



“Non-refoulement as a principle of international law and the role of the judiciary in its implementation”



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

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Dialogue between judges

Proceedings of the Seminar
27 January 2017

*“Non-refoulement as a principle of
international law
and the role of the judiciary in its
implementation”*

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Guido Raimondi

President
of the European Court of Human Rights

WELCOME SPEECH

Dear guests, Dear colleagues, Dear friends,

It is my great pleasure to welcome all of you today for the events organised to mark the opening of the judicial year of the European Court of Human Rights.

I see so many familiar faces in the room that today's event almost has the feel of a very extensive family reunion.

A joyful reunion, I should specify, that we can enjoy from beginning to end.

It never fails to impress me to see such a large gathering of the senior judiciary from virtually every State in Europe.

By your presence, you show the close and strong ties that bind all of the judicial actors in the Convention system.

This nexus is a vital one for making a concrete reality of human rights in all our States, and across our continent.

Human rights as our **common cause** – that is the enduring motto of this Court.

Promoting that cause, and deepening its shared nature, is the fundamental aim of seminar each year, whatever the exact subject-matter may be.

Along with our national interlocutors, we also have with us representatives of other international courts with whom our contact and dialogue is of great importance too:

- the Court of Justice and the General Court of the European Union;
- the International Criminal Court;
- the International Criminal Tribunal for the Former Yugoslavia;
- and the Mechanism for International Criminal Tribunals.

This year our subject-matter is extremely topical.

It will take the discussions into an area of extraordinary challenges for States, for the European institutions, and of course for the global institutions too.

All of these perspectives will figure in the interventions that will be heard this afternoon.

You will know that in the past year this Court has devoted close attention to aspects of *non-refoulement*, with a number of important judgments given by the Grand Chamber.

It has been a very rich year, one may say, in jurisprudential terms.

And so I believe that the theme of the seminar was very well-chosen – the scene is set for an excellent exchange of ideas and experience on this subject.

I will leave it to my colleague Judge Ganna Yudkivska, who has chaired the Organising Committee, to formally introduce the seminar in a moment, and to present this afternoon's speakers.

Let me simply express my great gratitude to them all for their willingness to take up the challenge of leading us into our discussions today.

And my thanks go as well to Ganna and the other members of the organising team for all of the work that has gone into the preparation of this year's event.

Ladies and Gentlemen,

It is time to begin our seminar, so I shall cede the floor to the Chair.

I shall follow the discussions with great interest.

And I look forward to seeing all of our guests in the hearing room later on for the more formal part of today's proceedings.

Thank you.



Ganna Yudkivska

Judge of the
European Court of Human Rights

Mr President, senior members of the judiciary, Ladies and Gentlemen, dear colleagues, dear friends,

I am happy to welcome you warmly to this seminar, the topic of which is, as usual, on the front burner today. Nowadays, we undoubtedly find ourselves at the heart of the biggest flow of refugees since the Second World War.

But today we appear to be much **better** equipped. Thomas Buergethal, one of the greatest international legal minds of the twentieth century and a Holocaust survivor, believed that "had today's international human rights mechanisms and norms existed in the 1930s, many of the lives that were lost at that time might well have been saved". Today it is **we** who are being tested, and we will be judged by future generations. The arrival of so many refugees in so short a time undoubtedly creates, as the Court recognised in its recent judgment in the case of *Khlaifia and Others v. Italy*, "organisational, logistical and structural difficulties for the ... authorities in view of the combination of requirements to be met".

During the past couple of years this Court has delivered a number of important judgments addressing different issues relating to refugee and asylum policy, procedural flaws in the migration process, the quality of the law, the reception conditions of migrants and their access to various remedies in the member States.

By tackling the shortcomings in the European States' migration systems, we are developing durable tools and safeguards that will not only cope with the current crisis, but will also prevent it from ever recurring. In so doing, we should not forget why people leave their home countries: in the words of the Somali poet Warsan Shire, "no one leaves home unless home is the mouth of a shark".

The history of humankind is a history of migration. Long before the 1951 Refugee Convention was drafted, Hannah Arendt in her work "We refugees" formulated a notion of refugee – "those of us who have been so unfortunate as to arrive in a new country without means and have to be helped...".

And as Immanuel Kant observed more than 200 years ago in his "Perpetual peace", this is "not a question of philanthropy but of right. Hospitality means" – he continued – "the right of a stranger not to be treated as an enemy when he arrives in the land of another". In the current world context, where wars erupt simultaneously in different parts of the world including Europe, every civilian who is not a combatant or a war criminal qualifies for our protection as a refugee. We have our duty of hospitality towards them, which in legal terms means a right to asylum.

What we call today a "migration crisis" has happened not merely because of the quantity of newcomers, but also as a result of the insufficiently clarified architecture of the corresponding rights and duties of migrants and hosts.

Migration is like Alice's looking glass in Lewis Carroll's fantasy. Nothing is clear or predetermined, you never know what you will find there – safety or danger, shelter or a lion in the way – but it is the only chance to escape from the word EVIL and find it being spelt backwards and

turned into its antithesis: LIVE. And that is what we are going to discuss today – how to turn the “evil” that pushed refugees to seek protection in Europe into a decent “life” corresponding to our Western values.

Allow me to draw your attention to the new format of the seminar. We will have an introductory panel on the international-law principle of *non-refoulement*, which will be discussed by the United Nations Special Rapporteur on the Human Rights of Migrants, Mr François Crépeau, and Judge Ledi Bianku.

Then we will have two parallel workshops, a format which we have never tried before. But this year, given the complexity of the problem under discussion and the deep involvement of our Court and your respective courts in cases relating to refugee problems, we have decided to make this seminar more practical, and to use more efficiently the relatively short time allocated to it. You are free to choose which workshop you would like to attend, depending on their respective topics.

The first workshop, which will take place in this room, is devoted to the assessment of the credibility of asylum-seekers when they apply for asylum. Here we are in an intensive dialogue with our national counterparts, as many complaints about a refusal to grant asylum eventually come before the Court. A very interesting and encouraging discussion, I am sure, will be led by the President of the French National Asylum Tribunal, Ms Michèle de Segonzac, and Judge Georges Ravarani of the Court. This workshop will be bilingual and simultaneous English-French interpretation will be provided.

The second workshop will cover issues relating to migrants who have already settled: how to meet their basic needs and ensure their effective integration, which is vital for any sustainable society? What kind of problems that might potentially raise an issue under the Convention do national authorities experience in welcoming migrants? We will be delighted to discuss all this with the Chief Judge of the Swedish Migration Court of Appeal, Anita Linder, and with Christoph Grabenwarter, judge of the Constitutional Court of Austria. This workshop will take place in the room next door – the Press Room. Please be aware that it will be in English only, without interpretation.

After these two thought-provoking and inspiring discussions, we will meet here again for concluding remarks and a summary of the lessons that we have all learned from current migration problems – to be presented by Professor Bruno Nascimbene and Judge Carlo Ranzoni.

As we have tried to make this year’s seminar as practical as possible, in the background papers you will find not only a summary of the relevant judgments of this Court, but also an electronic file with the key judgments in the area of migration submitted by our domestic counterparts. Let me take this opportunity to thank warmly all those who have participated in this exercise and shared with all of us your experience and judicial wisdom.

At the end of our concluding panel, as happened last year, you will hear about recent developments in the work of the Superior Courts Network. Many thanks to President Raimondi, who has kindly agreed to provide us with further information.

I would like to thank wholeheartedly all the team that helped to organise this seminar, primarily the members of the Organising Committee, my colleagues and friends Judges Paul Lemmens, Faris Vehabović, Yonko Grozev, Ksenija Turković, Robert Spano, Iulia Motoc and Branko Lubarda, and the Registry team – Roderick Liddell, John Darcy, Valérie Schwartz, Patrick Titiun, Loredana Bianchi and many others.

Ladies and gentlemen, on behalf of the organising committee, I wish you a very fruitful seminar with lively debates and inspiring ideas. I hope that together we will be able to adapt the existing international human rights legal framework to the current needs of our societies, and will not allow the available human rights instruments to fail in the face of political crises.

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With that we start our introductory panel, and it is a great honour to have with us today Mr François Crépeau, the United Nations Special Rapporteur on the Human Rights of Migrants.

In this capacity he has conducted official visits to different countries and has produced several thematic reports on protection of migrants’ rights. Mr Crépeau is an international law professor, and inevitably his research in recent years has focused on the rights of migrants, especially vulnerable ones – their right not to be detained, not to be discriminated against, to have access to a sufficient level of social protection, and so on.

Today we have a unique chance to learn from your experience. What advice can you give us concerning priorities in observing the principle of *non-refoulement*, and what is our role as judges in responding properly to the basic needs of these people?

Mr Crépeau, you are one of the most influential voices when it comes to the human rights of migrants. The floor is yours.

• • •

I now give the floor to my colleague and friend Judge Ledi Bianku, who is also a member of the International Association of Refugee Law Judges and who actively participates in many conferences on asylum law. He is also the author of a great many publications on the subject. He is thus deeply involved in the matters we are going to discuss.

Ledi, the principle of *non-refoulement* is not explicitly laid down in the European Convention on Human Rights. However, since failure to observe this may amount to a violation of rights guaranteed by the Convention, the Court must respond appropriately to such problems.

So, how do you consider that the principle of *non-refoulement* is applied in the Court’s case-law? Is there a specific and consistent approach to this principle, and what is the Court’s contribution to the concept of *non-refoulement*?



François Crépeau

**UN Special Rapporteur
on the human rights of migrants**

Mr President, distinguished Judges, Ladies and Gentlemen,

It is a great honour for me to be here today. I follow as closely as possible the pioneering work of the European Court of Human Rights: I can testify to the fact that we teach many of your decisions in my law school at McGill University. I would like to express here my profound admiration for the extraordinary developments in European human rights law which your Court has produced over the past six decades.

In the hope of modestly contributing to your reflections, allow me to present a number of ideas resulting from the studies conducted during my mandate as the United Nations Special Rapporteur on the human rights of migrants.

MIGRANTS ARE RIGHTS HOLDERS

To begin with, I wish to emphasise that all migrants are protected by international human rights law. There are only two narrowly defined exceptions to this, namely the right to vote and be elected and the right to enter and stay in a country. Even for those exceptions, procedural safeguards must be observed, as well as the principles of *non-refoulement*, non discrimination, the best interests of the child and family unity.

All other rights extend to all, including all migrants, whatever their administrative status. This includes the right to equality and non-discrimination. Any distinction in the enjoyment of fundamental rights based on nationality or immigration status therefore needs to be justified: otherwise, it should be considered as prohibited discrimination. Surely, mere administrative status cannot justify a distinction in the enjoyment of fundamental rights.

As a response to the increased migration movements into Europe, we have seen European member states focus on increasing security. Their objective has been to “secure” their borders by building fences, using violence to stop irregular migrants from entering their country, using long term detention as a deterrent and carrying out mass expulsions of irregular migrants to transit countries without any proper individual assessments.

One thing is clear: due to push-and-pull factors, stopping migration isn’t possible over the long term. Migrants will continue arriving despite all efforts to stop them, often at a terrible cost in lives and suffering. Any attempt at “sealing” borders, without offering many more regular avenues for migration, will continue to fail on a massive scale.

EXTERNALISATION WON'T WORK IN THE LONG TERM

As part of efforts to secure borders, European States have moved their border management activities beyond their territorial borders, extending them to the high seas and third countries. In my missions I have seen much European cooperation with transit countries aimed at implementing Integrated Border Management systems and building detention centres, but no cooperation aimed at supporting their national human rights institutions in order to protect the human rights of migrants and refugees on their territory.

Externalising border controls has no impact on the push-and-pull factors determining migration movements: it responds neither to mobility needs nor to labour market needs. Therefore, it can only divert migration routes and make them more costly and more dangerous, as it pushes migrants deeper underground.

Too often, externalisation is a thinly disguised attempt to ensure that the human rights violations which are deemed necessary for effective deterrence and prevention of migration movements happen on another country's territory, thus avoiding the scrutiny of European human rights guardians, be they politicians, courts, national human rights institutions, journalists or civil society organisations. I must commend the judgments of the European Court of Human Rights and the European Court of Justice which have challenged externalisation practices, "the Dublin logic", immigration detention and issues regarding access to social protection.

The EU-Turkey Statement has prompted migrants to again find alternative routes to reach Europe. The number of deaths at sea has increased considerably and we all know about the human rights violations that migrants suffer in Libya. Readmission agreements are an area of particular concern. Despite protections against such practices in European Union legislation, I am very concerned about allegations of violations of the principle of *non-refoulement*, as we continue to hear about "pushbacks" or "turnbacks" at land and sea borders and about forced returns, often accomplished with violence, towards countries of origin and third countries with weak rule of law and poor asylum systems, all conducted without sufficient access to individual protection needs assessments and operated without proper oversight.

Such behaviour violates the principle which is at the root of all human rights, Immanuel Kant's categorical imperative: "Never treat the other only as a means, but always also as an end"¹. If democracies are to remain founded on their three pillars of political representation, human rights and the rule of law, legal accountability for such actions is key, even when performed by the authorities of other countries, if they are prompted and funded by Global North countries.

In the past, the European Court of Human Rights has challenged such practices. In 2012 the Court, in *Hirsi Jamaa and Others v. Italy*, ruled that bilateral agreements cannot be used to justify practices that are incompatible with human rights. The Court has also challenged the lawfulness of the Dublin logic, raising concerns about the application of the *non-refoulement* principle within the EU. In 2014 the Court ruled, in *Sharifi and Others v. Italy and Greece*, that both countries had violated Articles 3 and 13 of the European Convention on Human Rights and Fundamental Freedoms. In *Tarakhel v. Switzerland*, in November 2014, the Court ruled on the refusal of Switzerland to examine the asylum application of the members of an Afghan family and the decision to send them back to Italy without assurances that their rights would be protected. The Court held that there had been a violation of Article 3 of the Convention and discussed "systemic deficiencies" in the Italian system. In 2011, in *M.S.S v. Belgium and Greece*, the Court held that Belgium had violated Article 3 of the Convention by deporting an Afghan migrant to Greece despite systemic failures in asylum and social protection provisions. Hence, in my 2015 report on the EU, I recommended incorporating human rights concerns into migration and border management policies and implementing the relevant recent judgements of the European Court of Human Rights.

The priorities should be clear: fighting smuggling operations is less important than saving lives and protecting human rights. For example, the argument according to which one should not increase search and rescue capacity in order to avoid encouraging smuggling operations is morally, politically and legally bankrupt. It is vital that the European Union and all signatory States to the European Convention on Human Rights strengthen their search and rescue capacity, while also adhering to the principle of *non-refoulement*, allowing undocumented migrants to disembark immediately at the nearest port where their lives and freedoms would not be threatened, providing them with information, offering care and support, processing their asylum claims equitably, and supporting private vessels to carry out rescue operations without risk of being considered accessories to smuggling operations.

THE CRIMINALISATION OF UNDOCUMENTED MIGRATION THREATENS HUMAN RIGHTS

In many countries, the criminalisation of irregular migration is in discourse and practice more than in the law and policies proper, as migrants are most often dealt with under administrative law, not criminal law. Until recently, administrative law was not invasive of individual rights. But now administrative immigration regulations, proceedings and policies "mimic" the criminal justice system in many ways, including the importation of criminal categories, criminal-law enforcement mechanisms, institutions of criminal punishment and crime control rationales.

However, the stringent guarantees which evolved over a few centuries in criminal law – for example, regarding the burden of proof or the admissibility of evidence – because it was the most dangerous field of law on the books, have not reached administrative law, which is why States prefer it to criminal law as a more flexible and "efficient" tool. Yet in many States, such as those in Europe, that do not have the death penalty and do not extradite towards jurisdictions that have it, the administrative judge is today the only judge who can send people to face execution, torture or arbitrary detention, in direct violation of the principle of *non-refoulement*. For migrants, administrative law is today the most dangerous law of the land.

A good example of this trend relates to detention. Too often, migrants are detained for little else than being undocumented, despite having committed and being charged with no crime. This detention can often extend for months or years, and oversight mechanisms are too frequently lenient regarding the authorities' justifications for detention, preferring to defer to their judgment. For non-nationals as for citizens, freedom should always be the default condition and restrictions on freedom should be specifically justified. Considering the consequences of long-term detention for anyone, the test should be strenuous.

The situation is particularly worrisome regarding children. The Committee on the Rights of the Child has determined that the administrative detention of migrant children can "never ever" be in their "best interests" and that it is therefore always a violation of their rights. Yet I have met migrant children in detention in all European countries and neighbouring countries that I have visited: they are treated essentially as undocumented migrants, when they should be treated first and foremost as children.

My further concern is that the margin of appreciation often comes at the expense of the fundamental rights of migrants. It is not acceptable that migrants are kept in a precarious status because States have the administrative discretion to do so. Migrants' rights are fundamental rights by which States are bound, even in a so-called "crisis" situation. The margin of appreciation cannot justify systematic derogation from such obligations.

¹ "Act in such a way that you treat humanity, whether in your own person or in the person of any other, never merely as a means to an end, but always at the same time as an end" (Immanuel Kant, (1993) [1785], *Grounding for the Metaphysics of Morals*. Translated by Ellington, James W., 3rd ed., Cambridge (MA): Hackett, p. 30).

POLITICS REGARDING MIGRATION IS INCREASINGLY TOXIC

Electoral democracies don't know how to "represent" migrants. Human rights struggles have been mostly won on the basis of the political claim to equal citizenship: industrial workers, women, Aboriginals, detainees, gays and lesbians, persons with disabilities know that very well. Only when these groups started speaking up on the political stage and using their vote strategically did politicians pay attention and change their own conceptions, language and behaviour, in turn altering the perceptions of the electorate and empowering lawyers and judges to alter the interpretation of the law and expand human rights guarantees.

This open political struggle won't be available any time soon for migrants and refugees. If you are not represented, your rights are not defended in the political system. Consequently, undocumented migrants and migrants with a precarious status rarely mobilise, speak up, contest, protest or go to court to defend their rights, preferring strategies that do not threaten their situation as migrants: "moving on" is often a better strategy than trying to enforce one's rights. As citizens do not mobilise in favour of migrants either, there is actually no political accountability for anti-immigration discourse.

Nationalist populist politicians are setting the current dominant narrative, offering simplistic solutions to complex issues, scapegoating migrants with total impunity and saying that migrants steal jobs and drain social budgets, that all refugees bring insecurity or increase crime rates, or that all foreigners change our values, assertions which have all been proven wrong by social sciences. Ranting against courts – and especially foreign tribunals – which prevent them from dealing with migrants as they wish will earn certain politicians political points in the polls. Some even claim that undocumented migrants should not be covered by international or European human rights law. They invoke their conception of a "crisis" to justify trampling the rights of migrants, forgetting that human rights safeguards were put in place to remind States of their obligations, not only in times of peace but more especially in times of crisis or war.

What can be observed in the European political discourse and policy developments today is a regression of the human rights regime regarding migrants. At the political level, there is a trend towards eroding the rights of asylum seekers, refugees and migrants. Increased xenophobic behaviour towards any "foreign-looking person" has been noted in many countries. If this attitude becomes the norm, any meaningful discussion about rights, diversity and integration becomes impossible.

COURTS CAN HELP MIGRANT VOICES BE HEARD

Therefore, in the absence of any kind of political support, the only real line of defence for migrants' rights is that of courts, tribunals, national human rights institutions and ombudspersons or other dispute resolution bodies which aren't swayed by the polls but are interested in the coherence of the legal system and in particular the logic of the human rights doctrine.

Systematic barriers to the right to access justice are in place in many European States. Significant resource constraints are making member States unwilling to invest in services that facilitate access to justice for migrants, such as legal aid and translation and interpretation services. Migrants' fear of detection and/or deportation if they assert their right to access justice is also a key barrier. Additionally, inconsistencies in access to justice persist, depending upon the rights at stake, the type and nationality of the migrants, and the jurisdiction. A lack of specific rules on courts' duties to apply sanctions and/or compensation for violations of migrants' human rights is another important barrier. However, concerns about access to justice have been expressed in a number of rulings of the European courts. For instance, the European Court of Justice made a significant ruling in the case of *Bashir Mohamed Ali Mahdi*, emphasising that, under European Union law, a lack of identity papers should not be used to justify extending immigration detention and that migrants should have access to justice to challenge such detention.

I am very much counting on the European Court of Human Rights and the European Court of Justice, as well as on national courts, to resist the electorally motivated pressure from politicians to undermine how our human rights regime protects migrants, and instead to uphold migrants' status as

legitimate rights holders. The value of democracy is determined by its ability to deliver on the needs of the most vulnerable members of society. If the executive and legislative powers are unwilling or unable to protect the human rights of migrants, it is for the judiciary to stand up for them.

In consequence, migrants need – and we need to guarantee for them – proper access to effective remedies, an increased sensitivity on the part of lawyers and judges to the issue, appropriate training of all involved, access to legal aid and interpretation services, and effective appeal rights. If courts deliver on this task, politicians and citizens will listen, migrants will be empowered and rights will be protected.

We need to go further in our collective understanding of migrants' rights. On many issues, migrants should not be treated differently from anyone else but should have equal protection of their rights. In order to be able to speak up and fight to uphold their rights, migrants must not be made to fear contacting the authorities. Empowering migrants to speak freely to public services such as health care, education, local police, social services, public housing, labour inspection and other public service agencies, without fear of being denounced to the immigration enforcement authorities and then detained and deported, is key to ensuring that such services are able to perform their mission *vis-à-vis* all concerned. Without such "firewalls", migrants will never report human rights violations and perpetrators will benefit from immunity in practice. There are examples of such firewalls around the world, including in Europe.

THE WAY FORWARD

Mobility is a natural part of human existence: it's in our DNA. Migration is not a crime, not a problem and has the potential to be part of the solution to many of our economic and social problems. Employers and the business community know how much mobility and diversity are key to their success. Governing migration – instead of restricting it – allows us to undercut the smugglers, address States' security concerns, reduce human suffering and save lives.

Migration governance thus cannot only be about keeping people out by resorting to means that violate their rights. It must also be about multiplying regular, safe, accessible and affordable migration channels, eliminating unethical labour recruitment practices, cracking down on labour exploitation, empowering migrants by clearly enforcing their human and labour rights, providing pathways to permanent residence and citizenship, promoting integration in host societies, and celebrating the current diversity of most of our societies.

Thank you for your attention.



Ledi Bianku

Judge of the
European Court of Human Rights

Excellencies, Ladies and Gentleman, dear colleagues,

This seminar, held every year to mark the opening of the judicial year of the European Court of Human Rights, has always focussed on legal subjects of topical interest, especially those subjects which are of greatest concern to domestic and Strasbourg judges alike for the application and interpretation of the Convention.

The unprecedented migratory flows with which our continent is confronted are a phenomenon which not only troubles European societies and their political leaders but which also, for some years now, has become a challenge in the day-to-day work of domestic courts and the Courts of Strasbourg and Luxembourg.

So the first reason why I find that this choice of subject is perfectly justified for our meeting today is its topical relevance.

The second reason why it seems a good idea to speak today about the non-refoulement principle and the role of the courts in its implementation is the very difficulty of this subject. It takes on a particular significance because it concerns cases which involve, above all, absolute Convention rights. In addition, the courts, whether national or international, must rule on situations that are very distant from them and of which they do not necessarily have full and direct knowledge. In addition, non refoulement cases are generally cases concerning fluctuating situations – situations which are changing all the time. The consequence of this may well be that, in a number of cases, the legal basis for our analysis of the non-refoulement principle, in Strasbourg, differs from that adopted by domestic courts for their own analysis, or is no longer consistent with the latter. Our Court, for the sake of the practical and effective protection of Convention rights, must rule on such cases *ex nunc*, taking account of all the circumstances that are known to it at the time it takes its decision, and not only those known to the domestic courts at the time of their own decisions. Hence the need for increased cooperation and ongoing exchanges with all those concerned, practitioners in the courts and specialised organisations such as the Office of the UN High Commissioner for Refugees (UNHCR).

The third reason why I find this choice of subject very important lies in Strasbourg's unprecedented jurisprudential output in cases concerning non-refoulement, or asylum in general, regardless of the Convention Articles engaged. In the judicial year of 2016, 7 out of the 27 cases dealt with by the Grand Chamber concerned asylum or migration, more than any other situation within the scope of the Convention.

Of course, the human stories lived out in the territories and on the seas of Europe find their way into cases both before the national courts throughout our continent and before the Court here in Strasbourg.

- I -

What then is the contribution of Strasbourg's judgments to the concept of non-refoulement? As you are no doubt aware, the Court's contribution began with the celebrated case of *Soering v. the United Kingdom*, which was a fundamental step for the acknowledgment of the responsibility of States parties to the Convention in cases where an individual is to be returned to a third State where he or she might face torture or ill-treatment in breach of Article 3. That recognition, after *Soering*, was soon extended in the 1990s to asylum cases, by the judgments in *Cruz Varas*, *Vilvarajah*¹, and *Chahal*². The highly variable nature of the issues raised by this type of case, the complexity of these questions, and the need for the clearest possible and most useful approach for all courts concerned have led our Court to adopt strategic approaches in non-refoulement cases. With this in mind the Court has delivered a number of judgments in leading cases, especially from 2008 onwards, from which four main directions or areas can be identified:

(i) an appropriate assessment of country-of-origin information, particularly taking into account the importance of the UNHCR recommendations on the risks in the event of return (see *NA v. the United Kingdom*³);

(ii) an appropriate interpretation and application of Article 3 of the Convention as regards "generalised risk" issues (see, *inter alia*, *Sufi and Elmi v. the United Kingdom*⁴);

(iii) application of the Convention to the "common European asylum system" (see *M.S.S. v. Belgium and Greece*⁵ and *Tarakhel v. Switzerland*⁶);

(iv) the relationship between the European Convention on Human Rights and the 1951 Convention relating to the status of refugees, a relevant case being *Hirsi Jamaa and Others v. Italy*⁷, which directly concerned the concept of non-refoulement, and therefore Article 33 of the Geneva Convention.

Even if, at first sight, it could be said that it is only the fourth aspect which concerns the concept of non-refoulement – my subject today – I believe that all four areas in which the Court has delivered leading judgments are of crucial importance for this concept. I am also of the opinion that the Court's contribution to the concept of non-refoulement cannot be limited to these four principles, and so I will analyse that contribution in 2016 from two perspectives.

- II -

(a) First, clarification of the decisive legal elements for the concept of non-refoulement.

(b) Second, endeavours to consolidate the case-law covering the relevant aspects of the concept of non-refoulement.

(a) Under the first head, the Court has sought to clarify the specific elements of the legal analysis in asylum cases.

I would like here to mention three judgments delivered by the Grand Chamber in 2016.

The judgment in *F.G. v. Sweden*⁸, from March 2016, concerns an Iranian asylum-seeker who became a Christian after his arrival in Europe. The Court found that his expulsion to Iran without a sufficient examination of the implications of his conversion to the Christian faith would entail a

1 *Vilvarajah and Others v. the United Kingdom*, 30 October 1991, Series A no. 215.

2 *Chahal v. the United Kingdom*, 15 November 1996, Reports of Judgments and Decisions 1996 V.

3 *NA v. the United Kingdom*, no. 25904/07, 17 July 2008

4 *Sufi and Elmi v. the United Kingdom*, nos. 8319/07 and 11449/07, 28 June 2011

5 *M.S.S. v. Belgium and Greece* [GC], no. 30696/09, ECHR 2011

6 *Tarakhel v. Switzerland* [GC], no. 29217/12, ECHR 2014

7 *Hirsi Jamaa and Others v. Italy* [GC], no. 27765/09, ECHR 2012

8 *F.G. v. Sweden* [GC], no. 43611/11, ECHR 2016

violation of the Convention. The Court thus clarified an issue which had been under discussion for several years in European and domestic courts as well as among legal commentators, but above all it found that in asylum cases judges had to carry out an *ex nunc* analysis not only of the changes in situation in the asylum-seeker's country of origin, but also of the changes in the asylum-seeker's personal situation, even since his or her arrival in a European country.

The judgment in *Paposhvili v. Belgium*⁹, delivered in December 2016, concerned an asylum-seeker of Georgian nationality living in Belgium, who was suffering from a number of serious illnesses. In that case the applicant alleged that, if he were to be returned to Georgia, he would not have access to the health care that he needed and that, in the light of his very short life expectation, he would die a long way from his family and much quicker. In that judgment, the Court, as my colleague and friend Judge Lemmens stated in his concurring opinion appended to the judgment, clarified "our case-law in order to fill [the] gap while at the same time maintaining a high threshold for the application of Article 3 of the Convention"¹⁰. As Judge Lemmens explained, that judgment could be seen as the Court's answer to the concerns expressed by the Aliens Appeals Board, which had shown reluctance to apply strictly the criterion established in *N. v. the United Kingdom*¹¹. The judgment confirmed, once again, the approach adopted in *F.G.*, stressing the need for an analysis of all the relevant aspects of the personal and family situation of an asylum-seeker, not only under Article 3 but also under Article 8 of the Convention.

The judgment in *Khlaifia and Others v. Italy*¹², delivered last December, concerned the return to Tunisia of Tunisian nationals who had arrived in a context of mass migration by sea. The Grand Chamber distinguished the situation of the applicants in that case from that of the applicants in *Čonka v. Belgium*¹³, *Hirsi Jamaa and Others* and *Sharifi and Others v. Italy and Greece*¹⁴. There were three main reasons why the Grand Chamber, unlike the Chamber, found no violation of Article 4 of Protocol No. 4: first, the fact that the applicants had been "individualised" twice by the Italian authorities; secondly, the fact that the removal orders, while using standard wording, were nevertheless issued on an individual basis; and thirdly, the fact that the applicants had been removed at the same time as others did not mean that the removal orders against them were not individual. In that judgment the Grand Chamber clarified that Article 4 of Protocol No. 4 did not necessarily guarantee the right to an individual interview: its requirements could be met where each alien had the genuine and effective possibility of raising arguments against his or her expulsion and where those arguments would be examined in an appropriate manner by the authorities of the respondent State.

Legal commentators were quick to react, taking the view that this judgment represented a retrograde step in relation to *Hirsi Jamaa and Others* and *Sharifi and Others*. In an article from early January in *La Revue des droits de l'homme*, the *Khlaifia* judgment was described as "a phoney enhancement of the rights of migrants at the gates of Europe"¹⁵. Pending other comments and possible criticisms, it can be said, in any event, that this judgment has the merit of clarifying the procedural rights under Article 4 of Protocol No. 4.

(b) Under the second head, I will now turn to the efforts to codify the case-law covering the relevant aspects of the concept of non-refoulement.

9 *Paposhvili v. Belgium* [GC], no. 41738/10, ECHR 2016

10 See paragraph 3 of Judge Lemmens' concurring opinion

11 *N. v. the United Kingdom* [GC], no. 26565/05, ECHR 2008; see also *D. v. the United Kingdom*, 2 May 1997, Reports of Judgments and Decisions 1997 III.

12 *Khlaifia and Others v. Italy* [GC], no. 16483/12, ECHR 2016

13 *Čonka v. Belgium*, no. 51564/99, ECHR 2002 I

14 *Sharifi and Others v. Italy and Greece*, no. 16643/09, 21 October 2014

15 Foegle (Jean-Philippe), "Un renforcement en trompe-l'œil des droits des migrants retenus aux portes de l'Europe", *La Revue des droits de l'homme, Actualités Droits-Libertés*, 2017

While the three above-mentioned judgments have clarified specific aspects of the legal analysis in asylum cases, the judgment in *J.K. v. Sweden*¹⁶, delivered in August 2016, provides a compilation of the legal criteria to be taken into account in such cases. The case concerned three Iraqi nationals – asylum-seekers in Sweden – who were to be expelled to Iraq. It was a typical asylum case in terms of the facts. But the Grand Chamber saw fit, wisely in my view, to use this case to reiterate, systematise and consolidate the applicable principles in asylum cases. The Court, after analysing the guiding principles emanating from the case-law of the CJEU and those of the UNHCR, set out the following list of general principles applicable to asylum cases:

1. the general nature of the obligations under Article 3 – emphasising that this Article protects absolute rights;
2. the principle of non-refoulement, whether direct or indirect, to countries where there are risks;
3. the general principles concerning the application of Article 3 in expulsion cases, after a reminder of the right of States to control the entry, residence and expulsion of aliens except in cases where they face torture or comparable treatment in the destination country;
4. the risk of ill-treatment by private groups, not only public authorities;
5. principle of an *ex nunc* assessment of the circumstances, both general and individual;
6. the principle of subsidiarity;
7. assessment of the existence of a real risk;
8. distribution of the burden of proof;
9. past ill-treatment as an indication of risk;
10. membership of a targeted group.

This enumeration of ten principles provided in *J.K. and Others* represents, in the eyes of the Court, the criteria to be used in the examination and assessment of asylum cases under the Convention, at least under Article 3. Even though non-refoulement is just one of the ten principles thus enumerated by the Grand Chamber in *J.K. and Others*, it should not be overlooked that, if this principle is not respected, all the others will be breached and that, moreover, all those other principles are part of the analysis of the non-refoulement principle. To use the expression of Lord Steyn in the *Adan* case before the House of Lords in 2000¹⁷, I would say that non-refoulement practically constitutes the “alphabet” of asylum cases. *J.K. and Others* thus provides a prism through which to deal with asylum cases, whether at domestic level or in Strasbourg. It was drafted in such a way as, in particular, to enable the codification of case-law in such matters and to facilitate cooperation and dialogue with national courts, so that asylum cases can be finally settled at domestic level in conformity with these general Convention principles in such matters.

Of course, the endeavours by the Strasbourg Court to clarify and consolidate its case-law cannot be confined to these cases. The Court’s contribution in cases which have an impact on the concept of non-refoulement is very extensive. One could add, by way of example, judgments such as *Othman (Abu Qatada)*¹⁸ with its input on the concept of the flagrant denial of justice, *Al Saadoon et*

¹⁶ *J.K. and Others v. Sweden*, no. 59166/12, 23 August 2016

¹⁷ *Secretary of State for The Home Department, Ex Parte Adan R v. Secretary of State for The Home Department Ex Parte Aitseguer, R v.* [2000] UKHL 67

¹⁸ *Othman (Abu Qatada) v. the United Kingdom*, no. 8139/09, ECHR 2012

*Mufdhi*¹⁹, setting out a new perspective on capital punishment under the Convention, or the judgments on *incommunicado* detention and rendition such as *El-Masri*²⁰, *Al-Nashiri*²¹, or *Nasr and Ghali*²² (a judgment from 2016).

It is clear that there remains much work ahead, with many questions to be resolved at both national and international levels. Last autumn, the German²³ and Italian²⁴ courts cast doubt on the compatibility with fundamental rights of returns to Turkey in the context of the agreement with the EU. The European Commission, although it declared last May that the Dublin system “was dead”²⁵, has just decided to resume returns to Greece from next March. I can also tell you that we have given notice this week of a case concerning the Idomeni reception centre for asylum-seekers – a case which raises very complex questions relating to the closure of the Balkan route for refugees. As a result, there are many questions which are still awaiting our answers.

To be sure, all the judgments I have mentioned – and others I have not had time to cite here – reflect the direction and efforts pursued by the Strasbourg Court to ensure the clarification and consolidation of the legal criteria enabling a practical and sound application of the non-refoulement principle, respecting the rights guaranteed by the Convention and providing appropriate responses to the migration crisis in Europe.

- CONCLUSION -

To conclude, I would like to share with you the epilogue of an interview which was made public only a few days ago. It is a conversation arranged in the context of *EJIL-Talks* between Professor Joseph Weiler and Professor Philippe Sands concerning the latter’s recent book, *East West Street*. During the interview Sands made the following point “the big lesson I learned from writing the book is that in order to understand the concepts we deal with in international law, we have to understand personal stories”²⁶.

I believe that this lesson is very strongly reflected in the case of the non-refoulement principle – the idea of listening to and understanding personal stories, then deciding on them – that’s non-refoulement in a nutshell!

Thank you for your attention.

¹⁹ *Al-Saadoon et Mufdhi v. the United Kingdom*, no. 61498/08, ECHR 2010

²⁰ *El-Masri v. “the former Yugoslav Republic of Macedonia”* [GC], no. 39630/09, ECHR 2012

²¹ *Al Nashiri v. Poland*, no. 28761/11, 24 July 2014, and *Husayn (Abu Zubaydah) v. Poland*, no. 7511/13, 24 July 2014

²² *Nasr and Ghali v. Italy*, no. 44883/09, 23 February 2016

²³ Court of Appeal of Schleswig-Holstein, 1 Ausl (A) 45/15 (41/15) – decision of 22 September 2016

²⁴ Corte Suprema di Cassazione, 31675/16 – decision of 15 November 2016

²⁵ European Commission press release “Towards a sustainable and fair Common European Asylum System”, Brussels, 4 May 2016, at http://europa.eu/rapid/press-release_WM-16-2270_en.htm. During the press conference the Commission’s Vice-President Timmermans and Commissioner Avramopoulos commented as follows: “The old Dublin has died”, “I would say it was killed by this unprecedented pressure. When Dublin was adopted the landscape was totally different to what we have today”, stated Mr Avramopoulos; “I’m a Game of Thrones fan. This Dublin looks like Jon Snow stabbed on a table and dead for a couple of days...this reform is the essential thing we need to do to get Jon Snow off the table.” added Mr Timmermans.

²⁶ Article “New EJIL: Live ! Interview with Philippe Sands on his New Book, *East West Street: On the Origins of Genocide and Crimes Against Humanity*”; interview published 23 January 2017 by Helen McDermott at <https://www.ejiltalk.org/new-ejilive-interview-with-philippe-sands-on-his-new-book-east-west-street-on-the-origins-of-genocide-and-crimes-against-humanity/>.



Georges Ravarani

**Judge of the
European Court of Human Rights**

ASSESSMENT OF THE CREDIBILITY OF ASYLUM-SEEKERS: THE BURDEN OF PROOF AND THE LIMITS OF THE ECHR'S EXAMINATION

The assessment of credibility and the burden of proof are core issues in asylum cases. They raise very concrete questions that national courts have to deal with, being assisted and guided in this task by the European Court of Human Rights.

In the first part of my contribution, allow me to briefly outline the Court's recent case-law in this field (I). Moreover, the Strasbourg case-law is of course far from being self-sufficient: it has to be seen in a more global context involving other important players. The other European court, the ECJ, has also developed a significant body of case-law in the field of asylum as part of the creation of an EU area of freedom, security and justice, interpreting instruments such as the EU Qualification Directive. Most importantly, it remains for the national authorities and, in the last instance, the national courts to decide directly on asylum claims. So in the second part of my contribution, I will deal with the problems that arise when national courts implement in practice the case-law of both European courts (II).

I. THE CURRENT CASE-LAW CONCERNING THE ASSESSMENT OF ASYLUM-SEEKERS' CREDIBILITY

The Strasbourg Court has, during the past year, delivered two Grand Chamber judgments in asylum matters, with extended reasoning on the precise issue of the assessment of credibility and the burden of proof. Those cases are *F.G. v. Sweden* and *J.K. and Others v. Sweden*, handed down in March and August 2016 respectively. I will not explain in detail the contents of the two judgments – they have been made available in the background papers for today's seminar – but instead will limit myself to their salient features on the subject of interest to us today.

Very briefly, the facts of these cases were as follows:

- *F.G. v. Sweden* was about an Iranian national who had applied for asylum in Sweden on the grounds that he had worked with known opponents of the Iranian regime and had been arrested and held by the authorities on at least three occasions between 2007 and 2009, notably in connection with his web publishing activities. He alleged that he had been forced to flee after discovering that his business premises, where he kept politically sensitive material, had been searched and documents were missing. After arriving in Sweden, he converted to Christianity, which he subsequently claimed put him at risk of capital punishment for apostasy in the event of his return to Iran. His request for asylum was rejected by the Swedish authorities, which made an order for his expulsion.

- The *J.K. and Others* case concerned an Iraqi family. They applied for asylum in Sweden on the grounds that they risked persecution in Iraq by al-Qaeda, as the husband and father had worked for American clients and operated out of a US armed forces base in Iraq for many years. They had been the subject of serious threats and violence, including attempts on their lives, physical injury and kidnapping, during the period from 2004 to 2008. When the daughter was killed and the father seriously injured in an attack in 2008, the father stopped working and the family moved to different locations in Baghdad. Although his business stocks were attacked four or five times by al-Qaeda members, he stated that he had not received any personal threats since 2008 as the family had repeatedly moved around. However, he criticised the State authorities for not being able to protect him and his family and consequently left Iraq in 2010. He was followed by the other members of his family in 2011. His asylum request was also rejected.

In both cases, the applicants claimed that removal to their country of origin would expose them to a real risk of treatment contrary to Articles 2 and 3.

In both cases the Grand Chamber addressed a number of issues. Concerning more specifically the assessment of credibility and the burden of proof, the following principles were either reiterated or established:

- the *subsidiary role of the Court*: the Court repeated that it was not its task to substitute its own assessment of the facts for that of the domestic courts and that, as a general rule, it was for those courts to assess the evidence before them since they were best placed to do so. However, the Court must be satisfied that the assessment made by the national authorities is adequate and sufficiently supported by domestic materials, as well as by materials originating from other reliable and objective sources;
- *risk assessment and burden of proof*: in relation to this issue, the Court formulated two general rules: 1. it is, in principle, for the individual to submit, as soon as possible, his or her asylum claim together with the reasons and evidence in support of that claim; and 2. "it is the shared duty of an asylum-seeker and the immigration authorities to ascertain and evaluate all relevant facts of the case in the asylum proceedings"¹.

Beyond these general rules, the Court made a clear distinction between:

- *general and individual risks*:
 - When an asylum claim was based on a "well-known general risk, when information about such a risk is freely ascertainable from a wide number of sources", the Article 2 and 3 obligations on the State are such that the authorities are required to carry out an assessment of that general risk of their own motion.
 - As regards asylum claims based on individual risk, the Court, although recognising that it is important to take into account all of the difficulties which an asylum-seeker may encounter in collecting evidence, held that Articles 2 and 3 did not require a State to discover a risk factor to which an asylum-seeker had not even referred. As a general rule, "an asylum-seeker cannot be seen as having discharged the burden of proof until he or she provides a substantiated account of an individual, and thus a real, risk of ill-treatment upon deportation that is capable of distinguishing his or her situation from the general perils in the country of destination". The Court's clarification is based on its own case-law, relevant UNHCR² materials and the EU Qualification Directive³. The Court added, however, that if the State had been "made aware of facts, relating to a specific individual" that could expose him or her to a relevant risk of ill-treatment on expulsion, the authorities were required to carry out an assessment of that risk of their own motion.
 - There are special considerations regarding past *ill-treatment*: the Court considered

that established past ill-treatment contrary to Article 3 would provide a "strong indication" (in French: "*un indice solide*") of a future, real risk of ill-treatment, although it made that principle conditional on the applicant's having made "a generally coherent and credible account of events that is consistent with information from reliable and objective sources about the general situation in the country at issue". In such circumstances, the burden shifts to the Government "to dispel any doubts about that risk"⁴.

- Another issue addressed by the Court concerns *ex nunc* assessment: the relevant point in time for the assessment is that of the Court's consideration of the case. A full and *ex nunc* evaluation is required where it is necessary to take into account information that has come to light after the final decision by the domestic authorities was taken.

This leads me to the criticisms directed at the Court's findings:

- a highly problematic issue for a Court that consistently emphasises its subsidiary role and claims not to be a court of fourth instance is the fact that it performs an *ex nunc* assessment, having regard to new facts that have not even been presented before the national courts;
- the most common point in the *dissenting opinions* is criticism of the majority for considering it sufficient that, in the event of previous mistreatment, there is a "strong" indication of subsequent abuse if the applicant provides a "generally" credible and consistent report in line with general information and objective sources concerning the general situation in the country of origin. In this case, the Government are responsible for dispelling "any" doubts about the risk of mistreatment. This goes further than what the Qualification Directive says (it speaks about "serious" indications – in French: "*indice sérieux*");
- furthermore, the reference to a shared duty to both *ascertain and evaluate* facts could be regarded as problematic from the perspective of domestic and EU law. In accordance with EU law as interpreted by the ECJ, the shared responsibility is limited to the determination of the facts, responsibility for their assessment and evaluation lying solely with the authorities⁵;
- a further perhaps problematic issue lies with the statement by the Court that the Qualification Directive reflects implicitly or explicitly a *benefit of the doubt* principle. It is debatable whether such a principle can be read into the Directive.

After this little excursion into the recent case-law of the Strasbourg Court, let us have a look at how the national courts receive and apply the Court's jurisprudence on Article 3 in asylum cases.

II. THE IMPLEMENTATION OF GENERAL PRINCIPLES STATED BY THE EUROPEAN COURTS

Various factors contribute to making it far from easy for asylum courts to implement the Court's case-law.

- First, as the Court frequently emphasises, it is not an immigration or asylum court, since these areas are outside its competence. However, it is only too well known that this disavowal is highly contested. Let me quote, for example: "within as little as two decades, [the Court has become], if not the highest asylum court, the highest European

⁴ See *J.K. and Others v. Sweden*, § 102.

⁵ Article 4(1) of the EU Qualification Directive provides that "Member States may consider it the duty of the applicant to submit as soon as possible all the elements needed to substantiate the application for international protection. In cooperation with the applicant, it is the duty of the Member to assess the relevant elements of the application." In a judgment of 2012 the ECJ made a clear distinction, as regards the Article 4(1) duty to cooperate, between the determination of facts and the evaluation or assessment by the authorities. As regards the latter: "Such an examination of the merits of an asylum application is solely the responsibility of the competent national authority; accordingly, at that stage in the procedure, a requirement that the authority cooperate with the applicant – as laid down in the second sentence of Article 4(1) of Directive 2004/83 – is of no relevance" (*M.M. v. Minister for Justice, Equality and Law Reform and Others*, C-277/11, EU:C:2012:744, paragraphs 66-70).

¹ See *J.K. and Others v. Sweden*, § 96.

² Such as the UNHCR 1998 Note on Burden and Standard of Proof in Refugee Claims; the UNHCR's Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status; or the position of the Office of the United Nations High Commissioner for Refugees on returns to Iraq.

³ See, in particular, Article 4(4) and (5) of the EU Qualification Directive.

court in refugee questions, without being entitled to grant asylum strictly speaking", mainly by applying and interpreting Articles 2 and 3 of the Convention⁶. Bearing in mind the well-established principle that any person, regardless of nationality, can claim the benefit of the provisions of the Convention as soon as he or she is under the jurisdiction of a Contracting State, the Court's case-law implies that, in practice, the values enshrined in the Convention are exported to the entire world and are applicable not only to 800 million people, but to 7 billion.

If the principles established by the Court have to be applied by an asylum judge, there is a kind of asymmetry, not because a national court has to apply principles developed by a European court but because of the consequences of that application. It is possible that a person does not at all fulfil the legal criteria for being granted asylum (if the Geneva Convention criteria are not met) but that the person's expulsion would constitute a violation, for example of Article 3. The asylum judge is then caught in a dilemma as he or she cannot apply the normal asylum criteria but is nevertheless forced, especially by the recent Grand Chamber judgments, to apply the Convention criteria in the assessment of the applicant's claim for asylum.

- Secondly, as already mentioned, the Court makes an *ex nunc* assessment of the facts in asylum cases. Beyond the fact that this can hardly be considered *not* to be the behaviour of a fourth-instance court, the assessment of concrete evidence by the Court is highly problematic. As the Court itself recognises, the national courts are better placed to carry out the assessment of evidence, being closer to the parties and the facts. The Court does not see the parties in person, and the evidence produced is normally sparse. It simply does not have the tools available to the national courts to establish the facts in all their complexity.

- Thirdly, although any judgment of the Court refers to a concrete factual situation, it is, of course, the general principles going beyond the specific case that are important for the national courts, which then have to apply these general principles to concrete issues. In that sense, the role of the Court, although being in theory very different from that of the ECJ – the other European court that also has jurisdiction in asylum matters – is very similar. The ECJ gives general rulings when preliminary questions are referred to it by a national court but the Strasbourg Court also gives general rulings when it states general principles – indeed, the Grand Chamber always does this. There is no need, in that sense, for the entry into force of Protocol No. 16.

In this regard, in the context of today's topic, two problems have to be highlighted: first, it is quite problematic to state general rules in a highly specific area such as that of adducing evidence, and secondly, little imagination is needed to figure out that there may be potential conflicts between the theoretical solutions adopted by the two European courts.

Allow me to illustrate the combination of these two problems by providing a concrete example of a case a national court had to deal with: an Algerian national was applying for asylum in an EU Member State. He claimed to be at risk of prosecution and imprisonment for homosexuality in his home country. He referred to the case-law of the ECJ, according to which the sexual orientation of a person is such a substantial part of the person's identity that he or she cannot be expected to live without manifesting it⁷. According to this case-law, persecution occurs as soon as the person's sexual orientation can lead to criminal prosecution and actual imprisonment. The Luxembourg Court has stated in another judgment that applicants should not be subjected to tests or hearings to establish their actual sexual orientation⁸. By the way, similar principles have been affirmed by the ECJ with reference to religious beliefs. It has made it clear that a person cannot be asked not to practise his or her religion openly⁹.

In the specific case I am referring to, the national court felt unable to apply what it saw as a principle of almost automatic entitlement to asylum for people who claimed to be persecuted because

of their sexual orientation or their religious beliefs. The court in question emphasised, *inter alia*, that this principle could lead to reverse discrimination ("*discrimination à rebours*") in the sense that there was a difference in treatment concerning the burden of proof where politically persecuted individuals were required to adduce concrete evidence, compared to those who claimed to be persecuted on sexual or religious grounds, who were allowed simply to allege such persecution. Consequently, the national court found it problematic to apply abstractly formulated rules for the assessment of the facts in a specific case. It also discussed whether a certain degree of self-restraint could be expected on the part of persons with particular religious beliefs or a particular sexual orientation in problematic countries of origin. In this specific case, the national court ruled that the applicant had not proved that the Algerian authorities usually imprisoned homosexuals, but only those who were very exposed. The asylum application was therefore rejected¹⁰.

Let us tackle the problem a bit further: a *Köbler* problem could arise if the national court disregarded EU law as interpreted by the ECJ: the State's civil liability could be engaged as a result of the failure of the national authorities, including the courts, to comply with their EU law obligation. Firstly, however, this problem is solved by the national courts themselves (so the remedy risks being merely theoretical), and secondly, the establishment of State liability cannot, in practice, lead to what the asylum-seeker tried to achieve, namely the suspension of deportation to the country of origin.

Having had his case dismissed at national level, the applicant might then turn to Strasbourg. He could obviously rely on Article 3 and apply for an interim measure under Rule 39 of the Rules of Court. He would, however, not be obliged to do so and, at any rate, the Court could reject his application for an interim measure. As to the merits of the complaint alleging a violation of Article 3 of the Convention, the Court would examine whether there had been previous persecution and, in particular, whether there was a real danger that the applicant would be subjected to inhuman or degrading treatment in the event of his return (it may be the case that the expulsion had already taken place and that the Court would assess whether there had actually been a violation of Article 3).

Unlike the ECJ, the Strasbourg Court would examine the judgment of the national court in the specific case. It would probably do two things. It would state general principles and apply them to the specific case. One can of course only speculate as to what the Court would say. I am, however, only interested in the "technical" consequences of its judgment.

Two types of outcome of the dispute are conceivable.

It may be that the Court would find a violation in this specific case, since the national court imposed an undue burden of proof on the applicant. By the way, this is the most likely finding, in the light of the principles recently affirmed in the *F.G. v. Sweden* judgment. The Court would then indirectly become the "secular arm" of the ECJ, a role in which the latter does not like to see the Court...

It could also hold that the asylum-seeker could be expected to bear a certain burden of proof in the specific case. In that case, we would have an even greater problem, namely a contradiction between the positions taken by the two European courts. In such cases, the national courts have to face almost insoluble problems and despite the "assistance" from the two European courts, they may feel very lonely in the accomplishment of their task.

I turn to my colleague from the French National Asylum Tribunal and ask her if she feels lonely...

⁶ A. Nußberger, "Flüchtlingsschicksale zwischen Völkerrecht und Politik", *NVwZ* 12/2016, p. 820.

⁷ ECJ, 7 November 2013, C-199/12, C-200/12 and C-201/12.

⁸ ECJ, 2 December 2014, C-148/13 and C-150/13.

⁹ ECJ, 5 September 2012, C-71/11 and C-99/11.

¹⁰ Supreme Administrative Court of Luxembourg, 6 February 2014, no. 33641C, published on www.justice.public.lu



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ASSESSMENT OF THE CREDIBILITY OF ASYLUM-SEEKERS: BURDEN OF PROOF AND THE LIMITS OF THE ECHR'S EXAMINATION¹

The question of the establishment of the facts alleged by an asylum-seeker and the assessment of the risk of his or her being exposed to persecution or serious harm is central to the examination of any request for international protection.

This question often presents additional difficulties for the courts. The asylum court will thus be faced, at the outset, with an asymmetrical situation with the State (the decision-making authority) on one side and a foreign national on the other, presenting himself as a victim and often in a vulnerable situation, who will refer to the very conditions in which he fled to explain why he is unable to prove his allegations. The examination of the case will generally concern the truth of events that have occurred in a geographically distant country, and in which it is in practice impossible to check the facts without breaching the cardinal principle of confidentiality of asylum applications and running the risk of endangering the asylum-seeker.

These difficulties, and the extremely wide ranging parameters that have to be taken into account in order to assess the merits of asylum applications, have long sustained the idea that credibility was a subject which defied any kind of theoretical analysis; at the same time, the rules of evidence traditionally applied by the courts such as personal conviction (*intime conviction*) provide equally incomplete answers.

Today, credibility has established itself as a language common to all the institutions and courts that have to assess the country risk (I). This explains why the case-law of the ECHR has acquired such importance for asylum judges (II). This dialogue between judges based on the same language should thus promote a convergence of points of view which will also be achieved by better mutual understanding (III).

¹ Talk prepared with the assistance of L. Dufour, Research and Documentation Centre (CEREDOC) of the National Asylum Tribunal.

I – CREDIBILITY: A COMMON LANGUAGE OF ASYLUM JUDGES

1.1 IN ANALYSING THE COUNTRY RISK

The quantitative and qualitative development of information on the countries of origin, the COI, and its increasing accessibility especially via the Internet, have revolutionised court practice in asylum cases: in the years following the first qualification directive of 29 April 2004² various international institutions and associations³ sought to lay down a basis for specific reflection on the use of country information in asylum proceedings. The ECHR has adopted an identical approach in the application of the *non-refoulement* principle deriving from Article 3 of the European Convention on Human Rights.

The French asylum court, which had for many years based its decisions on updated reports and documents relevant in carrying out its assessment⁴, refrained, however, from systematically having the sources used appear in its decisions.

In that context the ECHR observed in 2010, in the case of *Y.P. and L.P. v. France*⁵, that the French asylum authorities had found that the applicants' fears were unfounded, **without referring to any international report on the situation prevailing in their country of origin** and relied, for its part, on various resolutions and reports of the United Nations, the Council of Europe, and governmental and non-governmental organisations in support of their ruling that the deportation of the applicants to their country of origin would entail a violation of Article 3 of the Convention.

References to geopolitical information in the decisions of the National Asylum Tribunal (CNDA) were perceived not just as an effort to state reasons justified by a specific case but as a general requirement allowing the court to establish an objective basis for its assessment of applications and to reflect the transparency of the judicial process by appropriate reasoning.

The *Conseil d'État* held, for its part, in 2012 that the CNDA should seek information relating to the country of origin necessary for the establishment of the facts and use it while complying with the principles of adversarial process⁶.

Information on countries of origin plays a decisive role in establishing the alleged facts and the risks incurred in the specific context, as an "external" credibility indicator of the asylum application. A trend towards a systematic and refined use of this information then became the starting point for a process of reflexion centred more on the asylum seeker's personal account.

1.2 IN ASSESSING THE ASYLUM-SEEKER'S PERSONAL ACCOUNT

Substantial efforts to identify objective criteria for assessing the asylum-seeker's personal account have been made over the past years on an European scale⁷ with the aim of achieving a better harmonisation of practices. The aim of this has been:

- to devise an approach common to the member States as the lack of credibility of applications is the main reason for most of the decisions refusing asylum; and

2 Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted.

3 Among which were the European Union, the HCR, the Austrian Centre for Country of Origin and Asylum Research (ACCORD), the Hungarian Helsinki Committee (HHC) and the International Association of Refugee Law Judges (IARLJ).

4 The CNDA has had a division specialised in research on countries of origin since 1995.

5 *Y.P. and L.P. v. France*, no. 32476/06, 2 September 2010.

6 *CE 22 October 2012 M. M. no. 328265 A*.

7 Beyond Proof by the UNHCR and CREDO Project (Partnership UNHCR, HHC, Asylum Aid, IARLJ). The CREDO project contains a section specifically devoted to courts: IARLJ, *Assessment of credibility in Refugee and Subsidiary Protection Claims under the EU Qualification Directive: Judicial Criteria and Standards*, Credo project, 2013.

- to establish criteria and methods to be used in assessing the credibility of the asylum-seeker's personal account of events in order to achieve greater equality of treatment of applications for international protection in the European Union.

It was with this aim in mind that the European Asylum Support Office (EASO) published a practical guide in March 2015 called "Evidence Assessment"⁸, which sets out a practical approach to assessing credibility, and is now coordinating a project specifically designed for national asylum judges⁹ in which the CNDA is actively involved.

This conceptual approach does not answer purely theoretical concerns: it is intended to help national asylum judges with their eminently complex task. This new approach has led the French judges to change paradigm and to abandon an approach centred on personal conviction (*intime conviction*) in favour of establishing an objective basis, of which, in sum, an account can be given.

The ECHR's case-law has also developed in this way, as part of a collective movement towards reinforcing the reasoning in decisions.

II – THE ECHR'S CASE-LAW AND ITS IMPACT ON THE METHODOLOGY OF THE NATIONAL JUDGES FOR ASSESSING THE CREDIBILITY OF ASYLUM APPLICATIONS

Beyond its role regarding the use of country information by national asylum courts, the ECHR's case-law has also induced major developments regarding the assessment of the credibility of applications. Two lines of case-law illustrate this influence.

2.1 THE QUESTION OF DOCUMENTS

The question of the place of documents produced by the applicants in the assessment of credibility can sometimes be a complex matter. The CNDA, like its counterpart courts, frequently has to assess the probative value of documents produced before it in the context of an overall assessment of the application because these are insufficient in themselves to establish the facts alleged by the asylum-seeker. This approach enables the court to verify whether there is overall consistency between the documents and the other materials in the file. Moreover, it appears to be shared by the ECHR, which carries out an overall assessment, on a case-by-case basis, of all the materials submitted to it, as it has recently observed in its judgment in the case of *R.V. v. France*¹⁰.

In this situation the ECHR may arrive at a substantially different assessment from that of the asylum court.

This difference derives from the Court's obligation to carry out an *ex nunc* assessment whereby it takes account of subsequent developments in the situation of the country of origin or new facts which could not be alleged in the domestic proceedings. It is also due to the fact that, save in exceptional cases, evidence is not heard from the protagonist in his or her own proceedings. This is a major difference because a comparison between the documents and the oral statements very often sheds decisive light on the probative value to be attached to the documents produced. The ECHR recognises this itself when it reiterates that "as a general principle, the national authorities are best placed to assess not just the facts but, more particularly, the credibility of witnesses since it is they who have had an opportunity to see, hear and assess the demeanour of the individual concerned"¹¹.

8 EASO, *Practical Guide: Evidence Assessment*, EASO Practical Guides Series, March 2015: This document is designed in particular for officials of administrative authorities responsible for examining asylum applications.

9 IARLJ/EASO *Evidence and credibility assessment in the context of the common European asylum system - A Judicial Analysis*, to be published.

10 *R.V. v. France*, no. 78514/14, 60, 7 July 2016.

11 *Ibid.* § 58.

This difference in assessment may be due, lastly, to the fact that the national judge has not adequately explained his or her reasons for declaring documents inadmissible in evidence and has referred exclusively to the unconvincing nature of the applicant's statements. In two highly illustrative cases in this respect, delivered in 2013 and 2014 respectively, *Mo. P. v. France* and *S.R. v. France*¹², the ECHR arrived at a similar assessment of the probative value of the documents produced to that of the CNDA, taking care, however, to point out that the asylum court's reasoning was insufficiently explicit. Thus, in *S.R. v. France*, the ECHR clearly explained that it could not base its decision on the national court's finding that the documents had no probative value in the absence of convincing statements by the applicant because it did not have any explanation for that finding.

The Court therefore appears to expect the asylum court to explain its assessment of the probative value of the documents produced before it on the basis of objective factors which the Court can assess in terms of relevance.

This point appears to be all the more important for the ECHR as it has held, particularly in 2013 in the cases *I. v. Sweden* and *R.J. v. France*¹³, that whilst it shared the reservations of the national authorities regarding the overall lack of credibility of the applicants' personal accounts, that finding alone did not allow it to rule out the risks that might be revealed by the medical certificates in themselves produced by the applicants. These were detailed medical certificates, established shortly after the facts giving rise to the application according to the recommended methodological standards¹⁴, and accordingly prima facie of probative value regarding the infliction of treatment contrary to Article 3 of the European Convention on Human Rights. Accordingly, the general lack of credibility of a personal account could not, in the ECHR's view, rebut a form of presumption; nor could it therefore dissipate "strong suspicions as to the origin of the applicant's injuries" according to the ECHR in *R.J. v. France*.

The *Conseil d'État* based a decision in 2015 on fairly similar reasoning when requiring the CNDA to carry out an autonomous assessment of the probative value of "documents containing detailed evidence regarding the alleged risks", criticising the court in that case for having declared inadmissible a medical certificate containing a detailed record of a number of injuries and traumatic injuries merely on the ground that "the brief, vague and contradictory nature of [the applicant's] account did not enable the court to establish the reality of the risks he would be liable to run were he to return to his country"¹⁵.

The CNDA is thus required to give substantial reasons when deciding not to regard as probative a document produced in respect of the alleged risks since it has to identify the specific facts which, in each case, justify this assessment.

2.2 SECOND ILLUSTRATION: OBJECTIVE RISK ABOVE PROCEDURAL CONTINGENCIES?

The Grand Chamber judgment of 23 March 2016 in the case of *F.G. v. Sweden*, which ruled on the scope of the factual circumstances which the decision-making authority and the asylum court must take into account – by virtue of the obligations incumbent on the States under Articles 2 and 3 of the European Convention on Human Rights –, contains unprecedented implications for the examination of asylum applications.

Whilst the ECHR has already had occasion to examine the conformity of particular procedural mechanisms – accelerated proceedings for example – with the safeguards provided for in the Convention or to reiterate that the application of the rules of national procedure must not lead to a violation of those safeguards¹⁶, it does not appear to have ever prescribed a positive obligation to that end as clearly as appears in paragraph 156 of that judgment¹⁷.

It is an objective-risk logic, as already appears in the case-law regarding risks arising from a general situation¹⁸, which appears to impose on the national authorities dealing with asylum applications a duty to assess all the factors of which they have, or ought to have, knowledge, irrespective of the choices expressed by the asylum-seekers as a basis for their application.

The need for such an examination of the Court's own motion derives, in the ECHR's view, not only from the absolute nature of Articles 2 and 3 of the Convention but also from the vulnerable situation in which asylum-seekers often find themselves.

This judgment is clearly a sign for the national courts in so far as, here again, the criticism expressed concerns the application of broadly shared working methods. The national courts will have to determine how to take that development into account in carrying out their duties and in their daily work.

III – THE DIALOGUE BETWEEN JUDGES THUS IMPLEMENTED MUST ENABLE A CONVERGENCE OF DIFFERENT POINTS OF VIEW TO BE ACHIEVED WHILE TAKING ACCOUNT OF THE REALITIES AND CONSTRAINTS AFFECTING EACH ONE:

3.1 MUTUAL ENRICHMENT...

The undeniable influence of the ECHR on the practice of the national asylum courts is sometimes perceived as paradoxical on account of the substantial differences in the respective applicable law and position of these courts in asylum proceedings. Thus it is frequently observed that the Court's case-law cannot be regarded as directly prescriptive for the assessment of the merits of asylum applications under the legal provisions relating to international protection.

More rarely is mention made of the many factors that I have just attempted to illustrate which draw the ECHR and the asylum courts closer together. These courts examine disputes on the merits, which are partly similar in that they concern risks of serious violations of fundamental rights, while relying on the same sources of information.

It is noteworthy in this regard that, in assessing the seriousness and the likelihood of the risks relied on under Article 3 of the Convention, the ECHR applies operational criteria resembling those used in determining eligibility for international protection: risks emanating from non-State actors, assessment of the protection available in the country of origin or in part of that country, seriousness of the acts feared.

This similarity of criteria was recently illustrated in the Grand Chamber judgment of 2016 *J.K. v. Sweden*, which lays down a mechanism of presumption of a future risk of violation of Article 3, a risk resulting from prior ill-treatment, very similar to that described by Article 4(4) of the Qualification Directive¹⁹ regarding international protection. Over time the ECHR's case-law seems to have become

¹⁶ *M.D. and M.A. v. Belgium*, no. 58689/12, 19 January 2016, regarding the consequences of application of the rules on review of asylum applications in Belgium.

¹⁷ "It follows therefore that, regardless of the applicant's conduct, the competent national authorities have an obligation to assess, of their own motion, all the information brought to their attention before taking a decision on [the applicant's] removal".

¹⁸ *M.S.S. v. Belgium and Greece* [GC], no. 30696/09, ECHR 2011; *Hirsi Jamaa and Others v. Italy* [GC], no. 27765/09, ECHR 2012.

¹⁹ "The fact that an applicant has already been subject to persecution or serious harm, or direct threats of such persecution or such harm, is a serious indication of the applicant's well-founded fear of persecution or real risk of suffering serious harm, unless there are good reasons to consider that such persecution or serious harm will not be repeated."

¹² *Mo. P. v. France* (dec.), no. 55787/09, 30 April 2013; *S.R. v. France* (dec.), no. 31283/11, 7 October 2014.

¹³ *I. v. Sweden*, no. 61204/09, 5 September 2013, and *R.J. v. France*, no. 10466/11, 19 September 2013.

¹⁴ In particular the "Istanbul Protocol: Manual on Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Office of the United Nations High Commissioner for Human Rights, 2005, Professional training series no. 8/Rev.1"

¹⁵ *CE 10 avril 2015 M. B. n°372864 B.*

enriched with numerous references to judgments of the CJEU and to judgments delivered on asylum matters at domestic level and symmetrically; the decisions of the CNDA rely, where necessary, on the Court's decisions regarding their assessment of the situation prevailing in a country of origin.

3.2 ... BUT ALSO A CHALLENGE FOR A COURT DEALING WITH CASES ON THE GROUND: THE EXAMPLE OF THE CNDA

Whilst the growing interrelation between the ECHR's case-law and that of asylum courts is most certainly a factor of mutual enrichment, the developments just described tend to modify the very conditions in which the asylum judges perform their duties. They constitute in many respects a challenge for the courts dealing with asylum cases on a daily basis.

The CNDA is the biggest French administrative court in terms of the number of applications received per year: 40,000 in 2016. It is important to mention that fact in order to get an idea of the scope of the task faced by the French court, so that the effort in terms of reasoning and wider regard for the risk factors is reflected, equally, in the treatment of all applications and is carried out while also ensuring consolidation of the procedural guarantees.

The considerable number of judges – nearly 300²⁰ whether this be professional judges or not – and rapporteurs (nearly 200) involved in the process of decision-making at the CNDA justifies the development, internally, of training strategies based on assessment of credibility and swift dissemination of decisions representative of good practices in this area. This will of course be a lengthy process, but one whose benefits are, I hope, clear to us all.

The stakes involved in this development are considerable for the judges and those applying to the courts and beyond that for the public perception of asylum law itself.

For asylum-seekers, clearly, it means a more attentive ear, increased regard in the proceedings for the intrinsic vulnerability of their situation, but also a real enhancement of their rights as applicants to the courts. For judges, this major effort will contribute to promoting a better understanding of the practical application of asylum law and to harmonising solutions. For everyone, it is designed to strengthen this wholly fundamental right.



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RECEPTION OF MIGRANTS: MATERIAL AND PROCEDURAL GUARANTEES FOR SETTLED MIGRANTS

A. INTRODUCTION

Europe is the only continent in the world where national discretion in the field of equal treatment of foreigners is limited by international guarantees controlled by an international Court whose decisions are binding. Before we look at the topic in detail one clarification is necessary.

When we talk about migration in Europe we have to realise that there are at least four types of migrants: people migrating within a country, people migrating between two member States of the European Union, people migrating between two member States of the Council of Europe, and people migrating from outside the European human rights area to one or more member States of the Convention.

In each of the four cases, the situation with regard to particular protection of migrants is different. But of course a family migrating within Russia may be in a similar situation as regards language, education and housing questions to a family migrating from Romania to Sweden. And we have to remember that in quite a few EU member States the number of internal EU migrants equals or even exceeds migration from outside the EU or from Europe as a whole.

The conclusion to be drawn from these figures is that migration is a complex issue, and does not only concern people from Africa reaching southern Europe and heading further north.

The work has been shared out between Judge Linder and myself as follows: she will investigate the issues directly linked to Article 8, while I shall be looking at some of the procedural and material guarantees extending beyond the framework of that provision.

B. PROCEDURAL GUARANTEES

The first procedural guarantee that springs to mind in the context of migration is Article 1 Protocol No. 7. This guarantee, like Article 8 of the Convention, protects against the loss of settled migrant status. I have therefore not mentioned it in my work here, although I do not overlook the fact that it might be – and in fact is – crucial for migrants.

Homing in on general procedural guarantees, we should first of all remember that, in principle, migrants and citizens enjoy the same level of protection, including in the field of procedural guarantees. In particular, Article 14 also applies in conjunction with Articles 5 and 6 of the Convention. And it protects migrants against discrimination irrespective of their nationality and regardless of whether they belong to a minority or not.

²⁰ “The fact that an applicant has already been subject to persecution or serious harm, or direct threats of such persecution or such harm, is a serious indication of the applicant's well-founded fear of persecution or real risk of suffering serious harm, unless there are good reasons to consider that such persecution or serious harm will not be repeated.”

There are, however, some guarantees which go beyond mere formal equality to grant special rights to migrants, although not exclusively to the latter. The reason for this group of special rights is to be found in the idea that no one under the jurisdiction of a State Party to the Convention should suffer disadvantages in the enjoyment of core procedural guarantees because they do not speak or understand the official State language used by the authorities. Linguistic issues are of crucial importance because they form the basis, so to speak, for the enjoyment of the right to a fair hearing, or, to be more exact, the right to be heard.

Article 5 § 2 and Article 6 § 3 (a) of the Convention are similarly worded, and indeed their relevant sections are identically worded: everyone who is arrested or charged with a criminal offence has the right to be informed promptly – and I quote – “in a language that he understands”. It is commonly agreed today that the requirement of prompt information should have an autonomous meaning extending beyond the realm of criminal-law measures, as the Court has constantly held, beginning with its *Van der Leer* case dating back to 1990. As in many other fields of the Convention the Court has developed detailed case-law which takes into account the different elements of fact in various situations. The legal issue has to be solved as in the other fields of Articles 5 and 6, as well as Articles 8 to 11 – often by weighing different aspects against each other: on the one hand, the severity of the consequences for the applicant, and on the other the extent of State officials’ duty to ensure the precision of the request for translation. An excellent example of this is the 2005 *Shamayev v. Georgia and Russia* case concerning the requirements of translation from Russian to Chechen in extradition proceedings. The Court’s reasoning is fully consistent in attaching particular importance to the negative consequences of extradition.

In the context of Article 6 § 3 (e) of the Convention, the Court has made it clear from the outset that the right in question is absolute and that it also applies to pre-trial proceedings and, where appropriate, to appeal proceedings, to oral statements as well as to certain written documents. The Court has, over the years, developed a positive obligation on the part of the State to supervise the interpreter to a certain extent, which obligation may extend to scrutiny of the adequacy of the interpretation – examples date back as far as 1989 in the *Kamasinski* judgment, as well as in the Grand Chamber Case of *Hermi v. Italy*.

The basic principle guiding the interpretation of Article 6 in general is that the rights under the Convention must be “practical and effective”. It is logical for the Court to assimilate its case-law on the importance of an interpreter for the fairness of proceedings with decisions on the presence of a lawyer during any initial questioning in police custody. To put it in a nutshell, the purpose of the special guarantees is not merely to achieve formal equality but to offset any disadvantages resulting from a lack of language skills. In a way, these rights form the strongest possible guarantee in terms of their content and purpose.

Let me move on to some substantive guarantees of the Convention in order to shed light on a few specific case-law issues, which will enable us to draw a number of general conclusions.

C. SUBSTANTIVE GUARANTEES

Taking political rights, the right to education and the right to protection of property as three very different types of rights can help clarify the significance of each.

1. POLITICAL RIGHTS

The tendency in the political rights sphere seems to be towards tightening restrictions on the rights of foreigners. Moreover, political rights must be further broken down into voting rights on the one hand, and the rights set out in Articles 10 and 11 of the Convention on the other.

A. ARTICLE 3 OF PROTOCOL NO. 1 TO THE ECHR

The right to vote and to be elected derive from Article 3 of Protocol No. 1. Although the Protocol does not explicitly refer to citizenship, the Court has never raised the question of requiring States to extend that right to foreigners. This is even more remarkable in the context of a rather dynamic, progressive interpretation of the guarantee as regards the right of prisoners to vote. As the Court held in the *Aziz* case in 2004, States enjoy considerable latitude in establishing rules, within their constitutional order, governing parliamentary elections and the composition of parliament, and that the relevant criteria may vary according to the historical and political factors peculiar to each State. However, “these rules should not be such as to exclude some persons or groups of persons from participating in the political life of the country and, in particular, in the choice of the legislature, a right guaranteed by both the Convention and the Constitutions of all Contracting States.”

Therefore, the European answer provided by the Convention is, in principle, that the integration of migrants as regards electoral rights involves granting citizenship, rather than extension of the guarantee to foreigners. The situation in the European Union is slightly different. As regards voting rights to the European Parliament and to the municipal level, Article 20 TFEU explicitly bans any discrimination against nationals of a different member State.

B. ARTICLE 10 AND ARTICLE 11 ECHR

As regards the set of political rights enshrined in Articles 10 and 11 – freedom of expression, freedom of the media, freedom of assembly, freedom of association – integration is implemented by means of non-discrimination, whereby citizenship is irrelevant. There is no reference to foreigners in the second paragraph of either Article, and none of the legitimate aims mentioned there makes the least allusion to foreigners. The State cannot adopt special measures against foreigners for reasons of national security, territorial integrity or public safety. I mention this because it does not seem to be as self-evident nowadays as it used to be.

Nor does Article 11, even taken in conjunction with Article 14, provide for a ground of discrimination referring to citizenship capable of justifying such discrimination. To put it in a nutshell, and bearing in mind the complexity of the issue: unlike Article 3 of Protocol No. 1, Articles 10 and 11 of the Convention do not provide any reason for drawing a distinction between foreigners and nationals.

C. ARTICLE 16 ECHR

This situation seems to change when it comes to Article 16, which is a special Article in many respects. There is first of all its wording: “[n]othing in Articles 10, 11 and 14 shall be regarded as preventing the High Contracting Parties from imposing restrictions on the political activity of aliens.” A simpler wording would have been possible, and would have simplified matters generally, unless the current wording played a major role in case-law. But so far it has not done so, nor is it likely to in the near future.

When the Convention entered into force in the early 1950s, Article 16 immediately became a kind of “Sleeping Beauty”. Her slumber almost ended in 1989, when the Court adjudicated the *Piermont* case. France had carried out nuclear tests in its territories in the Pacific Ocean, and a German Member of the European Parliament tried to enter New Caledonia in order to protest against the test – without success. France relied on Article 16, also unsuccessfully. The Court decided that Sleeping Beauty could continue her slumber. At the time it argued that Article 16 could not be relied upon against a member of the European Parliament. Today, the Court could and should base its argument on European Union citizenship. Instead, the Court went further. In 2015, in the *Perincek* case, concerning Switzerland and a Turkish applicant, therefore involving a non-EU member State and a national of a non-EU member State, the Grand Chamber held:

“Bearing in mind that clauses that permit interference with Convention rights must be interpreted restrictively ..., the Court finds that Article 16 should be construed as only capable of authorising restrictions on “activities” that directly affect the political process. This not being the case, it cannot be prayed in aid by the Swiss Government.”

One could say that in *Perincek* the Court sent Article 16 back into a long, if not eternal, beauty slumber – perhaps with a small exception, for example where a foreigner wishes to become the leader of a major party. For all other political activities, it is hard to see today how a measure that fails the necessity test under Article 10 and Article 11 § 2 can be justified under Article 16 in the light of the *Perincek* case.

2. ARTICLE 2 OF PROTOCOL NO. 1 TO THE ECHR

Let us move on to another Article that plays a vital role for migrants and is crucial for the process of integrating young migrants: the right to education under Article 2 of Protocol No. 1. At a time when we are finding it increasingly difficult to cope with the so-called migration crisis, it is worth noting that the Court in fact found the appropriate language in judgments and decisions back in the first few years of this century, a decade or so ago.

In 2005, in the *Leyla Sahin* case, the Grand Chamber held that:

“[i]n a democratic society, the right to education ... is indispensable to the furtherance of human rights [and] plays ... a fundamental role”.

Just a year later, in 2006, in its *Konrad* decision, the Court emphasised that:

“society has an interest in the integration of minorities in order to achieve pluralism and thus democracy.”

Since then the Court has dealt with a good number of applications concerning foreigners’ access to schools under Article 14 taken in conjunction with Article 2 Protocol No. 1. This case-law shows that the Court has found a line of argument which:

- is consistent with the principles of interpretation of the Convention and the case-law under other articles,
- has regard to the difficulties and (financial) needs of the States involved,
- takes due account of the situation of young migrants and their potential development in a society which is initially new to them.

While the Court acknowledges a wide margin of appreciation as regards access to public services and the cost of their use by foreigners, it draws a clear distinction in the educational sphere.

Let me quote the decisive part of the 2015 *Ponomaryovy* case concerning school fees to be paid by two Russian schoolchildren whose mother held a permanent residence permit in Bulgaria:

“The Court starts by observing that a State may have legitimate reasons for curtailing the use of resource hungry public services – such as welfare programmes, public benefits and health care – by short term and illegal immigrants, who, as a rule, do not contribute to their funding. It may also, in certain circumstances, justifiably differentiate between different categories of aliens residing in its territory.”

The Court goes on to acknowledge that special treatment of foreigners from within the EU is possible, which exception may be said to be based on an objective and reasonable justification in general. It then denies that this idea can be transposed to education without qualification. And it continues:

“It is true that education is an activity that is complex to organise and expensive to run, whereas the resources that the authorities can devote to it are necessarily finite. It is also true that in deciding how to regulate access to education, and in particular whether or not to charge fees for it and to whom, a State must strike a balance between, on the one hand, the educational needs of

those under its jurisdiction and, on the other, its limited capacity to accommodate them. However, the Court cannot overlook the fact that, unlike some other public services, education is a right that enjoys direct protection under the Convention. It is expressly enshrined in Article 2 of Protocol No. 1. It is also a very particular type of public service, which not only directly benefits those using it but also serves broader societal functions.”

The Court has expanded a guarantee which in the beginning had little significance outside special cases (such as language questions in schools in and around Brussels or sexual education in school), into a core guarantee for the protection of Human Rights in Europe, particularly as regards the integration of migrants. And it has – with remarkable openness – stressed its value for the development of a democratic society, even in times of crisis, or, better still, particularly in times of crisis.

If we had more time we could – and should – deal with the religious aspects of education and discrimination against minorities in education – I would just mention the *Folgerø* judgment and the Grand Chamber judgment in the Czech Roma school case *D.H. and Others*, both of which were delivered 10 years ago, in 2007.

3. ARTICLE 1 OF PROTOCOL NO. 1 TO THE ECHR

I am nearing the conclusion of my address. But before ending I must mention Article 1 of Protocol No. 1, the first paragraph of which refers to “general principles of international law”, affirming that international law affords foreigners special guarantees in cases of expropriation. Addressing this and other aspects of the protection of foreigners’ property would confront us with a completely new set of issues.

D. CONCLUSION

Instead of beginning a new topic I must conclude by returning to our starting point. Europe is the only continent where migrants have access to an international Court which has jurisdiction, in respect of almost all States, to decide on alleged human rights breaches by national authorities. It is possibly this quality which makes Europe so attractive to migrants, whatever their initial motives for migrating. The Strasbourg Court is aware that member States are bound to sustain this quality by governing immigration in a way that is consistent both with human rights and with the needs of peaceful societies. Most national courts, including the Constitutional Courts, are also doing their utmost to achieve that end. To that end, the will to constant cooperation, mutual understanding and mutual trust is needed on all sides – in Strasbourg as well as in Stockholm, Rome, Lisbon or Warsaw.

This has just been a short initial input into a workshop of experts. I hope that I have been able to highlight a few interesting issues that can serve as a starting-point for discussions.



Anita Linder

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RECEPTION OF MIGRANTS: SUBSTANTIVE AND PROCEDURAL GUARANTEES FOR SETTLED MIGRANTS

I would like to focus on some problems that we have encountered lately with regard to settled migrants in the field of family reunion. I will illustrate these problems – and also how we have solved them – with some different cases from my court.

First of all I must explain that the Swedish legislation regarding family reunion has basically remained the same, at least since the nineteen eighties. Accordingly, spouses or partners and children have been granted a residence permit if their partner or parent is living in Sweden.

However, family reunion in those days mainly concerned families from other countries in Europe and some countries in South America. Later on we also had large groups coming from the Middle East.

Common to all these was the fact that they came from countries that had a fairly well-functioning administration and therefore they could easily present passports and other official documents in order to certify their identity and other circumstances of relevance for their application. And our legislation and praxis was founded on this presumption.

But during the last 25 years a large number of people have arrived in Sweden originating from countries where there is no administration at all or where the quality of the administration and the documents they produce are so poor that they cannot be relied on. This has led to cases concerning family reunion which contain completely new problems. Problems that we have tried to solve in our case law.

My first example illustrates this very well. In a number of cases between 2011 and 2016 the problems with the identity of an applicant were dealt with. In a case from 2011 (MIG 2011:11), the Migration Court of Appeal confirmed that according to established practice a residence permit for a family member cannot be granted unless the identity of the applicant has been verified.

However, already in 2012 a modification was made to this principle and it was later revised further. The result of these, so far, three cases (MIG 2012:1, MIG 2014:16 and MIG 2016:16) is that a so-called evidentiary alleviation may be applied in certain situations. When a foreigner applies for a residence permit in order to join his or her spouse in Sweden, and if they have children together, it may be justified to accept that the identity of the foreigner cannot be verified with proper documents. This may be the case if the foreigner comes from a country where it is very difficult to obtain acceptable documents to verify his or her identity and if the spouses or partners had been living together before one of them moved to Sweden and became a settled migrant there. Another condition is that they have children together and that there is a DNA analysis certifying that the spouses are both parents to the child or children in question.

The Migration Court of Appeal underlined that the principle of proportionality requires that the interest of the parent and other members of the family in being united must be weighed against the interest of the State in controlling the entry and stay of non-nationals on its territory. In a situation where the family has been established already before any of the family members are granted asylum in Sweden, the interest of the family in being reunited is stronger than the interest of the State.

However, the court has also stated that the interest in family reunion cannot be considered more important than the State's interest in control when it comes to a relationship that has been established at a later date; that is to say, when one of the partners, after becoming settled in Sweden as a single person, contracts a marriage with someone from another country. In this situation, the duty imposed by Article 8 cannot be considered as extending to a general obligation to respect the choice by married couples of the country of their matrimonial residence and to accept the non-national spouse for settlement in our country without proper documentation as to this person's identity. Here a reference was made to the judgment of the European Court of Human Rights in the case of *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, 28 May 1985, Series A no. 94).

I will now turn to another problem, similar to the one I have just described, but this relates only to children whose mother or sometimes father have taken up residence in Sweden. According to the EU Directive on Family reunification, and Swedish law, a child whose mother or father is living in Sweden may be allowed to take up residence here too, if the other parent consents to this.

Now, it is not unusual in these cases for the parent who is living in Sweden to claim to be the only parent because the mother or father is deceased or has disappeared. As I explained before, when the family originates in countries like Somalia or sometimes Afghanistan there is no proper documentation to support such a claim. Very often, therefore, an application to take up residence in Sweden has been declined in these situations. But in a case from 2015 (MIG 2015:8) the Migration Court of Appeal found that even if there are good reasons for having high demands when it comes to proof of a parent's death or disappearance there might be situations when an alleviation could be justified.

If a person comes from a country that lacks a functional administration capable of issuing the necessary documentation in order to prove a person's death for example, a request for proper documentation might be highly problematic or even impossible to fulfil. If this requirement renders family reunification inconceivable, it must be possible to accept other means of information regarding the other parent's destiny.

This particular case concerned two young brothers from Afghanistan. Their older brother had been granted a residence permit with subsidiary protection status in 2012, and in 2013 their mother was granted a residence permit as his family member. The application from the two brothers on the other hand was rejected, since they could not present any proper documentation in support of their claim that their father was deceased.

However, the Migration Court of Appeal found that all members of the family had supplied consistent information as to the time and circumstances of the father's death. Thus, this statement was accepted and the two brothers could be allowed to settle in Sweden as well.

Also in this case a reference was made to the requirements of Article 8 of the Convention on Human Rights.

Finally, I would like to present my last problem – a delicate matter of polygamy!

It is a quite recent case from December 2016 (MIG 2016:26), which concerns a man from Syria who was granted permanent residence in Sweden with subsidiary protection status. Shortly thereafter his two wives and their children applied for a residence permit in order to join him. The children were allowed to enter Sweden since their mothers had consented to their settlement in Sweden. So, the matter for my court was what to do with the wives?

The court stated that according to the EU Directive on Family Reunification the right to family reunification should be practised in accordance with the values and principles that prevail in the member States. In particular the rights of women and children must be considered. Therefore restrictions are justified when it comes to polygamy.

The court also considered whether restrictions on polygamy could be in conflict with the right to respect for family life in Article 8 of the European Convention on Human Rights. A reference was made here to a decision of the Commission on Human Rights from June 1992 in the case of *R.B. v. the United Kingdom* (no. 19628/92) where the Commission concluded as follows.

"In the circumstances of the case the Commission is of the view that the family life circumstances in the present case do not outweigh the legitimate considerations of an immigration policy which rejects polygamy and is designed to maintain the United Kingdom's cultural identity in this respect. It finds, therefore, that the interference with the applicant's right to respect for family life was in accordance with the law and justified as being necessary in a democratic society for the protection of morals and the rights and freedoms of others."

The Migration Court of Appeal therefore rejected the wives' applications with reference to the strong interest of the State to prevent polygamy. Neither the principle of the best interests of the child, nor the right to respect for family life, was considered to be violated by this decision.

Carlo Ranzoni



Judge of the
European Court of Human Rights

ASSESSMENT OF THE CREDIBILITY OF ASYLUM-SEEKERS: THE BURDEN OF PROOF AND THE LIMITS OF THE ECHR'S EXAMINATION

Ladies and Gentleman, dear colleagues,

Evidence assessment, in particular the assessment of credibility, is a difficult task. I am not a specialist in asylum procedures. However, as a former judge in criminal matters I am familiar with evidence assessment and with the challenges domestic authorities are faced with in this regard. I am also aware of our Court's limits, especially in assessing the credibility of people we have never seen or spoken to.

The issue of the assessment of credibility and the burden of proof was the theme of Workshop 1.

My colleague Georges Ravarani, Judge of the European Court of Human Rights elected in respect of Luxembourg, in the first part of his contribution outlined the recent case-law of our Court, in particular *F.G. v. Sweden and J.K. and Others v. Sweden*. He summarised the following principles:

1. Subsidiarity: it is not the Court's task to substitute its own assessment of the facts for that of the domestic authorities; however, it must be satisfied that the assessment at domestic level is adequate and sufficiently supported by domestic and international materials.
2. Risk assessment and burden of proof: it is for the individual to submit reasons and evidence for his or her claim, but there is a shared duty to ascertain and evaluate all the relevant facts.
3. General and individual risks: the authorities are required to carry out the assessment of general risks of their own motion. Individual risks, as a rule, must be asserted and substantiated by the asylum-seeker. However, if the authorities have been made aware of such individual risks, they likewise have to assess them of their own motion.
4. Past ill-treatment: this would provide a strong indication of a future, real risk of ill-treatment in the case of a generally coherent and credible account of events consistent with further information. In such circumstances, the burden shifts to the State.
5. *Ex nunc* assessment: the relevant point in time is that of the Court's consideration of the case.

The speaker then pointed to some problematic issues and referred, *inter alia*, to the criticism in the dissenting opinions in *J.K. and Others*; I shall refrain from repeating these deviating views as I was one of the dissenters. He also mentioned divergences with EU law, found that the *ex nunc* assessment and the Court's fourth-instance role was in contradiction with subsidiarity, and pointed to the problems of the shared duty to both ascertain and evaluate the facts.

In the second part, Judge Ravarani examined how national authorities receive and apply the Court's case-law, identifying several factors rendering the task of implementing general principles far from easy:

1. Although the Court frequently underlines that it is not an immigration or asylum court, this denial is contested. Moreover, Judge Ravarani highlighted the dilemma facing national asylum judges in deciding between the normal asylum criteria and our Court's criteria.
2. He referred to the problem of our Court assessing evidence without seeing the parties in person or having the tools available to the national authorities in establishing the facts in all their complexity.
3. He highlighted the problem of stating general rules in a specific area such as that of adducing evidence, and the potential conflict between the theoretical solutions adopted by our Court and the European Court of Justice.

Judge Ravarani provided a concrete example in relation to the last-mentioned problem, emphasising that the application of a principle affirmed by the ECJ could lead to different treatment concerning the burden of proof between, on the one hand, sexually or religiously persecuted individuals and, on the other hand, politically persecuted individuals. He also tackled the problem that could arise if the national court disregarded EU law. Finally, he explained that, should the person then turn to Strasbourg, our Court would, unlike the ECJ, examine the specific case, with two possible outcomes: it could find that the national court had imposed an undue burden of proof on the applicant; or it could hold that the asylum-seeker had to bear a certain burden of proof, which would entail a contradictory approach on the part of the two European courts and almost insoluble problems for national courts.

Ms Michèle de Segonzac, President of the National Asylum Tribunal (*Cour nationale du droit d'asile* – “the CNDA”) in France, first pointed out in her speech that asylum judges were confronted with foreign nationals who were often in a vulnerable and deprived situation and relied on the very conditions in which they had fled to explain their inability to prove their allegations.

She went on to show that credibility was necessarily a common language among asylum judges, both in analysing the country risk and assessing the personal account given by the asylum-seeker. On the first point she cited the *Y.P. and L.P. v. France* judgment in which the Court observed that the national authorities had considered the applicants' fears to be unfounded, “without referring to any international report on the situation prevailing in their country of origin”. That reference to geopolitical information was perceived as a requirement allowing the court to establish an objective basis for its assessment of applications. With regard to assessment of the applicant's personal account, the speaker showed that substantial efforts to identify objective criteria had been made, particularly in a practical guide published by the European Asylum Support Service entitled “Evidence Assessment”, a document which I find very interesting and helpful.

With regard to the second point, Ms de Segonzac analysed the Court's case-law and its impact on the methods used by national judges in assessing credibility.

She first addressed the question of the place of the documents produced by asylum-seekers and the assessment of the probative value of such documents. Referring to the *R.V. v. France* judgment, she showed that the method involved an overall assessment of all the material submitted. However, the Court's assessment may be significantly different from that of the national judge, as the Court carries out an *ex nunc* assessment, taking into account new facts, but without hearing the applicant.

The speaker observed, rightly in my view, that a comparison between the documents and the oral statements very often shed decisive light on the case. In any event, the Court's case-law (see, among other authorities, the judgments *R.J. v. France* and *I. v. Sweden*) would appear to require asylum judges to explain their assessment of the probative value of the documents on the basis of objective factors.

Ms de Segonzac then explained that the *F.G. v. Sweden* judgment contained unprecedented implications for the examination of asylum applications, particularly the obligation for the national authorities to assess of their own motion all the factors of which they were – or ought to be – aware irrespective of the choices expressed by the asylum-seekers regarding the grounds for their applications.

Lastly, the speaker showed that the dialogue between judges promoted a convergence of points of view while having regard to the realities and constraints affecting each one. That convergence of points of view was mutually enriching, both between the Court and the national courts and at the international level (see *J.K. v. Sweden*). However, it was also a challenge for a court dealing with cases on the ground. Taking the example of the CNDA, Ms de Segonzac reiterated the number of applications per year (40,000 in 2016) in order to give an idea of the scope of the task involved, and the number of judges (nearly 300) and rapporteurs (nearly 200) to show the need to devise training strategies based on an assessment of credibility. In any event, for asylum-seekers this would mean lending a more attentive ear, increased regard for the vulnerability of their situation and a real enhancement of their rights.

In the subsequent discussion, several points were raised and questions asked. I cannot go into all the details, but I will briefly mention the main points:

The discussion concentrated on the issue of *ex nunc* assessment. The participants tried to find a solution for the dilemma between the subsidiary role of our Court and the *ex nunc* assessment made in specific cases. However, no such solution could be found.

The discussions ranged between criticism of and support for the Court's approach. It was mentioned that the problem, to some extent, also existed at national level. Furthermore, the question was raised whether national authorities had the possibility of “taking a case back” for a fresh assessment, in particular when new relevant and disputed facts had come up before the Court. However, no clear answer was given. Regarding another question, namely whether Protocol No. 16 could offer a solution, no clear answer was found either.

FINAL REMARKS OF THE RAPPORTEUR:

It is the role of the European Court of Human Rights to give guidance on the assessment of credibility and to define the burden of proof. However, there are limits to this task and to our Court's examination when it comes to the assessment of concrete cases. My main “lessons learned” are:

first, the national authorities, in principle, are best placed to assess not just the facts but also the credibility of applicants and witnesses (keyword: competence); second, if the national authorities do their job, there is no need for our Court to intervene (keyword: subsidiarity) – we should not become an international immigration or asylum court; and third, coordination with other international authorities and courts is indispensable (keyword: dialogue).

Thank you very much.



Bruno Nascimbene

Former Professor of EU law
University of Milan

1. INTRODUCTION

Allow me first of all to thank the Court for inviting me to this prestigious seminar and for doing me the honour of giving me the floor at the concluding session, an honour which I share with Judge Ranzoni.

The title of the seminar encourages us to reflect on the lessons learned and accordingly the conclusions that can be drawn from the general reports and from those presented at the two workshops.

Time does not permit me to go into the details of the very interesting avenues for reflection that have been proposed to us and which would merit a wider and more thorough assessment than we have time for at this session.

I will therefore concentrate my remarks on Workshop 2, which was devoted to the reception of migrants, and make a few comments on the general subject of *non-refoulement* (Workshop 1 was devoted to an assessment of the credibility of asylum-seekers: the burden of proof and the limits of the ECHR's examination). If we are referring both to asylum-seekers and to migrants, *non-refoulement* can be regarded as a sensitive, or even a delicate, subject which engages lawyers from both a theoretical and a practical point of view.

2. GENERAL COMMENTS

I will confine myself to making a number of general remarks, before moving on to the reports presented at Workshop 2.

2.1. I would observe first of all that a major development of international law has been brought to light. The protection of human rights is an integral part of international law, not only because treaty rules have become a substantial standard-setting *corpus* on account of the many different aspects concerned, but also because a large part of these essential rights (right to life, security of person in its various forms) are part of customary law. The very principle of *non-refoulement* can be recognised as a human right which all the Member States of the international community guarantee as such to individuals.

2.2. The emergence and affirmation of human rights have placed substantial limits on State sovereignty over time. In this evolving framework it is especially the Universal Declaration of Human Rights and, at European level, the ECHR which have played a fundamental role.

2.3. Migrants and refugees have rights which fall into the category of human rights (this corresponds to a recent development in these rights and is one of the particular features of the protection of individual rights). They are people who are regarded as vulnerable and requiring special protection.

2.4. Migration is not a crime: it must be regulated or managed while having regard to its positive aspects. The eloquent reports of the United Nations Special Rapporteur, Mr Crépeau, and Judge Bianku have emphasised this point.

Affirmation of these rights has been a very recent phenomenon, and has received often varying attention from the international community, international organisations, national governments and public opinion. The courts have played an important role and have contributed to forging a conscience and awareness hitherto unknown.

3. RECEPTION OF MIGRANTS

3.1. The workshop on the reception of migrants concentrated on the situation of settled migrants, and therefore on the rights of the category of aliens who have already entered and are staying in a State (or living there because they were born in that State). The reports produced by Mr Grabenwarter and Ms Linder examined the problem of material and procedural guarantees. Both reports were very stimulating and constructive, as was the discussion. The national authorities, by virtue of the sovereign right of control vesting in them in accordance with a well-established (and well-known in the case-law) principle of international law, maintain a margin of appreciation which is nonetheless limited in many respects today.

3.2. I would like to point out firstly that the domestic case-law (Swedish in particular) and the case-law of the European Court of Human Rights, cited and explained by the rapporteurs, are very useful for drawing comparisons between different systems. Cross-fertilisation both between national courts and between them and the European Court of Human Rights is a precious asset.

Case-law and practice must take account of the commitments deriving from bilateral or multilateral treaties, and from primary and subordinate legislation of the European Union.

3.3. Secondly, regard must be had to the nature of the ties between the person and the country concerned. Strong and lasting ties may be decisive in establishing a level of integration which puts an alien residing in a State in the same category as a national citizen. The criterion of residence, or, better, integration or social ties, has become important in constructing the notion of nationality or residential citizenship. In my view, this concept must be properly taken into account in all cases where the issue is discrimination on the basis of nationality or ethnic origin (see *Biao v. Denmark*) and difference of treatment justifiable only if the measures provided for, such as extended length of residence, or possession of nationality, are held to be proportionate (in *Biao*, the twenty-eight years of nationality and residence rule was found to be disproportionate, the justification for the aims pursued being considered unacceptable).

Indirect discrimination deriving from national rules or practices is very often insidious: legislation, for example on the acquisition of nationality by birth and by naturalisation, may appear neutral, but its application could lead to discrimination contrary to Article 14 of the ECHR.

3.4. Substantive rights, such as the right to protection of family life (Ms Linder's report), the rights to freedom of expression and of association, the right of property (Mr Grabenwarter's report, which also addressed the subject of political rights and the limits provided for in Article 16 of the ECHR), and procedural safeguards must be effective.

Effectiveness (I fully share the opinion of our rapporteurs) is a *leitmotiv* in this sphere.

Foreign nationals cannot be effectively integrated if family reunification is prevented by obstacles that are not based on objective factors. The logic underlying Article 8 or Articles 5 and 6 of the ECHR would be jeopardised. European Union law, both in terms of Directive 2004/38 and Directive 2003/86 on family reunification by third country nationals, and the Charter of Fundamental Rights (Article 21 prohibiting any discrimination, including that based on race, ethnic origin or membership of a minority, Article 7 on respect for private and family life, and Article 47 on jurisdictional guarantees) constitute confirmation of the State's obligations to guarantee everyone a right linked to conditions of strong ties, from which there can be no derogation other than for compelling reasons. The "ECHR Charter" logic is the same.

3.5. We must therefore always ask ourselves whether national rules or practices are compatible with the prohibition of discrimination. The State's margin of appreciation gives the government latitude, according to the economic and social context, which may lead it to consider that differences of treatment between foreign nationals and citizens are compatible with that prohibition. In the area of social assistance, family allowances constitute a benefit for the family, protected by Article 8 of the ECHR (Ms Linder's report examined closely, as has been said, the problems relating to Article 8), and where, for example (see *Dhahbi v. Italy*), a foreign national lawfully residing and working in the country was paying contributions to a public insurance scheme, the State could justify a difference in treatment only on compelling budgetary grounds (which require the protection of national interests and, accordingly, justify the measure in question being regarded as proportionate).

3.6. The sphere of economic and social rights, in which it has not been possible to establish a consensus among the States (not only in international law, but also in European Union law), creates numerous difficulties with regard to recognition and enjoyment.

I think that the most important issue is to define, in general, the margin remaining available to the State in economic and social matters, and the justification of objective and reasonable limits. This has been observed with regard to family benefits, but the principle also applies to the right to education, protected by Article 2 of Protocol No. 1 (see, for example, *Ponomaryovi v. Bulgaria*, which is the subject of examination in particular in Mr Grabenwarter's report).

Education ranks among the most important public services provided by a State. If primary-school education, which promotes social integration and experience in living together, is compulsory and free, it must be so for all, both foreign nationals and nationals of the State in question. Where secondary or higher education is concerned and is neither compulsory nor free, the differences in treatment may be regarded as legitimate and justified. Here again, however, it will be necessary to examine the specific circumstances, and thus take account of the degree of integration and ties with the host country (such as length of stay, family ties, knowledge of the language, associative and cultural links established).

4. PROCEDURAL GUARANTEES AND EFFECTIVE REMEDY

4.1. A settled migrant should have the benefit of tightened procedural guarantees. Lengthy duration of stay, or birth on the territory of the State where the immigrant lives, studies, works and has family and social relations, are factors militating in favour of treating a foreign national in the same way as a national citizen. The criteria in the *Boultif* case justifying expulsion remain valid for the protection of family life referred to in Article 8 of the ECHR (the same is true of a person's private life, his or her social identity, the links maintained with his or her peers and the outside world).

4.2. A removal order should therefore be exceptional, as can be seen, moreover, from the "guidelines on forced return" of the Committee of Ministers (2005).

4.3. The most frequently asked question, and which represents a real problem for the national courts, concerns the guarantees which a settled immigrant should enjoy, and in particular the right of a foreign national having arguable complaints, based on the ECHR, to assert them, not only in law, but also in practice. The remedies and the possibility of redress must be effective and sufficient. We may well ask ourselves what is the real meaning of these terms, which appear in the Charter of Fundamental Rights of the European Union, in Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast), or in Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals: what is the thrust of the effectiveness of a remedy within the meaning of Article 13 of the ECHR?

4.4. A remedy with automatic suspensive effect, in the event of expulsion, would be desirable, but, if it is necessary to balance the competing interests, there is no absolute guarantee. A person exposed to a real risk of infringement of his right to life (Article 2, but also Article 4 of

Protocol No. 4) must have access to an effective remedy enabling him or her to obtain close and rigorous scrutiny by a national court (without ruling out the possibility that this scrutiny will be carried out by an administrative authority, in all cases independent and impartial, guaranteeing scrutiny of equal “quality”). In other cases it is the State’s interest which prevails: thus removal of the foreign national. An infringement of private and family life would not be sufficient to guarantee suspensive effect, but effective and sufficient procedural guarantees must be provided (Article 13 taken in conjunction with Article 8 of the ECHR; on Article 8, see Ms Linder’s report; on the procedural guarantees, see, in particular, Mr Grabenwarter’s report).

4.5. The Court has, moreover, specified that in accordance with Protocol No. 7 (Article 1) a deportation is contrary to a person’s human rights even if it has been implemented in conformity with the domestic law, where that law does not satisfy the requirements of the Convention: the Convention and its Protocols “must be interpreted in such a way as to guarantee rights which are practical and effective as opposed to theoretical and illusory” (see *Lupsa v. Romania*, § 60). The Court also recognises such rights in the event of collective expulsions in its case-law on Article 4 of Protocol No. 4, which prohibits this type of expulsion. Everyone has the right to “a reasonable and objective examination of his or her specific situation”.

States have a sovereign right to establish their own immigration policy, but “problems with managing migratory flows cannot justify a State’s having recourse to practices which are not compatible with its obligations under the Convention” (see *Georgia v. Russia*, § 177, and *Hirsi Jamaa and Others v. Italy*, § 179).

4.6. At a talk he gave last year (14 April 2016) at the Italian Court of Cassation, Judge De Gaetano (the moderator at our workshop) reiterated those principles, and, referring to the *Hirsi Jamaa* judgment, he also highlighted a rule of interpretation of treaty provisions which is a fundamental criterion: these must always be “interpreted in good faith in the light of the object and purpose of the treaty and in accordance with the rule of effectiveness” (§ 179).

4.7. A comment, lastly, on the role of the courts. They have contributed, I repeat, to raising consciousness of and sensitivity towards migration matters, which were unknown in the past. That point deserves recognition in the current context of a serious migration crisis in Europe and dangerous infringements of personal rights.

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



Guido Raimondi

President of the
European Court of Human Rights

OPENING ADDRESS

Presidents of Constitutional Courts and Supreme Courts, President of the Parliamentary Assembly, Secretary General of the Council of Europe, Excellencies, ladies and gentlemen,

I should like to thank you, personally and on behalf of all of my colleagues, for honouring us with your presence at this solemn hearing to mark the opening of the judicial year at the European Court of Human Rights. Since we are still, for a few days yet, in the month of January, I shall follow tradition and wish you a happy and successful year in 2017.

New judges joined us in the course of 2016, and I welcome them most particularly, since they are taking part in this solemn hearing for the first time as judges of the Court.

As is usual on this occasion, I shall begin by providing some statistical information about our Court's activity.

In 2016 the Court ruled in more than 38,000 cases. At the end of 2015 there were some 65,000 applications pending. This figure rose to 80,000 at the end of 2016, which represents an increase of 23%.

After a two-year reduction in the number of incoming cases, in 2016 we saw for the first time in several years a 32% increase in the number of new cases. This influx is to be explained by the situation in three countries: Hungary, Romania and Turkey.

Firstly, with regard to Hungary and Romania, for which the number of cases increased by 95% and 108% respectively in 2016, these essentially concern issues related to conditions of detention. Admittedly, these are priority cases, since they come under Article 3 of the Convention, but they are repetitive cases which reflect systemic or structural difficulties and require that solutions be found at domestic level.

Yet we are all aware that no immediate miracle cure exists for these situations, either in the country concerned, for which resolving this issue implies considerable political and budgetary measures, or in Strasbourg.

In the prison field, the Court admittedly defines principles, which, moreover, were clearly set out in 2016 in the *Muršič* judgment. On the basis of these principles it diagnoses a given situation in a member State. Nevertheless, and I repeat, it is at national level that the solutions must be found. This is possible, as is demonstrated by the example of Italy, for which the number of cases has been more than halved in two and a half years. This is the result of the Italian Government's policy, firstly in response to the *Torreggiani* pilot judgment, which concerned prison overcrowding, and secondly, with regard to the length of proceedings. This shows that where a Government has the will to resolve a situation and takes the necessary measures, the results quickly follow.

Then we come to Turkey. Recent years had seen a significant reduction in the number of pending cases from that country, essentially as a result of the existence of a direct appeal to the Constitutional Court, a remedy that we had considered effective. Indeed, I welcome the presence among us this evening of a large delegation from that Court.

Since last July's tragic attempted *coup d'état*, Turkey has climbed back up to second position, with a very significant increase in the number of cases.

Whatever the follow-up that will be given to these cases, this is a striking example of the direct impact of a major political crisis in a member State on the work of our Court.

To close this point, I would note that this week's developments in Turkey are encouraging. The creation, by legislative decree, of a commission with responsibility for examining the appeals lodged in response to the decisions taken since the attempted *coup d'état* is an excellent initiative, particularly since a judicial appeal will lie against the decisions taken by that commission.

In any event, whatever the country concerned, it is essential to adopt specific and targeted strategies if we really wish to attack the backlog of cases.

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A year ago, in this same room, I was discussing the numerous challenges that the Court would have to face in 2016. Little did I imagine at that point the **major** threats that Europe would have to confront over the year. I have already mentioned the attempted *coup d'état* in Turkey, but of course I am also thinking of the terrorist attacks which have continued to plunge our continent into mourning, whether in Nice, Brussels, Berlin or Istanbul.

Terrorism, economic crisis, the mass arrival of migrants: Europe must square up to all of these challenges simultaneously. And as though this tragic context were not enough, an **identity** crisis is causing some States to turn inward, Brexit being the apogee of this trend. We are also seeing a re-assessment of the rule of law. As Emmanuel Decaux has noted, the law has become "an unbearable constraint" in some quarters.

Yet the rule of law is what sets Europe apart: it is one of the achievements of our civilisation, **a rampart against tyranny**. This is what Europe represents: a part of the world where the rules of the democratic game have been laid down, and where compliance with these rules is guaranteed by the Constitutional and Supreme Courts.

For its part, the European Court of Human Rights has contributed for almost sixty years to establishing a community of values in Europe and, in so doing, has helped to consolidate the rule of law. It is the guarantor of a common area of protection for rights and freedoms. In doing battle with arbitrariness, it too oversees compliance with the rules of the democratic game.

The Court continued to play this role to the full in 2016, by maintaining the quality of its case-law. From this perspective, it cannot be disputed that the past year was a particularly rich one, making it all the more difficult to select the cases that I wish to refer to this evening.

I have mentioned the rule of law: it was one of its fundamental principles, the independence of the judiciary, which was at stake in the case of *Baka v. Hungary*. The applicant, Mr Baka, President of the Hungarian Supreme Court, alleged that his mandate had been prematurely terminated as a result of the views he had expressed publicly, in his capacity as President of the Supreme Court, in respect of legislative reforms affecting the courts. Our Court found in his favour, and held that there had been an interference with the exercise of his right to freedom of expression. Such a measure could not serve the aim of increasing the independence of the judiciary. Yet the independence of the judiciary remains a marker for a **State governed by the rule of law**.

Presidents of Constitutional Courts and Supreme Courts,

If judges end up afraid to express their opinions in the exercise of their functions, this will inevitably lead to a weakening, or even the disappearance, of one of the foundations of democracy.

This is what makes *Baka* a **landmark** judgment.

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For several years we have been powerless spectators to these images of human beings launching themselves onto the seas and along the highways in an attempt to reach Europe: "When Humans become Migrants", to repeat the very apt title of Marie-Bénédicte Dembour's book.

It is precisely this tragedy that lies at the heart of the *Khlaifia v. Italy* judgment, delivered at the end of 2016. It concerned the holding, in the well-known Lampedusa reception centre, then on ships in Palermo harbour, of irregular migrants who had arrived on the Italian coasts following the events of the "Arab Spring".

We held that their deprivation of liberty, without any clear and accessible legal basis did not satisfy the general principle of legal certainty, and that they had been unable to enjoy the fundamental safeguards of habeas corpus, as laid down in the Italian Constitution.

In fact, the refusal-of-entry orders issued by the Italian authorities contained **no** reference to the applicants' detention, or to the legal and factual reasons for such a measure, and they had not been notified of them "promptly". Nor did they have any remedy by which they could have obtained a judicial decision on the lawfulness of their detention.

Protection against arbitrariness, the necessity of a remedy to challenge a judicial decision – these are the **essential** elements in a State governed by the rule of law, and they were absent in the *Khlaifia* case.

The mass arrival of migrants places national authorities in a very difficult situation. However, although this judgment reiterates that there are principles from which States cannot derogate, it did not find a violation of Article 3 of the Convention on account of the conditions in which the applicants were held. Nor did it consider that there had been a collective expulsion of aliens, which is prohibited by a Protocol to the Convention.

The judgment thus provided balanced and reasonable responses to these difficult questions – but it did so with due respect for our values.

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The judgment in *Paposhvili v. Belgium*, delivered last December, has already received widespread coverage. It is noteworthy in several respects. **Firstly** in its content, and **secondly**, from the perspective of our relationships with the national supreme courts.

The background to this case is relevant. You will remember that in 2008 the Court had held, in the case of *N. v. the United Kingdom*, that it was possible to expel a Ugandan national suffering from Aids to her country of origin, without this entailing a violation of Article 3. It had found at that time that a State could only be prevented from expelling a sick alien "in very exceptional cases, where the humanitarian grounds against removal" were compelling.

This case-law attracted criticism. The Court's approach was subsequently reaffirmed in several Chamber judgments. Nonetheless, the judges who had expressed their views in a separate opinion, **like the legal theorists**, voiced the hope that the Grand Chamber would one day return to this question.

This has now been done, and the *Paposhvili* judgment departs from the *N. v. the United Kingdom* case-law, clarifying it in a manner that is more favourable for applicants. The applicant in this case, who was suffering from a very serious illness and whose condition was life-threatening, did not wish to be deported to Georgia. The Court considered that in the absence of any assessment by the domestic authorities of the risk facing him in Georgia, with due regard to his state of health and of whether or not there existed appropriate treatment in the destination country, the Belgian domestic authorities did not have available to them sufficient information to conclude that the applicant, if returned to Georgia, would not run a real and concrete risk of treatment contrary to Article 3 of the Convention.

The *Paposhvili* judgment provides important explanations and clarifies the approach followed to date. Admittedly, the threshold of severity for preventing the deportation of an alien suffering from an illness remains high. However, the work of assessment is **primarily** for the national authorities, who must put in place adequate procedures in order to evaluate the risks run in the event of deportation. **This is proper implementation of the principle of subsidiarity.** The assessment must take account both of the general situation in the receiving State and of the alien's particular case. It is necessary to obtain assurances that medical treatment will be available and accessible to the person concerned.

However, this case also warrants examination in terms of our relationship with the Supreme Courts. In practice, the *N. v. the United Kingdom* judgment had led the Belgian authorities to grant leave to remain only in really very exceptional circumstances, where the individual concerned was close to death. Yet the Belgian supreme courts considered that wider protection **ought** to be provided. We see here a very interesting dialogue between the domestic court and our Court, in which it is the national court which, **as it were**, asks us to adopt a less restrictive position, one that is more protective of the rights of applicants.

The voices raised in Brussels have thus been heard in Strasbourg.

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A little more than a year ago, together with the French supreme courts, the *Conseil d'Etat* and the Court of Cassation, we launched a trial phase for our Network for the exchange of information on the case-law of the European Convention on Human Rights. It has proved highly productive, and I should like to thank Jean-Marc Sauvé, Bertrand Louvel and Jean-Claude Marin, senior figures from these courts who have honoured us with their presence this evening, for agreeing to be our first partners in this project. They have been joined by **28** superior courts from **21** countries. I applaud the great success of this initiative. I should also like to extend a particular welcome to Francisco Pérez de los Cobos, President of the Spanish Constitutional Court, who is here with us this evening and who signed up to the Superior Courts Network this very morning.

Generally speaking, the dialogue with other national and international courts was very intense in 2016. This is not the moment to list all of the meetings which took place. Of the delegations which came to study about our Court, I will mention only those which travelled from another continent, namely those from South Africa, Brazil and Japan. It is always a source of **pride and satisfaction** on such occasions to note that the courts in these distant lands follow our case-law and take it into account in their own decisions.

Mr Bertrand Louvel, President, I felt this pride in a particular manner when hearing you, at the opening of the Court of Cassation's judicial year, utter words that I should like to repeat here: in ratifying the European Convention on Human Rights, "France voluntarily placed itself under the judicial authority of the Strasbourg Court. **The genius of this Court** is that it lies at the confluence of the various European legal traditions, of which it proposes a synthesis, **judgment after judgment.** Striving to make discerning use of the national margin of appreciation available to it, the Court of Cassation has loyally followed the approach taken by European Court, of which it has become an **active** partner through its working groups and the judgments which result from these deliberations, reflecting little by little a renewed conception of the traditional legalistic method".

President Louvel

Please accept our solemn thanks.

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One of the undoubted highlights of 2016 was the fact that the German-speaking Constitutional Courts of Germany, Austria, Switzerland and Liechtenstein chose to hold their two-yearly meeting at the European Court of Human Rights. I consider it a symbol of our proximity that this meeting, traditionally held at the seat of one of these Constitutional Courts, took place here in Strasbourg.

Among the attendees were the German-speaking judges of the Court of Justice, and foremost among them its President, my friend Koen Lenaerts. I welcome him most particularly this evening, since he is attending the opening of our judicial year for the first time in his capacity as President of the Court of Justice of the European Union.

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The ties which exist between our two Courts are much stronger than is generally thought. Indeed, our meeting in 2016 was particularly useful and warm.

Laurence Burgorgue-Larsen, the renowned observer of our respective case-laws, is correct in pointing out that "the necessary requirement of maintaining coherence between the two European systems leads the Strasbourg Court to **ally itself** with EU law by drawing attention to possible shortcomings in European Union law, particularly in the judgments of the Court of Justice". She is referring, of course, to our judgments in *M.S.S. v. Belgium and Greece* and *V.M. v. Belgium*.

I cannot cite the Court of Justice this year without mentioning the judgment in *Avotiņš v. Latvia*. Our Court was required to analyse the mutual recognition of foreign judgments. The judgment **upheld** the doctrine of equivalent protection in respect of the European Union, a concept which originated in the *Bosphorus* case-law. Nonetheless, the Court specified that, **where the conditions for application of the presumption of equivalent protection are met**, it must satisfy itself that "the mutual recognition mechanisms do not leave any gap or particular situation which would render the protection of the human rights guaranteed by the Convention manifestly deficient".

In terms of the relationship between the international legal systems, this judgment is consistent with our permanent quest for coherence and, **above all, clarity for European citizens.**

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Without wishing to be exhaustive, it would be remiss of me not to mention the great honour bestowed by the Municipality of Nijmegen in awarding us the Treaties of Nijmegen Medal. It will be recalled that the Nijmegen Treaties put an end to several European wars. In awarding us this Medal, the organisers wished to emphasise the work carried out by our Court in the service of peace and tolerance. This prestigious distinction is a spur to pursue our mission.

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Ladies and Gentlemen,

Of all the **distinguished** individuals whom I had the great honour of meeting in the course of 2016, there is one who left a particular impression: I refer to Silvia Fernández de Gurmendi, President of the International Criminal Court. It was my wish that she be the guest of honour at the solemn opening of our judicial year.

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Madame,

You come from a country, Argentina, whose very name fires the imagination, one which is both geographically **distant** and yet culturally **so close** to Europe.

A **distinguished** lawyer and **high-level** diplomat, you played a **major** role in the negotiations leading to the adoption of the Rome Statute, the international treaty which set up the International Criminal Court. You have been a judge at that Court since 2009 and its President since 2015.

The International Criminal Court is the fruit of a dream that seemed unachievable at the beginning of the 20th century: the creation of a permanent international court responsible for promoting human rights and international humanitarian law at the global level, and for bringing to account those who breach these rights in the most serious way.

Your court has much in common with ours. Admittedly, almost all of the cases that we judge would be inadmissible before your Court.

But, **like us**, you defend the same hard core of fundamental rights and, in particular, the right to life.

Like us, you accept the idea that it is necessary to create an international order based on human rights.

Like our Court, you are sometimes criticised. But you continue to plough your furrow, with a view to ensuring that the perpetrators of war crimes, genocide or crimes against humanity do not go unpunished.

Madame President of the International Criminal Court, dear Silvia Fernández de Gurmendi,

We serve the same universal values and your presence among us today is a great joy and an immense honour.

I would now kindly invite you to take the floor.



Silvia Alejandra Fernández de Gurmendi

President of the International Criminal Court

COMPLEMENTARITIES AND CONVERGENCES BETWEEN INTERNATIONAL CRIMINAL JUSTICE AND HUMAN RIGHTS LAW

President Raimondi, Honourable judges, Mr Secretary-General, Excellencies, Ladies and gentlemen,

Thank you very much, President Raimondi, for your kind words of introduction. I am very honoured to address your audience today.

This solemn hearing is certainly one of the most important judicial gatherings of the year. It celebrates the efforts of the European judicial community to safeguard the fundamental rights of all people in Europe.

These efforts echo beyond the Council of Europe area. The jurisprudence of this court inspires and influences efforts in other continents as well and thus helps to promote human rights worldwide.

The fact is that today's world is interdependent and interconnected, and that applies to courts as well.

Since I became President of the International Criminal Court two years ago, I have come to realize more than ever the importance of building connections between judicial institutions. Last year, I was very pleased to visit the European Court of Human Rights. I had a very productive discussion with President Raimondi on different steps we could take to bring our two courts closer together.

And I feel privileged that I have been invited to today's solemn hearing. This ceremony unites key actors of what is the oldest and largest regional human rights mechanism. I come myself from a different continent, a continent that has also invested great efforts in overcoming a legacy of violence including by setting up a regional human rights commission and court.

The International Criminal Court and other criminal tribunals are different from human rights courts. Criminal courts do not monitor respect for human rights in general, but focus exclusively on individual criminal responsibility for certain gross violations of human rights that may qualify as international crimes when they attain predefined thresholds. Importantly, international criminal courts seek to ensure the responsibility of individual perpetrators of those crimes regardless of whether they are state or non-state actors.

Notwithstanding the differences between our courts, we do share the same values. More importantly, we share a common purpose. We all aim at promoting the well-being of all by fostering the rule of law.

We also share common roots. As the world marks today the International Holocaust Remembrance Day, we are reminded that our institutions are a result of the international community's determination to prevent the repetition of the horrors of the past.

Despite their differences, international criminal justice and human rights law interact in many ways.

In accordance with its founding treaty, the Rome Statute, the ICC must apply and interpret its law in a manner consistent with internationally recognized human rights. Human rights law and jurisprudence have influenced many of our substantive and procedural provisions. They also guide us in areas where our own provisions are silent or very general, such as the detention of persons or reparations to victims.

Let me address some areas of complementarity and convergence in more detail.

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Human rights and humanitarian law are at the core of the prohibition of genocide, crimes against humanity and war crimes. Not so distant regional experiences of human rights abuses are reflected in the acts prohibited under those crimes. The inclusion of apartheid, enforced disappearances and forced pregnancy as crimes against humanity or war crimes are important examples, intended to take into account specific forms of egregious human rights violations suffered in particular in Africa, Latin America and Europe.

In today's world, international crimes are not only committed by individuals acting on behalf of States; non-State actors also perpetrate mass crimes and other atrocities. Since the Second World War, the nature of armed conflicts has changed drastically. We have witnessed an ever-growing participation of non-State groups in armed conflicts, while classical State-against-State confrontations have become the exception rather than the rule.

The international community has also taken stock that armed conflicts are not the only situations where mass atrocities are perpetrated and that civilian populations are victimised in time of peace by both State and non-State groups.

International humanitarian law and international criminal law have therefore developed in order to better reflect modern mass violence. As a result, the legal distinction between international and non-international armed conflicts is now blurred.

Crimes against humanity have also considerably expanded since Nuremberg to encapsulate various forms of criminality committed in a widespread or systematic scale by both State officials and private individuals, in both times of peace and war.

These developments provide legal basis to sanction most atrocities committed today. Criminal responsibility for such atrocities attaches to all individuals equally, whether they are State or non-State actors.

Most of the cases currently before the ICC involve non state actors. So far, all convictions involve non-State actors. Final convictions have been entered against two leaders of militia in the Democratic Republic of the Congo (Mr Lubanga and Mr Katanga) and a member of a group associated with Al-Qaeda, Mr Al Mahdi, convicted for the destruction of cultural property in Timbuktu, Mali. Another conviction against Jean Pierre Bemba, for crimes committed in Central African Republic by non-State forces under his command is now under appeal.

We hope these proceedings send a powerful message to all those involved in situations of violence: **the rule of law knows no exception**. Thanks to the remarkable development of international criminal law in the last decades, non-State actors are now on notice that they too can be held accountable for participation in mass atrocities.

As said, human rights law has also influenced the procedural scheme of the ICC. The Rome Statute encapsulates fair trial rights enshrined in human rights instruments, including the right to have adequate time and facilities for the preparation of the defence, the right to legal assistance

of the accused's choosing and the right to have free of any costs interpretation and translations in a language that the accused fully understands and speaks. This is an aspect that has proved to be extremely challenging in practice at our Court.

The Rome Statute, in an historic step forward, has made progress from an exercise of purely retributive justice to a new dimension that includes elements of restorative justice. Accordingly, victims may participate in all phases of the proceedings to express their views and concerns, and to seek reparation in the event of a conviction.

The definition of victims and harm, as well as the procedural and substantive rights to be accorded to them, have been influenced by human rights law and the jurisprudence of regional courts of human rights.

The distance between our proceedings at The Hague from communities directly affected by the crimes is a major challenge for a global Court. In order to ensure understanding of and meaningful access to justice by victims, the ICC makes great efforts to raise their awareness about the system and bring justice closer to such communities.

Recently, we took a number of initiatives to reach out to them in Northern Uganda by organizing viewing sessions in various localities particularly affected by the crimes allegedly committed by the Lord Resistance Army. This has made it possible for people to follow the trial against Mr Dominic Ongwen, an alleged former commander of this rebel group.

The Court can also choose to hold proceedings *in situ*. Unfortunately security reasons have prevented us from doing it thus far. We hope to do so in a near future as this would be an effective way of bringing our Court closer to those directly concerned by the crimes.

As said, human rights law and jurisprudence have influenced the approach of the ICC to reparations to victims. Under the Rome Statute, reparation orders are not directed against States, but at convicted persons. In certain cases, reparations can be made through a special trust fund for victims, which receives voluntary donations from states and private entities and individuals.

Following convictions, the ICC has now started to test this innovative legal framework. Currently, reparations are being considered in relation to the enlistment and conscription of child soldiers, attacks against the civilian population, sexual violence and the destruction of cultural property.

The distance of proceedings in The Hague from the actual place where crimes took place also raises human rights challenges regarding the detention of our suspects and accused persons coming from distant countries. The ICC must have due regard to cultural differences and needs to ensure, *inter alia*, the maintaining of sufficient family links. Again, human rights law and jurisprudence guides the responses provided by the Court.

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Colleagues, Excellencies, Ladies and Gentlemen,

It can be seen clearly from the examples I have given that there are many areas of convergence between human rights law on the one hand and the theory and practice of international criminal law on the other. We share a common goal, that of promoting the rule of law. That is why it is important for us to listen to each other as much as possible. It is vital that we should be able to count on our mutual support in order to send together, on the basis of our common values, a clear message in favour of justice and an end to impunity.

This solemn occasion represents a unique opportunity for us to engage in a dialogue, so that we can strengthen our mutual understanding and our commitment to see justice done.

It is equally as important to enter into a dialogue with the national courts, and in that connection I am glad to see here today so many representatives of judicial authorities from the various States.

The International Criminal Court and the European Court of Human Rights are both courts of last resort. They both act to complement the work accomplished at an earlier stage by the national courts. Together, we are all participants in a system of global justice, and one which seeks to protect the most precious values of our societies.

National courts have a role that is essential – and even crucial – in upholding the rule of law. The outcome of our efforts to ensure respect for human rights and an end to impunity for international crimes depends above all on the willingness of the States and their capacity to achieve this.

This requires enacting legislation to that end at national level, particularly for the purpose of implementing the Rome Statute and other major human rights and international humanitarian law treaties which have now classified as criminal offences some of the most heinous acts. And this also means having the requisite jurisdiction at a national and an extraterritorial level to investigate those crimes and prosecute the perpetrators.

The responses of the domestic courts are taken into account by the International Criminal Court. In its turn, our Court may also have an influence on the way in which national and regional courts deal with international crimes. This influence takes different forms, in particular by the incorporation into a State's legislation of the relevant crimes, the different types of responsibility and the general principles of the Rome Statute. In many countries, the definitions which have been adopted are either identical or very similar to those of the Rome Statute.

The adoption of analogous provisions laying down criminal sanctions for those crimes at national level is a major step forward for the harmonisation of international criminal law – a harmonisation which contributes in turn to the strengthening of the system of global justice.

The international, national and regional institutions can together become stronger by their mutual reinforcement through a system of global justice. We recently had occasion to commend the regional approach which provided a solution for the momentous trial of Hissène Habré before the Extraordinary African Chambers within the courts of Senegal.

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Colleagues, Excellencies, Ladies and Gentlemen,

Our passion for justice is what unites us. While we each have different mandates, our aspirations are the same. Our institutions, although they have followed different paths, are working towards the same goals.

By uniting in our efforts to achieve these objectives we can make the system of global justice more effective.

On behalf of the International Criminal Court, I wish the European Court of Human Rights a productive and successful judicial year 2017.

Thank you for your attention.

PHOTO





PREVIOUS DIALOGUES BETWEEN JUDGES

- Dialogue between judges - 2016
- Dialogue between judges - 2015
- Dialogue between judges - 2014
- Dialogue between judges - 2013
- Dialogue between judges - 2012
- Dialogue between judges - 2011
- Dialogue between judges - 2010
- Dialogue between judges - 2009
- Dialogue between judges - 2008
- Dialogue between judges - 2007
- Dialogue between judges - 2006
- Dialogue between judges - 2005