



# DIALOGUE BETWEEN JUDGES 2012

“How can we ensure greater involvement of national courts in the Convention system?”



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



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# Dialogue between judges

Proceedings of the Seminar  
27 January 2012

*“How can we ensure greater involvement of national courts in the Convention system?”*

Strasbourg, January 2012

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## **Sir Nicolas Bratza**

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

Ladies and gentlemen,

I take the floor very briefly to welcome you all to this year's judicial seminar.

It is for us a high point in the year when we host so many Presidents of Supreme Courts and Constitutional Courts and other senior judicial figures from all across Europe. It makes for a unique occasion of dialogue and exchange at the highest level, and I thank you all for making the journey here today. On every occasion it has been a stimulating and rewarding exercise, well worthy of wider attention through publication of the proceedings in previous years in book form and today on CD-ROM and on the Court's website.

So let me already thank in advance our three invited speakers, as well as those who will contribute to the discussions later on.

The theme this year is framed as a question: How can we ensure greater involvement of national courts in the Convention system? It is a simple and open question. We shall see how easy it is to answer.

It is also a highly relevant and timely question, at this time of reflection on the reform of the Convention system. The reform exercise is as much – if not even more – about the protection of Convention rights nationally as it is about any changes to the supervisory mechanism at European level. This point has been taken by the United Kingdom, currently chairing the Committee of Ministers, and featured prominently in the address made by the Prime Minister to the Parliamentary Assembly earlier this week.

In a moment I shall hand over to Françoise Tulkens who will be the moderator of our seminar.

But before I do, I take this opportunity to thank Françoise publicly for her unflagging commitment to the judicial seminar.

Year after year she has been the moving force behind this event, chairing the preparatory committee with characteristic dynamism and enthusiasm, and has on every occasion given us an excellent day of high-quality discussions. I am sure that is what awaits us this year again.

And with these words of appreciation I now invite Françoise to take the floor.

## Françoise Tulkens

### Vice-President of the European Court of Human Rights

#### Introduction

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

No two years are alike...

Dialogue between judges – in other words, the purpose of these seminars – is, in our opinion, more necessary than ever in 2012. Given the challenges facing fundamental rights in the current economic, social and political climate, it is essential to reiterate that the protection of human rights in Europe is a necessity and a joint responsibility.

It is for this reason that, this year, we have chosen a topic that concerns us all: *“How can we ensure greater involvement of national courts in the Convention system?”* We have broken it down into three questions. Firstly, what is currently the role of the national courts in the Convention system? Secondly, how can the European Court strengthen the role of the national courts? Thirdly, is there a place in the Convention system for consultative opinions or referrals for preliminary rulings, a procedure which could introduce a genuine relationship of inter-court collaboration? Our three rapporteurs – only two of whom are present today, as Judge Orlando Afonso, President of the Consultative Council of European Judges, is confined to bed – have been invited to reply to each of these questions, which clearly overlap.

#### 1. What is currently the role of the national courts in the Convention system?

Although the Convention does not spell out the role of national courts in implementing the Convention system, the obligation for applicants to exhaust domestic remedies under Article 35 § 1 of the Convention ensures that national courts at all levels are structurally involved in the Convention process. This is confirmed by the wording of Article 35 § 3 (b), which provides that an application may not be rejected on the ground that the applicant has not suffered a significant advantage if the case has not been duly considered by a domestic tribunal.

More generally, the obligation on Contracting States under Article 1 of the Convention to secure the substantive Convention rights and freedoms also speaks to the judicial authorities, as do directly the due process guarantees in Articles 5 and 6. The right of access to a court read into the latter provision asserts the key role to be played by the judiciary in the operation of the principles of the rule of law underpinning the Convention.

Over the years, the Court’s case-law has developed a number of principles and rules of interpretation which testify to the crucial role that the national courts – and especially the superior national courts – must play in the Convention system. I am thinking in particular of the principle of subsidiarity and its impact on those aspects that characterise the Court’s intervention, such as its assessment of any restrictions placed on rights and freedoms and the margin of appreciation, or the refusal to act as a *“court of fourth instance”*. The Interlaken and İzmir Conferences both highlighted the importance of strengthening the principle of subsidiarity. However, the essential precondition is effective implementation of the Convention at the domestic level. Subsidiarity in this context is thus a sort of *“supplementary subsidiarity”*. It is national courts

at all levels which must play the primary role in interpreting and giving effect to the Convention norms. The Court's ability to intervene is limited only to those instances where the national courts have been or are unable to ensure effective protection of the rights guaranteed by the Convention.

As to the national courts' perspective, while the Convention is admittedly now incorporated into the national legal systems of all the Contracting States, given the variety of forms in which its provisions have been transposed it is difficult to paint an overall picture<sup>1</sup>. Nonetheless, there are clearly significant differences in how the national courts deal with issues concerning the Convention and apply the Strasbourg case-law.

In the United Kingdom, for example, national courts are required to take account of the Strasbourg case-law under the Human Rights Act 1998. In a famous statement in what was then the House of Lords, the late Lord Bingham explained this duty as follows: *"The duty of national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less."*<sup>2</sup> However, the dialogue between the United Kingdom courts and Strasbourg has also been expressed in different terms by Lord Phillips: *"The requirement to 'take into account' the Strasbourg jurisprudence will normally result in [the Supreme Court] applying principles that are clearly established by the Strasbourg Court. There will however be rare occasions where [the Supreme Court] has concerns as to whether a decision of the Strasbourg Court sufficiently appreciates or accommodates particular aspects of our domestic process. In those circumstances it is open to [the Supreme Court] to decline to follow the Strasbourg decision, giving reasons for adopting this course. This is likely to give the Strasbourg Court the opportunity to reconsider the particular aspect of the decision that is in issue, so that there takes place what may prove to be a valuable dialogue between [the Supreme Court] and the Strasbourg Court."*<sup>3</sup> The *Al-Khawaja and Tahery v. the United Kingdom* judgment of 15 December 2011 of our Grand Chamber is a perfect illustration and the concurring opinion of Judge Bratza a model of moral integrity<sup>4</sup>.

In France, as Mr Guyomar, the public rapporteur, has noted, the *Conseil d'Etat*, *"seeks to understand the precise meaning of the European case-law, in order to apply it correctly, to anticipate it in a reasonable manner or even, where it considers this necessary, to depart from it properly informed"*<sup>5</sup>.

The German Federal Constitutional Court has held: *"The Basic Law accords particular protection to the central stock of international human rights. This protection ... is the basis for the constitutional duty to use the European Convention on Human Rights in its specific manifestation when applying German fundamental rights too ... As long as applicable methodological standards leave scope for interpretation and weighing of interests, German courts must give precedence to interpretation in accordance with the Convention."*<sup>6</sup> In the same case the Federal Constitutional Court added its view of what taking into account Strasbourg decisions amounted to: *"it means taking notice of the Convention provision as interpreted by the [European Court of Human Rights] and applying it to the case, provided the application does not violate prior-ranking law, in particular constitutional law."*

1. See H. Keller and A. Stone Sweet, *A Europe of Rights, the Impact of the ECHR on National Legal Systems*, Oxford University Press, 2008.

2. *R (Ullah) v. Special Adjudicator* [2004] INLR 381.

3. Lord Phillips in *R. v. Horncastle & Others* [2009] U.K.S.C. 14. See E. Bjorge, "National supreme courts and the development of ECHR rights", *International Journal of Constitutional Law*, vol. 9, no. 1, 2001, pp. 5-31.

4. [GC], nos. 26766/05 and 22228/06, to be reported in ECHR 2011.

5. M. Guyomar, "Le dialogue des jurisprudences entre le Conseil d'Etat et la Cour de Strasbourg: appropriation, anticipation, émancipation", *Mélanges en honneur de Jean-Paul Costa*, Dalloz, 2011.

6. BVerfG 111, 307 ("Görgülü"). However, see the "Leitsätze": "1. The principle that the judge is bound by statute and law (Article 20.3 of the Basic Law (Grundgesetz – GG)) includes taking into account the guarantees of the European Convention for the Protection of Human Rights and Fundamental Freedoms and the decisions of the European Court of Human Rights (ECHR) as part of a methodologically justifiable interpretation of the law. Both a failure to consider a decision of the ECHR and the "enforcement" of such a decision in a schematic way, in violation of prior-ranking law, may violate fundamental rights in conjunction with the principle of the rule of law. 2. In taking into account decisions of the ECHR, the state bodies must include the effects on the national legal system in their application of the law. This applies in particular when the relevant national law is a balanced partial system of domestic law that is intended to achieve an equilibrium between differing fundamental rights."

For its part, the Polish Constitutional Court has established the following principle with regard to the applicability of norms for the protection of human rights: “[the] need to take account of the existence of a judgment by the European Court of Human Rights in the context of the activities of State domestic bodies gives rise to an obligation on the Constitutional Court, in examining [cases], to make use of principles and methods of interpretation that are capable of resolving any possible conflict between the norms of Polish law and those arising from the Convention.”<sup>7</sup>

These examples are very succinct<sup>8</sup>, but I would invite you to consult the work of the Consultative Council of European Judges in this respect, such as its Opinion No. 9 (2006) on “*The role of national judges in ensuring an effective application of international and European law*”. It describes the forms of dialogue that may exist between the national superior courts and the Strasbourg Court, a dialogue based on mutual respect and trust. As President Bratza wrote in the most recent edition of the *European Human Rights Law Review* on “*The relationship between the UK Courts and Strasbourg*”: “... there is room for increased dialogue between the judges of the courts, both informally and through their judgments. ... Dialogue through judgments is of equal importance.”<sup>9</sup>

How can this dialogue be made meaningful? The second and third questions will seek to provide a response.

## 2. How can the European Court strengthen the role of national courts in the Convention system?

More specifically, what conditions are necessary so that the national courts are able and willing to play their role as principle guarantors of the Convention?

In the first instance, there are practical aspects. It is clear that, if the national courts are to play the role assigned to them by the Convention system, in other words, to apply the Convention directly in the light of the Court’s case-law, then they must have access to that case-law. Although a number of isolated initiatives have been taken over the years, much remains to be done. The Court is currently working on two related projects in this area. The first consists of developing a new version of its case-law database (HUDOC), with significantly improved search options. The second involves translating into as many languages as possible the Court’s main judgments, in particular those which raise new case-law issues. At the same time, the Izmir Conference approved the proposal for the creation by the Court, on a budget-neutral basis, of a training unit for professionals, which would include judges<sup>10</sup>.

A further and more sensitive issue is the extent to which the Court can use judicial policy to encourage the national courts to implement in full the task conferred on them by the Convention.

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7. Judgment of the Polish Constitutional Court of 18 October 2004, P 8/04, cited, together with other examples, in the reference document for the speech by Mr Christos Pourgourides, Chair of the Committee for Legal Affairs and Human Rights (AS/Jur) of the Parliamentary Assembly of the Council of Europe, at the conference on “*Strengthening subsidiarity: integrating the Court’s case-law into national legislation and court practice*” (Skopje, 1-2 October 2010).
  8. For a comparative analysis of the methods used by the British, French and German courts, see E. Bjorge, “*National supreme courts and the development of ECHR rights*”, *op. cit.*
  9. N. Bratza, “*The relationship between the UK Courts and Strasbourg*”, *E.H.R.L.R.*, 2011, issue 5, p. 511.
  10. See the Izmir Declaration, adopted at the High Level Conference on the Future of the European Court of Human Rights, organised within the framework of the Turkish Chairmanship of the Committee of Ministers of the Council of Europe in Izmir (Turkey) on 26 and 27 April 2011, Follow-up Plan, point 2.g. of part F, accessible at the following address: <http://www.coe.int/t/dghl/standardsetting/conferenceizmir/Declaration%20Izmir%20E.pdf>

The predictability of our case-law is an important element. While it is well-established that there is no formal doctrine of precedent at European level, the Court has recognised that the evolutive or dynamic character of the Convention must be tempered by other considerations. Thus it has held: “while the Court is not formally bound to follow any of its previous judgments, it is in the interests of legal certainty, foreseeability and equality before the law that it should not depart, without cogent reason, from precedents laid down in previous cases”<sup>11</sup>. The Court is currently considering whether to give the option of relinquishment to the Grand Chamber under Article 30 of the Convention compulsory force under the Rules of Court where a Chamber is contemplating departing from existing settled case-law.

As regards its relationship with superior national courts, the Court repeated in 2011 in the *MGN Limited v. the United Kingdom* judgment that: “Where ... the superior national courts have analysed in a comprehensive and convincing manner the precise nature of the impugned restriction, on the basis of the relevant Convention case-law and principles drawn therefrom, this Court would need strong reasons to differ from the conclusion reached by those courts by substituting its own views for those of the national courts on a question of interpretation of domestic law ... and by finding, contrary to their view, that there was arguably a right recognised by domestic law.”<sup>12</sup> The question is whether this approach can have wider application in different Convention contexts?

Finally, are our judgments drafted in a way which facilitates – or, on the contrary, complicates – subsequent application of the general principles identifiable in them? It is for you to tell us.

### 3. Is there a place for consultative opinions and preliminary questions to other courts?

Here is one issue that reminds me of the Loch Ness Monster or Godot... Frequently discussed, never seen.

The preliminary reference procedure has proved an effective instrument in enabling the law of the European Communities – now the law of the European Union – to enter the domestic systems. Given the nature of the procedure and the specific features of EU law, it is true that this model would probably not be best adapted to literal transposition into the Convention system<sup>13</sup>.

It is nonetheless the case that the possibility of creating a certain form of institutionalised dialogue continues to be discussed. The Group of Wise Persons set up in 2005 to examine the long-term effectiveness of the Convention’s control mechanism makes specific reference to it, particularly with a view to strengthening the Court’s constitutional role<sup>14</sup>.

In its Opinion adopted in preparation for the İzmir Conference, the Court emphasised: “The idea of allowing national courts to seek advisory opinions aims at reinforcing domestic implementation of the Convention in accordance with the principle of subsidiarity ...”<sup>15</sup>

The İzmir Declaration of 27 April 2011 invited the Committee of Ministers to reflect on the advisability of introducing a more extensive consultative procedure. Should such a procedure enable the highest national courts to request advisory opinions from the Court concerning the interpretation and application of the

11. See, for example, *Chapman v. the United Kingdom* [GC], no. 27238/95, § 70, ECHR 2001-I.

12. No. 39401/04, §150, 18 January 2011. See also *Roche v. the United Kingdom* [GC], no. 32555/96, § 120, ECHR 2005-X.

13. Report by the Group of Wise Persons to the Committee of Ministers, 15 November 2006, doc. CM(2006)203, § 80.

14. *Ibid.*, §§ 76-86.

15. Opinion adopted by the Plenary Court on 4 April 2011.

Convention, it would help to clarify the Convention's provisions and the Court's case-law. Consultative opinions would be intended to provide further guidance to assist States Parties in avoiding future violations<sup>16</sup>. Discussions on this subject are currently being conducted by the Committee of experts on the Reform of the Court (DH-GDR). Thus, a proposal, or at least a report on the subject, will probably be submitted to the Committee of Ministers in 2012 with a view to introducing institutionalised dialogue of this sort.

## Conclusion

Writing in 1944 on a future international bill of rights Sir Hersch Lauterpacht stated: "*States must confer upon their courts the power and impose on them the duty to pass judgment or to express an opinion on the conformity of the acts of the legislative, judicial, and administrative authorities with the clauses of the Bill of Rights.*"<sup>17</sup> That far-sighted analysis of the crucial role to be played by national courts in any international system of human rights protection remains entirely valid today. Enhancing that role within the Convention system must therefore be a priority in the context of securing its future effectiveness.

This will require the adoption of measures both in Strasbourg and within the Contracting States, and also the adoption of a particular frame of mind. As François Rigaux suggests, "*the process of interaction (Wechselwirkung) depends on this, since no individual actor can claim to have supremacy over the others; like the concept of sovereignty, the very concept of supremacy is incompatible with the effective safeguard of fundamental rights*"<sup>18</sup>.

Before getting to the heart of the matter and handing the floor to the three speakers who will help us explore these topics, I should like to thank the working party within the Court which has prepared this seminar: judges Ledi Bianku, Guido Raimondi, Angelika Nußberger, Julia Laffranque and Linos-Alexandre Sicilianos, as well as Roderick Liddell, to whom I wish to pay special tribute. Sincere thanks also to Valérie Schwartz for her "*quiet strength*". I should also like to express my deep gratitude to Sylvie Ruffenach, who has been my assistant since 1998. Finally, last but very far from least, I should like to thank in advance the skilled professionals who are sitting in the interpreters' booths this afternoon (Sally Bailey, Chloé Chenetier, Grégoire Devictor, Paola Giraudo, Annamaria Vaccari). I might be your worst nightmare, but you know how much I appreciate your work!

16. See the İzmir Declaration, op. cit., Follow-up Plan, part D. "*Advisory opinions.*"

17. H. Lauterpacht, *An International Bill of the Rights of Man*, New York, 1945.

18. F. Rigaux, "*Conclusions*", *La Charte des droits fondamentaux de l'Union. Son apport à la protection des droits de l'homme en Europe*, under the supervision of J.-Y. Carlier and O. De Schutter, Brussels, Bruylant, 2002, p. 262.

## Gertrude Lübbe-Wolff

Justice of the Federal Constitutional Court of Germany

### HOW CAN THE EUROPEAN COURT OF HUMAN RIGHTS REINFORCE THE ROLE OF NATIONAL COURTS IN THE CONVENTION SYSTEM?

To play a cooperative and constructive role in the Convention system, national courts must be *able* and *willing* to do so. What can the European Court of Human Rights do to promote that ability and willingness?

Ability to cooperate is certainly an important issue, involving language problems and other questions of access to information. I have nevertheless decided to focus on the motivational aspect (“*willingness*”) because it is paramount. As women who have tried to make their husbands cooperate in housekeeping and child raising know, ability follows willingness, not *vice versa*.

Whatever the legal powers of the European Court of Human Rights and whatever the interpretation of these powers in the case-law of the Court, the *factual* power of this Court – its chances to command loyalty, strengthen the Convention system and prevent it from breaking apart – ultimately depend on only two resources: on the power of the ideal of safely protected human rights, and on the Court’s reputation as *the* institution standing for the approximation of the entire continent to that ideal.

Both these potentially very potent resources – the power of the ideal and the image of the Court as its institutional epitome – are not entirely at the disposal of the Court itself, but they certainly are heavily affected by the way the Court defines its own role and cooperates with the national courts.

It is my conviction that the long-term viability and strength of the Convention system depend on a division of labour based on dialogue and procedural as well as substantive subsidiarity, and I would like to draw attention to the way dialogue between the courts in the exercise of their respective jurisdictions and the principle of subsidiarity are interconnected. Based on some considerations concerning this nexus, I will discuss two of the reform proposals which the organisers have suggested as possible topics for my presentation: the proposal to permit domestic courts to seek advisory opinions from the European Court of Human Rights – a proposal which has been recommended, *inter alia*, on the grounds that it would foster dialogue and reinforce the principle of subsidiarity – and a proposal aiming to secure more judicial restraint on the part of the Court in cases where domestic courts have applied Convention rights.

#### 1. Procedural subsidiarity

The procedural principle of subsidiarity is expressed in the rule regarding the exhaustion of domestic remedies found in Article 35 § 1 of the Convention. The purpose of that rule, the Court has explained, is “*to afford the Contracting States the opportunity of preventing or putting right the violations alleged against them before those allegations are submitted to the Court ...*”.<sup>1</sup>

From this explanation one might be inclined to infer that, wherever the courts of a Contracting State have not made use of the opportunity to find that the alleged violation had indeed occurred, the rule on exhaustion

1. *Kudła v. Poland* [GC], no. 30210/96, § 152, ECHR 2000-XI.

of domestic remedies has somehow failed in its purpose. Such a view would however be wrong: it would neglect the communicative function of subsidiarity, which is also important in domestic legal systems.

In a well-ordered judicial system, the higher levels operate under rules of subsidiarity. They will not examine claims which the applicant has failed to raise properly before the lower courts. This is of course also true for the German Federal Constitutional Court ("FCC"). We consider the corresponding limitations of our own power as important elements of a rational, efficient division of labour between different courts which includes the principle that higher courts should judge only after the lower courts – which usually have more specialised legal experience and better knowledge of realities in the relevant field – have examined the case. In our relationship with the regular courts, by taking seriously the principle that the less central courts must speak and be heard first, this secures the most important of all forms of dialogue. It is an essential prerequisite to the smooth cooperation that characterises the relationship between the FCC and the regular courts in Germany.

As an element of cooperation between the Strasbourg Court and domestic courts, procedural subsidiarity is obviously even more important, because the Court acts at a more remote distance and the information gap that needs to be bridged is much wider.

It has been said that the Court puts its reputation at risk when it fails to respect the principle of subsidiarity (including, for instance, the rather formal rules governing admissibility of applications to the French Court of Cassation)<sup>2</sup>. It must indeed be borne in mind that procedural subsidiarity as a principle of the Convention system is of vital importance not only as an instrument of dialogue between the highest national courts and the Strasbourg Court but also as a matter of respect for the rules of subsidiarity and other procedural rules under which the domestic courts operate, in other words as a matter of respect for the division of labour between domestic courts which the domestic law deems to be rational and efficient, and for the necessary dialogue between judges at the domestic level.

In all fairness, however, one has to acknowledge the enormous technical difficulties that the Court is faced with in applying the procedural principle of subsidiarity. Checking compliance with the procedural principle of subsidiarity is difficult and cumbersome enough within a domestic system. It is probably impossible for the Strasbourg Court to perform the same task reliably with respect to the legal systems of forty-seven States, each with different and often internally diverse, complex procedural rules governing what an applicant must do to defend his or her claim successfully. This raises intricate questions concerning, *inter alia*, the extent to which the Court can be expected to examine subsidiarity (and act upon its findings) *ex officio* and the adequate role of rules regarding the burden of proof in this context – that cannot be discussed adequately in just a small part of one of the contributions to a dialogue seminar.

This has implications when assessing the proposal to permit national courts to seek advisory opinions from the Strasbourg Court.

## 2. Advisory opinions: a means of promoting dialogue and reinforcing subsidiarity?

At the İzmir Conference in April 2011, the Committee of Ministers was invited to reflect on the advisability of introducing a procedure allowing the highest national courts to seek advisory opinions from the Court concerning the interpretation and application of the Convention<sup>3</sup>. The Court has encouraged discussion of

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2. Guy Canivet (then president of the Court of Cassation, now a member of the Constitutional Council) in his contribution to the first *Dialogue between judges* in 2005, p. 31.

3. Declaration of the High Level Conference on the Future of the European Court of Human Rights, organised within the framework

this idea<sup>4</sup>. A Norwegian/Dutch proposal, according to which the highest national courts would be entitled but not obliged to seek a (non-binding) advisory opinion from the Strasbourg Court in cases revealing a potential systemic or structural problem, is currently being discussed by the Committee of Experts on the Reform of the Court (DH-GDR)<sup>5</sup>.

It has been suggested that permitting such advisory opinions would foster dialogue between the Strasbourg Court and the national courts and reinforce the principle of subsidiarity<sup>6</sup>. Would that really be the effect? I realise that in view of the position already taken by the Court, a sceptical comment may be unwelcome and futile; but since we are here for dialogue, let me voice it nevertheless.

By way of example, the FCC will soon have to decide on the conformity with Germany's constitution of legislation providing for a so-called *reserved preventive detention*<sup>7</sup>. It will have to consider whether this concept is compatible with the second sentence and sub-paragraph (a) of Article 5 § 1 of the Convention – in particular whether there is a sufficient causal nexus<sup>8</sup> between the original conviction and the imposition of the reserved preventive detention.

If seeking an advisory opinion were permitted, we might just ask the Court and would then presumably decide according to its advice<sup>9</sup>. Since there is no procedure allowing us to seek an advisory opinion as yet, we will instead have to make up our own minds on the relevant meaning of the Convention, based on a careful analysis of the Convention and the pertinent case-law of the Court and of what it probably means in the carefully analysed specific context of the German legal provisions under scrutiny (in terms of the purposes of these provisions, their full legal meaning<sup>10</sup>, possible alternatives that would equally serve the legislative purpose, and so on).

Suppose we end up finding the domestic provisions to be in violation of constitutional rights – possibly as a result of finding that they cannot be approved in the light of European case-law: if that were to be the case, there would not be a lack of dialogue to be complained about from the point of view of the Convention system. And, by the way, the Court would be spared an application, probably even many.

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of the Turkish Chairmanship of the Committee of Ministers of the Council of Europe, İzmir, Turkey, 26-27 April 2011, D.2 (<https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=2074588&SecMod=1&DocId=1733590&Usage=2>).

4. See the Opinion of the Court on the İzmir Conference (adopted by the Plenary Court on 4 April 2011), paragraph 15: “*The idea of allowing national courts to seek advisory opinions aims at reinforcing domestic implementation of the Convention in accordance with the principle of subsidiarity. Although there is a risk that it might initially generate more work, the longer term objective would clearly be to ensure that more cases are dealt with satisfactorily at national level. The Court takes the view that this proposal could be explored further and again considers that it should be involved closely in this process.*”
5. Draft CDDH Report on the proposal to extend the Court's jurisdiction to give advisory opinions, Appendix VII to the Report on the 8th meeting of the Committee of Experts on the Reform of the Court (DH-GDR), DH-GDR(2011) R 8 Appendix VI. ([http://www.coe.int/t/dghl/standardsetting/cddh/DHGDR\\_en.asp](http://www.coe.int/t/dghl/standardsetting/cddh/DHGDR_en.asp))
6. Loc. cit. (note 5), at B. 3. (vi). See also note 4.
7. See § 66 (a) of the German Criminal Code (*Strafgesetzbuch*). § 66 (a) authorises a court convicting someone for certain serious crimes to provide, as part of the conviction, that security detention *may* be imposed upon the convicted person by judicial decision at the end of the convicted person's term of sentence if it is then established that, considering the person, his or her criminal act(s) and his or her development up to the time of the reserved decision, the expectation is that he or she would, if released, commit serious crimes that would cause severe physical or psychological damage to the potential victims.
8. Compare with the Court's case-law in *Van Droogenbroeck v. Belgium*, 24 June 1982, § 35, Series A no. 50, and *M. v. Germany*, no. 19359/04, § 88, with further references, 17 December 2009.
9. In its *Görgülü* decision of 14 October 2004 (order of 14 October 2004 – 2 BvR 1481/04 –, BVerfGE 111, 307 (315); an English version is available for downloading at [www.bverfg.de](http://www.bverfg.de)), the FCC reaffirmed that all national courts must in so far as methodologically possible interpret German law, including the fundamental rights set out in the national Constitution (*Grundgesetz*), in conformity with the Convention as interpreted by the Strasbourg Court (this had been established before, see BVerfG, order of 26 March 1987 – 2 BvR 589/79 et al. –, BVerfGE 74, 358 (370)). *Görgülü* (loc. cit., pp. 317, 329 et seq.) also made it clear that as a consequence, whereas constitutional complaints cannot be based directly on Convention rights, alleged violations of Convention rights and an alleged disregard of the case-law of the Strasbourg Court can be brought indirectly to the FCC on the presumption that where a Convention right has been violated, there is also a violation of the corresponding constitutional right.
10. In other words, the ensemble of prerequisites and consequences of reserved security detention.

Suppose, on the other hand, that we end up finding that there is no violation of constitutional rights, one of the reasons being that it is considered there is compliance with the Convention. The plaintiff may then take his or her case to the Court and challenge the result of our analysis. The Court would then be able to decide on the basis of all the arguments discussed in our judgment.

In my view, a decision of the Strasbourg Court made under these circumstances would be based on much more of a dialogue than a decision simply based on a question.

It might be objected that the advisory opinion is not binding, so that the domestic courts remain at liberty to confront the Strasbourg Court with an alternative view in their decision. But that would be a merely theoretical liberty, and the “*dialogue*” thus instituted would not really be a bottom-up dialogue, as it ought to be<sup>11</sup>.

It might also be objected that the referring national court could be encouraged or even expected to take a stand on the matter in the request for an advisory opinion and base this on all the above-mentioned analysis. But that would leave the procedure without the advantage of being able to spare national courts the necessity of speaking out in a situation of uncertainty about the Court’s position (and thereby preventing open disagreement between national and international levels of jurisdiction).

States Parties and national courts may find seeking advisory opinions a helpful way to reduce the risk of national courts being “*corrected*” by the Strasbourg Court. National courts may even find referring questions to the international level a helpful or even necessary way to avoid pressure by and conflict with their respective national governments. If strong demands for this kind of relief are articulated on the part of national governments or national courts<sup>12</sup>, this must of course be taken seriously. But the reverse side of the medal should also be considered:

- Allowing national courts to seek advisory opinions would “*relieve*” national legal systems of the onus of developing a position of their own on open Convention issues. It would thereby allow them to make the imperatives of human rights a matter of *import* rather than a matter of domestic production and genuine domestic belief.
- It would leave the Strasbourg Court much less well-equipped with information from the national level than it would be if it had to decide cases only.
- And it would foster judicial rule-making at higher levels of abstraction as opposed to the more judicious, incremental case-by-case approach that seems so much more appropriate for an international court just because it leaves more room for dialogue in future cases (and because in practice there is virtually no way that international courts can be overruled by legislation).

For these reasons, I doubt that the instrument would be conducive to better integration into and assimilation of the Convention system. To advertise it as reinforcing the principle of subsidiarity seems to me to turn the matter upside down. I would rather see it as opposed to the idea of subsidiarity in its procedural as well as in its substantive sense.

### 3. Substantive subsidiarity

Most of the serious opposition that decisions of the Strasbourg Court have met is not related to procedural subsidiarity. It is decisions on substantive matters – on questions of prisoners’ right to vote<sup>13</sup>, of crucifixes in

11. This argument was also adduced by my colleague Judge Gabriele Britz at a recent bilateral meeting of judges from the Strasbourg Court and the FCC.

12. Compare the İzmir Declaration, loc. cit. (note 3), preamble no. 13: “Taking into account that some States Parties have expressed interest in a procedure allowing the highest national courts to request advisory opinions from the Court concerning the interpretation and application of the Convention ...”.

13. *Hirst v. the United Kingdom* (no. 2) [GC], no. 74025/01, ECHR 2005-IX.

State schools<sup>14</sup>, of the right to a fair trial<sup>15</sup>, and so on – that have produced the most severe conflicts and solicited the harshest critical comments.

Obviously, the Court cannot make it its primary objective to avoid opposition. It is there to protect Convention rights. In performing this task, it is bound to meet some criticism. National courts as well as national parliaments must be aware that in an international system for the protection of human rights, their respective views on what certain human rights do or do not require cannot always prevail. Accession to the Convention means accepting that. The Court may in some cases have to make decisions that are hard to take for the respective States Parties. The regular course of affairs in such cases is that national courts, parliaments and other authorities will comply, whether or not they are convinced<sup>16</sup>.

On the part of the Court, the approach most conducive to such compliance, and the only one capable of producing and preserving loyalty to the Convention system in the long run, will be an approach based on the idea that the Convention system is *subsidiary* not only in a procedural, but also in a substantive sense: a system designed not to create *uniform* human rights standards all over Europe, but to step in where minimum standards have not been met.

The idea of substantive subsidiarity is expressed in Article 53 of the Convention, according to which nothing in the Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured in the laws of any High Contracting Party. The Convention thus protects the right of the Contracting Parties to set for themselves higher standards than those guaranteed by the Convention. This provision is of fundamental importance because it leaves space for specific national solutions and thereby increases the likelihood of acceptance of, and decreases the likelihood of destructive conflicts within, the Convention system.

Its implications are most obvious when we look at situations where Convention rights are opposed to each other in a contradictory way, in other words in such a way that extending the right of person A (for example, that person's right to privacy) is tantamount to restricting a conflicting right of person B (for example, a publisher's freedom under Article 10 to write about person A or publish photos of him or her), and *vice versa*. With respect to all situations of this kind, the Court would manifestly run into trouble with the Article 53 ban on restricting rights which are granted on the domestic level if, instead of applying the *minimum* standards for both rights involved and leaving a margin of balancing options to national courts and legislators, it were to undertake to do all the balancing itself<sup>17</sup>.

The doctrines developed in the case-law of the Court concerning national margins of appreciation<sup>18</sup> and the role of consensus (not to be confused with unanimity)<sup>19</sup> are abstract expressions of substantive subsidiarity.

14. *Lautsi v. Italy*, no. 30814/06, 3 November 2009; overruled by *Lautsi and Others v. Italy* [GC], no. 30814/06, to be reported in ECHR 2011.

15. Compare the examples mentioned and commented on by Lord Hoffmann, "The Universality of Human Rights", Judicial Studies Board Annual Lecture, 19 March 2009 ([http://www.judiciary.gov.uk/Resources/JCO/Documents/Speeches/Hoffmann\\_2009\\_JSB\\_Annual\\_Lecture\\_Universality\\_of\\_Human\\_Rights.pdf](http://www.judiciary.gov.uk/Resources/JCO/Documents/Speeches/Hoffmann_2009_JSB_Annual_Lecture_Universality_of_Human_Rights.pdf)), paragraph 29 et seq.

16. As an example of compliance in spite of explicit dissent, see the Swiss Federal Court's (*Bundesgericht*) judgment of 15 September 2010, 9 F 9/2009 (in German: [www.bger.ch](http://www.bger.ch); in French: [www.bger.ch/fr](http://www.bger.ch/fr)), following the Strasbourg Court's judgment in *Schlumpf v. Switzerland*, 8 January 2009, no. 29002/06.

17. For a more detailed analysis, see Gertrude Lübke-Wolff, "Der Grundrechtsschutz nach der Europäischen Menschenrechtskonvention bei konfligierenden Individualrechten. Plädoyer für eine Korridorlösung", in: Martin Hochhuth (ed.), *Nachdenken über Staat und Recht. Kolloquium zum 60. Geburtstag von Dietrich Murswiek*, Duncker & Humblot, Berlin 2010, pp. 193-209.

18. The classic explanation is to be found in *Handyside v. the United Kingdom*, 7 December 1976, § 48, Series A no. 24, where the necessity to respect the margin of appreciation is explicitly related to the principle of subsidiarity.

19. Vladimiro Zagrebelski, "Considérations sur les sources d'inspiration et la motivation des arrêts de la Cour européenne des droits de l'homme", in: Christine Hohmann-Dennhardt, Peter Masuch, Marc Villiger (eds.), *Festschrift für Renate Jaeger*, Kehl (N.P. Engel Verlag) 2011, pp. 211-22 (pp. 213f.).

The same is even true of the (undoubtedly correct) idea that human rights are not static but *evolve*<sup>20</sup>. This is not just a justification of evolutive judicial creativity. It also implies that human rights are cultural products with meanings that may change along with material and spiritual conditions. If that is so, there is as little reason to postulate perfect identity and invariability of content over space as there is over time<sup>21</sup>, and there is every reason to beware of overstraining a system which is to operate for forty-seven States with very different legal cultures, economic conditions and so on.

Only a clear substantive subsidiarity (minimum standard) approach will therefore help to prevent disruptive conflict, lower the risk of human rights coming to be seen as a set of *Strasbourg* dictates rather than as achievements and projects of one's own, and prevent the Convention system's mission from being trivialised – not to speak of the caseload problems which also depend on the Court's general approach to interpreting the Convention<sup>22</sup>.

#### 4. A new rule to reinforce substantive subsidiarity?

There is a British/Swiss proposal, submitted to the Committee of Experts on the Reform of the Court, which in substance aims at reinforcing substantive subsidiarity. According to this proposal, the Court would be empowered to declare an application inadmissible if it were substantially the same as a matter that had already been examined by a domestic tribunal applying the rights guaranteed by the Convention and the Protocols – with the exception of cases where the national court “*manifestly erred*” in its interpretation or application of the Convention rights or where the application raises a serious question affecting the interpretation or application of the Convention.

This might create a certain incentive to deal more explicitly with Convention rights in countries whose courts have a habit of looking primarily at domestic rights. I doubt, however, whether such a rule would serve the purpose of reinforcing substantive subsidiarity.

The proposal is an attempt to force the appropriate judicial restraint upon the Court. Judicial restraint, however, is not something that can be forced upon a court by rules prescribing it, because all the doctrines or standards that have been or might be used for that purpose (margin of appreciation, minimum standard, manifest error, or whatever it may be) are fundamentally vague. Appropriate judicial restraint is a matter of beliefs and attitudes, of modesty, judiciousness, respect and insight into the prerequisites of cooperative relations. Judges who do not believe in the wisdom of a minimum-standard approach will be as quick to discover “*manifest errors*” in the interpretation of Convention rights as they have previously been to discover errors without such a qualification. As a consequence, Contracting States and domestic courts might find themselves more grossly, rather than more rarely, offended by their findings. It is better to rely on argument. The advocates of substantive subsidiarity must try to convince. That was my endeavour. I hope that those who do not find my remarks convincing will at least believe that I have not made them because I want the Convention system to be weak but because I want it to be strong.

20. For an interesting use of that idea, see *Stummer v. Austria* [GC], no. 37452/02, §§ 105 et seq., to be reported in ECHR 2011, implying that in a context of changing standards there may be a duty to co-evolve which, however, leaves room for domestic agenda-setting choices. Evolutive interpretation was the subject of the 2011 *Dialogue between judges* (where the seminar title was “What are the limits to the evolutive interpretation of the Convention?”, [http://www.echr.coe.int/NR/rdonlyres/D901069F-76A0-401F-BF48-248FC80E728A/0/DIALOGUE\\_2011\\_EN.pdf](http://www.echr.coe.int/NR/rdonlyres/D901069F-76A0-401F-BF48-248FC80E728A/0/DIALOGUE_2011_EN.pdf)). For relevant case-law, see the introduction by Françoise Tulkens, pp. 7 and 8.

21. On the issue of universality addressed here, see Gertrude Lübke-Wolff, “Who has the Last Word? National and Transnational Courts – Conflict and Cooperation”, *Yearbook of European Law*, vol. 30 (2011), pp. 86-99.

22. On the latter point, see Marc Bossuyt, “Should the Strasbourg Court exercise more self-restraint?”, in: *Human Rights Law Journal* 28 (2007), p. 321 (pp. 331 et seq.).

## Jean-Paul Jacqu 

Honorary Director General of the Council of the European Union

### PRELIMINARY REFERENCES TO THE EUROPEAN COURT OF HUMAN RIGHTS

President, members of the Court, President Costa, members of national Supreme Courts, dear friends and colleagues,

I would first like to thank my colleague Judge Sicilianos for his far too flattering introduction and say how proud I am to see him – once an outstanding student of the University of Strasbourg – holding such distinguished office today. It is also a great honour for me – and for that I am particularly indebted to Vice-President Tulkens – to be able to address you on a subject that, although not a new one, has recently been put back on the agenda. I have often found that, in the area of European construction, a considerable amount of time may pass between the emergence of an idea and the moment when it becomes possible to start putting that idea into practice. The subject on which I am to speak is no exception to that rule; the old proverb *“there’s many a slip twixt the cup and the lip”* certainly holds true here. We are still at the stage of reflecting on whether it is appropriate to initiate a process that would, if successful, ultimately result in a protocol to the Convention on *“advisory opinions”*, to use the Court’s own terminology.

With a view to improving the direct dialogue between the European Court and domestic courts, in 2005 Guy Canivet suggested introducing the possibility for domestic courts to seek preliminary rulings from the Court<sup>1</sup>, an idea that had previously been suggested in 2002 in an article by Professor Florence Benoit-Rohmer<sup>2</sup>. Initially, Court specialists seemed reluctant to take over a system that they felt would be a mere transposition of the European Union’s preliminary ruling mechanism. To be sure, in the EU such rulings have a specific function that is not comparable to the task entrusted to the European Court of Human Rights. However, the suggestion has slowly been gaining momentum. In 2006 it was included in the Wise

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1. *National supreme courts and the European Convention on Human Rights: New role or radical change in the domestic legal order?* Speech by Mr Guy Canivet, President of the Court of Cassation, at a seminar organised by the European Court of Human Rights on 21 January 2005: *“But the structure of the relationship with the national supreme courts does not afford any system of formal cooperation between the two judicial orders or, therefore, any individual or collective means enabling the national courts to express their views to the European Court of Human Rights outside the purely procedural context. That, it seems to me, is a gap that needs to be filled if there is to be properly understood decentralisation in the application of the Convention. It seems to me that there would be merit in institutionalising dialogue between the national judges and the judges of the European Court. It has often been said that the machinery for obtaining a preliminary ruling on the question of interpretation from the Court of Justice of the European Communities is, in this connection, far preferable. It establishes a genuine relationship of judicial cooperation. While I understand that for structural reasons the European Court of Human Rights is unable to set up a like system, it does seem to me that, one way or another, means of formal cooperation should be established.”*
  2. F. Benoit-Rohmer, *“Les perspectives de r formes   long terme de la Cour Europ enne des droits de l’homme : ‘certiorari versus renvoi pr judiciel’”*, *Revue universelle des droits de l’homme*, 16 December 2002, vol. 14, no. 7-8; see also, by the same author, *“Il faut sauver le recours individuel”*, D. 2003, chron. 2584.

Persons' Report on the reform of the Court<sup>3</sup>. It was referred to by President Costa at the İzmir Conference<sup>4</sup> and advocated by the Conference itself<sup>5</sup>. It is now being studied in the Council of Europe as part of further reform of the Court<sup>6</sup> and can be found among the United Kingdom's proposals for the 2012 Brighton Conference.

Before addressing the question further, two preliminary points of clarification are necessary. As regards the terminology, the terms "*preliminary ruling*" and "*advisory opinion*" do not have the same meaning. A preliminary ruling is given in a case being examined before a court which suspends the proceedings pending receipt of the response to a question that it has submitted to another body. An advisory opinion, as provided for by Article 47 of the Convention, may be requested by the Committee of Ministers at any time outside the context of a case, but that is not the subject we are discussing today. The mechanism now being referred to as an "*advisory opinion*" certainly encompasses the notion of preliminary ruling. Perhaps it would be preferable to speak of an "*avis contentieux*" (litigation-related opinion), the term used in French administrative proceedings for this type of ruling? Secondly, as regards the Convention system, the aim is certainly not to substitute preliminary rulings for the right of individual petition, which remains the cornerstone of the Convention. The introduction of a preliminary ruling mechanism would be but a supplementary means of protecting the guaranteed rights through a direct dialogue between the Court and national courts.

The preliminary ruling is a well-known mechanism in domestic legal systems. Various reasons have led to its introduction. It may be a question of reducing the case-processing time, thus avoiding an appeal, or of limiting the growth of particular litigation by allowing a lower court to seek the opinion of a higher court on a matter of importance. This is the case, for example, of the "*avis contentieux*" given by the French *Conseil d'Etat* at the request of the lower administrative courts on "*a new question of law, presenting a serious difficulty and arising in numerous disputes*". In some jurisdictions a specialist judge may be requested to rule on a matter referred by a non-specialist. This mechanism is frequently found in constitutional proceedings, by way of exception, or in relations between administrative courts and the courts of general jurisdiction where the two orders are separate. If the solution to a dispute depends on the answer to a question that is within the remit of a general court, the administrative court may refer a preliminary request to the latter before ruling on the merits. If the solution to a dispute depends on the answer to a question of constitutionality, a constitutional court may be called upon before the tribunal of fact can give its decision. This is also the mechanism adopted in the European Union, where domestic courts of general jurisdiction

3. "81. On the other hand, the Group considers that it would be useful to introduce a system under which the national courts could apply to the Court for advisory opinions on legal questions relating to interpretation of the Convention and the Protocols thereto. This is an innovation which would foster dialogue between courts and enhance the Court's 'constitutional' role. 82. Requests for an opinion would always be optional for the national courts and the opinions given by the Court would not be binding. 83. The rules governing this category of advisory opinions should differ from those governing opinions given at the request of the Committee of Ministers, which are provided for under Article 47 of the Convention. Opinions given at the request of a national court should not be subject to the restrictions laid down in paragraph 2 of that provision. 84. The Group also believes that, to enhance the judicial authority of this type of advisory opinion, all the States Parties to the Convention should have the opportunity to submit observations to the Court on the legal issues on which an opinion is requested." Report of 15 November 2006, CM (2006)203.

4. "Lastly, İzmir should afford an opportunity to reflect on the possibility for our Court to give advisory opinions. Going beyond the dialogue that we maintain voluntarily with the highest courts of the member States, this could be a means of concretely reinforcing subsidiarity. In the medium term the Court's workload would be reduced as a result", Conference on the future of the European Court of Human Rights, Mr Jean-Paul Costa, President of the European Court of Human Rights, İzmir, 26 April 2011 (translation).

5. İzmir Conference, 26 and 27 April 2011, Declaration: "Bearing in mind the need for adequate national measures to contribute actively to diminishing the number of applications, invites the Committee of Ministers to reflect on the advisability of introducing a procedure allowing the highest national courts to request advisory opinions from the Court concerning the interpretation and application of the Convention that would help clarify the provisions of the Convention and the Court's case-law, thus providing further guidance in order to assist States Parties in avoiding future violations."

6. See the report of the Steering Committee on Human Rights, CDDH(2012)R74 Addendum I.

refer a question to a specialised court, the Court of Justice of the European Union. In all such cases the referring court does not relinquish jurisdiction – the procedure is merely suspended pending the answer to the question – and that is indeed what we are speaking of here.

In this sense the preliminary ruling can be seen as a beneficial means of resolving, in a spirit of cooperation between courts, any difficulties arising from legal pluralism, whether domestic pluralism (relations between different branches of law) or international pluralism (relations between the international or EU order and the national order). This means of regulating relations between systems is highly advantageous. As such, could it thus come to play a role in the Convention system and, if so, under what conditions could it, in this particular context, provide for a meaningful dialogue between this Court and domestic courts?

## I. The interest of the preliminary ruling for the Strasbourg system

1. Whenever it involves intervention by a judicial body, the international system of sanctions to ensure observance of the law is characterised by a certain linear nature: a breach committed by a State will possibly give rise to a decision of the domestic courts (with the exhaustion of domestic remedies), then to a sanction imposed by the international court. It is this kind of process that we find under the Convention system, with its specific feature of the right of individual petition.

A preliminary reference mechanism affords the advantage of escaping from this linear process by interrupting the proceedings before the lower court, in this case the domestic court, to bring the question of conformity with the Convention – and that question alone – before the international court.

2. When one looks at the preliminary ruling procedure in the context of the European Union, as provided for by Article 267 of the Treaty on the Functioning of the European Union, it is true that its original aim was to preserve the unity of the treaty's interpretation, this being essential to avoid any distortion of competition in a single market. The fact of waiting until the outcome of infringement proceedings against a State, also provided for in the Treaty, would lead to an acceptance of such disunity in the market for the duration of the proceedings. For this reason, in its *Simmenthal* judgment, the Court of Justice held as follows: *"A national court which is called upon, within the limits of its jurisdiction, to apply provisions of Community law is under a duty to give full effect to those provisions, if necessary refusing of its own motion to apply any conflicting provision of national legislation, even if adopted subsequently, and it is not necessary for the court to request or await the prior setting aside of such provisions by legislative or other constitutional means."*<sup>7</sup> It is precisely in order to fulfil this obligation that the domestic court may or must, as the case may be, request a preliminary ruling from the Court of Justice. The objective is clear: to ensure, through the dialogue thus established with the domestic court, the immediate application of European Union law.

An additional aim was to enable economic operators to defend their rights both against member States and against the Union. Against States, because they could obtain confirmation that a particular statute or national practice was incompatible with the treaty; against the Union, because, even without bringing an action directly before the Luxembourg Court, they were able by this procedure to have acts of the Union declared null and void. On that basis the Court of Justice developed the idea of a comprehensive system of actions, upholding both the primacy and the direct effect of EU law. It is noteworthy, however, that the implementation of the preliminary ruling procedure is not in the hands of individuals and that only a domestic court is empowered to make such a request. Whilst there is an obligation for courts hearing a

7. Judgment of the Court of Justice of the European Communities of 9 March 1978, C-106/77.

case at last instance to refer a request, it is well known that the Court of Justice circumscribed this obligation to avoid being inundated<sup>8</sup>. Furthermore, the formulating of the questions is the work of the national court alone, not that of an individual.

3. All these features are specific to the Union's procedure and cannot readily be transposed to the Convention system, but some of the effects would be the same. As has already been said, the preliminary ruling request severs the otherwise linear process. The incompatibility with the Convention would be established before the violation becomes final and it would then be solely for the domestic court, enlightened by the ruling it has received, to give judgment accordingly.

The political interest of such a mechanism is of some significance, because it would help to avoid the excessive politicising of a dispute. By their very nature, international proceedings may, as recent cases have shown, arouse considerable tension that undermines the proper administration of justice. They are seen as proceedings against the nation before a court that is accused of being ignorant of national culture and specificities, allegedly because, as a result of its international character, it is ill-suited for the task. In the context of a preliminary ruling procedure, the authoritative solution is provided by the national court, which benefits from the respect that is due by governments to their own judicial systems. In such a context the acceptability of the solution will be far greater.

4. Above all, however, the preliminary ruling procedure would emphasise the national court's role in supervising compliance with the Convention. It is perfectly consonant with the principle of subsidiarity as it lays emphasis on the fundamental role of the domestic court in ensuring that the Convention rights are upheld. It would also enable the national court to express its specific concerns and to obtain an answer. If it is confronted with a new question, it would not be required to settle the matter in a state of uncertainty as to how Strasbourg might react, with the risk that the solution might subsequently be censured by the European Court of Human Rights. The preliminary reference would then trigger a practical dialogue between the courts – a dialogue enhanced over time as more and more requests are referred.

5. This solution would also be advantageous for the applicant, allowing him or her to obtain an early answer without having to embark upon proceedings in Strasbourg without being sure of the outcome. As the saying goes, "*justice delayed is justice denied*". Here the answer would be forthcoming as early as possible and closely connected to the substantive dispute before the national court. In the context of a criminal trial or expulsion proceedings, would it not be better for the compatibility with the Convention to be assessed before the national decision, rather than obliging the State to reverse its decision several years later after Strasbourg has ruled on the matter? Whilst the damage caused to an individual may be compensated for financially, this can never wipe out the long years during which the individual will have suffered from a breach of his rights, as a result, for example, of unlawful imprisonment, expulsion or confiscation of property. It is thus possible to avoid such a situation.

6. Lastly, if a violation is found, the judgment execution will be facilitated as it will follow the normal domestic-law process. It will thus no longer be necessary to implement special procedures for the reopening of cases before the national court after a Strasbourg judgment. Moreover, if the preliminary ruling is requested by a supreme court and that court then abides by the solution indicated by the European Court of Human Rights, the judgment will benefit from the authority vested in Strasbourg judgments under domestic law.

7. Of course, the preliminary ruling procedure is not sufficient by itself. In the European Union system, the action for failure to fulfil an obligation serves as a complementary remedy in cases where the Court of

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8. See the *Cilfit* judgment of 6 October 1982, C-283/81.

Justice's ruling is not heeded. Similarly, in a Convention context, it would not exclude individual application if the Court's opinion were not followed.

In terms of structural implications, therefore, the introduction of a reference or opinion procedure would not undermine the Convention system. It would have the advantage, by contrast, of enabling direct dialogue between the national court and the Strasbourg Court, provided that the procedure complies with certain conditions.

## II. Conditions for the dialogue

The existence of a fruitful dialogue depends on the mutual respect that should be shown by the various stakeholders. Without a meaningful spirit of cooperation, the procedure would remain unused. It would undoubtedly require some time for those domestic judicial systems that are unfamiliar with such a procedure to become accustomed to it. However, twenty-seven States Parties – and soon twenty-eight – have the experience of requesting preliminary rulings from Luxembourg. Those States at least are familiar with the technique and art of drafting the questions. For the others, the Strasbourg Court would have to take a pedagogical approach, in particular by reformulating any questions that are not submitted in a pertinent manner.

1. This implies, first of all, that the initiative should be left to the domestic court. It has been suggested that the possibility of requesting opinions could be confined to systemic or fundamental aspects alone. It is true that we are speaking here of the most sensitive issues for which the preliminary ruling procedure is most useful for the domestic court. However, would it not be better to leave the court itself to consider what is fundamental and not limit its possibility of asking questions, without imposing excessively strict admissibility conditions? Especially as the notion of "importance" is a matter of subjective assessment. Something that is important in one State may not be in another. If the national court has to engage in an in-depth analysis of each question before referring it, it is highly likely that it will give up for fear of being humiliated if the request is then declared inadmissible. Moreover, if the possibility were to be reserved for the highest courts, it is unlikely that it would be used for secondary issues. Lastly, a court that has its request declared inadmissible on such grounds would be less likely to use the procedure in future. Of course, the Court would remain free to reformulate the question.

2. It may appear justified, on the other hand, to reserve the procedure for questions that are new and are likely to give rise to a significant volume of litigation, without however making this a strict condition of admissibility. It would be sufficient to indicate the purpose of the procedure in the relevant protocol and the domestic court would undoubtedly take that into account. In any event, if the request did not meet these conditions and, in particular, if it did not concern a new question, it would be sufficient to point out the existing case-law; the domestic court could always then explain how its question has not been answered. How could the Court, which has found that the Convention imposes a duty on the domestic court to give reasons for a refusal to refer a request for a preliminary ruling<sup>9</sup>, not apply its case-law to itself to some extent and give reasons for refusing a request, even though the request may not be mandatory?

9. *Ullens de Schooten and Rezabek v. Belgium*, nos. 3989/07 and 38353/07, §§ 61-63, 20 September 2011 (unofficial translation): "61. Consequently, where it is called upon to examine, on that basis, an alleged violation of Article 6 § 1, the Court has to be satisfied that any refusal brought before it was duly accompanied by such reasons. That being said, whilst it is required to carry out such verification in a rigorous manner, it need not consider any errors that may have been committed by domestic bodies in interpreting or applying the relevant law. 62. In the specific context of the third paragraph of Article 234 of the Treaty establishing the European Community (Article 267 of the Treaty on the Functioning of the European Union), this means that a national court whose decisions are not amenable to judicial review under domestic law, and which refuses to request from the Court of Justice a preliminary ruling on a question concerning the interpretation of European Union law raised before it, is obliged to give reasons for its refusal based on the exceptions provided for in the case-law of the Court of Justice. It will therefore be required, in accordance with the above-mentioned *Cilfit* case-law, to indicate the reasons why it finds that the question is not pertinent, that the relevant provision of European Union law has already been interpreted by the Court of Justice, or that the correct application of European Union law is so obvious as to leave no scope for any reasonable doubt. 63. The Court finds that this obligation to give reasons has been fulfilled in the present case."

3. It has been suggested that the Court could be dispensed from giving reasons for a refusal to respond. That would not seem to be a good solution. In view of the mutual respect that is indispensable for good cooperation between courts, it hardly seems appropriate to refuse a request without giving reasons. The Court's workload would admittedly be heavier, but the sole source of a court's legitimacy stems from the reasoning of its decisions. To explain rationally the reasoning followed is an instrument of dialogue. Reasoning is indispensable for mutual trust.

4. The Court would have to respect the remit of the domestic courts. The purpose of the preliminary reference would not be to transfer the dispute to the Court, but to give the domestic court the necessary means of assessment for its own disposal of the case. The domestic court would retain control of the establishment and characterisation of the facts. Admittedly, knowledge of the whole case file may be necessary for the Court to interpret the Convention in the light of the context, but it must leave the task of assessment to be discharged fully by the domestic court. It will thus be for the latter to decide *in concreto* on the solution to the dispute. Even in the Court of Justice of the European Union, where the objective is to ensure uniform interpretation of EU law, the judges refrain from settling the dispute in the place of the domestic court, at least in matters of interpretation, with matters of validity being dealt with in a completely different logic as a result of Luxembourg's exclusive power to declare an act of the Union null and void. Either it rules exclusively on the interpretation to be given to the provision in question and leaves the domestic court to use this in the context of the dispute, or, where there is a possibility of assessing the provision in the light of the context, it gives the necessary indications to the domestic court, leaving the latter to determine the suitability of the interpretation for the concrete situation that gave rise to the dispute<sup>10</sup>. It is clear that the same attitude would have to be adopted in the Convention system, in order to safeguard the domestic court's margin of appreciation, especially with regard to questions of proportionality or the balancing of interests. The principle of subsidiarity requires this. It goes without saying that the approach would be quite different from that ordinarily adopted in contentious proceedings, where the examination of the facts is of fundamental importance.

5. In terms of jurisprudential policy, it should be noted that the request for a preliminary ruling is not a purely legal operation. When it submits such a request, the domestic court expects an answer and it may well refrain from requesting a ruling if it expects the answer to be completely contrary to its own opinion. If it does refer a request, it is because of a doubt, and it will hope to obtain a result that confirms its reasons for doubting. The dialogue will not be engaged if the reasoning does not show that the presumed opinion has been taken into consideration. This point is well illustrated by the *Melki*<sup>11</sup> judgment of the Court of Justice of the European Union. The French Court of Cassation had severe doubts about the "*preliminary ruling on constitutionality*" procedure and referred the matter in the hope that the Court of Justice would declare it incompatible with the Treaty. For its part, the Court of Justice could not condemn a procedure that accorded significant rights to citizens and thus find itself in opposition to the French Constitutional Council. But nor could it depart from its *Simmenthal* precedent. It gave a ruling that preserved its previous case-law

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10. Thus, for an example taken at random while this article was being drafted, see the judgment of 1 March 2012, C-484/10, in which the Luxembourg Court emphasised the domestic court's margin of appreciation: "Articles 34 TFEU and 36 TFEU must be interpreted as meaning that the requirements laid down in Article 81 of the structural concrete regulations (EHE-08) approved by Royal Decree no. 1247/2008 of 18 July 2008, read in conjunction with Annex 19 to those regulations, for official recognition of certificates demonstrating the quality level of reinforcing steel for concrete granted in a member State other than the Kingdom of Spain constitute a restriction on the free movement of goods. Such a restriction may be justified by the objective of the protection of human life and health, provided the requirements laid down are not higher than the minimum standards required for the use of reinforcing steel for concrete in Spain. *In such a case, it is for the referring court to ascertain* – where the entity granting the certificate of quality which must be officially recognised in Spain is an approved body within the meaning of Council Directive 89/106/EEC of 21 December 1988 on the approximation of laws, regulations and administrative provisions of the member States relating to construction products, as amended by Council Directive 93/68/EEC of 22 July 1993 – *which of those requirements go beyond what is necessary for the purposes of attaining the objective of the protection of human life and health.*" (Emphasis added)

11. Judgment of 22 June 2010, C-188/10 and C-189/10.

without directly opposing either the Court of Cassation, because it recognised the legitimacy of its request, or the Constitutional Council, because the procedure was upheld. The dialogue was a fruitful one, because the response, without giving total satisfaction to the author of the request, showed that the Court of Justice had fully taken into consideration the position of the Court of Cassation.

6. It is common ground that the request for an opinion should not emanate from courts whose judgments are amenable to appeal before a court of appeal or cassation. Should it then be reserved for supreme courts alone, or should it be extended to all courts ruling in the last instance, because some domestic courts rule in both the first and last instances? The latter solution would appear wise and consistent with the principle of the exhaustion of domestic remedies, but it could lead to a proliferation of requests. This point must no doubt be studied in greater depth. The idea of reference by constitutional courts could also be considered. It must be said that the practice within the European Union varies considerably. It has taken on a certain importance because of the obligation in principle for judges ruling at last instance to refer such requests. However, in a Convention context, since such reference would be optional for the domestic court, it would be for each constitutional court to decide where it stands on this point.

7. A residual issue is that of the authority to be attributed to the Court's responses to such references. This issue may seem rather theoretical. Whilst the response would not be binding for the domestic court, the latter would nevertheless be aware that if it did not abide by the Court's indications, adopted by a Grand Chamber, the individual application avenue would still be open, and such a prospect would surely bring pressure to bear. No court would be happy to be overruled as a result of having disregarded the Court's opinion. In any event, since the Court is not a tribunal of fact, it is not impossible that it might have to review, in contentious proceedings, the assessment of the facts that gave rise to the opinion. With that in mind, it would actually seem logical for the opinion to be made binding, as the individual concerned would not then be so tempted to bring a case to the European Court. It has also been suggested, to avoid individual applications after a preliminary reference, that such applications should be inadmissible in cases where the domestic court has followed the Court's opinion. However, the States Parties appear to be rather reticent about giving opinions binding force. The question seems above all to be a political one and, in reality, the solution adopted would not seem to be of fundamental importance.

8. Having set out the conditions, I am of the view that a dialogue should be engaged with the domestic courts with the adoption of an optional protocol, thus enabling a gradual development of the system in the light of experience. Admittedly, this could increase the Court's workload, but in view of the European Union's experience, such an increase does not appear excessive. The number of preliminary references by supreme courts, for the most active ones, can be counted on one hand. It must be said that, since the domestic proceedings would be suspended pending the answer to the request, the Grand Chamber would have to deal with it relatively quickly. But such constraints would be balanced by the advantages of avoiding numerous subsequent applications. One only needs to imagine, retrospectively, the possible effect of such a procedure in the Hungarian cases that are currently pending.

In view of the foregoing observations, the preliminary reference mechanism, if it were to be introduced, could open up a new avenue, in parallel to that of the individual application, for the protection of fundamental rights – an avenue no longer based on the classical violation/condemnation cycle, but on the opening of a fruitful dialogue with preventive effect. For some years now all Convention specialists have been laying emphasis on the role of the domestic court in implementing the Convention and have been shouting from the rooftops that one of the principal ways to curb the Court's growing workload is to take that role into account. With this in mind, can we afford to dismiss a mechanism that would strengthen that role and broaden the scope of dialogue between the Court and national courts? The preliminary ruling or, to use the Court's terminology, the advisory opinion, whilst not being a remedy for all ills, is nevertheless a promising avenue that is not to be neglected.

## Sir Nicolas Bratza

President of the European Court of Human Rights

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

Presidents, Excellencies,  
Monsieur le Président du Conseil Général du Bas-Rhin,  
Monsieur le Sénateur Maire,  
Deputy Secretary General, colleagues, ladies and gentlemen,

It is always a great pleasure to welcome our distinguished guests to this ceremony, with which we mark the opening of the judicial year. It is course for us particularly pleasing to see so many senior representatives from national courts.

I must also welcome former colleagues and in particular my predecessors, Jean-Paul Costa and Luzius Wildhaber.

I must greet too the representatives of the local community and the host State who do us the honour of joining us this evening. Finally, those who represent our parent institution, the Council of Europe, parliamentarians, permanent representatives and senior officers, also have their role and their stake in the Convention system. The Court needs their support and I thank those of you who are with us today for this ceremony. The protection of human rights is too important and too complex a business to be monopolised by one institution or body; it requires a collective effort as the authors of the Convention recognised.

The omens for 2012 are hardly auspicious. The economic crisis with its potential for generating political instability seems to spiral further and further out of control. All our societies are experiencing difficulties that few of us can have foreseen only a short time ago. In this environment the vulnerable are more exposed and minority interests struggle to express themselves. The temptation is to be inward-looking and defensive, for States as well as individuals. Human rights, the rule of law, justice seem to slip further down the political agenda as governments look for quick solutions or simply find themselves faced with difficult choices as funds become scarce. It is in times like these that democratic society is tested. In this climate we must remember that human rights are not a luxury.

And yet at the same time events in North Africa and part of the Middle East and more recently in Burma remind us that the aspiration for fundamental rights and democratic freedoms is universal. The humbling courage of ordinary people in Cairo, Tripoli and Homs brings home to us the true value of ideas and principles which we too often take for granted. It also reminds those of us who have the privilege of working within this system why we are here.

Looking at these different contexts I draw what is for me an inescapable conclusion. That is that the argument for effective international action to secure human rights and democracy is as compelling as it has ever been. Council of Europe countries which already have the benefit of what is incontestably the leading

mechanism for international human rights protection have a responsibility to themselves but also to the wider international community to preserve and indeed build on their extraordinary achievement in giving concrete expression to the ideals and hopes expressed in the Universal Declaration.

I make no apologies for beginning this evening by addressing the broader picture because I do not believe that what we do here in Strasbourg can be seen in isolation – but also because it helps us put into perspective the difficulties confronting us, while placing them in a context which perhaps makes it easier to focus on priorities. For several years now the Court has been treated as a patient whose sickness if not terminal is all but incurable, or at least the eminent physicians summoned to diagnose the disease have seemed unable to agree on the cure to be prescribed. The reform process leading up to Protocol No. 14, the Wise Persons' Report, the Conferences of Interlaken and Izmir and a new conference to be held under the United Kingdom Chairmanship of the Committee of Ministers this year: these are all evidence of the efforts made to adapt the Convention system to the situation of massive caseload which was the inevitable consequence of the enlargement of the Council of Europe to include post-communist States as they embraced democracy.

While I do not underestimate the challenges which still face us and while I am grateful for the different initiatives taken by governments chairing the Committee of Ministers, I think we have sometimes lost sight of more healthy signs of life. Firstly throughout this period of intense activity on the reform front, the Court has continued to deliver a substantial number of judgments on important issues of human rights jurisprudence. A glance at the short case-law survey in the provisional version of the Annual Report for 2011 which is available today indicates the range of cases dealt with and how the Court has steadily continued to apply the Convention and its own case-law across a wide spectrum of issues. In doing so it fulfils its Convention mission of maintaining and strengthening human rights at national level. These cases which commonly require a delicate balancing of sometimes multiple competing interests are the essence of the Court's work. They are perhaps the most important yardstick by which the effectiveness of the Convention machinery should be measured.

But the Court has also taken a number of decisive and rather bold steps designed to enhance the effectiveness of the Convention system. Without going into details, as many of you will be aware, it developed the pilot-judgment procedure in response to the proliferation of structural and systemic violations capable of generating large numbers of applications from different countries. It has also adopted a prioritisation policy under which it aims to concentrate its resources, and particularly those of the Registry, on the cases whose adjudication will have the most impact in securing the goals of the Convention, as well as those raising the most serious allegations of human rights violations. Finally, in implementing Protocol No. 14 the Court has sought to achieve the maximum effect for the single-judge mechanism, under which a single judge assisted by a Registry rapporteur carries out the filtering function. The results obtained using this new procedure have been spectacular, with an increase of over 30% of applications disposed of in this way.

In direct response to the Interlaken and Izmir Conferences, the Court has also made a considerable effort to increase the information available on its procedure and particularly on admissibility conditions. Thus the Court has published a detailed admissibility guide now available in fourteen languages, notably thanks to contributions from different States. At the end of last year it put an admissibility checklist on its website, with a progressive sequence of questions aimed at helping potential applicants understand the reason why their application might be declared inadmissible. Just yesterday we launched a short admissibility video produced with the support of the authorities of Monaco which aims to get across the message in a simple, graphic way that 90% of applications fail to meet the admissibility conditions and what those conditions are.

Another example of responding to concerns expressed at these conferences is the reorganisation in 2011 of the Court's internal set-up for dealing with urgent requests for interim measures under Rule 39 of the Rules of Court. Having been nearly submerged by such requests just over a year ago, the Court changed its procedures at the judicial and administrative level, revised its practice direction, and, through its President, made a public statement on the situation. These measures have produced their effects quickly, returning this aspect of proceedings to a more normal rhythm.

I think that it is therefore fair to say that the Court has done broadly what it was asked to do under the different declarations and action plans. We now await proposals to be brought forward under the United Kingdom Chair in preparation for a conference to be held in Brighton in April, as announced by the Prime Minister this week in his speech to the Parliamentary Assembly. Before leaving the topic of the Court's input to the reform process, I should like to take up one claim that has been repeated in different quarters and comes back at regular intervals. This is that the Court and its Registry are in some way inefficient and that that is why a backlog has been allowed to build up. I categorically refute that suggestion which is indeed offensive to the many highly committed and hard-working judges and officials who make up the Court and its Registry. What may be considered to be inefficient is the system, which was not designed to cope with the massive case-load with which it is now confronted. Within the means available to it, the Court has done everything it can to rationalise and streamline its processes and with remarkable success, as has been confirmed by a number of outside observers and by a consistent increase in its overall productivity. This year our working methods will be scrutinised by the French Court of Auditors, who are the Council of Europe's external auditors and while there is always something to learn from these exercises I have no doubt that they will recognise that much has already been achieved.

But as was acknowledged at both Interlaken and İzmir, the Convention is a shared responsibility. The Court self-evidently cannot shoulder the whole burden of its implementation. As is clear from the terms of the Convention and as the Court has consistently stressed, the primary responsibility for securing the Convention rights and freedoms falls on the Contracting States themselves. This means in particular acting to prevent violations and establishing remedies to afford redress where breaches are committed. Where States do this seriously, where national courts apply the Convention and its case-law convincingly, the Strasbourg Court's task is made considerably easier. The importance of effective action at domestic level has been recognised at every stage in the reform process, notably in the package of Resolutions accompanying Protocol No. 14 and in the Interlaken and İzmir Declarations.

One crucial area in this respect is the proper execution of judgments. The taking of timely and appropriate general measures to eliminate the causes of the violation found is a key component of the Convention system, among other things, because it reduces the risk of future applications brought on the same basis. Where the Court finds that the violation is of a structural, systemic or endemic character, speedy remedial action at national level is even more critical. Failure to take such action in good time results in what we refer to as repetitive cases. The Court currently has over 30,000 such cases on its docket. This phenomenon represents a significant obstacle to the smooth functioning of the Convention system as a whole and serious efforts must be made to identify effective solutions. Ultimately these are cases which should not be before the Court; there is typically a clear breach and the Court's only role is to establish the amount of compensation to be awarded. The only effective response to these situations lies with the Contracting States themselves. So far we would say that the responsibility for these cases has not been shared equitably.

Another important aspect of effective Convention implementation is the role of the national courts and the necessary dialogue between Strasbourg and its national counterparts, as I mentioned earlier. Despite what is sometimes heard, the Court is highly respectful of national courts and their place in the Convention

system. National courts applying themselves the Convention can be influential in the way in which the Court's own interpretation evolves. In pursuit of this dialogue we have regular working meetings with national superior courts, just this week for instance with the German Federal Constitutional Court.

But there is also scope for judicial dialogue through judgments and decided cases. I would cite one recent example in relation to my own country – the Grand Chamber's judgment in *Al-Khawaja and Tahery v. the United Kingdom*<sup>1</sup>. The Supreme Court of the United Kingdom conveyed to Strasbourg its misgivings over what it perceived as an inflexible application of the Court's case-law on the fairness of relying on hearsay evidence, with no proper regard to the specific features of the country's rules of criminal procedure. This view was considered carefully by our Court, and responded to at length in the Grand Chamber's judgment. It was, in my view, a very valuable exchange, conducted in a constructive spirit on both sides.

There is, of course, as things stand, no formal, direct channel permitting such communication or exchange within the Convention system. Whether there should be a new, purpose-made procedure for dialogue between national courts and the European Court is a question now under consideration in the broader reflection on future reforms.

Ladies and gentlemen, the notion of shared responsibility runs through the Convention, responsibility shared between the Court and the Contracting States, but also between the Contracting States themselves. It relates firstly to implementation of the Convention and particularly to the execution of judgments, the clearest expression of the principle of the collective guarantee. States are responsible for their own and each others' respect for human rights. But they are also responsible for the Convention machinery and its proper functioning. This includes ensuring that the Court is properly resourced. I am of course aware of the budgetary constraints imposed on the Council of Europe and the very real economic difficulties facing member States. I am also conscious of the special efforts that have been made until recently to increase, or at least to protect, the Court's budget. I would simply say that if the innovative measures taken by the Court are to be fully exploited, as long as the volume of incoming cases continues to increase, some additional financial support will be necessary.

But support for the Court should be more than just financial. As judges we are responsible for ensuring that the Court's judgments continue to be of appropriate quality to carry sufficient weight. I do not expect governments to agree with all the Court's judgments and decisions and they are naturally free to express that disagreement. Where they feel the need to do so, I would urge them to use terms which do not undermine the independence and authority of the Court and which seek to rely on reasoned argument rather than emotion and exaggeration. Democracy cannot function effectively without the rule of law; there can be no rule of law without respect for an independent judiciary, and that is true at European as well as domestic level.

One important issue for the future of the Convention system is the European Union accession. Last October a draft accession treaty was submitted by the Steering Committee for Human Rights (CDDH) to the Committee of Ministers of the Council of Europe for consideration and further guidance. However, since then the process seems to have stalled. Without accession the European Union is left in the anomalous position of not being subject to the same external scrutiny as its member States. Moreover accession is now urgently needed for the sake of preserving legal certainty in the field of European fundamental rights protection. The increasing number of binding legal instruments laying down fundamental rights within the European Union legal system – and the risk of confusion which goes with it – only reinforces the need

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1. [GC], nos. 26766/05 and 22228/06, to be reported in ECHR 2011.

for an external mechanism capable of providing legal certainty as to the minimum protection standard applicable in the field. This was recognised in the Lisbon Treaty which provides that this anomaly is to be removed. After some thirty years of discussion, all that now appears to be lacking is the political will to overcome the last obstacles. I would therefore urge the member States to make every possible effort to reach a compromise allowing the completion of the process.

Ladies and gentlemen, this is the first time that I have been called upon to address this gathering, but as it is also the last time, since my term of office comes to an end next autumn, I hope you will forgive me a personal reflection as someone who has been involved with the Convention for over forty years, as counsel, member of the Commission and a judge of the Court itself. Looking back over the first fifty years of its existence, the achievements of the Court in setting standards throughout Europe and giving practical effect to each of the fundamental rights in the Convention have been truly remarkable.

Any process of selection is inevitably subjective. But certain of its achievements stand out: for example, the Court's protection of the right to life by its repeated insistence on a prompt, independent, effective and transparent investigation into killings and sudden deaths, whether at the hands of the agents of the State or otherwise, and the Court's implacable opposition to the use of the death penalty, whether in member States or elsewhere; the increasing firmness shown by the Court in outlawing acts of ill-treatment of those in custody, in requiring an effective investigation into allegations of ill-treatment and in condemning unacceptable conditions of detention; the Court's continuing emphasis on the fundamental importance of prompt judicial control of all forms of detention; the Court's insistence on the independence and impartiality of national tribunals and its development of the principle of legal certainty to prevent the arbitrary quashing of final and binding judgments of the domestic courts; the strong protection given by the Court to private sexual relations, in particular private homosexual relations, whether in civilian life or in the armed forces; the Court's insistence that any system of covert surveillance should have effective statutory safeguards against abuse, and the increased attention shown to affording protection against media intrusion into the private life of individuals; the Court's strong defence of the freedom of the press, particularly when fulfilling their watchdog role and of the rights of journalists to protect their sources; and last, but not least, the increasing attention attached by the Court to the protection of minorities and the prohibition of discrimination on grounds of race, ethnic origin and gender.

What of the future? There are as I have indicated grounds for real optimism, but there are also major challenges. What is indispensable is to ensure that the Court remains strong, independent and courageous in its defence of Convention rights. But, of equal importance is that the Court should be able to assume the supervisory role for which it was designed. This it can only do with the help of the member States themselves and their willingness to assume their primary responsibility not only of protecting and giving effect to fundamental rights but of remedying breaches of those rights as and when they occur.

The British Prime Minister, David Cameron, in his speech to the Parliamentary Assembly this week acknowledged the importance of Contracting States, as he put it, "*getting better at implementing the Convention at national level*". He also recognised the strategic importance of fundamental rights protection over and above purely national interests. The Prime Minister finished his speech by promising us that the reform proposals put forward by his government would, to use his own words again, be "*built on the noble intentions of the Convention*" and "*driven by a belief in fundamental human rights and a passion to advance them*". I think that aspiration is something that we can all subscribe to. Thank you.

I turn now to our invited speaker this evening, Mr Thomas Hammarberg, Council of Europe Commissioner for Human Rights.

Commissioner, by inviting you to speak this evening as your term of office draws to a close we wished both to recognise the important role that other Council of Europe actors play within the Convention system and to pay tribute to your own tireless work for human rights throughout the Council of Europe States. You have built successfully on the foundations laid by your predecessor to make the office of Commissioner an essential point of reference on the landscape of European human rights protection. Your personal authority on an impressive range of human rights issues is acknowledged throughout Europe. You have also been an effective advocate for the European Court of Human Rights throughout your time in Strasbourg. We welcome you this evening as our honoured guest, and I invite you to take the floor.

## Thomas Hammarberg

### Council of Europe Commissioner for Human Rights

#### THE COURT OF HUMAN RIGHTS VERSUS THE “COURT OF PUBLIC OPINION”

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

Thank you for inviting me to this event today, marking the opening of the Court’s judicial year.

The last time I had the honour to speak in this very room was during a hearing before the Grand Chamber on the case of *M.S.S. v. Belgium and Greece*<sup>1</sup>. That was in fact my first oral intervention here.

In that case the Court delivered a judgment a few months later which had wide-ranging consequences for the protection of the human rights of asylum-seekers in Europe: it recognised that the living conditions asylum-seekers had to endure in Greece amounted to degrading treatment.

In response several member States then suspended returns of asylum-seekers to Greece. The findings of the Court also prompted more calls within the European Union for a rethink of the “*Dublin Regulation*” itself.

#### The significance of the Court

I have now served as Commissioner for Human Rights for almost six years. I have travelled all over the European continent. I have visited police stations, courts, penitentiary institutions, refugee camps, Roma settlements, shelters for battered women and care institutions for both disabled children and adults.

At the same time I have had discussions with active civil society groups, ombudsmen, equality commissions, prosecutors, judges and other representatives of the judicial system as well as with local politicians, parliamentarians and, of course, government leaders, ministers and other governmental representatives.

Based on these experiences I can testify to the enormous importance of this Court.

- One. The Court is certainly important for *individual victims* who are given an opportunity to obtain justice when this is denied at home. This is also a relief for the families of the actual victims, who are in many cases victimised themselves.
- Two. The fact that such Court decisions *oblige national authorities themselves to take concrete action to remedy the violations committed against individual victims* is crucial. An example is set when a mistake is corrected by the same authorities which previously failed.
- Three. There is, moreover, an essential preventive dimension in the way the system works. Court decisions remind governments about the *need for changes to laws and procedures* to avoid future violations of the European Convention. I can testify that this dimension is in fact taken seriously by decision-makers in most member States.

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1. [GC], no. 30696/09, to be reported in ECHR 2011.

- Four. The *interpretative authority* (*res interpretata*) of the Court's judgments is also important. National legislators and courts must take into account the Convention as interpreted by your Court – even in judgments concerning violations that have occurred in other countries. In all European States, law, policy and practice are now heavily influenced by the Court's decisions.
- Five. There is one more dimension to highlight, which is somewhat difficult to define but no less important. The fact that an individual can appeal to an international court when he or she feels let down by the domestic justice system and that governments will have to listen to the response of this body – on the case itself and on the system at the origin of the case – has a broader psychological effect. In short, it gives *hope* to quite a number of people – not only to those who file complaints or want to do so, but to many others as well.

The mere existence of such an international court – principled, impartial and fair in its procedures and rulings – is an encouragement for people working for human rights throughout the continent. I have noticed that this Court is an inspiration for people and courts outside Europe as well. Indeed, its judgments are looked upon by superior courts all over the world.

### Essential features of the European system

I hope these aspects of the system will not be forgotten in the ongoing discussion about the need to reform the Court. In spite of my enthusiasm I do agree that changes are needed – in order for the Court to be able to cope with its workload and for it to play its role as the supreme interpreter of the European Convention in a truly competent manner.

However, everything that I have learned has made me believe that there are some features of the system which definitely must be protected through the reform process. One is the possibility of individual petition. Another is the principle of collective guarantee. A third one is the notion of the Convention as a "*living instrument*", allowing the Court to make dynamic interpretations of the rights set forth in the Convention.

The right of *individual petition* – giving an individual the right to seek justice, as a last resort, at supranational level – should in my opinion remain a key characteristic of the system of protecting European human rights.

There is deep concern among human rights organisations that this right will be undermined by the reform process. Even the less dramatic proposals such as introducing a fee or requiring communications via a professional attorney have met their opposition. This is understandable, as the individuals most in need of protection may lack financial resources or access to lawyers.

The dilemma is of course how to combine the principle of individual petition with an effective "*filtering*" mechanism which would make it possible for the Court to focus on the key problems – and with limited delays. This is clearly one of the major issues for the reform process and I notice that positive steps are already being taken by the Court itself to square this circle.

Another essential feature of the system which should be protected is the inter-State dimension. The Convention is built on the notion of a *collective guarantee*. This could be described as a reciprocal agreement between the State Parties based on the understanding that they – and their people – all have an interest in the protection of human rights, including in other States, and an interest in safeguarding the rights of individuals throughout Europe.

I am convinced that this idea that we will all benefit when human rights are respected all over the continent has become even more important with time. Nation States are less and less isolated from their neighbours – I do not need to mention the obvious link between human rights and peace; or the relationship between human rights and migration; or the simple fact that each and every State nowadays has citizens in other countries.

The principle of collective guarantee is also reflected in the peer approach to the monitoring of the execution of Court decisions – by the member States, together, in the Committee of Ministers. The possibility in the Convention for inter-State complaints is another reflection. However, most important in my view is the very idea that we are in this together.

A consequence of this attitude is that all member States should be concerned when the Convention is violated in another country and, also, that every member State should accept that they themselves may be subject to the Court's procedures. No government is given immunity and member States are not divided into categories; they must all, as a matter of principle, be treated equally, according to the same standards. Those with better systems at home will have fewer problems in Strasbourg.

I mentioned the notion of the Convention as a "*living instrument*" and argued that this approach should also be protected. The fact that the Court has established a practice of *dynamic interpretations* is indeed crucial to its relevance.

After all, our societies have developed enormously in the past six decades. One example is the revolutionary changes caused by new information technologies. In other areas too, totally new human rights issues have emerged since the Convention was first drafted – problems which were unknown at the time.

The Court has of course received complaints through the years on human rights violations which are not specifically mentioned in the Convention and its response has been to apply the principles of the Convention to these new situations. Any other approach would have limited the usefulness of the Convention and the Court's procedures.

It should, however, be admitted that this is a difficult task and a genuine challenge to the wisdom of the judges. This is particularly the case when it comes to the development of attitudes in society which may, to complicate the matter further, also differ considerably between member States. Of course, the possibility of having additional Protocols drafted, adopted and ratified does exist but would not meaningfully address this problem in all its depth.

However, I do consider that the Court on the whole has handled this challenge in a proper manner. Criticisms about "*judicial activism*" or arbitrariness have really not been fair. The approach has been serious. The judges have not introduced just personal ideas; they explore whether there is a consensus on such cases in the superior courts in the member States; they analyse decisions of other international jurisdictions; and they take into account, when relevant, treaty developments in the United Nations.

### **Rulings of particular interest and relevance**

The image and reputation of the Court is of course primarily influenced by its actual rulings on controversial issues – and media reactions to these decisions. The British newspaper *The Guardian* carried the other day an editorial with the headline: "*European court of human rights: judgment day*". Yes, the article did describe two Court decisions, but the word "*judgment*" referred to something else.

The editorial started with these words: “*In the dock at the court of public opinion was Europe’s human rights framework*”. It turned out that the paper in this particular case felt that the Court had in fact passed the test. It even wrote that the judges showed themselves to have been hard-headed, principled and pragmatic. Not every institution manages to be praised in the media for being, at the same time, both principled and pragmatic...

The “*court of public opinion*” is indeed a challenge – and primarily for responsible politicians in member States. It may be tempting to exploit populist media reactions against inopportune, though principled, Court decisions; but I think that those who know better should instead seek to clarify the role of the Court and the legal issues at stake.

The Court itself should not be forced to enter into discussions on this level.

Let me refer to some decisions of the Court which may have been controversial but have had a particular significance for the promotion of justice on our continent. I already mentioned the landmark decision on the “*Dublin Regulation*”. There have been other key decisions preventing the deportation of people to countries where they are at risk of torture or other ill-treatment.

Decisions on cases of *discrimination against Roma people* have been particularly helpful in my own efforts to promote the rights of individuals within this heavily abused and disadvantaged minority. One example is the Court’s positions on the rights of Roma children to enjoy education without discrimination.

The fact is that Roma children in a number of countries are disproportionately represented in schools for children with intellectual disabilities. They can also be sent to mainstream schools which are Roma only, or to Roma-only classes in mixed schools. In all cases, the tendency is that they receive substandard education.

The Court has addressed these aspects in three important judgments: against Greece, for non-enrolment; against Croatia, for separate classes; and against the Czech Republic, for routinely putting Roma children in schools for people with intellectual disabilities. The standards these decisions have set are binding on all States: they should all make sure that their practices are in line with these judgments.

The judgment in *A. v. the United Kingdom*<sup>2</sup> was in my view another landmark decision. It was the first ruling on parental corporal punishment and one of the relatively few cases brought before the Court by a child applicant. The judgment required the State to provide children, as vulnerable individuals, with adequate protection, including effective deterrence, against degrading punishment. The conclusion in this case was that repeated, forceful hitting of a child was in breach of Article 3 of the Convention.

During the last two decades the Court has also taken steady steps to address problems related to homophobia and transphobia. A major result is that homosexuality is now decriminalised across Europe and there is a new awareness of the situation of transgender people.

Article 14 of the Convention has rightly been interpreted to cover discrimination on grounds of *sexual orientation and gender identity*. The Court has acknowledged that the right to respect for family life under Article 8 of the Convention also covers same-sex couples. This opens up new perspectives for the recognition of the human rights enjoyed by members of LGBT families, including children.

Another area in which particularly crucial decisions have been made is the human rights of persons with disabilities. The Court has made the point that persons with mental health problems or intellectual

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2. 23 September 1998, *Reports of Judgments and Decisions* 1998-VI.

disabilities tend to be vulnerable and have in many cases suffered considerable discrimination throughout their lives. In view of the long-standing prejudices against them, it is particularly important to avoid further social exclusion.

In 2010 the Court examined the banning in Hungary of such individuals from taking part in general elections. The Court found such a blanket, automatic ban to be inadmissible. An indiscriminate removal of voting rights based solely on a mental disability requiring partial guardianship was found not compatible with the European Convention and the fundamental democratic principle of universal suffrage.

The blanket denial of *voting rights for prisoners* is another important issue which the Court has dealt with – and thereby provoked a judgment by the “*court of public opinion*”, or at least by the tabloid press in one particular member State.

In fact, the Court has given a wide margin of appreciation to member States on this issue: it has left it to them to determine which categories of prisoners, if any, could be deprived of the right to vote and how to apply the agreed criteria for such decisions. I am aware that a case on this issue is still pending before the Grand Chamber.

It is very useful that this issue has come up for Europe-wide discussion. The matter itself is of great principal importance and practices vary widely between the member States.

My own opinion is that if the deprivation of voting rights is to be introduced as a punishment, there should be a logical connection between the offence and this particular sanction. Furthermore, such decisions should be individual, for the duration of the imprisonment only and be based on a judicial procedure.

The principle of universal suffrage is, after all, a cornerstone of democracy; there should be extremely strong reasons for depriving anyone of the right to vote. This right symbolises belonging to the human community. We are no longer excommunicating from our societies people who are “*unwanted*”.

This is also a question of purpose. It can hardly be argued that disenfranchising prisoners would deter crime or facilitate the reintegration of convicts after release into a normal, law-abiding life in society.

In fact, a large number of member States do indeed allow imprisoned citizens to vote and I have noticed that there is no public pressure in those countries to change this policy.

### **Non-implementation of judgments – and the consequences**

Of course, some judgments are not welcomed by the governments concerned. This is obviously one reason why Court decisions are implemented slowly or not at all. Non-execution is indeed a major problem in the current system.

Though the majority of member States do comply with the Court’s decisions, there are some which are strikingly slow to abide by their obligation to execute the judgments. Some important Court decisions have remained unimplemented after several years despite guidance given by the Committee of Ministers. This is unacceptable. It is another injustice against the individual whose rights had been endorsed by the Court. It undermines the credibility of the protection system as such.

It is also one of the roots of a very concrete problem for the Court itself: it tends to cause so-called “*repetitive applications*” – new applications coming in on issues which have already been the subject of Court decisions and therefore should have been resolved by the respondent member States.

These “*repetitive applications*” contribute to the overloading of the Court, which in turn creates the risk of delayed decisions in general. This is a situation which produces a number of negative chain-effects.

I am sad to report that I have met people who have declared that they have decided not to bring their urgent case to the Court because they felt they could not wait so long for a judgment. This is particularly problematic in cases where the potential applicant fears harassment after having filed his or her complaint.

I have in fact received information about threats against applicants because of their complaints to Strasbourg. This is intolerable. As the Court has stated, applicants or potential applicants should be able to communicate with it freely, without being subjected to any form of pressure from the authorities to withdraw or modify their complaints.

### **Violations should be remedied at home**

The Court is overloaded. As you know, more than 60,000 new applications were filed last year and the number of pending cases is now over 150,000.

It must be stressed that the problem is not that people complain, but that many of them have reasons to do so.

In more than 80% of the judgments delivered since 1959, the Court has found at least one violation of the Convention by the respondent State. The main reason why the Court is overloaded is that people have found that justice could not be obtained at home.

The obvious answer is that much more must be done to protect human rights at home, at the domestic level.

The European system was never intended to act as a long-term substitute for national mechanisms – quite the reverse. Each individual should be able to seek and receive justice at home, in line with the principle of subsidiarity. Recourse to an international court should be seen for what it is – essentially a failure to provide proper national remedies.

The problem is that the judicial processes in European countries are far from perfect. In fact, many of the complaints to the Strasbourg Court relate to excessively slow proceedings and to the failure of member States to enforce domestic court decisions. In several European countries, court decisions are often enforced only partly, after long delays, or sometimes not at all. Flawed execution of final court decisions must be seen as a failure to uphold the rule of law.

Domestic courts themselves are not functioning as they should in a great number of States, and former communist countries in particular have been slow to develop a truly independent and competent judiciary. Corruption and political interference are undermining public trust in the system.

In several European countries there is a widespread belief that the judiciary is corrupt and that the courts tend to favour people with money and contacts. Though this perception may sometimes be exaggerated, it should be taken seriously. No system of justice is effective if it is not trusted by the population.

While there has also been some progress, I have observed that the independence of judges is still not fully protected in some of the countries I have visited. Political and economic pressures still appear to influence the courts in some cases. Ministers and other leading politicians do not always respect the independence of the judiciary and instead signal to prosecutors or judges on what is expected of them.

In other words, more needs to be done in order to implement the Convention through the national courts. After all, the Convention is part of the law of the land in all member States. This is expressed in different manners, an interesting model being the Human Rights Act in the United Kingdom.

On a positive note, let me also mention the significant impact of the various national human rights structures such as parliamentary ombudsmen, equality bodies, data protection commissioners, children's ombudsmen, police complaints commissions and other similar mechanisms. When they are allowed to act truly independently, they have the potential to improve the human rights situation considerably.

Building a human rights culture also requires governments to introduce policies which favour freedom and pluralism of the media and the emergence of active civil society groups.

For me the problems of the Court are primarily symptoms of a deeper crisis: human rights principles are still not taken sufficiently seriously in our member States. This, in turn, underlines the essential linkage between the Court and other parts of the Council of Europe.

### **What future for the Court?**

However, this is not an excuse to slow down the reform process of the Court itself.

In fact, this process is ongoing and the Court is self-reforming. As President Bratza pointed out, it has adopted a prioritisation policy to concentrate resources on the cases which will have the most impact on securing the goals of the Convention. The adoption of Protocol No. 14 has made it possible to decide on admissibility through a single-judge procedure and this has already helped to speed up the process.

It is also important to avoid any outside pressure to reform turning into a numbers game. The focus must be on quality rather than on quantity. Well-reasoned judgments on key issues are the particular strength of this Court. High quality interpretations of the Convention should be the highest priority.

My emphasis on the need for reforms at national level means that the further development of contacts and dialogues with the national courts is essential and will certainly have positive chain effects – including on the workload.

Improved information on the Court and its proceedings is essential and the new guide and video on admissibility are welcome developments. Such information should be a preoccupation for the whole of the Council of Europe – including its field offices – but of course also for the domestic structures in member States. With time this may well reduce the number of ill-founded applications. But more importantly it will contribute to the building of a more solid human rights culture in our Europe.

What about the judgment of the “*court of public opinion*”?

We should not be nervous. That “*court*” has “*judges*” other than the tabloid press – and these “*judges*” rule in favour of our Court.

In fact, they regard it as invaluable; they want it to have sufficient resources and they are ready to provide constructive advice for its future work.

Thank you.

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