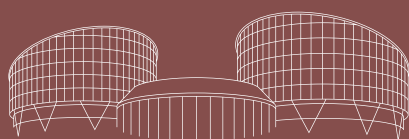




“What are the limits to the evolutive interpretation of the Convention?”



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



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Dialogue between judges

“What are the limits to the
evolutive interpretation of the
Convention?”

Strasbourg, January 2011

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Jean-Paul Costa

President of the European Court of Human Rights

Ladies and gentlemen, dear friends,

For the past six years now the Court's solemn hearing for the opening of the judicial year has been preceded by a seminar, which every year has proved increasingly successful.

I will shortly be giving the floor to my colleague, Françoise Tulkens, who was behind this excellent initiative, for her presentation of this year's theme. I should like simply to make a few introductory remarks, but allow me first to thank our three speakers this afternoon. All three are doubly qualified: they are all eminent jurists in their countries; and they are all very familiar with the European Convention on Human Rights.

Baroness Hale, you are a Justice of the Supreme Court of the United Kingdom, and the first woman Justice of this prestigious court, which has succeeded the House of Lords in its judicial capacity.

Professor Helgesen, you are a well-known international law specialist in Norway. You have been a member and the President of the Venice Commission, and you are currently its Vice-President.

Mr Antoine Garapon, you are a judge, and Secretary General of the *Institut des hautes études sur la justice*; you have written many works on domestic and international justice and on democracy.

I should thus like to thank you all for having accepted the invitation to speak at our seminar.

The theme this year is "What are the limits to the evolutive interpretation of the Convention?"

Therein lie a question and a fact. The fact is that, more or less since the beginning, the Convention organs – the Commission and Court – have taken the view that the text should be interpreted, and applied, by adapting it to the changes that have taken place over time – to changes in society, in morals, in mentalities, in laws, but also to technological innovations and scientific progress. The Convention is sixty years old: history has moved inexorably onward during that period and this contextual evolution has been highly significant. The Convention's interpreters expressly rejected a static or finite analysis. I am convinced they were right.

But our seminar will also pose a question: what are the limits to the dynamic nature of that interpretation? That presupposes that such limits exist – we may at least presume they do. In any event, if there are limits what are they? Do they lie in the European consensus or absence of consensus? Are they circumscribed by the intent of the States which, as masters of the treaties, have adopted a number of additional Protocols to the Convention? Is that intent always indicated expressly? Or does evolutive interpretation exist by tacit consent?

These issues are of great importance. They remind us, *mutatis mutandis*, of the dichotomy between statute law and case-law, bearing in mind that it is easier to change the law in a given country than to change an international treaty involving forty-seven States. In short, a number of problems may have to be addressed – I have mentioned just a few. I will now give the floor to Françoise Tulkens so that she can introduce the seminar in somewhat greater detail.

Once again, I thank you all for coming here today in such large numbers. I am sure that you will not be disappointed.

Françoise Tulkens

Section President of the European Court of Human Rights

Introduction

President, eminent members of the judiciary, ladies and gentlemen, dear colleagues, dear friends,

In the spirit of the dialogue between judges which pervades our seminars, this year we have chosen a theme which is no doubt quite conventional but which today raises new questions and also – to be frank – new criticisms. Hence the need for us to discuss the nature of the evolutive interpretation of the Convention by the Court and its limits: not an armchair conversation but an exchange of ideas and arguments – a “communication” in the substantive sense of the word, as M. Villiger has rightly observed in his contribution on “The Dialogue of Judges” in *Festschrift für Renate Jaeger*, in honour of our former colleague¹.

According to our usual method, we have given our three speakers, whom I would like to thank for being here, a background paper that you will also find in your file.

Basic certainties

A number of basic certainties can first be identified. Article 32 § 1 of the European Convention on Human Rights provides that the Court’s jurisdiction extends to all matters concerning the interpretation and application of the Convention and the Protocols thereto. “Interpretation” thus lies at the heart of the Court’s adjudication process. Moreover it is in the nature of fundamental rights that they can be applied only through a process of interpretation, as such rights are not circumscribed. They are also abstract in nature and acquire a concrete meaning in the particular context in which they are invoked. As to the European Court of Human Rights, it predominantly protects civil and political rights – those deriving from the philosophy of natural rights developed in Europe in the late eighteenth century. As Harris and O’Boyle rightly observe, for the drafters of the Convention it was a matter of priority and strategy “to have a short, non-controversial text which the governments could accept at once, while the tide for human rights was strong”². But the organs responsible for interpreting and applying those rights have never regarded them as static³.

The Court has accordingly had to develop “methods of interpretation”. In so doing it has been guided by the Vienna Convention on the Law of Treaties (Articles 31 and 32). Article 31 § 1 of that convention establishes the *purposive/teleological* method of interpretation, giving priority to the *object* and *purpose* of treaties⁴. Furthermore, under Article 31 § 2, the *Preamble* to a treaty forms an integral part of the context for its interpretation.

1. M.E. Villiger, “The Dialogue of Judges”, in C. Hohmann-Dennhardt et al. (eds.), *Festschrift für Renate Jaeger – Grundrechte und Solidarität. Durchsetzung und Verfahren*, Kehl am Rhein, N.P. Engel Verlag, 2011, p. 196.

2. L. Bégin, “L’internationalisation des droits de l’homme et les défis de la ‘contextualisation’”, *Revue interdisciplinaire d’études juridiques*, 2004, no. 53, pp. 63 et seq.

3. D.J. Harris, M. O’Boyle, E.P. Bates and C.M. Buckley, *Law of the European Convention on Human Rights*, 2nd edition, Oxford University Press, 2009, p. 3. See also F. Tulkens and S. Van Drooghenbroeck, “La place des droits sociaux dans la jurisprudence de la Cour européenne des droits de l’homme. La question de la pauvreté”, in Commission nationale consultative des droits de l’homme, *La déclaration universelle des droits de l’homme (1948-2008). Réalité d’un idéal commun? Les droits économiques, sociaux et culturels en question*, Paris, La documentation française, 2009, pp. 105 et seq.

4. R.C.A. White and C. Ovey, *The European Convention on Human Rights*, 5th edition, Oxford University Press, 2010, p. 4.

The Preamble to the Convention refers not only to the “maintenance” but also to the “further realisation” of human rights and fundamental freedoms. “Maintenance” requires the Court to ensure in particular that the rights and freedoms set out in the Convention continue to be effective in changing circumstances. This concern for effectiveness is the main driving force behind the interpretative methods developed by the Court. “Further realisation” allows for a degree of innovation and creativity, extending the reach of the Convention guarantees, especially when it is necessary to protect the substance of the rights and freedoms.

These are the two notions which provide the basis for “evolutive interpretation”.

Early case-law

Please forgive me for returning to some early judgments – the “forerunners” – but they are most enlightening.

In *Wemhoff v. Germany*, one of its first judgments, the Court clearly rejected the assertion that the Convention should be interpreted “restrictively”: “Given that [the Convention] is a law-making treaty, it is ... necessary to seek the interpretation that is most appropriate in order to realise the aim and achieve the object of the treaty, not that which would restrict to the greatest possible degree the obligations undertaken by the Parties.”⁵

In *Golder v. the United Kingdom* (1975) the Court observed, in relation to its interpretation of Article 6 § 1 of the Convention, that “this [was] not an extensive interpretation forcing new obligations on the Contracting States: it [was] based on the very terms of the first sentence of Article 6 § 1 read in its context and having regard to the object and purpose of the Convention, a law-making treaty”⁶. In finding that a right of access to a court could be read into Article 6 of the Convention, the Court noted that “[i]t would be inconceivable, in the opinion of the Court, that Article 6 § 1 should describe in detail the procedural guarantees afforded to parties ... and should not first protect that which alone makes it in fact possible to benefit from such guarantees, that is, access to a court. The fair, public and expeditious characteristics of judicial proceedings are of no value at all if there are no judicial proceedings”⁷.

In *Young, James and Webster v. the United Kingdom*, in accepting that the negative aspect of a person’s freedom of association could fall within the ambit of Article 11 and rejecting the proposition that each and every compulsion to join a particular trade union is compatible with the intention of that provision, the Court found that to “construe Article 11 as permitting every kind of compulsion in the field of trade union membership would strike at the very substance of the freedom it is designed to guarantee”⁸.

A living instrument

Perhaps the best known expression of the evolutive approach is to be found in the “living instrument” doctrine. As the Court has found in numerous judgments, “human rights treaties are living instruments, whose interpretation must consider the changes over time and, in particular, present-day conditions”⁹. In

5. 27 June 1968, p. 23, § 8, Series A no. 7.

6. 21 February 1975, § 36, Series A no. 18.

7. *Ibid.*, § 35 *in fine*.

8. 13 August 1981, § 52, Series A no. 44.

9. See *Tyrer v. the United Kingdom*, 25 April 1978, § 31, Series A no. 36; *Loizidou v. Turkey* (preliminary objections), 23 March 1995, § 71, Series A no. 310; *Christine Goodwin v. the United Kingdom* [GC], no. 28957/95, § 75, ECHR 2002-VI; *Öcalan v. Turkey*, no. 46221/99, § 193, 12 March 2003; *E.B. v. France* [GC], no. 43546/02, § 92, 22 January 2008; and *Saadi v. the United Kingdom* [GC], no. 13229/03, § 62, 29 January 2008. That expression has been used in some thirty cases. See L. Wildhaber, “The European Court of Human Rights in Action”, *Ritsumeikan Law Review*, 2004, vol. 21, p. 84; see also S. C. Prebensen, “Evolutive Interpretation of the European Convention on Human Rights”, in P. Mahoney et al. (eds.), *Protecting Human Rights: The European Perspective. Studies in Memory of Rolv Ryssdal*, Köln, Carl Heymanns Verlag KG, 2000, pp. 1123-37.

other words, the concepts used by the Convention are to be understood in the sense given to them by democratic societies today¹⁰. In fact, the principle of effectiveness is the bedrock of evolutive interpretation¹¹, and the “living instrument” approach to interpretation is the temporal dimension of that principle¹².

The Grand Chamber judgment in the case of *Scoppola v. Italy* (no. 2) of 2009, concerning the retrospective application of more favourable criminal legislation (*in mitius*), provides a more recent summary of the essence of this approach: “Since the Convention is first and foremost a system for the protection of human rights, the Court must ... have regard to the changing conditions in the respondent State and in the Contracting States in general ... It is of crucial importance that the Convention is interpreted and applied in a manner which renders its rights practical and effective, not theoretical and illusory.”¹³

Objections and criticisms

As summarised above, evolutive interpretation has given rise to “objections and criticisms”, even within the Court itself, as can be seen from the partly dissenting opinion of Judge Nicolaou (joined by Judges Bratza, Lorenzen, Villiger, Jočiené and Sajò) appended to the *Scoppola* (no. 2) judgment of 2009 that I have just mentioned.

Thus, certain objections come from the actual “text” of the Convention, in spite of its dynamic nature. The Convention and its Protocols must certainly be interpreted in the light of present-day conditions, but the Court cannot, by means of an evolutive interpretation, derive from these instruments a right which was not included therein at the outset. This is particularly so where the omission was deliberate¹⁴.

Criticism of evolutive interpretation is also often linked to concerns of “democratic legitimacy”. Can international treaties be interpreted in such a way as to impose more obligations on States than they are prepared to accept? More specifically, to what extent does the sovereignty principle admit of an interpretation that goes beyond the original intention of the treaty and modifies the “obligations” to which the States initially committed themselves?¹⁵

Lastly, in some quarters evolutive interpretation is seen as a symbol of “activism”, or worse of judicial imperialism, even if it can also, in some cases, have as an effect the restriction of the scope of the rights protected by the Convention¹⁶. The *Mangouras v. Spain* judgment¹⁷ in which the Court justified, under Article 5 § 3 of the Convention, the high amount of bail in an environmental case (the ecological disaster caused by the *Prestige* that sunk off Galicia in 2002), is a recent example. The question arises, however, whether the Court should not, in certain cases, show more “judicial self-restraint”.

10. F. Matscher, “Les contraintes de l’interprétation juridictionnelle. Les méthodes d’interprétation de la Convention européenne”, in F. Sudre (dir.), *L’interprétation de la Convention européenne des droits de l’homme*, Nemesis-Bruylant, coll. “Droit et justice”, no. 21, Brussels, 1998, p. 23.

11. R.C.A. White and C. Ovey, *The European Convention on Human Rights*, op. cit., p. 73.

12. S. C. Prebensen, “Evolutive Interpretation of the European Convention on Human Rights”, op. cit., p. 1125; E. Dubout, “Interprétation téléologique et politique jurisprudentielle de la Cour européenne des droits de l’homme”, *Revue trimestrielle des droits de l’homme*, 2008, pp. 383 et seq., esp. pp. 392-93.

13. [GC], no. 10249/03, § 104, 17 September 2009.

14. See, for example, *Johnston and Others v. Ireland*, 18 December 1986, § 53, Series A no. 112, and *Emonet and Others v. Switzerland*, no. 39051/03, § 66, 13 December 2007.

15. See, for example, M. Bossuyt, “Should the Strasbourg Court exercise more self-restraint? On the extension of the jurisdiction of the European Court of Human Rights to social security regulations”, *Human Rights Law Journal*, 2007, vol. 28, no. 9-12, pp. 321 et seq.

16. See *Bacchini v. Switzerland* (dec.), no. 62915/00, 21 June 2005, in which the Court found that the publication of a judicial decision on the Internet could in certain cases satisfy the requirement that the judgment be pronounced publicly, in accordance with Article 6 § 1 of the Convention. The case of *Pretty v. the United Kingdom* (no. 2346/02, ECHR 2002-III), is another example: the Court – after referring to it – refused to apply the “living instrument” theory to recognise that States, under Article 3 of the Convention, might have a positive obligation to permit the assisted suicide of a terminally ill person (§§ 54-55).

17. [GC], no. 12050/04, 28 September 2010.

Limits

Evolutionary interpretation is thus not and cannot be unlimited – we all agree on that. So what are the limits? I will explore a number of avenues.

The notion of a “European consensus” has long played an important role in regulating the pace of Convention development¹⁸. Faced with certain concepts used in the Convention, the Court determines the meaning they have acquired over time, such evolution being accepted however only if a sufficient number of States Parties to the Convention adhered to it. In many cases it is thus a question of identifying the “common denominator” among States. To put it differently, a decisive element of evolutionary interpretation results from the convergence between domestic laws of the States Parties to the Convention.

In terms of methodology, in the Court’s recent practice, in ascertaining the existence of such consensus it has less systematic recourse to comparative domestic law studies and more often analyses the “indications” provided by various instruments (even those of soft law), whether European or international. Thus, in the case of *Demir and Baykara v. Turkey*, which concerned collective bargaining, the Court noted as follows: “The consensus emerging from specialised international instruments ... may constitute a relevant consideration for the Court when it interprets the provisions of the Convention in specific cases”¹⁹. In that case the Court referred to instruments other than the Convention as elements or factors of “objectivisation” for the evolutionary or consensual interpretation²⁰.

In addition to the regulating role of consensus, the Court has repeatedly stated that “while [the Court] is not formally bound to follow any of its previous judgments, it is in the interests of legal certainty, foreseeability and equality before the law that it should not depart, without good reason, from precedents ...”²¹. This explains the approach that has been followed by the Court as consistently as possible, namely not to “change course”²², or depart from its case-law unless there are “good reasons” to do so²³, to explain any such departures clearly and to entrust the task to the Grand Chamber.

Lastly, in the interests of legal certainty, the Court has in certain circumstances had recourse to what might be termed “compensatory measures”. Thus in the *Marckx* judgment, the Court expressly dispensed the Belgian State “from re-opening legal acts or situations that antedate[d] the delivery of the ... judgment”²⁴. In her reflection on ways of helping to optimise relations between domestic Supreme Courts and the European courts, Lady Arden, who spoke at last year’s seminar, invited the Court to impose “temporal limitations” on the effects of its judgments more systematically: “there may be cases where, consistently with justice and subsidiarity, a temporal limitation should be imposed”²⁵.

18. See *Marckx v. Belgium*, 13 June 1979, § 41, Series A no. 31; *Dudgeon v. the United Kingdom*, 22 October 1981, § 60, Series A no. 45; *Soering v. the United Kingdom*, 7 July 1989, § 102, Series A no. 161; *L. and V. v. Austria*, nos. 39392/98 and 39829/98, § 50, ECHR 2003 I; and *Christine Goodwin v. the United Kingdom* [GC], no. 28957/95, § 85, ECHR 2002 VI.

19. [GC], no. 34503/97, § 85, 12 November 2008.

20. F. Tulkens and S. Van Drooghenbroeck, “Le soft law des droits de l’homme est-il vraiment si soft ? Les développements de la pratique interprétative récente de la Cour européenne des droits de l’homme”, *Liber amicorum Michel Mahieu*, Brussels, Larcier, 2008, pp. 505 et seq.

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

22. To use the expression of L. Burgorgue-Larsen, “De l’art de changer de cap. Libre propos sur les ‘nouveaux’ revirements de jurisprudence de la Cour européenne des droits de l’homme”, in *Libertés, justice, tolérance. Mélanges en hommage au Doyen Gérard Cohen-Jonathan*, Brussels, Bruylant, 2004, vol. I, pp. 335 et seq.

23. See *Chapman*, cited above, § 70.

24. See *Marckx*, cited above, § 58.

25. “Peaceful or problematic? The relationship between national Supreme Courts and supranational courts in Europe”, www.judiciary.gov.uk. See also M. Arden, “Is the Convention ours?”, in *Dialogue between Judges. The Convention is Yours*, European Court of Human Rights, Council of Europe, 2010.

Between flexibility and certainty

I would like to conclude by suggesting a dialectical approach.

Ultimately I believe that a balance must be struck between legal certainty and flexibility. On the one hand, the Court accepts the importance of “legal certainty”, what Fuller calls the “internal morality of law”, particularly in order to define the nature of the obligations imposed on the States. At the same time, a flexible interpretation of the Convention, responsive to the evolution of facts and ideas, is also necessary to pursue its fundamental goals, notably the maintenance and further realisation of human rights.

These, therefore, are the questions that the Court would like to discuss with you all.

Before giving the floor to our three speakers, who will assist us in our analysis, I should like to thank all those who, in the steering committee, have contributed to the organisation of this seminar: my colleagues Egbert Myjer, Sverre Erik Jebens and Isabelle Berro-Lefèvre; members of the Registry: Patrick Titiun, Leif Berg, Stéphanie Klein and Delphine De Angelis, under the enlightened and intelligent supervision of Roderick Liddell, to whom I would like to pay particular tribute, and with the calm, cheerful and efficient help of Valérie Schwartz. To Sylvie Ruffenach, who has been my assistant since 1998, I would like to express my sincere gratitude. Last – but certainly not least – I would also now like to thank the interpreters who will be assisting us this afternoon (Sally Bailey-Ravet, Robert Szymanski and Julia Tanner). Without you we would be lost in our Tower of Babel.

The Rt. Hon. The Baroness Hale of Richmond, DBE, PC

Justice of the Supreme Court of the United Kingdom

I come to this topic as a Judge in the Supreme Court of one of the member States; a State which has chosen to implement the Convention by turning the Convention rights into rights in domestic law, and given the courts the task of working out what those rights mean. In doing so, we are required to “have regard” to the jurisprudence of the European Court of Human Rights and other organs¹, but we are not required slavishly to follow it. Nevertheless, we will follow a “clear and constant” line of Strasbourg jurisprudence, unless there is a very good reason not to do so. This is not least because this Court can be expected to do so², and so it can create problems for us when it does not. Our duty, according to the late and much lamented Lord Bingham, “is to keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less”³. The “no more” is controversial, but I am not here to discuss what our own Human Rights Act requires of us. I am here to discuss how we may rationally predict what this Court requires of us.

Evolutionary interpretation in the common law

I also come to this topic as a Judge from a common-law country. The common law is no stranger to the concept of evolutionary interpretation, both of precedent case-law and of legislation. We are used to adapting our judge-made law to meet new problems and new factual situations. But the theory is that this is what the law has always been. We are simply correcting past errors. As the great Scottish Law Lord, Lord Reid, famously but ironically put it in 1971:

“Those with a taste for fairy tales seem to have thought that in some Aladdin’s cave there is hidden the Common Law in all its splendour and that on a judge’s appointment there descends on him knowledge of the magic words Open Sesame. Bad decisions are given when the judge has muddled the password and the wrong door opens.”⁴

But we recognise some important limits. First, we are seeking to identify and apply the existing principles of the law, extending and adapting them to meet new situations but not turning them on their head. Secondly, we do not legislate. This is not so much that we defer to Parliament, still less that Parliament is more democratic than we are – the courts are just as essential to a democracy based on the rule of law as is Parliament. It is rather a question of institutional competence. The courts can develop and adapt within existing concepts and principles, but they cannot devise whole new legislative schemes – and that, as we shall see, is giving us some problems with the implementation of the judgments of this Court. There are also some things which *ought* to be decided by a democratically elected Parliament rather than by the courts. Thirdly, of course, we are mindful that changes in judge-made law operate retrospectively, so that at the very least we should stay within the bounds of what is foreseeable. We too recognise the importance of legal certainty⁵.

1. Human Rights Act 1998, section 2(1).

2. *R (Alconbury Developments Ltd) v. Secretary of State for the Environment, Transport and the Regions* [2001] UKHL 23, [2003] 2 AC 295, at para. 26.

3. *R (Ullah) v. Special Adjudicator* [2004] UKHL 26, [2004] 2 AC 323, at para. 20.

4. “The Judge as Lawmaker” (1972) 12 JSPTL 22.

5. A good example is the removal of the marital rape exemption by *R v. R (Rape: Marital Exemption)* [1992] 1 AC 599, sanctioned by this Court in *S.W. v. the United Kingdom* (22 November 1995, § 36, Series A no. 335-B), as it was “consistent with the essence of the offence and could reasonably be foreseen”.

When it comes to the interpretation of statutes, except where the Human Rights Act requires us to act differently, we are in theory looking for the “intention of Parliament”. This is an illusion, because on most points which come before us Parliament did not have any intention at all. We have to deduce the intention of the legislation from the words used, read in the light of the statutory purpose. But it is rare for an Act of Parliament to have to be construed and applied exactly as it would have been applied when it was first passed. Statutes are said to be “always speaking” and so the words used must be made to apply to situations which would never have been contemplated when they were enacted. Thus in 2001, a “member of the family”, first used in 1920, could be held to include a same-sex partner⁶. In 1998, “bodily harm” in a statute of 1861 could be held to include psychiatric harm⁷. And in 2011, “violence” could be held to extend beyond physical violence into other sorts of harmful and abusive behaviour⁸.

In all of these examples, the court is seeking to further the purpose of the legislation in the social world as it now is rather than as it used to be, but to do so in a principled and predictable way which will not offend against either the intention of Parliament or the principle of legal certainty.

Evolutionary interpretation of the Convention

So how do our notions, of the “Aladdin’s cave” of the common law and the “always speaking” statute, differ from the Convention concept of evolutionary interpretation? Although the theory is different, the limits, it seems to me, are very similar. Of one thing we can be clear: in neither place is there room for the more extreme versions of the American doctrine of originalism, whether this is based on what the original drafters must be taken actually to have meant (intentionalism) or on what the original readers must be taken to have thought that they meant (textualism). It seems to me that there are three governing ideas behind the evolutionary approach developed in the four landmark decisions⁹ in *Golder v. the United Kingdom*¹⁰, *Tyrer v. the United Kingdom*¹¹, *Marckx v. Belgium*¹², and *Airey v. Ireland*¹³. These in turn have led to the “further development” of the Convention rights in at least four different ways.

The first, and perhaps the most important, of the governing ideas is that of a purposive rather than a literal construction of the language used. Thus in *Golder*, the Court relied upon Article 31 of the Vienna Convention on the Law of Treaties (although not yet in force) to give priority to the “object and purpose” of the Convention. As stated in the Preamble, this was “as governments of European countries which are like-minded and have a common heritage of political traditions, ideals, freedom and the rule of law, to take the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration”. Access to the courts was an essential prerequisite to the rule of law. Hence the right of access was “inherent” in the right to a fair trial under Article 6 § 1.

The second idea, articulated in *Tyrer*, is that the Convention is a “living instrument”¹⁴. This was an echo, whether conscious or unconscious I do not know, of the words of Lord Sankey, in *Edwards v. Attorney General for Canada*¹⁵, when he said that the Constitution of Canada should be seen “as a living tree capable of growth and expansion within its natural limits”. The third idea, first articulated in *Airey*, is that

6. *Fitzpatrick v. Sterling Housing Association Ltd* [2001] 1 AC 27.

7. *R v. Ireland* [1998] AC 147.

8. *Yemshaw v. Hounslow London Borough Council* [2011] UKSC 3.

9. Incidentally, I do not think it any coincidence that three out of these four cases came from common-law countries. It was common-law advocates who persuaded the Court to take this line, even in the teeth of strongly argued dissent from the United Kingdom judge.

10. 21 February 1975, Series A no. 18.

11. 25 April 1978, Series A no. 26.

12. 13 June 1979, Series A no. 31.

13. 9 October 1979, Series A no. 32.

14. See *Tyrer*, cited above, § 31.

15. [1930] AC 124, at p. 136.

the rights protected must be “practical and effective” rather than “theoretical or illusory”.

Views may differ on whether this is all a good or a bad thing. Sir Gerald Fitzmaurice, it will be remembered, argued forcibly in *Golder* that judge-made law might be acceptable in domestic adjudication, but not in international adjudication which depends upon the agreement between States. Our own Lord Bingham, although a strong supporter of the Convention and of the values it represents, has said much the same thing in recent cases, for example, in *Brown v. Stott*¹⁶:

“In interpreting the Convention, as any other treaty, it is generally to be assumed that the parties have included the terms which they wished to include on which they were able to agree, omitting other terms which they did not wish to include or on which they were not able to agree.”

And in *R (Gentle) v. Prime Minister*¹⁷ he found it

“impossible to conceive that the proud sovereign States of Europe could ever have contemplated binding themselves legally to establish an independent inquiry into the process by which a decision might have been made to commit the State’s armed forces to war”.

But how are we to tell what those “natural limits” might be, how tall the living tree may grow? It seems to me that the relationship between growth and natural limits may work out differently in each of the four (or more) different ways in which the Convention jurisprudence has developed beyond the expectations of the original parties: I refer to (a) the interpretation of the “autonomous concepts” in the Convention; (b) the implication of terms; (c) the development of positive obligations; and (d) the narrowing of the margin of appreciation.

(a) The autonomous concepts

This too goes back to the early days, to *Engel and Others v. the Netherlands*¹⁸, where it was held that national laws could define conduct into the concept of a criminal charge in Article 6, but not *out of it*. It stands to reason that, once a State has committed itself to certain minimum standards, it cannot contract out of those by defining the terms used in its own way. Certain key terms must have a common meaning across the *espace juridique*. It also stands to reason that the meaning of those terms can develop over time, in just the same way that our domestic understanding of words such as “family” and “violence” has developed over time.

There are many obvious examples: recognising that judicial birching is “inhuman and degrading treatment” which is absolutely prohibited under Article 3¹⁹; that unmarried fathers may enjoy a family life with their children which is worthy of respect under Article 8²⁰; that homosexuals have as much right to respect for their private expressions of their sexuality as anyone else²¹; or that discrimination under Article 14 may include not only direct but indirect discrimination, for example in selection criteria for schools which discriminate indirectly against Roma children²². Indeed, some may be wondering why it is taking the Court so long to recognise that same-sex couples may enjoy family life together with one another and their children²³.

16. [2003] 1 AC 686, at p. 703.

17. [2008] UKHL 20, [2008] 1 AC 1386, at para. 9.

18. 8 June 1976, Series A no. 22.

19. See *Tyrer*, cited above.

20. See *Keegan v. Ireland*, 26 May 1994, Series A no. 290.

21. See *Dudgeon v. the United Kingdom*, 22 October 1981, Series A no. 45.

22. See *D.H. and Others v. the Czech Republic* [GC], no. 57325/00, to be reported in ECHR 2007-IV.

23. Cf. *J.M. v. the United Kingdom*, no. 37060/06, 28 September 2010.

These are all examples of applying the language of the Convention to situations which may not have been contemplated by the original framers, but which are entirely capable of being covered by the language used and are consistent with its underlying principles and purpose. It is also an approach which can have built-in limits. In the *Hunting Act* cases in the United Kingdom²⁴, it was argued that the ban on hunting with dogs in the *Hunting Act 2004* was an interference with the right to respect for private life. Two of the Law Lords took the view that the notion of “private life” in Article 8 might well be capable of covering activities such as hunting which a person saw as essential to his personality and ability to develop relationships with other people. They were only persuaded that it was not because of the very public nature of hunting as an activity. In finding the complaint inadmissible²⁵, this Court agreed that private life did not extend to public activities. Is that perhaps a natural limit to its growth?

On the other hand, there are concepts which have undoubtedly been developed far beyond their initial scope and may not yet have reached their natural limits. For example, what precisely is a “civil right” for the purpose of Article 6 § 1? And in particular, what kinds of public-law claims now count as “civil rights” for the purpose of Article 6? This is certainly a topic upon which we have had some difficulty in anticipating what the approach of this Court would be. For the time being, we have decided that, while this Court has made it clear that it can cover claims to defined financial benefits, such as housing benefit²⁶, it does not cover claims to public services, such as health, social care and housing for the homeless²⁷. For what it is worth, our view is that this development has now reached its natural limit: claims for services, which require a high degree of discretionary judgment on the part of officials, are not readily susceptible to court-like adjudication on the merits. But are we right?

(b) The implication of rights

It is not difficult to understand how certain implied rights evolved. The most important example is in Article 2: there is not much point in a duty not to take life if no one knows how and why a person died. So we all understood the need for the investigative duty in Article 2, recognised by the Court in the “death on the rock” case²⁸. But until recently we had thought that it was ancillary to the principal duty. Hence in 2004²⁹, the House of Lords held that, for the purpose of our implementation of the Convention rights in domestic law, the investigative duty did not apply to deaths taking place before the Human Rights Act came into force. This followed the analysis in previous Strasbourg cases: that obligations would not be imposed upon States in respect of breaches alleged to have taken place before they ratified or accepted a right of individual petition. (We recognised, of course, that the United Kingdom might still be in breach, but that was not a matter for us.)

Next week, however, we have a case in which it is to be argued that we should depart from the earlier decision and order an Article 2 compliant investigation into deaths in Northern Ireland which took place long before the Human Rights Act came into force. This is, of course, because of the decision of the Grand Chamber in *Šilih v. Slovenia*³⁰. The Court endorsed the “interference principle”, established in *Blečić v. Croatia*³¹, as the crucial criterion for assessing its temporal jurisdiction (§ 146). As the investigative duty under Article 2 had now evolved into a “separate and autonomous duty”, it was capable of binding the member State even where the death took place before the critical date (§ 159). There could therefore

24. *R (Countrywide Alliance) v. Attorney General* [2007] UKHL 52, [2008] 1 AC 719.

25. See *Friend and Others v. the United Kingdom* (dec.), nos. 16072/06 and 27809/08, 24 November 2009.

26. See *Salesi v. Italy*, 26 February 1993, Series A no. 257-E, and *Tsfayo v. the United Kingdom*, no. 60860/00, 14 November 2006.

27. *Ali v. Birmingham City Council* [2010] UKSC 8, [2010] 2 AC 39; also *Runa Begum v. Tower Hamlets London Borough Council* [2003] 2 AC 433, and *R (A) v. Croydon London Borough Council* [2009] 1 WLR 2557.

28. See *McCann and Others v. the United Kingdom*, 27 September 1995, Series A no. 324.

29. *Re McKerr* [2004] UKHL 12, [2004] 1 WLR 807.

30. [GC], no. 71463/01, 9 April 2009.

31. [GC], no. 59532/00, ECHR 2006-III.

be an interference with this right if the obligation persisted after the Convention came into force. Earlier, there is a reference to the obligations binding the State “throughout the period in which the authorities can reasonably be expected to take measures with an aim to elucidate the circumstances of the death and establish responsibility for it” (§ 157³²). Thus a significant proportion of the steps required either will have been or should have been carried out after the critical date (§ 163).

There were other views. Judge Lorenzen, for example, concurred in the result but considered that the majority’s criterion of “a genuine connection” between the death and the entry into force of the Convention was too vague and potentially far-reaching to be consistent with the declared intention to respect the principle of legal certainty. Judges Bratza and Türmen differed from the majority view that the procedural obligation is “detachable” from the death which gives rise to it. In their view this was tantamount to giving retroactive effect to the Convention. It also gave rise to inconsistency between the approach to Article 2 and to Article 13, contrary to the doctrine of harmonious interpretation of the Convention. More importantly, it gave rise to serious issues of legal certainty – especially if the connection could be based simply on “the need to ensure that the guarantees and the underlying values of the Convention are protected in a real and effective manner” (referring back to § 163).

Some may think that those predictions were proved only too true in the decision in *Varnava and Others v. Turkey*³³. This was, of course, concerned with the duty to investigate suspicious disappearances rather than suspicious deaths. The Court decided that the requirements of proximity of death and investigation to the entry into force of the Convention did not apply to the obligation to investigate a disappearance; this will, potentially, continue as long as the fate of the person is unaccounted for; and even where death may eventually be presumed – as in this case where the disappearances had occurred more than thirty years before.

These decisions might be criticised as running counter to the general approach of international law as enshrined, for example, in Article 28 of the Vienna Convention on Treaties. On the other hand, in *Varnava and Others* the Court was following the approach to disappearances taken by the Inter-American Court of Human Rights. And many will think that their approach represents a humane understanding of the peculiar anguish caused by not knowing whether, how and why a loved one has disappeared. From the point of view of a national court, however, this is a development which will cause us real difficulty. The Court of course recognised that there had to be limits – but how far back does the duty go? And what is meant by a “genuine connection”?

These decisions do seem to me to be examples of an evolution in the Court’s jurisprudence which, however admirable it may be from some points of view, does risk going further than anything the member States committed themselves to at the time. They raise the question: should one of the limiting principles be what the States Parties might reasonably have considered that they were committing themselves to when they ratified the treaty, albeit one which committed them to a “living instrument”? After all, whatever may have been the position of the original ten Contracting Parties, later members will have had a much better idea of what they might expect. In other words, is foreseeability the key?

There is another implied right which is causing considerable difficulty in the United Kingdom, although not in the courts. Once again, there is really no difficulty with the implication of the right itself. The obligation, in Article 3 of Protocol No. 1, to hold “free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature” must imply that individuals have the right to vote. Indeed, in modern times, it must dictate that universal suffrage be

32. Referring to *Brecknell v. the United Kingdom*, no. 32457/04, 27 November 2007.

33. [GC], nos. 16064/90 et al., 18 September 2009.

the basic principle³⁴. But of course it does not dictate what method of counting there should be – first past the post, single transferable vote, or any other method of proportional representation. The question is how far it dictates who should be entitled to vote.

To digress, voting is a sore point with at least one of my colleagues. Before the establishment of the Supreme Court of the United Kingdom in October 2009, the highest court in the United Kingdom was composed of members of the House of Lords. Members of the House of Lords cannot vote in Parliamentary elections. When most of the hereditary peers were expelled from the House, they ceased to be members and thus regained the vote. We, on the other hand, have not ceased to be members. We have merely been deprived of the right to sit and vote on the business of the House³⁵. And we still cannot vote in Parliamentary elections. Lord Brown believes this to be a disproportionate interference with his democratic rights. So perhaps one of these days you will have to contend with the case of *Brown v. the United Kingdom* – and I am puzzled as to how he can exhaust his domestic remedies at present, as any panel of the Supreme Court would have a majority who are in the same position as he is.

But it is not this which is so troubling the House of Commons at present. They are still agonising about how to put into effect the decision of this Court in *Hirst v. the United Kingdom (no. 2)*³⁶. The government, apparently on legal advice, proposed a ban upon all prisoners serving a sentence of four years' imprisonment or more. This is proving unacceptable to many of their own backbenchers. A compromise proposal of one year or more is also being attacked by those who think that the time has come to stand up for the right of the democratically elected body to determine who the electorate should be. Putting it that way, however, begs the whole question. The point of the Convention is to protect certain values independently of the will of the majority: democracy values each person equally even if the majority does not³⁷. And in any event, who are the majority?

(c) Positive obligations

The third area where evolution can be both beneficial and problematic is in the development of positive obligations. We know, of course, that the dividing line is not precise. But the *Marckx* judgment required more of the State than simply to refrain from interfering in the actual family life which mother and child enjoyed: it required the law to recognise when family life exists and create the circumstances which will allow it to develop. Once again, there was a vigorous dissent from Sir Gerald Fitzmaurice, but few would now see the decision as controversial. The same must apply to the development of positive procedural obligations under Article 8. These are an integral part of making the substantive right to respect and non-interference practical and effective. There is not much point in having a right to respect for your family life if you have no say in the authorities' decisions to interfere with it³⁸.

The more controversial area is the development of substantive positive obligations – for the State actually to provide some benefit which it would not otherwise be obliged or wish to provide. Are we seeing the glimmerings of the evolution of socio-legal rights? We have found this a particularly troubling area in the United Kingdom. In the *N.* case³⁹, we concluded, with heavy heart, that the *Soering* principle did not preclude returning a failed asylum seeker with HIV to her home country despite the severe risks to her health. It was not possible to spell out of Article 3 a positive obligation to continue to supply her, and

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

35. Constitutional Reform Act 2005, section 137(3).

36. [GC], no. 74025/01, ECHR 2005-IX.

37. *Ghaidan v. Godin-Mendoza* [2004] UKHL 30, [2004] 2 AC 557, para. 132.

38. The obligation dates back, of course, to the disgraceful state of English law before the Children Act 1989, when public authorities could deny all contact between a child and his family without any access to a court to challenge this. In those days, English lawyers welcomed developments like *W. v. the United Kingdom* (8 July 1987, Series A no. 121) with open arms.

39. *N v. Secretary of State for the Home Department* [2005] UKHL 31, [2005] 2 AC 296.

everyone else in her sad situation, with the health care she needed. This Court upheld that decision⁴⁰. However, in the *Limbuela* case⁴¹, the House of Lords held that it was inhuman and degrading treatment, contrary to Article 3, deliberately to reduce certain categories of asylum-seeker to utter destitution by denying them any access to State support and prohibiting them from taking paid employment. Although the House took comfort from the lack of any clear dividing line between positive and negative obligations, this did, in reality, amount to imposing upon the State a positive obligation to provide support for those who had nothing else. Indeed, could it be that in that case, unusually, we were going beyond what this Court would require of us?

On the other hand, what about housing? It has been said that there is no duty to supply a person with a home⁴². But this Court is developing a duty not to deprive a person of the home he already has, even in circumstances where there is no duty in domestic law to continue to supply him with it⁴³. I quite understand the temptation to apply exactly the same kind of proportionality analysis to depriving someone of their established home as we all apply to depriving someone of their established family life. But in the case of family life, that does not entail a positive obligation to provide it – it exists because of the personal relationships between the people involved – while in the case of a home, it does mean continuing to provide a tangible, material good which would otherwise be available to someone else who may have a much more deserving case. It is in practice very hard for a judge to strike a fair balance between the interests of other unidentified but deserving cases and the particular case before the court.

(d) Narrowing the margin of appreciation

This brings me to the final area of difficulty – that is the degree to which we should *all* recognise that certain judgments are better made by Parliament than by any court, whether in Strasbourg or in London. When it comes to qualified rights, this Court has generally conceded a wide margin of appreciation to national authorities to judge what is “necessary in a democratic society”. This is where the potential conflict between democratic *values*, as enshrined in the Convention, and democratic *decisions*, as made by the democratically elected and accountable institutions, becomes most acute. The evolutive approach to interpreting the Convention tends to lead to a narrowing of the margin of appreciation. When only the courts suffer, perhaps we should not mind too much. But what weight should this or any court give to the considered opinion of the legislature?

Here again, I appeal to Lord Bingham. In the Hunting Act case⁴⁴, he relied upon “the degree of respect to be shown to the considered judgment of a democratic assembly”. While acknowledging that this “will vary according to the subject matter and the circumstances”, the case in question was “pre-eminently one in which respect should be shown to what the House of Commons decided. The democratic process is liable to be subverted if, on a question of moral and political judgment, opponents of the Act achieve through the courts what they could not achieve in Parliament”. This Court, too, in rejecting the huntsmen’s complaints under Article 11, commented that “the bans had been introduced after extensive debate by the democratically elected representatives of the State on the social and ethical issues raised by that type of hunting”⁴⁵.

40. See *N. v. the United Kingdom* [GC], no. 26565/05, 27 May 2008.

41. *R (Limbuela) v. Secretary of State for the Home Department* [2005] UKHL 66, [2006] 1 AC 396.

42. See *Chapman v. the United Kingdom*, no. 27238/95, ECHR 2001-I.

43. See *Connors v. the United Kingdom*, no. 66746/01, 27 May 2004; *McCann v. the United Kingdom*, no. 19009/04, 13 May 2008; and *Kay and Others v. the United Kingdom*, no. 37341/06, 29 September 2010.

44. *R (Countrywide Alliance) v. Attorney General* [2007] UKHL 52, [2008] 1 AC 719. Another example is *R (Animal Defenders International) v. Secretary of State for Culture, Media and Sport* [2008] UKHL 15, [2008] 1 AC 1312, a challenge to our very strict rules against political advertising. The issue was the balance to be struck between freedom of speech, especially political speech, and preserving the integrity of the electoral process against the assaults of the rich and powerful. Once again, we gave great weight to the recent, considered opinion of the elected Parliament. As far as I know, the claimants have not brought their complaint to this Court.

45. See *Friend and Others*, cited above.

But it would be idle to pretend that we have not sometimes been deeply troubled by an apparent narrowing of the margin. *Hirst*, the prisoners' voting case, may be one example. *S. and Marper v. the United Kingdom*⁴⁶ may be another. It leaves the United Kingdom in the difficult position of being told that a "blanket and indiscriminate" power to hold fingerprints, cellular samples and DNA profiles, as applied to the applicants in that case, overstepped the margin of appreciation. Yet beyond saying that it went too far in those cases, the decision gives little guidance on what rules would be proportionate to the admittedly legitimate and important aim of detecting crime (and, I would add, the equally important aim of exculpating the innocent at an early stage of an investigation). My particular concern is that the positive obligation to protect the vulnerable against rape and other attacks upon the right to respect for their bodily integrity⁴⁷ should not be hindered or hampered by an unduly restrictive approach. It is no wonder that Parliament too is having difficulty finding the right balance to be struck. Legislation passed last year⁴⁸ has not been brought into force and different, more restrictive legislation is being promoted. In the meantime, the Supreme Court is being invited to decide whether continued storage under the old guidelines is lawful. So next week the Supreme Court of the United Kingdom is full of two cases where this Court's decisions have put us in a quandary.

Conclusion

What are the natural limits to the growth of the living tree? They are not set by the literal meaning of the words used. They are not set by the intentions of the drafters, whether actual or presumed. They are not even set by what the drafters definitely did *not* intend⁴⁹. But there must be some limits. I have sketched out some particular areas of difficulty for a national court which is trying loyally to keep pace with the evolution and on occasions to make a reasonable prediction of where this Court will go next. In the end, the standard most often appealed to in the Court's jurisprudence is the common European understanding. But sometimes, as in *S. and Marper*, this is judged by the standards to be found in the domestic legislation of the member States; and at other times, as in *Marckx*, it is judged by evolving European attitudes and beliefs; and sometimes, as in *Hirst*, it seems to get some way ahead of both.

Perhaps there are no real limits. Perhaps the Convention is a magic beanstalk rather than a living tree. Perhaps this Court is like Sir Frederick Pollock's "knights errant of our lady the Common Law" who "must be abroad on a perpetual quest; no sooner is an adventure accomplished than a fresh one is disclosed or arises out of that very achievement"⁵⁰. As a supporter of the Convention and the work of this Court, however, my plea is not to give too much ammunition to your enemies. Otherwise I have a fear that your judgments, and ours, will increasingly be defied by our governments and Parliaments. This is a very rare phenomenon at present and long may it remain so.

46. [GC], nos. 30562/04 and 30566/04, 4 December 2008.

47. See *X and Y v. the Netherlands*, 26 March 1985, Series A no. 91.

48. Crime and Security Act 2010, sections 2 to 23.

49. See *Young, James and Webster v. the United Kingdom*, 13 August 1981, Series A no. 44.

50. Sir Frederick Pollock, *The Genius of the Common Law*, Columbia University Press, 1912, pp. 112-13.

Jan Erik Helgesen

First Vice-President of the Venice Commission, Professor, University Oslo

Introductory remarks

President Costa, Judge Tulkens, ladies and gentlemen,

I feel very privileged to be invited to this important seminar.

I am, of course, not representing the Venice Commission: I am representing myself. I will however try to present not only a Norwegian, but also a rather more Nordic view on the issues before us.

1. Case of *Golder v. the United Kingdom*¹

Like Baroness Hale, I will start on a very personal note. There is a long line leading from Strasbourg today to my first visit here, more than thirty-five years ago.

I would like to start with the *Golder* case. Judge Tulkens has already told us about the importance of the *Golder* case. This could in itself have been a plausible reason for starting with exactly this judgment: it was here that the evolutive interpretation started, followed immediately by other important cases, namely the three trade-union cases (*National Union of Belgian Police v. Belgium*²; the *Swedish Engine Drivers' Union v. Sweden*³; and *Schmidt and Dahlström v. Sweden*⁴); sex education in Denmark (*Kjeldsen, Busk Madsen and Pedersen v. Denmark*⁵); *Ireland v. the United Kingdom*⁶; *Tyrer v. the United Kingdom*⁷; and later cases.

Between 1975 and 1980 the interpretation by the Court progressed and developed in a most visible way.

The reason for my focus on the *Golder* case is more personal, though. The *Golder* case was my first serious involvement with the European Convention on Human Rights. My professor, Torkel Opsahl, brought me to Strasbourg for the first time. Again, on a personal point, I am very pleased to see that there are friends from those days among the audience today.

My Masters thesis at the Law School of the University of Oslo was an analysis of *Golder*. I published the thesis in 1974, half a year before the judgment was delivered. I predicted the outcome to be that the Court would interpret Article 6 so as to imply a substantive right to access to courts. However, may I add that the evaluation committee at the Law School looked with great scepticism at my dissertation. Never during my time at Law School did I receive such a poor grade. This is interesting, in view of the perspective I am supposed to operate from today. One of the members of the evaluation committee was among the founding fathers of the Convention in 1950. He told the young law student that Article 6 was never meant to be interpreted like that!

1. 21 February 1975, Series A no. 18.
 2. 27 October 1975, Series A no. 19.
 3. 6 February 1976, Series A no. 20.
 4. 6 February 1976, Series A no. 21.
 5. 7 December 1976, Series A no. 23.
 6. 18 January 1978, Series A no. 25.
 7. 25 April 1978, Series A no. 26.

I mention this personal experience to testify that, for more than three decades, I have been a very close friend of the Court. I have consistently and vigorously defended the Court. Today, I will also present some views which may sound critical. I sincerely hope that you do not take this as criticism pure and simple, but rather as constructive criticism. I am convinced that Europe will need the Court for many years to come and that is why we, the friends of the Court, must find different ways to support its sound development.

1.1. Not invited to analyse or justify the theory of “evolutive interpretation”

I have not been invited to analyse or justify the theory of evolutive interpretation. Although this is not within my mandate, let me nevertheless remind ourselves that it was precisely from *Golder* onwards that the Court established the famous doctrine of interpretation (the principles of which the present Court still applies): the reference to the Vienna Convention on the Law of Treaties; the notions that the European Convention on Human Rights is a living instrument that must be interpreted in a dynamic and evolutive way; that it must meet present-day conditions;

Let me add another theoretical observation. The Convention is seen as some kind of tripartite agreement, between the States, the Court and the individual. This is a special kind of international convention, which necessitates a special doctrine of interpretation.

1.2. The distinction between “dynamic” and “evolutive” interpretation: not necessarily stringent concepts

1.2.1. “Evolutive” interpretation: the Court’s answer to new facts

1.2.2. “Dynamic” interpretation: the Court’s new answer to old facts

The title given to us contains the concept “evolutive”, not “dynamic”.

None of these concepts is extremely precise or stringent. They are partly used as synonyms, partly applied with slightly different connotations.

In legal theory there is a discussion on these two concepts. May I offer a small contribution? I would rather use the word “evolutive” as covering the situation where the Court gives answers to new facts, issues resulting from societal changes, and issues that have never been considered before by the Court; whereas “dynamic” interpretation, to my mind, refers primarily to the situation of when the Court gives new answers to old facts.

1.3. “Limits”

1.3.1. According to *Webster’s Encyclopedic Unabridged Dictionary of the English Language*: “the final or furthest bound or point as to extent, amount, continuance, procedure etc.”

In the title given to us, I found the word “limit”. Being a non-native English speaker, I immediately consulted my dictionary. According to *Webster’s Dictionary*, a “limit” is the final or furthest bound or point as to the extent, amount, continuance, procedure.

1.3.2. We are not there yet. My remarks will focus on roads/avenues which possibly might lead the Court to the “limits”

I don't think we have reached the limits. I am not going to define the limits. I will rather, metaphorically, try to define six clusters of problems, some kind of avenues. The Court can travel on these avenues. The further the Court goes down these avenues, the closer the Court will approach the limits.

2. Six clusters of problems, six avenues which possibly might lead the Court to the "limits"

2.1. "Legal methodology"

My first problem, or cluster of problems, is what I call "legal methodology". Although a law professor, I must admit that the problems we discover along this avenue are the least interesting when analysing the limits for the Court.

We shall, nevertheless, have to approach these at two levels.

2.1.1. At the meta level: the Court provides the ultimate interpretation of the Convention (Article 32)

The question of the legal limits is not a very interesting issue to discuss today, because it follows clearly from Article 32 of the Convention that the Court provides the ultimate interpretation of the Convention, albeit guided by the doctrine of legal methodology in public international law. At the end of the day, the Court decides its own interpretation of the Convention. The Court must always keep in mind, however, that the Convention is a very special kind of convention.

2.1.2. At the infra level: the Court's position vis-à-vis its own jurisprudence

At the lower level, one might of course analyse the legal limits from the perspective of to what extent the Court is bound by previous decisions. So far the Court's position has been that it must attach considerable weight to previous case-law. The magical formula frequently used is: "While the Court is not formally bound to follow its previous judgments, it is in the interests of legal certainty, foreseeability and equality before the law that it should not depart, without good reason, from precedents laid down in previous cases" (*Christine Goodwin v. the United Kingdom*⁸, and *Mamatkulov and Askarov v. Turkey*⁹).

Of course, this doctrine may be debated. There might probably be reasons to believe that this would be challenged in the future. I would not recommend, however, that this position be changed. If the Court would like to reorient itself, to take one step back, it would necessitate an analysis of whether there exists some kind of legal limitation. The Court is for the time being bound by its doctrine of precedent.

2.2. "State sovereignty": the principle of "consent"

My second cluster of problems relates to the question of State sovereignty or the principle of consent. This is also certainly a legal dimension. International protection of human rights does represent a restriction on State sovereignty.

Torkel Opsahl always claimed, however, that one should turn this around and claim that when a State binds itself to a treaty, the State is not restricting its sovereignty, but is in fact exercising its sovereignty.

8. [GC], no. 28957/95, § 74, ECHR 2002-VI.

9. [GC], nos. 46827/99 and 46951/99, ECHR 2005-I.

I will not pursue this legal dimension today. I will rather elaborate on a more emotional or political dimension to sovereignty. To what extent do people in a national State wish to be governed by an international institution? In my own country, in Norway, and also partly in the Nordic countries, this is a very important issue. It is a sad fact in Norway that people tend to confuse Strasbourg with Brussels. Just when I had published a textbook on legal methodology, I received a letter from a colleague. He wrote: "It is a good book, but you are far too expansive on the application of international human rights provisions in domestic law. Long live national sovereignty! Down with Brussels, down with Strasbourg!" I think it is a sad fact that in a Nordic country, at least in Norway, this turns out to be a common reaction. Scepticism towards the European Union is also influencing the attitude towards the Council of Europe and the Court.

2.3. The "legitimacy" of the Court's judgments, "ownership" of the Convention

The third cluster of problems is what I call the legitimacy of the Court's judgments, or what is often referred to as "ownership of the Convention". This dimension is certainly not primarily an emotional one. This dimension takes us into theories on democracy and the rule of law.

One may ask, what makes a judgment from the European Court legitimate? Legitimate for whom? Parliament, the government, people at large? Obviously, it must be legitimate for Parliament and the government. But in a modern, open democratic society, the judgment must be legitimate also for the public out there in the streets.

These issues are normally, at the domestic level, discussed within a paradigm which is often formulated as judicial activism versus judicial restraint. The same paradigm often applies also to the discussions concerning the Court. In my view, this is slightly misleading. One should be careful when transferring concepts and problems from the domestic level to the international level. If one wishes to defend the Court, one must remember that if the Court were to refrain from being active and creating new norms, there would be no normative development at all. The Court cannot, like a domestic Supreme Court or Constitutional Court, leave the challenge of developing norms to the legislator. The Court cannot leave the legislative action to the States. They would certainly not act. This is a very important difference from the parallel discussion within a domestic political system.

However those, like voices in the Nordic countries, who would criticise the Court, would emphasise that it is particularly dangerous for an international court to create new norms, since there is no political body which may correct and control the court. The international society lacks a Parliament.

This dilemma illustrates that tensions exist today between two fundamental principles, on which the European States are built: the principle of democracy and the principle of the rule of law. We experience this all over the world.

In 2009 the Venice Commission arranged, in cooperation with the South African Constitutional Court, a large conference on constitutional law in Cape Town. Some one hundred Supreme Courts or Constitutional Courts were represented. In my capacity as the President of the Venice Commission, I gave a press conference, together with the President of the Constitutional Court of South Africa. All the journalists immediately approached the President of the Constitutional Court. Their question was: "Sir, why do you think that your court has the competence to intervene with Acts of Parliament?" In the South African context, we all know what the question really was: why and how can the Constitutional Court intervene with the decisions of the ANC? After some five minutes, I asked patiently if I could add something.

I said that this was not primarily a South African discussion: this was a global discussion, also going on in the Nordic countries. These discussions illustrate that there are tensions between two fundamental principles, on which our European States are built: the principle of democracy and the principle of the rule of law.

I would like to inform this distinguished audience today about a discussion which has been more and more articulated in Norway during the last decade. Seen from Venice, I have however observed the same conflict in other States, inside and outside of Europe.

In Norway, the government appointed some ten years ago a committee mandated to analyse the distribution of powers in society. The committee submitted their report in 2003. One of the main conclusions was that during the last decades, power had been transferred from politicians to judges, from Parliament to the courts. This development has accelerated as Norway has ratified the international human rights conventions; political power has even been transferred to international courts. The committee interprets this development as a threat to our democracy: politicians are answering to the electorate, whereas judges are answering to no one but themselves.

There has been active discussion in the aftermath of this report. Two extreme positions have been exposed: Parliament should have the ultimate power to interpret its own competence; or the Supreme Court must be the ultimate guardian and protector of the individual.

As you are aware, none of the five Nordic countries has a Constitutional Court. The ordinary Supreme Court does have the competence to review the constitutionality of Acts of Parliament. This is also implemented to varying degrees.

Consequently, the Nordic position towards the European Court of Human Rights must be read from this perspective. In some sceptical circles, the scepticism does not necessarily relate to protection of human rights per se, but rather as to who should control the national implementation of these rights. These discussions certainly also have bearings on the attitude towards the Court.

Let me draw a line between the Nordic countries and Venice. The Finnish government submitted a request to the Venice Commission to evaluate certain aspects of the Finnish Constitution of 1999. The Commission also addressed this important issue. In its opinion¹⁰, the Commission first expressed its general position, stating that normally a State should establish a special Constitutional Court. The Commission added, however, that if the existing Finnish system protected and guaranteed the same values and interests as did a fully fledged Constitutional Court, the Commission would recognise that the principle of the rule of law was satisfied. The Commission also explicitly mentioned that the system of judicial review had to be seen in its historical context.

Today we can learn from this opinion that, according to the Venice Commission, in a modern democratic State governed by the rule of law, independent courts must have the competence to control Parliament.

I personally fully support such a position.

In his previous capacity as President of the Norwegian Parliament, Thorbjørn Jagland initiated the appointment by Parliament of a Constitutional Commission to analyse whether a modern human rights catalogue should be included in the Norwegian Constitution, on the occasion of its 200th anniversary in

10. Opinion no. 420/2007 on the Constitution of Finland adopted by the Venice Commission at its 74th plenary session (Venice, 14-15 March 2008).

2014. One of the items according to the mandate is to discuss the control of human rights provisions. I am very pleased to serve on this Commission.

There is a general consensus that the Convention and the Court have changed dramatically during these last sixty years. This development may also be analysed from the perspectives on which I will now elaborate.

When one studies the drafting of the Convention, one is struck by to what degree the Second World War marked the Convention in 1950. The Convention had to be a barrier against a new disaster. It was to become a safeguard against Nazism and Soviet communism. It was to guarantee a free democratic Europe, or at least western Europe.

Forty years thereafter in 1990, the President of the Court, Rolv Ryssdal, gave a guest lecture at King's College, London. There, he expressed his future visions for the Court: "It is my firm conviction that if the Court continues in the course that it has followed since its early days, it will consolidate more and more its emergent role as a European Constitutional Court". What a dramatic change, from being a bulwark against war and oppression, to being a pan-European Constitutional Court.

In 1996, Rolv Ryssdal stated that this process of transition was completed. He wrote in an article: "The Court's position as a quasi-Constitutional Court for the whole of Europe is now widely accepted". And he added: "As we approach the end of one century and the beginning of the next, the Convention community of States has with some courage embraced a new era".

I am convinced that Mr Ryssdal was right, both in 1990 and 1996. I doubt, however, that he would have expressed the same views if he were present here today. Actually, shortly before he passed away, Rolv Ryssdal expressed deep concern as to the Court's and the Convention's future. He asked whether, with a Convention system based on subsidiarity and the fact that rights are protected at the national level, such a system could work with more than forty States. He argued further that one would have to rethink the whole system, that one might have to go back to "the fundamental aim of the Convention and what the system can reasonably be expected to achieve".

I'll stop with Rolv Ryssdal's very wise thoughts and ideas. However this dimension is, in my humble view, part of the reason for the problems facing the Court today. Seen from many domestic political and legal systems, the Court does not have legitimacy as a pan-European Constitutional Court.

However, one might hear voices claiming that if the Court in the future is not to be drowned in tens of thousands of trivial complaints, it must rise as a court of European principles. As I see it, I am afraid that such an avenue will eventually lead into a dead end for the two reasons I have just explained: scepticism in many countries concerning judicial review at the national level; and even greater scepticism, at least in the Nordic countries, for judicial review at the international level.

2.4. "Efficiency": the judgments must be construed in a form which allows States to implement/execute them

I have labelled my fourth cluster of problems with the term "efficiency". Rather disturbingly, one observes more and more that the fight for respect for human rights is not settled when the Court delivers its judgment. It remains for that judgment to be executed effectively. It is obviously also a consideration relating to the limits of evolutive interpretation that the Court must be able to give guidance to governments as to how they should best implement judgments. There has been a lot of focus within the Council of Europe on the execution of judgments. This is still a problem. It falls outside my mandate to look into this aspect. I hear,

however, from time to time that governments feel that the directions from Strasbourg are far too detailed and leave too little to the discretion of the national authorities.

2.5. “Capacity”: new areas/issues of protection will lead to even more complaints

Luckily, we have not been asked to provide ideas as to how the Court should deal effectively with the enormous backlog. Allow me, nevertheless, to point to one pretty obvious factor. If the Court in the future were to expand even more into areas of the life of States and individuals, the number of applications would certainly increase even further.

2.6. “Cross-over effects”: increasing concern/scepticism by States vis-à-vis new human rights commitments, in particular mechanisms of individual complaints

Being personal again, going back to my own analysis of the *Golder* case, I was some thirty-five years ago sincerely convinced that the interpretation which, in an optimal way, would promote and protect human rights was exactly the conclusion which the Court finally reached. I will also always remember meeting enthusiastic members of the Commission and the Court in Strasbourg, who were proud of being at the forefront of the protection of human rights. We all did this with the very best intentions.

Along the way, however, something has gone wrong. Today, I’m unable to indicate what has gone wrong. Probably this: we have left the governments behind, we have lost them. It is disturbing today to see how governments are reluctant to enter into new human rights commitments.

I experienced this at the United Nations, where I was for many years chairing the drafting of the Declaration on Human Rights Defenders. It took years and years. The governments knew perfectly well that an open formulation in the text would later be held against them.

Such scepticism does not only apply when new substantive commitments are negotiated. Even more disturbingly, many governments are reluctant to accept in optional protocols mechanisms of individual complaints.

In conclusion, this expansive dynamism has created some kind of a backfire effect. There is a lack of trust between many governments and the international supervisory bodies. There is thus an urgent need to restore this trust.

3. Some techniques which the Court may apply to avoid approaching the “limits”

I will now turn my attention to some techniques which the Court might apply in order to avoid approaching the “limits”. These techniques can give the Court remarkable discretion: the Court can cut deeply into the souls of governments; or give considerable leeway to the States.

3.1. The principle of “subsidiarity”: a general principle in disguise

The concept of “subsidiarity” has become *the* word in the legal vocabulary during the last few years. I see this as a general principle in disguise. It has been given different connotations in different areas.

In the Strasbourg context, I would plead that the issues I list under point 3.1. are all elements contained in a broad concept of “subsidiarity”, as understood in the context of the Convention.

There is neither time, nor is it necessary before this distinguished audience, to go deep into the many elements I list here. It suffices to reflect on certain general aspects of these questions.

3.1.1. “Subsidiarity” seen from the perspective of the States

This principle must be seen both from the perspective of the States and that of the Court. At the outset, looking from the perspective of the States, if a State claims that it is better placed than the Strasbourg Court to implement human rights, then it must act accordingly. The State must actively guarantee that the three branches of government implement and secure the rights protected in the Convention. This relates to everything, from information about the standards to be applied to the political will to comply with those standards. Furthermore, the State must create effective domestic remedies which will allow individuals to seek redress at home rather than spending years before the Court. It is even implied in my statement that the State should also recognise the binding effect of the Court’s jurisprudence, even though the State is not strictly speaking a “party” according to Article 46 of the Convention. I tend to agree with those who claim that such a *de facto erga omnes* effect follows from Articles 1 and 19.

3.1.2. Subsidiarity seen from the perspective of the Court

On the other hand, seen from the Court’s perspective, the Court must also take the principle of subsidiarity “seriously”, to borrow Dworkin’s famous phrase. The Court has given itself enough effective tools to do so. I have listed some here:

- 3.1.2.1. “Margin of appreciation”
- 3.1.2.2. “Fourth instance”
- 3.1.2.3. The “facts” of the case
- 3.1.2.4. “Proportionality”
- 3.1.2.5. “Necessary in a democratic society”

These tools, these principles are designed so as to allow States room for manoeuvre – not outside, but within the Convention. The Court may also however, if it so wishes, refrain from applying these principles, which would give the States the feeling of being overruled on an issue of great importance to them.

If I were to advise the Court, I would have pleaded in favour of applying these principles in a favourable way, with a basic understanding that a State is better placed than the Court to decide on the details.

3.2. Interim measures (Rule 39)

Yet another issue which is much debated these days is the question of interim measures. In a sophisticated judicial system, such measures are certainly needed. Without them, justice cannot be done because the case is in reality closed before the Court can open the legal work. The applicant has been expelled.

On the other hand, governments often feel that their hands are bound for a long period, waiting for the outcome of the case. Again, the joint partnership between the States and the Court is at stake. Again, I would advise that the Court should not interpret its competence in this area too broadly.

3.3. Major challenges from Interlaken

“... ensuring the clarity and consistency of the Court’s case-law”

“... preserving the impartiality and quality of the Court”

“... a shared responsibility between States Parties and the Court”

Interlaken has left us with major challenges.

I will focus on one single aspect only. Being a rather boring lawyer, I see consistency as a basic prerequisite for credibility. And, I should add, I am not alone in Europe. I have a good friend, who is much more creative than me: he told me once that consistency was for boring people like me. But I think in the long run that even people who are more innovative and creative would expect the Strasbourg Court to be consistent. If not, the Court will not only lose its credibility: it will lose its relevance.

I see with great enthusiasm the techniques developed by the Court itself, as well as by the States, to maintain consistency. It is my sincere hope that the Court would avail itself of these opportunities.

Allow me towards the end to raise two issues (points 3.4. and 3.5.) which are both politically sensitive and legally complicated, though I think that sooner or later they will have to be addressed.

3.4. Looking into the crystal ball: forty-seven member States – “a common European standard” or “different European standards”?

Since the early days, the Commission and the Court have been trying to establish what they call “a common European standard”. States who were lagging behind or falling below these standards would have to be prepared to lose their case in Strasbourg.

Since then, two major events have occurred. Firstly, the Convention now covers forty-seven member States. Secondly, the protection of human rights in Europe has reached a level of sophistication which was unimaginable to those who were struggling to establish “a common European standard”. Looking into the future, is it realistic to pretend that the whole continent will be covered by a “common European standard”, in each and every aspect of an individual’s life?

3.4.1. Links between “standards” and “margin of appreciation”

Of course from a theoretical point of view, one might claim that the already established principles, in particular “margin of appreciation” and “necessary in a democratic society”, give the Court an opportunity to avoid raising this very general issue.

I feel however that sooner or later the Court – and we outside the Court – will have to address this challenge up front.

3.4.2. “Universalism” versus “relativism”

As I said, the problems under point 3.4. are very sensitive and difficult. Today we can only touch on them briefly.

At the United Nations, this discussion has been going on for decades: are human rights really universal,

or do we have to recognise regional differences? As we all know, the western position is that one should defend the principle of universalism and oppose the position according to which the protection of human rights must be interpreted in a regional, relative context.

But we are in Europe, where regional differences certainly exist, but to a much lesser degree than at the global level. This makes a similar discussion less complicated here.

The Court has over the years brought a sophisticated level of human rights protection to Europe. My challenge, which might possibly be discussed in the years to come, is this: is it conducive to accept a more relative interpretation of human rights protection, taking into account sociological, historical and other basic factors?

3.4.3. Differentiation according to rights?

While struggling to find the answers to the last question, maybe I should dare to be even more courageous today. In the future, will it be necessary to differentiate between different rights according to the Court's jurisprudence?

Could we envisage a future where the Court, in order not to approach or even overstep the "limits", will establish a jurisprudence according to which there are some "hard core" rights which are universal, whereas other rights are to be interpreted in a relative context?

3.5. Another perspective, from the theory of legal reasoning: "conflict between norms" versus "harmonisation of arguments"

The very last issue I am bringing forward today is very dear to my theoretical heart. Again, I can only briefly touch on it here. This is a problem in terms of legal methodology. Normally, we discuss a potential conflict between international and domestic law according to this model: interpretation of international treaties (such as the Convention) on the one hand and interpretation of domestic statutes (for example, Norwegian criminal procedural law) on the other. This is seen as some kind of conflict between different *norms*.

I have for many decades presented another model. Legal argumentation is a process where one harmonises different kinds of *arguments* into one single, comprehensive process.

I hope that the Court in the future could also look into this.

I am extremely pleased to see that Judge Tulkens expresses the following position: "It seems better to see if some compromises, from both sides, could be reached in order to avoid sacrifice on either side¹¹". In your excellent article on the Court's recent jurisprudence, Madam, you devoted an entire page to this issue, which I find extremely promising and very interesting.

President Costa, Judge Tulkens, ladies and gentlemen, thank you for your attention.

11. Françoise Tulkens, "The European Court of Human Rights is Fifty. Recent Trends in the Court's Jurisprudence", *Constitutional Law Review* (Constitutional Court of Georgia), vol. 3, 2010, p. 3, at p. 11.

Antoine Garapon

Secretary General of the *Institut des Hautes Etudes sur la Justice* - Paris

THE LIMITS TO THE EVOLUTIVE INTERPRETATION OF THE CONVENTION

First of all, I would like to thank President Costa and Françoise Tulkens for their invitation to this prestigious gathering. I am both honoured and awed; as a simple judge, I am acutely aware of the list of illustrious speakers who have preceded me in this forum. I am therefore at pains to point out that I will be speaking this afternoon as a keen observer of justice, in seeking an answer to the question of how to define the limits to the evolutive case-law of the European Court of Human Rights.

When faced with an awkward question to which we have no answer, one possible solution is to say that the question is poorly worded and should be put differently! That is to some extent what I will be doing, albeit with the aim of providing the beginnings of an answer. What are the limits to the evolutive interpretation of the European Convention on Human Rights? While our instinctive response is to look for spatial boundaries, I propose, rather than defining a perimeter, to introduce a new dimension: that of the *third party*. Taking a step back in this way allows us to go beyond confrontation between the Court's rulings and national cultures by viewing the relationship as the sharing of the *role of third party* (see Section I). This relationship is not hierarchical, nor is it based on mere dialogue: it reflects a need for cooperation which can only flourish if there is *mutual recognition* between national courts and the European Court (see Section II). All of which leads to a search for the implicit limits to the evolutive interpretation in *time* rather than in space (see Section III).

I. FROM FENCING OFF JUDICIAL AREAS TO SLOTTING THEM TOGETHER

To illustrate my first point I will refer to recent judicial developments in my country. France's judicial institutions are currently undergoing a far-reaching transformation – not to say a revolution – due in large part to the rulings of the European Court of Human Rights. A number of judgments delivered in recent months have turned our culture on its head and forced us to review whole swathes of our criminal justice system. I am thinking primarily of the *Brusco v. France*¹ judgment concerning police custody and, of course, of *Medvedyev and Others v. France*² and, later, *Moulin v. France*³ concerning public prosecutors. Although it is of less direct relevance to us, we might add the *Taxquet v. Belgium*⁴ judgment on the reasoning of Assize Court decisions. Taken together, all these rulings alter the complexion of our criminal-law institutions, not by dictating what has to be done, but in defining what is no longer compatible with the Convention. Unlike in other countries, the issue does not concern isolated provisions or one-off legislation, but goes to the heart of French culture, that is to say, the centralised view of authority as embodied by the unified nature of the judiciary.

1. No. 1466/07, 14 October 2010.

2. No. 3394/03, 10 July 2008, and [GC], no. 3394/03, 29 March 2010.

3. No. 37104/06, 23 November 2010.

4. [GC], no. 926/05, 16 November 2010.

I can, however, assure you that these rulings, which have had a considerable impact, have not been perceived as an assault on our culture. Quite the opposite: they have been greeted with relief, speeding up the resolution of a debate that had been rumbling on for years. Moreover, this line of case-law was immediately taken up by the Court of Cassation, which held, in a historic judgment delivered a little over a month ago, that public prosecutors in France are not “judge[s] or other officer[s] authorised by law to exercise judicial power” as they are not independent of the executive⁵. The legislature has also anticipated future reform: the combined effects of the two judgments on police custody and public prosecutors prompted it to propose, in the new draft legislation, that police custody should henceforth be supervised by a judge rather than by the prosecuting authorities.

Moving beyond consensus in European legislation towards shared exercise of the third-party role

Why, you may ask, did the French courts accede so readily? Perhaps because the European Court in reality played the part of a *third-party separator*, helping to sever the link between the government and the public prosecution service, something nobody else had summoned the resolve to do. These rulings settled in no uncertain terms an internal debate in France which had been turning round in circles (the judgment made explicit reference, moreover, to the opinion of the French judicial authorities⁶). The French case is not an isolated one and it reveals the extent to which this third-party role, played in this instance by your Court’s case-law, is vital to any political community, rescuing democracy from one of its main internal contradictions⁷, the fact that it lacks the transcendental dimension of religion and hence a solid reference point⁸ (even more so in cultures which, like the French, take an absolute view of sovereignty, in which political representation has a near-monopoly). But even in the culture of the United States, the first country to entrust this task to the Supreme Court, one might speculate whether the presence of a court removed from the vicissitudes and impasses of political life might not have put an end to segregation sooner (it took the Supreme Court until 1954 to abolish it⁹).

Thus, the third party creates the distance between the founding instrument and its interpretation. It is the presence of judges that makes it a living instrument. It is because it plays the role of third party that the European Court of Human Rights cannot be likened to a higher-instance court; it is also this third-party role, with responsibility for ensuring compliance with a reference text partly removed from the sovereign sphere, which truly sets the Convention apart from an ordinary international treaty. The Convention cannot be equated with a “treaty-contract” or even a “treaty-law”¹⁰ aimed at laying the foundations for a set of permanent common rules. None of these categories takes account of the dynamic, “living” component which the third-party element introduces. It is not enough to assert that the European Court seeks to identify a common denominator between States or to arrive at a consensus. Let us take a fresh look at the *Ireland v. the United Kingdom* judgment of 18 January 1978: “Unlike international treaties of the classic kind, the Convention comprises more than mere reciprocal engagements between contracting States. It creates, over and above a network of mutual, bilateral undertakings, objective obligations which, in the words of the Preamble, benefit from a ‘collective enforcement’”¹¹. A project of this kind actually has more to do with *sharing* than with reciprocity. The Convention is aimed not merely at exchanging, but at sharing – but *sharing* what? Not so much sovereignty (executive functions) as judicial functions. Through the Convention

5. Court of Cassation (France), *Creissen* judgment, 15 December 2010.

6. *Moulin*, cited above, §§ 25 and 28.

7. Marcel Gauchet demonstrates that this is one of the chief difficulties facing French political culture since the Revolution (*La Révolution des pouvoirs*, Paris, Gallimard, 1996).

8. This rapprochement, with a spiritual if not transcending role, is set out in the conclusion.

9. Afua Hirsch, “Judges: can’t live with ‘em...”, *The Guardian*, 6 April 2009.

10. See Frédéric Sudre, “L’interprétation dynamique de la Cour européenne des droits de l’homme”, *L’Office du juge*, French Senate colloquium of 29-30 September 2006.

11. *Ireland v. the United Kingdom*, 18 January 1978, § 239, Series A no. 25.

the Contracting States do not just share obligations (this is nothing new, since the same States sign many treaties which give rise to human rights obligations – moreover, several of the rights recognised by the Convention were already enshrined in national Constitutions or legal systems); they have also set up a full-time Court to monitor their implementation (this is a major new departure) and to which they look for “collective enforcement”. The creation of a responsive body resembling national courts in form and, what is more, linked to them, a body entrusted with the task of giving final interpretations, a living instrument, demonstrates that the Contracting States – perhaps without fully realising it – embarked on a sharing of resources in a third-party project taking the generic form of “democratic society”. A careful distinction needs to be made between this sharing on the one hand and reciprocity and community on the other¹².

From the exercise of this third-party role by the European judges we can deduce a new relationship between the jurisprudence of your Court and the national legal systems, one in which they *slot into* each other rather than being superimposed. Unlike a situation where several levels of government are superimposed on each other, this implies that the legitimacy of the national courts is divided from the outset between their domestic powers and the authority conferred on them by the international instruments which make them the Community court of first instance or vest powers in them to review the compatibility of domestic legislation with the Convention. These two roles do not overlap but are nonetheless mutually supportive, with one being a prerequisite for the other. Moreover, the external case-law reinforces the internal third-party function and further removes it from the executive¹³. The process is therefore one of universalisation from the inside rather than the outside; the third party – in other words, the judge – is the point of contact between the sovereign power and its “Other”. Truth to tell, there is no satisfactory way of representing this in a diagram.

Culture as identity and aspiration

The French example allows us to further define the concept of “culture”. The latter must not be viewed in terms of substance: if we define culture as identity we are in great danger of becoming embroiled in an irresolvable conflict. Every culture has two dimensions: identity and aspiration. The concept of national identity has two sub-categories: *idem*-identity and *ipse*-identity, to use the terms defined by the philosopher Paul Ricoeur¹⁴, that is to say, one dimension which refers to the “self” and another which means “promise made to oneself”. As well as uniting the nation through language, territory and shared traditions, the Constitution also declares abstract values – which in Europe can be summed up as respect for human rights – which make it possible to take a step back from reality, in other words, to exercise critical detachment. That is why any Constitution fulfils a dual role of *integration* and *subversion*; after a troubled period in history, it must at once cement a new identity and guard against possible abuse of that identity. It must express a self but at the same time identify an “other than self” in order to ensure its faithful preservation.

Looking beyond the basic text, every legal instrument is characterised by this diffraction; it is here that the universal dimension of the law resides. As the depositary of this third-party function, the European Convention supports and extends the universalising force contained in every legal rule; it completes and perfects the rule of law by placing the third party, essential to its achievement, beyond the reach of popular power and passions.

It is helpful, therefore, to view the case-law of the European Court of Human Rights not as antagonistic to national legal systems but as a new dimension of them. A new dimension which, in its turn, implies

12. Paul Ricoeur stresses this point in *Parcours de la reconnaissance. Trois études*, Stock, Paris, 2004.

13. This is the case with the complementary relationship between the International Criminal Court and the national courts.

14. Paul Ricoeur, *Soi-même comme un autre*, Paris, Seuil, 1990.

understanding the law as being born out of a certain tension, viewing it henceforth as both positive and fundamental, domestic and supranational, closed and open¹⁵.

Societies communicate through their aspirations. Only their ideals can be held in common: identity-based cultures can never be other than separate. What unites us is a common aspiration to place human rights at the heart of our Constitutions. For that reason it may be pointless to search for a hypothetical European culture in the sense of a substantive identity (*idem*-identity), that is to say, a set of common mores, which would only be a synthesis of cultures (or a synthetic culture!). What creates European identity, on the other hand, is a certain number of shared aspirations. The Strasbourg Court embodies a shared *ipse*-identity, as the depositary of the promise Europe made to itself in the aftermath of the Second World War and the horrors of the genocide. This promise, reflected in shared principles, receives different cultural expressions; it is embodied in different cultures (both external and internal).

To come back to the French example: in requiring French legal culture to meet such high standards, the Court is not attacking it but in a sense forcing it to be more true to itself, a better self. The Court stands as guarantor of the promises contained in the commitment to human rights. This shared function allows the Court to play both an internal and an external role.

As a result, standards lose their purity or, more accurately, their homogeneity: the “fundamentalisation” of all rights expresses the composite and multidimensional nature now taken on by every standard. Hence, in France today, two standards are in head-on conflict: some investigating judges are calling for the immediate implementation of the reform of police custody (presence of a lawyer from the first hour of custody, right to remain silent), while the police are instructed to implement French law as it continues to apply. Both are right, which is why the conflict can only be resolved through negotiation.

The European Court of Human Rights shares its powers with a large number of national courts (not just Constitutional Courts but also ordinary, administrative and even financial courts) and this conflict of powers is not adjudicated in a clear manner, since the constitutional pluralism in question has no rational basis. How can the different roles fit together? This is the second point I will address.

II. FROM IMPERSONAL COORDINATION TO RELATIONAL COOPERATION

In the Westphalian system the border was clearly delineated: an issue was either domestic or international but could not be both. The world has changed since then: from a mosaic of closed-off territories it has become a single space, but one in which several levels are superimposed (depending, for instance, on the ability to move around). There is a need to establish demarcation lines other than the physical borders between States which form horizontal demarcation lines based on surface area. Without territories, representation is vertical rather than horizontal (hence the expression “multilevel”). Where the Westphalian model viewed coexistence between States in contiguous form, as on a map, we now have vertical boundaries which can be divided into levels at which domestic law has complete freedom of action and those where sovereignty has to be shared, but in entirely new forms.

15. The dual dimension is well illustrated by the German Basic Law. Article 23 represents an opening-up towards Europe, in other words, it contains this principle of shifting focus from itself. It rightly asserts its own prior existence and origin, but at the same time accepts relinquishment to a domestic third party (the Constitutional Court) and an external third party (the international human rights treaties). In so doing the Basic Law – like any Constitution – relinquishes of its own accord the monopoly over scrutiny of its affairs and agrees to let others share in judging it. This does not imply a total transfer of powers to Europe and the European Court of Human Rights; the Basic Law occupies two spaces – that of its own territory and that of the law safeguarded by the Strasbourg Court.

This change in the complexion of the globe has numerous implications for the law: whereas legal concepts used to be classified according to a hierarchical system based ultimately on this territorial coherence, the new structure is more chaotic since the boundaries between the different levels are less clear than geographical borders. It is set against a dynamic, interactive and hence *temporal* backdrop. Order is no longer spatially defined but arises out of the interaction which takes place over time between the various judicial actors.

“Relational” legal concepts are aimed at organising the relationship between the various coexisting jurisdictions no longer on the basis of a predetermined order but on the basis of their interaction (thus, always from a current perspective). The relationships range from simple comparison to cooperation and mutual recognition, with each court ultimately contributing to a new European legal order.

From coordination to comparison

While globalisation creates relationships between individuals, goods, ideas and cultures, the first constraint can be found in this new global context itself, that is to say, in the simple fact of being thrown together in the same space rather than in separate spaces as in the past. This exposes us to comparisons.

Let me first of all give an example of the “pressure” created by being in contact with each other. French legal culture has traditionally been hostile to any review of constitutionality. But since the review of compatibility with the Convention gave the French courts the power to review the law in 1981, it became untenable to maintain a bar on constitutional review. The 2008 reform¹⁶ therefore put an end to this bizarre situation and instituted constitutional review in the form of a preliminary ruling on constitutionality. The European Court of Human Rights thus played a very decisive role, albeit *indirectly*.

This new “competition” between avenues of appeal and courts does not stop there. The institution of constitutional review, spurred on by the review of compatibility with the Convention, created a very positive dynamic between the highest-ranking French courts that did not exist while each had its own well-defined sphere of jurisdiction. The review of constitutionality to which they contribute, both concurrently and consecutively, provides them with common ground for comparison, and this has proved to be a great boon in terms of liberties! Moreover, that is not the end of the matter. Now that the Constitutional Council has assumed a function which was frankly unknown in the French tradition, it finds itself face to face with its opposite numbers in the form of the other Constitutional Courts.

The German Basic Law lays down the principle of openness towards international law, or *Völkerrechtsfreundlichkeit* – literally, the principle of friendliness towards international law, and *Europarechtsfreundlichkeit*, openness towards European law. These “relational” concepts reflect an attitude and mindset which are henceforth expected of everyone and are liable to have certain effects: another court has to be taken into consideration. “Taking into consideration” is very different from “applying”; the former means paying attention or consideration to others and hence spontaneously placing constraints on one’s self-determination – mine are not the only wishes, nor are they paramount. While application is an act of obedience whereby I have to bow to the wishes of others, the fact of taking others into consideration springs from a voluntary association which does not in any way detract from free will or creativity. This is demonstrated by the dispute between Paris and Strasbourg on the subject of the Government Commissioner, which concluded when the French *Conseil d’Etat* found an imaginative compromise which enabled it to take the Court’s case-law into consideration while remaining true to its own traditions.

16. Constitutional revision of 23 July 2008.

This new context allows the courts to better assess their own system by comparing it to others to which they are linked by the Convention. This was the reasoning adopted by the British House of Lords when it referred to the Spanish example in ruling that the government derogation from the Convention for the purposes of combating terrorism was unwarranted¹⁷.

Lastly, comparison can acquire the status of a principle, as demonstrated by the famous “Solange” rule: the rules of the Convention apply “as long as ...”; this is clearly a comparison.

From obedience to *cooperation*

If we pursue the rationale of this coexistence slightly further, it can be classified as *cooperation*. As the current President of the Constitutional Court in Karlsruhe has pointed out, a minimum of coordination is required in order to allocate responsibilities within a system of this kind: “The *Verbund* concept helps to describe the functioning of a complex multilevel system, without prescribing the precise techniques (rules, as we might say) of that functioning”¹⁸. These techniques are reaffirmed in legal concepts such as *comity*, which might be described as “international courtesy”.

Another form of cooperation, of course, is this notion of *dialogue between judges* which is greatly in vogue these days. The word “dialogue” is slightly misleading: it does not refer to a friendly conversation between ordinary people or to an academic debate, but to an interactive process between authorities – judges – who were traditionally supposed to pronounce only through their judgments, that is, on a final basis, a form which caused them to exhaust their power by exercising it. Unlike with conversation, the initiative for this dialogue is forced rather than voluntary; the dialogue between judges is a necessity and loses the gratuitous character which gives conversation its charm.

Cooperation is a self-imposed constraint, the exact opposite of an order. It has limits, but they are internal limits, unlike the constraint of a legal rule. Hence the reference to *will* as a principle of interpretation – the will exercised by judges and no longer (exclusively) by political bodies. The judges’ role is no longer confined to deciding issues of law in a static manner but also entails moving the law forward. No more false debates on judicial activism: the active component of judging has been embraced, a development that can only be welcomed.

As to the status of the French public prosecutor, the Court’s case-law did not come about abruptly, but in a highly evolutive, not to say gradual, manner: a number of earlier judgments had presaged the second *Medvedyev and Others* judgment and subsequently the *Moulin* judgment. For that reason some French legal professionals criticise the legislature for having adopted a defensive and “entrenched” position and having waited too long, and criticise judges for not having engaged in dialogue: because the latter failed to read the writing on the wall, they had to submit to this judgment.

From indifference to *mutual recognition*

Are these new “relational” concepts destined to be confined to the sphere of good intentions or to a formal description of these relationships? While they undoubtedly describe the new context, they nevertheless seem powerless to define criteria as a basis for these relationships and for adjudicating possible conflicts. The concept of “dialogue between judges” is in danger of appearing a little soft and incapable of taking

17. Decision of the Appellate Committee of the House of Lords, 16 December 2004.

18. Andreas Voßkuhle, “Multilevel cooperation of the European Constitutional Courts”, *European Constitutional Law Review*, vol. 6, 2010, p. 183.

account of the conflictual dimension of relations between legal systems, which calls for consistent criteria as a basis for clear arbitration. It would be equally instructive to explore cooperation by looking at its opposite, namely refusal to cooperate, which frequently takes the form of a unilateral act. The space is wiped out by the fact that everyone is made subject to a single jurisdiction. This was the issue raised before the United States Supreme Court in two anti-trust cases (*Intel* and *Empagran*¹⁹, June 2004) and, more recently, in *Morrison*²⁰. These cases remind us that the new model has not completely done away with the earlier Westphalian model and that global law these days is a scene of ongoing tension between the spatial model, which keeps trying to reintroduce the territorial approach, and the new relational and temporal model.

In order for cooperation to be fully effective, it needs to focus on the pact underlying it. This pact has to be spelt out (as it tends to be implicit) and updated (as it evolves). Where the Court of Justice is concerned, domestic law undertakes to ensure the implementation and smooth functioning of European law, while the European authorities for their part undertake to respect different national identities²¹. The terms of this pact vary in each instance – an effort must therefore be made to specify them in each case – but they are invariably underpinned by interests which are partly shared and partly different²².

With regard to the European Court of Human Rights, we have seen that this pact is based on sharing of the third-party role. Recognition is also vital for the third party and, moreover, is never finally achieved. Thus, the Court must strive not only to interpret the Convention but also to respect different cultures, that is to say, different ways of arriving at the same goal. Its long-term survival depends on it.

In a general sense, all these pacts between jurisdictions reflect *mutual recognition*; no longer between citizens or nations but between the various nations and the European courts. The dialogue presupposes not just mutual knowledge but also mutual recognition, which it strengthens by asserting itself. This idea is not a mere statement of principle: it takes on a very practical meaning in the context, for instance, of the European arrest warrant, the enforcement of which presupposes that the courts have confidence in the system of the country making the request. All the more so since this confidence cannot be bestowed by laws and treaties: it is elusive and cannot be forced²³.

From legal protectionism to *contribution* to a European human rights order

To take this a step further: what interest do the judges have in cooperating? The initial reaction of French judges was indeed to try to limit the application of the Convention, to contain it or even to put it out of range²⁴. But they soon realised that this protectionist stance would avail nothing. This gave rise to the third stage, which Régis de Gouttes refers to as the “spontaneous” and “constructive” application of the Convention. Contrary to the French judges’ initial belief, the Convention and the Court’s case-law do not restrict them, but on the contrary are “a source of extension of [their] role and a factor strengthening [their] primary mission as guardians of individual liberties”²⁵. French judges are thus entering a phase of acculturation – or rather inculturation – in the sense that they have appropriated the instrument not as something external but as part of the resources at their disposal.

19. *Intel Corp. v. Advanced Micro Devices, Inc. and F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 24 June 2004.

20. *Morrison v. National Australia Bank*, 24 June 2010.

21. Andreas Voßkuhle, *art.cit.*, p. 193.

22. This pact, if certain scholars like Cass Sunstein are to be believed, even provides the underlying logic for certain judicial decisions which amount to a compromise between diverging interests (*Legal Reasoning and Political Conflict*, Oxford, 1996, cited by Philippe Raynaud, *Le juge et le philosophe*, Paris, Armand Collin, 2008, p. 86). Péter Kovács makes a similar analysis in relation to the International Court of Justice (“Développements et limites de la jurisprudence en droit international”, report submitted to the 2002 Colloquium of the Société française pour le droit international, Lille, 12-14 September 2002).

23. This will be a major problem for emerging countries (notably China). It is not enough to pass laws or to state that the judiciary is independent; it has to be proven, and above all, the country’s partners have to believe in it.

24. Note the spatial metaphor.

25. Régis De Gouttes, “La naissance du droit européen des droits de l’homme dans l’ordre judiciaire français” (not yet published).

In this changed context, certain courts and certain ways of arguing and drafting decisions achieve more recognition than others because they are more prestigious or more convincing. They have persuasive authority²⁶ which emanates intrinsically from a particular decision, aside from any institutional links. This new sort of authority informs the process of contributing by assigning a goal to it.

Power, in this changed context, no longer resides in protecting oneself but in contributing to and influencing the construction of a common system. But this means having the necessary resources²⁷. By virtue of the *Verbund* concept, the case-law of the various constitutional courts is engaged in a discursive quest to find the “best solution”, one which makes this multilevel cooperation a learning experience²⁸. The current President of the Karlsruhe Court replies in the following terms to those who regret the fact that Karlsruhe no longer has exclusive power to review the constitutionality of German law and pronounce on German constitutional law: “The sharing of responsibilities between the courts of justice does not curtail fundamental rights but, on the contrary, triples them, thanks to cooperation (*Verbund*) between the Constitutional Court in Karlsruhe and the courts in Strasbourg and Luxembourg.”²⁹ Hence, there is a trade-off between, on the one hand, a certain loss of power and, on the other hand, the opportunity to extend one’s influence (this contrasts with the position of the United States Supreme Court). So instead of taking a nostalgic view of the old “exclusivist” model we should look forward, opening up in both space and time. This positive approach to making a contribution may be associated with several ideas such as “assistance in interpreting”, or a “normative guidance” and “orientation” role.

III. FROM A SPATIAL TO A TEMPORAL REFERENCE

What the evolutive case-law of the European Court of Human Rights demonstrates is the victory of time over space. What is no longer organised spatially must be organised temporally. This new relationship to time can be inferred from the Preamble to the Convention, which refers not just to the maintenance of human rights but also to their further realisation. Time goes to the heart of the Court’s judicial activity for at least two major reasons. Firstly because, in monitoring the effectiveness of rights and not just their formal recognition, the Court must ensure that rights remain effective even when circumstances change. Its activity is thus linked to the evolution of national societies which, because they are democratic, are subject to constant change and even to the acceleration of time³⁰. The second reason relates to a combination of the teleological interpretation and the abstract nature of human rights, which represent a horizon of expectation as they can never be fully achieved (reality can never fully match our expectations – only a form can be perfect). “Time”, as François Ost puts it, “is the fourth dimension of human rights”³¹.

So, a constant imbalance between a court without a territory and territorial States is at the very heart of the project of the Convention and the Court. All the ingredients for a genuine dynamic are there, whereas the relationship to space (or at least the visible part of concern to Europe³²) produced, by contrast, a static dimension. Whereas the Westphalian model, centred on space, aimed to achieve *equilibrium*, the new model is destined to be in constant movement. The equilibrium between the major territorial States was based essentially on a return to the *status quo ante*, or at least to largely identical relations. This model

26. See Anne-Marie Slaughter, *A New World Order*, Princeton, Princeton University Press, 2004.

27. This means drafting in clear and well-argued language (this applies to everyone including the European Court of Human Rights, where it can be seen that making a contribution entails order and reasoned argument – telling a story in a way that anyone can understand). This reminds me of an English colleague who said to me, after coming upon a Court of Cassation decision: “I’ve read the press release or the summary – where’s the decision?”

28. Andreas Voßkuhle, *art. cit.*, p. 198.

29. *Ibid.*, p. 197.

30. See Hartmut Rosa, *Accélération. Une critique sociale du temps*, translated from the German by Didier Renault, Paris, La Découverte, 2010.

31. François Ost, “Le temps, quatrième dimension des droits de l’homme”, *Le journal des tribunaux*, Brussels, January 1999.

32. Carl Schmitt demonstrates that the dynamic of appropriation related more to the seas and “untamed” spaces to be colonised (Carl Schmitt, *Le Nomos de la terre dans le droit des gens du jus publicum europaeum*, translated from the German by Lilyane Deroche-Gursel, introduction by Peter Haggenmacher, Paris, PUF, 2001).

focused on physical borders and was instinctively wary of any attempt to apply moral considerations to relations between States (this had echoes of the dark era of the religious wars which left Europe exhausted and from which it emerged precisely by means of spatialisation). So, we have now moved from Westphalian geography to global “chronography”³³.

It therefore comes as no surprise that many of these new concepts refer to time rather than space. Time is the new reference framework for a law which is now based on principles, just as space was the framework for positive law (which went hand-in-hand with the unique nature and single nationality of the law-maker).

This is demonstrated by the term “preliminary ruling on constitutionality”, which reflects a temporal rather than a spatial dimension. It also reflects the fact that legal certainty, meaning certainty over time, has become a major preoccupation. This requires the national courts to anticipate the rulings of the European Court. The French, German and British judges, in their rulings, anticipate the decisions of the Strasbourg Court; thus, a genuine dynamic is created by internalising how the other one is going to act (it is well known that anticipation is central to the functioning of markets). The current President of the Karlsruhe Court observes that both his court and the Strasbourg Court strive to “prevent clashes”³⁴. In France, a growing number of judicial decisions set a deferred date for implementation, starting with the *Creissen* judgment³⁵. In each case this reflects an attempt to obtain a degree of certainty from time which space can no longer provide.

This new relationship to time has a bearing on the idea of legal consistency. The idea of *consistency* also takes on a new meaning; it is no longer something predefined but rather an ongoing quest over time for a dynamic consistency, measured against higher principles. In the first case, consistency is presented at the outset as a past model to be followed; in the second, it has no inherent substance but must be constructed on a case-by-case basis, according to an evolutive philosophy rather than in a spirit of post-modernism.

Conclusion: Europe, its cultures and human rights for the common good

The interaction between different cultures and the construction of a pluralist universalising space under the auspices of the European Court of Human Rights is made possible by the shared aspiration to improve the human rights situation. This is very novel, and yet is not unconnected to the situation in Europe before it was divided into sovereign States. To understand the place occupied by human rights in this new context, we have to look back to medieval Europe, before the need to defend the large territorial entities of the kingdoms led to sovereignty becoming absolute and the law being reduced to an expression of sovereignty³⁶. Justice was considered as the “*raison d’Etat*” of the different kingdoms which made up Europe at the time. This term, in the Middle Ages, meant the exact opposite of what it means today: not a reason for suspending the law, but the *status* of the kingdom, which did not take into account “its real state and the full set of conditions necessary for its preservation, its constitutive ‘form’”. By this means, *status* frequently becomes synonymous with common good³⁷.

33. The expression is taken from Paul Mathias, “*la normativité réticulaire*”.

34. Andreas Voßkuhle, *art. cit.*, p. 187.

35. *Creissen*, cited above.

36. Harold J. Berman, *Law and Revolution. The Formation of Western Legal Tradition*, Harvard University Press, Cambridge (Mass.), 1983.

37. Michel Senellart, who goes on to say: “[M]odern thought, beyond the declared breaks with the past, finds its roots in medieval theology. The neglect of the latter is the great oversight of our culture” (Michel Senellart, *Machiavélisme et raison d’Etat*, coll. “*Philosophies*”, Paris, PUF, 1989, p. 13).

The Russian historian Aaron J. Gurevich views the need to construct everything on the basis of the law – and not just of political power – as one of the defining characteristics of medieval European culture³⁸. In this sense, the United States, which takes a written Constitution as its basis, is merely taking to its abstract conclusion the European idea of using the law as a basis.

We have to go back to the historical origins of the European Court of Human Rights in order to understand that human rights claim to be an antidote to historicism and the possible collapse of sovereignty. This constitutional pluralism has to be linked to modernity and the disappearance of transcendence. But unlike this precedence of the law which – later – came to be confused with the Catholic Church, this new version of the common good is entirely rational and formalised. It is no longer natural law based on Christianity, but Dworkin's famous chain novel (again the temporal reference), several chapters of which remain to be written.

Thus Europe advances by going back to its roots (Christian in structure but modern in substance, thus enabling everyone to agree). It is wholly modern while linking back to what made it distinctive. Hence, it is possible to be culturally different and nevertheless share common values; the past gives us confidence in the future. The evolutive case-law of the European Court of Human Rights and everything it implies, namely, the interaction it establishes – though perhaps not without some deviations – between specific cultures and the sharing of sovereignty (made possible by the concept of human rights): all these make Europe a laboratory for civilising globalisation.

38. Aaron J. Gurevich, *Les catégories de la culture médiévale*, translated from Russian by Hélène Courtin and Nina Godneff, preface by Georges Duby, Paris, Gallimard, coll. "Bibliothèque des histoires", 1983. This contrasts sharply with Chinese culture, which does not have this precedence of the law and instead derives all law from the founder of the imperial dynasty.

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,

On behalf of my colleagues and all the members of the European Court of Human Rights, I should like to thank you for honouring us with your presence at the official opening of our Court's judicial year. This is a sign of your attachment to human rights, which are our common heritage, and your loyalty to our Court, whose *raison d'être* is to ensure that they are respected and developed across the whole continent.

Before sharing a few thoughts with you, I should like to welcome our guest of honour, Mr António Guterres, United Nations High Commissioner for Refugees and former Prime Minister of Portugal. I am grateful to you, High Commissioner, for accepting our invitation. Your presence highlights the universal and topical nature of refugee protection, and also the practical links we are seeking to develop with the United Nations bodies and institutions working in the field of justice and fundamental rights. We will listen very attentively to what you have to say, especially in view of the delicate and important task of the High Commissioner's Office in assisting asylum-seekers, refugees and stateless persons.

I have a further preliminary announcement to make. It concerns the launch of a quite exceptional book about the European Court of Human Rights, published to celebrate its 50th anniversary and the 60th anniversary of the Convention by which it came into being. This is an important occasion. Never before have we had a high-quality reference book charting developments over the past few decades while looking firmly towards the future. This fine book is a collective effort. It was planned and produced under the guidance of an editorial board chaired by my colleague Egbert Myjer, with the assistance of several other judges and members of the Registry. The publication coordinator was Mr Jonathan Sharpe, a former member of the Registry. The book is published by Third Millennium Publishing in London, in English and French. Lastly, a very substantial contribution towards the funding of the book came from the Ministry of Foreign Affairs of the Grand Duchy of Luxembourg, to which I should like to place on record our gratitude; the Ministry is represented here by Mr Georges Friden, Director of Political Affairs. Without its contribution, the project could not have been completed. More broadly, I wish to thank everyone involved in producing the book, which is entitled *The Conscience of Europe*.

Lastly, I should mention, with a sense of collective pride, that on 29 May 2010 in Middelburg, in the presence of the Queen of the Netherlands, I received the Franklin D. Roosevelt Four Freedoms Award on behalf of the Court. More than just a reward, this high distinction is an encouragement for us.

Ladies and gentlemen,

I would like to structure my thoughts this year around our Court's recent developments and future plans, before looking at the present state and the future of human rights in Europe.

The European Court of Human Rights, which became a permanent institution in 1998, has been undergoing reforms ever since, both through internal measures and as a result of institutional changes brought about by the States Parties. Emphasis should also be laid on the efforts made by States at national level that have facilitated the Court's task. I do not need to remind you that the Convention was established on the principle of shared responsibility. The member States undertook to guarantee the rights and freedoms set forth in the Convention. They collectively renewed this promise at Interlaken; I shall come back to this. In examining disputes brought before it, the Court determines whether these undertakings have been honoured; where this has not been the case, it reaches a finding of a violation of the Convention or the Protocols thereto. It will then be for the States concerned to execute the judgment, under the supervision of the Committee of Ministers of the Council of Europe; this requires them to take individual as well as general measures. Often, they will have to change their laws or practice, or the approach taken by their courts. When you think about it, this is a rather unusual process! It is understandable that there is sometimes resistance; I am happy to note that it fades over time.

This mechanism, an impressively bold innovation in 1950, has been constantly enriched over the years, first of all in terms of the nature and scope of the rights protected. There are now six additional Protocols in force complementing the substantive provisions of the Convention. Two of them have the supremely emblematic purpose of abolishing the death penalty, which now no longer exists in Europe. In addition, the case-law, which treats the Convention as a "living instrument", has favoured a dynamic interpretation of the rights it safeguards. This afternoon's seminar raised the question of the limits to this form of interpretation; in my view, an evolutive approach seems essential, otherwise the text of the 1950 Convention would have been rendered obsolete or ineffective as a result of changes in society and morals and technological innovations. Who at the time could have imagined computers, the Internet, social networks, medically assisted procreation, gamete donation, transsexuality, or indeed the increasing importance of the environment and ecology?

Judicial protection of rights also requires procedures, which themselves have been amended several times. In the recent past, Protocol No. 11 abolished the European Commission of Human Rights, turned our Court into a permanent body and made the right of individual application and acceptance of the Court's jurisdiction automatic and compulsory aspects of procedure. As regards the long-awaited Protocol No. 14, which finally came into force on 1 June last year, it has created single-judge formations, assigned new powers to the three-judge Committees, made it possible to reduce the number of judges in a Chamber from seven to five, introduced a new admissibility criterion, empowered the Committee of Ministers to institute interpretation and infringement proceedings, and afforded the Commissioner for Human Rights the right to intervene as a third party.

The end of History as announced by Hegel, or more recently by Francis Fukuyama, does not appear imminent to me. Similarly, the history of the Convention seems far from complete. The fourteenth Protocol will certainly not be the last one. There are two main reasons for this, which are partly linked.

Firstly, the new procedures established by the Protocol, while necessary or even indispensable, are not sufficient. As was foreseeable and indeed foreseen, they do not in themselves make it possible to bridge the gap between the number of decisions delivered by the Court and the influx of applications lodged with it. I shall not overwhelm you with statistics. A single example will suffice: in 2010, the number of applications

disposed of increased by 16% from 2009, without any additional resources, which is encouraging; however, alongside this, the number of new applications increased by 7%. At this rate, and bearing in mind the size of the backlog, it would still take many years to be wiped out. Although the effects of the single-judge procedure were only felt over a period of seven months in 2010, even over a full year they will not keep pace with the immensity of the task: we will need to go further. In any event, our Court, whose resources are scarcely increasing if at all, cannot devote most of its efforts and means to rejecting applications with no prospects of success; otherwise, the handling of serious and urgent cases would be delayed indefinitely. The Court has therefore set up a priority policy. There will be no immediate gains in purely statistical terms, but the cause of human rights and their effective protection will, on the other hand, benefit. We have to be clear on this point, so that all interested parties are aware and are not surprised over the next few years.

Secondly, the medium- and long-term future will involve changes that cannot take effect without amending the Convention, even if, as the Wise Persons' Report recommended in 2006, the amendment procedure needs to be simplified in future. As you know, a very important occasion in 2010 was the Ministerial Conference on the future of the Court, held in Interlaken, Switzerland, which I announced to you here a year ago, having suggested the idea the year before that. The conference was, in itself, a political success. In particular, it reaffirmed the States' attachment to the Convention and recognised "the extraordinary contribution of the Court to the protection of human rights in Europe", which is no mean tribute. It also adopted a Declaration, together with an Action Plan. I shall not go into the details of the measures recommended or envisaged in the two instruments. They make provision for decisions to be taken at various levels, stretching over a period of several years, from 2010 to 2019, and involving a range of different entities: the Court itself – and we have begun without delay; the States, which are responsible in the first place for protecting rights and freedoms at national level; and the bodies of the Council of Europe, in particular the Secretary General, the Committee of Ministers and the Parliamentary Assembly.

Several key words are particularly significant in the Declaration and Action Plan, illustrating the scale and variety of this pluriannual programme of reforms: subsidiarity; shared responsibility; clarity and consistency of the case-law; reduction in the number of clearly inadmissible applications; full and rapid execution of judgments; a Statute for the Court; greater autonomy for the Court within the Council of Europe (in the interests of efficiency); the crucial importance of its independence and impartiality; and systematic use of procedural tools (such as pilot judgments or friendly settlements). I wish to emphasise two aspects which I consider urgent: the setting up of a mechanism for effective *filtering* of applications – the vast majority of which, I would remind you, are rejected as inadmissible, a considerable and abnormal problem – and a radical reduction of the number of *repetitive applications*. Such applications are usually well-founded because they reflect systemic defects that should be remedied and eradicated at national level, so that clone cases of this kind would no longer be brought to Strasbourg in future. This would solve part of our problems regarding delays and processing times, and above all the principle of shared responsibility would be applied more fairly and effectively.

Since Interlaken, our Court has already taken steps, either alone or with the assistance of others, to increase its efficiency, despite the financial crisis which has deprived it of the additional resources it requires.

Without giving an exhaustive list, I would mention the development of *pilot judgments*, which are having an increasingly satisfactory effect, and clarification of the implications of such judgments; the adoption of the priority policy referred to earlier; new criteria and scales for the calculation of just-satisfaction awards under Article 41 of the Convention; and the adoption of a Practical Guide on Admissibility Criteria, designed to provide all interested parties with information about the conditions that must be satisfied for an application to have any chance of success.

Recently, on my initiative, the Committee of Ministers set up a Panel of Experts and appointed its seven members, several of whom are present, and I am pleased to welcome them; drawing inspiration from the panel established under the Lisbon Treaty for the appointment of judges and advocates-general of the Court of Justice, this panel, which has just met for the first time, is to advise States when drawing up lists of candidates submitted to the Parliamentary Assembly for election as judges of the Court. I can assure you that this is by no means a minor reform.

Short-term projects also include the enhancement of the tools at our disposal, in particular the HUDOC database, an essential resource not only for our own productivity and for maximum consistency of our case-law, but also for all practitioners, especially as a means of ensuring that national courts are familiar with our decisions and draw on them in their own rulings. I should point out that many States have provided the Court with valuable voluntary contributions, for which I thank them. Some are financial in nature and have, for example, enabled us to make webcasts of hearings available and to improve the Court's IT system – in particular, we will be able to develop the HUDOC case-law database thanks to contributions of this kind; others take the form of the secondment to the Registry of legal officers who come to help us and, when they leave, take back to their own countries' legal systems an extremely useful knowledge of the European Convention, based not on textbooks but on practice. This is a good example of *collaboration*, naturally on a wholly independent basis since we select the candidates, who are then overseen by experienced Registry lawyers, under the supervision of our judges.

This is perhaps the time to mention a serious obstacle to the Court's functioning, a problem which has recently worsened and which cannot be avoided without just such collaboration between all those involved in the system, whether State authorities or other entities. I am referring to the urgent measures provided for in Rule 39 of the Rules of Court, which are designed to avoid violations of the Convention that would be irreversible, and take the form of orders to the respondent State to take or to refrain from taking particular actions. The pre-eminent field in which these interim measures are applied is that of the expulsion of aliens or the refusal of asylum requests, a subject which Mr Guterres will tell us about. It is not an exaggeration to say that the application of Rule 39 has preserved the physical integrity, the liberty and even the lives of many people who by definition are vulnerable. Rule 39 proceedings have developed considerably in the past few years; often, however, they confront the Court with a difficult or indeed impossible task. Decisions have to be taken as a matter of urgency, on the basis of a rudimentary case file, on whether to allow or refuse the expulsion or extradition of people to countries where they are at risk of serious violations of their rights. It is clear, as is confirmed by the Interlaken Declaration, that our Court cannot, without infringing the subsidiarity principle, assume the role of a third- or fourth-instance court; however, recourse to Rule 39, vital though it may be for the effectiveness of the rights at stake, is threatening to transform it into a first-instance immigration tribunal, while also taking up an excessive portion of its time and human resources, to the detriment of the examination of cases on the merits. It is time to come together to discuss these problems, which, it must be admitted, are a reflection of the state of fundamental freedoms in Europe and beyond; but to carry on as before without reviewing the situation would be irresponsible and harmful.

I cannot think about the future of our Court without emphasising the great importance of the European Union's accession to the European Convention on Human Rights. Envisaged in Brussels since the late 1970s, the Union's accession has been called for by its twenty-seven member States. This political decision was expressed in the Lisbon Treaty, which came into force on 1 December 2009, while Protocol No. 14 to the Convention made accession possible thanks to the unanimous consent of the forty-seven States Parties. Since last summer, the Council of Europe and the European Union have begun negotiations, in which the Court is taking part as an observer, on implementing this major decision in procedural terms. The issues to be resolved are not easy, since the Convention, which was drafted with States in mind, will apply to an

organisation of twenty-seven States. But solutions will be found, I am sure. We discussed the matter very recently in Luxembourg at one of our regular meetings with our colleagues from the Court of Justice of the European Union; the meeting resulted in a joint communication by the Presidents of the two Courts, my friend Mr Vassilios Skouris, who is here today, and myself, with the aim of providing some guidance for the negotiators, who have received a copy of the document.

Ladies and gentlemen,

Having undergone a series of additions and amendments, the European Convention on Human Rights has stood the test of time. The twelve States who signed it on 4 November 1950 have been joined by thirty-five others over the years, covering practically the entire continent, which constitutes an exceptional success. It forms part of the legal system of all member States. Litigants and their counsel rely on it, and the national courts interpret and apply it, under the ultimate supervision of our Court. Executives and legislatures take it into account and draw inspiration from it, at any rate much more than they did twelve years ago; this date serves as a useful reference point for me as an observer, since it coincides with my taking office as a judge in Strasbourg. The Convention is taught in the countries we cover, and not only as part of courses in law. Its 60th anniversary was celebrated in style at the Council of Europe last October, in the presence of the Secretary General of the United Nations, Mr Ban Ki-Moon.

As for our Court, everyone is aware of its difficulties, largely arising from the hope it represents for eight hundred million Europeans, a hope which may, however, be too great because of a lack of sufficiently thorough information; hence the excessive number of applications with no prospects of success. We are trying to remedy this situation. Despite the Court's problems, it has unparalleled influence, authority and prestige. I am convinced that the process launched at Interlaken will be successfully pursued, thus preserving the future of the Court and hence of the protection system. At this juncture I wish to pay tribute to some 700 men and women – our forty-seven judges and the members of the Registry who assist them – for their dedication and the high quality of their work. Of course, to quote the poem by Aragon, "Man never truly possesses anything, neither his strength, nor his weakness ...". All of us, therefore, must constantly strive to do better; it is only natural that we should be committed to this task.

Ladies and gentlemen, I promised – and this may come as a surprise – to reflect on *human rights*. A Convention and a Court, certainly; European – that goes without saying. But what about human rights? What does that mean? Or rather: what does it *still* mean, at the start of the twenty-first century?

We have come a long way since the Age of the Enlightenment, when, one hundred years after the British Bill of Rights and thirteen years after the American Declaration of Independence, the Constituent Assembly adopted the Declaration of the Rights of Man and of the Citizen. We have even moved on from the Universal Declaration, the fundamental instrument that inspired our Convention and, later on, the American Convention on Human Rights and the African Charter on Human and Peoples' Rights. What are today's human rights, and those of the decades to come? What threats do they face, and what protective or preventive measures must be taken to counter those threats?

Answering these questions is no easy matter, and I do not claim to be giving anything other than a few outline replies, or even mere observations. I would note in passing that such questions have been asked by

major writers, for example Mr Amartya Sen, Nobel Laureate in Economics, notably in a recent essay, *The Idea of Justice*.

First of all, an examination of the applications reaching Strasbourg indicates certain changes which are not insignificant. By way of example, since we are marking the opening of the judicial year, let us look at some important judgments delivered over the past year. I shall not always mention the conclusions reached by the Court, especially as some of the judgments are not final. But the subjects they concern are interesting.

Several recent cases have concerned general public international law, humanitarian law or the law of the sea. We had to adjudicate between an embassy employee's access to a court and the employer State's plea of immunity from jurisdiction (another case of the same type is pending). A person's conviction for war crimes committed in 1944 was challenged by him, mainly on the basis of the prohibition of retrospective application of the law; a case decided two years ago involved a similar complaint by a person convicted of crimes against humanity committed in 1956. As regards the law of the sea, two judgments delivered in 2010 concerned, in one case, the consequences of the arrest on the high seas of the crew of a ship engaged in drug trafficking and, in the other case, the arrest of the master of a ship that had caused an ecological disaster, who was deprived of his liberty and later released on bail. Human rights law has thus ventured beyond its traditional limits.

Private life, in the broad sense, has given rise to a large number of applications raising social issues. The applicants' contention that the State had a positive obligation to grant a same-sex couple the right to marry was rejected by the Court (the judgment is final). The Grand Chamber, without recognising a general right to abortion and while finding against two of the applicants, found that the third had suffered a violation of Article 8 because she had been unable to undergo a legal abortion in her country. The Grand Chamber also held that there would be a breach of Article 8 in the event of the enforcement of an order for a child to be returned to another country from which his mother had wrongfully removed him within the meaning of the Hague Convention. An applicant argued that the uncertainty of the law had deprived her of the right to home birth, and that her country should have enacted specific, comprehensive legislation. Very recently, another applicant contended that his country was under an obligation to supply him with medication enabling him to commit suicide in a safe and dignified manner. An application pending before the Grand Chamber concerns sperm and ova donation for *in vitro* fertilisation.

Several recent judgments have concerned the right to stand in elections under Article 3 of Protocol No. 1, or the right for a member of parliament to have his parliamentary immunity lifted, and a pending case raises the issue of the voting rights of a country's nationals living abroad.

Thus, besides the more typical disputes, many cases coming to Strasbourg, often important ones, relate either to other branches of international law, or to social issues relating to life, death, the family or sexual orientation, or to aspects of political and democratic life. Other recent or pending applications concern the delicate relations between religions, society and the State; and there are still large numbers of cases dealing with the balance to be struck between liberties and security, either in a general criminal context, or in the context of countering the dreadful scourge of terrorism. I shall not go into disputes concerning aliens, and more specifically the right to asylum – the specialist field of Mr Guterres, who will be talking about it with the particular authority deriving from his functions – other than to note that the Grand Chamber judgment in *M.S.S. v. Belgium and Greece*¹, concerning a case brought by an asylum-seeker, was delivered a few days ago. It has and will have significant consequences.

1. [GC], no. 30696/09, 21 January 2011.

What conclusions can be drawn from the changes in the cases brought before the European Court of Human Rights, and more generally from the social observations to which such cases give rise? I can identify four main points.

Firstly, the State's duty to refrain from arbitrary interference in the exercise of rights and freedoms is increasingly being accompanied by *positive obligations*: the State must take the necessary steps to organise and facilitate the exercise of these rights and freedoms. Contrary to what is sometimes said, positive obligations are not a concept deriving purely from judicial interpretation. Significant traces of them can be found in the Convention itself. The law, and hence the State, has a duty to protect the right to respect for life; the right to a fair hearing – to which René Cassin attached vital importance, in relation to both the Universal Declaration and the Convention (Articles 10 and 6 respectively) – requires the public authorities to make a whole series of judicial and procedural arrangements; Article 13 of our Convention, of such great importance in the light of Interlaken, enshrines the right to an effective remedy, and thus an obligation for States to provide for means of redress in their own systems. It is true, however, that the case-law has developed the sphere of positive obligations, rightly so in my opinion, and this has certainly provided a source of arguments for our applicants.

Secondly, the relationship that existed in the minds of the Founding Fathers, and that can be found in the wording of the Preamble, between peace and democracy on the one hand, and justice and human rights on the other hand, is increasingly reflected in the applications being registered – and, more generally, in the state of rights and freedoms in Europe. However, this relationship often appears in a negative light. Conflicts at international level (or within nations) have either not ended, or their after-effects are still being felt, in several regions of our continent. Sometimes latent or dormant, they are at risk of resurfacing. They have given rise to a large number of actual or potential cases. For example, there are two inter-State applications pending before the Court, against a background of conflict, and there may well be others to come, which is certainly not a desirable state of affairs. Europe sometimes has trouble overcoming its past. We must hope that in the future, the “closer unity” set forth as an aim of the Council of Europe will be achieved by overcoming competing interests and passions. This will, of course, take time.

Thirdly, human rights violations, whether alleged or established, are nowadays often attributed not to the respondent State but to other individuals or groups. Of course, unfortunately, the public authorities and their officials continue to commit direct, and sometimes serious, violations of the Convention. But they no longer have a monopoly on them. The States' positive obligations, which I have just mentioned, do not arise solely because the failure to take action may render freedoms more theoretical than practical. They may also come into being because the State, in guaranteeing collective security and social peace, has a legal and moral duty to protect everyone's rights from anyone's actions. Violence in all its forms, racism, xenophobia, domestic or professional exploitation, and discrimination of any kind cannot be tolerated by the authorities, and at all events require them to intervene, to protect the victims. This is not an entirely new idea: “Between the strong and the weak, it is freedom that oppresses and the law that sets free”, as Lacordaire said back in the nineteenth century. However, it is taking on renewed relevance: paradoxically, as a result of the financial and social crisis, the model of the welfare State is becoming weaker, while that of the nightwatchman State is re-emerging, not only as the mere regulator and overseer of economic life, but as the protector of fundamental freedoms. Is this not another form of welfare? At any rate, it is no surprise that political and social trends should have an impact on the system of rights and on the foundations and applicability of State responsibility under our Convention. It is true that the “horizontal effect” resulting from our case-law has extended State responsibility, but is that really surprising? Such a development is entailed by the need to make rights effective and to afford them better protection.

The perception that may thus emerge of the new face of human rights calls, in my view, for two further and final observations.

Firstly, the Convention rightly calls not only for the protection of human rights but for their *development*. The first aim is crucial, and yet is not self-evident, since – despite the undeniable progress of democracy in Europe – rights and freedoms are never permanently secured; it thus remains essential to safeguard them. As to their development, or “further realisation” as the English version of the Convention puts it, this seems an equally desirable aim. It is an ideal that forms part of the “progress of the human mind”, as in the subject of Condorcet’s *Sketch for a Historical Picture*. Interpreting the Convention in a manner that is not static but dynamic contributes, as I have said, to this progress. However, I believe that the best way of achieving this aim lies in *deepening* rights. In this context, it is useful to bear in mind the adjective “*fundamental*”. It is found in the very title of our Convention, which is concerned with human rights and fundamental freedoms. Similarly, the European Union now has its own Charter of Fundamental Rights. Deepening rights will indisputably entail an increasingly exacting, rigorous approach to the setting of thresholds and standards, and to judicial review of their observance. On the other hand, the inflation or dilution of rights would result in weakening rather than actually developing them. Do we really need to be reminded that *not all rights of humans are human rights*? Or, as Sir Thomas Gresham said in the sixteenth century, in a different context, “bad money drives out good”; we must not become “counterfeiters”!

Secondly, the increasingly diverse nature of human rights violations should result in correspondingly diverse solutions to preventing and countering them. I attach importance to the role assigned by the Interlaken Conference to *civil society*. It called on the Committee of Ministers and the States Parties to consult with civil society “on effective means to implement the Action Plan”. This is necessary. Alongside the Council of Europe, the Court and the States Parties, non-institutional entities have extremely important tasks to perform. They can contribute to teaching citizenship and tolerance and providing legal training to potential applicants; they can display vigilance and solidarity in the face of threats to our liberties from whatever source; and they can remind people that the Convention and the Court, despite their considerable power of attraction, cannot resolve all problems in life. It is therefore above all at national level that civil society must be active, but the Court is naturally open to dialogue.

Ladies and gentlemen, human rights are not “a new idea in Europe”, as Saint-Just said of happiness. Nor are they, thankfully, an idea belonging to the past. They must be preserved and developed. Let us all help each other to achieve that aim! Thank you.

António Guterres

United Nations High Commissioner for Refugees

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

Thank you for inviting me to address this distinguished gathering, marking the opening of the judicial year. It is an honor for me as United Nations High Commissioner for Refugees, as a former member of the Parliamentary Assembly of the Council of Europe, and – most of all – as a citizen of Europe.

Mr President, the origins of the Council of Europe, of my Office and of this Court are intertwined. All were born out of the ruins of the Second World War, and all share a joint mission, and a joint vision, of respect for the rule of law and for human rights. My Office maintains a Representation here in Strasbourg in order to cooperate in the accomplishment of this mission, on behalf of refugees and stateless people in Europe.

UNHCR was established on 14 December 1950, just a few weeks after the European Convention on Human Rights was signed, and two years to the day after proclamation of the Universal Declaration of Human Rights. Article 14 of that Declaration affirms the right of every person to seek and enjoy asylum from persecution. And although this right is not explicitly contained in the European Convention on Human Rights, your Court plays an indispensable role in ensuring protection from return to persecution or serious harm – in other words, in ensuring respect for the principle of *non-refoulement*.

That principle, contained in Article 3 of the European Convention on Human Rights, is also the cornerstone of the 1951 Convention relating to the Status of Refugees and its 1967 Protocol, which together now have 147 State Parties. All European countries¹ have acceded to the Refugee Convention, but not all have national asylum systems which meet regional or international standards, and there are unfortunately still major situations of displacement in Europe. Yet when UNHCR was created, the United Nations General Assembly gave it just a three-year term to resolve refugee problems in Europe remaining from the Second World War, and thereafter to disband. The hope that UNHCR would rapidly become redundant was short lived. Late last year we marked our 60th birthday, and this year we commemorate the 60th anniversary of the Refugee Convention.

In Europe alone, the 1951 Convention has provided a framework for the protection of millions of refugees, guaranteeing them not only safety but also the social and economic rights necessary to start new lives. However, the human rights agenda out of which UNHCR was born, and on which we depend, is increasingly coming under strain. The global economic crisis has brought with it a populist wave of anti-foreigner sentiment, albeit often couched in terms of national sovereignty and national security. At the same time, the changing nature of armed conflict is increasingly limiting the space for humanitarian action.

In this difficult environment, I am concerned about the emergence of protection gaps with respect to persons of concern to my Office. By protection gaps, I mean areas where existing provisions of international refugee law – and human rights law – are either not adequate in scope or are not applied in a sufficiently broad or inclusive way to protect victims of forced displacement. Our ability to address these gaps is complicated by the fact that, unlike other international human rights instruments, there is no treaty body to supervise the application of the 1951 Refugee Convention. And although Article 38 of that Convention allows parties to submit disputes relating to its interpretation or application to the International Court of Justice,

1. With the exception of Andorra and San Marino.

this has never happened. Thus we must rely on UNHCR's supervisory role under Article 35 of the Refugee Convention, and on coherent legal interpretation and guidance from judicial bodies, whose role is to remain above the vagaries of public opinion, including in times of economic and social difficulty.

Mr President, you have pointed out that a large proportion of this Court's caseload concerns asylum issues. This highlights the unsettling fact that even in States party to both the 1951 Refugee Convention and the European Convention on Human Rights many asylum-seekers, refugees and other displaced people consider that their rights are not adequately respected. The volume of requests for interim measures, in particular from individuals who have fled conflict situations, reveals a gap in Europe's approach to the protection of victims of generalised violence.

Today we are witnessing some of the most intractable armed conflicts of modern history, creating displacement on a practically global scale, along with steadily diminishing space for humanitarian action. It has been reported that there were more than 300 armed conflicts in the second half of the twentieth century, involving a proliferation of State and non-State actors, causing around 100 million deaths and countless millions of refugees and displaced persons.

It is therefore not surprising that one of the most important questions which European asylum authorities are grappling with today concerns the approach to be taken to persons seeking protection from the indiscriminate effects of generalised violence. Although it is now clearly recognised that persecution can emanate from non-State as well as State actors, a narrow interpretation of the refugee definition as well as of Article 3 of the European Convention on Human Rights and Article 15(c) of the European Union Qualification Directive often leaves persons who have fled situations of violence without the protection they deserve. There is a certain irony in the fact that while European instances meticulously examine whether the intensity of an armed conflict or the individual level of risk is sufficient to justify granting protection, in Africa and Asia, States are taking in hundreds of thousands of persons fleeing precisely the same situations.

In Europe last year, nearly 25% of asylum applicants came from just three countries in conflict: Afghanistan, Iraq and Somalia. I would like to dwell for a moment on the effects of the conflict in Somalia, which has been ongoing for twenty years. At the end of 2010, there were around 700,000 Somali refugees in more than 100 countries around the world, though more than 90% were in six countries in the East African region. Every month, 8,000 more flee Somalia. Within the country, one and a half million people are displaced and live in conditions so miserable that it is hard to find words to describe them. Those who try to flee risk drowning in the Gulf of Aden, perishing in deserts or being shot at trying to cross borders. Outside Somalia, they are often subject to security crackdowns, or face racism and xenophobia. Yet many are denied protection because decision-makers and national courts are not persuaded that they are *individually* at risk.

In the *Salah Sheekh v. the Netherlands* case², your Court addressed the degree of individual risk required in order to be protected under Article 3 of the Convention, and dismissed the restrictive interpretation put forward by the respondent State. The national court had rejected the asylum application of a Somali man, *inter alia*, because he failed to show that he was personally targeted by the violence in Mogadishu. Your Court found that belonging to a minority clan which was systematically at risk was sufficient to enjoy protection from *refoulement* under Article 3 of the European Convention on Human Rights, without having to demonstrate further distinguishing features.

Persons fleeing violence are also often told by European asylum authorities that they could have found safety in another part of their own countries – the so-called internal flight or relocation alternative. Your

2. No. 1948/04, 11 January 2007.

Court has also set out important safeguards for application of this concept, which refers to a specific part of an asylum-seeker's country of origin where he or she has no well-founded fear of persecution and can reasonably be expected to establish him or herself. The safeguards developed in the *Salah Sheekh* case have been incorporated by the European Commission in its proposal for recast of the European Union Qualification Directive, thereby demonstrating that your guidance is also crucial to addressing some of the normative gaps in the emerging common European asylum system.

This decision goes some way toward filling the protection gap which relates to persons fleeing conflict situations, but there are still a number of open issues. Our own research reveals great differences in the approach taken by European countries to asylum applications from persons fleeing internal or international armed conflict, and in particular disparities in the criteria used to assess the nature and intensity of violence and the resulting risks. We will follow with great interest the development of the case-law in this respect, and will remain available to provide information to the Court, based on our field experience, to help in your assessment of the risks against which human rights protection must be granted.

I should also note that the narrow approach taken by many States to the protection needs of persons fleeing conflict situations results in a growing number whose applications for protection are turned down, but who cannot be returned to their countries of origin. Such persons frequently end up in a situation of illegality and destitution, without access to basic rights. This in turn generates social tensions and criticism of government policies.

Alongside the problem of how to ensure protection of persons fleeing generalised violence, we also observe ongoing – I might even say expanding – efforts by States to deflect their protection obligations to other countries. Within Europe, the Dublin II Regulation establishes a system for identifying the State responsible for examining an asylum application. That system is based on the assumption, which is unfortunately not a reality, that an asylum-seeker's chances of finding protection are equivalent in all Dublin participating States.

Your Court has already clarified that the *non-refoulement* obligation under Article 3 of the European Convention on Human Rights also extends to indirect *refoulement* – that is, to return to a country from where there is a risk of onward return to ill-treatment. A little over three years ago you confirmed that the operation of the Dublin Convention (now the Dublin II Regulation) did not affect States' responsibilities under the ECHR³. Your recent judgment in *M.S.S. v. Belgium and Greece*⁴ reiterates this fundamental principle, and at the same time provides a vivid reminder of just how much still needs to be done to achieve a truly common European asylum system, in full respect of human rights.

We also observe that States are increasingly acting outside their territories in order to prevent irregular migration. Border management and the territorial scope of States' refugee protection and human rights obligations are issues which will no doubt require this Court's attention in future. It is UNHCR's long-held view that the obligations of States under international human rights treaties, including the 1951 Refugee Convention, prevail wherever the State exercises its jurisdiction, including outside its borders.

Mr President, this Court has addressed a number of issues not explicitly covered by the 1951 Refugee Convention – in particular with regard to how asylum procedures should be conducted. For example, the Eritrean journalist Asebeha Gebremedhin turned to this Court⁵ after his asylum application was rejected at the French border. By virtue of the interim measures of your Court, he was allowed to enter France and, a

3. See *T.I. v. the United Kingdom* (dec.), no. 43844/98, ECHR 2000-III.

4. [GC], no. 30696/09, 21 January 2011.

5. See *Gebremedhin [Gaberamadhien] v. France*, no. 25389/05, to be reported in ECHR 2007-II.

few months later, the authorities recognised him as a refugee in the sense of the 1951 Convention. In that case, the Rule 39 mechanism compensated for the absence of automatic suspensive effect of an appeal made in the accelerated asylum procedure at the border. In its judgment on the merits of the case, the Court found that such a procedural gap violated the right to an effective remedy guaranteed by the European Convention on Human Rights. This is extremely important, as a growing number of asylum applications are being dealt with in accelerated procedures, often at borders and frequently involving asylum-seekers who are held in detention.

It remains a matter of serious concern to me that persons seeking entry into Europe for the purpose of claiming protection are increasingly detained on immigration grounds, irrespective of their specific situation. Asylum-seekers who are detained for illegal entry or illegal stay benefit from fewer safeguards than persons suspected or convicted of criminal acts, for instance with regard to judicial review and to their conditions of detention. The safeguards set out by your Court against unlawful and arbitrary detention, as well as regarding conditions of detention, are therefore of great importance to asylum-seekers deprived of their liberty in Europe⁶. It is not unreasonable to expect that your Court will be called upon to provide further guidance regarding detention of asylum-seekers for the purpose of preventing their irregular entry.

I would be remiss if I did not also mention the situation of persons who flee, but remain within the borders of their own countries. As of the end of last year, there were still more than two million internally displaced persons in Europe – and more than 27 million worldwide. In the context of collaborative arrangements among United Nations agencies, UNHCR already plays the lead role with respect to the protection of persons internally displaced by conflict, and we are now also called upon to intervene when displacement is caused by natural disasters.

The United Nations Guiding Principles on Internal Displacement were derived from relevant international human rights instruments. However, no specific international instrument protects the rights of persons displaced within the borders of their own countries, whether by war or by natural disaster. In an encouraging development, the African Union recently adopted the Kampala Convention for the Protection and Assistance of Internally Displaced Persons. There is no similar regional instrument in Europe, although internally displaced persons on this continent enjoy protection of their fundamental rights through the European Convention on Human Rights. Your Court has on several occasions been called upon to address issues concerning the rights of internally displaced people, including the right of return as well as housing and property rights. While the number of cases brought to the Court by IDPs is still relatively low⁷, in view of the protracted nature of internal displacement in Europe and the mounting frustration of the internally displaced, this number could rise.

Finally, let me mention a further area where protection gaps emerge, and where the complementarity of different bodies of law can help to fill them. Although it is not widely known, UNHCR has a global mandate for the prevention and reduction of statelessness and for the international protection of stateless persons. At the end of 2010, there were some six million persons known to be stateless worldwide, of whom around 600,000 in Europe. The real number may be much higher, as statelessness often goes unrecorded. And while the Refugee Convention enjoys broad ratification, only sixty-five States are party to the 1954 Convention relating to the status of stateless persons, and just thirty-seven to the 1961 Convention on the reduction of statelessness. Only twenty member States of the Council of Europe are party to both instruments.

6. See *Abdolkhani and Karimnia v. Turkey*, no. 30471/08, 22 September 2009.

7. See, among a few others, *Saghinadze and Others v. Georgia*, no. 18768/05, 27 May 2010, or more recently *Soltanov and Others v. Azerbaijan*, nos. 41177/08 et al., 13 January 2011.

A person who is not regarded as a national by any State clearly faces a particular risk of human rights violations. Your Court has already dealt with a number of applications from stateless persons⁸ and found that some of their rights under the European Convention on Human Rights had been violated. The Court may be called upon in future also to examine, under the Convention, the responsibility of the State for deprivation of nationality or for failing to resolve situations of statelessness.

Mr President, it is well known that this Court is the busiest international judicial body. Conscious of your workload, I sincerely hope that it will continue to be possible for individuals to continue to have effective access to the Court, as it is an important source of guidance on issues of principle as well as of legal protection for vulnerable people, including many to whom my mandate extends. The authority and the prestige of the Court have been reinforced both by its accessibility and by its ability to interpret and apply the European Convention on Human Rights as a “living instrument ... in the light of present-day conditions”⁹.

Before concluding, I also wish to say how positive it is that the Court remains open to the views of others. Engagement with the judiciary, at national and regional levels, is a central part of my Office’s work. The practice of your Court to authorise and even to invite third-party interveners such as UNHCR, allows broader perspectives to be brought to the Court. We appreciate this opportunity and are humbled by the responsibility it carries. It is also a source of great encouragement to us in the exercise of our supervisory role, and for the purpose of filling the protection gaps highlighted above, that the Court gives due weight to our views.

Mr President, ladies and gentlemen, it is nearly seventy years now since Hannah Arendt, in the middle of the Second World War, published her seminal essay entitled “We Refugees”, in which she developed the notion of “the right to have rights”. By working over the past fifty years to define and defend the rights of refugees, internally displaced and stateless people, your Court has helped to make this notion a reality. For this, we remain very grateful.

Thank you.

8. See list of cases at <http://www.unhcr.org/45179cbd4.html>.

9. See *Mamatkulov and Askarov v. Turkey* [GC], nos. 46827/99 and 46951/99, § 121, ECHR 2005-I.

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