

THE 2022 HELP NETWORK CONFERENCE

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KEYNOTE ADDRESS

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Introduction

Dear Minister Byrne, Dear Ambassador Kuneva, Dear Director General, Dear colleagues, Dear friends, both here in person and afar, attending via Kudo.

Thank you very much to the organisers for asking me to address this year's annual HELP Network Conference. It is a great honour and pleasure to be with you. President Spano regrets that he cannot be here today and asked me to convey his apologies.

I would also like to thank the Irish Presidency, under whose auspices this Conference takes place, as well as the dynamic HELP team within the Council of Europe.

To paraphrase what the President of the Court said at the Solemn Hearing, this year's conference takes place "at a transformative moment in our European history, a moment when the relative peace and security which we have taken for granted on our continent has been shattered by Russia's war in Ukraine". In these circumstances, the importance of the structural integrity of the "Convention ... one of the greatest peace projects in human history" as well as other instruments safeguarding fundamental human rights takes on renewed significance. After all, as the preamble to the Statute of the Council of Europe highlights, the protection of fundamental human rights and the rule of law are the principles which form the very basis of all genuine democracy, which we are all charged to safeguard. I am grateful to have been given an opportunity to reflect afresh on this in my preparations for today.

I would also like to note that, as a judge who before my election to the Court was a senior legal practitioner in my home jurisdiction, I am particularly delighted to be addressing judges and legal practitioners and some of the associations so committed to supporting them. As I hope my comments today will highlight, I am reminded every day in my current role to what degree our work and our effectiveness as a Court relies on your tireless efforts and cooperation. The Court as an institution has also - separately to the dialogue with the national courts - recognised the importance of lawyers through its regular contacts with the CCBE and, since last October, its biannual meetings with the national bar associations.

Ultimately, "We are all in this together"

I say this in particular because, as practitioners and judges, you are a part of an interconnected and non-hierarchical structure of human rights courts that is the

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Convention system. When considering the relationship between the Strasbourg Court and the national courts, it is important to remember that the ECtHR does not occupy a superior position to the courts of the member states. Instead, we are in partnership – sharing responsibility for the effective implementation of the Convention.

Neither the Court's mandate nor the rights guaranteed by the Convention are the prerogative of the Strasbourg Court, but, as noted in the Convention preamble, they are an expression of the shared pan-European heritage of all Council of Europe members. Thus, although the Strasbourg Court plays an undeniably critical role in this paradigm, the practical extent of its intervention ought to be that of the safety net – operating as a check on the effective implementation of the Convention, an implementation which occurs chiefly in the national courts, who have the primary responsibility in securing the rights and freedoms set out therein.

Subsidiarity

This relationship has long been recognised by the Court through the principle of subsidiarity, a principle that has now been formally added to the Convention's preamble. The principle of subsidiarity restrains the Court from entertaining an application where the issue can be more properly determined at the local level, demonstrating the Court's preference to defer to the national court's assessment of its own adherence to the Convention, provided its judgment and reasoning conforms to its standards. This is fitting, considering the central role of domestic human rights courts – which, as noted by the President of the Court during his address to the HELP Conference last year - "is the primary arena for resolving Convention disputes, not Strasbourg."²

In this context, the Court also recognises a variable margin of appreciation towards the judgments of the national courts, reassuring member states that judicial decisions impacting their national constitutional identity are primarily decided at home and not by a distant court.

In the 2018 case, *Ndidi v. the United Kingdom*, in applying the principle of subsidiarity, the Court found no violation, reaffirming that where independent and impartial domestic courts have carefully examined the facts, applying the relevant human rights standards consistently with the Convention and its case-law, and adequately balanced the applicant's personal interests against the more general public interest in the case, it is not for the Court to substitute its own assessment of the merits (including, in particular, its own assessment of the factual details of proportionality) for that of the competent national authorities. The only exception to this is where there are shown to be strong reasons for doing so.³ Despite this formal-sounding articulation, the principle of subsidiarity and the margin of appreciation as its corollary is not a formal division, but an aspect of the dialogue between courts sitting in streamline.

Apart from matters of principle underlying subsidiarity, the highly pragmatic truth is that the Court depends on it. Without the benefit of quality domestic judgments and the legal professionals which make them possible, the Court's effectiveness would be greatly reduced. There are three reasons for this:

1. The first is that the principle of subsidiarity acknowledges the reality that, in a multilateral enterprise, national authorities have direct democratic legitimation and are

² Speech by Robert Spano, at the 2021 HELP Network e-Conference, Strasbourg, France, 1 July 2021, "Human Rights Responses to Global Challenges".

³ *Ndidi v. the United Kingdom*, no. 41215/14, 29 January 2018, § 76.

better equipped than the Strasbourg Court to evaluate the local needs and conditions, as they relate to the Convention's standards.⁴

2. Secondly, the Court depends on the work of good lawyers and national judges in order to effectively and efficiently adjudicate the cases that come before us:

a. Good lawyers frame the case for the Court – drawing out aspects which require close examination, collating the required evidence and communicating key facts. Particularly in an adversarial setting, and because the Court is without its own, dedicated fact-finding body, we would simply be blind without the work of professional lawyers.

b. National judges are likewise indispensable to the Court – again for the communication of factual findings, but also in providing quality, comprehensive and well-reasoned judgments which enable us to determine whether there has been exhaustion of remedies and whether the Court's case law and standards were properly applied. But not only that, the dialogue with the national judges is also essential as a corrective and in order to enable the Convention protection to develop and adapt as a "living instrument".

HELP provides excellent programming in this area including essential training on how to draft quality judgements which comply with Council of Europe standards. This tool enhances the dialogue between Strasbourg and the national human rights courts and practitioners – which ultimately ensures decisions being taken quicker and closer to home and victim and also reduces the burden on the Strasbourg Court.

3. On this latter point, I will only mention that the Court moves at an incredible pace – producing a massive amount of case law, a pace that is only possible due to its adapted, highly efficient processes identified in its new priority policy "A Court that matters",⁵ and due to the diligent and detailed work of the domestic courts and all of you. In 2021 alone, the Court decided 36,092 applications in 3,131 judgments⁶ - by comparison, in 2020 the U.S. Supreme Court heard arguments on only 73 cases in the same year and disposed of 53 in signed opinions.⁷

In view of this workload, even if it were, in principle, possible for the Court to take on the role of a human rights court of first instance, it is in practice virtually impossible, and would result in the delay or denial of access to justice for many applicants. The right to meaningful access to justice thus depends on national courts and legal practitioners.

Key Cases

With such a rapid output of cases, I have picked out a select few from the last year to highlight for you today with the aim of giving a small update into what the Court has been up to:

Vavricka and Others v. the Czech Republic is a prime example of the Court's new flexible prioritization strategy in action, which allows the Court to categorise cases for

⁴ Organising Committee, *Background Paper: Seminar to mark the official opening of the judicial year*, http://www.echr.coe.int/Documents/Seminar_background_paper_2015_ENG.pdf, at § 17 (Accessed 28 June 2022).

⁵ See *A Court that matters/Une Cour qui compte: A strategy for more targeted and effective case-processing*, at https://www.echr.coe.int/Documents/Court_that_matters_ENG.pdf, (Accessed 28 June 2022).

⁶ Annual Report 2021 of the European Court of Human Rights, Council of Europe, https://www.echr.coe.int/Documents/Annual_report_2021_ENG.pdf, at 179 (Accessed 28 June 2022).

⁷ Supreme Court of the United States, *2020 Year-End Report on the Federal Judiciary*, <https://www.supremecourt.gov/publicinfo/year-end/2020year-endreport.pdf>, at 5 (Accessed 28 June 2022).

prompt adjudication based on characteristics such as urgency, novelty, or interest.⁸ This case arose from applications filed well before the COVID pandemic, challenging a statutory child vaccination duty. The Grand Chamber of the Court heard and determined this case at an early stage of that pandemic and found no violation in the mandate or the national court's assessment of it⁹, as the statute pursued a legitimate aim in the interest of public safety and economic wellbeing, and the prevention of disorder¹⁰. In doing so, the Court identified important principles when considering the imposition of a vaccine mandate, including "the value of social solidarity, the purpose of the duty being to protect the health of all members of society, particularly those who are especially vulnerable with respect to certain diseases and on whose behalf the remainder of the population is asked to assume a minimum risk in the form of vaccination".¹¹

I should also mention the landmark judgments in *Big Brother Watch and Others v. United Kingdom* and *Centrum för rättvisa v. Sweden*, concerning the bulk interception of cross-border communications and safeguards against abuse. While the Court concluded that bulk interception regimes were, in principle, permissible under the Convention, it set out the fundamental "end-to-end" safeguards required of these regimes under the Convention. In its judgments the Court paid a great deal of attention to the work and specific findings of the national authorities and the domestic courts both of the states concerned and beyond; an example of the dialogue I referred to to enable us to understand and balance the competing concerns at play.

Last but not least, I should mention the recent Grand Chamber judgment in *Grzęda v. Poland*, in which the Court considered the most fundamental aspects of the rule of law, namely the independence of the judiciary and, more specifically, the conditions of appointment of judges. In finding a violation of Article 6 § 1 the Court emphasised *inter alia* the need to protect a judicial council's autonomy, notably in matters concerning judicial appointments, from encroachment by the legislative and executive powers, and its role as a bulwark against political influence over the judiciary.

Interplay with EU

This latter case also demonstrates the Court's detailed engagement with the judgments of the Court of Justice of the EU and in particular its jurisprudence in relation to the EU Charter of Fundamental Rights. In its approach, the Court is of course aware of the additional complexity of the legal landscape facing legal professionals which arises out of the interplay between the Convention and the Charter. As you are aware, the Court seeks to engage with that relationship through the operation of a presumption of equivalent protection to the effect that a State has not departed from the requirements of the Convention when it does no more than implement legal obligations flowing from its membership of the organisation. However, any such presumption can be rebutted if, in the circumstances of a particular case, it is considered that the protection of Convention rights was manifestly deficient.¹²

Likewise, of course the Convention's integral role in the EU Charter of Fundamental Rights is enshrined in the conformity clause of Article 52(3), which provides that "so far as this Charter contains rights which correspond to rights guaranteed by the Convention

⁸ See *A Court that Matters*, cited above.

⁹ *Vavříčka and Others v. the Czech Republic* [GC], nos. 47621/13 and 5 others, §§ 309-311.

¹⁰ *Ibid.*, § 272.

¹¹ *Ibid.*, § 279.

¹² *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* [GC], no. 45036/98, 30 June 2005, § 159; *Michaud v. France*, no. 12323/11, 6 March 2013, § 102.

for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by said Convention”;¹³ not to mention Article 6 of the TEU which both renders the rights guaranteed by the Convention “general principles” of EU law and mandates EU accession to the Convention; something that is currently under negotiation.

HELP Programming

At this point, what becomes apparent is the sometimes staggering volume of legal developments and authorities confronting national judges and lawyers; added to the significant output of the Court of Human Rights, there is the law as it develops in your own jurisdictions, as well as, at least for those of you whose Member States are members of the European Union, the judgments of the CJEU. To be honest, I sometimes have difficulty staying on top of the case law just from *this* court and remember how much more difficult it is to keep up with all of those separate but interconnected developments in your shoes!

That is, of course, where the HELP Programme provides excellent assistance by *inter alia* synthesizing case law and facilitating free, accessible training, making it possible to stay abreast in this fast-paced, and at times, diffuse international landscape.

With regards to the CJEU, the HELP in the EU Programme provides programming which on a thematic basis gives practitioners the tools to navigate and comparatively assess the protections across different instruments, and to clarify the requirements of overlapping regimes.

In this context I would like to highlight the close cooperation which the Court and in particular its Registry lawyers have with the HELP team and its work. By participating in this way, human rights experts in the field are able to share their knowledge and produce the high-class training modules HELP provides to you.

Through the cooperative exchange of expertise of HELP’s programming and through other valuable platforms such as the Supreme Court Network, and the Court’s own robust knowledge sharing efforts, we strive to strengthen the community of European human rights judges and practitioners on whom we rely to interpret and apply the Convention’s standards at the national level – which hopefully makes this task a little easier.

The Rule of Law and Legal Professionals

Which brings me to my final point.

With all that is asked of human rights lawyers and judges, their ability to operate independently, unburdened by harassment, is fundamental to maintaining the respect for the rule of law and fundamental human rights which is core to any democracy.

Although there has been extensive literature on the rule of law, I consistently return to Lord Bingham’s definition in his influential work the *Rule of Law*, in which he summarises the concept as “all persons and authorities within a state, whether public or private, should be bound by and entitled to the benefit of laws publicly and prospectively promulgated and publicly administered in the courts.”¹⁴ Lord Bingham also outlined eight fundamental principles of the rule of law, one of which requires that, in order to establish

¹³ EU Charter of Fundamental Rights, Article 52(3).

¹⁴ Lord Bingham, *The Rule of Law*, (2007) 66 Cambridge Law Journal, at 80.

a rule of law, the law must also protect human rights.¹⁵ The other essential reference point is, of course, the Venice Commission's 2016 Rule of Law Checklist.

As I have already indicated, however, human rights and the rule of law cannot be had separately – as eloquently expressed by my colleague Vice-President O'Leary, "For the Strasbourg Court...respect for the rule of law, human rights and the requirements of a democratic society are a set of intertwined and mutually reinforcing foundational principles which have always lain at the core of the Conventions and the rights and freedoms it provides. Concern for the rule of law has not recently come into vogue in Strasbourg because, quite simply, it has never been out of vogue."¹⁶

As human rights judges and practitioners, you are at the very juncture of these foundational concepts. Just as individual applicants rely on you to represent and protect their rights, your national governments also rely on you to provide counterbalance and legitimacy to the legal system, which are absolutely indispensable to the rule of law. And, as I have already stressed here today, the Strasbourg Court itself would be blind without the efforts of national lawyers and judges to fulfil this role.

As some of our recent case-law has highlighted again, the independence of the judiciary and the legal profession is therefore critical to maintaining the rule of law and protecting human rights. However, judges and lawyers continue to face pressure, harassment, and worse while carrying out their professional duties. In response, the Court has continued to strive to defend the independent judiciary in its judgments, understanding that there is a paramount need to protect it as a critical bulwark against abuses of power.¹⁷ This continues as a recurring issue of importance to the Court, as we recognise that without your committed service as human rights practitioners and judges, the Convention would quickly become an empty promise.

Closing

Let me close by reiterating that the future of the Convention depends on its implementation in domestic jurisdictions, and your efforts as judges and lawyers are critical in accomplishing that. Good faith cooperation and dialogue through the HELP network and other channels provides critical opportunities that remind us that, though we perhaps operate at different levels, we are all human rights lawyers and judges with the shared aim of ensuring observance of the Convention's rights and protecting the rule of law.

I would like to conclude by again thanking HELP for inviting me to speak today, and to congratulate them on the exponential growth of the HELP network – the rapid and sustained expansion of this network both demonstrates the quality of the materials produced by your team, as well as our continued need for them.

Thank you.

¹⁵ Ibid at 75.

¹⁶ Speech by Judge Siofra O'Leary, at the ESCB Annual Legal Conference, Frankfurt, 6 September 2018, "Europe and the Rule of Law".

¹⁷ *Grzęda v. Poland* [GC], no. 43572/18, 15 March 2022, § 346.