision of 11 January 1961, Yearbook of the European Convention on Human Rights 4, p. 116, at p. 138).

11 See I/A Court H.R., *Case of Herrera Ulloa v. Costa Rica*, Series C no. 107, § 122 (2 July 2004) (citing the European Court’s judgment in *The Sunday Times v. the United Kingdom*, 26 April 1979, § 59, Series A no. 30).

12 See I/A Court H.R., *Case of “The Last Temptation of Christ” (Olmedo Bustos et al.) v. Chile*, Series C no. 73, § 69 (5 February 2001) (citing, *inter alia*, the above-mentioned Sunday Times judgment, §§ 59 and 65).

13 See, for example, Committee on Juridical and Political Affairs of the Permanent Council of the Organization of American States, Work Plan to Continue the Process of Reflection on the Inter-American System for the Promotion and Protection of Human Rights (2008-2009), OEA/Ser.G, CP/CAJP-2665/08 rev. 6 (4 February 2009), and Steering Committee for Human Rights (CDDH), Final report containing proposals of the CDDH “Guaranteeing the long-term effectiveness of the control system of the European Convention on Human Rights”, CDDH(2003)006 Addendum [http://www.coe.int/t/e/humanrights/cddh/3.committees/O1.%20steering%20committee%20for%20human%20rights%20%28cddh%29/04.%20working%20documents/2003/2003\\_006add\\_en.asp#TopOfPage](http://www.coe.int/t/e/humanrights/cddh/3.committees/O1.%20steering%20committee%20for%20human%20rights%20%28cddh%29/04.%20working%20documents/2003/2003_006add_en.asp#TopOfPage).

14 See, for example, Ed Bates, “Supervising the Execution of Judgments Delivered by the European Court of Human Rights: The Challenges Facing the Committee of Ministers”, in Theodora A. Christou and Juan Pablo Raymond (eds.), *European Court of Human Rights: Remedies and Execution of Judgments*, 2005, p. 49, at pp. 84-86 (discussing cases of gross human rights violations in Turkey and Russia) (internal citations omitted).

15 For landmark decisions on standards of evidence and proof, see I/A Court H.R., *Case of Velásquez Rodríguez v. Honduras*, Series C no. 4 (29 July 1988). On the reach of State responsibility for non-governmental or para-governmental actors, see I/A Court H.R., *Case of the Pueblo Bello Massacre v. Colombia*, Series C no. 30 (31 January 2006), and I/A Court H.R., *Case of Ximenes Lopes v. Brasil*, Series C no. 139 (30 November 2005). On the definitions of victims entitled to reparation, see I/A Court H.R., *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Series C no. 79 (31 August 2001), and I/A Court H.R., *Case of Blake v. Guatemala*, Series C no. 36 (24 January 1998).

16 See, for example, Ed Bates, *op. cit.*, p. 104.

supervision and enforcement of judgments<sup>17</sup>. I note in particular that some of the most interesting Inter-American innovations regarding remedies seem to revive a somewhat old-fashioned view – at least as old as Plato – of law as a tool for the education of a population<sup>18</sup>. This expressive and pedagogical emphasis has much to offer to Europe as well, in particular when dealing with States where the rule of law is chronically weak.

Turning to developments in the Americas, we find that, in contrast to much of the first half-century of the Inter-American Commission, we are now much less engaged with massive and systematic violations of the rights to life and physical integrity. To be sure, disappearances, torture and extrajudicial executions still occur, and massacres are not unknown – no one can pretend that we have left all such violations behind<sup>19</sup>. But much more so than in the past we are now faced with more complex questions of constitutional dimension in democratic societies. Many of the democracies are weak – as they are in many of the newer member States of the Council of Europe as well – and widespread social exclusion is an endemic problem throughout the region<sup>20</sup>. In this context, we have a great deal to learn from the way in which the European Court has engaged questions of the permissible limitations on rights in democratic societies. This environment also begins to raise questions for the Americas about the boundaries of legitimate pluralism in the realisation of human rights. That is to say, no one could reasonably ask whether torture, for instance, might be more or less tolerable in one State or another under the Convention; but if we ask, instead, about the right balance between, say, the Convention's protection of freedom of expression<sup>21</sup> and its protection of a person's honour and reputation<sup>22</sup>, the possibility for reasonable variations becomes real<sup>23</sup>. The Inter-American institutions have (deliberately) never imported the European notion of the margin of appreciation<sup>24</sup>, but nevertheless I believe that we will

increasingly find ourselves in need of some functional equivalents to it, in order to manage diversity with the same measured skill that has characterised the European Court of Human Rights in its best moments. The ultimate aim of both systems is to give genuine effect to the principle of subsidiarity – not subsidiarity in the reductive sense of pure devolution of authority, but rather in the fuller and more authentic sense of providing assistance (a *subsidium*) to local political communities and their institutions that enhances their capacity to achieve their ends on their own<sup>25</sup>.

To give one example of where these several different factors of convergence come together from both directions, I would cite the growing case-law in both systems regarding State obligations to criminalise human rights violations and punish their perpetrators by criminal sanctions. Although an important innovation to try to rein in impunity in the Americas, the push to criminalise is also threatening now to become a form of neo-punitivism that fails to take into account the complex and divergent ways in which criminal law relates to political communities, the power of the State, and the realisation of human rights<sup>26</sup>. Similarly, in Europe there has been an ever-growing tendency to require the criminalisation of certain behaviour affecting human rights, especially in response to the structural weaknesses in accountability found in the younger and more tenuously democratic States<sup>27</sup>. Both regional systems therefore have a great deal to learn in this area, not only from one another but also from national legal systems and their long and varied experience with the relationship between criminal sanctions and human rights.

This question of recognising and managing the boundaries of a legitimate diversity of approaches to human rights problems brings me to a more general observation regarding our designated theme of fragmentation in international human rights law. Several of the other participants in this seminar have expressed their view that the danger of fragmentation has been overstated and exaggerated in much recent discussion of international law. I agree, but propose to take the point even one step further: under certain circumstances, I am convinced that normative pluralism within human rights can be a good and necessary thing. The history of regional systems in general (*vis-à-vis* the universal human rights institutions and processes), and the history of the European Court within its own area, demonstrate that a degree of diversity and pluralism, within the limits of the requirements of human dignity, is not only compatible with the idea of human rights but even

17 See Dina Shelton, *Remedies in International Human Rights Law*, 2005, pp. 285-89, 299-301, 314-16.

18 See, generally, Plato, *The Laws*, translated by Trevor J. Saunders, Penguin Books, 1970; see also Niklas Luhmann, *A Sociological Theory of Law* (1972), translated by Elizabeth King and Martin Albrow, Taylor & Francis, 1985, p. 172. Such theories are proving to have a continued, or perhaps revived, influence in various expressive theories of law. See, for example, Alex Geisinger and Michael Ashley Stein, "A Theory of Expressive International Law", *Vanderbilt Law Review*, vol. 60, 2007, p. 77.

19 See, for example, I/A Court H.R., *Case of Servellón García et al. v. Honduras*, Series C no. 152 (21 September 2006) (involving the 1995 arrest, torture, and extrajudicial killing of four at-risk youths by State agents); I/A Court H.R., *Case of the Mapiripán Massacre v. Colombia*, Series C no. 134 (15 September 2005) (involving the 1997 massacre of at least forty-nine civilians by paramilitary forces); I/A Court H.R., *Case of Martín Pelicó Coxic et al. v. Guatemala*, no. 11.658, Report no. 80/07 (2007), at <https://www.cidh.oas.org/annualrep/2007eng/guatemala11658eng.htm> (involving the torture and extrajudicial execution in 1995 of a human rights advocate by members of a self-defence patrol); and I/A Court H.R., *Case of Franz Britton v. Guyana*, no. 12.264, Report no. 1/06 (2006), at <https://www.cidh.oas.org/annualrep/2006eng/guyana.12264eng.htm> (involving the forced disappearance in 1999 of an individual by State agents).

20 See, for example, I/A Court H.R., *Observations of the Inter-American Commission on Human Rights upon conclusion of its April 2007 visit to Haiti*, OEA/Ser.L.V/II.131, Doc.36 (2 March 2008), and I/A Court H.R., *Access to Justice and Social Inclusion: The Road Towards Strengthening Democracy in Bolivia*, OEA/Ser.L.V/II., Doc.34 (28 June 2007).

21 See Article 13 of the American Convention.

22 See Article 11 of the American Convention.

23 See, for example, I/A Court H.R., *Case of Kimel v. Argentina*, Series C no. 177 (2 May 2008) (addressing the balance of these rights).

24 See Eyal Benvenisti, "Margin of Appreciation, Consensus, and Universal Standards", *New York University Journal of International Law and Politics*, vol. 31, 1999, p. 843, at p. 844 (noting that "[i]nternational human rights organs, other than the ECHR, have largely succeeded in avoiding a systematic recourse to the margin of appreciation doctrine"); cf.

Fionnuala Ni Aolain, "The Emergence of Diversity: Differences in Human Rights Jurisprudence", *Fordham International Law Journal*, vol. 19, 1995, p. 101 (contrasting the European Court's use of the margin of appreciation doctrine with the Inter-American Court's close examination of governmental practices in relation to emergency situations). Indeed, the Inter-American Court has referenced the doctrine only in approving "the margin of appreciation which is reserved to States when it comes to the establishment of requirements for the acquisition of nationality and the determination whether they have been complied with" (I/A Court H.R., *Advisory Opinion OC-4184, Proposed Amendments to the Naturalizations Provisions of the Constitution of Costa Rica*, Series A no. 4, § 62 (9 January 1984)).

25 See Paolo Carozza, "Subsidiarity as a Structural Principle in International Human Rights Law", *American Journal of International Law*, vol. 97, 2003, p. 38.

26 On the original impetus regarding accountability, see, for example, Yves Beigbeder, *International Justice Against Impunity: Progress and New Challenges*, 2005. On the new punitivism, see John Pratt, David Brown, Mark Brown, Simon Hallsworth and Wayne Morrison (eds.), *The New Punitiveness: Trends, Theories, Perspectives*, 2005.

27 See, for example, the following judgments of the European Court: *Osman v. the United Kingdom*, 28 October 1998, *Reports of Judgments and Decisions* 1998-VIII; *M.C. v. Bulgaria*, no. 39272/98, ECHR 2003-XII; and *Siliadin v. France*, no. 73316/01, ECHR 2005-VII.

important to their realisation<sup>28</sup>. As we contemplate the problem of fragmentation in international law, including human rights law, it may be important to remember that pluralism can in some circumstances also bring the benefits of dynamism, flexibility, healthy experimentation, and responsiveness of the law to society<sup>29</sup> – as the comments made by Judge Tulkens in her introduction to our seminar this afternoon precisely confirm. Harmonisation does not need to be homogenisation. Or to put it a different way, we can borrow the famous metaphor of United States Supreme Court Justice Louis Brandeis regarding the American federal system, referring to the fifty States as “laboratories of democracy”<sup>30</sup>. Similarly, we may hope for our regional systems and the democracies within them to be just such laboratories for the realisation of human rights.

This would of course require a substantial dialogue, not only among international tribunals as we are having today, but a fertile and constant dialogue between the transnational and national courts as well. One model for understanding the network of relationships that we are building is to regard it as the development of a new sort of global *ius commune* of human rights – universal in its scope and its basic principles, but interacting in a symbiotic way with the *ius proprium* of different local jurisdictions rather than supplanting them<sup>31</sup>.

In conclusion, and in a very different vein, I would like to recall that all of the interactions and fruitful borrowings and cross-fertilisations that have taken place between the regional systems have not been the result merely of formal rules and practices, or bureaucratic mechanisms. Their vitality has come from human relations and encounters. Reviewing the history of the Inter-American Commission and Court and their relationship to Europe, one cannot help but be struck by Cassin, Buergenthal, and many others, whose personal presence, commitments, and openness generated rich interchange and consequent growth on both sides of the Atlantic. The links between people generated the links between institutions.

It is my great hope that our encounter today will be, in the same way, such an occasion for lasting and fruitful friendships.

Thank you, and congratulations to the Court on its 50th anniversary.

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

28 See, for example, Paolo Carozza, op. cit.

29 Ibid.

30 See *New State Ice Co. v. Liebmann*, 285 US 262, 311 (1932) (“It is one of the happy incidents of the federal system that a single courageous State may ... serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country”, Justice Brandeis, dissenting).

31 See Paolo Carozza, “My Friend Is a Stranger”: The Death Penalty and the Global *Ius Commune* of Human Rights”, *Texas Law Review*, vol. 81, 2003, p. 1031, at p. 1043.



## Jean-Paul Costa

### President of the European Court of Human Rights

Ladies and gentlemen,

This year the ceremony for the official opening of the judicial year of the European Court of Human Rights is rather special since it coincides with the beginning of the Court's 50<sup>th</sup> anniversary year.

Perhaps that explains why the number of people attending this year's event is exceptionally high.

In any case may I thank you all for coming. Your presence this evening is greatly appreciated as warm encouragement for us. I should like to greet in particular the many former judges of the Court and members of the Commission who have joined us this evening.

I should also like, on behalf of my fellow judges and the members of the Registry, to wish you an extremely happy and successful year in 2009.

I am delighted to see so many representatives of different authorities, members of governments, parliamentarians, the senior officials of the Council of Europe and the permanent representatives of the member States. I greatly welcome the presence of so many Presidents and high-ranking members of national and international courts. The national courts help us to ensure that States respect the rights guaranteed by the Convention, demonstrating the importance of domestic remedies and therefore the principle of subsidiarity; if the Convention is a "living instrument" it is also because you make it live. International courts show that the existence and expanded role of numerous international judicial bodies make possible a joint effort to uphold justice and fundamental rights.

I do, however, wish to greet more personally our two special guests and speakers.

Dame Rosalyn Higgins, who in a few days' time will be leaving the International Court of Justice, which she has served and presided over brilliantly, is honouring us with a few thoughts on the judicial cooperation between the Hague Court, whose vocation is universal and general, and the Strasbourg Court, whose jurisdiction is regional and specialised.

We are also honoured by the presence of Rachida Dati, Garde des Sceaux, Minister of Justice, representing the French Republic as the host State of the Court and the Council of Europe. She will close the ceremony by reminding us how much France and indeed Europe are attached to the protection of rights and freedoms.

I thank them both wholeheartedly.

We are going through a phase of anniversaries. Last December the 60th anniversary of the Universal Declaration of Human Rights was celebrated all over the world. On 5 May our parent institution, the Council of Europe, celebrates its 60th anniversary, and last October we organised a seminar to mark the 10th anniversary of the transformation of the existing Convention bodies into a single, full-time Court.

In view of all these different commemorations, I propose to take stock of the last fifty years and then reflect on the long-term future. This was the approach taken by the historian Fernand Braudel when he asserted that it was necessary to study history from the long-term perspective. The world, Europe and human rights are radically different in this first part of the 21st century from what they were after the Second World War. Moreover, when the Court was set up, no one, I think, could have imagined that it would one day fill the European judicial space to the extent that it does today. Its current influence in Europe, and even beyond, could hardly have been predicted. As an eminent observer said to me recently, seen retrospectively, the Court's development over the last fifty years was something of a miracle.

When the Court began its work, only twelve States had ratified the Convention for the Protection of Human Rights and Fundamental Freedoms. The "iron curtain" denounced by Churchill in 1946 remained lowered. In the West some dictatorships survived, disqualifying those countries from entry to the Council of Europe, and decolonisation wars were still in progress. The state of fundamental freedoms was below the required standard of protection.

It is nevertheless striking that the first signatories of the Convention, clearly linking their initiative to the Universal Declaration, expressed their belief in common values and ideas: democracy, freedoms and the rule of law. There was a political commitment, and indeed a bold one since States recognised that individuals had rights and freedoms guaranteed under international law and created a judicial mechanism to ensure the observance of their own engagements. This was a gesture whose nobility and far-reaching significance we should not underestimate.

The last fifty years have been far from idyllic. International and civil peace, an indispensable, albeit not necessarily sufficient, condition for the development of human rights has not prevailed everywhere. The democratisation of European States was not achieved without clashes. The reconciliation of the two halves of the continent did not produce a consistent and immediate improvement in the protection of freedoms.

However, if we compare 1959 with 2009, it is clear that the state of human rights is broadly speaking better – in Europe at least – than fifty years ago; and that application of the Convention at national level and its review by the Strasbourg Court have played a major role in achieving this.

Numerous reforms have been undertaken as a result of the judgments delivered here and executed under the supervision of the Committee of Ministers of the Council of Europe. Through its interpretation of the Convention, the Court has gradually raised the standards of protection required, which has led via a process of emulation to a harmonisation of standards at a higher level. It has been assisted in this task by the other organs and institutions of the Council of Europe, to which due credit should be given.

Admittedly, even where faulty national legislation has been remedied, it is not always correctly applied. Execution of the Court's judgments is frequently delayed or, in rare but deeply regrettable instances, refused. The Convention is not sufficiently well-known everywhere or sufficiently relied on or given effect to. There are many reasons for this, including the linguistic hurdle, but there are also, and perhaps this is even more common, certain nationalist reflexes. It does not necessarily come naturally to accept all the consequences of acceding to a binding international instrument, in particular where they relate to the execution of judgments which can be perceived as awkward or even offensive. For the States it takes a great amount of open-mindedness to assimilate this dimension; for the Court it takes a great deal of pedagogy and judicial diplomacy if it is to succeed in persuading national authorities that this mechanism of a collective guarantee requires compliance with common rules.

The States have on the whole made remarkable efforts to apply the Convention guarantees and to implement the Strasbourg judgments. We need to be pragmatic. There is no point in chanting the maxim "*pacta sunt servanda*" on which Grotius based international law. The Court could only have been influential and it can only avoid the danger of being misunderstood, or even rejected, so long as it observes a degree of restraint and explains again and again to judges and other national authorities the basis for its decisions. This is why we attach great importance to meetings with other courts. Rosalyn Higgins has herself always encouraged this approach.

In any event the stature the Strasbourg Court has acquired and the influence it exerts contribute to the development of human rights. It has given the Convention a dynamic interpretation. It has thus expanded the scope of the rights guaranteed, while adapting its reading of the founding text in the light of technological and societal evolutions which were unforeseeable in 1950. At the same time, the case-law has developed concepts like the margin of appreciation and that of the threshold of severity in relation to violations. These methods of interpretation and the solutions which derive from them are clearly not immune from criticism, and the Court is sometimes criticised. However, such reticence is certainly less strong than fifty years ago or even ten years ago.



Let us look briefly at the statistics. The Court's activity has grown spectacularly. Over its first forty years, it delivered just over 800 judgments on the merits, in other words around 20 a year, even if this average masks what was in reality a gradual increase, with a steep rise in later years. At that time, from a quantitative perspective, the main burden of the system was borne by the European Commission of Human Rights, whose activity ceased ten years ago. Since then the Court has issued tens

of thousands of inadmissibility decisions (or striking-out decisions), but also more than 9,000 judgments on the merits: that is an average of more than one thousand a year and in fact well over that average in 2008.

The increase in the number of applications has the effect of generating a persistent deficit. There continues to be far too great a gap between the number of judgments rendered and decisions, on the one hand, and the volume of newly registered applications, on the other (for 2008 some 1,900 applications gave rise to judgments and there were 30,200 decisions, but there were also around 50,000 new applications). In these circumstances the number of cases pending (97,000 at the end of 2008) continues to grow, leading to increasing delays in the processing of cases. Yet the Court should normally examine each case within a "reasonable time" within the meaning of Article 6 of the Convention.

It is true that the potential applicants to the Court number over 800 million and that proceedings are instituted almost exclusively through individual applications, even though at present there are two inter-State cases pending, both brought by Georgia against the Russian Federation. Currently 57% of the applications pending before the Court are directed against just four States (the Russian Federation, Turkey, Romania and Ukraine), whose combined population accounts for only about 35% of the total population of the Convention States. This shows that, if the problem of the Court's case overload is a general phenomenon, it is in reality particularly concentrated on a limited number of countries. Efforts have to be made as a matter of priority in relation to them.

Many judgments over the last half-century have had far-reaching implications and have influenced national law. This is not the place to draw up a list, even a short one, since it would inevitably be subjective and over-simplistic. Moreover the collections of leading judgments in different countries and in different languages provide sufficient information in this respect. I will therefore confine myself to the most recent period and indicate without analysing them in any detail some of the judgments delivered in 2008, which are of course accessible via the Court's website.

*Saadi v. Italy*<sup>1</sup> dealt with the problem of the expulsion of a person suspected of terrorism to a State where he would be at risk of inhuman or degrading treatment.

In *Korbely v. Hungary*<sup>2</sup>, the Court found a violation of Article 7 on account of conviction for crimes against humanity of a person prosecuted for a murder committed during the uprising in Budapest in 1956.

In *S. and Marper v. the United Kingdom*<sup>3</sup>, the Court was confronted with the issue of the retention for an indefinite period of fingerprints, biological samples and DNA profiles of persons suspected but not convicted of criminal offences.

*E.B. v. France*<sup>4</sup> was a case concerning the prohibition of discrimination on grounds of sexual orientation with regard to adoption authorisation.

1 [GC], no. 37201/06, to be reported in ECHR 2008.

2 [GC], no. 9174/02, to be reported in ECHR 2008.

3 [GC], nos. 30562/04 and 30566/04, to be reported in ECHR 2008.

4 [GC], no. 43546/02, to be reported in ECHR 2008.

*Kovačić and Others v. Slovenia*<sup>5</sup> concerned the freezing of bank deposits after the dissolution of the former Yugoslavia. The Court approved the position adopted by the Parliamentary Assembly of the Council of Europe and called upon the successor States to resolve through negotiation the problems encountered by the thousands of persons in the same situation as the applicants.

I should also mention the advisory opinion delivered at the request of the Committee of Ministers – and it was the first such opinion – on certain legal questions concerning the lists of candidates submitted for the election of judges of the Court. The central issue was whether such lists could be rejected solely on the grounds of gender balance.



Without allowing any room for complacency, I think we can say that the Court's activity since it began has had an important and positive impact. But what is the future of human rights in the 21st century and what is the future of the European system for the judicial protection of those rights?

It is difficult not to see how fragile human rights and their protection are.

The “resurrection” of human rights which occurred at the end of the 1940s was of course ideological, but this ideology was ultimately carried forward by an almost unanimous political wave of enthusiasm. At the United Nations, the Universal Declaration was adopted without a single vote against. It was a revolt (“never again”) and an aspiration (for peace, justice and freedom).

More recently, new threats and a new context have emerged: terrorism, crime (whether organised or not), different types of trafficking. All this has created tension in public opinion and in our societies and a tendency to give precedence to order and security. The influx of illegal immigrants driven by poverty and despair has an impact on policies, but has also been accompanied by xenophobia, racism and intolerance, or contributed to their increase. In the same way the connection which is, sometimes over-hastily, made between certain types of religious belief and violence, or indeed terrorism, has exacerbated sensibilities, yet freedom of religion is also a fundamental human right. This requires dialogue and not insults.

In addition, the nature of protected rights has become more complicated. The development of science and technology in the fields of information technology and biology, while an instrument of progress, may generate new threats for private life and freedoms.

Moreover the texts for the protection of rights were designed to protect persons from abuses perpetrated by States, whereas such abuses frequently derive from groups or persons who fall outside State authority.

Likewise, conflicts are no longer necessarily between freedom and the defence of public order, but often between two competing human rights which are equally guaranteed and deserving of protection, for example freedom of expression versus the right to respect for private life. This gives rise to difficult balancing exercises for legislators and for judges, including ourselves.

Moreover, the ideology of the protection of rights can no longer rely on the groundswell of support that carried it forward in the 1950s. It has come up against the difficulties of establishing or maintaining peace, the return of materialism and of individualism, the extolling of national interests, and more recently the financial and economic crisis which could force freedoms into second place. Bismarck's old expression “*Realpolitik*” has reappeared and is regularly cited.

The protection of human rights has thus become more fragile, more complex. But does that mean that it must yield?

My answer is no. On the contrary, I would argue that it is necessary to consolidate and breathe new life into these rights, to bring about their *aggiornamento*.

We should reinforce what already exists. Reinforcing what exists means reaffirming what we call “classic” rights, what Jean Rivero called freedom-rights as opposed to claim-rights. It also means driving back areas of non-law and accepting that women, children, old people, the disabled, detained persons, all vulnerable people, and minorities, that they too must have the benefit, on the same basis as everyone else, of the freedoms guaranteed.

Moreover many European constitutions now stress the importance of economic and social rights and of what are known as third-generation rights. The same is true of the Charter of Fundamental Rights of the European Union, which under the Lisbon Treaty will acquire the same binding force as the Treaties. I accept that we should not extend the rights protected indefinitely. At the same time it makes sense to see human rights differently compared to fifty years ago. It is perhaps a paradox that in the present crisis human rights appear in a different light from how they were viewed in the years of post-war economic growth, if only because of greater understanding of the need for solidarity.

This analysis calls for a long-term perspective and a common political will.

It seems to me that the States Parties to the Convention should, fifty years on, engage in a collective reflection on the rights and freedoms which they wish to guarantee to their citizens for the future, without of course in any way reneging on the existing rights. I do not believe that any one is seriously considering going backwards after half a century of progress and development.

As part of the same process, the States should also reflect on how to protect such rights. The principle of collective guarantee is, I think, inviolable but the practical aspects of the protection of rights and their implementation can be rethought.

This reflection could be organised around a major formal conference in the first half of 2010. Such a conference would articulate a new commitment and it would be the best way of giving the Court, which exists only by the will of the States, a reaffirmed legitimacy and a clarified mandate. These revised objectives

<sup>5</sup> [GC], nos. 44574/98, 45133/98 and 48316/99, to be reported in ECHR 2008.

would also concern the national authorities, without forgetting the very important role in the field of fundamental rights played by a court with which we have excellent relations, the Court of Justice of the European Communities. The presence of its President this evening honours us.

To give a label to this special conference, which will need to be prepared with great care and which cannot have any real impact without the participation of senior political figures, I floated the expression “*Etats généraux des droits de l’homme en Europe*”. In fact the title matters little, apart from its value for communication purposes, if the idea and objective of such an event are accepted. The Court envisages setting out the arguments for such a conference and explaining what the subject matter might be by submitting a “memorandum” to the member States on the subject.

The idea is for the States, the guarantors of human rights, to give human rights protection a second wind. This would help to express support for the Court, breathe new life into this fifty-year-old and rejuvenate it.

The present situation is not satisfactory (the few figures that I mentioned demonstrate this). Over the last ten years, the different reform processes have not yet produced results. Protocol No. 14 has still not entered into force, and I regret this. The causes of this blockage are well known. As a consequence, the report of the Group of Wise Persons, which contained some good proposals, is also blocked. We should, of course, not give up on these reforms; indeed, I believe we must continue to work for their implementation, but they should be viewed from a broader perspective.

Despite the budgetary difficulties, the States have enhanced the Court’s resources – for example the Registry staff has tripled in ten years; over the same period the number of decisions and judgments has been multiplied by eight. We have to thank the States for their support, even if we must say clearly to them that we will continue to need that support in the coming years.

But can we go on like this indefinitely? Can we proceed with an unlimited expansion of the Court and its Registry? Are we not running the risk of exhaustion with this headlong flight?

It is hard to see how the system can remain viable unless we slow down the influx of new applications, without of course blocking those which are new and well-founded. At the same time, the Court is reforming itself. It is developing new working methods, such as a more systematic sorting of cases with a view to giving priority to the more important and more serious ones, more frequent recourse to pilot judgments, in cooperation with the States and the Committee of Ministers, and encouragement for the conclusion of more friendly settlements. Following on from the seminars held in Bratislava and Stockholm under the chairmanships of Slovakia and Sweden, the Court will look to enhance the role of Government Agents, while of course preserving fully its own independence. It also expects much from measures to be taken at national level to prevent violations and to remedy them. It counts on Bar associations who in often difficult, and sometimes dangerous, conditions

make a major contribution, as do non-governmental organisations, to assisting applicants, for which they should be given credit. They can also help the Court by preventing futile or hopeless applications.

Finally, part of the case overload is due to the large number of repetitive applications. In this context, the Court hopes to be able to rely on the cooperation of the Committee of Ministers in ensuring effective execution of its judgments.

The Court can in no way be accused of being passive. Yet, it will not surmount its difficulties if it is not given a clear indication of the commitment or reaffirmed commitment of the States. Fifty years after it began sitting, it needs an updated “roadmap”, including directions as to the means of protection.

Claude Lefort wrote “rights cannot be disassociated from the awareness of rights”. This is true of people too, and also of civil society which does so much to promote human rights – their contribution cannot be underestimated. But it is also true of the States themselves. The rule of law means that States are subject to the law and they must accept that with full awareness of what it entails. I think the time has come for States to reassess their position, which will lead to a renewed momentum.

Ladies and gentlemen, it is time for me to give the floor to our two speakers. Let me finish by making a bet. In twenty years time, in fifty years, there may even be a World Court of Human Rights, I do not know. But I do know that there will always be human beings who suffer from physical abuse, whose freedom is curtailed and whose dignity is undermined. We must ensure that at least we Europeans use the law to reduce that suffering and to prevent it recurring. We need to reflect upon how to give human rights an even more concrete character, a more effective and less illusory character. That was the will of the founding fathers, and much has been achieved. We need to consolidate and reinvigorate the system. Before you here today, I make the bet that this is possible, but only with your help.

Thank you for your attention.



## Rosalyn Higgins

**President of the International Court of Justice**

### **THE INTERNATIONAL COURT OF JUSTICE AND THE EUROPEAN COURT OF HUMAN RIGHTS: PARTNERS FOR THE PROTECTION OF HUMAN RIGHTS**

President Costa, members of the Bench, Minister Dati, excellencies, ladies and gentlemen,

I greatly appreciate the invitation of President Costa to speak at this ceremony marking the opening of the judicial year as well as the 50<sup>th</sup> anniversary of the European Court of Human Rights. I take it as a mark of friendship between our Courts.

I am honoured to say some words as we commemorate fifty truly remarkable years, during which you have for ever changed for the better the judicial protection of human rights.

While the International Court of Justice and the European Court of Human Rights have different roles to play, there is a great deal of common ground between The Hague and Strasbourg. The International Court of Justice possesses general subject matter jurisdiction and its docket invariably contains a diverse range of cases. It has over the years always had occasional cases touching on human rights. Although its responses have been given in the context of contentious litigation or requests for advisory opinions, and have involved States or international organisations, they have still had an impact on the perception of what an *individual* may invoke as fundamental rights protected by international law. As for the European Court of Human Rights, while always mindful of the special character of the European Convention on Human Rights, it has long recognised that “the principles underlying the Convention cannot be interpreted and applied in a vacuum”; it must also take into account any relevant rules of international law<sup>1</sup>. Indeed, some provisions of the Convention refer explicitly to international law (Articles 7, 15 and 35). The European Court of Human Rights regularly looks to the jurisprudence of the International Court for statements on general international law, Charter interpretation and State responsibility, and the International Court looks to the European Court’s

development of the law on specific human rights; and allusion may be made to this. In this way, The Hague and Strasbourg can be perceived as partners for the protection of human rights.

While the European Court of Human Rights is today most strongly associated with its handling of cases brought by individuals, Article 33 of the European Convention provides for the possibility of inter-State cases. Such cases have been heard from time to time. In the 1970s, Ireland brought a case against the United Kingdom relating to security measures in Northern Ireland. The central issue of the case was the distinction between torture and inhuman or degrading treatment, and the minimum level of severity for acts to fall within the scope of Article 3 of the Convention. At the same time, the Court took the opportunity to state its position on two broader issues of policy that have since run like a thread through its jurisprudence. First, it found that the responsibilities assigned to the Court within the framework of the Convention system extended beyond the case before it: “The Court’s judgments in fact serve not only to decide those cases brought before the Court but, more generally, to elucidate, safeguard and develop the rules instituted by the Convention, thereby contributing to the observance by the States of the engagements undertaken by them as Contracting Parties.”<sup>2</sup>

Second, the Court stated that in interpreting the Convention regard should be had to its special character as a treaty for the collective enforcement of human rights and fundamental freedoms<sup>3</sup>.

In 2001, in the inter-State case of *Cyprus v. Turkey*, the Court reiterated the special character of the Convention as “an instrument of European public order (*ordre public*) for the protection of individual human beings”<sup>4</sup>.

In 2007 and 2008, Georgia lodged applications against the Russian Federation. The more recent of these applications has coincided with a case between the same two States before the ICJ – a situation that I will come back to.

While only a tiny percentage of the European Court of Human Rights’ cases are inter-State, all contentious cases at the ICJ are of this nature. Article 34 of the Statute of the ICJ provides that only States can be parties to cases.

Despite viewing cases through the lens of inter-State relations, the ICJ, and its predecessor the Permanent Court of International Justice, have issued judgments that fundamentally concern the rights of individuals under international law. Just last week, the International Court issued a judgment in a case brought by Mexico against the United States of America concerning interpretation of its 2004 judgment in the *Avena* case. This case came before the International Court as a legal dispute between two States, but at its core were the rights of Mexican nationals on death row in the United States who had been arrested and sentenced without being informed of their rights under Article 36 of the Vienna Convention on Consular Relations, and the remedy the International Court had articulated.

<sup>1</sup> See *Loizidou v. Turkey* (merits), 18 December 1996, § 43, *Reports of Judgments and Decisions* 1996-VI.

<sup>2</sup> *Ireland v. the United Kingdom*, 18 January 1978, § 154, Series A no. 25.

<sup>3</sup> *Ibid.*, § 239.

<sup>4</sup> *Cyprus v. Turkey* [GC], no. 25781/94, § 78, ECHR 2001-IV.

The Permanent Court of International Justice – which operated between 1922 and 1946 – dealt with “big” rights, close conceptually to collective rights, such as the principle of non-discrimination. In the *Polish Upper Silesia* case<sup>5</sup>, the Permanent Court showed a profound insight into what was necessary to make the protection of national minorities a reality. It held that what the minority was entitled to was equality in fact as well as in law; and that, while the claim to be a member of a national minority should be based on fact, self-identification was the only acceptable method of association. This principle has been of lasting importance in human rights law, particularly for the European Court, which has developed a rich jurisprudence relating to the rights of minorities.

In the 1935 *Minority Schools in Albania* case, the Permanent Court determined that special needs and equality in fact “are indeed closely interlocked, for there would be no true equality between a majority and a minority if the latter were deprived of its own institutions, and were consequently compelled to renounce that which constitutes the very essence of its being as a minority”<sup>6</sup>. Of equal importance was the finding that differentiation for objective reasons does not constitute discrimination.

In its early years the current International Court of Justice (the legal successor to the old Permanent Court of International Justice) played a major and critical role in the development of the concept of self-determination in the *South West Africa, Namibia and Western Sahara* cases. The European Court of Human Rights, for its part, has for the moment a different sense of what is meant by self-determination. It has developed the concept of self-determination in the sense of the family and the individual. Its case-law has emphasised that the principle of self-determination forms the basis of the guarantees in Article 8 of the European Convention (right to respect for private and family life)<sup>7</sup>.

Of course, it is the European Convention on Human Rights, rather than international humanitarian law, which is at the core of your Court’s work. But sometimes both Courts have been called upon to analyse the relationship between human rights law and international humanitarian law. It is rather routine for the International Court of Justice to have to deal with this issue. In the advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, the International Court found it had to consider both branches of law, treating international humanitarian law as *lex specialis*<sup>8</sup>. I have the impression in reading your interesting case-law that what you view as the parameters of the proper role of the European Court of Human Rights in relation to international humanitarian law is still work in progress. And we have noticed that in the 2008 *Korbely v. Hungary* case, in determining whether an act of which the applicant was convicted amounted to a crime against humanity as that concept was understood

in 1956, the European Court of Human Rights referred to the Fourth Geneva Convention, Additional Protocol I, and Additional Protocol II<sup>9</sup>. Some very direct analysis of international humanitarian law ensued.

Another contemporary legal issue for both Courts is the tension between the customary international law on immunity and the drive against impunity for human rights violations. In three Grand Chamber judgments in late 2001, the European Court of Human Rights held that the application of the doctrine of sovereign immunity, effectively preventing legal proceedings against foreign governments, did not violate the right to a fair trial under Article 6 of the European Convention on Human Rights<sup>10</sup>. The ICJ had been confronted in the 2002 *Arrest Warrant* case with the question of whether a human rights exception to immunity existed in customary international law<sup>11</sup>. After examining the practice of regional and national courts, the ICJ concluded that there did not yet exist any form of exception in general international law to the rule according immunity from criminal jurisdiction to incumbent Ministers for Foreign Affairs, even where they were suspected of having committed war crimes or crimes against humanity. But this is a rapidly evolving area of law that both our Courts will no doubt continue to watch carefully.

A recurring question before the International Court and the European Court of Human Rights is the territorial scope of various human rights obligations. In your Court, this question usually arises in the context of whether the obligations of the European Convention on Human Rights are applicable to a government when acting abroad. Given the *Banković, Loizidou, Issa and Ilaşcu* cases<sup>12</sup>, more may yet be said on this issue in the future.

At the ICJ, we have seen the question come before us in two ways. First, there is the general proposition that a government is responsible for acts committed under its authority abroad. In the *Congo v. Uganda* case, for example, it held that Uganda at all times had responsibility for all actions and omissions of its own military forces in the territory of the Democratic Republic of the Congo<sup>13</sup>. Second, the International Court occasionally has to look at whether, by reference to a treaty, a State is under those treaty obligations when acting abroad. The answer turns upon the reading in context of the treaty, in the light of its object and purpose. In the recent *Georgia v. Russia* case<sup>14</sup>, the parties disagreed on the territorial scope of the application of the obligations of a State Party under the Convention on the Elimination of All Forms of Racial Discrimination: Georgia claimed that the convention did not include any limitation on its territorial application, while the Russian Federation claimed that

5 *Certain German Interests in Polish Upper Silesia (Germany v. Poland)*, PCIJ, Series A no. 7.

6 *Minority Schools in Albania*, Advisory Opinion, PCIJ, Series A/B no. 64, p. 17.

7 See *Pretty v. the United Kingdom*, no. 2346/02, ECHR 2002-III, and *Van Kück v. Germany*, no. 35968/97, ECHR 2003-VII.

8 ICJ Reports 2004, § 106.

9 *Korbely v. Hungary* [GC], no. 9174/02, to be reported in ECHR 2008. See Section II on relevant international and domestic law.

10 See *McElhinney v. Ireland* [GC], no. 31253/96, ECHR 2001-XI; *Al-Adsani v. the United Kingdom* [GC], no. 35763/97, ECHR 2001-XI; and *Fogarty v. the United Kingdom* [GC], no. 37112/97, ECHR 2001-XI. See also M. Emberland, “International Decisions”, *AJIL*, vol. 96, 2002, p. 699.

11 *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, ICJ Reports 2002.

12 *Banković and Others v. Belgium and Others* (dec.) [GC], no. 52207/99, ECHR 2001-XII; *Loizidou v. Turkey* (preliminary objections), 23 March 1995, Series A no. 310; *Issa and Others v. Turkey*, no. 31821/96, 16 November 2004; and *Ilaşcu and Others v. Moldova and Russia* [GC], no. 48787/99, ECHR 2004-VII.

13 *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, ICJ Reports 2004, § 180.

14 *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, Order indicating provisional measures, 15 October 2008.

the provisions of the convention could not govern a State's conduct outside its own borders. In its order of last October, the ICJ observed that there was no restriction of a general nature in the Convention on the Elimination of All Forms of Racial Discrimination relating to its territorial application and the provisions in question (Articles 2 and 5) generally appeared to apply to the actions of a State Party when it chose to act beyond its territory.

The *Georgia v. Russia* case is significant for another reason – it is an example of the contemporary phenomenon of the same or similar legal questions surfacing in diverse fora. This is a consequence of the dispersal of responsibility for interpreting international law – especially human rights law – among different judicial and quasi-judicial bodies. In addition to the International Court of Justice and the three major regional systems for the protection of human rights in Europe, the Americas and Africa, there are the treaty bodies responsible for monitoring implementation of the provisions of international human rights treaties dealing with the two Covenants, the elimination of racial discrimination, discrimination against women, torture, the rights of the child, and the rights of migrant workers. Moreover, in the last fifteen years, following the mass atrocities in the former Yugoslavia and Rwanda, we have seen the creation of *ad hoc* international tribunals with jurisdiction to try the individuals responsible for such crimes as well as the establishment of a permanent International Criminal Court.

The dispute between Georgia and Russia over the events of August 2008 came before the ICJ as a contentious proceeding regarding the application of the Convention on the Elimination of All Forms of Racial Discrimination. In its order, the International Court noted that the matter might also properly be brought to the attention of the Committee on the Elimination of Racial Discrimination. Around the same time, Georgia lodged an inter-State application with the European Court of Human Rights alleging violations of Articles 2 (right to life) and 3 (prohibition of inhuman and degrading treatment) of the European Convention on Human Rights and Article 1 (protection of property) of Protocol No. 1 to the Convention. The European Court ordered provisional measures calling on both parties to comply with their engagements under the Convention, particularly Articles 2 and 3. In addition, the European Court has since received thousands of applications against Georgia concerning hostilities which broke out in South Ossetia in August 2008. Meanwhile, the Prosecutor of the International Criminal Court has stated that the situation in Georgia is under analysis by his Office.

We saw this same phenomenon of reformulated claims, on essentially the same subject matter, at the time of the 1999 air strikes by NATO against the Federal Republic of Yugoslavia. Here, too, the International Court of Justice and the European Court of Human Rights were both engaged.

The plethora of judicial and quasi-judicial bodies operating in the field of human rights does pose the risk of divergent jurisprudence.

Some perceived the case of *Loizidou v. Turkey*<sup>15</sup> as an example of the European Court of Human Rights taking a different position from the ICJ on the question of reservations to human rights treaties. My own view is that any perceived bifurcation depends on what one believes to have been the scope of the International Court's

judgment in the 1951 advisory opinion on *Reservations to the Genocide Convention*<sup>16</sup>, in particular whether it precluded a court from doing anything other than noting whether a particular State had objected to a reservation. In the 2006 *Congo v. Rwanda* judgment, five judges of the ICJ (including myself) referred expressly to the *Loizidou v. Turkey* case in a joint separate opinion<sup>17</sup>, observing that the fact that courts such as the European Court of Human Rights had pronounced upon the compatibility of specific reservations to the European Convention on Human Rights, rather than treating the question as a simple matter of bilateral sets of obligations left to the individual assessment of the States Parties to the Convention concerned, did *not* create a "schism" in international law. Rather, the judges saw the jurisprudence of the human rights courts on this question "as developing the law to meet contemporary realities"<sup>18</sup>.

It has long been my view that the best way to avoid fragmentation of international law is for us all to keep ourselves well informed of each other's decisions, to have open channels of communication, and to build on the cordial relationships that already exist among the courts in The Hague, Strasbourg, Luxembourg, Arusha and so on. I had the pleasure of hosting an inter-court seminar on legal topics of mutual interest in December 2007 which was attended by judges from your Court, a team from the European Court of Justice led by President Skouris, along with members of the International Criminal Tribunal for the former Yugoslavia and the ICJ. President Costa and I hope that such meetings will take place on a regular basis, with different courts hosting each time. Today's judicial seminar has proved to be a further effective way of encouraging the fruitful exchange of ideas.

President Costa, members of the Bench, Minister Dati, excellencies, ladies and gentlemen,

The European Court of Human Rights is surely one of the busiest and most exemplary of international judicial bodies. It exerts a profound influence on the laws and social realities of its member States and has become the paradigm for other regional human rights courts, not to mention other international judicial bodies in general. It is a court that continually renews itself, adjusting its procedures to maximise efficiency and to address the considerable operational problems that face it. From our seat in The Hague, the judges of the International Court of Justice admire all that you have achieved, and we will continue to follow your work with the greatest interest, constantly looking for ways in which we can be partners in protecting human rights.

Thank you for this invitation and we warmly congratulate you on your 50<sup>th</sup> anniversary and all the remarkable work of your Court in this last half-century.

<sup>15</sup> See note 3 on page 84.

<sup>16</sup> ICJ Reports 1951, p. 15.

<sup>17</sup> *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*, ICJ Reports 2006, joint separate opinion by Judges Higgins, Kooijmans, Elaraby, Owada and Simma.

<sup>18</sup> *Ibid.*, § 23.



## Rachida Dati

**Garde des Sceaux  
French Minister of Justice**

President of the Court, Madam President, members of the Court, excellencies, ladies and gentlemen,

It is a great honour for me to address your Court today as Minister of Justice of the host country. The presence of such a distinguished audience at this solemn hearing, marking the 50<sup>th</sup> anniversary of the European Court of Human Rights, attests to the status that your Court has acquired in the European legal arena. I am particularly grateful to you, President Costa, for giving me the opportunity to emphasise this.

After the proclamation, on 10 December 1948, of the Universal Declaration of Human Rights by the General Assembly of the United Nations, the adoption in 1950 of the Convention for the Protection of Human Rights and Fundamental Freedoms and the creation of your Court marked a turning point in the history of our continent.

The Council of Europe foresaw that relations between our various countries had to be consolidated by strengthening our democratic values, guaranteeing liberty and promoting the rule of law.

For the last fifty years your Court has shown its determination and will to make this “Europe of law” a reality. It has fulfilled that goal.

The establishment of the right of access to an impartial tribunal and the right to a fair trial guarantees, together with the implementation of an ambitious and coherent case-law in areas as varied as bioethics, immigration law or the protection of minorities, have made the European Court of Human Rights an unchallenged authority in respect of citizens’ rights and guarantees.

This is the fruit of very intensive work which must be commended: the Court has handed down more than 10,000 judgments since it was first established.

With the now forty-seven member States of the Council of Europe, your judicial activity will continue to gather pace and your Court will need to ensure that it has the means to fulfil its mission in the best possible conditions.

I know, Mr President, that you are pursuing this goal with determination. It will require a commitment on the part of all States.

The Court has done much to bring our fellow Europeans closer together, rallying them around fundamental values. Your case-law has led the way on many sensitive issues of society and has broken down legal borders. Europeans are increasingly turning towards your Court – there is no better proof of the trust and faith that civil society has placed in you.

I would like to take this opportunity of your anniversary to look to the future with you.

The defence of democracy, the rule of law and the protection of fundamental freedoms are priorities that we must never cease to affirm. Europe has brought us peace – that is a heritage we must preserve. Human rights still have to be fought for – let us not forget all those who turn to your Court, and to the Council of Europe, seeking symbols, examples, guidance.

In this connection, may your Court continue to have a rewarding and fruitful dialogue not only with domestic courts but also with lawmakers.

I am particularly attached to this kind of dialogue and confrontation. Such exchanges help us to make progress and to strengthen our legal systems, to ensure that the adversarial principle and the conditions of a truly fair trial are guaranteed at all stages of our procedures.

Your Court sets requirements that occasionally impose changes to applicable domestic legislation or sometimes even call it into question. But that should not be a cause for concern: our legal systems are not set in stone and the case-law of the Court here in Strasbourg has enabled better adaptation to the evolution of our societies and their aspirations. That is how France perceives things and I am sure that this view is widespread.

The European Union’s accession to the Convention for the Protection of Human Rights and Fundamental Freedoms – once the Lisbon Treaty has been ratified – will be a historic event.

It will be the sign of a rapprochement and enhanced complementarity between your Court and the Court of Justice of the European Communities. I look forward to that occasion. The presence here today of the President of the Court of Justice is certainly a testimony to the excellent relations that already exist between your two Courts.

Lastly, you have mentioned, Mr President, that you wish to convene in the near future “*États généraux*” on human rights in Europe. I would like to take this opportunity to express my interest in and support for this important initiative.



President of the Court, Madam President, members of the Court, excellencies, ladies and gentlemen,

At a time when Europe is asking questions about its contours, its borders, and is seeking to strengthen its common identity, your Court has been reminding us, for the last fifty years, of the importance of our values.

The protection of human rights and fundamental freedoms is our common achievement: this must never be forgotten or disregarded and, above all, never taken for granted.

We can all rely on your Court to remind us of our commitments and of our responsibilities.

Thank you.

## PHOTOS





## PREVIOUS DIALOGUES BETWEEN JUDGES

- Dialogue between judges - 2008
- Dialogue between judges - 2007
- Dialogue between judges - 2006
- Dialogue between judges - 2005