



# Dialogue between Judges

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# **Dialogue between Judges**

« The Convention is yours »

Strasbourg, January 2010

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## Jean-Paul Costa

### President of the European Court of Human Rights

Ladies and gentlemen, dear friends,

It gives me, my colleagues and the members of the Registry who are present today great pleasure to welcome you to this seminar, held, as is our tradition, on the same date as the official opening of the Court's judicial year, which this year coincides with the 60th anniversary of the European Convention on Human Rights.

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

Every year, we try to find a theme for the seminar, which over the years has become a meeting point for those applying the European Convention on Human Rights in their respective countries, often as the head of a supreme court.

This year, there was an obvious choice for the title: "The Convention is yours."

This is also the title of a video clip we are releasing today for the general public.

However, this title cannot simply remain a slogan. We wanted to convey our view that it is essential that domestic judicial authorities should assume ownership of the Convention; that there should be, so to speak, a distribution of responsibilities in the field of human-rights protection between the national authorities and the Court.

The position of treaties in the hierarchy of legal instruments may vary from country to country. However, the Convention, a multilateral instrument for the collective enforcement of rights, occupies a special place. National judges must interpret it, apply it, ensure that it prevails over rules or practices that are incompatible with it. The more they do so, the less our Court will have to intervene, other than to act as a final rampart as its founding fathers intended.

We are aware of the key position you occupy and we felt that it was important to be able to come together with you today to consider our respective roles.

The topics for discussion are many and varied: exhaustion of domestic remedies, redress by the State for alleged violations, creation of effective remedies at national level, the Court's application of the "margin of appreciation" doctrine, and so on.

The scope and diversity of these issues shows the extent to which dialogue with national judges is and remains essential and must be encouraged.

I should like to add that our meeting today comes a few days before the major conference in Interlaken on the future of the Court.

I am convinced that the matters we will be addressing today should be central to the discussions in Interlaken, since this shared responsibility between the Court and national courts is one of the keys to tackling the bottleneck with which we are now confronted. The future of the Convention system depends on effective protection of fundamental rights at national level, and rather than serving as a final level of jurisdiction, recourse to Strasbourg should be a last resort in exceptional cases.

Before handing the floor to my friend and colleague Françoise Tulkens, allow me to welcome our speakers, Dame Mary Arden, Judge of the Court of Appeal of England and Wales, Geert Corstens, President of the Supreme Court of the Netherlands, and Branko Hrvatin, President of the Supreme Court of Croatia. My thanks to them for joining us today.

However, I should also like to welcome our guest of honour today, Jean-Marc Sauvé, who presides over France's highest administrative court, the *Conseil d'Etat*. I shall introduce him in more detail this evening, but I am very grateful to him for being willing to play an active part in this seminar.

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

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

## Françoise Tulkens

### Judge at the European Court of Human Rights

President, Vice-President of the *Conseil d'Etat*, senior judges, ladies and gentlemen, dear colleagues, dear friends,

Today we open the 2010 *Dialogue between judges*: this is an important year, since it marks the 60<sup>th</sup> anniversary of the European Convention on Human Rights, which we shall celebrate on 4 November. It was therefore natural to choose a topic for this occasion which takes us back to basics, to the source of our work. *La Convention vous appartient*. The Convention is yours.

The European Convention on Human Rights is intended to be a part of national law. This does not merely imply incorporating the text of the Convention into domestic law, although that is an essential step; it is also vital that the national authorities, and primarily the judicial authorities, take ownership of the Convention. Our President speaks of a sharing of responsibilities in the protection of human rights between the national authorities and the Court<sup>1</sup>. In the Court's vocabulary, we refer to the fundamental principle of *subsidiarity*. Subsidiarity implies a shared responsibility, which in turn requires interaction, in the strongest sense of the term, between all concerned.

What obligations are derived from the principle of subsidiarity in respect of the various protagonists in the Convention system: the applicants, the Contracting States and the Court itself?

#### 1. Applicants

Under Article 35 § 1 of the Convention, applicants are required to *exhaust all domestic remedies*. This requirement reflects a long-established rule of international customary law<sup>2</sup> and represents an essential aspect of the subsidiary nature of the Convention mechanism<sup>3</sup>. Its purpose is to give the national authorities the opportunity to find and acknowledge and then to remedy and provide redress for the alleged violations of the Convention. In other words, the Convention system is based on the presumption that the domestic legal system provides an effective remedy for violations of it. This basic principle is at the heart of the Convention system.

#### 2. The Contracting States

For their part, the Contracting States have two principal duties. The first is to ensure that the rights and freedoms set out in the Convention are duly protected. The second is to provide a remedy where that protection is lacking. It is not enough to enshrine a right in the national legislation; redress must be guaranteed at domestic level.

1. Memorandum of the President of the European Court of Human Rights to the States with a view to preparing the Interlaken Conference, 3 July 2009; see [www.echr.coe.int](http://www.echr.coe.int).

2. See, for example, International Court of Justice, the *Interhandel Case* (Switzerland v. the United States of America), judgment of 21 March 1959.

3. *Selmouni v. France* [GC], no. 25803/94, §§ 74 and 75, ECHR 199-V.

In other words, the States must establish the appropriate structures and procedures to guarantee in practice the rights and freedoms set out in the Convention (Article 1). They must also provide for effective remedies before the national courts (Article 13). In this respect, the Court has in recent years adopted a broader approach, which reflects a greater awareness of the vital role played by domestic remedies in an international system for human rights protection, especially in cases of structural or systemic violations.

In the *Kudła*<sup>4</sup> judgment, adopted in 2000, the year of the 50<sup>th</sup> anniversary of the Convention, the Court states: “In that way, Article 13, giving direct expression to the States’ obligation to protect human rights first and foremost within their own legal system, establishes an additional guarantee for an individual in order to ensure that he or she effectively enjoys those rights. The object of Article 13, as emerges from the *travaux préparatoires* ..., is to provide a means whereby individuals can obtain relief at national level for violations of their Convention rights before having to set in motion the international machinery of complaint before the Court.”<sup>5</sup>

Today there is a clearer understanding of the role of Article 13 – the right to an effective remedy – in the Convention system, and this is a path that will certainly be explored further in the context of discussions on the Court’s future. In the spirit of subsidiarity, the ideal is that the national system provide remedies for violations of the rights and freedoms guaranteed by the Convention, thus enabling the national courts to deal with a complaint based on the Convention directly, in the light of the Court’s case-law.

### 3. The Court

Although no Convention provision explicitly provides for it, the Court has nonetheless recognised the subsidiary nature of the Convention machinery from its earliest judgments<sup>6</sup>. This was confirmed in a frequently cited passage from the *Handyside* judgment, a text that is illuminating in its simplicity:

“The Court points out that the machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights ... The Convention leaves to each Contracting State, in the first place, the task of securing the rights and liberties it enshrines.”<sup>7</sup>

In the Court’s case-law, subsidiarity operates in three main ways.

Firstly, in the doctrine of the *margin of appreciation*, subsidiarity gives rise to long discussions and considerable debate. Authors disagree as to its basis and scope<sup>8</sup>. That said, whether it is seen as essentially substantial or essentially structural, the margin of appreciation has a role to play as modulator in the relationship between an international court and the national courts.

Another aspect of this is the so-called *fourth-instance* rule, which was reiterated in the *García Ruiz v. Spain* judgment:

“... the Court reiterates that, according to Article 19 of the Convention, its duty is to ensure the observance of the engagements undertaken by the Contracting Parties to the Convention. In particular, it is not its function to deal

4. *Kudła v. Poland* [GC], no. 30210/96, ECHR 200-XI.

5. *Ibid.*, § 152.

6. See, for example, Case “relating to certain aspects of the laws on the use of languages in education in Belgium” (merits), 23 July 1968, p. 34, § 10 *in fine*, Series A no. 6.

7. *Handyside v. the United Kingdom*, 7 December 1976, § 48, Series A no. 24.

8. See, for example, George Letsas, “Two Concepts of the Margin of Appreciation”, *Oxford Journal of Legal Studies*, vol. 26, no. 4, Oxford University Press, 2006.



with errors of fact or law allegedly committed by a national court unless and in so far as they may have infringed rights and freedoms protected by the Convention.”<sup>9</sup>

In addition, the Court has described its relations with the highest national courts in the following terms:

“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 ...”<sup>10</sup>

Finally, where it faces situations of a structural or systemic violation, the Court has in recent years introduced the concept of *pilot judgments*, in which it emphasises the importance of providing remedies at national level. Thus, once a structural defect has been identified, “it [falls] to the national authorities, under the supervision of the Committee of Ministers, to take, retroactively if appropriate, the necessary remedial measures in accordance with the subsidiary character of the Convention”<sup>11</sup>. In adopting this procedural innovation, not without some controversy, the Court, rightly in our opinion, re emphasised the role that the national authorities should play in the actual application of the Convention.

#### 4. Conclusion

How best can we ensure the personal ownership of the Convention suggested by the title of this seminar?

With regard to *applicants*, the main thing is to make them aware of the opportunities to assert their Convention rights at domestic level. Hundreds, or rather thousands of applicants – whether or not they are assisted by a lawyer – still come here each year without having exhausted domestic remedies. Could the Court itself assist in this process by requiring that applicants explicitly refer to the Convention in exhausting domestic remedies? You will give us your opinion.

As to *States*, the key obligation is to establish domestic remedies which will ensure that the process of exhausting them provides a genuine possibility to rule on the Convention issue at stake. Here again, the Court could intervene through the manner in which it makes use of Article 13. It could, for example, insist on the judicial nature of the remedies established under that provision. Beyond that, we might consider a broader reception for the Convention and the case-law arising from it, not only in the relevant texts, but also and especially in the domestic legal culture and mindset. To this end, it is important that the Strasbourg case-law should exist in the national language or languages. In order genuinely to be able to adopt the law of the Convention as their own, the domestic courts at all levels must have access to it in a language that they understand. This is a minimal requirement.

Finally, the Court’s responsibility is clearly inescapable. The sharing of responsibilities referred to by the President of the Court is based on the concept of partnership. In other words, while remaining, in accordance with the Convention, the final arbiter for questions concerning the Convention and thus legitimately assuming that national courts will follow the interpretation provided by it, the Court can and must enrich its own scrutiny by reflecting on national decisions in which Convention law is analysed. The Court does not have a monopoly on understanding the Convention.

9. *García Ruiz v. Spain* [GC], no. 30544/96, § 28, ECHR 1999-I.

10. *Roche v. the United Kingdom* [GC], no. 32555/96, § 120, ECHR 2005-X.

11. *Hutten-Czapska v. Poland* [GC], no. 35014/97, § 232, ECHR 2006-VII.

The European Convention on Human Rights is our common heritage: it calls on us to undertake a magnificent and awe-inspiring mission together, namely to be the conscience of Europe. In times of crisis, human rights are not a luxury, but a necessity: they oblige us to get back to essentials. Of course, we cannot take on all the misery of the world, but we must be willing to shoulder our part of the burden faithfully. As Dostoyevsky wrote: "We are all responsible for everything towards everyone."<sup>12</sup>

To examine these questions in more depth, we have three outstanding speakers: Lady Justice Arden, judge at the Court of Appeal for England and Wales; President Branko Hrvatin of the Supreme Court of Croatia; and President Geert Corstens of the Supreme Court (*Hoge Raad*) of the Netherlands. On behalf of the Court, thank you for coming today.

Finally, I should like to thank most sincerely the linchpins of this entire day, who met in a group which answers to the charming name of "Copi": Judges Egbert Myjer, Sverre Erik Jebens and Isabelle Berro-Lefèvre; and members of the Registry: Roderick Liddell, Patrick Titiun, Leif Berg, Delphine De Angelis, Sylvie Ruffenach and Sabine van Migem. And, as at the Cannes Film Festival, I should like to award the Palme d'or, on an equal basis, to Stéphanie Klein and Valérie Schwartz.

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12. F.M. Dostoyevsky, *The Brothers Karamazov*, Harmondsworth, Penguin Classics, 1984.

## Geert Corstens

### President of the Supreme Court of the Netherlands

Mr President, Madam chair of the seminar, members of the judiciary, dear colleagues from foreign courts, ladies and gentlemen,

#### 1. Introduction

I feel very privileged to be able to address you here today, on the opening of the judicial year. The Court occupies a central place in the international legal order. I therefore wish, above all, to express my deep admiration for the important work being done here and my hope that the Court will continue, for a long time to come, to guide the way for the effective protection of the human rights enshrined in the Convention. I also congratulate the Court on the honour bestowed on it by the Roosevelt Institute, which has granted it the prestigious Four Freedoms Award. This award, which is presented in New York and Middelburg (the Netherlands) alternately, is granted to persons or organisations that have made a particularly outstanding contribution to protecting the four fundamental freedoms. Rewarded for its contribution to human rights in Europe over the past fifty years, the Court will be adding its name this year to a long list of illustrious laureates, such as President Kennedy, Vaclav Havel and Coretta King. I am proud that it is in my country, on 29 May, that your President will be receiving the award on behalf of your institution.

#### 2. Subsidiarity

The subject of this seminar, “The Convention is yours”, makes direct reference to the principle of subsidiarity. As you know, this principle provides that the protection of the human rights enshrined in the Convention is first and foremost the duty of the States themselves. They are required to ensure that these rights are effectively protected and to take corrective measures should that protection fail. The European system has a purely complementary role and will come into play only where the domestic authorities have partially or totally failed to perform their task<sup>1</sup>.

The implications of the subsidiarity principle are diverse<sup>2</sup>. I shall mention the following:

- (i) the member States must be aware of their task and take it seriously, which means that they must ensure that their nationals benefit in concrete terms from the protection afforded by the Convention. They must also follow the case-law of the Court closely and apply it diligently;
- (ii) the Court must steer the protection of human rights by delivering clear and well-reasoned judgments that enable the domestic authorities and courts to ascertain how the Convention should be interpreted in specific cases. It must also comply with the subsidiarity principle, however, and not seek to become a fourth-instance court. It is therefore required to show a degree of self-restraint;
- (iii) nationals of the member States must themselves also fully grasp the fact that the Court is not a fourth-instance body and refrain from bringing cases that are a lost cause.

1. On the subject of the national authorities' mission, consult, among other sources: T. Barkhuysen, “Artikel 13 EVRM. Effectieve nationale rechtsbescherming bij schending van mensenrechten” [“Article 13 ECHR. Effectiveness of national legal protection in the event of a violation of human rights”] (thesis, Leiden), Vermande, Lelystad, 1998.

2. See, *inter alia*, the working document for this seminar which deals with the question of the obligations which this principle entails for applicants, member States and the Court.

You are well aware of the problem of the bottleneck at the Court<sup>3</sup>. I will not linger on this point. I just want to point out that, in my view, in a community of hundreds of millions of people, the number of individual complaints is unlikely to diminish. On the contrary. The successes achieved at Strasbourg are likely to encourage others. Furthermore, the development of the rule of law in a large number of countries cannot but make their populations increasingly aware of human rights violations and multiply the number of complaints. At a future date, if the subsidiarity principle works well and the member States assume their responsibilities, the number may conceivably decrease.

### 3. Measures to reduce the bottleneck

Many measures have already been put in place to improve the situation<sup>4</sup> – for example Protocol No. 14 or the pilot-judgment procedure – but they would appear to be insufficient. The adoption of Protocol No. 14 by Russia is a sign of the latter's attachment to human rights, which is cause for optimism. The process for ratification of this Protocol has, moreover, convinced me of the need to provide the Court with the power to take this kind of measure itself in future, for example by means of its Rules of Court, in the interests of the proper judicial control of human rights<sup>5</sup>. A tribute such as the one that will be paid to the Court on 29 May this year should be accompanied by a gift. A gift such as this would probably be the most appropriate one that the member States could bestow on the Court, thus reaffirming their confidence in this institution. It is a proposal that I am submitting to you now. I also ask my fellow presidents of the national Supreme Courts to subscribe to this proposal and to submit it at an opportune moment to their Ministers for Justice and Foreign Affairs and to the representatives of their countries at the Parliamentary Assembly of the Council of Europe. I would also be grateful to the President of the Court for overseeing the coordination of this initiative.

### 4. Measures at national level

The present situation requires new, radical measures, based not on the backlog as such but on the Court's mission and the tasks deriving from it. Thought needs to be given to how it can be enabled to continue carrying out these tasks effectively.

This is a problem that concerns first and foremost the member States. They must give thought to the role that they want to attribute to the Court and to their readiness to take action to achieve that. The time for fine words is now definitively over. The time has come for all interested parties to assume their responsibilities properly with a view to ensuring that the system for the protection of human rights works effectively.

The subsidiarity principle that I have already referred to is one of the essential elements of any reflection on the role of the Court. Let us not hesitate to repeat that it is the member States that bear primary responsibility for the effective protection of the rights enshrined in the Convention. The Court will only intervene if the member States fail to perform that task. Its mission is to guide this legal protection by delivering clear judgments on the interpretation of the Convention in specific cases which indicate the precedent to be followed. These judgments must then be executed quickly by the member States, with the domestic courts, the national legislatures and the national authorities being bound to comply with that case-law.

3. At the end of 2008, almost 100,000 cases were pending before a judicial formation, and that number has only increased since.

4. The President of the Court sets out on page 2 of his Memorandum the measures taken over the past years. For the pilot-judgment procedure, see, among others, Jean Pradel, Geert Corstens and Gert Vermeulen, *Droit pénal européen*, 3rd ed., Dalloz, Paris, 2009, pp. 267-68 and 272-73.

5. See, on this point, the aforementioned Memorandum of the President of the Court, p. 3, and the Wise Persons' Report, pp. 13-15.

Allow me to give you a number of examples from my country. Not that the Netherlands is a model country, but simply because it is the system I know best. I will begin with the reaction of the Netherlands courts to the judgment of 27 November 2008 given against Turkey in the *Salduz* case<sup>6</sup>, which concerned the possibility of being assisted by a lawyer during police custody. Immediately after that leading judgment was delivered, the Netherlands Supreme Court amended its case-law, making express reference to it. In a judgment of 30 June 2009, it undertook a thorough examination of the implications of the *Salduz* judgment for judicial practice in the Netherlands<sup>7</sup>, as much at the request of the trial judges as at that of the Public Prosecution Service and the Bar. A swift reaction like that serves society best. Indeed, after the Court had settled the urgent question, the Supreme Court assumed its responsibility at national level, as required by the subsidiarity principle. Thus did it accomplish the task of, I quote, “securing the rights and liberties it [the Convention] enshrines”<sup>8</sup>. Applications to “Strasbourg” were thus, I am sure, avoided in many cases.

There are many other examples of the subsidiarity principle being implemented, not only by the courts but also by the legislature and the executive. I shall briefly refer to some here.

Let me start with the *Bentham* judgment of 1985<sup>9</sup>, which sent a veritable shock wave throughout the Netherlands. To summarise, the Court considered in that case that the remedy known as an appeal “to the Crown” did not comply with the fundamental right to an independent tribunal enshrined in Article 6 of the Convention. The effect of that remedy was that in some administrative-law cases, where a decision affecting civil rights was made, the power to rule in the final instance was not vested in an independent court, but in the executive. The *Bentham* judgment led to the abolition of appeals to the Crown and prompted the creation of a new system of administrative justice.

Let me also cite the *Goodwin* judgment of 27 March 1996 on freedom of the press. Within six weeks the Supreme Court of the Netherlands had delivered a judgment in which it adapted its established case-law<sup>10</sup>.

The *Brogan and Others v. the United Kingdom* case<sup>11</sup> also received a lot of publicity in my country. Although it was not a party to the case, it made the Netherlands aware that it did not always comply with the provision of Article 5 of the Convention which says that any arrested person must be brought promptly before a judge. An authoritative commission (the Moons Commission) was then instructed to give an emergency opinion to the legislature, which then took the necessary steps<sup>12</sup>. The Public Prosecution Service and the police did not wait, moreover, for the amendment to take effect before following the Court’s case-law<sup>13</sup>.

I will also mention the decisions taken in the Netherlands following the cases of *Lala* and *Pelladoah*<sup>14</sup>. Those judgments declared that the case-law of the Supreme Court, according to which a lawyer could not intervene in a hearing in the absence of the suspect unless the latter had convincing reasons for not appearing, infringed the Convention. The Supreme Court was then quick to comply with the Strasbourg ruling<sup>15</sup>. The Court’s judgment was delivered on 22 September 1994 and the Supreme Court reacted just

6. [GC], no. 36391/02, to be published in ECHR 2008.

7. Supreme Court of the Netherlands, 30 June 2009, LJN [National Jurisprudence Number] BH3079, NJ [Netherlands Law Reports] 2009, p. 349, commentary by T.M. Schalken.

8. *Handyside v. the United Kingdom*, 7 December 1976, Series A no. 24.

9. *Bentham v. the Netherlands*, 23 October 1985, Series A no. 97.

10. *Goodwin v. the United Kingdom*, 27 March 1996, *Reports of Judgments and Decisions* 1996-II; LJN AD2519, NJ 1996, p. 557; and Supreme Court of the Netherlands, 10 May 1996, LJN ZC2072, NJ 1996, p. 578.

11. *Brogan and Others v. the United Kingdom*, 29 November 1988, Series A no. 145-B.

12. This rule, laid down in Article 59a of the Code of Criminal Procedure, came into force on 1 October 1994.

13. The Public Prosecution Service had already laid down a policy to be followed on the basis of the judgment in question.

14. *Lala v. the Netherlands*, 22 September 1994, Series A no. 297-A and *Pelladoah v. the Netherlands*, 22 September 1994, Series A no. 297-B.

15. Supreme Court of the Netherlands, 6 December 1994, NJ 1995, p. 515, with annotations AHJS.



a few months later, on 6 December that same year. Those judgments also prompted the legislature to revise the rules governing judgments given *in absentia*<sup>16</sup>.

And now for my last example: on the basis of the case-law of the Court, the Netherlands is preparing a government bill on compensation for unreasonably long administrative or civil proceedings. With regard to criminal law, the Supreme Court has indicated, in a number of leading judgments, the line to be followed by trial courts where a reasonable time is exceeded<sup>17</sup>. In that connection it has had regard to the concepts of *dies a quo* and *dies ad quem*, which are familiar to you, and has reflected on which time-periods can still be regarded as reasonable.

All these examples show that, after a leading judgment has been delivered by the Court, each and every member State should ask itself to what extent its practices are in conformity with the case-law thus established. This approach may lead the domestic courts to adapt their established case-law – as happened after the *Salduz* case, concerning assistance by a lawyer during police custody – or the legislature to amend the law – as happened with regard to the question raised by the *Bentham* case – or the prosecution to adapt its practices – as required by the *Brogan and Others* case. It is, moreover, highly likely that one and the same judgment will require action by two, or even three, of these actors. Citizens are entitled to demand that administrators of justice respect human rights, firstly because that is a legitimate requirement but also because it is a declaration of the principle of subsidiarity<sup>18</sup>. Accordingly, the cause of human rights will be swiftly and effectively served and the Court will be able to fulfil the mission vested in it: interpreting human rights and giving them form. The core of its activities should not consist in repeating – because States have failed to comply with them – decisions that it has already taken. It should be pointed out, lastly, that States should not confine themselves to reacting only in those cases in which they are directly concerned. That would be too severe a limitation on the value of the Court's case-law, and on the principle of subsidiarity. As certain examples given here have shown, the Netherlands does not in any way – whether it be in the courts or in academic debate or in any other context – draw a distinction between cases that concern them directly and judgments concerning another State. The Court itself pointed out in the *Opuz* case that all States, whether they be party to the proceedings or not, had a duty to comply with its case-law<sup>19</sup>.

## 5. Measures at the European Court level

I will now, if I may, comment briefly on the measures to be taken by the Court. The substantial delays in proceedings and the huge flow of incoming cases prevent the Court from fulfilling the functions I have described. This tide of incoming cases can be stemmed in a number of different ways. The Court must be able to concentrate on cases raising new issues in which its guidance is both desirable and necessary. This means saving it the bother of ruling on applications that are manifestly inadmissible and repetitive. As I have already said, the responsibility for this falls mainly on the member States, particularly of course on those known to be Strasbourg's high case-count countries. It should be possible to reject cases that are of secondary importance in terms of the Court's objectives.

16. Article 279 of the Code of Criminal Procedure.

17. See Supreme Court of the Netherlands, 17 June 2008, LJN BD2578, and Supreme Court of the Netherlands, 3 October 2000, *Nederlandse Jurisprudentie* 2000, p. 721, commentary by J. de Hullu.

18. I would add that it would not surprise me if the National Commission for the Revision of the Netherlands Constitution proposed introducing into our Constitution an Article like Article 6 of the Convention. This would underscore the principle of subsidiarity.

19. *Opuz v. Turkey*, no. 33401/02, to be published in ECHR 2009.

There are in any event two ways of combating the incoming tide of manifestly inadmissible cases. Potential applicants and their lawyers must be made to understand properly that in some cases it is futile to apply to Strasbourg, for example where not all the domestic remedies have been exhausted. However, I do not think that information campaigns of that sort relating to the subsidiary character of the Court are sufficient. The Court could require that the Convention provision in issue has been expressly, and not merely implicitly, relied on in the domestic courts. It should thus raise the level of its requirements. Such a condition does not appear to me to be excessive. It would allow the Court to play its subsidiary role properly. This is an option open to the Court, and it is up to it to decide whether to implement it.

The Court should be able to reject manifestly inadmissible applications through a short procedure, that is, without an examination on the merits and at the lowest level possible. In that connection I support the suggestion by your President that appropriate cases be allocated to legal secretaries, probably on a non-official basis<sup>20</sup>. That would represent a big step forward.

The avenues I have opened do not apply to repetitive cases because they concern violations of one or more human rights enshrined in the Convention. The Court therefore has a duty to examine them. It has taken the creative step of introducing a pilot-judgment procedure for certain specific situations<sup>21</sup>. This is an excellent initiative, which, I hope, will relieve the workload.

The frequency of repetitive applications is proof that certain member States do not properly comply with their obligations to apply the Court's case-law. This situation cannot continue. The Committee of Ministers has a major task before it in this respect<sup>22</sup>. My advice here, if I may be so bold, is that the time has come to act and exert pressure.

I also think that an attempt to find solutions should take every possibility into account, including the introduction of a filtering system<sup>23</sup>. Article 12 of Protocol No. 14 already envisages this possibility by providing that Article 35 § 3 of the Convention shall be amended to read that the Court shall declare inadmissible any application if, and I quote, it "considers that ... the applicant has not suffered a significant disadvantage, unless respect for human rights ... requires an examination of the application on the merits and provided that no case may be rejected on this ground which has not been duly considered by a domestic tribunal". The single judge also has this power, at least where, under Article 27 § 1 of the Convention, "such a decision can be taken without further examination". Strictly speaking, as the Explanatory Report to Protocol No. 14 says<sup>24</sup>, this power does not undermine the right of individual petition or a declaration of inadmissibility in respect of a manifestly ill-founded application. The Court can be seised of the case, but will declare that it is not suitable for a more thorough examination, for example where the prejudice suffered is minimal. The Steering Committee for Human Rights has made the following statement on this subject: "In the longer term, there lies the possibility that the Court might one day develop to have some degree of power to choose from amongst the applications it receives those that would receive judicial

20. In his above-mentioned Memorandum, the President of the Court raises the possibility of having certain cases processed by legal secretaries. That might be a good solution.

21. *Broniowski v. Poland*, no. 31433/96, ECHR 2004-V. See, on this subject, Jean Pradel, Geert Corstens and Gert Vermeulen, *Droit pénal européen*, 3rd ed., Dalloz, Paris, 2009, pp. 267-68 and 272-73.

22. See also, on this subject, the aforementioned opinion of the CDDH.

23. The introduction of a filtering system is currently being envisaged in the Netherlands. In 2008 an authoritative committee published a report recommending that the Supreme Court be given the possibility of selecting cases that would receive its judicial determination (Report of the Committee on the Normative Role of the Supreme Court. Improving cassation procedure, 2008, which can be consulted at [www.hogeraad.nl](http://www.hogeraad.nl), and is also available in English).

24. See paragraph 39.

determination. The time is not yet ripe, however, to make specific proposals to this end.”<sup>25</sup> The Committee is clearly thinking of a more thorough filtering process than the one provided for in Article 35 § 3. In my view, it is high time to reflect on this. Desperate ills call for desperate remedies! Moreover, such an approach would serve the principle of subsidiarity.

A restriction on the right of individual petition to *the Court itself*, whatever its form, should not be a taboo subject. As I have already said, the signs are that hundreds of millions of citizens in our community will in future be making increased use of this right. Further consideration should be given to creating a filtering system at another level, or even at regional level.

Coming back to the principle of subsidiarity, the Steering Committee for Human Rights proposes studying the possibility of allowing national courts to, I quote, “apply to the Court for advisory opinions on legal questions relating to the interpretation of the Convention and its Protocols”<sup>26</sup>. This proposal is an interesting one from the point of view of the tasks and role of the Court. However, these preliminary questions run the huge risk of increasing the Court’s workload rather than reducing it. The experience of the Court of Justice of the European Communities in this regard does not suggest that this would do anything to expedite proceedings. It is worth considering whether it may not be too ambitious at this juncture to provide for both preliminary rulings and a right of individual petition. This also raises the question of the relationship between preliminary rulings and the principle of subsidiarity.

## 6. Conclusion

I will conclude by underlining the strong, positive influence of the Court, including on the national systems. This has rendered your institution absolutely essential. I am convinced that the actors concerned will be able to find the means to enable it to continue occupying the prominent place it holds in the international legal order. Lastly, at the start of this new judicial year I wish you wisdom and success in your work.

Thank you for your attention.

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25. See opinion of 30 November 2009.

26. Loc. cit.

## Branko Hrvatin

### President of the Supreme Court of Croatia

President Costa, members of the Court, distinguished colleagues, ladies and gentlemen,

I understand the topic of this seminar as it is addressed to me and my fellow judges from national courts here today as being how we see the relationship between the European system of human rights protection and those national courts in which we sit. We are told that the Convention is ours. This is a good slogan, but to make it a reality requires some effort from us, and, Mr President, I would also say some effort from you. You have often spoken of the need for partnership in this context, a sharing of responsibilities. I would like to say that in Croatia we take this offer seriously and that we are willing to assume our role in guaranteeing the rights set out in the Convention at national level.

This is what is meant when we talk about having a subsidiary system. A key element in this respect is the margin of appreciation which your Court has recognised for national authorities since the earliest days of the Convention. In the broadest terms, the margin of appreciation leaves the States Parties some freedom in respect of policy-making within the sphere of the Convention rights. However, the margin left to the States Parties is not one of pure discretion. It is not mere deference to a national legislator, but rather something more. We need to understand it in substantive terms<sup>1</sup>.

For a Contracting State, this implies a duty constantly to balance its policies and measures with the requirements of the Convention. Even within the margin of appreciation, it has to make sure that its measures protect and promote human rights as much as possible.

The margin of appreciation doctrine embodies the proportionality principle which is required by the Convention. However, it is *broader* than the proportionality principle and represents a “frame of reference” within which different levels of intensity of judicial review are possible. Such levels of intensity range from “rationality review” as in *Rasmussen v. Denmark* (28 November 1984, Series A no. 87), where it is sufficient that the national regulator demonstrate a rational basis for passing the contested legislation, to more strict levels of scrutiny, where “compelling State interest”, or “weighty reasons” (see, for example, *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, 28 May 1985, Series A no. 94) should be demonstrated in order to justify a national measure.

The breadth of the national regulatory playground depends on both the European Court of Human Rights and national courts.

On the part of the European Court of Human Rights, the understanding of the margin of appreciation means *respect* for a certain level of diversity and political choice that can be exercised by the national legislature.

As the Court has pointed out, a number of factors have to be taken into account when determining the breadth of the margin of appreciation to be enjoyed by a State. Thus, for example, with respect to Article 8 and the protection of private and family life, where a particularly important facet of an individual's

1. See George Letsas, “Two Concepts of the Margin of Appreciation”, *Oxford Journal of Legal Studies*, vol. 26, no. 4, Oxford University Press, 2006.

existence or identity is at stake, the margin allowed to the State will be restricted (see, for example, *Christine Goodwin v. the United Kingdom* [GC], no. 28957/95, § 90, ECHR 2002-VI).

At the same time, and this was the subject of the seminar held here two years ago, we know that where there is no consensus within the member States of the Council of Europe, either as to the relative importance of the interest at stake or as to the best means of protecting it, particularly where the case raises sensitive moral or ethical issues, the margin will be wider (see *X, Y and Z v. the United Kingdom*, 22 April 1997, § 44, *Reports of Judgments and Decisions* 1997-II, and *Fretté v. France*, no. 36515/97, § 41, ECHR 2002-I).

In other words, the margin will be wider in cases where there are no coordinated policies common to the States Parties and in areas where national values are deeply entrenched and form part of the national culture. For example, concepts of national security (see *The Sunday Times v. the United Kingdom*) or pornography (see *Handyside v. the United Kingdom*, 7 December 1976, Series A no. 24) traditionally enjoy a wide margin of appreciation. Where a regulatory goal or policy is perceived as “common” or European, the margin of appreciation narrows.

Very often in the exercise of the margin of appreciation, national courts will be called upon to strike a balance between competing private and public interests or Convention rights. In this context Strasbourg has recognised a wider margin (see *Odièvre v. France* [GC], no. 42326/98, §§ 44-49, ECHR 2003-III, and *Fretté*, cited above, § 42).

Moreover, within the national legal systems, the courts of the States Parties cannot give *carte blanche* to the legislators simply because they are entitled to a certain margin of appreciation. It is the national courts that exercise the important supervisory function which precedes, and is primary to, the one exercised by the European Court of Human Rights. To be able to exercise that function, national courts need the courage to confront the legislature and to balance regulatory (public) interests against the rights of individuals. In doing so, national courts are guided by the Convention and the case-law of the European Court of Human Rights. In other words, the margin of appreciation left to the States Parties is subject to judgment and fine-tuning by the national courts.

The margin of appreciation does not always entail a balancing act. There are instances of clear violations of the Convention which *prima facie* make national regulation contrary to the Convention. Examples would be arbitrary discrimination on grounds such as ethnicity or sex.

The real province of the margin of appreciation doctrine is in cases that involve regulatory judgment: the fine-tuning of national regulatory interests and the protection of individual rights.

Once a regulatory goal is within a margin of appreciation, the balancing/diversity approach is not a threat to the effectiveness of human rights protection. On the contrary, by not viewing national interest and fundamental rights as mutually exclusive, judges ensure that the Convention is realistically and practically applied, thus making it “ours”.

The title of this seminar seeks to define the relationship between the national courts and the Strasbourg court and I have said that the margin of appreciation is an important element in ensuring that national authorities acquire ownership of the Convention.

A separate issue arises for the member States of the European Union and for candidate countries for European Union accession, such as Croatia. The relationship between national courts and European Union law has to be defined in different terms. There is, for example, no inherent margin of appreciation, at least in the same sense, with regard to the implementation of European Union legislation. On the other



hand, member States may have a margin of discretion when applying human rights standards in the context of European Union law.

We therefore need to consider the relationship between the requirements of the Convention and European Union fundamental rights guarantees, established not only by the case-law of the European Court of Justice, but also now by the European Union Charter of Fundamental Rights which has become legally binding under the Treaty of Lisbon.

The plurality of standards of protection of fundamental rights calls for an increasing cooperation and dialogue between high courts – a discussion the Croatian Supreme Court is eager to join.

Croatia has now acquired considerable experience of the Convention. The advent of European Union law as a binding body of rules and principles in the national context is a new challenge for us, as it is for other new or future member States. In my view, meeting that challenge can only improve the quality of human rights protection as well as the level of compliance with the Convention.

However, there are grey areas that need to be clarified further. What happens if certain regulatory interests fall within the margin of appreciation as defined by the European Court of Human Rights, but still run counter to European Union law? For example, what if the protection of certain values, such as the right to freedom of expression or the right to a private life, run counter to the exercise of one of the market freedoms, such as in the *Schmidberger*, *Familiapress* or *Omega* cases? Is the margin of appreciation under the Convention a valid justification for departure from States' obligations under the law of the European Union? Or is it the law of the European Union which has to be brought into line with the Convention?

This dilemma needs to be resolved in practical terms by the national courts, giving due respect to the requirements of the three legal systems – the national legal system, the system of the Convention and the system of European Union law. In doing so, to use the expression often employed by the European Court of Justice (for example, in the *Promusicae* case), "a fair balance needs to be struck" between protecting the interests of human rights and those of the market freedoms.

To conclude the issue of the margin of appreciation, this means that it is not enough for courts to find that a certain margin of appreciation exists, and that therefore the legislator/agency was justified in its actions. The courts actually need to balance the interests pursued by the measure with the Convention right interfered with, taking into account the legitimacy of the goals pursued, the methods of regulation, the necessity of the measure, and its costs and benefits to society. This is not an easy task, even for the highest courts of the States Parties to the Convention. But it needs to be done, and it is us who need to do it.

In this sense, the level of judicial protection of Convention rights could benefit from the introduction of a binding European Union fundamental rights law and the requisite procedural mechanisms for its enforcement – a task not only for legislators, but also for courts of Contracting/member States. As I mentioned previously, this would not lead to conflicts between European Union and Convention law, but indeed to cross-pollination and mutual strengthening.

A new element in this connection is the future accession of the European Union to the Convention. I understand that discussions on this are ongoing. What is important for those of us who have responsibility for ensuring the protection of human rights at national level is that the European system remains coherent both structurally and substantively. Divergent interpretation of fundamental rights by the two international jurisdictions would complicate our task and weaken the overall protection. We must not have two competing systems. At the same time the potential involvement of two international courts presents a threat

to procedural economy. There are therefore risks which need to be avoided, but on the whole accession must be welcomed as an opportunity to strengthen the coherence of European human rights protection and therefore to reinforce the stability and security of the continent as a whole.

Another important aspect of national ownership of the Convention is the question of national remedies/national enforcement.

Today, the Convention is embedded in the legal systems of all States Parties. However, models of national application of the Convention are different. The Convention, being an international treaty, requires bona fide implementation, but that does not necessarily entail an automatic obligation on the part of the States to make it directly enforceable by national courts. The indirect approach, according to which the Convention guarantees are transposed into national legislation, is also possible. *In either case, national courts have a responsibility to extend protection to Convention rights.* Where the Convention is directly applicable, the courts will base their decisions directly on the Convention. Where the Convention is transposed into national law, national courts will have to interpret national law in accordance with the Convention, but their decisions will be based on presumptively compatible national law.

When we speak about effective enforcement of the Convention, a clear distinction needs to be drawn between legislative implementation and judicial enforcement.

National legislation might guarantee, for example, a procedural possibility to make a claim that a Convention right has been violated. Parties might, for example, have the option of challenging the legality of an administrative act before a court, of appealing against the decision of that court, etc. Those procedural mechanisms may even satisfy the requirement of a domestic remedy under Article 13 of the Convention. However, legislative guarantees are often not enough in the absence of commitment on the part of national courts to apply them effectively and to broaden the protected area. Courts have to be not only legally entitled, but also willing and actually able to enter into the necessary analysis.

The role of the highest courts, whether Supreme or Constitutional, is of paramount importance. They have the responsibility to apply the Convention, as interpreted by the European Court of Human Rights, within the national legal system and to encourage national courts to apply it directly when deciding disputes falling within their jurisdiction. I imagine that Croatia is not the only Convention country in which the lower courts are reluctant to apply the Convention and, even more so, to follow the Strasbourg case-law. Of course it is important in this context that the courts be given the means to do so in the form of access to the relevant and leading judgments in a language which they understand. In addition to already having all decisions and judgments against Croatia translated and put on the Internet, we are also working to ensure that more translations of Grand Chamber judgments and some other important judgments are available in the Croatian language. But it is also necessary for the higher courts to take the lead and to send the right signals to the courts below. The impulse must come from above if we want the lower courts to be involved and they must feel confident that their application of Convention law will not subsequently be disavowed by a superior court less open to Strasbourg influences.

I am pleased that there are signs that Croatian courts are starting to take the Convention seriously. In its 2008 judgment in *Marušić*, the Administrative Court broadened the scope of judicial review and extended the protection of the right to freedom of expression under the Constitution and under the Convention to cover university bodies. In this way the Administrative Court extended the scope of application of an existing judicial remedy to an area of protection where it had previously not been applicable (judgment of 21 November 2008).

In addition to legislative implementation of the Convention, effective judicial protection of human rights guarantees, whether those under the Convention, those under the national Constitution, or those under the European Union Charter of Fundamental Rights, requires that parties have an actual, practical and effective possibility of asserting those rights and obtaining relief. In this respect, the law of the European Union has long recognised the need for effective judicial control. Thus in the *Johnston* ((1986) ECR 1651) and *Peterbroeck* cases ((1995) ECR I-4599), referring to Articles 6 and 13 of the Convention the ECJ held that it was for the national courts to provide effective judicial protection when they enforced individual rights under European Union law.

Providing effective judicial protection may entail setting aside (by the courts) national legal rules that are an obstacle to providing such legal protection. There is nothing, in principle, to preclude the same reasoning being applied in the case of the Convention, at least in those legal systems such as the Croatian one which regard the Convention as part of the national legal order. The Convention forms part of national law under the Constitution (Article 139) and has legal status superior to ordinary legislation. There is nothing to prevent the Croatian ordinary courts from applying the guarantees of the Convention directly, including the guarantee to an effective legal remedy.

Once again, the role of national courts is crucial. The Convention is a subsidiary means of protection and, as has been noted by Laurence R. Helfer, its subsidiarity follows from the exhaustion of domestic remedies rule and the corresponding obligation to provide an effective legal remedy. It is well established that an effective legal remedy is one which is “in principle capable of providing an effective and sufficient means of redressing the wrongs for which, on the international plane, the respondent State is alleged to be responsible” (see *Nielsen v. Denmark*, no. 343/57, Commission decision of 2 September 1959, Yearbook 2, p. 412). Such legal remedies may comprise regular legal remedies, which are otherwise applicable within a national legal system, or specific legal remedies, such as the claim for violation of the right to a trial within a reasonable time, introduced under section 27 of the Croatian Courts Act.

I emphasise that we in Croatia are deeply committed to making the Convention work within our system; we therefore embrace the slogan which is the title of this seminar. However, that does not mean that every Strasbourg decision is greeted with joy and enthusiasm. We may for example – and many of my fellow national judges here today may recognise this feeling – be concerned with some of the practical consequences of decisions made on grounds of principle in Strasbourg, perhaps without always taking into account the problems faced in the day-to-day functioning of the administration of justice. I am thinking for example of the case of *Maresti v. Croatia* (no. 55759/07, 25 June 2009), which followed the Grand Chamber judgment in *Sergey Zolotukhin v. Russia* (no. 14939/03, to be published in ECHR 2009), raising the issue of *ne bis in idem* in connection with consecutive sanctions for petty public-order offences and criminal offences. I am thinking too, for example, of the possible implications of the *Micallef v. Malta* case ([GC], no. 17056/06, to be published in ECHR 2009) for the ease and speed with which interlocutory proceedings can be conducted. I do not contest the application of the principles – but at national level we do have an obligation of effectiveness which is of course reinforced by your scrutiny from a different angle. We have to look for workable solutions.

Mr President, it has been a great honour for me to address this seminar. I congratulate the European Court of Human Rights for everything that it has achieved over the last fifty years and I look forward to further cooperation and dialogue with you and with the representatives of other European judiciaries. We all have a common goal encapsulated in the notion of the rule of law within a democratic framework. The Convention is the primary tool that we use to pursue that goal. It is indeed “ours”!

## Lady Justice Arden

Member of the Court of Appeal of England and Wales

President, distinguished judges, ladies and gentlemen,

The theme for the opening of the legal year of the European Court of Human Rights this year is "The Convention is yours". I have been asked to address that theme from the perspective of a judge in the United Kingdom. So I ask: "Is the Convention actually ours?"

I should like to start by saying that in my view human rights have made an important contribution to civil society in the United Kingdom. For example, a major challenge since 9/11 has been the balancing of freedom and security in relation to terrorism issues. Decisions of our domestic courts on human rights have played a crucial role in the resolution of these issues. So have decisions of the Strasbourg Court. We have had a very recent example of this. In *Gillan and Quinton v. the United Kingdom*<sup>1</sup>, the Fourth Section of the Strasbourg Court held that the United Kingdom was in breach of Article 8 of the Convention because it had enacted a broad power to stop and search individuals for articles which could be used in connection with terrorism even when the police officer had no grounds for suspecting the presence of articles of that kind. The Strasbourg Court held that this power was excessive and did not contain sufficient safeguards. In this respect, its decision differed from those of both appeal courts in England. Liberty is a very precious right, and, living in a law-abiding country, we can forget that it is important to maintain this right. The benefit of decisions of the Strasbourg Court is that they encourage domestic courts vigorously to enforce fundamental rights, and correct our decisions if we forget the importance of those rights.

As regards the reception of Strasbourg jurisprudence in the United Kingdom, the Convention is virtually self-executing in our courts (save with regard to primary legislation which is incompatible with the Convention). The courts have a duty to act in accordance with the Convention and to interpret legislation so far as possible compatibly with the Convention. The courts of the United Kingdom take their obligations very seriously. However, the courts cannot strike down primary legislation that violates the Convention.

However, a problem for national courts arises when the Strasbourg Court has sought to develop its jurisprudence in a manner which appears to demonstrate a misunderstanding of the domestic-law position. For instance, the conclusion of the Strasbourg Court in *Osman v. the United Kingdom*<sup>2</sup> was that it was a violation of Article 6 on access to a court for the English court summarily to dismiss a case where it had been concluded that it was not fair, just or reasonable to impose a duty of care. Under domestic law, however, this was just a mechanism for determining as a matter of substantive law when a cause of action in negligence would not lie. Happily a different conclusion was later arrived at in *Z and Others v. the United Kingdom*<sup>3</sup>. So far as the United Kingdom is concerned, these occasions are relatively rare, but they can occur in areas of the law that are very important in practice, thus causing substantial difficulties for the national legal system.

We are not the only member State to have had this experience of decisions of the Strasbourg Court that cause great disruption in the domestic system. For example, in Princess Caroline's case, the German Federal

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1. No. 4158/05, to be published in ECHR 2010.

2. 28 October 1998, *Reports of Judgments and Decisions* 1998-VIII.

3. [GC], no. 29392/95, ECHR 2001-V; see §§ 87, 98 and 101 of the judgment and my concurring opinion.

Constitutional Court ruled, in favour of freedom of expression, that the rights of the Princess to protection of her personality under the German Constitution had not been violated by intrusive press photography<sup>4</sup>. Princess Caroline was a public figure trying to lead a private life. The Federal Constitutional Court held that she was a figure of contemporary history and that she only enjoyed protection of her private life outside her home if she was in a secluded place out of the public eye. Princess Caroline took her case to Strasbourg where the Third Section of the Strasbourg Court reached a different conclusion on the balance to be drawn between press freedom and privacy, and held that the Princess's right to respect for her private life had been violated<sup>5</sup>. This decision caused enormous difficulty for the German Federal Constitutional Court. It found itself in the embarrassing position of having to revise its interpretation of the constitutional right.

Nonetheless, in the great scheme of things, we all gain more than we lose by having the Strasbourg Court. We need a court with ultimate authority to interpret the Convention. Moreover, a supranational system of human rights has considerable advantages for each of the Contracting States to the Convention. It subjects the institutions of the State to outside scrutiny, and that is particularly important where, as in the United Kingdom, there is a strong doctrine of parliamentary sovereignty. In addition, in the United Kingdom, unless Convention rights are involved, a high level of unreasonableness on the part of an organ of the State must in general be shown in administrative law before an act of such an organ can be reviewed by the court. The existence of a supranational court, establishing human rights principles, empowers the domestic judiciary and strengthens their independence as against other institutions of their own State. Furthermore, the Convention system gives us a legitimate interest in how other countries in Europe treat their citizens. This is a more powerful position than could be achieved at the political level alone. The Strasbourg Court can bring about remarkable change in the raising of standards throughout Europe. In addition, in my experience, its influence stretches far beyond the shores of Europe. As things stand, we have the opportunity to influence and contribute to its jurisprudence.

So we gain more than we lose. The real question is how the Convention system can be improved. I am not going to talk about what improvements national courts can make. I am going to turn the tables around and ask what the Strasbourg Court can do to improve the implementation of the Convention system. But to answer that question we must first ask ourselves what qualities the Strasbourg Court should demonstrate. I suggest to you that at the highest level of abstraction the qualities which the Strasbourg Court should aim for include the following:

(i) *Independence*. This goes without saying and I need say no more about it.

(ii) *Effectiveness in creating a principled body of law within their jurisdiction*. This too is self-evident. We need a court to take the lead in human rights, and to create substantive law meeting the highest standards.

(iii) *Quality of reasoning and ability to communicate clearly with their constituents*. This is a matter that I need to enlarge on below.

(iv) *Respect for the role of national institutions*. By this, I mean an awareness of where the boundaries are between its role and that of the national institutions, including courts, a sensitivity to national traditions and national legal systems, and an appreciation that there may be constitutional ramifications for the national institutions flowing from its decisions. This is really a call for judicial restraint by the Strasbourg Court, and a sharing by it of its responsibilities for judging whether a breach of human rights has occurred.

Once we have understood what makes a good or bad supranational adjudication by the Strasbourg Court, we are better able to think about what can be done to make the Convention system work better. I next move to the various suggestions that I want to make. I call this my "toolkit".

4. *Re C* (1999) 10 BHRC 131.

5. *Von Hannover v. Germany*, no. 59320/00, ECHR 2004-VI.



## MY TOOLKIT FOR MAKING IMPROVEMENTS IN THE CONVENTION SYSTEM

My toolkit of suggestions for improving the system of supranational adjudication of human rights contains four main tools: (1) more dialogue, meaning both dialogue between national judges and judges of the Strasbourg Court and dialogue between the judges of the different national courts among themselves; (2) more subsidiarity; (3) more temporal limitations; and (4) clearer judgments.

### 1. More Dialogue

Dialogue can take several forms and achieve several objectives. I start with informal dialogue between judges of the national courts on the one hand and judges of the Strasbourg Court on the other hand. There is a great value in personal contact. There can be an enriching exchange of experiences. The informal discussion can also give the national judges an input into the process of developing jurisprudence at the supranational level. In addition, the national judges can explain where the shoe pinches most and how the new jurisprudence can best be absorbed into their own system.

Furthermore, I see judicial dialogue of this kind as of constitutional importance in the European legal order. Any supranational court needs to be subject to checks and balances. In the case of the Strasbourg Court, dialogue with the national courts is an important means of providing such checks and balances.

Another form of judicial dialogue takes place at plenary meetings of judges from different member States, either with or without the judges of the Strasbourg Court. I would like to see more meetings between judges of national courts with interests in common, such as the judges of the common-law jurisdictions within the European Union. This would enable them to forge a common approach. We also need meetings between judges in Europe who do not, on the face of it, have interests in common. This enables us to increase our understanding of our European legal heritage. I would particularly like to see a conference of judges from all the Contracting States to the Convention after the Interlaken Conference has taken place to discuss whether and, if so, how the judiciaries of the Contracting States can take forward the recommendations which the Contracting States agree upon at Interlaken.

Another very important means of dialogue is through judgments. It is obviously of great benefit to the United Kingdom in terms of influencing the direction of the jurisprudence in the Strasbourg Court that the United Kingdom courts are, as a result of the Human Rights Act 1998, able to give judgments interpreting the Convention rights in domestic cases rather than domestic constitutional rights. The national court can in effect send a message to the Strasbourg Court by reflecting its views on the Strasbourg jurisprudence in its judgment either in a case before it goes to Strasbourg or in some other case raising the same issue. The Strasbourg Court is not bound to accept what the national court says but it has gone a very long way towards recognising the role of superior national courts:

“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 (see *Z and Others*, cited above, § 101) and by finding, contrary to their view, that there was arguably a right recognised by domestic law.”<sup>6</sup>

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6. *Roche v. the United Kingdom* [GC], no. 32555/96, § 120, ECHR 2005-X.

This authority, which refers to *Z and Others*, cited above, means that the Strasbourg Court would equally be willing in an appropriate case to reconsider an earlier decision in the light of disagreement expressed by the superior national court. In my view, that is a good reason why in an appropriate case the superior national court should not simply apply the Strasbourg jurisprudence with which it has a serious disagreement, but should state its disagreement and, if it reaches a different conclusion from the Strasbourg Court, leave the applicant to his remedy in Strasbourg, where the national government can argue the matter fully. If necessary, it can seek a reference to the Grand Chamber of the Strasbourg Court.

But, to some extent, our domestic courts have been disabled from having an active dialogue. This point derives from the way in which section 2 of the Human Rights Act 1998 has been interpreted. Section 2 provides that when the court determines a question which has arisen in connection with a Convention right, it must *take into account* any jurisprudence of the Strasbourg organs, whenever made or given, so far as in the opinion of the court it is relevant to the proceedings in which the question has arisen. Section 2 imposes a much weaker obligation than that imposed on British courts to give effect to the law of the European Union<sup>7</sup>. However, section 2 has been interpreted at the highest level as generally requiring our domestic courts to follow Strasbourg jurisprudence “as it evolves over time: no more but certainly no less”.

There are advantages in this approach, which has become known as the *Ullah* approach after the case in which it was laid down<sup>8</sup>. It recognises the function of the Strasbourg Court as the organ for the authoritative interpretation of the Convention, and at the end of the day domestic courts have to respect its authoritative role. Moreover, from the perspective of minimising the risk of a decision of the national court being the subject of an application to the Strasbourg Court, and a finding of a violation against the member State in question, this approach makes good sense.

There are also disadvantages to this approach. It does not, for instance, acknowledge that the Strasbourg Court is only laying down minimum guarantees. More fundamentally, it is difficult to have an effective dialogue if the courts start from a position of deference. That deference must colour the national court’s approach.

It is said that the majority of courts in the other Contracting States do not take the view that they are effectively bound by Strasbourg jurisprudence<sup>9</sup>. However, in these jurisdictions there are usually written constitutions so that precedence can be given to the rights contained in the constitution. In Germany, for instance, the obligation is again to take account of Strasbourg case-law, which means that the courts attach considerable importance to the Strasbourg jurisprudence and must justify not following it. However, they are not bound by it<sup>10</sup>.

What we need in the United Kingdom is to be able under our domestic law to say to the Strasbourg Court that it has not made the principle clear, or that it has not applied the principle consistently, or that it has misunderstood national law or the impact of its decisions on the legal system in the relevant part of the United Kingdom. I do not suggest there should be a free-for-all, or that domestic courts should be free to reinvent the wheel on human rights jurisprudence. However, I would argue in favour of an approach which is more flexible than the *Ullah* approach.

7. See section 2 of the European Communities Act 1972.

8. *R (Ullah) v. Special Adjudicator* [2004] 2 AC 323.

9. See “The Relations between the Constitutional Courts and the other National Courts including the Interference in this Area of the Action of the European Courts”, General Report to the XIth Conference of European Constitutional Courts, *Human Rights Law Journal*, vol. 23, May 2002, p. 304, at p. 327.

10. *Görgülü BVerfGE* 111. See further Hans-Jürgen Papier, “Execution and Effects of the Judgments of the European Court of Human Rights from the Perspective of German National Courts”, *Human Rights Law Journal*, vol. 27, April 2006, p. 1.

The attitude of the UK courts may be changing. In the case of *Horncastle* decided in December 2009<sup>11</sup>, the new Supreme Court of the United Kingdom, our new final appeal court, approved a departure from Strasbourg jurisprudence in the knowledge the same point was likely to come before the Grand Chamber of the Strasbourg Court in another case. The Supreme Court did not refer to the earlier case of *Ullah* at all, which leads me to the conclusion that it contemplated the following scenario:

- (a) the Strasbourg Court decides a point which the national court considers fails properly to evaluate the compatibility with the Convention of national law;
- (b) in a later case on the same point, the domestic court then respectfully disagrees with the conclusion of the Strasbourg Court in the earlier case, giving reasons;
- (c) the Strasbourg Court considers the point again in another case;
- (d) dialogue between the national court and the Strasbourg Court then ensues through their respective judgments.

The Supreme Court did not limit the course of action it was taking to a final court of appeal, and one may expect to see this approach being adopted by other courts of the United Kingdom<sup>12</sup>.

It is important to give both the national and supranational court the chance to think again. Dialogue cannot go on for ever but I very much expect that by the end both national case-law and Strasbourg jurisprudence will end up in a different place from where it started.

There was no discussion in *Horncastle* of the respective roles of the Strasbourg Court and the national court in the new European legal order, but there is a movement towards a practical solution, and a willingness on the part of the national court to engage in a form of dialogue.

In addition, after Protocol No. 14 comes into effect, domestic courts may, before they rule on the effect of a decision of the Strasbourg Court on their domestic law, wish to allow time for a case to be referred back to the Strasbourg Court for clarification by the Committee of Ministers under Article 46 of the Convention, as amended by Article 16 of that Protocol.

Before I leave this topic I should refer to the extension of Strasbourg jurisprudence. Some people are concerned by the development by the Strasbourg Court of its own jurisprudence. The Strasbourg Court adopts what is known as evolutive or dynamic interpretation. The language of the Convention is open-textured, and the Strasbourg Court gives it a dynamic interpretation so as to keep the Convention in line with present-day conditions. Strasbourg has for example to keep pace with changes in technology, such as the storage of DNA. Lord Hoffmann, for instance, criticises the liberal way in which the Strasbourg Court interprets the Convention<sup>13</sup>. However, if Parliament does not like some development of the jurisprudence by the Strasbourg Court, it is always open to it to pass primary legislation preventing our domestic courts from giving effect to that development. It will then be for the government to justify that course in Strasbourg. In appropriate cases, the Strasbourg Court should be willing to reconsider its jurisprudence. That still leaves the Strasbourg Court in the driving seat, but that position is inevitable, short of an amendment to the Convention.

11. *R v. Horncastle* [2009] UKSC 14. Lord Phillips, giving the judgment of the court, held:

"11. ... The requirement to 'take into account' the Strasbourg jurisprudence will normally result in this Court applying principles that are clearly established by the Strasbourg Court. There will, however, be rare occasions where this Court has concerns as to whether a decision of the Strasbourg Court sufficiently appreciates or accommodates particular aspects of our domestic process. In such circumstances it is open to this 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 this Court and the Strasbourg Court. This is such a case."

12. See, for example, the decision of the High Court of Justiciary of Scotland in *HM Advocate v. Maclean* 2010 SLT 73.

13. Lord Hoffmann, *The Universality of Human Rights*, Judicial Studies Board Annual Lecture, March 2009.

## 2. More subsidiarity

Subsidiarity for this purpose is the principle that a central authority should have a subsidiary function, performing only those tasks that cannot be performed effectively at a more immediate or local level<sup>14</sup>. It inevitably follows from subsidiarity that it is recognised that there can be a diversity of solutions to a particular problem.

Subsidiarity is consistent with democracy, and with the right of the individual to self-realisation reflected in Article 8 of the Convention. This means that, so far as practical, decisions should be taken by the appropriate authorities in the areas most affected by those decisions. Examining the degree to which the Strasbourg Court implements the principle of subsidiarity is therefore one way of testing my fourth quality: respect for the role of national institutions.

In Strasbourg jurisprudence, the doctrine of subsidiarity is well established. The Strasbourg Court is not a “fourth instance”. Its role is supervisory. In general, domestic remedies must be exhausted before any application can be made.

An allied doctrine is the doctrine of the margin of appreciation. The expression “margin of appreciation” is used to describe those cases where the Strasbourg Court recognises that the domestic authorities are in the best position to decide on measures in a particular area. The Strasbourg Court has held that there is a margin of appreciation in cases where the Contracting State has asserted a derogation in times of a public emergency, or where there is a question of, for example, morals or the length of statutes of limitation on which there is no consensus among the member States. The doctrine is often controversial. Some feel that having a doctrine of margin of appreciation effectively compromises the role of the Strasbourg Court as the guardian of human rights because it leaves it to the national authorities to provide remedies, and they may fail to do so. After all, the most serious cases about breaches of human rights arise because the rights of some unpopular minority have been infringed.

But the margin of appreciation is not solely about the protection of rights. The margin of appreciation ought not to be just about cases where there is no consensus in the Contracting States. It is also about the comparative institutional competence of the Strasbourg Court and national institutions<sup>15</sup>. This aspect of the doctrine of the margin of appreciation should be recognised and developed. It is again relevant to my fourth quality: respect for the role of national institutions.

My view is that subsidiarity, including the margin of appreciation, is a concept which the Strasbourg Court should strengthen in its jurisprudence. It should also build on the idea of subsidiarity in another direction. The Strasbourg Court has a daunting burden of work. In 2008, the Strasbourg Court issued 30,200 decisions but it received 50,000 applications, increasing its backlog of cases to 97,000<sup>16</sup>. Some of these cases may be capable of being dismissed summarily as manifestly ill-founded. However, that would still leave a large residue. The only solution as I see it is to share the load with the national courts: however distasteful it may be to a human rights court, the Strasbourg Court should, at least until matters improve, seek to focus on the more important cases and leave the cases which are less important to be dealt with by the national courts without further recourse to the Strasbourg Court even if the litigant is dissatisfied with the result. There would have to be a clear definition of which cases were less important to Contracting States

14. Oxford English Dictionary.

15. See, for example, the speech of Lord Hope in *R (Kebilene) v. Director of Public Prosecutions* [2000] 2 AC, p. 326, at pp. 380-81.

16. Speech by President Jean-Paul Costa printed in *Dialogue between judges*, European Court of Human Rights, Council of Europe, 2009, at p. 84.

in general, and the Strasbourg Court would have to have a discretion, but the definition ought to exclude cases which raise issues in areas of law where there is already a clear and constant case-law, and with which the national courts ought to be able to deal. The Strasbourg Court might be able to use its “pilot judgment” procedure for this purpose. Excluding these cases would enable the Strasbourg Court to focus on areas of its jurisprudence that most call for its special expertise.

The Strasbourg Court has to resist the temptation of deciding matters which properly fall within the margin of appreciation. At the moment, in other cases, the Strasbourg Court is bound to decide all the questions which need to be decided in the case before it. It is in general unable to remit questions back to the member State, because national remedies have been exhausted. If necessary, the Interlaken process should consider whether an amendment to the Convention is necessary to impose on Contracting States an obligation to allow an applicant to have a matter reopened in the domestic courts if the Strasbourg Court so requires. That would give the Strasbourg Court an extra tool. It could require the domestic courts to apply its jurisprudence, which it would identify. Involving national courts in this way may help to change the culture in jurisdictions where Strasbourg jurisprudence is less well understood or less readily applied.

### 3. More temporal limitations

The Strasbourg Court has from time to time imposed temporal limitations but in the normal course it will be much less easy for it to do so as it will simply be dealing with the instant case and not with its impact on the domestic legal system. Nonetheless, there may be cases where, consistently with justice and subsidiarity, a temporal limitation should be imposed.

### 4. Clearer judgments

The clarity of judgments from the Strasbourg Court is also sometimes an issue. We should continue to press the Strasbourg Court to maintain high standards in this regard. Acceptance of its jurisprudence by the Contracting States depends on the clarity of its jurisprudence. However, there is a partial remedy in Protocol No. 14 in that the Committee of Ministers will be able to refer cases back to the Strasbourg Court for clarification<sup>17</sup>.

## CONCLUSIONS

What I have sought to do in this intervention is to pose some questions about what makes for effective supranational adjudication by the Strasbourg Court. I have sought also to put forward some criteria for assessing its work on a principled basis.

So, to conclude. The United Kingdom has obtained substantial benefits from Strasbourg jurisprudence. So have other Contracting States. The relationship has been beneficial and in general harmonious. However, in this intervention, I have identified a number of practical issues, and suggested solutions directed to achieving the most effective Convention system.

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17. See Article 16 of Protocol No. 14.



So, the answer to the question “Is the Convention ours?” has to be: No. It is not ours. But, importantly, it is not the sole preserve of the Strasbourg Court either. The Strasbourg Court is of course the authoritative court for the interpretation of the Convention. But each of the national courts has its own part to play as well in the development and enforcement of human rights jurisprudence.

All these courts must have appropriate respect for each other’s role, and in particular, as I have explained in this intervention, the Strasbourg Court has to have respect for the national institutions if the Convention system is to achieve its true purpose.

In summary, in this intervention, I have advocated:

- more dialogue between judges, and in particular a plenary meeting of judges of the national courts with judges of the Strasbourg Court after the Interlaken Conference;
- more subsidiarity, including an option for the Strasbourg Court, when it gives judgment, to remit a case back to the national courts to reconsider afresh in the light of identified principles of Convention jurisprudence; and
- continued vigilance with respect to clarity in judgments and, where appropriate, greater use of temporal limitations.

Finally, I would like to thank the President and judges of the Strasbourg Court for organising this valuable opportunity for an exchange of views, and to wish them well for the year ahead.

## Jean-Paul Costa

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

Ladies and gentlemen,

It gives me and my colleagues great pleasure to welcome you to the official opening of the Court's judicial year. Your presence here today encourages us to pursue our work and build on our achievements. I should also like to take this opportunity to wish you all a very happy and successful year in 2010.

Last year several of you were present here in this same room for a special solemn hearing marking the Court's fiftieth anniversary.

2010 is also a special year as we will be commemorating the sixtieth anniversary of the European Convention on Human Rights.

We are delighted to see here, today, so many representatives of various authorities, members of government, parliamentarians, senior officials of the Council of Europe, Ambassadors, and permanent representatives to the Council. I am also pleased to welcome the heads of national and international courts with which the Court cooperates closely. One of them, my friend Jean-Marc Sauvé, Vice-President of the French Conseil d'Etat, has kindly accepted the invitation to be our guest of honour, for which I am most grateful to him, and I have no doubt that what he has to say to us later on will be of the greatest interest. The seminar this afternoon was entitled "The Convention is yours". This theme reflects the important role of domestic courts, which are the first to apply and interpret the Convention. Their essential share of the responsibility for protecting fundamental rights is constantly increasing.

I should like to extend a particularly personal welcome to Mr Thorbjørn Jagland, the new Secretary General of the Council of Europe. It is the first time that he has attended the opening of the Court's judicial year. He took office only a few months ago, after serving his own country at high levels of responsibility. Our first contacts have been excellent and most promising for our future cooperation. Since his arrival Thorbjørn Jagland has taken some initiatives that I find very positive, in terms of reforming the Council and strengthening the Court. Last week the Committee of Ministers of the Council of Europe gave him their backing. I would like to thank him for his endeavours and encourage him to bring them to fruition. I will certainly give him my support. The Council of Europe and the Court, whose destinies have always been closely connected, must move forward together.

I also extend a warm welcome to Mr Jean-Marie Bockel, State Secretary for Justice to the Minister for Justice and Liberties, the Garde des Sceaux, representing the Government of France, the Court's host State.

Mr Bockel, you are well-acquainted with the Council of Europe as you have sat in its Parliamentary Assembly and are a leading elected representative in Alsace. I greatly appreciated the fact that one of your first official visits was to the Court, last July. Your support for our work will help us succeed.

Celebrations are a time for looking back but they are also an opportunity to think about the long term. After fifty years our institution should be looking firmly to the future – its own future and that of human rights on our continent.

We had great expectations for 2009, but at the same time certain concerns. I believe that 2009 lived up to those expectations and we have been reassured and stimulated by a number of positive developments over the past year.

## **I. Positive developments**

One year ago the situation was not very healthy: for ten years the various attempts to reform the system had proved unsuccessful. Protocol 14 was still to enter into force and this was blocking the reform process, including the implementation of the recommendations by the Group of Wise Persons; the situation of the judges, having no pension scheme or social protection, was anomalous.

Solutions have since been found.

For Protocol 14, the first hurdle was crossed in Madrid on 12 May 2009, when the High Contracting Parties to the European Convention on Human Rights decided, by consensus, to implement on a provisional basis, in respect of those States that gave their consent, the procedural provisions of Protocol 14: the new single-judge formation and the new powers of the three-judge committees. To date, nineteen States have already accepted these new procedures, and since their introduction in the early summer of 2009 they have proved very promising in terms of efficiency.

The Court has already adopted, for example, over 2,000 decisions using the single-judge procedure; the first judgments by three-judge committees were delivered on 1 December.

Even more important was the vote by the State Duma of the Russian Federation on 15 January, then by the Federation Council the day before yesterday, in favour of the ratification of Protocol 14, thus clearing the way for all its provisions to be implemented in respect of the 47 member States. That was a decision that we had been hoping for, even though it was still far from certain only a few months ago. It must be commended and it bodes well for the future of our system, which is shortly to be addressed by the Ministerial Conference at Interlaken, about which I will say a few words later.

As to the judges' social-security situation – a question which, since the beginning of the "new" Court, had been raised by my predecessor Luzius Wildhaber, who is present today and whom I delighted to greet, and then by myself – a Resolution was adopted by the Committee of Ministers on 23 September 2009 approving a retirement pension and appropriate social protection arrangements for our judges. I would like to thank the Secretariat and the Committee of Ministers, through the Ambassadors present here today, for at last putting an end to an anomaly: we were the only court which did not have an institutional social protection scheme. The new provisions will also contribute to the independence of the judges, this being indispensable for the independence of the Court itself.

Another major event – delayed by the vicissitudes of European construction – was the entry into force, on 1 December, of the Lisbon Treaty. The Treaty provides for the European Union's accession to the European Convention on Human Rights, which is made possible by Article 17 of Protocol 14. This accession will complete the foundations of a common European legal area of fundamental rights. The European Union Court of Justice in Luxembourg and our Court, in working together closely and faithfully, have largely contributed to this endeavour through their respective case-law. However, it is now time, as the drafters of the Lisbon Treaty and Protocol 14 intended, to ensure consolidation of the Europe of 27 and the Europe of 47 in matters of human rights, thus avoiding any discrepancy between the standards of protection and strengthening ties between the Council of Europe and the European Union. This clear expression of political will is certainly something to be welcomed and should allow us to finalise the arrangements for the accession without delay.

At the same time, the European Union's Charter of Fundamental Rights has become legally binding under the Lisbon Treaty. The Charter took the Convention as its basis, whilst complementing and modernising its guarantees; indeed, it cites the Convention as a specific source, in line with the original intention. Accession of the Union to the Convention, binding force of the Charter of Fundamental Rights: we are only just beginning to realise what these two innovations, which had for a long time been on the back burner, are going to bring for the "citizen's Europe" after half a century of European legal construction. For its part, the Court is prepared to take forward this new development and to play a full part in it from the outset. The European Union's accession to the Convention will also open up new horizons, not only for the Court but also for the Council of Europe as a whole.

2009 was also positive for the Court's judicial activity: the total number of applications decided by decision or judgment rose significantly, by about 11%; the increase was as high as 27% for those decided by judgment (some 2,400).

Whilst there is no room for complacency, it can be said that this increase in productivity has not been at the expense of the quality or authority of our judgments, which may sometimes be criticised – as is inevitable – but which are always regarded as important. The Court should not relax its efforts, however, because it is confronted with an ever-increasing number of complaints concerning a variety of issues, some of them in new or very sensitive fields. There is even a temptation to use "Strasbourg" as an ultimate adjudicator whenever actors in the political, social or international arenas find themselves in a predicament or are unable to settle a dispute. In my opinion, the Court was probably not created to solve all problems and I leave you to reflect on the excessive recognition that is shown to us; even if this respect may not always be a welcome gift, it is a gift we cannot refuse, otherwise we would be accused of shirking responsibility or denying justice... And admittedly, to paraphrase Racine's Britannicus, an excess of honour is preferable to an affront.

Some gifts are, however, more welcome and honour us unreservedly. The Court is proud to have received an international award, for the first time as an institution: the Four Freedoms Award, under the auspices of the Roosevelt Stichting. I will be going to Middelburg in the Netherlands in May to receive this prestigious award, on behalf of the Court, in the presence of Her Majesty Queen Beatrix.

Another good sign is the increasing number of visitors to the Court – over 17,000 in 2009: judges from courts at all levels, including supreme and constitutional courts, together with prosecutors, lawyers, academics and students. It is gratifying to receive them because it is important to be open to Europe and the rest of the world. I am delighted that we continue to develop close working relations with the other regional human rights courts: in America, in Africa – and the one now in gestation in Asia.

The fact of being regarded – as is increasingly the case – not as a model but as a source of inspiration, is something we can be proud of. Mr Roland Ries, Mayor of Strasbourg, who is present here today, also takes a particular interest, I believe, in the international outreach of the “Strasbourg Court” and he supports that cooperation. The City and the Court themselves enjoy close and cordial relations.

This year, mainly for reasons of time, I will not give an overview of last year’s caselaw. I should like, however, to emphasise that some very important judgments and decisions have been given on highly varied subjects: from police custody to the conservation of DNA profiles, from nationality-dependent pension rights to special detention regimes, from the disappearance of individuals in conflicts to questions of parliamentary immunity and eligibility to stand for election – to mention but a few examples.

I would also point out the importance – admittedly not exclusive – of the Grand Chamber, which examines serious questions affecting the interpretation or application of the Convention or serious issues of general importance. The Grand Chamber delivered eighteen judgments in 2009. They represent less than 1% of the Court’s judgments but have a particularly strong impact.

There were many positive developments in 2009. However, there are still some concerns and it would be disingenuous not to mention them as well.

## II. Concerns

The first concern is the expanding gap between the number of applications arriving in the Registry and the number of decisions rendered. In 2009 over 57,000 new applications were registered. This considerable figure exceeds by about 22,000 the number – already unprecedented – of decisions and judgments delivered in the same year. In other words, every month the gap between what comes in and what goes out has increased by over 1,800 cases. As to the number of pending cases, the situation is no less alarming. At the end of 2009 almost 120,000 cases were pending. That figure had increased by 23% in one year and by 50% in two years. All the senior members of the judiciary here today will have a clear idea of what such a figure represents. To go into more detail, 55% of applications come from four countries, which represent – I should say only represent – 35% of the population of Council of Europe States. If the applications against those four States were in proportion to the number of their inhabitants, our case-load would be reduced by 25,000. This illustrates the point that specific efforts would significantly help to reduce our backlog.

The total number of cases pending is – I must repeat – substantial. Even if we were to consider a “moratorium” and stop registering new applications, it would take many years, at the current rate, to finish off all the existing cases. The waiting time for cases to be decided is often unreasonable, within the meaning of Article 6 of the Convention, and the Court is thus hardly able to comply with the relevant provision of that Article. This is a criticism we often hear, especially from domestic courts. We are well aware of the issue and our aim is obviously to ensure that this situation does not last.

The Court’s extremely high case-load has already had certain negative consequences.

Firstly, as the number of judges is limited under the Convention to one for each High Contracting Party, the “output” as such cannot be increased indefinitely. In spite of the valuable assistance of the Registry’s staff, my colleagues cannot reasonably handle many more cases than they do already.

Secondly, an increase in the number of cases adjudicated carries, in spite of all our precautions, a greater risk of inconsistent case-law.

Lastly, this increase also makes the prompt execution of judgments more difficult. The workload of the department which assists the Committee of Ministers in supervising execution grows in proportion to the number of judgments, in a difficult budgetary context. That department is also verging on saturation.

The Court now finds itself in a paradoxical situation. We have to deal with an extremely large number of applications that have no chance of succeeding – many of which (about 90 in every 100) are rejected after a full examination, but on the basis of brief reasoning that applicants are not always willing to accept. It is true that no blame would appear to attach to the respondent States in respect of these numerous cases, as the applications are declared inadmissible.

However, this does raise a question: how is it possible that tens of thousands of cases come before the Court each year when they are bound to fail? There is certainly a lack of information about the Convention and the rights that it guarantees, about the rules of procedure, and about the few basic formal requirements for bringing a case. Should we not be informing applicants better? If so, how? We have often encouraged lawyers to give better advice to their clients. But what happens when there is no lawyer? What role can the State play without being suspected of impeding the exercise of the right of individual petition? Practical solutions that are easy to implement can be found at national level to help reduce the excessive number of applications coming our way. Civil society can, of course, also play a useful role in this connection.

Citizens – potential parties – need to know, if they have a complaint concerning the protection of their rights under the Convention – and those rights alone –, that they have six months to take their case to the Strasbourg Court after exhausting all domestic remedies, but that it is not a court of fourth instance and therefore cannot hold a retrial or quash a judgment.

Efforts have to be made by all, including NGOs, Bar Associations and academia, to point out continually that whilst everyone has a right of petition, it cannot meet all expectations or cover all activities and all aspects of life which we as human beings seek to secure. Such efforts should be organised in liaison with the Court itself.

We have to be creative because we are hampered by two major constraints: one is the need to preserve the right of individual petition, to which we are all attached and which remains the cornerstone of a collective protection mechanism applying to 800 million Europeans; the other is the difficulty of obtaining additional financial and human resources, at this time of economic crisis.

However, there is a second category of applications that should logically have been dealt with at national level. These are complaints that, by contrast, are bound to succeed, on the basis of well-established case-law that the Court has simply to apply, reiterating its previous findings.

The fact that repetitive cases have to be dealt with in Strasbourg shows that national systems are not well-adapted and that, quite often, judgments are not properly executed by States. It is for the States to uphold complaints by victims of manifest violations of the Convention. It is for the States to protect human rights and make reparation for the consequences of violations. The Court must ensure that States observe their engagements but cannot substitute itself for them. It cannot be a fourth instance court, of course, but still less a court of first instance or a mere compensation board.

The commitment of States is precisely one of the key issues for the Interlaken Conference which will be taking place in just under three weeks – and this will be my last subject.



### III. The future: Interlaken and its follow-up

A year ago I expressed the wish that the States Parties to the Convention should engage in a collective reflection on the rights and freedoms that they sought to guarantee to their citizens, without reneging on the existing rights. I called for a major political conference that would articulate a new commitment and would be the best way of giving the Court a reaffirmed legitimacy and a clarified mandate. I announced that in due course I would be sending a memorandum to States: this was done on 3 July.

I should like to pay tribute to the authorities of Switzerland, the country that has chaired the Committee of Ministers since 18 November 2009, for their decision to organise a high-level conference on the future of the European Court of Human Rights in Interlaken on 18 and 19 February 2010. It is generous of them to do so and I feel that this reflects a clarity of political vision.

Switzerland's response to the appeal made last year is very timely for enhancing the Court's effectiveness in the short and long term. The Court clearly needs States to take decisions on the regulatory and structural reforms that have to be undertaken. All the stakeholders in the system thus have great hopes for the Interlaken Conference. The Court expects it to produce the clear roadmap that is essential.

Ladies and gentlemen, I have already spoken at some length. In any event, I am unable to go into the details of the conference and must certainly not prejudge the decisions that will be taken at Interlaken. However, a few guiding principles are worthy of mention.

We have to reaffirm the right of individual petition whilst attempting to regulate the increase in the number of new applications, which is seven times higher today than it was ten years ago and twice as high as it was six years ago. In addition to the beneficial effects of Protocol 14, filtering mechanisms will need to be set up in the Court to ensure efficient sorting and allow the Court to devote most of its energy to dealing with new problems and the most serious violations. We need to build on procedures that have already been introduced – pilot judgments, friendly settlements, unilateral declarations – so the Court can deal expediently and fairly with similar complaints from large numbers of applicants. We also need to forestall disputes and execute judgments more effectively. Perhaps we should also be developing the Court's advisory role. It is really important.

More fundamentally, Interlaken should help us go “back to basics”, as they say in sport or political parlance. The Convention, to which a number of Protocols have been added, was conceived in the middle of last century as a multilateral treaty for the collective protection of rights. Its drafters never intended to shift responsibility, exclusively or even predominantly, to the Court. On the contrary, the Convention laid emphasis on the obligations of States: an obligation to secure Convention rights to everyone within their jurisdiction; a duty to provide effective remedies before domestic courts and in particular to set up judicial systems that are independent, impartial, transparent, fair and reasonably quick; an undertaking to comply with the Court's judgments, at least in those disputes to which the State in question is a party – and increasingly where judgments identify similar shortcomings in other States; and lastly, a need to respect the Court's institutional independence and contribute to its efficiency, especially by covering its operating costs. All these duties are implicitly – and even explicitly – assigned by the European Convention on Human Rights to the States Parties. It is only at that price, and under those conditions, that the Court – a creation of the States – can play the role that they themselves conferred on it: it must ensure the observance of their engagements, in other words monitor them and if necessary find against them, but not substitute itself for them.

Once again, ladies and gentlemen, the Convention is yours. But the rights and freedoms belong to everyone and it is primarily your task to ensure that all can enjoy them.

Basically, the Convention is more than just an ordinary treaty, it is a Covenant, and a particularly bold one when you think about it. It is a founding Covenant, because it created what the Court itself has had occasion to describe as a “constitutional public order for the protection of human rights”. Interlaken must give us the opportunity for a solemn confirmation – not to say “rebuilding” – of this Covenant, sixty years on. *Pacta sunt servanda* – Covenants should not only be observed, they may sometimes have to be confirmed.

However, even though the conference in three weeks’ time and the decisions taken there will be important, we will not achieve everything all at once. Interlaken will provide the venue and time for raising new awareness and for setting a process in motion. There will be an after-Interlaken. But first we must be able to seize this great opportunity. I would reiterate my call for a large number of political leaders to represent their States at the conference. The issues at stake are important enough to merit – even to require – their attendance.

Ladies and gentlemen, before handing over to my colleague and friend, Jean-Marc Sauvé, allow me to finish as I began, on an optimistic note.

It is my belief that the European human rights protection system, as it was first set up and has been enhanced by fifty years of case-law, has all the necessary characteristics to guarantee it a promising future. As Saint-Exupéry said, “the future is always about putting the present in order”. Is it impossible to put things in order? I do not believe so. And if it is possible, it is also necessary. So it will be done if we all work together to that end.

Thank you for your attention.

## Jean-Marc Sauvé

**Vice-President of the French *Conseil d'Etat***

President, members of the judiciary, Minister, Secretary General of the Council of Europe, ladies and gentlemen,

" ... Allow me to think aloud here about the innocent victims of wars and about the defenders of human rights, freedom and dignity. My thoughts also turn to all those silent judges who, with justice and civic courage, apply the rules for the protection of the rights of individuals in society.

It is all these people, dead or alive, men of goodwill, those who have constructed a fairer human condition, the fervent 'catalysts' of rules that are old in substance, but now expressed in terms better suited to our modern world, who are – in the name of one of their number – the real laureates of the Nobel Peace Prize."

Thus did René Cassin, my illustrious predecessor at the *Conseil d'Etat* of France, who was at that time the President of your Court, express himself in December 1968 when receiving the Nobel Peace Prize for his work in promoting human rights.

René Cassin's thinking was rooted in the unshakeable conviction that there can be no lasting peace without "the practical ratification of essential human rights", as he had declared back in 1941 at the St. James's Palace Conference.

You – and we, the national judges – are the heirs and keepers of that promise and that statement of hope.

Sixty years after the signing of the European Convention on Human Rights, I, as President of a Supreme Court, wish to bear witness to the work done by your Court, which, last year, celebrated its 50th anniversary and whose role in protecting fundamental rights has recently been justly rewarded by the Roosevelt Institute<sup>1</sup>.

Never before have human rights been better enshrined and protected in the European space. Democratic principles are the common reference of the forty-seven member States of the Council of Europe and a "pax europeana" is secured. A historic moment is upon us, with the entry into force on 1 December 2009 of the Treaty of Lisbon: the European Union is now in a position to accede to the European Convention on Human Rights, and the Charter of Fundamental Rights of the European Union has received the same value in law as the treaties. The European network of human rights safeguards is thus continually being tightened and reinforced.

It is, however, the very success of the European system for the protection of human rights that, beyond this remarkable achievement, raises questions about its future prospects. For what do we in fact observe?

Firstly, the serious bottleneck at your Court, which, being inundated as a result of the confidence it inspires, registers more than 50,000 new applications per year.

1. The Roosevelt Institute of Middelburg (Netherlands) has granted the Franklin D. Roosevelt International Four Freedoms Award to the European Court of Human Rights for the year 2010. Noting its remarkable record in establishing solid foundations for the rule of law in the field of human rights, the Roosevelt Institute has expressed its appreciation for the Court's contribution to the protection of individual human rights in post-war Europe, offering in particular an accessible tool for strengthening an effective democracy.

There are also questions – or even criticisms – at times concerning the role of the international courts and the scope of their case-law.

There is, lastly, a tendency to refer fundamental rights guarantees back to States: such a tendency is welcome if it is part of a healthy desire to promote the principle of subsidiarity, but will be more problematical if the protection of rights at national level conflicts with your Court's case-law.

The questions raised by the current situation call for answers. However, before envisaging solutions we need to take stock of the path travelled in Europe with a view to defining and protecting human rights. We also need to take the measure of the profound transformation in the protection of human rights within the States Parties introduced by the European Convention and your Court's case-law.

**I. It must first be emphatically stated that the European system for the protection of human rights has proved itself to be the guarantor of a common heritage that is indissociable from our shared European humanism.**

A. This system has emerged as a result of the unspeakable ordeals inflicted by our continent on itself and on the world during the twentieth century. It has much older origins, however: it is the fruit of thinking in respect of which, without claiming any monopoly, the European continent has been the melting-pot. It is not the prerogative of a particular State or population that is more deserving than another, but is intrinsically linked to a European identity that has been constructed over time and is now our common heritage.

This remarkable and unprecedented legal construction, crowned by your Court, is the end result of a conception of mankind that has been slowly forged by thinkers in various countries who, through their research, their writings, their travels, their dialogues and also their intellectual conflicts, have constructed a common area of thought. In all European countries people have stood up who "pride themselves on being capable of thinking tomorrow otherwise than they do today"<sup>2</sup>. It is in this common area of thought, and on this fertile ground, that a philosophical and political vision of man, his rights and their necessary protection has emerged. A vision that has made it possible to regard people as beings who are an end in themselves and never simply a means: beyond empirical man has been unveiled the "humanity within men". In short, Europe has been "the cradle of the notions of the person and of freedom".

This vision, which has since been supplemented and renewed, but sometimes also denied, has resulted in a moral doctrine, a political system, a legal order.

B. The European system for the protection of human rights, as created from 1950 onwards, is the legal expression of this humanism. It is even one of its end results. This system enshrines, as you yourselves have said, a veritable "European public order" which "expresses the essential requirements of life in society. In referring thereto, [your] Court ... works on the premise that rules exist that are perceived as fundamental for European society and are binding on its members"<sup>3</sup>.

From this derives the body of rights that have now been enshrined, be they individual or collective rights, some of which – such as the prohibition of torture and inhuman or degrading treatment or the prohibition of slavery – cannot be the subject of any derogation.

2. Marguerite Yourcenar, *L'œuvre au noir*.

3. Frédéric Sudre et al., *Les grands arrêts de la Cour européenne des Droits de l'Homme*, 5th edition, Presse Universitaire de France, 2009, Thémis droit, p. 10.

All these rights have been progressively enriched, developed and extended. The theory of implied rights, which has led, for example, to the recognition of the right to execution of a court decision<sup>4</sup>, is an illustration of this. Similarly, the Convention can also have indirect and extraterritorial effect<sup>5</sup>. It can also give rise to positive obligations on States and not only obligations to refrain from a particular course of action: this principle, which was established in the case-law in 1979<sup>6</sup>, makes it possible to rule against a State on grounds of wrongful failure to act and not only on grounds of active interference with a protected right. The Convention can also produce horizontal effects and apply to relations of individuals between themselves rather than exclusively those between citizens and public authorities<sup>7</sup>.

This logical extension of scope has given rise to a system of rules for interpreting and applying the rights in question. Your Court examines particularly carefully whether interferences or restrictions in the exercise of rights, where these are permitted under the Convention, are prescribed by law, that is, by a law that is accessible, foreseeable and compatible with the rule of law. My country took the measure of this requirement in 1990, when it had not yet legislated on the use of telephone tapping<sup>8</sup>. Your Court also determines whether such interferences or restrictions, which must be “necessary in a democratic society”, are justified on grounds of necessity and proportionality<sup>9</sup>.

In the space of half a century, and in the tradition of European humanist thought that has been ratified by the people, you have thus constructed an impressive body of case-law designed to protect human rights. The density of this body of case-law, and its advance or its lead on many national sources, have led to a profound transformation of the protection of rights in all the States Parties to the Convention.

## **II. The European system for the protection of human rights, while respecting the differences that make us richer, has been the source of a profound change in the protection of rights in our States.**

A. Whilst having regard for the diversity of our national legal traditions, the system of human rights protection that has derived from the Convention has become an essential source of development of the protection of these rights in the European States. This system is, I believe, well assimilated by those States and is a source of inspiration for the courts and national legislators.

1. Thus it is that in France, which has a monistic regime, the European Convention, which has been directly incorporated into the national legal system, has been one of the ferments in the development of the case-law, including that of the administrative courts for two decades. Not only does the *Conseil d’Etat* apply the case-law of the European Court of Human Rights, it does so with commitment and determination<sup>10</sup>. The right to a fair trial, which is a fundamental right *par excellence*, is, accordingly, one that has given rise to the most profound changes in our case-law. The courts draw all the consequences, both from the substantive scope attributed<sup>11</sup> to this provision and from the guarantees it contains, particularly

4. *Hornsby v. Greece*, 19 March 1997, *Reports of Judgments and Decisions* 1997-II.

5. *Al-Saadoon and Mufdhi v. the United Kingdom*, no. 61498/08, 30 June 2009.

6. *Marckx v. Belgium*, 13 June 1979, Series A no. 31; *Airey v. Ireland*, 9 October 1979, Series A no. 32; see also *Siliadin v. France*, no. 73316/01, ECHR 2005-VII.

7. *López Ostra v. Spain*, 9 December 1994, Series A no. 303-C.

8. *Kruslin v. France*, 24 April 1990, Series A no. 176-A.

9. *United Communist Party of Turkey and Others v. Turkey*, 30 January 1998, *Reports* 1998-I.

10. See on this point, *inter alia*, Frédéric Sudre, “Du dialogue des juges à l’euro-compatibilité”, *Le dialogue des juges. Mélanges en l’honneur du président B. Genevois*, Dalloz, 2008, pp. 1015-32.

11. The administrative courts thus apply the guarantees in this Article to the disciplinary tribunals (CE, Ass., *Maubleu*, 14 February 1996, Rec. 34), the audit offices (CE, *M. Beausoleil et Mme Richard*, 30 December 2003, Rec. 531), and also to the collegiate bodies imposing administrative penalties (CE, Ass., *Didier*, 3 December 1999, Rec. 399, and CE, Sect., *Parent*, 27 October 2006, Rec. 454).

with regard to reviewing penalties<sup>12</sup>. The right to the peaceful enjoyment of possessions and the prohibition on discrimination have also given rise to major departures from precedent: it was under the direct influence of your case-law that the pensions of ex-servicemen originating from Africa that had been frozen over fifty years previously could be unfrozen in 2001<sup>13</sup>. Similar observations apply, *mutatis mutandis*, to the French Court of Cassation within its area of competence.

The regard had to the case-law of your Court has also substantially affected the protection of rights in the other States. President Corstens of the Supreme Court of the Netherlands has this afternoon given a striking illustration of the consequences drawn by the Netherlands courts from the Court's judgments, even those in respect of other States. I shall confine myself to two further examples. In Germany, a country with a regime of "moderate dualism", according to the expression used by the President of the German Constitutional Court, Mr Papier<sup>14</sup>, the purely legislative value of the stipulations contained in its international commitments does not prevent your judgments from producing *erga omnes* effects or even having a constitutional-law dimension<sup>15</sup>. The Convention, as interpreted by your Court, has thus become a reference point for constitutional review.

There can be no question but that many national constitutional courts, albeit implicitly, apply similar methods of scrutiny, with the rights and freedoms guaranteed by the Constitutions of the States being interpreted in the light of your case-law.

In the United Kingdom, which is a State with a dualist tradition, even before the Human Rights Act of 1998, the influence of your case-law was no less strong for being more diffuse. As Sir Stephen Sedley, Lord Justice of Appeal, said here in 2006, the United Kingdom courts, which have to act consistently with the Convention, have regard to the case-law of your Court, which gives rise to "invisible changes in [the] modes of legal reasoning". We also know that, whilst common law is not directly touched by the Human Rights Act, it "slowly adopts the same shape as the Convention"<sup>16</sup>. Lady Justice Arden DBE<sup>17</sup>, whilst pleading strongly in favour of compliance with the principle of subsidiarity, has reminded us today that the Convention is virtually self-executing in the United Kingdom.

2. More broadly, the strength of the European system for the protection of human rights lies in having been capable of imposing itself as a source of inspiration not only for the courts, but also for the legislators. Regarding the courts first, and confining myself to my experience of the court of which I am president, the profound influence exerted by the stipulations contained in our international commitments in the field of human rights has found expression in, among other things, very protective new case-law on the State's responsibility in cases where damage has occurred as a result of a law that is contrary to such a commitment<sup>18</sup>. In the same way, the scrutiny of the lawfulness of measures concerning

12. They scrutinise respect for the rights of the defence, the adversarial nature of proceedings and the impartiality of decisions (CE, Ass., *Didier*, 3 December 1999, cited above, and CE, *Banque d'escompte et Wormser frères réunis*, 30 July 2003, Rec. 351), and also compliance with the requirements of paragraph 3 of Article 6 of the Convention (CE, Sect., *Parent*, 27 October 2006, cited above).

13. CE, Ass., *Ministre de la défense c. Diop*, 30 November 2001, Rec. 605, concl. Courtial, GAJA, 17th edition, pp. 827 et seq.

14. Hans-Jürgen Papier, President of the Federal Constitutional Court of Germany, "Execution and effects of the judgments of the European Court of Human Rights in the German judicial system", *Dialogue between judges*, European Court of Human Rights, Council of Europe, Strasbourg, 2006, p. 57.

15. Federal Constitutional Court, *Görgülü*, judgment of 14 October 2004, BVerfGE 111, p. 307, at p. 319.

16. Sir Stephen Sedley, Lord Justice of Appeal, England and Wales, "Personal reflections on the reception and application of the Court's case-law", *Dialogue between judges*, European Court of Human Rights, Council of Europe, Strasbourg, 2006, p. 84. He adds "the structured inquiry into proportionality which Strasbourg has developed is replacing simple yes-or-no decisions as to whether something is reasonable ...".

17. Judge of the Court of Appeal for England and Wales.

18. CE, Ass., *Gardiedieu*, 8 February 2007, Rec. 78, concl. Drepas.



aliens<sup>19</sup> or detainees<sup>20</sup> has been greatly extended and developed. Currently, nearly a quarter of the 3,000 most important decisions delivered each year by the *Conseil d'État* contain a ruling on whether or not rights protected by the European Convention on Human Rights have been violated. There can be no better illustration of the influence and impact of this instrument which now permeates the whole of French public law and guides the scrutiny of the administrative authorities. These developments have, moreover, given rise to a veritable dialectic in the protection of human rights. Thus, the national courts do not confine themselves to displaying “judicial discipline” towards your Court. For the sake of consistency with their own case-law, they do not hesitate to go beyond the standards fixed by you.

The rule-making authorities have also drawn consequences from the Convention as you have interpreted it: many States have thus adapted their legislation or their regulations as a preventive or curative measure, be it to reform their criminal, civil or administrative procedure with a view to applying the rules of a fair trial, to provide for compensation for damage caused by failure to comply with a reasonable time-limit, to take action against the excessive length of pre-trial detention or to regulate telephone interceptions. In France we have also had to repeal the Monitoring of the Foreign Press Act and revise the Opinion Polls Act.

B. At the root of this remarkable development of human rights protection in the Convention system is one of the important dynamics in the formation of European humanism, namely, the existence of a dialogue that respects the identity and richness of cultural traditions in Europe.

The general economy of the Convention is founded on respect for the diversity of cultures and legitimate legal traditions. Your Court has reiterated this by affirming at the outset that it “cannot assume the role of the competent national authorities, for it would thereby lose sight of the subsidiary nature of the international machinery of collective enforcement established by the Convention”<sup>21</sup>. This concept of subsidiarity is designed to guarantee that “pluralism”, together with “tolerance” and “broadmindedness”, will remain one of the foundations of “democratic society”<sup>22</sup>.

In keeping with the heteronomy inherent in this system, each of its actors makes an essential contribution to an extensive dialogue that is one of the sources and one of the expressions of European humanism.

This dialogue is, firstly, at the very foundation of the working methods and of the spirit that reigns at your Court. Franz Matscher, referring to his own experience as a judge of your Court, emphasised this when he said that he very quickly realised, after arriving in Strasbourg, that the “cultural baggage”, “legal training” and “mentality” he had brought with him from his country of origin were not the only truths, but that there were “other solutions that were equally valid, if not better”<sup>23</sup>.

19. In order to give full effect to the provisions of Article 8 of the Convention, the administrative courts now scrutinise the proportionality between interference by regulatory measures with an alien's family life and the public interests, linked if applicable to public policy (*ordre public*), which, according to the case, constitutes grounds for an order for deportation (CE, Ass., 19 April 1991, *Belgacem*, Rec. 152, concl. R. Abraham), removal (CE, 19 April 1991, *Mme Babas*, Rec. 162), refusing a residence permit (CE, Sect., 10 April 1992, *Marzini*, Rec. 154), or refusing a visa (CE, Sect., 10 April 1992, *Aykan*, Rec. 152).

20. CE, Ass., 14 December 2007 three decisions: *Planchenault*, *garde des Sceaux*, and *Min. de la Justice c. Boussouar et Payet*, Rec. 474, 495 and 498.

CE, Ass., 17 February 1995, *Marie*, Rec. 85.

CE, 30 July 2003, *Remli*, Rec. 366.

CE, 14 November 2008, *El Shennawy*, Rec. 417, in line with the case-law of the Court, *Kudła v. Poland* [GC], no. 30210/96, ECHR 2000-XI, and *Iwanczuk v. Poland*, no. 25196/94, 15 November 2001.

CE, 17 December 2008, *Sect. fr. de l'Observatoire int.l des prisons*, Rec. 463.

CE, 17 December 2008, *Sect. fr. de l'Observatoire int.l des prisons*, Rec. 456, on the choice of bedding for detainees and protection against fire risks.

CE, 30 November 2009, *garde des sceaux c. M. Kehli*, no. 318589, to be published in the Rec.

21. Case “relating to certain aspects of the laws on the use of languages in education in Belgium” (merits), 23 July 1968, Series A no. 6.

22. *Handyside v. the United Kingdom*, 7 December 1976, Series A no. 24.

23. Franz Matscher, “The European Court of Human Rights, yesterday, today and tomorrow, shortly after its fiftieth anniversary – Observations of a former judge at the Court”, *Revue trimestrielle des droits de l'homme*, vol. 80/2009, p. 901.

This dialogue is also clearly expressed through the quest to achieve a consensus that your Court endeavours to establish by comparing and contrasting the various systems for the protection of human rights and their development. The existence of this consensus may sometimes be contested; attention has sometimes been drawn to the “ambiguity” of its role<sup>24</sup>. However, it is indeed the search for a consensus through a dialogue between cultures and legal systems which makes the Convention a “living instrument” that requires an evolutive interpretation in the light of “present-day conditions” and “commonly accepted standards”<sup>25</sup>.

This dialogue also finds expression in the insertion of the Convention system into a denser and broader network of judges and norms: denser, because the system allows us to exchange and share our respective experiences beyond an institutional dialogue. Meetings such as today’s seminar are an example, through the diversity of the persons present, of this “dialogue between judges” that your Court promotes. As we have seen this afternoon, there could and should be more of them. This dialogue is also broader for the increasing recourse, in interpreting the Convention, to sources of inspiration which go beyond the actual text itself. An illustration of this can be seen in one of your recent judgments, which was expressly based on the texts of the Council of Europe and on the law and practice of the member States, but also on the law of the European Union and the case-law of the Supreme Court of Canada<sup>26</sup>. Whilst this method of interpretation can only be used with care, it is nonetheless revealing of the Convention system’s insertion into a veritable dialogue between cultures, which is a source of enrichment of our principles.

This European dialogue between legal systems and cultures would inevitably fade, however, if the Convention system were to evolve in such a way that the principles that inspired it became suffocated under the weight of their success or even started to dry up, for this would mean that we had not been capable of preserving them. If that were to happen, European humanism in its entirety would lose part of its essence.

### **III. The preservation of the European Convention system, which is our common responsibility, requires us to be faithful to the principles that inspired it and creates important duties for us.**

A. The originality and strength of the Convention system are expressed, in its actual provisions, in two fundamental principles which underlie its mechanism: the right of individual petition and the principle of subsidiarity. The first has to be preserved and the second reaffirmed.

1. The right of individual petition is “a key component of the machinery for protecting the rights” set forth in the Convention, as you have stated<sup>27</sup>. Without this procedural guarantee, the “European public order” that you mean to construct would remain a frontispiece for our principles without ever being effectively translated into law. It is the right of individual petition which ensures the “practical ratification of man’s essential rights” as advocated by René Cassin. Admittedly, the right of petition has not been immediately at the centre of the States’ concerns. However, the development of the European system for the protection of human rights has shown to what extent this guarantee lies at the very heart of its existence. Thus did Protocol No. 9, subject to certain reservations<sup>28</sup>, grant individuals the right to bring their case to the Court. Protocol No. 11, for its part, has radically transformed the control mechanism established by the Convention by creating a single judicial body – your Court – to which legal subjects can directly apply.

24. John L. Murray, Chief Justice of Ireland, “Consensus: concordance or hegemony of the majority”, *Dialogue between judges*, European Court of Human Rights, Council of Europe, 2008.

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

26. *S. and Marper v. the United Kingdom* [GC], nos. 30562/04 and 30566/04, to be published in ECHR 2008.

27. *Mamatkulov and Askarov v. Turkey* [GC], nos. 46827/99 and 46951/99, ECHR 2005-I.

28. In particular, the State had to have ratified the Protocol and a Committee of three judges could, unanimously, decide that the case would be examined by the Court.

Lastly, by giving binding force to interim measures pronounced under Rule 39 of your Rules of Court<sup>29</sup>, you have completed this development and guaranteed the effectiveness of the right of individual petition by providing that mere non-compliance with an interim measure amounts to a breach of Article 34 of the Convention. History is not made up of progress alone; it stops and starts; and the right of individual petition may provide a helpful antidote to its flaws.

2. The evolution of the Convention system must also tend towards reaffirming its “subsidiary character to the national systems safeguarding human rights”<sup>30</sup>. This principle of subsidiarity, which is expressed in the form of an obligation to exhaust domestic remedies, is designed to allow the Court to ensure respect for human rights “without thereby erasing the special features of domestic laws”<sup>31</sup>. Reaffirmation of the subsidiary – that is, ultimate – character of the guarantee that an application to your Court represents is fully consistent with a reassertion of the principle that it is the domestic courts that are the ordinary tribunals for infringements of the rights guaranteed by the Convention. This would undeniably be of huge benefit to the European system for the protection of human rights: would not the greatest success of the Court be to deal with only the most essential questions, limited in number, raised by the protection of these rights in Europe, and leave to the national judges the task of ensuring their protection on a daily basis?

That is my conviction.

B. In this context the preservation of the European system for the protection of fundamental rights creates important duties for us.

1. It creates important ones for your Court of course. As national Supreme Courts, we are aware of the importance attached to clear and foreseeable case-law and are attentive to your Court’s contribution to this objective. The profound changes over the past decade, not all of which perhaps have been integrated by the domestic courts, also put a particular price on the stability of this case-law. Where a departure from precedent is necessary, it is of course worth explaining the reasons for this, just as the national Supreme Courts have a duty – as you have stated very recently<sup>32</sup> – to give a substantial statement of reasons justifying the departure. It is essential for us that your Court give guidelines as to its interpretation of the Convention and indications regarding execution of its judgments. In that connection the practice of “pilot judgments”<sup>33</sup>, which makes it possible to accompany the measures taken by the respondent State to put an end to structural deficiencies, are extremely useful<sup>34</sup>. Your Court could also give us better guidance regarding the circumstances in which it bases its decisions on the existence of a consensus between the States Parties; it could even endeavour to confine its use of that principle of interpretation to developments in the protection of rights which raise “no doubts in an informed mind”<sup>35</sup>. Accordingly, without in any way freezing the scope of the Convention, a consensual interpretation would become a melting-pot to which the States Parties would acquiesce and would give the decision reached by the Court the best chance of effectiveness<sup>36</sup>.

29. *Mamatkulov and Askarov*, cited above. CE, ord. ref. 30 June 2009, *ministre de l’intérieur, de l’outre-mer et des collectivités territoriales c. Beghal*, no. 328879, to be published in the *Recueil Lebon*.

30. *Handyside*, cited above.

31. Frédéric Sudre, “Le pluralisme saisi par le juge européen”, *Droit et pluralisme*, Bruylant, 2007, p. 281.

32. *Atanasovski v. “the former Yugoslav Republic of Macedonia”*, no. 36815/03, 14 January 2010.

33. Procedure applied for the first time in *Broniowski v. Poland* [GC], no. 31443/96, ECHR 2004-V.

34. As are the developments in which the Court describes the execution measures capable of remedying a finding of a violation: see, for example, *Scozzari and Giunta v. Italy* [GC], nos. 39221/98 and 41963/98, ECHR 2000-VIII, and *Maestri v. Italy* [GC], no. 39748/98, ECHR 2004-I.

35. To adopt President Braibant’s definition of a manifest error of appreciation, given in his conclusions on CE, Sect., *Lambert*, 13 November 1970, Rec. 665.

36. Frédéric Sudre, “L’effectivité des arrêts de la Cour européenne des droits de l’homme”, *Revue trimestrielle des droits de l’homme*, vol. 76/2008, pp. 917-47.

2. The preservation of the Convention system also creates important duties for the domestic courts and the States. They must pursue the efforts they have made towards achieving a speedy and full application not only of your judgments, but also more broadly of your case-law. They have a duty, in the first instance, to prevent, examine and remedy violations of the Convention. The way to do this is to bring into line domestic laws and regulations which are incompatible with your case-law and provide for effective remedies that give full scope to the rights guaranteed by the Convention. The national courts also have a duty of loyal cooperation with your Court, which must lead to providing for recognition of the interpretative authority of its judgments and thus their *erga omnes* effect, irrespective of any final decision between the parties.

3. The preservation of the Convention system is, lastly, a duty incumbent on the Council of Europe, which must pursue the efforts made to provide the Court with the instruments necessary, in the present conjuncture, to perform its essential mission. The imminent entry into force of Protocol No. 14<sup>37</sup>, which will allow the Court to better adapt its examination to the difficulty of each case and which will also improve the process of execution of judgments, is very welcome. But it will certainly be necessary to go further. Should there not, for example, be more thorough “filtering” of applications that are unmeritorious, repetitive or where the applicant has not exhausted domestic remedies? Nor should the possibility be ruled out in the longer term of allowing the Court to select the cases it will examine or, possibly, the creation of a mechanism for referring cases to you for a preliminary ruling, provided that the right of individual petition is preserved. Would it not also be a solution to go further in affirming the authority and the judicial autonomy of your Court, for example by strengthening the status of judges and allowing your Court, by a simplified procedure, to propose rules for processing applications without it being necessary to revise the Convention each time? I think that these solutions should, at the very least, not be discarded outright.

\* \* \*

The future of the European system for the protection of human rights is therefore our common responsibility. This system, spearheaded by your Court, is confronted with major challenges. It has the ability to face those challenges while remaining true to the founding principles which make it one of the guarantors of the humanism and moral conscience born on our continent. This system is heir to a vast project designed to achieve reason and peace through law. It pursues, in the service of justice, the dialogue built up over the centuries by European thinkers on the human condition. It continues to build, stone by stone, a common vision of man, his rights and his dignity. It undoubtedly represents, today, the best that Europe can provide to the rest of the world: a certain concept of human beings and a certain concept of national as well as international justice, for the protection of the fundamental rights of the person. That which the world has failed to do since the Universal Declaration of Human Rights in 1948, Europe has done. You are the determinative actors behind this achievement.

I wish to end by expressing my warm thanks to President Costa and to the members of your Court who have honoured me with an invitation to engage in this dialogue with you here today. I sincerely hope that the new judicial year will once again see your Court asserting its role and its authority in the service of our shared ideals.

37. The State Duma of the Russian Federation voted in favour of the draft law ratifying Protocol No. 14 to the European Convention on Human Rights on 15 January 2010. This vote opens the way to the entry into force of the Protocol, already ratified by the forty-six other States Parties.

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