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Judgments of the European Court of Human Rights Effects and Implementation

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Keynote speech

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Ladies and Gentlemen,

I would like to preface my address to this conference with some words of well-deserved gratitude.

My thanks first of all to the conference organisers, Professor Anja Seibert-Fohr and Judge Mark Villiger. It is because of Professor Seibert-Fohr that we have gathered here in Göttingen. With the help of her team, she has dealt with the myriad details that go along with the organising of international events such as this, and we owe them a debt of gratitude.

My thanks also to Professor Schorkopf for his kind words of welcome, and of course to the University of Göttingen for hosting this event.

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Given the subject-matter of this conference – the judgments of the European Court of Human Rights – it was only natural for me to accept the invitation to deliver the keynote address. As you can see, Mark Villiger and I are not the only ones to have travelled from Strasbourg. Other members of the Court, present and past, appear on the programme and will be contributing to the



discussions over the course of today and tomorrow. Our presence here marks the importance that the Court attaches to this event.

I would like to begin by emphasising the timeliness of this event.

It is timely in the general context of Convention reform. The Interlaken process (to use its original name) is now in its fourth year. It is far from over – indeed, it has not yet reached its mid-point, since the timeframe envisaged at Interlaken reaches to 2019. Nevertheless, the focus of the reform discussions is about to shift, from the near future to the longer term. As you know, the first wave of Convention reform is now accomplished. Protocols 15 and 16 exist and will enter into force in due course.

This second stage of the reform process has a dual focus. First there is continuous observation and assessment of the situation of the Court, which has managed to greatly increase its capacity. The number of cases decided at Strasbourg annually has more than doubled since the Interlaken conference. That is a truly remarkable feat. It is due mainly to the Single Judge formation, although there have been significant increases in other areas too.

One might say that the Court has found the accelerator.

However, the longstanding problem of an excessive number of pending cases persists. The effectiveness of the new filtering system has changed the physiognomy of the Court's docket. It is now clearer than ever where the real weight of the burden lies. It is above all composed of repetitive cases stemming from unsolved problems, structural or systemic, in a number of European States. There are over 47,000 of these cases pending before the Court. It poses a major difficulty for the Convention system, and we must continue to seek solutions. These concerns coincide precisely with the theme of this conference. As has been said often, repetitive applications are the consequence of inadequate implementation of previous judgments.

Then there is the second focus which, as I have mentioned, is on the long-term future of the Convention system. This is contained in Part G of the Brighton Declaration, which calls for a comprehensive analysis of potential options for the role of the Court in future.

This will include the option of preserving the Court's current role, which – I would stress – is unique in the world. The significance of this exercise is self-evident, and will soon begin. The first step is the creation of a hybrid group of State representatives and independent experts. Their task will be to aid the Committee of Ministers reach an interim view in 2015.

I believe that the proceedings of this conference will be of great assistance to the group when it begins its work in a few months' time, and indeed to all those who take part in the process.

The reform discussions can only be enriched by the contributions of gatherings such as this.

There is no doubting the impact that an event of this sort can have on political decision-making, as the Convention's history shows. The great reform of Protocol 11 was foreshadowed some years before by the Neuchatel conference. Let the Göttingen conference make a similar mark.

Clearly, it is not our task today to try to reach any sort of political consensus – we can leave that to the diplomats. Instead, with a spirit of academic freedom and scientific rigour, our task is to look closely and critically at the judgments of the Court, their effects and their implementation. I applaud the organisers' desire to have a transnational perspective on the subject, which is entirely in keeping with the character of human rights' law as part of Europe's *ius commune*. And the cornerstone of that system of protection is the right of individual petition.

Likewise I welcome the involvement in these proceedings of three very important "constituencies":

- the judicial constituency, domestic and European;
- the professional constituency, in the sense of legal practitioners;
- and the academic constituency, with well-known established scholars from the fields of international law and human rights law.

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I come now to the substance of the conference. It pertains to the very bedrock of the Convention system. Through its judgments, the Court weaves the threads of the Convention into the fabric of European human rights law. The Court's judgments concretise the guarantees of the Convention and the Protocols.

From the substantive viewpoint, this is a very familiar area – there is no shortage of commentary on the Strasbourg case-law. But our programme comes at this familiar subject from another angle, inviting us to shift to a perspective that is systemic and strategic. That perspective rests on the reality of the Convention system today, sixty years after the treaty entered into force. In two key ways, the system in practice has developed beyond the original schema. First, as regards the place of the Court, while it is external to the legal systems of the contracting States, to see it only as such is to overlook the fact that the Convention machinery is part of a multi-level system of law. The European

Court is not the sole judicial actor in the field, and the Convention system is not limited to what takes place in Strasbourg. It follows that the effectiveness of the Convention system is best served by the combined and co-ordinated actions of a plurality of actors.

What does that look like? And how often is that achieved?

It clearly involves communication between the different actors, and in particular judicial dialogue, which, may I say, is practised with conviction by the European Court. The conference paper anticipates new strategies of communication between the national judge and the European judge. I find that an enticing idea. While the Convention gives to the European Court the final say, that is not the only say in a case. The culture of the Convention system is, by design, a pluralist one. Subject always to meeting the minimum standard of protection, it accommodates the great diversity of 47 European States. The paramount concern is effectiveness, not uniformity. And so there is an important place for dialogue within the system, among its multiple levels. I simply note in passing that Protocol 16, to be opened for signature on 2 October next, will open a formal and direct channel for dialogue between the national and European judge. I have long believed in the value of such a procedure, and am convinced of its potential to improve implementation of the Convention.

The second way in which the reality of the Convention mechanism surpasses the original model is in the impact of the Court's judgments. The States' express obligation to abide by judgments only concerns judgments delivered against them, as Article 46 § 1 provides. Yet that fails to capture the true potency of the Court's rulings. Its binding determinations in a case, contained in the operative provisions of the judgment, rest upon its authoritative interpretation of the text of the Convention. To put it another way, *res judicata* is paired with *res interpretata* (or "*l'autorité de la chose interprétée*") Those interpretations are closely studied and followed by domestic courts.

I would observe here that the European Court is very conscious of this broad impact of its judgments. From this follows the need for a case-law that meets a high degree of consistency, and develops in an orderly and persuasive manner. You will be aware that this is the objective pursued by one of the amendments included in Protocol 15. This will amend Article 30 of the Convention so as to remove the parties' veto over the sending of a case to the Grand Chamber of the Court. The amendment was in fact proposed by the Court, signalling its desire to further improve the means of ensuring consistency in the Strasbourg jurisprudence.

Underpinning our discussions will be the notion of subsidiarity. There is a broad consensus nowadays about the significance and legitimacy of this

concept. It is a key structural principle for the Convention system, and a *leitmotif* in the reform discussions. While its origins lie in the Court's case-law, Protocol 15, as you know, will bring the term into the text of the Convention, placing it in the Preamble. It is a rather flexible concept, carrying different shades of meaning. From the perspective of the Court, subsidiarity implies careful application by the domestic authorities of the relevant Convention standard, as elucidated in the Court's case-law. Where this is done, it has the effect of – if I can put it this way - lowering the centre of gravity of the Convention system, meaning greater balance and stability. One avoids the problem of “top-heaviness”, meaning excessive weight and over-dependence on the European Court. As the reform declarations have put it, very simply and very well, subsidiarity is the expression of shared responsibility.

Even if subsidiarity is more often thought of in terms of “before”, i.e. before judgment, it is also relevant to the “after”, that is to the execution or implementation of judgments. As the Court has put it in a great many cases, “a State remains free to choose the means by which it will discharge its legal obligation under Article 46 of the Convention, provided that such means are compatible with the conclusions set out in the Court's judgment”.

This statement has been qualified to a certain extent in the Court's recent practice. The prime example of this is pilot judgments. For the defining characteristic of a pilot judgment is an indication – or even an instruction – in the operative provisions to the State to take specified remedial steps (Rule 63(3) of the Rules of Court). There have been relatively few such cases so far, however. While the pilot procedure was an innovation on the part of the Court, it has enjoyed the support of States, who subscribe to the Court's objective of addressing the underlying cause of repetitive cases. It must be stressed that this is not an inroad into the principle of subsidiarity – on the contrary, the Court has stated that the aim of a pilot judgment is, and I quote, “implementing the principle of subsidiarity which underpins the Convention system”¹.

The pilot-judgment procedure is the clearest example of the Court seeking to manage the effects of its judgments. This involves a shift of tone, from the declaratory to the directive. I think it true to say that the procedure has proven its effectiveness. It has allowed the Court to dispose of thousands of repetitive applications, either by sending them back to new domestic remedies, or on the basis of mass settlements offered by the respondent State.

I have called it an innovation, but I would also say that the Court has applied the procedure with caution and circumspection. In some cases, Court has been quite detailed regarding the type of measure required and the timeframe for

¹ E.g. the *Burdov (No. 2)* judgment, at § 127.

action. In others, it has acknowledged the limits of the judicial role, and deferred to the expertise available to the Committee of Ministers to assess complex reforms. A broad margin of appreciation is another reason for the Court to refrain from indicating how exactly its judgment should be implemented. I give the example here of the pilot judgment about prisoner voting, *Greens and M.T. v. the United Kingdom*. Regarding this case, I observe with the deepest dismay (*mit brennender Sorge*) the lack of any significant progress in executing this judgment, notwithstanding the margin of appreciation allowed to the respondent State.

As I have already said, the pilot procedure has been used quite selectively.

More frequently, the Court has preferred a softer approach, relying on Article 46 and/or Article 41 to suggest to the respondent State the type of measures that would be appropriate to implement the judgment. Typically, the operative provisions remain silent on the point, although on occasion the Court will take that further step. As I have made clear in a number of separate opinions, I belong to the school of thought at the Court that wished to see some of these judgments go further than Article 46 *dicta*, and place an express obligation on the State to achieve *restitutio in integrum*. I refer in particular to judgments finding a violation of the right to a fair criminal trial. The Court's settled position is that, in such cases, the applicant should be granted a retrial if that is their wish. The view I expressed was that the point was so important that it deserved inclusion in the operative provisions of the judgment. In this way, the State would be formally bound to provide the most adequate redress to the applicant for a serious violation of the Convention.

That is what the Court did in the different context of the case *Volkov v. Ukraine*, which is referred to in the conference document. I have some familiarity with the judgment, since I was the presiding judge, and confirm that it is a noteworthy one. As regards implementation, the judgment embraces the softer approach for general measures that Ukraine will have to take. For individual measures, it expressly requires the domestic authorities to secure the applicant's reinstatement as a judge of the Supreme Court of Ukraine. A precedent, undoubtedly, but one based on "very exceptional circumstances", justifying departure from the habitual declaratory style of judgment. One can find some other examples in the case-law of "injunctions" to the respondent State. But they remain rare – one might say that there are the beginnings of a pattern, but not yet a practice.

It may be that the distinction between "Article 46" judgments and those in which the Court makes use of the operative provisions to oblige the respondent State to take certain measures is less significant in practice than in theory. The Court has used very clear, imperative language under Article 46. I cite as an

example of this the recent judgment *Dzhurayev v. Russia*, which has just become final. It includes a lengthy passage under Article 46 on the measures needed to prevent similar violations (the problem being the removal of applicants to a third country notwithstanding the application of Rule 39). The reasoning here is remarkably detailed, so that it is clear to the respondent State, the Committee of Ministers and, no less important, to the domestic judiciary, what type of response is required. The possibility of going further if need be in a future case is left open, the Court stating that it “will abstain at this stage from formulating specific orders” (emphasis added).

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The last panel discussion will ask what future role for the Court in the implementation of its judgments? I shall be very interested to hear the predictions made by the members of that panel, and from the conference floor. For myself, I prefer to be cautious in predicting what the Court might do in future as regards implementation. That said, it appears to me that Protocol No. 16 – once it takes effect - may be relevant here. I would not rule out the possibility of a supreme court seeking an advisory opinion from the European Court regarding the implications of a judgment that has already been delivered. Surely this too could be a “question of principle”, which is the term used in Article 1 of the Protocol. While this particular scenario is not envisaged in the Explanatory Report, would it not be (and here I paraphrase the Preamble) a form of interaction between the domestic and European levels, reinforcing implementation of the Convention in accordance with the principle of subsidiarity? I leave the suggestion for your consideration.

And I would add a second remark, which concerns the role of the Committee of Ministers. Two weeks ago I had a meeting with all ambassadors at Strasbourg, as part of the Court’s ongoing contact and dialogue with the States Parties. I was impressed to hear how many delegations took the floor to call for more vigorous supervision of the execution of judgments. This has been a major theme of the reform discussions, and I have the sense that State thinking is evolving. My point is the following – just as the Court may devise some further practices or procedures in order to boost the implementation of its judgments, so the Committee of Ministers must find its way towards more effective action. That is the logic of the Convention mechanism, and we should deepen it, not depart from it.

Ladies and gentlemen,

I see the task of the keynote speaker as sounding the note that allows the whole ensemble to find the right pitch so the performance may commence. I hope I have managed this, although I am aware that I have sounded essentially a

Strasbourg note. This is just one element of a richer, more elaborate work. I look to the *solistes* and to the *chef d'orchestre* to give it its full rendering.

It is on this note that I shall draw my remarks to a close, and I thank you for your attention.