

Conference on the long-term future
of the European Court of Human Rights

Conférence sur l'avenir à long terme
de la Cour européenne des droits de l'homme



Proceedings / Actes

Oslo, 7-8 April / avril 2014

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The long-term future of the European Court of Human Rights

L'avenir à long terme de la Cour européenne des droits de l'homme

MultiRights Annual Conference organised by PluriCourts under the auspices of the Council of Europe in Holmenkollen Park Hotel, Oslo, Norway, 7-8 April 2014

Conférence annuelle de MultiRights organisée par PluriCourts sous l'égide du Conseil de l'Europe à Holmenkollen Park Hotel, Oslo, Norvège, 7-8 avril 2014

Proceedings Actes

Directorate General
of Human Rights and Rule of Law
Council of Europe

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Monday 7 April

Lundi 7 avril

**08:30-
09:00** **Registration**

Inscription

**09:00-
09:30** **Opening ceremony**

Cérémonie d'ouverture

Anders Anundsen, Minister of Justice,
Norway

Anders Anundsen, ministre de la justice,
Norvège

Philippe Boillat, Director General,
Directorate General of Human Rights and
Rule of Law, Council of Europe

Philippe Boillat, Directeur général,
Direction générale Droits de l'Homme
et État de droit, Conseil de l'Europe

Dean Spielmann, President of the European
Court of Human Rights

Dean Spielmann, Président de la Cour
européenne des droits de l'homme

Andreas Føllesdal, Professor, Director of
PluriCourts, University of Oslo

Andreas Føllesdal, Professeur, Directeur
de PluriCourts, Université d'Oslo

**Session I – History, reforms and
remaining challenges**

**Session I – L'histoire, les réformes
et les défis qui subsistent**

Chair: Morten Ruud, Norwegian Ministry
of Justice; Chairperson of DH-GDR

Président : Morten Ruud, Ministère
de la Justice de la Norvège ; Président
du DH-GDR

**09:30-
10:40** **The Court: Historical framework**

La Cour : cadre historique

Morten Ruud, Norwegian Ministry of
Justice; Chairperson of DH-GDR

Morten Ruud, Ministère de la Justice
de la Norvège ; Président du DH-GDR

**The Interlaken/Izmir/Brighton process
– outside and inside evaluations**

**Le processus d'Interlaken, Izmir
et Brighton – évaluations par un
observateur et par un initié**

Başak Çalı, Professor, Koç University Law
School

Başak Çalı, Professeur, Faculté de Droit
de l'Université de Koç

Martin Kuijer, Senior legal adviser on
human rights law, Ministry of Security and
Justice of the Netherlands; University of
Amsterdam

Martin Kuijer, Conseiller juridique
principal pour les droits de l'homme,
Ministère de la Sécurité et de la Justice
des Pays-Bas ; Université d'Amsterdam

**The successes of and challenges for the
European Court, seen from the outside**

**Les succès et les défis posés à la Cour
européenne, perçus de l'extérieur**

Laurence Helfer, Professor, Duke
University

Laurence Helfer, Professeur, Université
de Duke

**The successes of and challenges for the
European Court, seen from the inside**

**Les succès et les défis posés à la Cour
européenne, perçus de l'intérieur**

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| | Dean Spielmann, President of the European Court of Human Rights | Dean Spielmann, Président de la Cour européenne des droits de l'homme |
| | Invited reflections on the above, as an introduction to the general debate | Réflexions sur ce qui précède, en introduction au débat général |
| | Vít Schorm, Government Agent, Ministry of Justice, Czech Republic; Chairperson of CDDH | Vít Schorm, Agent du Gouvernement, Ministère de la Justice, République tchèque ; Président du CDDH |
| 10:40-11:10 | <i>Coffee/tea</i> | <i>Pause-café</i> |
| 11:10-12:30 | General debate | Débat général |
| 12:30-14:00 | <i>Lunch</i> | <i>Déjeuner</i> |
| | Session II – The Court in the year 2030 | Session II – La Cour en 2030 |
| | Chair: Morten Ruud, Norwegian Ministry of Justice; Chairperson of DH-GDR | Président : Morten Ruud, Ministère de la Justice de la Norvège ; Président du DH-GDR |
| 14:00-16:30 | Subsidiarity: Dialogue between Court and national courts | Subsidiarité : le dialogue entre la Cour et les juridictions nationales |
| | <i>How do the Court and national courts interact in the interpretation and development of the Convention? Do the Court's judgments have an erga omnes effect; and if yes, to what extent? What is the role of the margin of appreciation and European consensus?</i> | <i>Comment la Cour et les cours nationales interagissent-elles dans l'interprétation et le développement du contenu de la CEDH ? Les arrêts de la Cour ont-ils un effet erga omnes ; et si oui, à quel point ? Quel est le rôle de la marge d'appréciation et du consensus européen ?</i> |
| | Andreas Paulus, Judge, Federal Constitutional Court, Germany | Andreas Paulus, Juge, Cour constitutionnelle fédérale, Allemagne |
| | Comments | Observations |
| | Kristine Lice, Government Agent, Representative of the Government of Latvia before International Human Rights Organisations, Ministry of Foreign Affairs, Latvia | Kristine Lice, Agent du Gouvernement, Représentante du Gouvernement de la Lettonie auprès des organisations internationales en matière de droits de l'homme, Ministère des Affaires étrangères, Lettonie |
| | Julia Laffranque, Judge, European Court of Human Rights | Julia Laffranque, Juge, Cour européenne des droits de l'homme |

Accountability and authority

The Court must be independent, yet accountable. How does the Court interact with domestic and European democratic bodies? How should the authority of its judgments best be maintained? Does it respect professional standards of legal reasoning? Should it be more responsive to public opinion? Is there room for principled non-compliance?

Andreas Føllesdal, Professor, Director of PluriCourts, University of Oslo

Comments

Almut Wittling-Vogel, Representative of the Federal Government for Matters relating to Human Rights, Federal Ministry of Justice, Germany

Alan Miller, Chair, European Network of National Human Rights Institutions

Rule of law: “Constitutional Court” or “guardian of individuals”?

The system established in 1950 was based on a Commission, which handled all individual applications, and a Court, which was only seized in cases submitted by either the Commission or the responding State. By Protocol 11 the Court and Commission were merged. Today, the Court sifts all applications and decides on admissible cases. Serious cases can be submitted to a Grand Chamber. Has this reform functioned as expected, and does it permit the Court to fulfill both tasks reasonably well? – If not, how might it improve?

Luzius Wildhaber, Professor, University of Basel; former President of the European Court of Human Rights

Geir Ulfstein, Professor, Co-director of PluriCourts, University of Oslo

Responsabilité et autorité

La Cour doit à la fois être indépendante et responsable. Comment interagit-elle avec les organes démocratiques nationaux et européens ? Comment l'autorité de ses arrêts peut-elle être assurée ? La Cour respecte-t-elle les normes professionnelles d'argumentation juridique ? Devrait-elle répondre davantage à l'opinion publique ? Le non-respect par principe est-il possible ou légitime ?

Andreas Føllesdal, Professeur, Directeur de PluriCourts, Université d'Oslo

Observations

Almut Wittling-Vogel, Représentante du Gouvernement fédéral pour les questions relatives aux droits de l'homme, Ministère fédéral de la Justice, Allemagne

Alan Miller, Président, Réseau européen des institutions nationales des droits de l'homme

État de droit : « une cour constitutionnelle » ou « protectrice des individus » ?

Le système établi en 1950 fut fondé sur une Commission chargée de traiter toutes les plaintes des individus, et une Cour qui s'occupait uniquement des requêtes soumises par la Commission ou l'État demandeur. La Cour et la Commission furent unies par le Protocole n° 11. Aujourd'hui, la Cour trie les requêtes et prend une décision quant à leur recevabilité. Il est possible de soumettre des cas graves à la Grande Chambre. Cette réforme satisfait-elle les attentes, et permet-elle à la Cour de remplir ses tâches de manière satisfaisante ?

Luzius Wildhaber, Professeur, Université de Bâle ; ancien Président de la Cour européenne des droits de l'homme

Geir Ulfstein, Professeur, Co-directeur de PluriCourts, Université d'Oslo

Programme

| Comments | Observations |
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| Frank Schürmann, Government Agent, Federal Office of Justice, Switzerland | Frank Schürmann, Agent du Gouvernement, Office fédéral de la justice, Suisse |
| Adam Bodnar, Vice-President, Helsinki Foundation for Human Rights, Poland | Adam Bodnar, Vice-Président, Fondation d'Helsinki pour les droits de l'homme, Pologne |
| 16:30- 17:00 | <i>Coffee/tea</i> <i>Pause-café</i> |
| 17:00- 18:00 | General debate Débat général |
| 18:00 | Closing of session Clôture de la session |
| 19:15 | <i>Apéritif</i> <i>Nobel Room, Holmenkollen Park Hotel</i> |
| 19:45 | <i>Dinner</i> <i>The Gallery, Holmenkollen Park Hotel</i> |

Tuesday 8 April

Mardi 8 avril

| Session III – Implementation of judgments | Session III – La mise en œuvre des arrêt |
|---|--|
| Chair: Morten Ruud, Norwegian Ministry of Justice; Chairperson of DH-GDR | Président : Morten Ruud, Ministère de la Justice de la Norvège ; Président du DH-GDR |
| 09:00- 10:30 | <i>A main challenge for the credibility of the system in the years to come will be the implementation of judgments by the Member States.</i> <i>Un des défis principaux pour la crédibilité du système dans les prochaines années sera la mise en œuvre des arrêts par les États membres.</i> |
| Roles of the Court <i>Which steps can or should the Court take to speed up domestic implementation? Are the remedies at the Court's disposal appropriate to this end, including pilot judgments? How should the Court deal with repetitive cases?</i> | Les rôles de la Cour <i>Comment la Cour peut-elle encourager une mise en œuvre plus rapide dans les États membres ? Les recours à la disposition de la Cour, dont les arrêts pilotes, conviennent-ils à cette fin ? Quelle devrait être l'approche de la Cour aux requêtes répétitives ?</i> |
| Dinah Shelton, Professor, George Washington University Law School, United States | Dinah Shelton, Faculté de Droit, Université George Washington, États-Unis |

Comments

Rob Linham, Head of Council of Europe Human Rights Policy, Ministry of Justice, United Kingdom

Helen Keller, Judge, European Court of Human Rights

Role of the Committee of Ministers

The responsibility to ensure the proper implementation of judgments lies with the Committee of Ministers. The CM has a growing number of cases on its agenda, and implementation often takes considerable time. Should the CM process be made more efficient, and does the Committee have adequate resources and sanctions?

Elisabeth Lambert-Abdelgawad, Professor, University of Strasbourg

Comments

Carl-Henrik Ehrenkrona, Permanent Representative of Sweden to the Council of Europe

Christos Giakoumopoulos, Director of Human Rights, Directorate General of Human Rights and Rule of Law, Council of Europe

Role of National Parliaments

The responsibility to respect and implement the judgments of the Court lies with the governments. It differs considerably if and to what extent national parliaments are involved, i.e. to supervise implementation. What can be done by the parliaments, and by other national institutions or bodies to encourage and facilitate swifter implementation?

Alice Donald, Senior Research Fellow, Middlesex University

Comments

Liselot Egmond, Deputy Agent for the Government of the Netherlands, Ministry of Foreign Affairs, the Netherlands

10:30-
10:50 *Coffee/tea*

Observations

Rob Linham, Chef des politiques du Conseil de l'Europe en matière de droits de l'homme, Ministère de la Justice, Royaume-Uni

Helen Keller, Juge, Cour européenne des droits de l'homme

Le rôle du Comité des Ministres

Le Comité des ministres est responsable de surveiller la mise en œuvre satisfaisante des arrêts de la Cour. Le nombre de cas devant le CM augmente, et la mise en œuvre peut prendre beaucoup de temps. Devrait-on rendre la procédure du CM plus efficace ? Le CM dispose-t-il de ressources et sanctions adéquates ?

Elisabeth Lambert-Abdelgawad, Professeur, Université de Strasbourg

Observations

Carl-Henrik Ehrenkrona, Représentant permanent de la Suède auprès du Conseil de l'Europe

Christos Giakoumopoulos, Directeur des Droits de l'Homme, Direction générale Droits de l'Homme et État de Droit, Conseil de l'Europe

Le rôle des parlements nationaux

Les gouvernements nationaux sont responsables de respecter et de mettre en œuvre les arrêts de la Cour. Les parlements nationaux sont inclus dans ce processus à un degré variable, entre autre dans la surveillance de la mise en œuvre. Comment les parlements et d'autres institutions nationales peuvent-ils encourager et faciliter une mise en œuvre plus rapide ?

Alice Donald, Directeur de recherche, Université du Middlesex

Observations

Liselot Egmond, Co-Agent du Gouvernement des Pays-Bas, Ministère des Affaires étrangères, Pays-Bas

Pause-café

Programme

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| 10:50-12:00 | General debate | Débat général |
| 12:00-12:30 | Closing the conference – summing up | Clôture de la conférence – résumé |
| | Chair: Morten Ruud, Norwegian Ministry of Justice; Chairperson of DH-GDR | Président : Morten Ruud, Ministère de la Justice de la Norvège ; Président du DH-GDR |
| | Geir Ulfstein, Professor, Co-director of PluriCourts, University of Oslo | Geir Ulfstein, Professeur, Co-directeur de PluriCourts, Université d’Oslo |
| | Philippe Boillat, Director General, Directorate General of Human Rights and Rule of Law, Council of Europe | Philippe Boillat, Directeur général, Direction générale Droits de l’Homme et État de Droit, Conseil de l’Europe |
| 13:00 | <i>Lunch</i> | <i>Déjeuner</i> |

OPENING CEREMONY – CÉRÉMONIE D’OUVERTURE

Anders Anundsen

Minister of Justice, Norway/Ministre de la Justice, Norvège

Ladies and Gentlemen, Dear Guests,

It is a pleasure for me, on behalf of the Norwegian Government, to wish you all welcome to Oslo and to this conference on the long-term future of the European Court of Human Rights.

Norway is a founding member of the Council of Europe, and took an active part in the drafting of the European Convention on Human Rights. Norway has also been a strong supporter of the European Court, which served under a Norwegian president, Rolv Ryssdal from 1985 until his death in 1998. This year we also mark the 100th anniversary of the birth of president Ryssdal. I am convinced that if he had still been alive, he would have taken an active part in the reform process that you are engaged in.

The fathers of the Convention probably didn't foresee its success and the success of the Court. What started as an ambitious Convention between 12 western European States has been instrumental in uniting the whole of Europe under common values such as democracy and the respect for human rights. One might be tempted to think that fundamental values, such as peace, democracy and human rights, are self-evident factors in our part of the world. But the large number of applications to the European Court of Human Rights, as well as situations occurring in many places, also in Europe, are reminders that these are values that have to be guarded and protected constantly.

It has been said by many that the European Court has become a victim of its own success. It has been a source for hope and support for thousands of individuals who have considered themselves victims of the abuse of power from the authorities in the Member States. The control system established in the 1950s was by no means capable of handling this immense workload. As you are all aware, two major reforms have been implemented. Firstly, Protocol 11 providing for the merger of the Court and the Commission, and a few years later the adoption of Protocol No. 14, introducing a number of amendments with the aim to speed up the Court's procedure. It took an unreasonably long time before Pro-

TOCOL 14 entered into force. It is not before last year that we have begun to see the effect of it. The Court's caseload is diminishing almost day by day, and the Court should indeed be commended for its work.

Still, there is work to be done. The caseload is still higher than what should be seen as comfortable. There is definitively a need for a third wave of reforms, which is exactly the process that you are engaged in. It started with ministerial conferences at Interlaken, Izmir and Brighton, and has been followed up by two new additional protocols to the Convention. The Brighton Conference also challenged the Council of Europe, through its Committee of Ministers, to look into the long-term future of the Court. It is the hope that this conference will bring forward new ideas that will enable the Court to deal with its important tasks in many years to come. The responsibility for adopting new rules lies with the Council of Europe and its Member States. The idea of bringing together all interested parties; governmental experts, judges, scholars and representatives of civil society will hopefully bring forward new ideas that can be developed through the forthcoming process. The governmental experts, or bureaucrats, as we usually call them in Norway, need some fresh ideas to work with.

In this respect, the open call for information, proposals and views that the Council of Europe held last autumn, and the more than hundred responses given to it, also indicates the broad interest for the future of the Court that exists all over Europe. It is important that these contributions are studied closely, they may contain new and challenging ideas for future work.

I mentioned that the reforms of Protocol No. 14 are starting to take effect. The single-judge decisions are eliminating the backlog of admissibility decisions. However, there are still a number of challenges to cope with. While it seems that the Court itself is doing its part of the job of reducing the caseload, it is necessary to look more closely into the responsibilities of the other stakeholders in the process. The Committee of Ministers is facing a growing backlog of delivered judgments that fails to be implemented. And the number of "repetitive cases" will remain a challenge for years to come. This problem cannot be solved by the Court alone; it requires the active participation of Member States.

A conference is a forum for dialogue. In the years to come, dialogue between judges – of the European Court and national courts – will be a key element for success. It will also help to secure the margin of appreciation which through Protocol No. 15 is spelled out in the Convention itself. If the Convention shall maintain its role as the main instrument for protecting human rights in Europe, it must at the same time make room for different cultural and legal solutions in the Member States. The protection of human rights standards may be implemented in different ways, and it must be given some room for different solutions in different Member States. Active dialogue between courts will definitely be a useful tool in this respect.

Finally, as a long-time member of the Norwegian parliament, I welcome the discussion on the role of national parliaments. In Norway we celebrate this year the 200th anniversary of our Constitution. The parliament is now considering a number of proposals for amendments to the Constitution. Prominent among these are proposals aiming at introducing into the Constitution a catalogue of fundamental human rights, based on the rights secured in the European Convention. I might also mention that a proposal has been raised in the parliament to establish a national institution for human rights, directly under the parliament.

I wish you a good conference, which should bring forward new and challenging ideas for the reform process. At the same time I express the hope that you will enjoy your stay in Oslo and the coming of the spring.

Thank you for your attention.

Philippe Boillat

*Director General, Directorate General of Human Rights and Rule of Law,
Council of Europe/Directeur général, Direction générale Droits de l'Homme et
État de droit, Conseil de l'Europe*

Dear Minister, Dear President of the Court, Dear Professor, Excellencies, Ladies and Gentlemen, Dear Friends,

It is an honour and a real pleasure for me to address you on behalf of the Secretary General of the Council of Europe, Mr Thorbjørn Jagland, under whose auspices this conference is being held. Mr Jagland sends his apologies for not being with us this morning. I join him in thanking the organisers, PluriCourts, for this timely and relevant initiative.

Two years after the Brighton Conference, following an intense and highly productive period, we are now turning to a fundamental issue for the Council of Europe and its role in Europe – the longer-term future of the Convention system and the Court. Here I stress “Convention system”: even if the Court is the most visible sign of the Council of Europe’s human rights engagement, its future depends on a number of further mechanisms at all levels – from domestic implementation to Strasbourg Court proceedings, and the important link between domestic and European levels provided by the Committee of Ministers’ super-

vision of execution. This global approach is not new: it has been at the heart of all reflections on the Convention system since its inception and particularly so since the Rome Ministerial Conference in 2000.

Recent years have seen encouraging progress at all levels, both domestic and in Strasbourg.

Domestically, the implementation of the Convention has moved forward in a number of ways: better governmental and parliamentary procedures to ensure Convention conformity of draft legislation; the development of effective domestic remedies; and improvements in domestic capacity for the rapid execution of the Court's judgments.

Protocol No. 14 has shown its strengths in improving the situation of the Court. The Single Judge system, in particular, and accompanying reforms within the Registry, seem to have brought the problem of clearly inadmissible applications under control. Parallel reforms of the Committee of Ministers' supervision of execution have also created efficiency gains, allowing a significant decrease in the number of judgments awaiting closure.

Notwithstanding these achievements – including new Protocol Nos. 15 and 16 – the system remains under strain. This is notably due to the persistently high numbers of applications made to the Court. Far too many of these are repetitive applications arising from structural or systemic issues. One can only sympathise with the Court's insistence that the primary responsibility for preventing repetitive cases lies with the States Parties concerned, under the supervision of the Committee of Ministers – but not with an international tribunal. It is no more than subsidiarity in practice.

Alongside these problems, there are growing challenges and criticisms to the legitimacy of the Court, its judges and its case-law; to the idea of European supervision of human rights protection; and perhaps even to the concept of universal human rights. Such criticisms represent a threat to the basic philosophical, political and institutional concepts that lie at the origin of our system. In their possible concrete effects – widespread disrespect for Court judgments, or a State Party quitting the Convention – these criticisms ultimately represent a political threat to the system's continued effectiveness and viability.

To address all these problems in a longer-term perspective, we need to be “thinking outside the box.” After two years of extremely detailed technical analysis and discussion, sometimes repeating debates first held long before, we need to raise our heads and look to a more distant horizon. To this end, the Council of Europe has held an open consultation, and has invited independent, eminent legal personalities to participate in its reflections. And the Steering Committee for Human Rights, which is at the centre of our work, has come in its entirety to participate in this conference.

So what can we expect from this Conference? Our common aim must, I believe, be to find ways to increase the effectiveness of the system. Beyond that, I will not attempt to anticipate our discussions; but I will seek to identify certain basic principles and avenues for reflection.

One, the material rights enshrined in the Convention are “untouchables”. Two, subsidiarity: the Parties to the Convention must implement it fully, in good faith – including by respecting and protecting Convention rights and providing effective domestic remedies. Three, individuals have a right to apply to the Court. Four, judicial determination of complaints: decisions must be issued by a judicial body, whose jurisdiction must be compulsory for all Parties. Five, the Parties are obliged to implement Court judgments. And six, collective enforcement: including through effective supervision of the execution of Court judgments by the Committee of Ministers of the Council of Europe.

These basic principles may appear to describe the current system – and of course, in general terms, they do – but as a basic structure, they offer potential for considerable variation. We have already seen some striking innovations by the Court, such as the pilot judgment procedure, prioritisation of applications and the grouping of cases into single judgments.

We can also ask ourselves what some of these basic principles should mean in practice. I will mention some questions that have already been tentatively posed. For example, does a right of individual petition, coupled with the compulsory jurisdiction of the Court, mean that the Court must finally determine every application made to it? What does the principle of subsidiarity mean for the hierarchy of normative action between domestic and European levels, and for relations between the Court and domestic authorities? What measures should be available – and applied – within a system of collective enforcement in order to ensure that obligations are met?

Excellencies, Ladies and Gentlemen,

The Convention is a legal instrument whose effectiveness, in the end, depends on political will: political will of domestic authorities to act within their areas of competence; and political will of national governments to act collectively at European level. So another question must be, how to reinforce this political will? How to translate that political will into effective action? What reforms are needed to ensure that domestic authorities become effective guarantors of Convention rights? And what reforms are needed to ensure that the Council of Europe provides effective technical assistance and political supervision?

A few questions on which we may reflect. I look forward to our responses.

Dean Spielmann

President of the European Court of Human Rights/Président de la Cour européenne des droits de l'homme

Mr Minister, Professor Føllesdal, Ladies and Gentlemen,

Let me say, to begin with, how pleased I am to be present with you this morning for this conference on the long-term future of the European Court of Human Rights.

My gratitude goes to the Norwegian Government and the PluriCourts Centre for hosting what will surely be a significant event for the European Convention on Human Rights.

I pay tribute to this country's longstanding and profound commitment to the protection of human rights at the international level. Part of the Convention system since its inception, Norway has been a proponent of its development and strengthening ever since. At national level, it took the decisive step in 1999 of adopting the Human Rights Act, making the Convention (along with the two United Nations Covenants) part of the law of the land, giving these three international instruments precedence over any conflicting provision of domestic law. As I had the opportunity last year to say to the members of the Norwegian Supreme Court – when the whole membership of that court, led by Chief Justice Schei, made a study visit to Strasbourg – this country has deeply embedded European human rights norms in its domestic legal order.

Let me also recall, with great appreciation, that Norway and the Netherlands were strong advocates of the idea of a new advisory jurisdiction for the Court, now a reality with Protocol 16.

I could not take the floor today without paying homage to a great legal figure:

- ▶ a son of Norway who shaped both the legal system of his country and European human rights law;
- ▶ who presided the Supreme Court of this country and the Court at Strasbourg, serving with great vision and vigour for almost 30 years at the highest level;
- ▶ whose bust adorns the entrance hall of the Court building today;
- ▶ Chief Justice of Norway and European Court President, Rolv Ryssdal.

This conference comes in the wake of the three high-level conferences that inaugurated, gave impetus to and steered a vital and valuable reform process for the Convention system, and – as an integral part of that – the Court of Stras-

bourg. With the Brighton Declaration, and the two Protocols that derived from it, one can say that we came to the end of the beginning.

Our focus now moves to the long-term, and even the very long-term: I recall that at Interlaken, the furthest point in view was 2019. During this conference, we shall try to look even further, to 2030.

The importance that we, at the Court, place on this event is shown by the participation of several of my fellow judges – Judges Julia Laffranque and Helen Keller will take the floor today and tomorrow as speakers. Also present are Vice-President Guido Raimondi and Judge André Potocki. The Court has been a leading voice in the reform process all along, and it is our intention – indeed our duty – to continue to participate actively in it with all other parties to it, governmental and non-governmental, national and European.

Ladies and Gentlemen, I will bring these introductory remarks to a close at this point, since the organisers invited me, and I accepted, to present the Court's perspective on the reform so far, and the challenges that must still be faced. And so I shall take the floor once more in a short while.

For now, Mr Minister, Ladies and Gentlemen,
I thank you for your attention.

Andreas Føllesdal

Professor, Director of PluriCourts, University of Oslo/Professeur, Directeur de PluriCourts, Université d'Oslo

Dear Colleagues,

On behalf of my colleague, Professor Geir Ulfstein and myself, it is an honour and great pleasure to welcome you to this conference on the long-term future of the European Court of Human Rights.

This is the annual conference of a MultiRights research project, on the legitimacy of the multi-level human rights judiciary, funded by the European Research Council (www.multirights.net). It forms part of PluriCourts, a Norwegian Centre of Excellence hosted by the University of Oslo, where we look at the legitimacy of international courts across several issue areas (www.pluricourts.net).

Our conference addresses some of the challenges that the Court faces, and avenues for constructive responses.

Previous research at PluriCourts and elsewhere (Føllesdal, et al. 2013) has identified at least three issues as central long-term challenges for the Court, and

three main avenues of reform. They provide information on the structure of the conference today and tomorrow.

Three main challenges:

- ▶ a) how to “filter” incoming applications to avoid spending resources on unfounded appeals while providing swift, just and reasoned protection to claimants whose human rights have been violated;
- ▶ b) how the Court can best fulfil its task of supporting domestic human rights protection, when interacting with States that have very different traditions and records as regard commitments to the rule of law, a functioning independent judiciary and an entrenched democratic culture;
- ▶ c) how the Court can interpret the treaty “dynamically” so that it continues to protect human rights in changing circumstances – without abusing its independence and discretion. The task is to uphold the “rule of law” rather than to fuel suspicions of a “rule of lawyers”.

There are at least three promising avenues for reform. The following strands of further reflection provide information on the structure of the programme over the next two days.

- ▶ a) Powerful National Courts – through informal means.

These include:

Firstly, the Court’s practice of granting a “margin of appreciation”, recently supported by Protocol 15 currently awaiting signatures by sufficient States. This move is in line with the principle of “subsidiarity” – the topic of session II (Føllesdal 2014, Føllesdal 2013). Such deference to national courts seems especially appropriate where domestic authorities have undertaken good faith efforts to respect and balance their human rights obligations. A central future task will be to follow up Protocol 15 with work to render the practice of a margin of appreciation and the principle of subsidiarity more precise.

Another strand is to determine how national courts can affect the Court’s interpretation through “judicial dialogues” of various kinds (Schlütter 2012).

- ▶ b) A More Powerful European Human Rights Court

I submit that the impact of the Court – as for many human rights bodies – is mainly via its role as an accountability mechanism that engages *other audiences*: civil society and domestic courts and governments.

It is domestic organs that must implement the Court’s decisions, under the supervision of the Committee of Ministers.

The Court is a crucial tool to enable citizens and their groups to hold their own domestic authorities accountable. This does not require more transfer of power to the Court. Rather, the Council of Europe may explore ways to enhance the Court in two ways:

- ▶ **through informal means.** The Court may take on more of a *constitutional* role, elaborating further the trend some see in the requirements of the exhaustion of domestic remedies, standards of review, design of remedies, and pilot judgments (Ulfstein 2012). The Court also interprets the ECHR dynamically, and applies a “proportionality test”. These developments may or may not render the Court more powerful, and may or not bolster human rights protection: this will depend crucially on how cases are filtered and the standards of review. Among the required steps are to render the “proportionality test” more precise, and explore formal and “informal” modes of checks such as precedent (Ajevski 2013).
- ▶ **by formal rules,** e.g. most notably by the EU’s ratification of the ECHR. Such developments may help harmonise and simplify hitherto fragmented European law, and establish a common code of procedure of human rights organs.

I look forward to our joint reflections on these and other topics over the next day and a half.

Welcome!

SESSION I – HISTORY, REFORMS AND REMAINING CHALLENGES

SESSION I – L’HISTOIRE, LES RÉFORMES ET LES DÉFIS QUI SUBSISTENT

The Court: Historical framework/ La Cour : cadre historique

Morten Ruud

Norwegian Ministry of Justice; Chairperson of DH-GDR/Ministère de la Justice de la Norvège ; Président du DH-GDR

Ladies and Gentlemen,

I stand here as an alternate. Those of you who remember the program as it was presented on the internet a few weeks ago, might recall that the first presentation should be by Professor Ed Bates, under the title: “Historical framework: The European Court of Human Rights in pursuit of ever moving objectives”. Just a few weeks ago, Ed Bates had to cancel his participation at the conference, and Professor Mikael Rask Madsen kindly accepted to take over the task of presenting this introductory theme. Regrettably, last Friday Professor Rask Madsen had to apologize for not being able to come to Oslo, due to compelling reasons.

So late Friday evening, I was asked by the co-directors of PluriCourts if I would be willing to make this presentation, giving the historical framework of the Court. I suppose the main reason for asking me to do this is the fact that I was born in the same year as the Convention which created the Court.

Before embarking on this task, I feel obliged to issue some warnings. I am not an academic but a veteran civil servant, so that my perspectives on the issue might be somewhat different from those which the two professors would have given you. And within the time-frame that I have had to prepare this intervention, I have neither had time to study the writings of learned scholars, nor the bureaucratic files that I normally have a tendency to lean on. I had to prepare this on basis of memory. And at my age, memory might sometimes be failing, or at least biased. And since memory is the main basis, I have to concentrate on what I personally do remember, and that is first and foremost the reform laid down in

Protocol 11, which might be considered as the first major reform of the control system of the Convention. I had the privilege to chair the expert committee, DH-PR, which drafted Protocol 11; I shall come back to that in a short while.

It is, for several reasons already expressed, natural to start with the year 1950, when the European Convention on Human Rights was adopted and opened for signature and ratification. As you all know, the Convention included a list of fundamental human rights which the then twelve Member States of the Council of Europe undertook to respect and protect, also – and in fact primarily – in respect of their own citizens. The Convention was inspired by the United Nations' Universal Declaration on Human Rights, but went a step further by creating binding legal obligations, primarily on the international law level, that is as between the States Parties.

But the Convention also established a control mechanism, specially designed to deal with possible violations of the rights listed in the Convention, and intended to deal with individual cases. There were established a Commission and a Court, and two different complaint procedures: inter-state complaints and individual complaints. I have not had the possibility to verify this, but I believe that the inter-state complaint procedure was intended to be the main channel. That would at least be most in line with the dominant view of the role of individuals in international law in the late 1940s and early 1950s. However, experience would soon show that it was the individual complaints that would dominate the picture.

The procedure provided for was that complaints should be made to the Commission, who would study the case and make a report, which was submitted to the Committee of Ministers of the Council of Europe. The power to bring a case before the Court was limited to the defending State or the Commission itself.

It is probably fair to say that the system worked reasonably well until the 1980s. The number of Member States doubled, but was still only around twenty-five. And even if the work-load, especially of the Commission, increased, it was still possible for both the Commission and the Court to work on a part-time basis.

The first major calls for reform came in the mid-1980s. This was well before the fall of the Berlin Wall and the iron curtain, events that could hardly have been foreseen only a few years before they happened. So the main arguments for reform, which at an early stage took the form of a call for merger of the Commission and the Court into a “single Court”, were not primarily the work-load of the system. The main argument was the lack of equality of arms between the two opposing parties in the cases before the Court, on the one hand the individual applicant, on the other the “defending” state. When the increase of Member States of the Council of Europe, and consequently of parties to the Convention, finally took place in the early 1990s, simultaneously with the drafting of

Protocol 11, an argument was raised that we could not have ninety international judges in Strasbourg. I might be tempted to argue that with the workload and backlog that the Single Court has had to tackle, ninety judges might have been a good idea.

The idea of “merger” had strong support from some Member States, but not all. The governmental experts in the CDDH and DH-PR could not reach agreement. So it needed a political decision to take the process forward. This came in the form of a ministerial conference inviting the Council of Europe to prepare a reform based on the merger of the Commission and the Court into a single “full-time” European Court on Human Rights.

As I indicated earlier, I was at that time chairing the DH-PR, which was given the mandate to draft an amending Protocol, and was given one year to do the job. We managed, although stretching the time limit by some months.

Personally I had serious doubts as to whether the merger was a good idea. However, the president of the Court at that time was Rolv Ryssdal, who was a strong supporter, and the Norwegian government (not surprisingly) followed his advice, not mine. I was then put to the task of chairing work towards a result which I seriously doubted was advisable. It turned out to be a challenging but also interesting exercise. I will not claim the full honours for the success. If one name should be mentioned, it would be that of Mr. Jens Mayer-Ladewig, the German member and vice-chair of the DH-PR, who chaired several working groups and was the father of a lot of fruitful ideas during the process. And today, I tend to admit that the reform was both right and necessary, although by no means sufficient.

Let me dwell a while on my concrete doubts as to the advisability of the merger idea. First of all, in my opinion, the main challenge for the system would be how to handle the large number of inadmissible complaints and of cases where the established case-law left little legal doubt as to the outcome (including here what have been later described as “repetitive cases”). In my opinion, the system needed a form for “mass-production” of decisions for these types of cases. Chambers of seven judges, or even Committees of three would in my opinion not suffice. I take the liberty to state that later experience has shown that I was not totally wrong.

My second, and probably more sincere concern, was the consequence of the merger to abolish the two-fold examination. Coming from a small country, on the outskirts of Europe, and perhaps with some elements in our legal system that might seem unknown or strange to many other nations – but not necessarily for that reason less sound in relation to human rights – I thought it advisably to have the possibility of some sort of appeal if the Chamber of seven judges came out with a decision which in our view did not understand, or did not accept the difference between our legal system and what they might be accustomed to in their

own. Or, to put it slightly differently: did not apply the margin of appreciation in a proper manner. The possibility of appeal was, in my view, important also on the international level. I was not alone in that and, as we all know, the result was the creation of the Grand Chamber. A single Court, but with two instances. As an afterthought, I still consider it a creative solution, and again Mr. Meyer-Ladewig deserves credit for this. My main concern was, and still is, that the handling of cases in the Grand Chamber should be performed by the same group of judges that also sit in the Chambers. Every time a case is brought to the Grand Chamber, it steals time from and diminishes the capacity of the Chambers.

I should perhaps stop here. After having finished my participation in the drafting of Protocol 11, I stopped working with human rights issues, and was transferred to the Polar department of the Norwegian Ministry of Justice, dealing with matters relating to the Arctic and Antarctica, and after that served fifteen years as secretary general of the Ministry. It was not until nearly two years ago, after retiring from the post as secretary general, that I returned to Strasbourg and the CDDH and the DH-PR, now under the name of DH-GDR. I might be tempted to add that the challenges which we are now facing relating to reform are to a large degree recognisable as issues we dealt with in the 1980s and early 1990s. Some steps forward, even considerable steps, were made by Protocol 14. In this respect I would especially emphasise the introduction of the single judge system to deal with what I earlier described as the mass-production of non-admissibility decisions. But we – and the Court – are still challenged by the large number of repetitive cases, or the somewhat broader group of cases where the outcome follows directly from the Court's established case-law.

In my opinion, the main challenge, when drafting Protocol 11 as well as today, is how to handle the two main, and equally important tasks of the control system:

- ▶ Firstly, to be a control organ, protecting human rights in all Member States, to which people claiming to be victims of human rights abuses can bring their cases. That is the role of “guardian of individuals”.
- ▶ Secondly, the high legal instance to interpret and develop the rights of the Convention, the role that could be compared with that of a Constitutional Court on the domestic level.

Could, or should, these two equally important tasks be carried out by the same judicial organ, or should the tasks be divided? That is still an important issue for the on-going reform process. Another is the implementation of judgments; how to ensure, in an efficient manner, that Member States will respect and follow up the judgments given by the Court.

With this, I have gone beyond the historical perspective, and indicated what I consider the main challenges for the ongoing reform process relating to the long

term future of the Court, and consequently also for the issues to be discussed at this conference.

Thank you for your attention.

The Interlaken/Izmir/Brighton process – outside and inside evaluations/Le processus d’Interlaken, Izmir et Brighton – évaluations par un observateur et par un initié

Başak Çalı

Professor, Koç University Law School/Professeur, Faculté de Droit de l’Université de Koç¹

Secretary General of the Council of Europe, President of the European Court of Human Rights, Distinguished Judges, Academics, and Experts,

It is a real honour to be able to speak to you all and contribute to the discussions about the long-term future of the European Court of Human Rights.

As I was getting ready for this talk I asked a few friends across Europe how I should prepare. Many advised me to watch some of the compelling speeches at the famous TED talks. You know, the communications gurus in California. They are all available on YouTube, they said. I am now based in Turkey where YouTube was banned on 27 March. So, I must apologise in advance if I fall short of Ted’s high standards.

My brief for this morning is to address the outside evaluations on the reform debates of the European Court of Human Rights to inform long-term reform discussions.

1 Principle Investigator, UK ESRC Funded Research Project on the “Perceptions of the Judicial Legitimacy of the European Court of Human Rights: A Cross-country and cross-sectional analysis”. *For more comprehensive analyses of these findings see Çalı, Koch and Bruch, The Legitimacy of the European Court of Human Rights: The View From the Ground* (2011) at <http://ecthrproject.files.wordpress.com/2011/04/ecthrlegitimacyreport.pdf> and Çalı, Koch and Bruch, “The Legitimacy of Human Rights Courts: A Grounded Interpretivist Analysis of the European Court of Human Rights” 35(4) *Human Rights Quarterly* (2013) 955-984.

At first glance it might seem odd to draw a distinction between outside and inside evaluations when discussing the future of the European Court of Human Rights. As members of the Council of Europe community, are we not all insiders when it comes to the reform process of our Court? Any long-term reform of the European Court of Human Rights will undoubtedly affect the protection of human rights across the footprint of the Council of Europe – but also, I would hope, beyond.

For me, the distinction needs to be drawn – when we talk of outsiders and insiders – between those who are close to reform discussions – the insiders – and those further away – the outsiders.

For me, insiders mean members of the executive branches of government, and those in charge of leading the reform debates at the European Court of Human Rights. This includes ministers and officials from ministries of foreign affairs and justice. We can add officials from the European Court of Human Rights, and the Secretariat of the Council of Europe to the list as well as a limited number of international NGOs and individual experts.

So, then who are the outsiders?

They are the domestic stakeholders. The people who should not be, but are all frequently excluded from reform processes. At the top of this list are the very people for whom the Court exists – the individual or collective applicants to the Court, present and future. Alongside them are domestic lawyers, domestic judges, parliamentarians who are not part of the Parliamentary Assembly of the Council of Europe and domestic non-governmental organisations. Our outsiders, in other words, are domestic stakeholders of the European human rights system.

I spent three years interviewing these domestic stakeholders. My research took me from London to Berlin, from Sofia to Strasbourg, from Dublin to Diyarbakir. I listened to the people, who although situated far, far away from the reform process of the European Court of Human Rights, are profoundly impacted by it.

You may wonder what we can really expect from these outside perspectives concerning the long term reform of the Court.

I think these perspectives should give us direction and purpose. Of course, we should not expect detailed proposals regarding the internal administration of the Court or the appropriate number of lawyers needed at the Department for the Execution of Judgments.

It behoves us, however, to listen to their views on the general direction reforms should take.

Two important findings emerged from the three years I spent talking to domestic stakeholders in the United Kingdom, Bulgaria, Germany, Turkey and Ireland.

First, the problems identified within the European human rights system and their order of priority.

Second, the differences between key problems identified by internal and external voices and how each voice thinks these problems should be tackled.

In no particular order, outsiders saw the problems affecting the long-term future of the European Court of Human Rights as:

- ▶ long delays in hearing from or getting a judgment from the Court;
- ▶ a lack of adequate reasoning in inadmissibility decisions;
- ▶ a lack of quality or clarity of reasoning;
- ▶ a lack of clarity in the standards of judicial review employed by the Court;
- ▶ a lack of effective implementation of ECHR judgments, including interim measures;
- ▶ a lack of transparency and faith in the monitoring of the implementation of ECHR judgments;
- ▶ too much intervention in domestic affairs;
- ▶ too little intervention in domestic affairs.

This list is, of course, not easy to order, either by importance or urgency. Outside perspectives are divided over what exactly the drivers and goals of the Court's long-term reform should be.

For some, the starting point for reform is increasing the capacity of the Court. For others it is an improvement in the quality of decision-making. The remedy regime of the Court and the execution of judgments are more crucial in some minds, but for others still, reform should limit the powers of the Court.

These demands are impossible to consolidate. **Three simple reasons:**

First, the perspective of outside stakeholders varies from country to country depending on whether or not they have robust human rights protections through good executive, legislative and judicial practices and whether the political and legal culture have a strong nationalist tone or not.

Long delays in receiving a judgment from Strasbourg are a more serious concern for petitioners from countries such as Turkey and Bulgaria, where the need for the European Court of Human Rights is greater than, say, for those from Ireland and Germany, where there is a less of a need. Countries with the highest number of applications suffer the most from long delays. They need a more responsive European Court of Human Rights in the long-term.

Stakeholders from countries such as Ireland and the United Kingdom worry more about excessive intervention in domestic affairs. They see their domestic legal and political systems as very capable of handling human rights issues

without instructions from afar. They need well-reasoned judgments from the Court in the long-term.

Second, lawyers, judges and members of parliament place focus on different views of the problems and the future of the European human rights system. Stakeholder groups also have their own internal disagreements.

For example judges and lawyers worry more about the quality of judgments than politicians do. But whilst some judges are uncomfortable with the degree of judicial review exercised on them, others welcome it and would even like more. Whether a parliamentarian is in government or opposition also affects their views on the European Court of Human Rights.

Third, stakeholders' depth of knowledge of Strasbourg case-law affects how they order their concerns. Those with more knowledge of the case-law are less hostile to the Court overall, trust that the Court will improve its case-law and have more patience with positive human rights outcomes from the European human rights system as a whole.

These outside evaluations tend to view the European Court of Human Rights as having an important long-term agency that is slowly transforming the domestic human rights scenes. Strong criticism of the Court and calls for its radical reform are often based on a cherry-picked list of cases that domestic stakeholders dislike, be they a judge, a politician or a human rights lawyer.

Clearly, outside evaluations are at once fragmented and necessarily biased.

But, what does this mean in terms of the outside evaluations informing the long-term reform of the European Court of Human Rights?

The key lesson of this finding is that to strongly favour one perspective over another would do injustice to the broad range of concerns felt by the community of the Council of Europe.

This is an important insight for those leading the reform process. The voice bemoaning excessive intervention in domestic affairs should not drown out the voice concerned about ineffective implementation.

When bringing outside perspectives to bear on the reform process, special effort must be made to ensure that one domestic perspective among many does not come to represent the opinion of all domestic judges or politicians or lawyers.

Equally, the fact that one sectoral or domestic perspective is more apparent than others should not impede a balanced and considered assessment of the full range of outside views.

A few months ago, I was pleased to see this insight confirmed by Lord Justice Moses of the United Kingdom. Responding to criticism of a number of senior judges of the European Court of Human Rights since 2009, he said “each one of us has an independent view. Others do not speak for us”.

In this context, I will highlight one important finding from my own research. It is well known that loud voices in some Council of Europe countries proclaim that there is “too much intervention in domestic affairs”. The opposite – that the European Court of Human Rights does not intervene enough – is also a widely held opinion in many states and amongst many individuals – but this is more softly voiced. Basically, it is more news-worthy to bash Europe and the Court than to support it.

But silent support for the European Court of Human Rights should not be underestimated. It is reflected in the number of pending cases. Individuals bring cases because they still believe the idea that judgments from Strasbourg can have transformative effects on their individual situations alongside domestic law and politics. The bottleneck of cases before the Court is often described as a “crisis” by insiders. For outsiders, it indicates trust, expectation and patience.

It is crucial to appreciate and carefully balance the diversity of domestic perspectives. This requires thinking about what future arrangements best promote human rights for all within the Council of Europe’s jurisdiction.

This means assessing the Court in a spirit of solidarity with less fortunate individuals and States. As one of my interviewees put it “the European Human Rights System is like a house of cards”. Inward looking nationalist perspectives or resentment with cherry-picked cases pose a serious danger to the European promise to protect human rights for all.

Ultimately, reform must be based on the continuous and real need for a transnational, external court that peers over the shoulders of defective domestic institutions.

Let’s now consider **two issues** that go largely unmentioned by domestic stakeholders, but that are often raised by insiders and academics.

First, the “caseload problem” figures heavily in all internal debates about the Court. Externally, it does not feature at all. For domestic lawyers, the problem is not about caseload, but about unreasonable delays and the demise in the quality of judgments.

Delays in receiving judgment are, however, not the same as what is commonly referred to as the “caseload problem”.

Throughout my research I found that domestic judges, lawyers and politicians did not see “caseload” as a separate problem in and of itself. Domestic actors were more concerned with delayed or poor quality judgments or the failure to implement judgments from Strasbourg. Quite simply, removing the “caseload problem” will not resolve these deeper issues. Less cases at Strasbourg does not mean better human rights protection.

Much fanfare has been made of the fact that the number of cases pending before the European Court of Human Rights has dipped below 100 000. This, however, means little to a domestic judge struggling to incorporate principles

from the European Convention on Human Rights into his/her decision-making process in a legally and politically hostile environment to human rights law.

Actually, from a judicial, pedagogical perspective, frequent, repetitive cases help judges in their battle to internalise case-law principles. This came up frequently in the many discussions, interviews and trainings I have conducted with judges across Europe.

Again and again they tell me that a long string of similar cases are more effective to ensure a change in the case-law of otherwise unreceptive judiciaries.

Politicians, too, are moved more easily when faced with a bundle of cases highlighting the same violation rather than one that we may call an “orphan” judgment.

Second, there is a dichotomy common to insider debates and European human rights law academia. Should the European Court of Human Rights act more as a constitutional court that hand picks cases for their jurisprudential value? Or should it continue to deliver individual justice to applicants, however repetitive their cases may be?

This conundrum has been conspicuously absent from my analysis of external evaluations.

External evaluations accept the European Court of Human Rights as *a sui generis* human rights institution that cannot be moulded on models of domestic legal systems. As one Irish politician said to me, the “European Court of Human Rights is a floating court”. It is a unique institution. It is a human rights court. It does not only promise good human rights law jurisprudence. It also promises recognition to victims of human rights violations. From Dudgeon to Norris, from Norris to Modinos, from South-East Turkey cases to Chechen cases, it also promises repetition as a means to anchor change.

The European Court of Human Rights is also unique because it adjudicates individual cases, but in doing so it also addresses general, systematic and structural issues. To remove individual cases, however repetitive, from the core of the Court’s mission could erode trust in this institution amongst individual applicants. This would undermine the long-standing conviction that the European Court of Human Rights is a court of last resort. It is an insurance mechanism. There is no need to tamper with the Court’s true, core purposes, however plural these purposes are.

Repetitive case-law is not necessarily a bad outcome. It is a constant, visible reminder to all of us that States with weaker human rights protections are failing to protect human rights.

Repetitive cases are also an important persuasive tool to increase the buy-in of judges, political elites and the public at large to put an end to human rights violations. Repetitive cases from Strasbourg have important, positive effects on the

case-law of higher courts and in the human rights memory of political and public institutions.

The message from the outside is clear. There is no need to revise the unique mission of the European Court of Human Rights. Not now, not yet. Insiders must continue finding innovative solutions to ensure that the Court carries its historic mission, effectively serving both individuals and the long-term reform of our domestic political and legal institutions.

Martin Kuijer

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Ladies and Gentlemen,

It is my great pleasure and honor to address you today in these beautiful surroundings on such an important topic. Please allow me to express my gratitude to our Norwegian friends for such an excellent initiative and their hospitality. *Tusen takk for den faste støtten til Domstolen og Konvensjonen!*

I have been asked by the organisers to reflect on the history of the reform process and the remaining future challenges. Please allow me to express some personal observations which in no way reflect those of the Council of Europe working group on the longer term future of the Convention mechanism that I chair and which recently started its work. Nor do I speak as a representative of the Netherlands government.

Looking first at the past, the reform process obviously did *not* start with the consecutive declarations of Interlaken (2010), Izmir (2011) and Brighton (2012). In this regard I refer you to the highly informative Council of Europe compilation of all relevant documents concerning the reform process, which all of you should have received. This process has been going on for decades. It is hard to come up with a topic that has not been discussed at some stage, albeit not always in depth. It is equally hard to come up with any one topic which attracted clear political consensus. In that sense the reform process strongly resembles an Echternach procession.

Let me first say a few words on the reform process up to the Interlaken Conference. For convenience sake I will include Protocol 14 even though that entered into force a couple of months following the Interlaken Conference.

The original supervisory mechanism consisting of a part-time Court and a Commission was already overstretched in the 1980s. Already then commentators spoke of the “*burden of success*” of the Convention mechanism. More and more applicants found their way to Strasbourg and workload – roughly speaking – tripled every five years. In 1985 the Swiss government proposed a radical solution: the merger of the then Commission and the then part-time Court. Avoiding duplication of seemingly identical tasks of both institutions would increase efficiency. Leaving aside whether the assumption on which the proposal was based was actually correct, it took more than a decade to reach a political consensus. Eventually, in 1998 the 11th Protocol entered into force. As all of us know, the Commission ceased to exist, the part-time Court was replaced by a full time Court, the possibility of an internal “appeal” was created, and the foundations were laid for developing various judicial formations for different types of complaints. A committee of three judges would deal with unmeritorious complaints, a Chamber of 7 with “ordinary” complaints and a Grand Chamber of 17 judges with the extraordinarily important cases.

The latter recipe would basically be repeated in Protocol No. 14 which was concluded in May 2003 but only entered into force in June 2010: increasing efficiency through modification of the judicial formation responsible for disposing certain categories of complaints. The new Single Judge formation would deal in future with the clearly unmeritorious complaints and the committee of three was made responsible for disposing clearly meritorious complaints.

With the introduction of those judicial formations there is probably little further efficiency gain to be made in this field, only fine-tuning. For example, the functioning of the Single Judge is facilitated by the setting up of a special Filtering Section. The further development of the so-called WECL-criterion (well established case-law) by the Court could allow more cases to be dealt with by committees. And the ongoing discussion on reducing the number of judges in a Chamber from 7 to 5.

Protocol 14 also marked the beginning of a different trend in the reform negotiations. With the introduction of the “significant disadvantage” criterion, High Contracting Parties clearly introduced a *de minimis* rule for the Convention mechanism emphasizing the Court’s subsidiary role. While not ignoring the Court’s role in offering judicial protection to individual victims, the feeling was – and I think it is fair to say: still is – that a European Court should not deal with *all* violations that could arise under the Convention. This is also demonstrated in some of the more recent CDDH reports focusing on *inter alia* the requirements relating to the admissibility of applications and proposals intended to reg-

ulate access to the Court. Some of these aspects found their way into the text of Protocol 15.

This brings me to the more recent stages of the reform process which are clearly dominated by two themes: backlog and backlash. The first aspect focuses on the Court's horrendous workload. The second aspect focuses on maintaining and ensuring the legitimacy of the Court and its case-law in the broadest sense of the word. Some of the previous work done by the CDDH was concerned with the clarity and consistency of Court judgments, and the quality of the Court's judges.

Let me offer you some personal observations.

First, it is clear that we are not talking about the reform of the Court, we are talking about the reform of the Convention mechanism at all levels, including action at national plane, so as to reinforce the notion of "subsidiarity". The reform process needs a holistic approach. Indeed, many CDDH reports deal with issues such as the improvement of domestic remedies (including a set of Guidelines), domestic implementation (including a Toolkit to inform public officials about the State's obligations under the Convention) and the improvement of execution of Court judgments by State authorities. The rules of supervision of the execution of Court judgments have been amended with the introduction of the "twin track" procedures.

Second, while certain issues have not yet been resolved there is an increasing danger of "problematism" of the functioning of the Convention mechanism. I believe there were good reasons for ensuring political involvement with the reform process on the highest level leading up to Interlaken. Indeed, I believe that the greatest success in recent years in the reform process – the entry into force of Protocol 14 – would not have been achieved without the increased political pressure that was felt in the ongoing negotiations leading up to Interlaken. The side-effect of holding three high level conferences in three consecutive years however has been that most domestic politicians were led to believe – and in some instances strengthened in their beliefs – that the Convention mechanism needs urgent and radical reform. In reaction, a growing number of negotiators express a "reform fatigue", at least as far as ministerial summits are concerned. I praise our Norwegian hosts for their clairvoyance in this regard and ensuring a different "format" for this conference, i.e. not another ministerial conference.

Third, the negotiations not only produced three additional protocols, numbers 14, 15 and 16. Perhaps more importantly (although few things could be more important than Protocol 16 in my personal opinion, some of you will understand...), many things that were discussed in the various working groups were picked up by the Court without any formal decisions by the Committee of Ministers or amendments to the Convention. In that sense, the reform negotiations themselves serve a very useful purpose of facilitating a continuous dialogue

between State representatives, the Court and civil society and other stakeholders such as the Parliamentary Assembly.

Fourth, recent negotiations sometimes felt like “shooting at a moving target”. To give you one example. Before the entry into force of Protocol 14 the emphasis of the discussion on workload was with “filtering”. This problem seems to have evaporated with the introduction of the Single Judge and the Registry’s Filtering Section. Now the focus of the discussion has shifted towards cases allocated to a Chamber, especially those which are not qualified as a “priority” case under the prioritisation policy of the Court.

Fifth, past work has demonstrated the need for objective data in order to properly analyse the remaining challenges for the Convention mechanism. Data which is initially presented to the outside world in a firm manner evaporates once you lean on it. Again one example. Then President Jean Paul Costa issued a statement on 11 February 2011 drawing attention to an alarming rise in the number of requests for interim measures (an increase of over 4,000% between 2006 and 2010). The Committee of Ministers responded and asked the CDDH to prepare a report. In the course of that working group the importance of reliable figures was felt. It often proved to be impossible to work with the statistical information that was provided and draw accurate policy implications from it. Accurate and reliable statistical information is essential when analyzing a problem and advising our politicians what action to take. There are so many myths going around that it is of primordial importance to have reliable figures at hand. I believe the Council of Europe could and should do more in this field.

Let me then turn briefly to the debate on the *longer term* future of the Convention mechanism. Roughly speaking there are three options.

The first scenario is to leave the Court alone. “All is fine and there is no need to discuss the long term future”. This attitude may be dictated by the fear that such a debate creates the impression that something needs to be changed. Personally I do not agree with such an attitude. Partly because I believe you first discuss the merits before you draw conclusions. Those conclusions at the end of the day may very well be to do “nothing”. Partly because I believe the High Contracting Parties have a duty to do the regular maintenance of the Convention mechanism they set up. And partly because I think that doing nothing is not a real option to effectively guarantee the Convention mechanism for the longer future. That brings me to the second option.

A second scenario would be to maintain the basic characteristics of the current Convention mechanism but to endeavour to further strengthen the system. Personally, I believe the challenges in this scenario are mainly the following. One, increasing the Court’s capacity to process Chamber cases that have not been qualified a “priority case”. Two, increased (financial) incentives to imple-

ment Convention acquis on the domestic level especially if a structural deficiency causes a larger number of repetitive or clone cases.

The final scenario is to propose a drastic change in the outlook of the Convention mechanism. Often reference is made to a “constitutional” Court. It is always unclear what this actually means in practice, but I think roughly the following characteristics may be distinguished: less focus on offering judicial protection to *all* applicants, less focus on the *in concreto* approach currently adopted by the Court in its judgments, and the power to “pick and choose” certain lead cases to develop the case-law further and give guidance to domestic authorities on how the Convention should be interpreted, that is more focus on the *interpretation* of the Convention and less focus on the *application* of the Convention. Personally, I do not believe that Europe is currently in a position to abolish the Court’s role in offering judicial protection to individual victims, nor will it be in the short term, but clearly the merits of this scenario need to be discussed when examining the longer term future of the Court. When discussing this scenario we should be mindful of the “constitutional” characteristics that have already been developed within the current system. Applying a prioritisation policy implies the acceptance that not all cases lodged before the Court will actually be judicially determined. Indicating under Article 46 of the Convention which general measures need to be taken by a High Contracting Party in order to remedy a particular deficiency demonstrates that the Court has been prepared to abandon a strict application of the “in concreto” approach. Other procedural tools have been developed by the Court in order to collectively deal with a larger number of complaints related to essentially one legal issue. Given those developments, some of those who plead in favour of a more radical change to the Convention mechanism may in reality be arguing in favour of the second scenario I described above: maintenance of the current system with some improvements.

And finally, let me make two observations of a more general nature. Whatever scenario one prefers, I believe there are two challenges to *any* form of European human rights mechanism.

First, the flexibility to respond to a changing backdrop. Like the Convention it interprets, also the Court may be considered a living instrument. The context within which the Convention mechanism functions changes continuously. Either the High Contracting Parties are able to react swiftly to these developments, or we need to accept and even embrace the fact that the Court interprets the Convention as a living instrument. It is one or the other – one cannot criticize the evolutive case-law of the Court or the fact that the Court deals with certain practical problems it encounters in its Rules of Court if the responses to these challenges by other actors are inadequate and not sufficiently swift. The inconclusive discussion on a “simplified amendment procedure” may be recalled here.

Second, the need to convince the wider public of the continued need for European supervision in a politically sensitive field such as human rights. The perception of human rights as such is changing in the public and political domain. Too often, human rights are seen as an obstacle, a legal impediment which makes it impossible to initiate effective policies. A related issue is that human rights are only too often associated with the rights of perpetrators, in order to shield them from governmental interference. In addition, some wish to create the impression that those human rights standards are imposed on the domestic legal order by “Europe”. Relatedly, some now openly question the added value of European supervision. Would domestic mechanisms not suffice? Equally, public debate seems to be influenced by the perception in some quarters that judges too easily overturn decisions taken by democratically elected representatives in Parliament. Those perceptions are in all likelihood a far greater challenge or threat to the Convention mechanism than all of the developments I described earlier. So far, I fear that we have not been able to address those perceptions effectively and I would encourage their inclusion in our debate.

Ladies and gentlemen, thank you for your attention!

The successes of and challenges for the European Court, seen from the outside/Les succès et les défis posés à la Cour européenne, perçus de l’extérieur

Laurence Helfer

Professor, Duke University/Professeur, Université de Duke

It is a privilege to address such a distinguished group of judges, government representatives and officials from the Council of Europe. I have been a long-standing admirer of the European human rights system, which I first learned about in the late 1980s when I was a law student in the United States. At the time, I was dismayed over the US Supreme Court’s 1986 decision in *Bowers v. Hardwick*, which rejected a claim that the right to privacy protects intimate same-sex relationships between consenting adults. As I was researching a paper critiquing the Hardwick decision, another student mentioned to me in passing that he had heard of “some court in Europe” that had decided this issue the other way. I soon discovered the Court’s groundbreaking 1981 judgment in *Dudgeon v. the United*

Kingdom, and I have been an avid follower of the Court and the Strasbourg supervisory system ever since.

The organisers of this conference have asked me to address the successes and challenges for the Court as seen from the outside. I will take this opportunity to draw upon my research on human rights systems outside of Europe to explain how these systems have responded to some of the same challenges now facing the Council of Europe and the Court. I hope to convince you that international human rights courts, wherever they are located, require sustained political and material support if they are to thrive and grow over time.

I will illustrate my remarks with examples from the Inter-American and African courts of human rights and from lesser-known courts of sub-regional legal systems in Africa—the Economic Community of West African States (ECOWAS), the East African Community (EAC) and the Southern African Development Community (SADC). The judges of these courts often look to the Court's case-law for guidance. They are also aware of the high level of political and material support for the Strasbourg supervisory system. Just as these courts have drawn inspiration from the Court, so too those who will shape the Court's long-term future should consider both the achievements and the challenges that these regional and sub-regional systems have faced. In describing these positive and negative developments, I will focus on three issues – the evolution of human rights jurisprudence, the politics of compliance with court judgments, and government resistance and backlash.

I will begin with jurisprudential trends. The innovative doctrines and principles pioneered by judges in Strasbourg are alive and well in other human rights systems. Interpretive tools such as the evolutionary nature of human rights, the presumption that rights must be practical and effective, the creative and strategic approach to remedies, and cross-fertilisation of legal norms are commonplace in the case-law of all regional and sub-regional courts. For example, Inter-American judges have applied these doctrines in several types of cases, including the obligation to investigate, prosecute and punish the perpetrators of past human rights violations, the prohibition of amnesty for such violations, the rights of LGBT persons, and affirmative measures to combat violence against women. *Mtikila v. Tanzania*, the first merits judgment of the African Court of Human and Peoples' Rights decided in 2013, analyses the decisions of the other two regional human rights courts and the UN Human Rights Committee to support its conclusion that a ban on independent candidates standing for election violates the African Charter. Among the most striking examples of creative legal interpretation appear in the case-law of the East African Court of Justice and the SADC Tribunal. The judges of those courts have cited references to human rights, the rule of law and good governance in the principles and objec-

tives clauses of treaties establishing the economic communities to justify expanding their jurisdiction to include human rights.

These capacious interpretations have broadened the scope and reach of international human rights law. But they have also engendered significant compliance challenges. All other things equal, the more expansive and far-reaching remedies a court requires, the greater the likelihood of delay or resistance in implementing its judgments – in terms of political will, capacity, and commitment of resources. The Inter-American Court has by far the most ambitious approach to remedies, often specifying in exquisite detail the measures States must adopt. Governments have responded by implementing the easier and less politically costly remedies, with the result that partial compliance with the Inter-American Court's judgments is now commonplace.

Human rights courts in Africa are more circumspect, reflecting the fact that these nascent tribunals have fewer government or civil society allies to advocate compliance with more ambitious remedial orders. In the Mtikila case, for example the African Court directed Tanzania “to take constitutional, legislative and all other necessary measures within a reasonable time to remedy the violations found by the Court and to inform the Court of the measures taken”. It did not, however, indicate which measures were necessary. A similar approach appears in the 2012 judgment of the ECOWAS Court in *Socio-Economic Rights and Accountability Project v. Nigeria*, a case involving environment damage by multinational oil companies in the Niger Delta. The Court found Nigeria responsible for failing to regulate the companies that had despoiled the area, but it rejected a demand for US \$1 billion as impractical. Instead, the judges ordered the government to “take all measures” to restore the environment, prevent future damage, and hold the perpetrators accountable – without, however, specifying how the government was to achieve these goals.

Expansive legal interpretations and creative remedies are natural outgrowths of maturing human rights systems in which judges regularly apply international law to a diverse array of factual circumstances. Yet, as courts have issued more rulings that touch on politically sensitive topics, they have increasingly encountered overt—and occasionally strident—opposition from some States. Adverse reactions include reductions in funding (an ongoing challenge in the Inter-American system); restructuring the court (such as the creation of the EACJ Appellate Division following a controversial 2005 decision); and politicising judicial appointments. More extreme responses include overt non-compliance to signal a government's displeasure with specific rulings; unilateral treaty withdrawals (most recently, Venezuela's 2013 denunciation of the American Convention); threats to create a rival human rights regime (a possibility being explored by several left-leaning South American countries); and even suspending the

court and stripping its jurisdiction to hear complaints from private litigants (a rebuke of the SADC Tribunal spearheaded by Zimbabwe in 2011).

What lessons do these developments outside of Europe hold for the Court's long-term future? First, the negative views recently expressed by some parliamentarians, political leaders, and national judges in the Brighton Declaration, in judicial opinions, in public speeches, and in academic writings may signal to the Court the need for caution when expansively interpreting the Convention and fashioning remedies. This is not to suggest that the Court will abandon or significantly narrow the jurisprudential principles that it has so carefully developed. Rather, I foresee that these principles will be supplemented by other nuanced doctrines that enable the Court to fine-tune the deference given to national decision-makers depending upon how faithfully they apply the Convention – as interpreted in Strasbourg – within their respective national legal orders.

Second, the positive feedback loop that induces States to implement the Court's judgments is in danger of stalling. Over the last few decades, this virtuous circle has created a culture of compliance that views adherence to Strasbourg judgments as the norm and non-compliance as the problematic exception that can rightfully be challenged by other governments and civil society groups. As the Court has become more skilled at identifying systematic human rights violations, however, the delays in compliance by States responsible for those violations have lengthened and are becoming endemic in some countries. In addition to the ongoing harm to the thousands of individuals whose rights continue to be violated, this trend risks generating a vicious circle in which government officials point to public criticisms of the Court and compliance delays in other States to justify non-compliance in their own jurisdictions and to legitimise criticism of those who advocate adherence to the Court's rulings.

A final implication of the challenges to human rights adjudication outside of Europe relates to the possibility of a more widespread backlash against the Court. Russia's recent military and political interventions in Ukraine, the tens of thousands of applications pending against Russia, and the government's "traditional values" campaign in the UN Human Rights Council and at home are ominous signs of Russia's growing dissatisfaction with the European Convention and the Court. In fact, it is not beyond contemplation that Russia will create a rival Eurasian human rights regime comprised of a few allies in Eastern Europe and former Soviet republics in central Asia. The laws and institutions of such a system may superficially resemble those of the Council of Europe. In reality, however, they would be much weaker. A Eurasian human rights mechanism need not involve Russia's withdrawal from the European Convention – at least not initially. But even if the country remains nominally subject to the Court's jurisdiction, its officials can point to the competing decisions of Eurasian human

rights bodies to justify and legitimise non-compliance with the Strasbourg Court's judgments.

Ladies and gentlemen, if there is one message that I hope you take away from my remarks today, it is that the progressive evolution of international human rights laws and institutions should never be taken for granted – even in Europe. On the contrary, these laws and institutions need to be actively nurtured and supported. Such nurturing and support includes providing judges and registry lawyers in Strasbourg with the resources needed to process the backlog of cases. It is far more important, however, to bolster the NGOs, bar associations, national judges, and academics who are the Court's crucial interlocutors and compliance constituencies. These domestic actors must have the material support and the political space to continue to pressure governments to live up to the aspirations they espoused when creating what remains the world's most advanced international system for protecting human rights.

The successes of and challenges for the European Court, seen from the inside/Les succès et les défis posés à la Cour européenne, perçus de l'intérieur

Dean Spielmann

President of the European Court of Human Rights/Président de la Cour européenne des droits de l'homme

Monsieur le Ministre, Mesdames et Messieurs,

Permettez-moi d'abord de remercier les autorités norvégiennes et l'Université d'Oslo d'avoir pris l'initiative de cette conférence sur « L'avenir à long terme de la Cour européenne des droits de l'homme ». Des conférences sur ce thème ont déjà été organisées, y compris au plus haut niveau politique. Je pense, bien sûr, aux Conférences d'Interlaken, d'Izmir et de Brighton. Chacune d'entre elles a débouché sur des résultats concrets. Ainsi, la conférence d'Interlaken a facilité la ratification du Protocole n° 14 par la Fédération de Russie et elle a permis l'adoption d'un Plan d'action. Autre exemple : deux protocoles à la Convention

européenne des droits de l'homme ont été élaborés et ouverts à la signature à la suite de la Conférence de Brighton.

Notre rencontre d'aujourd'hui se déroule dans un format différent de celui de ces grandes conférences politiques. Mais je suis convaincu que la présence d'experts et d'universitaires de haut niveau contribuera à enrichir notre réflexion commune et à alimenter le débat.

Les organisateurs m'ont demandé de traiter des « succès et des défis posés à la Cour, perçus de l'intérieur ». Cet intitulé me paraît particulièrement bien choisi parce qu'effectivement les succès sont indéniables, même s'ils sont fragiles, et que, dans le même temps, nous sommes constamment confrontés à des défis nouveaux. Il est d'ailleurs intéressant de constater que beaucoup de réponses aux questions que nous nous posons se trouvent dans le programme de la conférence. J'y reviendrai.

Les succès, pour commencer.

Dès l'entrée en vigueur du Protocole n° 14, la Cour a fait plein usage des instruments qu'elle avait à sa disposition et, surtout, elle a fait preuve de créativité. Un certain nombre de réformes dans ses structures et ses méthodes de travail ont été introduites. La plus marquante a été la création d'une section spécialement chargée du filtrage des requêtes irrecevables, notamment en vue de leur traitement par le juge unique, lui-même créé par le Protocole n° 14. Deuxième outil utilisé avec succès par la Cour : la procédure dite de l'arrêt pilote à laquelle il a été fait recours de manière plus fréquente et pour des affaires très variées. Je pense, par exemple, à l'arrêt Torregiani relatif à la surpopulation carcérale en Italie. Suite à cet arrêt pilote, un train de mesures a été adopté par les autorités italiennes.

Toutes ces réformes ont porté leurs fruits et les chiffres parlent d'eux-mêmes. Les années 2012 et 2013 ont été des années excellentes pour la Cour en termes de productivité. Ceci est, bien sûr, dû au fait que nous nous sommes attaqués à l'arriéré des requêtes manifestement irrecevables. Or, cet arriéré va bientôt disparaître. De nombreux pays, gros pourvoyeurs de requêtes, telles la Turquie, la Roumanie, la Pologne, ont déjà éliminé l'arriéré de ce type d'affaires. En 2014, la même chose devrait se produire pour la Russie (ce que nous n'aurions pas cru envisageable ne serait-ce qu'il y a trois ans).

Une analyse plus fine des statistiques nous permet de tirer un certain nombre d'enseignements que je vais vous livrer :

- ▶ Tout d'abord, s'agissant des nouvelles requêtes reçues, les chiffres sont relativement stables, ce qui est en soi tout à fait positif puisque, jusqu'à présent, nous devons faire face à des augmentations chaque année. À la fin de l'année dernière, nous avons reçu environ 66 000 nouvelles requêtes, ce qui est sensiblement le même chiffre que l'année précédente.

- ▶ Ensuite, il y a les requêtes décidées : leur nombre est en augmentation d'environ 6 %. À la fin de l'année 2013, nous avons traité plus de 90 000 requêtes. Le nombre de décisions de juge unique, légèrement plus faible que l'année précédente, se situait, quant à lui, autour de 80 000.
- ▶ Enfin, et je sais que c'est un chiffre marquant, le nombre de requêtes pendantes s'élève actuellement à un peu plus de 96 000. Là encore, cela reflète une réduction considérable par rapport au chiffre que nous connaissions il y a un peu plus de deux ans et qui dépassait les 160 000. Ceci est pour nous un motif de grande satisfaction et un encouragement à poursuivre.

Cependant, il nous faut bien comprendre que cette réduction statistique impressionnante, qui concerne des affaires simples, ne va pas se poursuivre au cours des prochains mois, à moins que des améliorations considérables ne soient apportées dans l'exécution des arrêts de la Cour au niveau du Comité des Ministres et que la mise en œuvre des arrêts au niveau interne ne se fasse de manière efficace. Les succès réalisés ne signifient pas que les problèmes sont pour autant résolus et nous devons faire face à des défis.

Quels sont ces défis ?

D'abord, si on prend le nombre de requêtes pendantes par État, on peut effectivement se réjouir du fait que l'arriéré des affaires contre la Russie ou la Turquie ait considérablement diminué. Mais, dans le même temps, on a vu croître sensiblement le nombre d'affaires contre l'Ukraine, pays qui a pris la première place dans la liste de nos gros pourvoyeurs de requêtes, suivi par l'Italie, pour laquelle, jusqu'à présent, la situation n'a fait qu'empirer. La Russie est désormais en troisième position.

Ensuite et surtout, reste le problème crucial des très nombreuses requêtes répétitives. Leur nombre s'élève à plus de 41 000. C'est trop !

Un autre problème préoccupant est celui des affaires les plus graves, celles que nous appelons les affaires prioritaires. Or, nous souhaitons absolument réduire la durée de traitement de ces affaires prioritaires afin, notamment, de remplir les objectifs définis à Brighton.

Les problèmes doivent donc être réglés et ils doivent l'être à deux niveaux. D'abord à celui de la Cour. Nous avons largement endigué le flot des affaires à juge unique dont le nombre s'élève actuellement à environ 28 000. Cependant, j'ai la conviction que le modèle que nous avons utilisé, mis en œuvre par la section de filtrage, n'a pas épuisé toutes ses potentialités. Cette section de filtrage, très opérationnelle, et qui a désormais moins d'affaires de juge unique, va maintenant s'attaquer aux affaires répétitives et ce, en suivant les méthodes expérimentées avec succès pour les affaires de juge unique, ce que nous appelons le « *one in, one out* ». La section de filtrage a mis en place avec l'aide de notre

service informatique un système qui permettra de traiter rapidement ces requêtes, dans le respect de notre jurisprudence et en faisant usage, autant que faire se peut, des outils informatiques dont nous disposons. S'agissant de ces affaires répétitives, pour lesquelles la Cour a déjà tranché, par exemple dans une décision de principe, ce qui importe, c'est que le justiciable puisse, aussi rapidement que possible, recevoir une indemnisation. Les méthodes que nous mettons en place devraient le permettre.

Mais la Cour ne saurait être seule à agir. Je me dois d'insister sur le rôle que doivent jouer les États pour résoudre les problèmes qui sont à l'origine de ces affaires répétitives. Très souvent, le problème de droit a déjà été tranché par la Cour dans un arrêt de principe ou un arrêt pilote. Nous pouvons, je viens de le dire, mettre en place les mécanismes de résolution les plus sophistiqués. Il n'empêche : les problèmes structurels et endémiques doivent d'abord être résolus au niveau national pour que la Cour ne soit plus encombrée par ce type d'affaires. Nous sommes au cœur de la **responsabilité partagée** entre la Cour et les États.

Cette question des affaires répétitives est évidemment liée à celle de l'exécution des arrêts à laquelle vous consacrerez votre session de demain matin. Sur votre programme, vous posez, me semble-t-il, les bonnes questions et j'ai déjà apporté quelques éléments de réponse pour ce qui est du rôle de la Cour : utilisation des arrêts pilotes, recours à la section de filtrage. Vous traiterez aussi du rôle du Comité des Ministres. Il est crucial et j'ai d'ailleurs eu l'occasion de le rappeler à ses membres, il y a quelques mois, en faisant le lien, précisément, entre le nombre important d'affaires répétitives et l'inexécution des arrêts.

Les exemples d'inexécution sont connus : longueur des procédures en Italie, suivi des affaires Ivanov en Ukraine, affaires de restitution de propriété en Roumanie ou droit de vote des détenus au Royaume-Uni. Or, ce n'est pas seulement la crédibilité de la Cour qui est affectée par l'inexécution des arrêts, c'est aussi celle du Comité des Ministres. Il est donc d'autant plus important que ce dernier agisse pour faire face à ce type de situations. J'attire votre attention sur le fait que le protocole n° 14 donne au Comité des Ministres la possibilité, lorsqu'une Haute Partie contractante ne se conforme pas à un arrêt, de saisir la Cour du manquement par cette Partie à ses obligations. Cet outil reste inexploité pour l'instant. Je ne peux que regretter qu'à ce jour, le Comité des Ministres n'a pas usé de cette faculté.

Je souhaite à ce stade évoquer un autre point : le CDDH réfléchit actuellement à la manière dont nous adoptons notre Règlement. Certains États souhaiteraient jouer un rôle dans ce domaine. Je ne peux qu'être surpris par une telle revendication. Alors que nous nous employons, au quotidien, à faire face sans relâche aux problèmes posés par les affaires répétitives, par les affaires prioritaires, par l'inexécution de certains arrêts importants, certains au lieu de résoudre ces prob-

lèmes cruciaux en soulèvent d'autres, tels que celui-là, qui n'a aucun caractère d'urgence. J'y vois un désir de contrôle de notre Cour qui ne me semble pas correspondre aux défis qui se posent actuellement. Consacrons nous donc à l'essentiel.

Lors de votre session de demain matin, vous aborderez également le rôle des parlements nationaux. À cet égard, une initiative récente mérite d'être signalée : il s'agit de la décision prise au sein du parlement polonais de créer une commission permanente chargée de s'occuper de la bonne exécution des arrêts de la Cour par la Pologne. Cette commission est un nouveau pas vers une synergie entre un gouvernement et un parlement pour l'exécution des arrêts. Il me semble que ce modèle très intéressant pourrait être suivi dans d'autres États. S'agissant des parlements nationaux, l'Assemblée parlementaire du Conseil de l'Europe constitue un relais important et efficace des parlements nationaux et il ne faut pas hésiter à l'utiliser. J'ajoute que sa Présidente, ma compatriote et amie Anne Brasseur, est en faveur d'un rôle accru de l'assemblée parlementaire pour l'exécution des arrêts de la Cour et d'un renforcement de ses relations avec la Cour. J'y suis, bien sûr, également tout à fait favorable.

Je ne pourrai pas, en raison de mes obligations à Strasbourg, rester avec vous pendant toute cette journée. Aussi, voudrais-je encore dire un mot sur un des thèmes que vous aborderez dans l'après-midi. Il s'agit du dialogue entre les cours nationales et la Cour de Strasbourg. Ce dialogue est au cœur de mon action.

Il peut prendre plusieurs formes : rencontre entre les cours, dialogue jurisprudentiel, dialogue plus institutionnalisé avec la question des avis consultatifs. Il est certain qu'à côté de notre juridiction spécialisée en matière de droits de l'homme et qui n'a vocation à intervenir qu'à titre subsidiaire, lorsque les droits de l'homme n'ont pas été respectés au plan interne, les premiers juges des droits de l'homme sont les juges internes. Ce qui importe, en définitive, c'est que l'application de la Convention européenne des droits de l'homme conduise au même résultat, qu'elle soit appliquée par le juge interne ou par le juge international. Le dialogue, c'est d'abord le dialogue au sens premier du terme, qui a lieu à l'occasion d'une rencontre. Ces échanges ont souvent lieu à Strasbourg. Des cours suprêmes, de plus en plus nombreuses, nous rendent visite pour des réunions de travail sur nos jurisprudences respectives. À l'occasion de ces contacts, des liens sont noués entre les uns et les autres, parfois des malentendus sont dissipés. Bref, nous nous rapprochons les uns des autres.

Par ailleurs, au fil des ans, un dialogue des jurisprudences s'est instauré entre notre cour et les cours nationales. Le dialogue existe d'abord au niveau interne, lorsque le juge national cite la jurisprudence de notre Cour ou l'applique, même sans la citer. L'examen des décisions des cours nationales, qu'il s'agisse de cours constitutionnelles, de cours suprêmes ou de juridictions ordinaires, témoigne de l'évolution intervenue au cours des vingt dernières années. On voit de plus en

plus fréquemment les juridictions internes s'appuyer sur la Convention européenne des droits de l'homme telle qu'elle est appliquée à Strasbourg, mais, surtout, s'approprier les raisonnements juridiques de notre cour pour motiver leurs propres décisions.

Il me semble tout à fait important que les influences croisées se développent, puisque nous poursuivons le même objectif, comme je le disais au début de mon propos.

J'ai mentionné le dialogue institutionnalisé. Je pense, bien sûr, au Protocole 16. Il est destiné à mettre en place un dialogue nouveau entre les plus hautes juridictions nationales et notre Cour. C'est d'ailleurs pourquoi je me plais à l'intituler le « Protocole du dialogue ». Ce traité, qui entrera en vigueur après dix ratifications, permettra aux plus hautes juridictions, si elles le souhaitent, d'adresser à la Cour des demandes d'avis consultatifs sur des questions de principe relatives à l'interprétation ou à l'application des droits et libertés définis par la Convention. Ces demandes interviendront dans le cadre d'affaires pendantes devant la juridiction nationale. L'avis consultatif rendu par notre Cour sera motivé et non contraignant. Élément supplémentaire du dialogue judiciaire entre la Cour et les juridictions internes, il aura pour effet d'éclairer les cours nationales sans les lier pour autant. Je suis convaincu que, lorsqu'elles feront le choix de statuer conformément à cet avis, leur autorité en sera renforcée pour le plus grand bénéfice de tous. Les affaires pourront ainsi être résolues au niveau national plutôt que d'être portées devant notre Cour, même si cette possibilité restera ouverte aux parties après la décision interne définitive.

Pour ma part, je considère que de tels avis consultatifs auront une importance comparable à celle des arrêts de principe de la Cour et qu'ils contribueront à une interprétation harmonieuse des normes minimales en matière de respect des droits garantis par la Convention.

Je ne peux terminer mon intervention sans vous livrer mon sentiment personnel sur ce que doit être la Cour européenne des droits de l'homme sur le long terme. La Cour doit-elle être une cour constitutionnelle ou une cour protectrice des individus ? C'est la question que vous posez pour le débat de cet après-midi et je sais qu'à cet égard les conceptions diffèrent.

Ma position est claire : notre Cour est parfois qualifiée de Cour constitutionnelle européenne. Permettez-moi de citer la jurisprudence constante de la Cour, récemment réaffirmée dans l'arrêt de Grande Chambre Konstantin Markin qui déclare que : « Si le système mis en place par la Convention a pour objet fondamental d'offrir un recours aux particuliers, il a également pour but de trancher, dans l'intérêt général, des questions qui relèvent de l'ordre public, en élevant les normes de protection des droits de l'homme et en étendant la jurisprudence dans ce domaine à l'ensemble de la communauté des États parties à la Convention ». C'est naturel à bien des égards : d'abord, nous veillons constam-

ment à ce qu'un traité international, la Convention européenne des droits de l'homme, soit appliqué par les États qui l'ont signé. Ensuite, un dialogue entre notre Cour et les juges constitutionnels nationaux s'est noué et nos juridictions respectives se répondent les unes aux autres. Enfin, le juge constitutionnel et nous-même appliquons des normes identiques ou très proches. Il arrive régulièrement qu'une même question soit examinée successivement par la Cour constitutionnelle nationale, puis par la Cour de Strasbourg.

Mais nous ne sommes pas que cela car, dans le même temps, notre Cour tranche des affaires qui ne sont absolument pas de nature constitutionnelle. Je pense par exemple, aux longueurs de procédure, aux mauvais traitements en détention et je pourrais citer bien d'autres exemples tout aussi cruciaux pour les requérants. C'est aussi en raison de tout ce qu'elle a fait depuis des dizaines d'années pour remédier aux violations des droits de l'homme au quotidien qu'elle est à ce point respectée en Europe et dans le monde.

Il est exact que protéger les droits de tous les requérants implique une organisation parfaite et une efficacité sans faille, mais comme je le disais au début de mon intervention, la Cour a montré que cela était réalisable et qu'elle n'était plus victime de son succès. Ce qui importe à mes yeux, ce que je crois profondément, c'est qu'elle doit impérativement poursuivre cette mission de protection des droits des individus. Alors pour ma part, je crois à cette double vocation et je dis oui à une cour constitutionnelle européenne, à condition qu'elle demeure une cour protectrice des droits des individus en continuant à rendre justice dans le cas particulier soumis. Car ce qui a fait la force de notre système, ce qui nous rend fiers, c'est le droit de recours individuel.

Il demeure notre acquis incontestable et il fait de notre juridiction l'ultime recours, le dernier espoir des requérants. Ne les décevons pas.

Je vous remercie.

Invited reflections on the above, as an introduction to the general debate/Réflexions sur ce qui précède, en introduction au débat général

Vít Schorm

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Messieurs les Présidents de la séance et de la Cour, Mesdames et Messieurs les autres amis de la Cour, si je puis dire,

Tout d'abord, je souhaite louer les organisateurs d'avoir décidé d'introduire cette conférence par une session consacrée à l'enseignement tiré du passé et à l'identification des défis auxquels nous devrions répondre par une quelconque réforme actuelle du système de la Convention.

Je crains en effet que les défis n'aient pas été suffisamment anticipés dans le passé. Dans le processus menant au Protocole n° 11, l'unique protocole qui a plus profondément modifié le mécanisme de contrôle instauré par la Convention, il a certes été réagi aux défis alors visibles, mais au moins celui du nombre des requêtes croissant de manière dramatique, qui a commencé à mettre en danger le fonctionnement du système, a rendu nécessaire d'entamer un nouveau cycle des réformes peu après l'entrée en vigueur de la grande réforme des années 1990.

Comme nous l'avons vérifié à nouveau à propos du Protocole n° 14, il faut tenir compte du fait que tout processus dans un milieu international nécessite du temps, parfois une décennie. De surcroît, vu que les opinions peuvent diverger considérablement, le résultat des discussions peut être le dénominateur commun le plus petit qui n'est pas nécessairement à la hauteur du défi.

Aujourd'hui, il ne faut pas non plus mésestimer ce que nous n'avons pas vraiment connu il y a vingt ans, et je pense à l'exacerbation endémique du problème de la légitimité de la Cour européenne des droits de l'homme. Elle découle de l'amalgame souvent fait du Conseil de l'Europe et de l'Union européenne, cette dernière consistant en un projet d'intégration bien poussé et large, de l'extension naturelle de l'étendue des droits de l'homme, et par conséquent de l'intervention du mécanisme de la Convention, au-delà des horizons les plus traditionnels, ou de l'idée que les droits de l'homme sont un obstacle à la réalisation d'autres inté-

rêts nationaux à caractère plus ou moins vital, à l'instar de la protection contre le terrorisme ou des impacts de la crise économique et financière, ou d'intérêts partagés par une fraction importante de la population, peu importe les droits d'une minorité.

Je suis d'accord avec ce qui a été dit ici que les défis majeurs pour le système tant actuel que futur sont constitués, d'une part, par le volume de l'arriéré dont l'expression numérique a certes diminué, mais dont la structure est en train de glisser vers une proportion plus importante d'affaires plus complexes, même si pas forcément prioritaires, ce qui veut dire que la structure s'est empirée car ces affaires-ci ne peuvent guère être résolues par une procédure simplifiée (via les juges uniques ou les comités). D'autre part, il y a une perception problématique de la Cour qui résulte d'une certaine manipulation avec l'opinion publique (la Cour étant une institution à la fois composée de juges, européenne et s'occupant des droits de l'homme), mais peut-être aussi de l'expérience personnelle de ceux dont les cas n'ont pas connu de succès à Strasbourg.

On ne saurait sous-estimer ce groupe de gens qui, à l'occasion, sont à même de faire une publicité négative à la Cour. Cela tient dans une large mesure au fait que le nombre d'affaires examinées rend impossible d'expliquer dans chaque cas particulier pourquoi la plupart des requêtes sont manifestement irrecevables. Or, il y a des dizaines de milliers de gens concernés chaque année par le rejet, le plus souvent sommaire, de leurs griefs. Si leur mécontentement les a conduits à écrire à Strasbourg, nul ne peut douter de ce qu'ils se forment une image critique également de la Cour. Ces particuliers ne sont concernés que par leurs propres affaires dont l'issue est scellée par une lettre officielle et sans compassion invitant les intéressés à ne plus écrire à la Cour, et ne regardent pas les dizaines de milliers d'autres affaires plus méritoires auxquelles les ressources sont davantage consacrées.

Je crois que dans notre vision du système de la Convention pour l'an 2030, il ne devrait pas y avoir de place pour une manière non transparente de décider des requêtes, des demandes de renvoi devant la Grande chambre, etc., que nous pouvons comprendre, mais qui, par la force des choses, fait naître des spéculations dans l'esprit des gens et qui de surcroît ne correspond guère aux standards entourant les décisions juridictionnelles que la Cour elle-même s'attache à promouvoir vis-à-vis des États. Bref, c'est également pour assurer la légitimité et une perception positive de la Cour qu'il nous faut réfléchir sur les moyens qui permettront de garantir une administration de la Justice sereine et prévisible. La condition en est incontestablement la réduction du volume du contentieux devant la Cour.

Il est important de regarder le système de la Convention dans son ensemble. C'est la raison pour laquelle nous avons pris l'habitude de nous concentrer sur les trois piliers, à savoir (i) le fonctionnement de la Cour, (ii) la mise en œuvre de la

Convention au niveau national et (iii) une bonne exécution des arrêts de la Cour. Cette conférence est consacrée aux premier et troisième de ces volets qui sont directement liés au fonctionnement du mécanisme de contrôle strasbourgeois reposant sur les épaules de la Cour et du Comité des ministres du Conseil de l'Europe.

Ceci est en soi un grand défi car nous sommes censés discuter des changements de quelque chose qui, en l'occurrence, est le meilleur système régional de protection des droits de l'homme dans le monde. Sachant que « le mieux est l'ennemi du bien », nous ne devrions sûrement pas céder à la tentation de nous livrer uniquement à des améliorations mineures qui vont dans le bon sens, mais ne résolvent pas en elles-mêmes les défis complexes auxquels le système fait face. Je fais allusion à la procédure de modification du règlement de la Cour ; ici, le changement contribuerait à asseoir davantage la légitimité de la Cour dans l'esprit de la responsabilité partagée, mais le défi sur ce champ est loin d'être de taille aussi modeste. En d'autres mots, il importe d'identifier les vrais besoins et les vrais moyens pour y satisfaire et de ne procéder aux améliorations des détails que dans ce cadre-là.

Hélas, j'y reviens, nous devons aussi prendre en considération le milieu dans lequel nous essayons d'avancer. Je pense à l'environnement de la coopération intergouvernementale dont le trait typique est le consensus, y compris là où il est juridiquement possible de procéder au vote. Nous pouvons difficilement nous attendre à ce que le Comité des ministres change totalement ses approches dans le domaine de la surveillance de l'exécution des arrêts de la Cour quoi que la Convention telle qu'amendée par le Protocole no 14 permette de clarifier, par la voie des procédures spéciales initiées devant la Cour par le Comité des ministres, quelles obligations découlent de l'arrêt et si l'État concerné les a honorées. Le potentiel de ces procédures n'a pour le moment pas été testé et nous devrions probablement nous demander pourquoi afin d'en comprendre les raisons si ce n'est tout simplement l'incompatibilité entre ces procédures et le milieu dans lequel elles sont censées se mettre en œuvre.

De même, nous avons récemment rediscuté, dans le contexte de l'exécution des arrêts de la Cour, des pénalités qui pourraient être infligées aux États pour l'inobservation de leurs obligations en vertu de la Convention. Le recours en manquement en vertu du Traité sur le fonctionnement de l'Union européenne n'est-il pas juste un exemple d'un instrument certes efficace, mais non transposable dans un autre milieu ?

La grande question du moment est celle de savoir s'il est temps de redéfinir le rôle que la Cour devrait jouer à l'avenir. Les possibilités sont présentées d'une manière un peu extrême et simplifiée : la Cour doit-elle remplir plutôt un rôle « constitutionnel » visant à interpréter la Convention et demeurer plus abstrait,

ou plutôt un rôle de gardien des droits et libertés des individus visant à appliquer la Convention et s'attacher aux circonstances de chaque cause ?

Je ferais remarquer tout d'abord que nous devrions analyser si la subsidiarité, bientôt formellement consacrée, grâce au Protocole n° 15, dans le préambule de la Convention, est mieux préservée dans l'un ou l'autre scénario. Je dirais que si les organes de la Convention, que ce soit la Cour ou en fin de compte aussi le Comité des ministres, donnent des directives depuis une sorte de tour d'ivoire sans les tailler sur mesure en fonction des circonstances bien établies de chaque espèce, il y a de gros dangers pour la subsidiarité et la recherche des solutions appropriées au niveau national, en connaissance des réalités de chaque pays. Pour illustrer mon propos, je ne suis pas sûr que les deux organes de Strasbourg, après avoir examiné des milliers d'affaires de délais de procédures et acquis une expérience certaine en la matière, sachent donner de bons conseils circonstanciés aux États pour éradiquer les causes du mal.

Je me demanderais ensuite si tout simplement l'une des difficultés de l'exercice ne tient pas au fait que chaque État connaît des problèmes différents du point de vue de leur gravité ou fréquence et possède une autre capacité de résolution de ces problèmes. Et si le défi majeur du présent et de l'avenir proche tenait à cette divergence au sein de notre communauté de 47 États parties à la Convention à travers toute l'Europe ?

Ce qui paraît acceptable en relation avec certains États dont les tribunaux analysent quotidiennement le droit de la Convention et qui mènent avec la Cour de Strasbourg tout au plus un dialogue pour déterminer si l'essence de l'affaire se trouve ici ou là, mais le doute est exclu quant à l'examen de l'affaire au niveau national à la lumière des standards de protection des droits de l'homme, peut ne pas être la solution pour d'autres États ayant des problèmes bien plus basiques où il ne vient pas encore automatiquement à l'esprit au juge ou au fonctionnaire de s'inspirer dans la recherche des bonnes réponses par la Convention et la jurisprudence de la Cour.

Tout en croyant en un progrès notable sur ce terrain d'ici 2030, j'estime que si nous voulons maintenir l'unité du système de protection, cette divergence reste pour le moment l'un des facteurs limitatifs que les partisans d'un rôle avant tout « constitutionnel » de la Cour devraient ne pas perdre de vue. Ni même les États qui peuvent à juste titre vanter la hauteur de leurs propres standards en matière des droits de l'homme ne sauraient exclure qu'il existe des failles dans la protection qu'ils assurent dans certains secteurs. Ou bien, tout est-il autrement, les problèmes sont largement comparables, mais ne sont pas toujours perçus comme tels ?

Pourtant, il me semble que la demande des services de la Cour est généralement trop haute et je crains qu'une meilleure mise en œuvre de la Convention au niveau national et une exécution systématique des arrêts de la Cour, l'instaura-

tion des voies de recours internes, etc., ne conduisent pas nécessairement à plus long terme à la réduction numérique des requêtes adressées à la Cour puisque ces progrès indéniables seront contrebalancés par d'autres facteurs, tels une croyance grandissante en la possibilité quasiment illimitée de mettre en cause les décisions prises au niveau national et l'essor incessant des droits de l'homme, et donc de leur étendue et impacts.

À défaut de pouvoir agir sur la motivation des requérants qui les pousse à saisir la Cour – et rappelons-le, cette saisine n'exige ni de recourir au ministère d'un avocat, ni d'utiliser les langues officielles ni de payer de frais – je suis persuadé qu'un nombre non négligeable des requêtes, mêmes telles qui révèlent une violation, ne sont pas subjectivement d'une importance capitale pour l'intéressé ou bien le préjudice objectivement occasionné par la violation est au mieux purement spéculatif. Par conséquent, la Cour de Strasbourg devrait développer davantage sa jurisprudence relative au critère de l'absence de préjudice important, en ligne avec l'esprit du Protocole n° 15 sur ce champ. Elle n'est pas un juge de paix local en matière des litiges de voisinage, mais une juridiction internationale qui ne devrait connaître que des affaires d'un certain degré de gravité. Je ne prétends pas que les longues procédures judiciaires ne causent pas de préjudice réel aux parties, mais si je posais à nos politiciens et même souvent à nos juges la question de savoir grâce à quoi la Cour de Strasbourg est bien connue, ils pourraient facilement répondre, sans en comprendre forcément le double sens, que grâce aux « délais de procédure ». Or, nous allons nous mettre vite d'accord que sur le fait que cette Cour n'a pas été instituée pour s'occuper des délais de procédure. Et pourtant, sa perception peut être à tel point réductrice de ce que la Cour représente réellement comme acquis des Européens après la Grande guerre et la chute des régimes totalitaires quarante ans plus tard.

Ceci est une conférence spécialisée, académique, apolitique. Je ne parle pas devant vous au nom de mon gouvernement ni de celui du Comité directeur pour les droits de l'homme du Conseil de l'Europe. Sachons que bien des questions peuvent se résoudre sans moyens financiers additionnels, mais certaines peuvent impliquer de renforcer le budget. J'estime en effet que l'accumulation de l'arriéré exigeant un traitement plus sophistiqué, et non pas trivial, peut demander de l'argent en plus. Il s'agit de plus d'une dizaine de milliers d'affaires et il serait étrange de reconforter les requérants concernés pendant longtemps que leurs affaires ne sont pas de nature prioritaire puisque les intéressés n'encourent pas le risque de torture, à titre d'exemple. La Cour, de surcroît, ne peut subsister qu'en une symbiose avec le Conseil de l'Europe ; la juridiction et l'organisation exercent des fonctions complémentaires en matière de protection européenne des droits de l'homme. C'est la raison pour laquelle la tendance vers l'accroissement du budget de la Cour au détriment de celui du reste du Conseil de l'Europe ne saurait à mon avis continuer, tout comme le financement des fonctions essen-

tielles de la Cour et du Conseil de l'Europe sur la base des contributions volontaires.

Enfin, permettez-moi de remercier les organisateurs de la présente conférence d'avoir bien voulu se proposer comme tels et d'avoir investi autant d'énergie dans sa préparation que nous pouvons consacrer tranquillement les journées d'aujourd'hui et en partie de demain à nos discussions sur un sujet aussi important qu'est le nôtre. Je souhaite en même temps exprimer la croyance que nous quitterons la capitale norvégienne enrichis des idées intéressantes qui feront leur chemin bien mérité.

SESSION II – THE COURT IN THE YEAR 2030 SESSION II – LA COUR EN 2030

Subsidiarity: Dialogue between the Court and national courts/Subsidiarité : le dialogue entre la Cour et les juridictions nationales

How do the Court and national courts interact in the interpretation and development of the ECHR? Do Court judgments have an *erga omnes* effect; and if yes, to what extent? What is the role of the margin of appreciation and European consensus?

Comment la Cour et les cours nationales interagissent-elles dans l'interprétation et le développement du contenu de la CEDH ? Les arrêts de la Cour ont-ils un effet *erga omnes* ; et si oui, à quel point ? Quel est le rôle de la marge d'appréciation et du consensus européen ?

Andreas Paulus²

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I. Introduction: Subsidiarity and the European Court of Human Rights

Ever since the entry into force of Protocol XI, the dialogue between courts in what has been called the European community of courts – comprising the European Court of Justice, the European Court of Human Rights and the highest national courts and tribunals – has developed from wishful thinking into day-to-day reality. It is in this perspective I am particularly grateful to the organisers of this conference for having invited me to present the perspectives of a national judge as part of the discussion of the future of the European Court of Human

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Rights. I may not see my colleagues as often as the short distance between Strasbourg and Karlsruhe may suggest, or as I may wish, but I see them quite often nevertheless. Thus, this is not only a meeting between colleagues, but between friends.

As usual, among friends, though, this is also an open discussion. Frankness may not always produce agreement, but certainly a better understanding of the respective sensibilities. Only by finding a productive co-operation that tackles rather than avoids tough issues can we serve our common goal, namely the effective protection of human rights and fundamental freedoms in Europe, and at home, respecting both the necessity of common European standards and the need for translating these standards into reality that may be very varied in the 47 States Parties to the European Convention on Human Rights. Finally, when Protocol 16 will have entered into force, a new avenue of co-operation and dialogue will be open that may not be useful for every Member State, but will certainly be for a great many of them.

In this regard, the topic you have suggested for my intervention today is particularly apt. As is well known, subsidiarity is a favourite term of the German discussion on the relationship between European law and German law. It was included in the Treaty of Maastricht, in what has now become Article 5 § 3 of the Treaty on European Union, but also in Article 23, paragraph 1 of the German Constitution, the *Grundgesetz*, as a precondition for German co-operation in the European Union. In the broadest sense of the term, subsidiarity means that decisions should be taken at the lowest political level possible, not only for reasons of practicality, but as an expression of democracy. Accordingly, a special reason is required to adopt a common, one-size-fits-all solution, or, in the words of the Treaty, that the federal instance “shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at the” federal level.

While the European Convention on Human Rights, in the form presently in force, does not contain an equivalent provision, both the substantive provisions of the Convention and the practice of the European Court of Human Rights contain elements expressing a general principle of subsidiarity. In particular, this regards the formal admissibility criterion of the exhaustion of local remedies as contained in Article 35 § 1, as well as the material criterion of the margin of appreciation that the Court leaves more and more frequently to the States Parties to the Convention in cases in which no European consensus has emerged, or in so-called triangular cases in which the rights of all persons concerned cannot be fully protected at the same time. Upon the entry into force of Protocol No. 15, however, the Preamble of the Convention will contain a reference to the principle of subsidiarity, stating that “the High Contracting Parties, in accordance with

the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms ... and that in doing so they enjoy a margin of appreciation, subject to the supervisory jurisdiction of the European Court of Human Rights ...”

Seen from the angle of subsidiarity, the breadth and depth of the Strasbourg Court’s jurisprudence can however create problems of implementation for States Parties. Expectations diverge between States that do possess their own effective and efficient mechanisms of human rights protection and those that do not. Whereas the latter often expect a strict standard of protection, the former are at times wary of interventions by the European Court of Human Rights in their own systems of protection.

In this intervention, I will briefly touch upon three problem areas: the exhaustion of local remedies, the margin of appreciation, and the future use of Protocol 16 as an attempt to contribute, by an honest evaluation of the present, to the further enhancement of the effective protection of human rights and fundamental freedoms by the European Court of Human Rights.

II. Formal subsidiarity: the exhaustion of national remedies

As to the formal side of subsidiarity, at the level of the criteria for the admissibility of individual complaints, all effective national remedies must be exhausted in a meaningful way before an individual can address the Court. Accordingly, it is not sufficient to exhaust the remedies without invoking, in substance, the violations of the Convention, so as to give national authorities and courts an opportunity to redress their wrongs. The shortening of the time frame to file an individual application from six to four months under Article 6 of Protocol No. 15 reflects much stricter domestic criteria of filing. For example, the time frame for raising a constitutional complaint in Germany is only one month.

On the one hand, admissibility criteria may prevent a substantive pronouncement of the Court on important questions regarding human rights and thus create disappointment on the part of the complainants that their case has not been heard. On the other hand, non-exhaustion of domestic remedies may also create a certain feeling of frustration among national jurisdictions that their efforts have been neglected. Thus, in a recent case against Germany, a prisoner complained of his solitary confinement for a week, but only in Strasbourg did he disclose that he had been left naked during the whole time of special confinement. Nevertheless, the Court decided in his favour,³ because Germany was barred from raising the issue having failed to do so in its first submission.

³ *Hellig v. Germany*, European Court of Human Rights (5th Section), Application No. 20999/05, Judgment of July 2011.

According to Rule 55 of the Court “[a]ny plea of inadmissibility must, in so far as its character and the circumstances permit, be raised by the respondent Contracting Party in its written or oral observations on the admissibility of the application...” Otherwise, the State is barred from raising the non-exhaustion of local remedies at a later stage of the proceedings. However, to effectively raise the lack of exhaustion, this requires co-ordination between the judicial and executive branches of government. Or, such co-operation is at loggerheads with the principle of the separation of powers that is the cornerstone of a democratic legal order.

There is, of course, no magical solution to this problem. As is well known, the Court uses criteria developed by general international law that should enjoy, due to their universality, a certain presumption of appropriateness. But in this case, the requirement of a democratic constitutional order and the traditional opacity of the State in classical international law are not in harmony with each other. Thus, in egregious cases, the Court may reconsider whether such an absolute bar is appropriate. On the other hand, there is certainly room for improvement regarding the co-operation of the domestic branches of government in presenting objections to the admissibility of cases in a timely and complete manner.

III. Substantive subsidiarity: the margin of appreciation and problems of national implementation

Even more importantly, substantive subsidiarity requires the Court to give its Member States a margin of appreciation in cases in which there exists no broad European consensus – for instance with regard to religious symbols in classrooms, as in the *Lautsi* case⁴ – or in which the Court must bring the rights of more than one party into harmony with each other. In the following, I will concentrate on the latter issue.

1. *Adjudicating triangular legal relationships – the Springer case*

In cases in which the Court intervenes in civil cases between private individuals, the Court deals with the central role not only of courts in a democratic society, but also, and maybe foremost, on States and particularly their legislatures. Already in the 1950s, in the *Lüth* case,⁵ the First Senate of the German Federal Constitutional Court had argued that, while fundamental rights were not directly applicable in these relationships, courts needed to interpret “regular”

4 *Lautsi v. Italy*, Application No. 30814/06, Judgment of 18 March 2011 (Grand Chamber), para. 68.

5 *BVerfGE* 7, 198 <205>.

law such as the Civil Code in a manner reflecting the *objektive Wertordnung* (“objective value judgment”) contained in fundamental rights.

However, it is doubtful whether this reasoning should also apply to the European Court of Human Rights. After the Lüth decision – which is controversial to this day⁶ – had “constitutionalised” the German legal order, a parallel route for Strasbourg would “conventionalise” 47 legal orders in Europe in a way that may become problematic for domestic democracy. The primary role in balancing the rights of individuals is that of the legislature – getting, in Kant’s famous proverb,⁷ the right of the one in accordance with the right of the other. Even in a domestic setting, the Constitutional Court is reluctant to intervene in relevant legislation or judgments of the regular courts.⁸

This is why these triangular or multipolar cases are also an important example for the margin of appreciation left by the Court to domestic legal systems⁹ that has recently been strengthened by the Brighton Declaration of States Parties, to be included in the Preamble of the Convention under Protocol No. 15.¹⁰

In the most recent judgments of the European Court of Human Rights in the line of the von Hannover (or, in Germany, Caroline) cases balancing press freedom and privacy rights, the Court has emphasised the margin, putting forward quite an extensive text but leaving it, in principle, to domestic courts to draw the line.¹¹ However, in the Springer case, a majority of the Court believed

6 See M. Jestaedt, *Grundrechtsentfaltung im Gesetz* (Tübingen: Mohr Siebeck 1999), p. 37 ff.

7 Immanuel Kant, *Kritik der reinen Vernunft* (2nd ed., Königsberg 1787), p. B 373, Akademie-Ausgabe, Preußische Akademie der Wissenschaften (ed.), Berlin 1902 ff., vol. III, p. 247 f: “daß jedes Freiheit mit der anderen ihrer zusammen bestehen kann”; see also *BVerfG*, Ruling of 23.10.2013, 1 BvR 1842/11, available at www.bverfG.de/entscheidungen/rs20131023_1bvr184211.html (last visited 6 February 2014), para. 68.

8 One example is some of the Caroline cases, see, e.g., *BVerfGE* 120, 180 <199 f, 209f>.

9 Cf on the margin of appreciation, D. Spielmann, *Allowing the Right Margin: The European Court of Human Rights and the National Margin of Appreciation Doctrine: Waiver or Subsidiarity of European Review?*, Cambridge Yearbook of European Legal Studies (Cambridge: Hart 2011/12), vol. 14, p. 381.

10 Article 1 of Protocol No. 15 amending the Convention on the Protection of Human Rights and Fundamental Freedoms, signed 24 June 2013 (not yet in force), available at www.conventions.coe.int (last visited 29 January 2014), adding the paragraph: “Affirming that the High Contracting Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in this Convention and the Protocols thereto, and that in doing so they enjoy a margin of appreciation, subject to the supervisory jurisdiction of the European Court of Human Rights established by this Convention”; High Level Conference on the Future of the European Court of Human Rights, 19-20 April 2012, Brighton Declaration, para. 12 b), available at <http://hub.coe.int/20120419-brighton-declaration> (last visited 29 January 2014).

11 *Von Hannover v. Germany* (No. 2), the European Court of Human Rights (Grand Chamber) Application Nos. 40660/08 and 60641/08, Judgment of 7 February 2012, paras. 124-126.

it necessary to then fine-tune this test again rather than letting the domestic judgment stand.¹² One can rationalise this contradictory result by saying that a Chamber of the Court, in its first Caroline ruling, had preferred privacy over press freedom, and the Grand Chamber now intended to show that it held a more balanced view.¹³ For the dissenters, however, the case would rather have required an application of the margin of appreciation.¹⁴ The latter view has also prevailed in the later decision in von Hannover No. 3.¹⁵

The balancing between private rights of different parties is usually not the task of constitutional or human rights courts, but a question of the proper application of domestic legislation by regular courts. A balance can only be struck by according a margin of appreciation to domestic courts in fitting the Convention into the broader domestic legal framework, provided, however, that the rights of each side have been recognised and balanced against each other.

2. *Retroactivity in triangular relationships – the Fabris case*

The point becomes even more important with regard to legislation implementing a judgment by the European Court of Human Rights retroactively. Often, compliance will require a change of domestic law. This is not problematic in itself. In many countries, courts do not have jurisdiction to invalidate or override a law passed by parliament; in others, such as Germany, the constitutional court is entitled to annul laws only when they are contrary to the constitution. Indeed, in Article 41, the Convention appears to recognise that there may be situations that cannot be repaired by a change of domestic law, but only by paying compensation. An inherent tension exists between this provision and the binding force of a judgment under Article 46. Nevertheless, these provisions cannot be read to imply that domestic law is changed *ipso jure* by a judgment of the European Court of Human Rights or that the Convention requires direct effect in the domestic legal order.¹⁶

Nevertheless, in a recent judgment, the Grand Chamber of the Court – differing from the Fifth Section at first instance – required France to apply a judg-

12 *Springer v. Germany*, European Court of Human Rights (Grand Chamber), Application No. 39954/08, Judgment of 7 February 2012, paras. 85-88.

13 Diss. Op. Lopez Guerra on *Springer v. Germany*.

14 *Ibid.*

15 *Hannover v. Germany* (No. 3), European Court of Human Rights (5th section) Application No. 8772/10, Judgment of 19 September 2013. For a more generous application of the margin, see only – decided by the narrowest possible majority – *Animal Defenders v. the United Kingdom*, European Court of Human Rights (Grand Chamber) Application No. 48876/08, Judgment of 22 April 2013 (para. 104: narrow margin, in principle, but para 123: wider margin in the absence of a European consensus).

16 Cf. *BVerfGE* 128, 326 <403> with further references.

ment on inheritance law retroactively, changing the balance the legislator had struck between the inheritance rights of two private parties.¹⁷ While the injustice of the discrimination in question, against children “born of adultery”, carries great weight, it is a different matter how to weigh it retroactively against the rights of those who have taken up an inheritance in good faith.

While the *Fabris* case is very special, and it is probably not a good case for broader inferences, a Chamber of the First Senate of the Federal Constitutional Court decided at about the same time that a decision by the legislature to implement the Strasbourg Court’s judgment in the *Brauer* case¹⁸ did not require retroactivity on grounds of discrimination against children born out of marriage – partly due to preclusion of certain arguments the complaining party had failed to raise in time. However, the Chamber decision left open the question of whether there could be an exception where the case was similar to the one decided by the European Court of Human Rights.¹⁹ As in *Fabris*, the particular difficulty of the case was that the legislature had considered the *Brauer* judgment and decided against retroactivity (except in the case at hand). It is particularly difficult for any court to decide against the balance struck between individual rights – here non-discrimination vs. *bona fide* possession – by the legislature if and to the extent that the balancing was made in full understanding of the rights involved. In general, however, the balancing between vested rights and the finality of the law, on the one hand, and the injustice of past discrimination, on the other, should be left to the domestic legislature – if and to the extent the legislature has duly taken into account the rights of both sides. This also conforms to the previous case-law of the European Court of Human Rights.²⁰

3. *From necessary rights to extensive interpretation – the Herrmann case*

There are, however, also cases not involving triangular relationships that raise questions as to the Court’s reliance on the subsidiarity principle. In *Herrmann*,²¹ the Grand Chamber of the European Court of Human Rights has derived from the right to property, enshrined in Article 1 of Protocol 1, a right to prevent hunting on one’s property; even in view of a law that mandates membership in a

17 *Fabris v. France*, European Court of Human Rights (Grand Chamber), Application No. 16574/08, Judgment of 7 February 2013, but cf. Judgment of 21 July 2011 (5th Section).

18 *Brauer v. Germany*, European Court of Human Rights (5th Section) Application No. 3545/04, Judgment of 28 May 2009.

19 *BVerfG*, 1 BvR 2436/11 of 18 March 2013, para. 43.

20 See *supra* footnote 17.

21 *Herrmann v. Germany*, European Court of Human Rights (Grand Chamber) Application No. 9300/07, Judgment of 26 June 2012, para. 78.

hunting association that collectively fulfils the obligation of “Hege”, meaning “care”, for the proper exercise of hunting on small property below 75 hectares.

In Germany, the constitutional right to property has been traditionally understood as the protection of personal freedom with regard to economic assets, protecting pecuniary rights (“*vermögenswerte Rechte*”),²² not as an expression of the civil law principles of freedom to do whatever one pleases with one’s property²³ (which is then limited by other principles of civil law). In addition, the right to property is subject to determination by ordinary law, as long as that freedom is preserved and appropriately balanced against social needs and the property rights of others.

Before Herrmann, Article 1 of Protocol I was understood in a similar fashion. Without much of an argument, the Grand Chamber now broadens the right to one of complete freedom of dealing with objects belonging to property, simply holding that “the Court has misgivings of principle about the argument that strongly-held personal convictions could be traded against annual compensation for the restrictions on the use of the property”.²⁴ This is enough for overriding the law of – as the Court itself states – about half of the States Parties.

There is no explanation for why the Court would interpret the right to property beyond the sphere of economic freedom. Neither does the Court discuss whether the hunting associations can collectively exercise the property rights of their members where individual proprietors are unable to fulfil the duty of care required of any responsible owner. Finally, the question arises whether the freedom of conscience as contained in Article 9 of the Convention would not be the better place to discuss a mandatory membership in a hunting association.

The case demonstrates the dangers of expanding the rights enshrined in the Convention well beyond the existing protections in Member States. Some comparative research not only on hunting laws, but also on the right to property in the 47 Member States would have been more than useful to reach an understanding of Article 1 that relates – in one way or the other – to the established views on the scope and limits of the right to property.

In its newer case-law, the Federal Constitutional Court has established that the judgments of the European Court of Human Rights enjoy, for the interpretation and application of the Convention, an “*Orientierungs- und Leitfunktion*”, for example regarding them as serving a function of orientation and guidance for

22 See, e.g., *BVerfG*, First Senate, 1 BvR 3139/08, Judgment of 17 December 2013, www.bverfg.de/entscheidungen/rs20131217_1bvr313908.html (last visited 6 February 2014), para. 167 (protection of freedom in the pecuniary area); Bryde, in: von Münch/Kunig, *Grundgesetz Kommentar*, 6th ed., Article 14 para. 12, with further references to the *BVerfG* case-law.

23 See § 903 of the *Bürgerliches Gesetzbuch* (BGB, German Civil Code), *Bundesgesetzblatt* (*Federal Legal Gazette*), 2002 I 41.

24 See *supra* footnote 21.

the implementation of the Convention beyond their binding effect in the concrete case that was decided by the Court.²⁵ Thereby, the Federal Constitutional Court has recognised a certain *erga omnes*-effect of the Court's judgments even beyond a narrow reading of the contractual obligations the States parties have undertaken. But the Court will only be able to "orient" and "guide" national courts – and, by the way, its own Chambers – when it engages in a complete and comparative reasoning. Such reasoning is the precondition for a meaningful dialogue between the Court and its domestic equivalents.

In general, however, the margin of appreciation is meant to guarantee that the Court remains within the confines of the Convention as understood by the majority of the Member States.²⁶ The expansion of rights beyond this point has the potential to create conflicts with domestic law.

IV. Protocol No. 16

Allow me to approach a final issue: namely Protocol 16 allowing for requests by national courts to the European Court of Human Rights for an advisory opinion. I know that this protocol is particularly dear to our Norwegian hosts. However, let me explain why there exists a certain reluctance in Germany with regard to its ratification – a reluctance apparently shared by quite a few countries. While subsidiarity is not explicitly mentioned, the protocol takes it into account by only allowing the highest national courts and tribunals to request such an advisory opinion – unlike the EU example that opened up to lower courts the possibility of references to the European Court of Justice and thus enhanced its effectiveness considerably. The merely advisory and thus non-binding character of the advisory opinions²⁷ seems to indicate the innocuousness of the new procedure.

25 *BVerfGE* 128, 326 <368>; see also *BVerfGE* 111, 307 [320]; *BVerfGK* 10, 66 [77 f.]; 10, 234 [239], with further references.

26 See, for example the recent judgment in *Animal Defenders v. the United Kingdom*, App. No. 48876/08, Judgment (GC) of 22 April 2013, para. 123 (wider margin in the absence of a European consensus).

27 See Protocol No. 16, Article. 5. But see High Level Conference on the Future of the European Court of Human Rights, Brighton Declaration, 20 April 2012, Rn. 9, assembly.coe.int/Conferences/2012Strasbourg/Pdf/BrightonDeclaration_EN.pdf (visited 13 November 2013), excluding only a binding character towards third States: "The conference (...)

Notes that the interaction between the Court and national authorities could be strengthened by the introduction into the Convention of a further power of the Court, which States Parties could optionally accept, to deliver advisory opinions upon request on the interpretation of the Convention in the context of a specific case at domestic level, without prejudice to the non-binding character of the opinions for the other States Parties (...)."

For the controversial character of this question cf. also ECHR, Reflection Paper on the Proposal to extend the Court's Advisory Jurisdiction, paras. 42 f.

However, the protocol and its supporting materials seem to be more ambiguous:²⁸ Thus, the Court in its reflection paper²⁹ discourages individual complaints against national decisions executing an advisory opinion of the Court by admitting only complaints against the non-execution of such opinions. The purpose of the reference procedure is also quite uncertain: is it a means of dialogue between the courts, allowing for questions and responses, or does it constitute a means of enhancement of the efficiency of the Court by allowing for an early decision on recurrent domestic problems?

Nevertheless, the mechanism may be useful in two particular instances: when the courts struggle with the political branches for the implementation of their judgments, and in cases of a general lack of experience with the direct effect of human rights and fundamental freedoms. It is thus – in the spirit of subsidiarity – for each country to decide whether the Protocol could be useful for the more effective implementation of their obligations under the Convention.

This may explain, however, the reluctance of States with an established human rights litigation to ratify the Protocol. In the spirit of subsidiarity, they prefer their domestic courts to have the first say for the disposal of human rights cases, and they will allow the European level to intervene only when domestic attempts at judicial settlement have been exhausted. However, this reluctance does not imply any tendency not to execute binding judgments of the Court in the domestic order.

V. Conclusion: Towards a culture of dialogue and respect

From the perspective of subsidiarity, the European Court of Human Rights will always take the problems of domestic implementation into account. It would even more often resist the temptation to decide cases “through”, but should rather leave space for domestic diversity and respect the at times difficult relationship between the different domestic constitutional organs in implementing judgments of the European Court of Human Rights within the domestic legal order. Let me stress that I do not advocate case-law that discriminates between different countries – although it may be advisable to occasionally consider the real social differences between the 47 States Parties. However, I argue that the

²⁸ Cf. Council of Europe, Explanatory Report to the Protocol No. 16 para. 27:

“Advisory opinions under this protocol would have no direct effect on other later applications. They would, however, form part of the case-law of the Court, alongside its judgments and decisions. The interpretation of the Convention and the Protocols thereto contained in such advisory opinions would be analogous in its effect to the interpretative elements set out by the Court in judgments and decisions.”

²⁹ Cf. ECHR, Reflection Paper on the Proposal to extend the Court's Advisory Jurisdiction, para. 44.

Court should be more willing to take into account the domestic separation of powers and the limits of domestic courts in implementing judgments requiring legislative change. In substantive law, a more consistent use of the margin of appreciation will enhance rather than prevent a more effective implementation that leaves domestic courts the necessary discretion to apply the case-law to the situation *sur le terrain*.

We need a mutual understanding and respect for the maintenance of human rights and fundamental freedoms, on the one hand, and the conditions for their effective and efficient implementation in the domestic legal sphere, on the other. The Court is the final arbiter on the interpretation and application of the Convention in 47 States Parties, whereas the highest (constitutional) courts of States Parties interpret and apply domestic constitutions and laws, including with regard to the effective implementation of the Convention under the concrete circumstances in each Member State. In cases of overlapping jurisdiction, not only must both the European Court of Human Rights and the highest national courts work hand-in-hand, but the domestic legislature and executive branches need also be involved. Not jurisdictional claims of authority, but the effective protection of human rights and fundamental freedoms is at the centre of the diverse systems of rights protection in Europe.

Thus, there is no alternative to a culture of mutual respect between the highest courts adjudicating the Convention and the constitutional and supreme courts with jurisdiction on the human rights provisions in domestic Constitutions. Or, in the phrase of the Second Senate of the German court in the security detention case: “from this background the “last word” of the German constitution does not prevent international and European dialogue, but rather constitutes its normative basis.”³⁰

30 *BVerfGE* 128, 326 <369>, our translation.

Comments/Observations

Kristine Lice

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As an agent representing my government before the European Court of Human Rights (“the Court”) I am often asked to address the audiences of national judges. At such events I see occasional resistance to the Court, reluctance to follow its case-law, the feeling that the Strasbourg Court “imposes” on national courts. In my experience, the best way to break the ice is to remind them of the “national ownership” of the ECHR, which is the principle of subsidiarity described differently, and of the fact that national courts are not, and cannot be passive recipients of “Strasbourg wisdom”. On the contrary, national courts are active players and partners of the Court in shaping the interpretation and application of the ECHR.

The best description of this interaction between the Court and national courts and their relationship I heard at the opening of Judicial Year 2014, where Professor Andreas Voßkuhle, President of the Federal Constitutional Court of Germany, defined it as a “kinetic sculpture”, meaning an ensemble of balanced and interconnected parts where a movement of one part inevitably causes a movement of other parts.

I would like to offer some examples of such interconnected movement, and how it reveals “national ownership” of the ECHR I just mentioned. And, building on the presentation by Judge Paulus, I would like to indicate some questions we might wish to address. I will start with situations where movement by national courts triggers movement in the Court.

The most obvious interaction occurs when the Court examines an application where the alleged violation of the ECHR stems from the actions or failure to act by the national courts. Judge Paulus just spoke about the need to maintain “substantive subsidiarity”, particularly when deciding the cases of triangular relationship, that is, when balancing the rights of private parties. I would add that “substantive subsidiarity” becomes increasingly challenging also in the cases where the Court examines the domestic proceedings involving, in addition to the

ECHR, one or more international agreements binding on the respondent State. Such situations occur, for example, in the extradition cases, or in cases involving the application of the Hague Convention on the Civil Aspects of International Child Abduction. Also, the accession of the EU to the ECHR will put focus on the “substantive subsidiarity” in the combined application of EU law and the ECHR.

Another situation where the Court moves in reaction to the national courts is where the practice of national courts causes the Court to reconsider its previous conclusions regarding the effectiveness of a particular domestic remedy, which is a reflection of “formal subsidiarity” just described by Judge Paulus. The question I would like to put to you is – when examining the effectiveness of a recently introduced remedy, is the Court consistent in its presumptions? That is to say, is the remedy presumed effective, unless the applicant supplies examples of domestic case-law revealing a lack of effectiveness? Or, on the contrary, is the remedy presumed ineffective unless the respondent State submits examples of case-law proving its effectiveness? Agents representing their governments undoubtedly favour the former approach, but I acknowledge that if a long time has passed since the introduction of a remedy, it would be for the respondent State to prove its effectiveness.

Finally, we should not forget that concepts developed by the national courts are used by the Court, for example, the proportionality test as developed by the German courts is widely applied by the Court.

Now I would like to turn to situations where movement by the Court causes national courts to move.

The first example concerns the re-opening of domestic proceedings before the national courts following the finding of a violation by the Court. In an increasing number of judgments the Court indicates that re-opening is the most appropriate way to execute the particular judgment. It inevitably raises the question – is such practice compatible with the principle of subsidiarity, or should it be primarily for the States to decide on the best measures for the execution? Or, on the contrary, should the Court be encouraged to continue this practice, which would help States give proper effect to the judgments?

The second example relates to the fact that the national courts use the Court’s case-law to interpret the provisions of the domestic law. For example, the Constitutional Court of Latvia has on several occasions reiterated that the human rights provisions of the Latvian Constitution must be interpreted in light of Latvia’s international obligations, including those under the ECHR; one could therefore argue that developments in the interpretation of the ECHR have a direct effect on the interpretation of the national law. Likewise, the national courts use the jurisprudence of the Court to test the compatibility of domestic law with the ECHR (for example, Latvian administrative courts routinely use the three-stage test). In this regard my question is – are national courts sufficiently

equipped and able to follow developments in the Court’s case-law? How to ensure the quality of references to Strasbourg jurisprudence by the national courts, considering occasional failure to reflect the most up-to-date standards?

When discussing the interaction between the national courts and the Court, it is impossible to avoid the question about the *erga omnes* effect of Strasbourg judgments. I submit that there is a gradually emerging *de facto erga omnes* effect as far as the **interpretation** of the ECHR is concerned, because it would be difficult to imagine a successful challenge to, for example, the established interpretation of Article 3 as containing both a substantive and procedural aspect, or that a procedural aspect of Article 3 would impose an obligation to ensure independent and effective investigation of complaints alleging ill-treatment.

However, the situation is different regarding the **application** of the ECHR, where such an *erga omnes* effect is not possible, otherwise the concept of “obligation towards the process, not the result” becomes invalid.

Finally, another question that needs to be addressed in the context of interaction between the national courts and the Court, is – to what extent the “kinetic sculpture” consisting of the Court and national courts is affected by outside forces, for example the CJEU, the UN and other international tribunals?

To conclude, I would like to come back to the notion of “domestic ownership” of the ECHR. Because of the principle of subsidiarity, national courts have to assume a large part of the responsibility in terms of the direction in which the ECHR is going. And I believe that strengthening the “domestic ownership” will help further strengthen the legitimacy and authority of the whole Convention system.

Julia Laffranque

*Judge, European Court of Human Rights/Juge, Cour européenne des droits de l’homme*³¹

President of the Court, Minister of Justice, Director General, Excellencies, Professors, Judges, Government Agents, Ladies and Gentlemen,

It is appropriate to recall that according to Rolv Einar Rasmussen Ryssdal, Norwegian judge and President of the European Court of Human Rights (“the Strasbourg Court/Court”) from 1985 to 1998, the success of the European Con-

31 The views expressed are the author’s alone and do not necessarily reflect those of the Court.

vention on Human Rights (“the Convention”) system depends in the last resort on the existence of some form of co-operation between internal jurisdictions and the Strasbourg institutions.³²

Introduction to the Problematic: Key Issues for the Strasbourg Court

It appears symbolic that I have as a commentator on the given topic the last word: as you know the question that has been asked lately quite frequently is: “who has the last word in the fundamental rights protection in Europe?” Indeed: the people, the politicians, the non-governmental organisations (NGOs), the big corporations, the legislature, the executive bodies, the court: and on a multi-level: a national court or the Strasbourg Court or the Court of Justice of the European Union (CJEU) for the Member States of the EU? The pan-European concept is gaining more and more relevance.

But it is also relevant to ask: “who has the first word: who launches the dialogue and how, from what angle?” The Strasbourg Court should neither be the court of last instance (a well-known postulate), but also nor should it be the court of first instance, except in extreme situations when in matters covered by the Convention access to a court has not been possible at national level. The task of the Strasbourg Court is to apply and interpret the Convention, which is considered a living instrument.³³ The Strasbourg Court does not replace national jurisdictions; rather it is intended to complement them³⁴ by providing European supervision of how national courts have applied the Convention and upheld its values. By accepting the Convention system the Contracting States recognise that the Strasbourg Court can authoritatively interpret and apply the Convention.

One of the biggest challenges the Convention system faces today is not the reform of the Strasbourg Court (in the long run there should be less emphasis on the reforms and more concentration on executing the existing proposals for improvement because it is also very difficult for national courts to interact with the Strasbourg Court if the latter is in constant reforms), but rather the **effective**

32 La réussite du système de la Convention dépendra en dernier ressort de l'existence d'une forme quelconque de coopération entre les juridictions internes et les institutions de Strasbourg; cité par A. Drzemczewski et J. Meyer-Ladewig, Principales caractéristiques du nouveau mécanisme de contrôle établi par la CEDH suite au Protocole n° 11, signé le 11 mai 1994, RUDH, 1994, p. 81.

33 See, among other authorities: *Tyrer v. the United Kingdom*, 25 April 1978, § 31, Series A No. 26, and *Christine Goodwin v. the United Kingdom* [GC], No. 28957/95, § 75, ECHR 2002-VI.

34 Cf. Case “relating to certain aspects of the laws on the use of languages in education in Belgium” (merits), 23 July 1968, p. 35, § 10, Series A No. 6.

implementation of the judgments of the Strasbourg Court at national level across all Contracting States of the Convention: the issues related to the structural problems, pilot judgments and repetitive applications. This problem has also been well reflected in the majority of the proposals responding to a very interesting initiative: “open call for information, proposals and views on the future of the Strasbourg Court”, launched by the Committee of Experts on the reform of the European Court of Human Rights. Another challenge is the **independence of the Strasbourg Court and how to strengthen it**. These two key issues should be kept in mind when discussing any topics related to the Strasbourg Court, including ours.

About the Subject in General: Interrelated Topics

There are too many different, although interrelated questions raised under the present topic: dialogue, subsidiarity, margin of appreciation, European consensus, the *erga omnes* effect of the Strasbourg Court’s judgments, for me to be able to give equally sufficient attention to all of them within the very limited space at my disposal. Therefore I will concentrate more concretely on the so-called dialogue between the Strasbourg Court and national courts as I see the issues of subsidiarity,³⁵ margin of appreciation³⁶ and European consensus (recently more frequently called a trend),³⁷ as elements of this dialogue, as important principles and tools of interpretation at the disposal of the Strasbourg Court. But they vary widely, because they are nuanced and depend much on the case at hand and can

35 The new Protocol No. 15 of the Convention provides for the principle of subsidiarity, which previously had only been stated in the case-law of the Court, to be expressly included in the preamble to the Convention together with the notion of the margin of appreciation. It is normally easier for the national courts of the Contracting States to assess whether a particular interference is necessary in the society in question. The Court has repeatedly emphasised that according to its case-law, national authorities are, in principle, better placed to evaluate local needs and conditions than an international court. See, e.g. *Tkachevy v. Russia*, 14 February 2012, No. 35430/05, § 36.

36 In some matters such as, e.g. social and economic policy regarding which opinions in a democratic society may be rather diverse, national authorities, i.e. the national decision makers and politicians, are left with a margin of appreciation. Cf. e.g. *James and Others v. the United Kingdom*, 21 February 1986, § 46, Series A No. 98; *Kjartan Asmundsson v. Iceland*, No. 60669/00, § 45, ECHR 2004-IX; *Stec and Others v. the United Kingdom [GC]*, Nos. 65731/01 and 65900/01, § 52 and 57, ECHR 2006-VI. Where such a margin of appreciation exists, the Court will normally respect the choices of national legislature except where such choosing is manifestly without reasonable foundation. If, based on a comparative legal analysis, the Court finds that there is a consensus/trend on a particular issue in Europe, the margin of appreciation left to the States is correspondingly reduced. The margin of appreciation is narrow on issues that affect the core elements of democracy, such as freedom of expression and is non-existing in protecting, e.g. the right to life and liberty and the prohibition of torture, inhuman or degrading treatment; there is no margin afforded for violation.

37 *Vallianatos and Others v. Greece [GC]*, 7 November 2013, Nos. 29381/09 and 32684/09, § 91.

therefore not always be constant in every case, and should definitely not be over-politicised. Also of importance is the principle by which an interference with certain fundamental rights can only be justified in certain circumstances where it is necessary in a democratic society.³⁸

As to the *erga omnes* effect of the judgments of the Strasbourg Court, the domestic courts have an additional commitment upon application of the Convention to take into account the findings of the Strasbourg Court in general, although there is no *de jure* precedence, and a judgment of the Strasbourg Court is strictly speaking binding upon the parties. This *de facto erga omnes effect* has to my mind been well underlined already by the Interlaken Declaration Action Plan on the implementation of the Convention at national level and will be enhanced by both Protocols No. 15 and No. 16 of the Convention as far as the relinquishment of a case to the Grand Chamber and request by national courts for advisory opinion of the Strasbourg Court are concerned. Usually national courts follow the case-law of the Strasbourg Court, making in their judgments references to the Strasbourg Court's case-law concerning also other Contracting States which sometimes could create the problem for the parties of the national proceedings that some of the Strasbourg Court's case-law cited in national judgments might not be available in their respective languages.³⁹

Raison d'être of the Dialogue or Rather Exchange/Interaction

As a child of playwrights and I myself an amateur actress I note that in the theatre the best dialogue is when one person speaks about one thing and the other about a completely different thing, thus the reply might not at all correspond to the question. Sometimes dramaturges intentionally use methods where two actors/actresses are speaking at the same time on different topics! I think that this is not the dialogue we should have in mind between the Strasbourg Court and national courts – such dialogue is certainly not in the interest of the applicant and the protection of human rights. Therefore I would suggest talking

38 This is included in the text of the Convention itself, cf. e.g. according to Article 8 of the Convention there shall be no interference by a public authority with the exercise of the right to respect for private and family life except such as is in accordance with the law and is necessary in a democratic society in certain circumstances.

39 For example the Supreme Court of Estonia has implemented well the *erga omnes* application of the Strasbourg Court's judgments, because most of the case-law of the Court that has been referred to by the Supreme Court does not relate to the judgments rendered concerning Estonia. On the other hand the Supreme Court has maintained certain a healthy caution in finding for instance that the fact that the Strasbourg Court in another judgment has evaluated a ground for arrest in the national law of another State as the Convention confirms does not create an additional ground for an arrest in Estonian criminal procedural law which enumerates exclusively all the relevant grounds for taking into custody and holding in custody. In this decision the Supreme Court excluded in its reasoning the references to the Court's case-law used by the courts of lower instance; Decision of 10 January 2013 of the Criminal Law Chamber of the Supreme Court, Case No. 3-1-1-127-12.

instead of “dialogue” about the exchange of thoughts/views/opinions or, as Professor Sabino Cassese, judge of the Constitutional Court of Italy has suggested, about the “interchange between judges”. Protocol No. 16 of the Convention speaks in its preamble about the enhancement of the **interaction** between the Strasbourg Court and national authorities. Interchange, exchange/interaction is first and foremost followed through judgments. It is thanks to the exchange of thoughts that one sees their own judgment from another perspective, notes other details and aspects, and looks at one’s work in a more critical way. The exchange of thoughts is certainly important for the development of case-law; it is significant to discuss issues with other partners. But one vital element of this interchange which will sometimes easily be missed is the ability to listen, to pay attention to what the colleague says, to digest on the issue. Of course interchange on the same topic, thus a sort of Ping-Pong effect cannot last forever, and a “final” judgment needs to be made, but it is better if it is rendered when the common denominator and mutual understanding plays the biggest part and/or if the partner in the interchange has convinced the counterpart.

Fortunately there are many positive examples of this interaction, also between the German *Bundesverfassungsgericht* and the Strasbourg Court.⁴⁰ In fact, when one looks at the statistics, the Strasbourg Court takes a different approach to that

40 The Hannover case-law (*von Hannover 1* and *2 v. Germany*, respectively 24 June 2004, No. 59320/00, ECHR 2004-VI and 7 February 2012 [GC], Nos. 40660/08 and 60641/08) is a good example of an interaction between the *Bundesverfassungsgericht* and the Strasbourg Court: the former has in the second proceedings undertaken a balancing exercise in conformity with the criteria laid down in the Strasbourg Court’s case-law which the Strasbourg Court accepted by stating that it would require strong reasons to substitute its view for that of the domestic court. The *Bundesverfassungsgericht* has in its judgment concerning preventive detention in Germany inspired by the case-law of the Strasbourg Court stressed that the Convention has to be thoroughly considered at an early stage in the context of the constitutional system incorporating it, and that the Convention is an important guide to interpretation when it comes to determining the content and scope of the fundamental rights and constitutional guarantees of the Basic Law, *Entscheidungen des Bundesverfassungsgerichts – BVerfGE* 128, 326. There are also examples of fruitful interaction with other courts, such as the case-law developed by Austrian courts on the topic of freedom of expression (Article 10 of the Convention) based on the judgments of the European Court of Human Rights. The interaction between the Court and British courts is well reflected in cases such as *Vinter and Others v. the United Kingdom* [GC], 9 July 2013, Nos. 66069/09, 130/10 and 3896/10 (Article 3 in relation to non-reducible whole life orders) which was followed recently on 18 February 2014 in *R v. Newell*; *R v. McLoughlin* by Royal Courts of Justice in the court of appeal’s criminal division: the Strasbourg Court indicated that there was a problem because the state of domestic law was unclear, and the domestic court clarified the law, thus making it compliant with the Convention, or in *Al Khawaja and Tahery v. the United Kingdom* [GC], 15 December 2011, Nos. 26766/05 and 22228/06 (Article 6) (following the reply to the Strasbourg Court’s Chamber judgment by the Court of Appeal and the Supreme Court in *R. v. Horncastle and Others*). For further references of co-operation and interaction see also the Strasbourg Court’s Annual Seminar background paper: *Implementation of the judgments of the European Court of Human Rights: a shared judicial responsibility?* Prepared by the Organising Committee, chaired by Judge Julia Laffranque and composed of Judges Raimondi, Bianku, Nußberger and Sicilianos, assisted by R. Liddell of the Registry, available at the Court’s website.

taken by national courts only in very few cases. Quite often national courts are looking for advice and helpful recommendations from the Strasbourg Court. If national courts are consistently implementing the Convention in its interpretation and application by the Strasbourg Court, the caseload before the Strasbourg Court will continue to reduce considerably. But as President of the *Bundesverfassungsgericht*, Professor Andreas Voßkuhle has stressed in his speech at the Strasbourg Court during the solemn hearing at the beginning of this year: the relationship between the Strasbourg Court and national courts is not a one way street and the *Verbund* of European constitutional courts is a living and changing organism whose constant evolution deserves to be observed, accompanied and rebalanced.⁴¹

The interaction depends very much on the status of fundamental rights protection in the national legal order, it depends also on whether it is possible to interpret the national law in harmony with the Convention and what stand domestic law and practice take vis-à-vis the re-opening of a case in national court once a violation has been found in Strasbourg in the same or similar case. Furthermore, it depends on the fact whether the area has already been covered by the Strasbourg Court's case-law and whether the national court is following the Strasbourg Court, declines it if it believes the case-law to be wrong, or is taking itself on a path of an untouched domain. Absence of the Strasbourg Court's case-law should however not relieve national courts from confronting the question and from applying the Convention.

In connection with the exchange/interaction, I would like to underline three aspects that are relevant in relation to the exchange/interaction between the Strasbourg Court and national courts:

- ▶ 1) the importance of this exchange/interaction;
- ▶ 2) the essential conditions for an effective exchange/interaction;
- ▶ 3) and last, but not least, measures to improve the exchange/interaction.

Non-exhaustive lists of items related to all of these three issues are as follows:

The Importance of the Exchange/Interaction

Exchange/Interaction is important because:

41 Pyramid or Mobile? – Human Rights Protection by the European Constitutional Courts, Opening of the Judicial Year 2014 at the European Court of Human Rights Strasbourg, 31 January 2014, Professor Dr. Andreas Voßkuhle, President of the *Bundesverfassungsgericht*.

- ▶ The national courts and the Strasbourg Court should share common values, such as fidelity to the rule of law and democracy and the respect for human rights, and should have a common aim: protection of human rights;
- ▶ It enforces the joint responsibility to deal with serious human rights violations and enhances the uniform interpretation and maintenance of at least minimum human rights standards;
- ▶ In a Pan-European judicial space, mutual support and co-operation in the interest of the protection of human rights is indispensable;
- ▶ It increases the quality of judgments of national courts and of the Strasbourg Court;
- ▶ It supports the idea of improving the implementation of the Strasbourg Court's judgments;
- ▶ It helps to face together the common outside threats, such as populism, extremist political tendencies, crisis in society, austerity and terrorism, as well as to ensure Convention conformity of the means in which these phenomena are combatted;
- ▶ The Strasbourg Court should not be left alone to resolve problems arising from breaches of the Convention but helped by domestic implementation: this challenge should be faced also by other national authorities and branches of power, not only by judiciaries;
- ▶ It facilitates to adapt and if necessary expand in common understanding the rights protected by the Convention to new developments in society, science and the environment;
- ▶ It allows to safeguard also those rights and freedoms that are for some reasons not secured at national level, and to provide effective remedies, as well as to draw national authorities attention to these problems;

The interaction should be seen in a broader context, in the context of other exchanges, such as the interaction with legislature and executive bodies, society in general, lawyers, governments, NGOs, other human rights institutions, bodies of the Council of Europe in charge of judicial independence, such as the Consultative Council of European Judges, etc.⁴² The interaction should be grasped in the context of interaction between national courts themselves in exchanging experiences of Convention application and of interaction between

42 See also Mark E. Villiger, The Dialogue of Judges, in: *Grundrechte und Solidarität. Durchsetzung und Verfahren, Festschrift für renate Jaeger*, C. Hohmann-Dennhardt, P. Masuch, M. Villiger (eds.), 2011, pp. 195-209.

the Strasbourg Court and international courts as well as the Court of Justice of the European Union.

Essential conditions for exchange/interaction

Essential conditions for exchange/interaction are:

- ▶ good will, state of mind and the “interaction mentality” of judges;
- ▶ mutual recognition of legitimacy and authority;
- ▶ acknowledgement and understanding of each other’s tasks and complexity of work;
- ▶ free and mutual flow of comprehensible information;
- ▶ taking into account by the Strasbourg Court the whole picture of the respective national legal system and bearing in mind any sensitivities that the issue might raise for national authorities;
- ▶ well-reasoned judgments on both sides: this helps understand even if one does not agree;
- ▶ clarity: both in fact and application of law by national courts, and clarity by the Strasbourg Court in guidelines given to the national courts;
- ▶ consistency of the case-law and comprehensive explanations, if case-law is changed;
- ▶ civilised and courteous exchange of views, not imposing one’s thoughts, avoiding confrontation and conflicts;
- ▶ guidance and orientation given by the Strasbourg Court and, at the same time, leaving to national authorities the choice of final methods to be used to achieve a goal in conformity with the Convention;
- ▶ mutual trust and respect;
- ▶ respect for the division of powers both at national level and between the Strasbourg Court and Contracting States/Committee of Ministers;⁴³

43 As a good example of this respect of division of powers is a judgment of the Strasbourg Court in the case of *Savridin Dzhurayev v. Russia*, 25 April 2013, No. 71386/10 concerning a forcible transfer of a person to Tajikistan with real risk of ill-treatment and circumvention by the respondent State of the interim measures ordered by the Strasbourg Court. The Strasbourg Court required in a balanced manner the respondent State to take without delay individual tangible remedial measures to protect the applicant against the existing risks to his life and health in a foreign jurisdiction and to take general measures to ensure the lawfulness of State action in extradition and expulsion cases and the effective protection of potential victims.

- ▶ striking a just balance between the effectiveness of the human rights protection system (*effet utile*) and subsidiarity; as well as between addressing individual applications which are the cornerstone of the Strasbourg Court's existence and fulfilling the role of a Pan-European constitutional court;
- ▶ taking seriously one's responsibilities, not counting on others to be corrected if mistaken;
- ▶ coping with critics as a natural part of an interaction;⁴⁴
- ▶ but also the possibility to accept, to a certain extent, the different functions, different dimensions and even a different context (national/transnational) which might lead to different outcomes.

Measures to improve exchange/interaction

Some ideas on how to improve exchange/interaction:

- ▶ The Strasbourg Court should be open to the world and follow closely the general and recent developments and case-law at international, European Union and national level;
- ▶ The Strasbourg Court should increase its visibility;
- ▶ The Strasbourg Court should continue to disseminate and exchange information via:
 - Publications on the Court's case-law;
 - Dissemination and translation of the Court's case-law;
 - Official visits and working meetings, public seminars such as the Annual seminar of the Strasbourg Court between national judges and lawyers and the Strasbourg Court's judges and lawyers on issues of common interest;
 - Establishment of possible focal persons in national courts with responsibility to study closely the case-law of the Strasbourg Court, although every national judge should anyhow follow it regularly;

44 It is quite natural, that some of the Strasbourg Court's judgments are more easily accepted than others. Lord Kerr has made a noteworthy statement in this respect: "it is not extravagant to say that the Court – a supranational court for 47 Member States of the Council of Europe – could not be regarded as functioning effectively if its decisions did not occasionally upset, or even offend, some of the organs of state and especially the press and broadcast media, of some of those Member States.," Lord Kerr, *The need for dialogue between national courts and the European Court of Human Rights*, in: *The European Court of Human Rights and its Discontents*, S. Flogaitis, T. Zwart, J. Fraser (eds.), 2013, pp. 104-115 (104).

- Further enhancing the secondments, study visits and training for national judges and lawyers at the Strasbourg Court provided that the independence of the decision-making will be guaranteed;
 - Educating the general public not only lawyers and judges on the Strasbourg Court's case-law.
- ▶ Implementation of Protocol No. 16 once it enters into force:

President of the Strasbourg Court, Dean Spielmann has called Protocol No. 16 of the Convention “the protocol of dialogue”. According to this protocol the advisory jurisdiction is entrusted to the Grand Chamber, which shows that the interaction is placed at the highest possible level and at the same time access to third party interventions is ensured. However, a problematic issue is that of dual optionality and limited application of the protocol: firstly, it is facultative for the States and not all States need to join it in order for the protocol to enter into force; secondly, those who join the protocol apply it only to the highest jurisdictions/constitutional courts, and finally, by definition, advisory opinions are not binding. However, despite the fact that there is no obligation for the highest national courts to follow the opinion, it is unlikely that a national jurisdiction, if it has already asked for an opinion, does not abide it. The success of Protocol No. 16 depends on to what extent it is possible to shift the resolution of a number of questions of principle related to the interpretation of the Convention from *ex post*, to a certain extent, to *ex ante*.

I have heard that some highest courts/constitutional courts of some Contracting States might never ask for such an opinion from the Strasbourg Court. However, although it was also for a long time considered that for example *Bundesverfassungsgericht* would not make a reference for a preliminary ruling to the Court of Justice of the European Union, it nevertheless recently happened.⁴⁵ Perhaps in the future it could be quite productive for interaction if the national courts propose themselves some solutions while asking the Strasbourg Court for an advisory opinion.

Finally, I would like to hope that my colleagues at national level in their respective courts, no matter in which Contracting State and on what level of the court, feel themselves as European human rights judges. Based on a comparative study and practice it seems that the domestic courts are best placed as ambassadors of the Strasbourg Court's case-law in Contracting States.

⁴⁵ *BVerfG, 2 BvR 2728/13 vom 14.1.2014, Absatz-Nr. (1 – 105)* (about the legality of the European Central Bank's bond-buying programme).

Accountability and authority/ Responsabilité et autorité

The Court must be independent, yet accountable. How does the Court interact with domestic and European democratic bodies? How should the authority of its judgments best be maintained? Does it respect professional standards of legal reasoning? Should it be more responsive to public opinion? Is there room for principled non-compliance?

La Cour doit à la fois être indépendante et responsable. Comment interagit-elle avec les organes démocratiques nationaux et européens ? Comment l'autorité de ses arrêts peut-elle être assurée ? La Cour respecte-t-elle les normes professionnelles d'argumentation juridique ? Devrait-elle répondre davantage à l'opinion publique ? Le non-respect par principe est-il possible ou légitime ?

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Legitimacy Challenges – and what to do about them⁴⁶

The Court is among the most powerful of international courts. No surprise, then, that critics accuse it of several severe legitimacy deficits. Such criticisms have been analysed in depth by scholars present today, including Professors Çalı, Christoffersen and Helfer. For this session on accountability, four concerns merit mention:

- ▶ the Court's backlog of well-founded cases;
- ▶ allegations of overly dynamic interpretation by power-hungry judges;

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- ▶ criticism that the Court abdicates by granting powerful states a margin of appreciation;
- ▶ criticism that the Court lacks due deference toward well-functioning democracies.

A quick glance shows that some of these concerns about the Court are misguided, and that they are not even mutually compatible.

Yet the criticisms challenge the *authority* of the Court. That is the weight other actors will give to the judgments of the Court when they consider how to act. These other actors include domestic parliaments, governments and courts; other Council of Europe bodies; not least: citizens and NGOs, other States – and soon, several bodies of the European Union. For instance: states may react by complying – but they may also cut funding, refuse to comply, and possibly exit from the Convention.

The protection of human rights in Europe is at risk. What is to be done?

Many proposals may be subsumed under a general call for more accountability of the Court. To help our assessment of these suggestions, I first discuss accountability and point to a paradox of the accountable Court: its authority in the eyes of other actors requires both less and more accountability toward the States Parties. To move forward, I then summarize some of the risks that accountability measures are often meant to resolve, before concluding with six – or really five – challenges for the Court.⁴⁷

I. Accountability – by the Court and of the Court

Accountability mechanisms typically have four central features (Grant and Keohane 2005, Bovens 1998; Føllesdal 2004):

- ▶ some *actors* hold;
- ▶ a *subject* – a particular institution;
- ▶ to certain *standards*;
- ▶ and if the actor concludes that the subject has failed to live up to those standards, the actor may set in motion *reactions* – also by others – such as sanctions, exit, or denouncement.

The Court plays two different roles in two different discussions about accountability:

⁴⁷ I leave aside important other responses, such as checks and balances that could involve the Committee of Ministers and other bodies.

- ▶ Accountability *by* the Court. As an *actor* it is an umpire which holds *states* accountable to the standards of the Convention. If the Court finds the State wanting, this may be a signal to the population, opposition parties, national institutions and NGOs to mobilise, and other States to be vigilant. Indeed, the most important impact of human rights courts is often precisely when mobilising such other audiences to hold their own domestic authorities accountable.
- ▶ Secondly, the Court is also a *subject*: it should *itself* be held accountable to a variety of actors, to prevent the Court from abusing its powers. How can the Court best be held accountable? We can see that it should not be the same States that should hold the Court accountable, that it itself should monitor. Without sufficient independence from them, other States and citizens cannot trust the Court's adjudication.

II. *The Puzzle: Independent with discretion – yet accountable?*

The judges must be independent, and they must enjoy wide *discretion* when interpreting the Convention, to help prevent violations of human rights in ever new circumstances. New threats to individuals' urgent interests were unimaginable in the 1950s – ranging from internet surveillance and defamation to the increased heterogeneity of expressions of religious or sexual lifestyles; in states with a remarkable diversity of experiences with democracy and the rule of law.

For the Court to maintain its authority in pursuit of its objectives, it must thus enjoy independence from particular states, and a broad scope of discretion.

The risk is that the States and citizens of Europe may thus create a cure worse than the disease: the rule in Europe not of human rights law but of unaccountable human rights lawyers at the Court.

This creates a dilemma: how can the Court provide trustworthy, independent oversight of the policies and legislation of its masters, without itself becoming a new source of unaccountable domination?

Too much accountability toward a few states – or the EU – may make the Court into their puppet; while too much accountability toward too many audiences may become a straightjacket. However, complete unaccountability is a recipe for new risks of abuse – from the Court itself.

In order to discuss these challenges it is helpful to remember some of the risks of international courts generally, real or imagined.

III. *The risks of domination by the Court: corruption, puppets, institutional entrepreneurs*

What are some *possible* risks that the Court can abuse its power (Føllesdal 2014)?

A first risk is that international judges may become *corrupt for their private gain*.

Secondly, judges may serve as *puppets* – as pawns or marionettes for the powerful States that nominate them (Shapiro 1981, ch 1; Voeten 2013).

Thirdly, there is an *“entrepreneurial”* risk. Judges, particularly at a *new* international court, must build its legitimacy “capital” and its authority. Problems arise if the international judges pursue the power of the institution, beyond what is required to secure the objectives of the treaty.

These observations concern international courts generally. The Council of Europe must ask whether the Court is likely to suffer from any of these risks, and only if so, then, ask what should be done – without preventing the Court’s main function.

There may be three main strategies to fine-tune accountability mechanisms: firstly, by considering how the judges are *appointed*, and then ways to *guard* and *guide* the international court as a whole – without preventing the Court from holding States accountable to the Convention, but rather fostering professional legal norms of reasoning in the procedures and judgments to ensure that the decisions are sound and are regarded as authoritative.

IV. *Some paths to improve the accountability of the Court*

As we turn to suggestions for further improvements in light of these risks, I first submit a reminder that should temper eagerness to increase the accountability of the Court:

- ▶ a) If it ain’t broke, don’t fix it

While the Court enjoys a high level of formal independence, there are at least three reasons to be cautious about further reform proposals to make the Court more accountable.

Firstly, the Court’s room for discretion is already limited, since it can only address cases brought to it, and these must have exhausted local remedies. However, insofar as the Court must now select among the cases, this creates a certain risk of abuse of this power.

Secondly, compared to other international courts and tribunals, the Court already has a high degree of *transparency* of process and reasoning, even including public dissenting opinions.

Thirdly, while the current backlog and lack of *compliance* with the Court's rulings are problems *for* the Court and for the citizens of Europe, it is not primarily a problem *of* the Court – but a challenge *to* certain Member States. Director Christoffersen (Christoffersen 2011) and several other scholars present have highlighted this point. One important implication is that the solution should aim to maintain a high legal quality of the judgments, and to promote their impact on domestic actors by protecting democratic freedoms, and to bolster independent domestic courts, through judicial dialogue. It is not obvious that this requires further strengthening the sanctions that human rights courts may leverage.

▶ b) The selection of judges

With regard to the selection of judges, states must have enough influence in the *selection* process to ensure indirect democratic accountability, whilst ensuring that the judges are highly skilled so that decisions are regarded as authoritative by other actors. At the Court, this is done by a procedure where each State nominates three candidates, which are then selected by the Parliamentary Assembly of the Council of Europe. Rules regarding the term of office are also crafted to secure independence from the appointing bodies: This would seem to be one reason for the changes wrought by Protocol 14, that judges serve one non-renewable nine year term rather than a six-year term once renewable.

One possible task for the longer term is to elaborate and revise the Committee of Ministers' helpful *Guidelines on the selection of candidates*, and the role of advisory panels of experts.

▶ c) Better accountability through better legal reasoning

Both accountability *by* the Court and *of* the Court will be fostered by more systematic and principled legal analysis. As Professor Çalı and others have argued, the authority of the Court in the eyes of states and other actors increases when the legal reasoning is consistent and persuasive (Çalı, et al. 2011). At the same time, this strengthens what professor Helfer calls “discursive self constraint” of the Court when it seeks acceptance by surrounding judicial bodies at domestic, regional and international levels (Helfer 2006). This helps reduce the risk of too much activism.

Among sources of lessons we should welcome such initiatives as the European Research Council-funded project “Strengthening the European Court of Human Rights: More Accountability through Better Legal Reasoning”, chaired by professor Eva Brems.⁴⁸ Topics include dealing with cultural and other types of diversity, proportionality analysis and consistent approaches to conflicts in human rights.

48 www.ugent.be/nl/onderzoek/ugent/toponderzoek/eu-portfolio/enhr.htm.

► d) The Margin of Appreciation Doctrine

The Margin of Appreciation doctrine is an interesting part of both forms of accountability, by the Court and of the Court, and even more so with Protocol 15.

The Margin of Appreciation reduces the risks of the Court's dynamic interpretation. Indeed, states now seem to use this doctrine to hold the Court to account: recall the *Lautsi* case concerning crucifixes on classroom walls. The Italian Government there criticised the Court for not granting it a margin of appreciation.⁴⁹

The doctrine also helps accountability *by* the Court, because it helps citizens and other states hold the State accountable. Consider that the Court often denies such a margin if there is no evidence of a good faith *proportionality test* by the state prior to deciding on legislation or a policy. Over time this may induce state authorities to deliberate more carefully, in public, about the social objectives, alternative modes to promote them, and the likely effects of these alternatives for the human rights of affected individuals. Such deliberation is crucial if rulers are to be responsive to their citizens, and for domestic democratic accountability to be effective.

The margin of appreciation imposes two important tasks for reflection and reform. Several judges – and scholars present here today – criticise the practice as being *too vague*. The result is apparent inconsistencies of the Court, and suspicion that the Court favours some States. We need a more specified, predictable practice, guided by a clear understanding of why the Court should grant States a margin of appreciation in the first place.

A second issue concerns the Court's appeal to an “*emerging European Consensus*” or “*common European values*” (Letsas 2013). When the Court observes such emerging patterns, it restricts the margin of appreciation. The Court thereby becomes accountable *to majorities* among the States (Stone Sweet and Brunell 2013).

However, sightings of such a consensus are controversial, also among judges of the Court (Føllesdal 2014). And the policy is not obviously sound. Suppose there is partial convergence on *one* particular way to address tensions between human rights, or between such rights and social objectives – for instance to end the practice of established state churches. Why should this trend make the Court more suspicious toward *other* modes of handling these tensions by other Member States who will keep their established church?

49 “A study would have shown that there was no common approach in Europe in these fields, and would accordingly have led it to the finding that the Member States had a particularly wide margin of appreciation; consequently, the Chamber, in its judgment, had failed to take that margin of appreciation into consideration, thus ignoring one fundamental aspect of the problem.” (summarised in *Lautsi v. Italy* Ii 2011, para 34).

▶ e) Principled non-compliance – an ultimate accountability mechanism?

The current criticisms from some Member States *may* give rise to a new phenomenon: principled non-compliance by a State as an accountability mechanism and ultimate correction device.

We have witnessed other incidents of non-compliance with international law which raise similar concerns, thus professor Franck argued that the NATO forces in Kosovo, even though the intervention was illegal due to the lack of Security Council authorisation, still was morally necessary: it was a morally mandatory act of international civil disobedience.

One reason to expect such reactions is that international courts must resort to dynamic interpretation of treaties that are difficult to change. We must expect that even wise judges will sometimes make mistakes in their dynamic interpretations. One corrective device States may resort to as a last resort is non-compliance with a judgment, akin to “civil disobedience” known from domestic settings.

But how can we – and the Court – distinguish these acts of non-compliance aimed at changing treaty interpretation from “ordinary” law breaking? (Goodin 2005). It will be important to make such a distinction, both for the Court to understand that it should reconsider, and to avoid the spread of non-compliance.

To illustrate: one reason why the Hirst case should not count as such an incident is that we should require evidence that the State is actually engaged in a judicial dialogue of sorts, that it seeks to *voice loyalty* to the Convention – possibly to avoid *exit* as a last resort (Hirschman 1970): the State must state reasons for non-compliance, including a preferred alternative interpretation of the ECHR.

▶ f) The accountability roles of the EU vis-à-vis the Court

A final topic for the long-term future of the Court concerns the roles that the EU and its court may play in the two forms of accountability – *by* the European Court of Human Rights, and *of* the Court. There are several new challenges, some because the EU does not merit the same sort of deference as a democratic state.

Not only is the EU not a state, but the EU itself is frequently charged with a democratic deficit (Føllesdal and Hix 2006). This is one reason why the EU should not enjoy a margin of appreciation, at least not for the same reasons as the democratic Member States of the Council of Europe enjoys.

Secondly, the debate of how the Court should reform or reject its Bosphorus doctrine has not reached its conclusion.

Thirdly, the Court of Justice of the European Union may challenge the independence of the European Court of Human Rights.

One consequence is that the accession of the EU should lead the Council of Europe to think even more carefully about the challenges outlined in this presentation.

Conclusion

To conclude: I have urged that a central task for the Council of Europe in the years to come is to ensure that the European Court of Human Rights can both on the one hand promote accountability and the legitimate authority of its Member States and the EU. At the same time: the Court itself should remain accountable and maintain its own authority, so that it continues to contribute to the protection of human rights in Europe.

I have suggested five areas where further deliberation may be necessary in the long-term for the Court:

- ▶ the selection of judges;
- ▶ maintaining the high legal quality of judgments;
- ▶ the margin of appreciation doctrine;
- ▶ possible instances of principled non-compliance;
- ▶ the accountability challenges wrought by the accession of the EU.

This is not an exhaustive list. To the contrary, I suspect we will have a much longer list by the end of our days here.

Comments/Observations

Almut Wittling-Vogel

Representative of the Federal Government for Matters relating to Human Rights, Federal Ministry of Justice, Germany/Représentante du Gouvernement fédéral pour les questions relatives aux droits de l'homme, Ministère fédéral de la Justice, Allemagne

Ladies and Gentlemen, Organisers of the Conference,

Thank you very much for the opportunity to speak here. And many thanks to Andreas Føllesdal for his thoughtful and interesting introduction to the issue of accountability and authority of international courts.

I would like to add 8 points. I will do that in my personal capacity and not as a representative of my government.

1) Authority and accountability are perennial topics for all supreme courts, both at the national and international level. I agree with Andreas Føllesdal that there is certain tension here: a court must have the authority to issue judgments which are binding on state organs and citizens. And a court must be independent of those who are subject to its judgments. On the other hand, it must be responsible, as I would like to put it. I feel that we should rather talk about responsibility than about accountability.

2) Every court needs a foundation which justifies its wide-ranging authority to intervene in the private, governmental and parliamentary spheres. In the case of the European Court of Human Rights (“the Court”), it is quite obvious that it has been legitimised by the national parliaments.

- ▶ Through their approval of ratification, the parliaments themselves were the ones who created the European Convention on Human Rights (ECHR) system, and then repeatedly affirmed it by adopting its protocols.
- ▶ The Parliamentary Assembly, composed of delegations of the national parliaments, elects the Court’s judges.
- ▶ The national parliaments can – and sometimes must – exert influence over the way that judgments are executed.

3) The other side of the coin is that the court has to be careful about the limits of this clearly justified authority. The Court also derives its legitimacy by respect-

ing the boundaries imposed on the judiciary. This is its responsibility. Responsible jurisdiction means to stay within the limits of a court, and not to enter the field of the legislature.

- a) A court decides only those issues which have been submitted to it; but not those it might consider quite urgent but which do not come before it. This also means that it must resist the temptation to extend the issues of a case or to go further in the interpretation of the Convention than necessary for a given case.
- b) A court must review existing law, but it should not develop a legal order which it deems appropriate. It must respect space for political developments and solutions, even when it has the impression that there are better and more reasonable solutions. The Court should also respect quite particular national rules which are not part of an “emerging European consensus”. I agree with Andreas Føllesdal when he expresses doubts about some effects of the doctrine of the “emerging European consensus” in the Court’s case-law. The Grand Chamber judgement in *Scoppola vs. Italy* of 17 September 2009 (10249/03, § 105 *et seq.*; discussion in Grabenwarter, *Europäische Menschenrechtskonvention*, 5th ed., 2012, § 24 margin No. 145.) provides an example of overreach of that doctrine.

Even if many comparable cases are pending or have already been decided by the Court, it cannot take on the role of the legislative branch. Unlike a parliament, a court cannot be the place where the various perspectives and interests come together and influence the overall solution to a given problem. Even if it hands down a landmark decision, or a pilot judgment with a far-ranging effect, a court must limit itself to violations of the law. This limitation applies even more to a European or international court, which, unlike a national court, necessarily has a certain distance from the State concerned. It is not the task of a court to draft legislative programmes.

4) Does this also mean that the Court, as a matter of principle, must exercise special restraint with regard to the legislature because of the direct democratic legitimacy of parliaments?

In my opinion the answer is no.

Human rights are not a concept which would lose its effectiveness in a democratic system vis-à-vis a democratically, directly legitimised parliament. Rather, the role of human rights is to protect the rights of the individual vis-à-vis those organs that are authorised to issue laws and regulations. In a democratic system, the majority of the parliament and the democratically legitimised gov-

ernment are responsible for legislation and other decisions. Therefore, the focus is on court protection from a majority that has, for one reason or another, not taken the individual and his rights adequately into account.

Neither the special democratic legitimacy and representation of the people nor the parliamentary process can form the basis of having a lower level of protection existing with respect to parliament than with respect to the government or the courts.

5) A last restriction I want to refer to was already mentioned by Andreas Føllesdal. Does the Court have to exercise special restraint due to the difficulty in amending the Convention?

If a national court applies a statute in a manner other than that intended by the parliament, reaction from the legislature is easily possible. The law can be changed at the next opportunity.

The situation is more difficult when the statute violates the national constitution. Of course, in principle a constitution may be amended as well. But as a rule, the hurdles for a constitutional amendment are high. Therefore, the legislature can assert its will only in exceptional cases. But this is of course intended. The constitution is protected by special procedures from overzealous amendments.

The situation at the European level is even more difficult. Amending the first part of the ECHR in order to “correct” a judgment, which, in the view of the Contracting States, goes too far, is inconceivable. The rights and freedoms in the first part of the Convention are “untouchable”, as Philippe Boillat put it in his introductory statement at this conference. This is also not a mere coincidence of the system. The Convention and the Court were created precisely to secure certain human rights standards over the long-term. And the Contracting States were not only concerned with protecting their own legal order against faulty developments, but rather equally with the same protection in the neighbouring States. Therefore, it is a correct consequence that the system is stable – including in the sense that *de facto*, amendments or detailed descriptions of the substantive guarantees are not envisioned.

Nonetheless: the higher hurdles for the legislature which wishes to influence case-law with new legislation should correspond to increasing restraint by courts when it comes to *de facto* intervention in the democratically legitimised legal order. But this cannot and must not protect against justified intervention for the protection of human rights.

6) I do not wish these comments to be understood as speaking against the continued development of the Convention as a “living instrument”. It is completely undisputed that we cannot stagnate at the level of 1953. However, if the Court is aware of being a court and of the limitations which flow out of this, this has influenced and will influence the development of the Convention through its judgments.

7) Could we assure the obligation of judicial restraint in the procedure?

I do not want to talk about such dramatic measures as “principled non-compliance”, as mentioned in the conference programme. But I could imagine introducing a two-thirds majority for judgments that *de facto* do away with national courts’ judgments and decisions by national parliaments. These judgments brand the decisions of the national organs with the verdict of human rights violations. The fact that this is possible with four votes to three (or, in the Grand Chamber, with nine votes to eight) unfortunately sometimes conveys the impression of coincidence. In my view, nothing speaks against requiring a five to two (or twelve to five) majority in such cases.

8) However, the actual and most important instance that ensures compliance with the principles I have mentioned is a wise judge.

But the judges cannot always be wise on their own. They need support and assistance by way of a serious public debate.

And that is what this conference is for.

Thank you very much for your attention.

Alan Miller

*Chair, European Network of National Human Rights Institutions/
Président, Réseau européen des institutions nationales des droits de l'homme*

Distinguished guests, Ladies and Gentlemen,

I am very grateful for the opportunity to speak to you today on the topic of accountability and authority.

As I stressed at the 2012 Wilton Park Conference prior to the Brighton Ministerial Conference, I think we have come to the end of the road on technical adjustments to individual access to the Court. With the good news that the backlog is largely expected to be addressed by next year, I hope we can now belatedly turn to the question of implementation and accountability.

I have been asked to address you on the theme of accountability and authority. This theme, like much else in the debate that has gone on over the past two decades lends itself to much ambiguity. Does the theme suggest that States lack accountability? That the Court lacks authority? That the Court fails to ensure State’s accountability or that there is some symbiosis between the two concepts?

Rather than engage in semantics, I will give you my sense of this theme from the viewpoint of ENNHRI, the European Network of NHRIs which represents 41

NHRIs across the Council of Europe system, which has spoken at the Interlaken, Izmir and Brighton Conferences and is regularly represented as observer at the CDDH meetings.

Authority is a term that easily lends itself to the Convention system. At Wilton Park I compared the favourable European situation to the then evolving Arab Spring. Eighteen months on we can say that without institutions, any revolution will fail to guarantee human rights and the rule of law. The Convention system, imperfect as it is, yet represents the best of international justice. The jurisprudence of the Court continues to be the lifeblood for not just eastern but also western States including my own. Non-discrimination, protection of privacy, effective remedies, duties on States to “respect”, “protect” and “fulfil” human rights including where delegated to private actors: these are cutting edge human rights issues which the Convention system does well to keep abreast of.

So when we speak of authority I take that as a given. Every judgment issued by the court does not need to accord to my sense of whether the Court got it absolutely right. As a jurist, I accept the verdict of the Court, just as I do the judgment of my own courts. Once the Court takes a decision, the independence of the judiciary demands that we accept the decision and move on to implementation.

Accountability under the Convention system means firstly accountability to the individual to “secure” the rights in the Convention through subsidiarity and effective implementation. It also means accountability of Member States to the Committee of Ministers for implementation and execution of Judgments and adherence to the Convention system. Under the Council of Europe accountability is weaker than it should be. The bigger offending States need to be called to account by their peers to deal with systemic violations which are skewing the Court’s work and rendering it difficult to process new cases efficiently.

Implementation means execution of judgments by national parliaments and upholding the Convention in domestic legal systems. Execution also means an enhanced role by national parliaments in holding the executive to account. ENNHRI has cooperated with the Parliamentary Assembly of the Council of Europe on the report on the relationship of Parliaments and NHRIs and increasingly we look towards increased training of parliamentarians, interrogation (in the nicest sense) of State agents and proactive mechanisms to monitor compliance/ implementation and execution of judgments, with a link between the Parliamentary Assembly of the Council of Europe, national parliaments and the Department of Execution of Judgments.

This is where NHRIs can be of real relevance to implementation due to our broad mandates and the authority we are accorded at national and international level. In addition to having information on Convention rights and admissibility on our websites, we regularly interact with Government, Parliament and the

judiciary. We work with the executive in terms of executing a judgment, we regularly interact with the executive and legislature on draft remedial or new legislation to ensure it is Convention compliant, we intervene before domestic courts as *amicus curiae*, advising them on the relevance of ECHR norms/ standards, we train public officials and thus aim to lessen violations and resulting caseload. Some Ombuds-type NHRIs also handle individual complaints and function as an alternative body for dispute resolution in cases of alleged human rights violations.

In our most recent submission to GDR-F we recommended that due emphasis be placed on the three pillars of the system, namely national implementation, Court supervision and execution under the supervision of the Committee of Ministers. These three pillars exist in a cyclical relationship to each other, such that an effective outcome at one level will have benefits at the next, thus reinforcing the Convention system in its fullest sense, but also creating a situation where a failure at one level increases the pressure and possibility of poor outcomes at the next level, and so on.

Over-emphasis by the political organs of the Council of Europe on reforming the Court has left largely unaddressed the latter two pillars above, putting all the pressure on the Court to deal with a backlog of cases in addition to a steady influx of new complaints, the catalyst for which starts at a national, not Court level.

Paragraphs 35c to 35f of the Brighton Declaration, from which GDR-F draws its mandate, have as their focus the manner in which the Committee of Ministers can address the operation of the Convention system, to in turn allow the Court to fulfil its existing mandate to deal with individual applications, and authoritatively interpret the Convention, while at the same time reducing the number of applications to it.

The main challenge now is to ensure compliance with the Convention by its Member States. This means subsidiarity under which the Court does not have to deal with a matter where the national authorities can and do. It means well-founded cases being dealt with domestically because domestic remedies are effective in identifying and adjudicating on violations. If an individual application is ill-founded – admissibility or merits criteria will so find. But we must constantly ask why it is that the Court continues to make findings of violations, particularly where such an outcome is predictable and repetitive; prison conditions or length of proceedings for instance. The attitude of domestic courts to Convention implementation needs further attention, as does the defence put forward by States to these cases which is called into question. Ultimately the domestic authority of the State agent must be strengthened, in whatever way this is best achieved within the domestic constitutional order, to decide both that a case should be conceded where the Convention is clear on a point and that domestic structural reform be introduced in tandem to minimise its recurrence.

In parallel the Committee of Ministers must have stronger tools, backed up by peer pressure, to ensure effective and swift execution of Judgments. This is what we mean by accountability and authority. Under this rubric both Member States and the Convention system collectively gain in authority with the result being the rising of tides for the human rights of everyone across the European continent.

Thank you.

**Rule of law: “Constitutional Court” or
“guardian of individuals”?/État de droit :
« une cour constitutionnelle »
ou « protectrice des individus » ?**

The system established in 1950 was based on a Commission, which handled all individual applications, and a Court, which was only seized in cases submitted by either the Commission or the responding State. By Protocol 11 the Court and Commission were merged. Today, the Court sifts all applications and decides on admissible cases. Serious cases can be submitted to a Grand Chamber. Has this reform functioned as expected, and does it permit the Court to fulfill both tasks reasonably well? – If not, how might it improve?

Le système établi en 1950 fut fondé sur une Commission tâchée de traiter toutes les plaintes des individus, et une Cour qui s’occupa uniquement des requêtes soumises par la Commission ou l’État demandeur. La Cour et la Commission furent unies par le Protocole n° 11. Aujourd’hui, la Cour trie les requêtes et prend une décision quant à leur recevabilité. Il est possible de soumettre des cas graves à la Grande Chambre. Cette réforme satisfait-elle les attentes, et permet-elle à la Cour de remplir ses tâches de manière satisfaisante ?

Luzius Wildhaber

Professor, University of Basel; former President of the European Court of Human Rights/Professeur, Université de Bâle ; ancien Président de la Cour européenne des droits de l’homme

I have been asked to comment on whether the European Court of Human Rights (“the Court”) is a “Constitutional Court” or a “Guardian of individuals”.

The way this question is formulated, it looks as if two options existed and the choice between the two options was open. However, this is not so. In fact, to the extent that we can call the European Court of Human Rights a *Constitutional Court*, it is a Constitutional Court which is a guardian of individuals. And if we call the European Court of Human Rights a *guardian of individuals* that begs the question. Does it mean that the Court can in fact handle all the 66000 applications per year⁵⁰ with an equal amount of diligence in “a fair and public hearing within a reasonable time”, as Article 6 ECHR puts it? We know that this is not possible. If we try to describe the situation realistically, the Court has in recent times focussed most of its extra efforts on *urgent and high priority cases* on the one hand and on *inadmissible applications* on the other hand. According to the figures for 2013, the Court pronounced 916 judgments in more than 3600 cases on the merits.⁵¹ And it managed to bring down the total of pending applications from 151000 in 2011 to 96000, mostly because the Single-Judge formations decided on more than 80000 applications.⁵² Clearly this is due to huge efforts by the Judges and the Registry Staff. Given these figures, it would seem that, for the moment, we should leave the fate of inadmissible applications in the hands of the Court. In several respects, the Strasbourg system has now moved back to the times before 1998, when the Commission was still in existence and took care of sifting and classifying the cases.

The Court in recent years has invested less effort in the handling of *repetitive cases* and of *meritorious, non-repetitive cases of a lower priority*. These two categories of cases are, and remain, obvious problem areas.⁵³ With this description, I do not intend to put the blame on the Court. The Court, confronted with a lot more applications than it could handle properly, confronted also with the fact that not everything is possible, simply had to make choices and to assume its responsibilities.

Nevertheless, it is somewhat odd to have to state that the Court’s focus in recent years was both on the most and the least important cases, with a benignly neglected middle ground in between. This leads to the question whether the

50 European Court of Human Rights, Annual Report 2013 (2014), XII; Analyse statistique 2013 (2014), pp. 4-10.

51 *Ibid.*

52 *Ibid.*

53 ELI (European Law Institute), Statement on Case-Overload at the European Court of Human Rights (July 6, 2012) by Mark Entin/Jean-Paul Jacque/Paul Mahoney/Luzius Wildhaber; Paul Mahoney, The European Court of Human Rights and its ever-growing caseload: Preserving the mission of the Court while ensuring the viability of the individual petition system, in: The European Court of Human Rights and its Discontents (eds. Spyridon Flogaitis/Tom Zwart/Julie Fraser, 2013) 18-26; Luzius Wildhaber, Criticism and case-overload: Comments on the future of the European Court of Human Rights, in: The European Court of Human Rights and its Discontents (*supra*) 9-17.

“individual justice” thesis is an aim in itself, and if so, what is meant by such a claim. I shall come back to this important issue in a moment. But let us first look at the “constitutional justice” thesis.

The *Loizidou* judgment speaks of “the Convention as a constitutional instrument of European public order”.⁵⁴ Now it is granted that national constitutions deal with state tasks, state organs and their powers, federalism, economic policy, public goods, social balance or other matters which do not occur in the European Convention on Human Rights (ECHR). It is granted furthermore that several States have no Constitutional Courts, but only Supreme Courts, and that not all European Constitutional Courts have identical powers. Moreover the European Court of Human Rights does not have the power to annul national legislation or to quash court judgments. Evidently, therefore, the Court does not resemble national Constitutional or Supreme Courts *in all significant particulars*.⁵⁵ But it shapes a European human rights order as part of a common European law, much the same way as a national Constitutional Court creates a constitutional human rights order. There are clear resemblances in terms of importance, method and functions between all these courts.

At this point one may well wonder whether all the excitement about the antithesis between constitutional and individual justice is worth while. It is possible to understand the term “Constitutional Court” as an assertion that democracy and human rights constitute formative principles, either of contemporary international law, or of each national system in Europe. But this is a very abstract claim, which does not explain the vivid and sometimes shrill tones of the debate. It is only when we understand “constitutional justice” as a *concentration on grave and essential issues* that we approach the centre of the conflicts. Before the Brighton Conference, an important group of NGOs submitted a statement that there was “no evidence that there is a need for further review” of the Convention system.⁵⁶ In my opinion, that statement was plainly mistaken. It expresses, however, the views of a strong lobby of NGOs, academics, some governments and even judges that the right of individual application should be saved and not be touched, as the lobby has put it. Underlying these views is a concern about a *possible regression* in the level of human rights protection, about a loss of credibility

54 *Loizidou v. Turkey (preliminary objections)* (GC), 23 March 1995, A/310, § 75.

55 Steven Greer/Luzius Wildhaber, Revisiting the Debate about “constitutionalising” the European Court of Human Rights, HRLR 12 (2012) 655-87; Les droits de l'homme ont-ils constitutionnalisés le monde? (éds. Stéphanie Hennette-Vauchez/Jean-Marc Sorel, 2011).

56 Amnesty International, European Human Rights Advocacy Centre, Interights, International Commission of Jurists, Justice, Liberty and Redress, Joint NGO preliminary comments on the first draft of the Brighton Declaration on the Future of the European Court of Human Rights (5 March 2012), p. 7.

because of the alleged *lottery character* of access to the European Court of Human Rights, and about what is called a “*moral panic* in the face of figures”.⁵⁷

Such arguments ignore both fact and past history. The Strasbourg system has known *markedly distinct forms*.⁵⁸ Each time when a form did not work as hoped and planned, it was modified. It all began with optional protocols and denial of access to the Court for individuals. From 1994 to 1998, Protocol No. 9 introduced an optional “leave-to-appeal” possibility. The Explanatory Report to Protocol No. 11 insisted that there was an urgent need to restructure the control machinery of the Convention, “so as to shorten the length of ... proceedings”.⁵⁹ Amazingly, the full impact of 22 new Member States from Central and Eastern Europe (and in effect also Turkey) was only very marginally discussed or evaluated in the Report.⁶⁰ After some bitter fights, Protocol No. 14 then diminished the right of individual application, although only modestly. Along similar lines, the Court followed up in 2009 with a new prioritisation policy.⁶¹ At the end of 2011, an internal note of the Court estimated that the overall average time for communication of a case (not for deciding, but only for communicating) was more than 3 years.⁶²

I shall not go into details about these changes and problems. Let me spend the remainder of my time with a few words about what could, might or should be done.

It is difficult to accept that the main aim of the Strasbourg system is to offer, in a continent of more than 800 million potential applicants, a judicial remedy to every single individual, *irrespective* of whether his or her grievance is serious or trivial, structural or case-specific. In my view, the individual petition serves to bring *serious human rights violations* (and mostly only those) *expeditiously* (and that is a prerequisite) before a European Court. Thus, it helps directly the applicants, and indirectly as large a number of victims as possible. In addition, it should turn *human-rights-on-paper* into effective *human-rights-in-lived-reality*, again to the benefit of as many individuals as possible. In view of these two

57 Florence Benoit-Rohmer, Les perspectives de réformes à long terme de la Cour EDH: *certiorari versus* renvoi préjudiciel, RUDH 2002 313-19; *ead.*, Il faut sauver le recours individuel ..., Recueil Dalloz 2003, no. 38, 2584-90; Philip Leach, Access to the European Court of Human Rights – From a Legal Entitlement to a Lottery?, HRLJ 27 (2006) 11-25; FRANÇOISE TULKENS, Les réformes à droit constant, RUDH 2002 265-73; JOHN WADHAM/TAZEEN SAID, What Price the Right of Individual Petition, EHRLR 2002 169-74.

58 Ed Bates, The Evolution of the European Court of Human Rights (2010).

59 Explanatory Report to Protocol No. 11 (ed. Council of Europe 1994), §§ 23, 19.

60 *Id.*, §§ 4-5, 14, 22-25, 85-86.

61 Rule 41 of the Rules of Court (as amended on 29 June 2009); <http://echrblog.blogspot.ch/2010/11/courts-new-priority-policy.html>.

62 Note prepared by the Registry of the European Court of Human Rights. Information on Cases Pending before the Court Situation end 2011, p. 3.

main aims, one should, as the Court has done, promote the need to prioritise applications and the need to focus on human rights violations of persons who suffer truly.

If a *new European Court of Human Rights* could be *conceptualized*, irrespective of any political feasibility, I would advocate a system which would provide for a real and effective, expeditious and credible judicial remedy for some, but not necessarily for all individuals.⁶³ Two tracks should be opened. The present system would be available in *certain categories of very important cases*, such as: right to life, torture, slavery and long illegal detention; overruling of precedent; issues vital to the survival of a democracy; pilot judgments, including the periodical control of their execution; and interstate cases. For all other cases, a “*leave-to-appeal*” system would apply, in which a limited number of cases would be speedily decided.

Of course, such proposals sound radical and could at present hardly be realized politically. For the next two or three years, the decrease of pending inadmissible applications will lessen the pressure on the Court and may lead to a welcome feeling of “forgetting reform.”⁶⁴ The problems will not disappear, however, and that is why I mentioned my alternative. And given that the Court can hardly decide all applications in a judicial, expeditious and principled way, the end result of my alternative proposals would not be vastly different from today’s reality.

What else could be done? Let us begin with *repetitive cases*. The Court has tried for years to nudge Italy into repatriating the applications regarding the length of proceedings and into coping with them domestically. It seems very difficult to achieve tangible results in this way, but the Court should be encouraged and supported in its efforts. Such issues should indeed be settled primarily in the Member States involved. A European Court should not be compelled to repeat again and again, in thousands of cases, principles which it has laid down a long time ago. That is why repetitive cases are classified in a low category of priority, category V. Of course, it is also a workload problem, because one fails to comprehend how the Court can effectively process the pending 41000 repetitive applications⁶⁵ within a reasonable time. Basically, the time is overdue to conceive of the length of proceedings as an issue of execution of judgments.

63 For elaboration, Luzius Wildhaber, *Rethinking the European Court of Human Rights*, in: *The European Court of Human Rights between Law and Politics* (eds. Jonas Christoffersen/ Mikael Rask Madsen, 2011) 204-29.

64 Françoise Tulkens, *La Cour EDH et la Déclaration de Brighton. Oublier la réforme et penser l’avenir*, Cah. Dr. Eu. 2012 305-43.

65 At our conference, President Dean Spielmann has indicated these figures.

In its Preliminary Opinion before the Brighton Conference, the Court wrote: “The significant disadvantage admissibility criterion provided for in Article 35 § 3 (b) of the Convention has yet to achieve the impact foreseen by the drafters of the Protocol.”⁶⁶ If that is so, a European Court of Human Rights, which takes pride in turning the Convention into a living instrument, should be encouraged to turn Article 35 § 3 (b) ECHR into a living and effective tool, and even to raise the threshold of admissibility so as to approximate the desired result.

Naturally the Court cannot be expected and should not try to modify the system all by itself, without political support. There is the rub. Step-by-step, gradual approaches remain much more likely than a big bang. At the moment, the Court is about to cope with the backlog of inadmissible applications. That has been a big challenge. The next step will constitute an even bigger challenge: To cope with the two categories of the repetitive and the meritorious, non-repetitive cases of a lower priority. A good many of these cases are not minimal. Yet at present they cannot be handled within a reasonable time – *nowhere near a reasonable time*.⁶⁷ Both the Court and politics will have to find solutions, before these cases collect more dust, and before the Court’s credibility suffers more.

Professor Geir Ulfstein will look into specific proposals. I do not want to cover the same ground twice and shall therefore concentrate on one specific idea: I believe we should envisage *tailor-made country-specific solutions*. For years now, 60 to 70% of all applications have originated from only 4 or 5 States. In 2013, these are Russia, Ukraine, Italy, Serbia and Turkey.⁶⁸ Serbia is a newcomer on this list. As for Italy, 23% of all cases come from Western Europe;⁶⁹ 14% are of Italian origin, 9% of all other Western European countries taken together. If we could reduce the applications from the “big five” States (which amount to 67,5% of all applications, i.e. *more than two thirds*), this could improve the Court’s workload situation quite considerably.

Tailor-made, country-specific solutions may come up against the argument that they might encourage double standards. Yet, each country has its own laws, problems, implementation standards and thus a special “Convention profile”. To respond to different problems of different States in different ways is then not so much inherently unequal. It is taking each problem and each State seriously.

66 Preliminary Opinion of the European Court of Human Rights, § 10.

67 See the ELI Statement (*supra* footnote 52) for more details and arguments.

68 The European Court of Human Rights Annual Report 2013 and Analyse statistique 2013 (*supra* footnote 49).

69 *Ibid.* (Turkey is here omitted from “Western Europe”).

Geir Ulfstein

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Introduction

The European Court of Human Rights (“the Court”) managed in 2013 to reduce its caseload. The pending cases are now below the magic number of 100 000. This is a great achievement, and worthy of celebration.

A continuing concern is, however, that the vast majority of the cases disposed of in 2013 were the easiest ones. Around 90 000 cases were struck out of the list or declared inadmissible, while the Court adopted judgments in 916 cases.

The focus has so far been upon the inadmissible cases. My presentation will, however, concentrate on the Court’s ability to deal with the *well-founded* cases – and possible measures that might be taken to increase this ability.

Increased capacity to deal with the most important cases may first of all have the beneficial effects of allowing the Court to address the most severe human rights violations and the most essential general issues. It would furthermore mean that the Court would have more time to ensure quality and consistency in its judgments. This is important for the legitimacy of the Court and for ensuring implementation of judgments at the domestic level. And shorter waiting time may encourage the use of the Court by individuals who have well-founded cases. All in all, enhanced capacity to deal with the most important cases may improve human rights protection in Europe.

I will first discuss current mechanisms for dealing with the large number of applications: the filtering of non-admissible applications; judgments by Committees; and prioritization of the cases. As possible new measures, I will give prominence to discussing whether the Court should be allowed to restrict the number of cases it shall deal with, based on defined criteria. But I will also mention other possible measures. As the title of this session of the conference suggests, I will discuss whether such measures are best addressed in “constitutionalist” terms.

Filtering mechanisms

The European Convention on Human Rights (ECHR) establishes several grounds for declaring an application inadmissible, by a Committee of three members, but, importantly, also by a single judge. Article 35 (3) (a) provides that the Court shall declare an application inadmissible if it considers it to be “*manifestly ill-founded*”. It may be argued whether the Court strikes the right balance

and whether the reasoning should be more extensive. But this is a very important basis in practice for rejecting cases which the Court finds without merit, and it is essential for the 2013 improvement of the caseload.

But the Court shall also under Article 35 (3) (b) declare an application inadmissible if it considers that the applicant has “*not suffered a significant disadvantage*”. This means that applications may be rejected even if they have merit. Thus, even today not all meritorious cases are dealt with. But the Court has stated that this criterion “has yet to achieve the impact foreseen by the drafters of the Protocol”.

Judgments by Committees

It should also be mentioned that a Committee of three judges under Article 28 (1) (b) may by unanimous vote declare an application admissible and render a judgment on the merits if it can be done on the basis of “*well-established case-law*” of the Court.

Accordingly, this is not a basis for declaring a case inadmissible, but to make the procedure for handling cases which do not raise new legal questions more effective. The Court has declared that it will apply a wide definition of well-established case-law. But the Brighton Declaration “[i]nvites the Court to consult the States Parties as it considers applying a broader interpretation of the concept of well-established case-law”.

Prioritisation of cases

The Court adopted in 2009 seven categories for the purpose of prioritising cases:

- ▶ The first category covers “urgent applications”, such as a risk to the life or the health of the applicant;
- ▶ the second category
- ▶ includes applications arising from structural problems in a state or which raise important questions of general interest for several states; and
- ▶ the third category covers issues related to “core rights”, such as the right to life and protection against inhuman treatment.

But also among the top three priority categories, there is a large number of cases. The Court says that there were “almost 6 000 of these at the beginning of 2012. In 2011, 1 500 of these applications were received”.

The Court has also pointed out the problems with the non-prioritized cases, including “substantial non-repetitive cases” which in 2012 amounted to some 19,000, with 4 600 applications in 2011.

The problems with this way of prioritizing are, however, also that it does not allow any cases to be struck out of the list, and leaves applicants uninformed about when their case will be dealt with, if ever.

A constitutional court?

This section of the conference has been entitled “Rule of Law: ‘Constitutional Court’ or ‘Guardian of Individuals?’” And indeed, the term “constitutional” has been mentioned by the Steering Committee for Human Rights as a possible description of a future Court focusing more on the most serious cases – but with some reservation.

There have been several claims in the academic literature that the European Court of Human Rights is or should become such a constitutional court, but this approach has also been criticized. I have myself argued for the “constitutionalisation” of international – and even transnational – law, both from a descriptive and normative point of view.

I think that the Court is constitutional in the sense that it interacts with national constitutional organs, and that it promotes the application of constitutional values, such as democracy, rule of law and the protection of human rights. But the European Court of Human Rights is an international court, and not identical to national constitutional courts.

Furthermore, the c-word may not be helpful in our context. It easily leads to definitional issues, and to unjustifiable borrowing from domestic constitutional models. While “constitutionalisation” and “constitutionalism” are useful concepts in an academic debate, it is better in our context to deal with the concrete issues: What kinds of reforms are desirable?

Restricting the number of cases dealt with by the Court

The Court is already both filtering and prioritizing applications. These two elements should be continued. But the filtering is inflexible in the sense that it sets a minimum threshold. It may be difficult to formally raise this threshold, and it might more easily be argued that such a formal amendment would represent a denial of individual justice.

On the other hand, prioritization of the cases allows more flexibility for the Court. All applications are considered and assessed on the basis of determined criteria. These criteria combine both what could be called individual and general

justice. The current criteria for prioritization could be applied in the future, but they may also be further refined.

But should the Court be given the competence to determine how many cases it has the capacity to deal with and establish the number of cases accepted for processing accordingly?

While such a procedure is different from today, the difference in practice may not be so great, since cases with the lowest priority currently have little chance of being dealt with for years. Therefore, this procedure would arguably not represent a significant restriction of the right of individual petition. Such a competence would also have the benefit of applicants receiving a notice that their case will not be dealt with, instead of waiting almost indefinitely. And the Court will be able to strike out the cases.

This approach is different from what has been characterised as “pick and choose”, since the general rule would be that cases should be dealt with, not the opposite. And, as already stated, the criteria should not necessarily be taken from domestic constitutional courts.

But, assuming that the Court only has the capacity to adopt some 1000-1200 judgments per year, it would mean that several thousand applications would be denied. As already stated, the Court received 1 500 applications in the top three categories in 2011, and 4 600 applications of substantial non-repetitive cases not falling within these three categories. Furthermore, some applicants may want to keep an application on the list even if they have to wait for years for a judgment. Finally, it may be argued that keeping the applications on the list maintains a certain pressure on the relevant states.

Other measures

But there are also other measures that could allow the Court to focus more on the cases with the highest priority, such as:

- ▶ Stricter interpretation of the criteria “manifestly ill-founded” and “significant disadvantage” to declare applications inadmissible; or
- ▶ Delegating more powers to decide cases to Committees and Single judges; or
- ▶ Designing procedural requirements fitting the character of the case, such as lowering the requirements to stated reasons in less serious cases;
- ▶ Or, leaving cases resulting from domestic structural problems or political inability or unwillingness to the political arm, the Council of Ministers.

What is important is that more focus should be given to the Court’s capacity to deal with the most important cases, and which measures are necessary in this respect.

Comments/Observations

Frank Schürmann

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Dear Colleagues, Ladies and Gentlemen,

It is a pleasure and honour to attend this conference and to comment on the contributions of Professor Ulfstein and Professor Wildhaber.

I. Constitutional Court or guardian of individuals: the right alternative?

My first comment concerns the title of this section: “Constitutional Court or guardian of individuals?” The alternative might be clear in theory, but in practice, there is no clear distinction between the two concepts. The present system lies somewhere in between: On the one hand, the Court already today acts like a constitutional court. This has been pointed out both by Professor Ulfstein and Professor Wildhaber. In fact, the Strasbourg Court, to a large extent, decides the same kind of issues as a domestic Supreme Court or Constitutional Court, according to similar principles applicable to fundamental or human rights issues. On the other hand, we must recognise that, already today, there are important limitations to an “overall guardianship of individuals”: Length of proceedings before the Court; great majority of cases declared inadmissible without proper reasoning; pilot judgment procedure; prioritisation of cases; new admissibility criterion – these are developments which in reality weaken “the fundamental importance of the right of individual application as a cornerstone of the Convention system” (Interlaken, 1; Izmir, 1; Brighton, 2, 13).

II. Interim balance of the reform. Statistics

A second comment relates to the question whether the reform has functioned as expected. As it has been pointed out by several speakers, the Court has realised a significant reduction of the pending cases from more than 160 000 cases below the magic number of 100 000. Frankly speaking, I didn't believe that this would be possible in such a short time frame. Let me add that, in general, and without undermining the efforts and improvements put in place by the other key

actors of the control system, the Court has realised the most important steps of organisational and procedural nature, coming from the Interlaken/Izmir/Brighton Declarations. The extraordinary decrease of the caseload is probably the most impressive achievement among these steps.

On the other hand, the question arises whether there is a price to pay for this achievement. Without doubt, the decrease of the pending cases is mainly due to a massive increase of single judge decisions (more than 80 000 in 2013; this led to a reduction of 56% of the number of cases pending before the single judges within 1 year [1/1/2013: 59 850; 31/12/2013: 26 500]). Two observations in this regard: Firstly, one cannot exclude that the increased output by the single judges was only possible at the expense of the treatment of Chamber cases. At least at first sight, the recent figures seem to confirm this presumption: in 2013, 916 Chamber judgments were rendered, compared with 1499 in 2010. Secondly, the coherence of the case-law is at stake. Is it possible to assure this coherence in a system with 47 judges, hundreds of lawyers, in which every judge and every lawyer deals with every Convention matter, and which renders tens of thousands of decisions each year? The enormous output represents a big challenge, being understood that the majority of these decisions concern manifestly ill-founded applications. As Professor Ulfstein has pointed out, it may be discussed whether the Court strikes the right balance and whether the reasoning should be more extensive. Having regard to the lack of transparency, others compare this mass of manifestly ill-founded applications with a black box. In fact, discussions about the reform often leaves on the assumption that there are two types of applications which can be clearly distinguished: we are discussing solutions for the one package, which is the package of inadmissible cases, and solutions for the other package, which contains in particular the well founded cases. I am afraid that there is quite an important grey area in between.

To have a complete picture, we must look not only to the cases disposed of but to the new applications as well. The number of newly introduced applications did not significantly decrease over the last years and remains at a very high level (65 900 in 2013). It is interesting to note in this context, that this is also true for States where the Convention is supposed to be well established. For some States, the number has even increased (in 2013 for instance for Norway and Switzerland). One important category is certainly the category of repetitive applications. In this context, I remember Erik Fribergh's statement according to which an increased output by the Court seems to act as a magnet for even more repetitive applications. Another category might be the one I call the homemade cases: the combination of two factors has led and still leads to a huge potential of new applications: The dynamic approach ("living instrument"), which potentially covers all kinds of civil, criminal and administrative litigations, and the case-by-case approach, which is still the rule in the Court's practice. The potential gets

even bigger if the Convention and the case-law of the Court – as we would all like it to be the case – are still better known all over Europe.

III. Determination by the Court of the number of cases it has the capacity to deal with

Leaving to the Court the decision to determine a maximum number of cases it can deal with, although not a new idea, certainly is a proposal “out of the box”. To some extent, the idea has also been discussed during the preparation of the Brighton Conference when the proposal of the so called “sun set clause” was at stake.

Professor Ulfstein and Professor Wildhaber follow a similar approach according to which the number of cases to be dealt with by the Court during a certain time frame should be limited. Within this number, prioritisation should be fixed on the basis of objective criteria which have to be defined. Professor Wildhaber has further developed this proposal some years ago, identifying 9 categories of cases to be dealt with.⁷⁰ I think, this idea deserves further consideration.

Both, Professor Ulfstein and Professor Wildhaber point out that such a system would, in practice, not make a big difference to the present system. At first sight, this statement may be surprising. But at second sight, it has some merits: On the one hand, already today, the Court renders a very limited number of judgments (which, in the last years, was even lower than the maximum number of cases mentioned by Professor Ulfstein (1000 – 1200 per year) and Professor Wildhaber (not more than 2000 per year). On the other hand, in the present system, the cases with low priority have little chance of being dealt with for years. In this regard, and having regard to the mass of manifestly ill-founded cases, one must recognise that already the present system is in some way a system of “pick and choose”.

As Professor Wildhaber has underlined: such a limitation would in the end lead “to more predictability, transparency and honesty and would therefore serve the overall effectiveness of human rights better.”⁷¹

70 Luzius Wildhaber, Rethinking the European Court of Human Rights, in: *The European Court of Human Rights between Law and Politics*, Jonas Christoffersen and Mikael Rask Madsen (Ed.), Oxford University Press, 2011, p. 205-229 (the 9 categories being: (1) Articles 2, 3 and 4 ECHR; (2) long period of illegal detention; (3) wholly arbitrary and unfair procedures; (4) overruling of well-established European Court of Human Rights precedents; (5) issues gravely affecting national constitutions; (6) issues vital to the survival of a democracy and the democracy’s right to defend itself against its enemies; (7) guidelines for structural and systemic problems; (8) pilot judgments; (9) interstate applications).

71 See previous note.

IV. Fourth instance formula. Restriction of the Court's consideration (*cognition*)

To present another consideration “out of the box”, concerning the famous fourth-instance formula.

In fact, this formula has two different meanings. (1) According to the original meaning, it expresses the principle that it is not the Court's task “to deal with errors of fact or law allegedly committed by a national court unless and in so far as such errors may have infringed rights and freedoms protected by the Convention. It may not itself assess the facts which have led a national court to adopt one decision rather than another. If it were otherwise, the Court would be acting as a court of third or fourth instance, which would be to disregard the limits imposed on its action [...]”⁷² (2) A more recent, wider meaning of the formula encloses the examination of the case by the domestic courts *in the light of the Convention requirements* as well. It is this second meaning the Brighton Declaration refers to, affirming “that an application should be regarded as manifestly ill-founded within the meaning of Article 35(3)(a), *inter alia* to the extent that the Court considers that the application raises a complaint that has been duly considered by a domestic court applying the rights guaranteed by the Convention in light of well-established case-law of the Court including on the margin of appreciation as appropriate, unless the Court finds that the application raises a serious question affecting the interpretation or application of the Convention; ...”⁷³

The underlying principle of this second meaning is, of course, the principle of subsidiarity. This principle is not a one way road: the more the domestic courts have incorporated and do apply the Convention, the more difficult for them to understand a Court's judgment which, on the basis of the same general principles of the Court's case-law, comes to a different appreciation of the case. Many examples could be mentioned, especially concerning Articles 8, 9, 10 and 14 of the Convention. And as we know, quite often there are different views within the Court as well.

To conclude its appreciation, the Court often uses the formulation that it is “not convinced that the national authorities have managed a fair balance between the interests in play”. This is of course not enough to quash a duly motivated internal judgment. Even if we shouldn't take this formulation word-for-word, I nevertheless use it to go to the other end of the scale. There we find the *concept of arbitrariness or reasonableness*: the Court *should* be convinced that there was no fair balance, and even more than that: the violation must so to say

72 Practical Guide on Admissibility Criteria, 2011, § 356.

73 Brighton Declaration, § 15 d).

fly in the face of justice and common sense. That another solution might be possible as well or make even more sense, would not be enough.

Applying this concept means: the better the Convention is incorporated in the national courts' practice, and the more the national judges can be considered to be "insiders" of this Convention (if I may take the expression used by judge Laffranque just before), the more the Strasbourg Court could "lean back", which means, in legal terms, could restrict the density of its review (*cognition*, as we call it in our domestic procedural law).

We can assume that the Court already now *de facto* applies this concept of arbitrariness/reasonableness in some cases, cases which are then declared inadmissible for being manifestly ill founded. In relation to a system with a limited number of cases, as described before, one can assume that the Court would not re-examine any more cases which have been duly dealt with by the national courts.

V. Other measures

Professor Ulfstein has presented some other measures. I would like to comment, briefly, on one of them: the question whether cases resulting from domestic structural problems or political inability or unwillingness should be left to the political arm, the Committee of Ministers.

As many others, I think that the Court, in the longer term, should be released from these cases. The question is whether the whole responsibility can be left to Committee of Ministers. Different models have been proposed in the past (i.e. creation of a quasi-judicial organ, for instance a separate body or one operating under the auspices of the Committee of Ministers; strengthen the role of the Commissioner; inquiry procedure [UN]). These and other solutions should be further explored in the discussions on reform.

On the other hand, it is probably true to say that without the political will to promptly and fully execute the Court's judgments, no alternative solution is really better than the existing one.

As long as applications resulting from systemic problems and concerning serious human rights violation continue to be brought to Strasbourg, there is no alternative to the Court.

Adam Bodnar

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Constitutional Justice versus Individual Justice

Discussion concerning the future of the European Court of Human Rights concentrates around the outcome of the Interlaken, Izmir and Brighton Conferences (the so-called post-Brighton process). In general, it is the right way to proceed. However, we should not forget that there have been significant developments in the last few weeks that have a significant impact on the future of the European Court of Human Rights and, indeed, on the Convention system as a whole.

First, some United Kingdom ministers have started to openly discuss a possible exit from the Convention system and thus to undermine its long-term and historical commitment established to protect human rights in Europe. Declarations and statements made by the United Kingdom politicians⁷⁴ (and even judges)⁷⁵ have impact on the credibility of the system and provide an argument for certain “less principled” States not to follow the Strasbourg Court judgments.⁷⁶

Second, Russia – Member State of the Council of Europe – decided to illegally invade and occupy the territory of Ukraine, another Member State of the Council of Europe. The Parliamentary Assembly of the Council of Europe has suspended the credentials of the Russian delegation,⁷⁷ which was criticized by the Russian Duma.⁷⁸ We may even expect that Russia may denounce the Euro-

74 E.g. statements made by David Cameron, Prime Minister of the United Kingdom, on 29 September 2013; see also similar statements made by Ms Theresa May, the UK Interior Minister, and Christopher Grayling, Lord Chancellor and the Secretary of State for Justice.

75 See statement by Lord Judge, former Lord Chief Justice of England and Wales, available at www.bbc.com/news/uk-politics-25535327 [last access: 27 April 2014].

76 See statement by the Labour MP Sadiq Khan on the United Kingdom's possible withdrawal from the Convention, Daniel Boffey; Khan attacks Cameron's stance on the European Court of Human Rights, *The Observer*, 28 December 2013, available at www.theguardian.com/law/2013/dec/28/sadiq-khan-attacks-cameron-over-human-rights-court [last access: 27 April 2014]. See also Adam Bodnar, Dominika Bychawska-Siniarska, Saving the Strasbourg Court, blog comment, 30 January 2014, available at www.euractiv.com/justice/save-strasbourg-court-analysis-533157 [last access: 27 April 2014].

77 Resolution No. 1990 (2014): Reconsideration on substantive grounds of the previously ratified credentials of the Russian delegation, available at <http://website-pace.net/documents/10643/110596/20140410-Resolution1990-EN.pdf/57ba4bca-8f5f-4b0a-8258-66ca26f7117b> [last access: 27 April 2014].

78 Statement by the Russian Duma adopted on 18 April 2014, available at www.coe.mid.ru/doc/GD_eng.htm [last access: 27 April 2014].

pean Convention on Human Rights. Due to the fate of numerous victims of human rights and human rights defenders, I regret that this may indeed happen, but at a certain point it might be inevitable. It would have an impact on a number of cases pending before the Court⁷⁹ and the Committee of Ministers.⁸⁰

Declarations by certain ill-advised United Kingdom politicians cannot go unnoticed. An example was given by the President of the Court, Dean Spielmann, who actively engaged in the debate on this issue. However, strong commitment to the Convention by the other High Contracting Parties is also needed.⁸¹ This is the reason why the 21 non-governmental organisations made a statement addressed to participants of the Oslo Conference.⁸² We should not escape problems by going into discussions on issues which may seem quite technical. There is a need for strong leadership concerning the future of the European Court of Human Rights.⁸³

79 According to the Annual Report 2013 of the European Court of Human Rights, 16.8% of pending cases allocated to a judicial formation are from Russia.

80 According to the report “Supervision of the Execution of Judgments and Decisions of the European Court of Human Rights; 7th Annual Report of the Committee of Ministers 2013”, there are 1325 cases pending concerning Russia at the execution stage, out of which 170 cases are leading ones. It constitutes 11% of all leading cases pending before the Committee of Ministers.

81 See e.g. precedential participation of the President of the Court, Dean Spielmann, in the BBC talk show HARDtalk on 15 January 2014, available at www.bbc.co.uk/programmes/p01pzkcn [last access: 27 April 2014].

82 21 NGOs which signed the letter include: Association for Legal Intervention (Poland), Association for the Defense of Human Rights in Romania – the Helsinki Committee APADOR (Romania), Astras Central and Eastern European Women’s Network for Sexual and Reproductive Rights and Health, B.a.B.e., Budi aktivna. Budi emancipiran (Croatia), Belgrade Centre for Human Rights (Serbia), Bulgarian Helsinki Committee, Czech Helsinki Committee, Helsinki Foundation for Human Rights (Poland), Human Rights Action (Montenegro), Human Rights Centre (Estonia), Human Rights House Zagreb (Croatia), Human Rights Monitoring Institute (Lithuania), Hungarian Helsinki Committee, Juridicum Remedium (Czech Republic), Latvian Centre for Human Rights, League of Human Rights (Czech Republic), Polish Society of Antidiscrimination Law (Poland), Sarajevo Open Centre (Bosnia and Herzegovina), The Peace Institute (Slovenia), Via Iuris (Slovakia), YUCOM Lawyers’ Committee for Human Rights (Serbia). The joint letter is available at www.hfhr.pl/wp-content/uploads/2014/04/Future_ECHR.pdf [last access: 27 April 2014].

83 “To adapt the poet’s description of the Mosaic Code, the ethical and legal code protection by the Convention system is “a moon for mutable lampless men”. It is often described as a beacon of hope for the more than 800 million people of Europe. But the lamplighters who lit the beacon more than half a century ago are no more, and the light will fail unless our generation rekindles the flame. Let us hope that those who govern us will take heed.” Lord Anthony Lester, *The European Court of Human Rights after 50 Years*, [in:] Jonas Christoffersen, Mikael Rask Madsen (eds.), *The European Court of Human Rights between Law and Politics*, Oxford University Press 2013, pp. 98-115, at p. 115.

The Court cannot be the constitutional court of Europe.⁸⁴ The obligation of the High Contracting Parties under the European Convention on Human Rights is to secure rights and freedoms under the Convention to everyone within their jurisdiction. Also, every person has a right to complain. The ECHR in its original meaning did not think about treating certain rights as more or less important. Certainly, the principle of subsidiarity and primarity (as understood by Jonas Christoffersen)⁸⁵ should play an important role. But it should be the obligation of those High Contracting Parties obeying the Convention to use all possible diplomatic and legal avenues in order to compel other States to protect human rights and to reform their legal systems. Western States obviously knew what the situation was as regards human rights in countries like Ukraine, Moldova or Romania, when the latter joined the Council of Europe. They cannot be surprised by the number of applications (and the severity of human rights violations) addressed from such States. It is their obligation to support reforms in those countries, in order to make the system of human rights protection more efficient. The example of Poland shows that it might be possible – and that thanks to intensive co-operation – there is a real opportunity for internal reforms and for the decrease of the number of cases coming to Strasbourg.⁸⁶

However, the existence of problems, and the massive number of cases coming from certain States, should not result in reforms that act to the detriment of the Court as well as applicants. There is one possibility to change the situation dramatically: increase the budget of the European Court of Human Rights, as it was suggested in one of the reports by the Parliamentary Assembly of the Council of

84 On the current debate and different positions presented see e.g. Kanstantsin Dzehtsiarou, Alan Greene, Restructuring the European Court of Human Rights: preserving the right of individual petition and promoting constitutionalism, Public Law, No. 4/2013, pp. 710-719; Steven Greer, Luzius Wildhaber (Revisiting the Debate about “constitutionalising” the European Court of Human Rights, *Human Rights Law Review*, vol. 12 (2012), pp. 655-688; Fiona de Londras, Dual Functionality and the Persistent Frailty of the European Court of Human Rights, *European Human Rights Law Review*, No. 1/2013, pp. 38-46.

85 Jonas Christoffersen, *Fair Balance: Proportionality, Subsidiarity and Primarity in the European Convention on Human Rights*, Martinus Nijhoff Publishers, Leiden – Boston, 2009.

86 Poland has resolved a number of systemic issues thanks to the jurisprudence of the European Court of Human Rights, such as the remedy for the length of proceedings, abuse of pre-trial detention, overcrowding in prisons, compensation for property left beyond the Bug river or limitations on the increase of leases in private houses. The judicial dialogue with the Polish Constitutional Court helped with the introduction and legitimacy of the first pilot judgments. Among many articles on this issue, see e.g. Wojciech Sadurski, *Partnering with Strasbourg: Constitutionalisation of the European Court of Human Rights, the Accession of Central and East European States to the Council of Europe, and the Idea of Pilot Judgments*, *Human Rights Law Review*, volume 9 (2009), pp. 397-453.

Europe.⁸⁷ Another is to increase the budget for the Committee of Ministers enforcement machinery – as it was suggested in its recent 2013 report.⁸⁸

It is natural that the increased number of persons subject to the Court's jurisdiction, the growing awareness of rights, but also certain negative practices of some of the Member States (including from Western Europe), produce a higher number of applications. Reviewing them requires time and effort. Without proper financing, we will end up creating more and more measures like those of the “significant disadvantage”, single-judge inadmissibility decisions, “priority” policies, and the formalisation of procedures. The system will lose its credibility, unless the created measures are well-thought out and transparent as regards their application (e.g. pilot judgment procedures are good examples of how to deal with repetitive cases). Even now, it is subject to open criticism by the UN Human Rights Committee⁸⁹ or by some attorneys,⁹⁰ who treat their case work as “Russian roulette”. Even if their case goes through filtering, they may wait up to 10 years (or even more) for a judgment, or even for inadmissibility decision.

In the case of an increase of financing, the Court could increase the number of judges,⁹¹ double the number of employees of the Registry, and provide money for fact-finding visits (which are almost not organised right now). Should we have all those existing technical problems in such a situation? Should we then think about transforming the Court into a “cherry-picking” machine? Why should we not talk seriously about money? Why does the Strasbourg Court have a budget of less than a quarter of its Luxembourg counterpart (dealing with cases from only 28 states), and less than a third of that of the ICTY?

87 Doc. 12811 (January 2012), § 20: “The yearly cost, within the Council of Europe’s budget, of hiring a judge at the European Court of Human Rights is estimated to be €333 667,48 which is more than the annual contribution made by 15 Member States. In other words, the contribution made by those States does not even cover the cost of their own judge!”; <http://assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewPDF.asp?FileID=12914&lang=en>.

88 See Remarks by the Director General of the Directorate General of Human Rights and Rule of Law [in:] Supervision of the Execution of Judgments and Decisions of the European Court of Human Rights. 7th Annual Report of the Committee of Ministers 2013, pp. 12-13.

89 Janneke Gerrards, Inadmissibility Decisions of the European Court of Human Rights: A Critique of the Lack of Reasoning, *Human Rights Law Review*, vol. 14 (2014), pp. 148-158, and the case noted there: *Maria Cruz Achabal Puertas v. Spain* (1945/2010), CCPR/C/107/D/1945/2010 (2013); 20 IHRR 1013 (2013).

90 See letter of 5 November 2013 by the Polish Bar Association to the President of the European Court of Human Rights, Dean Spielmann, on the practice of using Article 27 of the Convention and the legitimacy of the Court’s practices, available at <http://adwokatura.pl/wp-content/uploads/2013/11/D-Spielmann-pl.pdf> [last access: 27 April 2014].

91 It would be most complicated due to the need of amending the Convention.

There is one democratic State which is not subject to effective judicial supra-national supervision as regards human rights protection. This country strongly believes in the effectiveness of its domestic legal system, its Constitution and the access of lawyers to remedies. This country – the United States of America – was recently negatively reviewed by the UN Human Rights Committee.⁹² No European State (except maybe for Russia) has ever had such a devastating report. A lack of effective and significant external supervision, coupled with unacceptable domestic policies, led to such dramatic results and the loss of the United States' leadership role as regards the promotion of human rights in the world.⁹³ Europe is different to the United States. We are privileged to have the system created by the European Convention on Human Rights, which is based on the principle of individual justice when States fail to deliver proper human rights protection. We should cherish and appreciate it – in order to avoid the mess our friends have got into across the Atlantic.

92 Concluding Observations on the fourth periodic report of the United States of America adopted by the UN Human Rights Committee, 23 April 2014, CCPR/C/USA/CO/4.

93 Jimmy Carter, A cruel and unusual record, *New York Times*, 24 June 2012, available at www.nytimes.com/2012/06/25/opinion/americas-shameful-human-rights-record.html [last access: 27 April 2014].

SESSION III – IMPLEMENTATION OF JUDGMENTS SESSION III – LA MISE EN ŒUVRE DES ARRÊTS

A main challenge for the credibility of the system in the years to come will be the implementation of judgments by the Member States

Un des défis principaux pour la crédibilité du système dans les prochaines années sera la mise en œuvre des arrêts par les États membres.

Roles of the Court/Les rôles de la Cour

Which steps can or should the Court take to speed up domestic implementation? Are the remedies at the Court’s disposal appropriate to this end, including pilot judgments? How should the Court deal with repetitive cases?

Comment la Cour peut-elle encourager une mise en œuvre plus rapide dans les États membres ? Les recours à la disposition de la Cour, dont les arrêts pilotes, conviennent-ils à cette fin ? Quelle devrait être l’approche de la Cour aux requêtes répétitives ?

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Making remedies in the European Court consistent with international law

The European Court of Human Rights has long held that “[s]ince the Convention is first and foremost a system for the protection of human rights, the Court must interpret and apply it in a manner which renders its rights practical and effective, not theoretical and illusory. The Convention must also be read as a whole, and interpreted in such a way as to promote internal consistency and

harmony between its various provisions”.⁹⁴ Second, the Court has stated that it “has never” considered the provisions of the Convention as the sole framework of reference for the interpretation of the rights and freedoms enshrined therein; instead, it must also take into account any relevant rules and principles of international law applicable in relations between the Contracting Parties.⁹⁵ Third, as a “living” instrument, the Convention must be interpreted in the light of present-day conditions, taking into account evolving norms of national and international law in its interpretation of Convention provisions.

I. The European Court’s jurisprudence on Articles 13, 41 and 46

The Court appears to apply the above principles of interpretation to every right in the Convention except the right to a remedy, where the jurisprudence often fails to provide an effective remedy and generally is deficient when compared to contemporary international standards, both with respect to the obligations of Contracting States and the Court itself. The Court has not always even addressed allegations that a Contracting State has violated Article 13, once an applicant has proved a violation of another right, thereby ignoring the need to advise Contracting States about the scope of their procedural and substantive obligations under Article 13.

In the recent *Kurić and Others v. Slovenia* just satisfaction judgment, for example, the Court briefly refers to the principle of *restitutio in integrum*: “The Grand Chamber reiterates that a judgment in which the Court finds a breach imposes on the respondent State a legal obligation to put an end to the breach and make reparation for its consequences *in such a way as to restore as far as possible the situation existing before the breach*”⁹⁶ The Court insists, however, that Contracting States parties to a case are in principle free to choose the means whereby they will comply with a judgment in which the Court has found a breach. According to the Court, “[t]his discretion as to the manner of execution of a judgment reflects the freedom of choice attaching to the primary obligation

⁹⁴ *Demir and Baykara v. Turkey* [GC], Judgment of 12 November 2008, Eur. Ct. H.R., para. 66.

⁹⁵ *Ibid*, para. 67.

⁹⁶ Case of *Kurić and Others v. Slovenia*, App. 26828/06, Judgment, (Just satisfaction) 12 March 2014 (GC) (emphasis added). Note that the Court’s formulation is more restrictive than the usual rule in that it takes the applicant back to the place held at the time of the breach and not to the place the victim would be holding today had the breach not occurred. This may become quite significant in respect to claims for lost earnings or profits.

of the Contracting States under the Convention to secure the rights and freedoms guaranteed (Article 1). If the nature of the breach allows of *restitutio in integrum*, it is for the respondent State to effect it⁹⁷

In addition to insisting on the State's obligation to devise and provide the remedy of its choice, the Court has shifted considerable responsibility for reparations to the Committee of Ministers. The Court in various cases has held that Article 46 of the Convention, as interpreted in the light of Article 1, imposes on the respondent State a legal obligation to implement, under the supervision of the Committee of Ministers, appropriate general and/or individual measures to secure the right of the applicants which the Court has found to be violated. Such measures must also be taken in respect of other persons in the applicants' position, notably by solving the problems that have led to the Court's findings.⁹⁸ This approach is supplemented or facilitated by the Court's pilot-judgment procedure, which is meant to identify the existence of structural problems underlying the violations and to indicate specific measures or actions to be taken by the respondent State to remedy them. According to the Court, it falls to the Committee of Ministers to evaluate the implementation of individual and general measures under Article 46 § 2 of the Convention. Another important aim of the pilot-judgment procedure is to allow the speediest possible redress to be granted at domestic level to the large numbers of people suffering from the general problem identified in the pilot judgment, thus implementing the principle of subsidiarity which underpins the Convention system.⁹⁹ With this in mind, the Court may decide in the pilot judgment that the proceedings in all cases stemming from the same problem should be adjourned pending the implementation of the relevant measures by the respondent State. In theory, if the respondent State delays the implementation of general measures beyond a reasonable time, leaves the problem unresolved and continues to violate the Convention, the Court will resume examination of all similar applications pending before it.

97 As discussed below, the Court also insisted that it will not review the amount of compensation a State decides to award.

98 See *Scozzari and Giunta v. Italy* [GC], Nos. 39221/98 and 41963/98, § 249, ECHR 2000-VIII; *Lukenda*, cited above, § 94; and *S. and Marper v. the United Kingdom* [GC], Nos. 30562/04 and 30566/04, § 134, ECHR 2008).

99 See *Burdov v. Russia* (No. 2), No. 33509/04, §§ 127 and 142, ECHR 2009, and *Greens and M.T. v. the United Kingdom*, Nos. 60041/08 and 60054/08, § 108, ECHR 2010.

Not surprisingly, Contracting States seem to like the Court's practice of transmitting, under the guise of enforcement, issues of reparations and remedies to the Committee of Ministers, where the States retain control. Indeed Protocol no. 14 reinforces the approach to Article 46, creating a new infringement procedure providing, in theory, more effective sanctions in case of non-compliance.¹⁰⁰ Given the weak response of the Committee of Ministers thus far to cases of non-compliance, it seems optimistic to assume that the new procedure will strengthen the political will of the States in this respect.¹⁰¹

As for its own judgments under Article 41, the Court has found that it may, but is not required to grant pecuniary damages, moral damages, and costs and fees: "Article 41 empowers the Court to afford the injured party such satisfaction as appears to it to be appropriate."¹⁰² It seems that the Court has long placed its major emphasis on a declaration of the violations found, shifting responsibility for remedies and reparations to the political Committee of Ministers.

The Court has frequently indicated its view that the purpose of its judgments is not to afford redress, but to engage in standard-setting. It has stated that its "judgments in fact serve not only to decide those cases brought before the Court but, more generally, to elucidate, safeguard and develop the rules instituted by the Convention, thereby contributing to the observance by the States of the engagements undertaken by them as Contracting Parties." More recently, the Court has begun to suggest that "the primary purpose" of the Convention system is to provide individual relief. Nonetheless, it continues to view its mission as one of determining issues on public-policy grounds in the common interest, raising the general standards of protection of human rights throughout the community of Convention States, rather than placing its focus on redress for the victim applicants.¹⁰³

100 Protocol 14 adds three new paragraphs to Article 46: paragraph 3 introduced a new interpretation procedure, and paragraphs 4 and 5 introduced a new infringement procedure.⁶ Paragraph 4 concerns situations where the CM considers that a State "refuses to abide by a final judgment", and provides the Committee with the competence to refer the case to the Court for a decision on whether the State "has failed to fulfil its obligation" to comply with the judgment. Finally, paragraph 5 stipulates that if the Court finds a violation of the obligation to comply, it shall "refer the case to the Committee of Ministers for consideration of the measures to be taken".

101 For a positive assessment, see Kjetil Mujezinović Larsen, *Compliance with Judgments from the European Court of Human Rights: The Court's Call for Legislative Reforms*, NJHR 31:4 (2013), 496–512.

102 See, among many authorities, *Papamichalopoulos and Others v. Greece* (former Article 50), 31 October 1995, § 34, Series A no. 330-B; *Guiso-Gallisay v. Italy* (just satisfaction) [GC], no. 58858/00, § 90, 22 December 2009).

103 *Karner v. Austria*, App. No. 40016/98, Judgment of 24 July 2003, Eur. Ct. H.R., 38 EHRR 24 (2004), para. 26.

More generally, in the *Varnava* case, the Court claimed that it is not the Court's role to function akin to a domestic tort mechanism court in apportioning fault and compensatory damages between civil parties.¹⁰⁴ This is a puzzling statement, because arguably determining compensatory damages is *precisely* one of the Court's significant roles in the present European system. A tort is a legal wrong and it is a general principle of law that the commission of a legal wrong, which must be decided by the European Court, entails an obligation on the part of the wrongdoer to redress that wrong as decided by the Court. An inherent part of the judicial function is to assess the culpability of the wrongdoer and the harm to an injured party. This is not part of the enforcement of a judgment – it is part of the judgment itself.

The Court's view is that applicants are not entitled to an award of just satisfaction, even if they have suffered pecuniary losses. Instead, the Court may decide no compensation is due; all remedies are based on equitable considerations and the facts of each case. In practice, violations of procedural rights, such as failure to provide a speedy trial, rarely have resulted in relief beyond a declaration of the violation. No compensation has been given to most prisoners, except where physical mistreatment is proven.

In some cases, the European Court makes clear that certain forms of redress are required by incorporating the obligation into the substantive right, rather than as part of Article 13. For example, in several cases the Court has made clear that failure to investigate and account for the disappearance or death of an individual constitutes a violation of the rights of remaining family members under Convention Articles 2 or 3 as well as 13.¹⁰⁵

As for the Court's awards, many who work in or appear before the Court have noted that "the case-law under Article 41 is characterized by the lack of a consistently applied law of damages."¹⁰⁶ This may be because the Court has always held that just satisfaction is not a right when a violation has been found, but is a matter totally within the discretion of the Court, without any international law content. This holding appears increasingly untenable, but the Court still frequently holds that a finding of the violation is adequate in itself, leaving the consequences of that finding to be decided by the political Committee of Ministers and the State held responsible for the violation.

104 *Case of Varnava and Others v. Turkey*, European Court of Human Rights, App. Nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90, and 16073/90, 18 September 2009 [GC], para. 226.

105 *Kurt v. Turkey*, judgment of 25 May 1998.

106 Harris, O'Boyle & Warbrick, *Law of the European Convention on Human Rights* (2nd ed., OUP 2009) at 856.

Other restrictions hamper the ability of victims to obtain redress from the Court. It will only make an award under Article 41 if one is claimed in a timely manner. Pecuniary losses must be proved. The Court's case-law establishes that there must be a clear causal connection between the damage claimed by the applicants and the violation of the Convention.¹⁰⁷

The Court seems more capable of recognising losses in property value than evaluating the more serious cases of harm to the person. The Court acknowledged this in the Kurić just satisfaction award:

A precise calculation of the sums necessary to make complete reparation (*restitutio in integrum*) in respect of the pecuniary losses suffered by the applicants may be prevented by the inherently uncertain character of the damage flowing from the violation. An award may still be made notwithstanding the large number of imponderables involved in the assessment of future losses, though the greater the lapse of time involved, the more uncertain the link becomes between the breach and the damage. The question to be decided in such cases is the level of just satisfaction, in respect of both past and future pecuniary losses, which it is necessary to award each applicant, the matter to be determined by the Court at its discretion, having regard to what is equitable.

The Court added that it could not “but agree with the assumption made by the parties that a precise calculation of the sums necessary to make complete reparation (*restitutio in integrum*) in respect of the pecuniary losses suffered by the applicants is prevented by the inherently uncertain character of the damage flowing from the violation.”¹⁰⁸ This statement seems to reveal the lack of domestic judicial experience or legal practice of many judges. Constitutional and private tort claims, including wrongful death, arbitrary detention, and other personal injury cases, have for centuries evaluated precisely these types of injuries and there is a vast literature on remedies that provide a set of factors that can guide judges in making awards. Actuarial tables and other sources of economic estimates of losses are routinely used in calculating damages for injury.

As for moral or non-pecuniary damages, the Court points to the absence of an express provision for non-pecuniary or moral damage in the Convention,

107 See, among other authorities, *Barberà, Messegué and Jabardo v. Spain* (former Article 50), 13 June 1994, §§ 16-20, Series A no. 285-C, and *Çakıcı v. Turkey* [GC], no. 23657/94, § 127, ECHR 1999-IV).

108 *Ibid.*, para. 88. The uncertainty arose according to the Court, because the applicants were removed from the Register of Permanent Residents without prior notification on 26 February 1992 and that they learned about the “erasure” only incidentally, creating “a multi-layered causal link between the unlawful measure and the pecuniary damage sustained”, its effects being spread over time and having further side-effects. Further, the consequences of the “erasure” were aggravated by the long period of time during which the applicants’ legal status was unregulated. Para. 89.

almost suggesting that such an award is an act of charity on the part of the Court, rather than necessary redress for the harm caused to the victim. The Court nonetheless has indicated that it will award moral damages if it finds that “the applicant has suffered evident trauma, whether physical or psychological, pain and suffering, distress, anxiety, frustration, feelings of injustice or humiliation, prolonged uncertainty, disruption to life, or real loss of opportunity”. The Court distinguishes such cases from those situations that, in its subjective judgment, are ones “where the public vindication of the wrong suffered by the applicant, in a judgment binding on the Contracting State, is a powerful form of redress in itself”. The Court has concluded that in many cases a declaration of the violation “is enough to put matters right”, although in most of these cases the applicant has indicated a different view by requesting an award of moral damages.

Costs and expenses are similarly subject to strict proof that they were actually incurred, necessary, and reasonable as to quantum. If the respondent State objects to the claim, the Court almost always reduces (sometimes by half) the amount applicants claim. Moreover, the Court has reversed its earlier encouragement to lawyers to bring innovative claims, denying the recovery of costs for any claim that the attorneys fail to win.

The rising caseload, particularly in regard to repetitive cases, prompted the Committee of Ministers itself to ask the Court to do more on reparations. As a result, the Court in recent years has in some instances moved beyond declaring the existence of a violation and measures of individual just satisfaction to indicating under Article 46 what general or individual measures the respondent government should take to rectify the violation found. The first instance in which the Court did so was in *Assanidze v. Georgia*¹⁰⁹ a case concerning arbitrary detention; the Court found that restitution of the applicant’s liberty was the appropriate measure to be taken.

The Grand Chamber judgment in *Kurić and Others v. Slovenia*¹¹⁰ marks another development in Articles 41/46 jurisprudence. On 26 February 1992, pursuant to the Slovenian Aliens Act, the applicants and some 25 000 other persons had their names deleted, without notification, from the Register of Permanent Residents, making them aliens without a residence permit. The erasure of their names had serious and enduring negative consequences: some of the applicants became stateless, while others were evicted from their apartments,

109 2004-II, 39 EHRR 653 (GC). See also *Ilascu and Others v. Moldova and Russia*, 2004-VII; 40 EHRR 1030 (GC) at point 22. Other cases have more generally called for action to “secure the implementation” of the guaranteed right that was violated. See *Broniowski v. Poland*, 2004-V; 40 EHRR 495 (GC); *Hutten-Czapska v. Poland*, 2006-VIII, 45 EHRR 52 (GC); *Lukenda v. Slovenia*, 2005-X, and *Xenides-Arestis v. Turkey*, (2005).

110 [GC] App. No. 26828/06, Judgment of 26 June 2012 [GC].

could not work or travel, lost all their personal possessions and lived for years in shelters and parks. Still others were detained and deported from Slovenia. In 1999 the Constitutional Court declared unconstitutional certain provisions of the Aliens Act, as well as the automatic “erasure” from the register, but the judgment did not remedy the situation.

In this pilot judgment, the Court unanimously held that the applicants and others similarly situated were entitled to compensation for these acts and indicated that as a general measure under Article 46 the State should set up a compensation scheme within one year. No guidelines were given to the State on the nature or extent of the compensation that should be afforded, nor was there any reference to international standards on redress for human rights violations. The Grand Chamber noted that the amendments and supplements to the Legal Status Act (“the amended Legal Status Act”) had been implemented only recently and that it was premature to examine whether or not this legislative reform and various other steps taken by the Government had achieved the result of satisfactorily regulating the residence status of the “erased”.

The Court deferred the applicants’ claims for pecuniary damages under Article 41 and indicated that the issue should be resolved “not only having regard to any agreement that might be reached between the parties, but also in the light of such individual or general measures as might be taken by the respondent Government in execution of the principal judgment”.¹¹¹ The Grand Chamber did award 20 000 euros (EUR) to each successful applicant in respect of non-pecuniary damage and an overall sum of EUR 30 000 to the applicants in respect of the costs and expenses incurred up to that stage of the proceedings, dismissing the remainder of their claims.

The direction to set up a domestic compensation scheme encountered difficulties and delays. The respondent Government first requested a one-year extension of the time-limit for setting up the scheme, which the Court “was not disposed to grant” because it viewed the matter as one which should be taken up with the Committee of Ministers under Article 46 §2. The government requested the Court reconsider that decision, which the Court denied. In May 2013 the government eventually introduced legislation enacted as the Act on Compensation for Damage to Persons Erased from the Register of Permanent Residents. It entered into force on 18 December 2013 and will become applicable on 18 June 2014.

111 Case of *Kurić and Others v. Slovenia*, App. 26828/06, Judgment, (Just satisfaction) 12 March 2014 (GC), § 424, and point 10 of the operative part of the principal judgment; see also *Broniowski v. Poland* (friendly settlement) [GC], No. 31443/96, §§ 3 and 36, ECHR 2005-IX, and *Hutten-Czapska v. Poland* (friendly settlement) [GC], No. 35014/97, §§ 3 and 33, 28 April 2008).

The Court's reservation on the issue of damages meant that the case had to return to the Grand Chamber for a second round; others cases may follow as well should some among the 25 000 affected persons view as inadequate the domestic compensation scheme. The Court will either have to review the adequacy of the compensation granted or decide that decisions on reparation and compensation are solely within the discretion of the State, contrary to international standards. The Court could have indicated to the State the international legal requirements for redress using the UN Basic Principles and other current iterations of reparation norms, discussed in the next section, but it did not do so, potentially creating a pool of future applicants.

The statute eventually passed in Slovenia introduced compensation on the basis of a lump sum for each month of the "erasure" and the possibility of claiming additional compensation under domestic law. The Grand Chamber in the just satisfaction judgment held that "[i]n the exceptional circumstances" of the case, the basic solution of awarding a lump sum in respect of the non-pecuniary and pecuniary damage sustained by the "erased" appears to be appropriate. Notably, the domestic amount foreseen for pecuniary and non-pecuniary damages is one-third what the Court awarded the eight applicants in the case for their pecuniary damages alone. It is thus somewhat troubling that the Court suggests it is unlikely to review any further cases on this issue, or that there will at least be a strong presumption of legality (wide margin of appreciation):

The Grand Chamber observes in this connection that according to the principle of subsidiarity and the margin of appreciation which goes with it, the amounts of compensation awarded at national level to other adversely affected persons in the context of general measures under Article 46 of the Convention are at the discretion of the respondent State, provided that they are compatible with the Court's judgment ordering those measures.¹¹²

The Court further insists that it is for the Committee of Ministers to evaluate the general measures adopted by the Republic of Slovenia and their implementation as far as the supervision of the execution of the Court's principal judgment is concerned. Thus, although it has been argued that an applicant could file a new application based on the State's failure to afford the indicated redress, since the right to have a judgment complied with is one "of the rights set forth in the Convention",¹¹³ since the 2003 judgment in *Fischer v. Austria* and *Lyons and others v.*

112 *Ibid*, para. 141, citing *Verein gegen Tierfabriken Schweiz (VgT) v. Switzerland (no. 2)* [GC], no. 32772/02, § 88, ECHR 2009).

113 S. K. Martens, "Commentary", in M. K. Bulterman and M. Kuijer (eds.), *Compliance with Judgments of International Courts* (Kluwer, the Hague 1996) 71.

the United Kingdom,¹¹⁴ the Court has consistently maintained that it “does not have jurisdiction to verify whether a Contracting Party has complied with the obligations imposed on it by one of the Court’s judgments” and that it cannot “examine complaints concerning the failure by States to execute its judgments.”¹¹⁵

As for the eight applicants in this case, the Court held it was clear that the loss of legal status resulting from the “erasure” entailed significant material consequences for all the applicants, including the loss of access to a wide range of social and political rights and legal benefits, such as identity documents, driving licences, health insurance and education, as well as the loss of employment and other opportunities, until they were granted permanent residence permits. Accordingly, the question under Article 41 was what just satisfaction should be afforded in respect of pecuniary damages respecting social¹¹⁶ and housing allowances,¹¹⁷ child benefit¹¹⁸ and pension rights,¹¹⁹ the matter to be determined by the Court at its discretion, having regard to what is equitable.¹²⁰ The Court accepted some awards and rejected others, calculating amounts not from 26 February 1992, when the applicants were “erased” from the Register of Permanent Residents, but from 28 June 1994 when the Convention came into force for Slovenia. Making an assessment on an equitable basis and having regard to the circum-

114 *Fischer v. Austria* (App. No. 27569/02) (Admissibility Decision, 6 May 2003); and *Lyons and Others v. the United Kingdom* (App. No. 15227/03) (Admissibility Decision, 8 July 2003).

115 *Egmez v. Cyprus* (App. No. 12214/07) (Admissibility Decision, 18 September 2012) [50].

116 The Court made an award “on the basis agreed upon by the parties”. *Ibid.*, para. 93.

117 The government objected to any award under this heading and the Court agreed, holding that the applicants had not proved that they would have been entitled to a housing allowance had they not been erased.

118 The two applicants claiming this benefit received an award despite the government’s objection to one applicant’s claim based on the fact that her children were in foster care.

119 As regards loss of future income in respect of pension rights, the applicants stated that they were claiming compensation for the contributions which they had been unable to pay to the pension scheme and for their resulting lack of entitlement to a pension in accordance with the national legislation. However, they asserted that it was possible to determine their minimum loss of future income by reference to the minimum pension to which they would have been entitled. The Grand Chamber accepted the governments’ argument that the granting of the applicants’ claims in respect of social allowance precludes any claim for loss of future income in respect of pension rights, but it noted the government’s statement that foreigners with a permanent residence permit residing in Slovenia may acquire the right to minimum pension support once they have reached the age of entitlement and that this will in principle apply to the applicants if they meet the statutory conditions.

120 *Ibid.*, para. 90, citing *Z and Others v. the United Kingdom*, cited above, §§ 121-122, and *Lordos and Others v. Turkey* (just satisfaction), no. 15973/90, §§ 64-70, 10 January 2012).

stances referred to above, the Court considers it reasonable to award amounts, based on a lump sum of EUR 150 for each month the legal status was denied, with some adjustments. The Court also awarded additional costs and fees with a view to reimbursing the costs which the applicants incurred in seeking to obtain just satisfaction – following a judgment in their favour – either from the competent national authorities or, where appropriate, from the Court.¹²¹

It is unclear why the European Court has been so reluctant to embrace modern law on remedies for human rights violations. Two explanations have been given. First is that the Court developed its approach during the period when its jurisdiction was optional and often circumscribed, and the Court was concerned with non-compliance¹²² or failure to renew the optional declarations recognising its jurisdiction.¹²³ Non-compliance is a growing problem, but it is unclear that compliance with remedial judgments of the Court would be any less frequent than the often delayed compliance with “enforcement” decisions of the Committee of Ministers. The second thesis is that the lack of redress is linked to the Court’s rising caseload and a fear that providing effective reparations will lead to even more applications. A third possibility, mentioned above, may lie in the prior experience of many judges as academics and government officials rather than judges and litigators before domestic courts. As discussed below, a shift to affording full reparation might equally lead to fewer cases because the costs imposed on States would provide a greater incentive for them to remedy the underlying problem sooner rather than later. In any event, the remedial practice of the European Court has failed to take into account developments in international law that insist on the right to full reparation for victims of human rights violations.

II. Evolution in International Remedies Law and the European System

121 See *Neumeister v. Austria* (former Article 50), 7 May 1974, § 43, Series A No. 17; *König v. Germany* (former Article 50), 10 March 1980, § 20, Series A No. 36; and *Scordino v. Italy* (No. 1) [GC], No. 36813/97, § 284, ECHR 2006-V. Such costs and expenses are frequently subject to tax which is passed on to the applicants; the Court held that this additional charge should also be paid by the State.

122 As Larsen astutely notes: “one method of avoiding non-compliance, and consequently avoiding exposure of the lack of effective sanctions, is to require measures with which the states may be presumed to be able and willing to comply”, Larsen, No. 8, at 502.

123 Thomas Antowiak speculates: “By generally refusing to order non-monetary remedies—and, on occasion, even cash compensation—the Court seems to be particularly worried about being disobeyed, which would likely undermine the Tribunal’s credibility and effectiveness.” Thomas Antowiak, *A 21st Century Mandate for International Tribunals: Victim-Centered Remedies and Restorative Justice* (manuscript on file with the author).

► 2.1) International law of remedies for human rights violations

The ICJ holds that the power to afford reparation is implicit in the jurisdiction of courts as a necessary concomitant to deciding disputes: “In general, jurisdiction to determine the merits of a dispute entails jurisdiction to determine reparation.”¹²⁴ This power extends to all aspects of reparation.¹²⁵ Other international courts have similarly found that they may award reparation and give related orders in cases over which they have jurisdiction. It would seem, therefore, that even if Article 41 had been omitted from the text of the Convention, the Court would have the function and the responsibility to indicate the reparation appropriate to a finding that a Contracting Party violated the Convention to the detriment of an applicant.

International law has long insisted that a state act or omission in violation of an international obligation must cease and the wrong-doing State must repair the harm caused by the illegal act. In the 1927 *Chorzow Factory* case, the PCIJ declared during the jurisdictional phase of the case that “reparation ... is the indispensable complement of a failure to apply a convention and there is no necessity for this to be stated in the convention itself”¹²⁶ Indeed, the PCIJ has called the obligation of reparation part of the general conception of law itself.¹²⁷

The PCIJ also specified the nature and scope of reparation, holding that “it is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form.”¹²⁸ According to the Court:

The essential principle contained in the actual notion of an illegal act ... is that reparation must, so far as possible, wipe-out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment

124 *Military and Paramilitary Activities in and Against Nicaragua (Nicar v. the United States)*, 1986 ICJ 14, para. 283.

125 *Corfu Channel Case (Alb v. the United Kingdom)*, 1949 ICJ 4, 26 (Apr. 9, 1949).

126 *Chorzów Factory (Ger. v. Pol.)*, Jurisdiction, 1927 PCIJ, ser. A, No. 9, para. 184 (Apr. 11).

127 *Chorzów Factory (Ger. v. Pol.)*, Merits, 1928 PCIJ (ser. A) No. 17 (Sept. 13), at 29 (“[I]t is a principle of international law, and even a general conception of law, that any breach of an engagement involves an obligation to make reparation.”). According to Fitzmaurice, “[T]he notion of international responsibility would be devoid of content if it did not involve a liability to “make reparation in an adequate form”” 1 Gerald Fitzmaurice, *The law and procedure of the international Court of Justice* 6 (1986).

128 *Chorzow Factory*, Jurisdiction, reaffirmed in the *Reparation for Injuries Suffered in the Service of the United Nations (Advisory Opinion, 1949 ICJ Rep., para. 184*. The ICJ has indicated that the basic principle of reparation articulated in the *Chorzow Factory* case applies to reparation for injury to individuals, even when a specific jurisdictional provision on reparation is contained in the statute of a tribunal. *Application for Review of Judgment No. 158 of the UNAT, Advisory Opinion, 1973 ICJ Rep. 197-198 (July 12)*, citing *Case Concerning the Factory at Chorzow (Merits)(Ger. v. Poland)*, 1928 PCIJ, ser. A, No. 17 (Sept. 13).

of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it--such are the principles which should serve to determine the amount of compensation due for an act contrary to international law.¹²⁹

These interrelated principles – that an international delict generates an obligation of reparation, and that reparation must insofar as possible eradicate the consequences of the illegal act – are the foundation of the international law on remedies, including remedies for human rights violations.

The right to a remedy exists in human rights law to ensure that when violations occur, victims have access to justice and, ultimately, substantive redress to stop the violations, restore their rights, repair the harm they experience and ensure effective measures are taken to prevent the violations from being repeated.¹³⁰ Indeed, the Inter-American Court of Human Rights has stated that “the objective of international human rights law is ...to protect the victims and to provide for the reparation of damages.”¹³¹ From the perspective of general principles of law, the element of redress is often included in the definition of legal rights,¹³² because a right entails a correlative duty to act or refrain from acting for the benefit of another person.¹³³ Unless compliance with this duty is required, a right may become seen as only a voluntary obligation that can be fulfilled or ignored at will. Human rights tribunals must thus develop not only the primary law describing what duties are owed, but the secondary law of what duties exist when a primary duty is violated. In this sense, affording remedies is a quintessential judicial task that should not be delegated to a political body, whose role is the enforcement of judicial decisions.

Numerous developments in international human rights law have reinforced the general principle of the right to a remedy. In 1985, the General Assembly adopted the “Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power.”¹³⁴ It contains broad guarantees of redress for those who suffer pecuniary losses, physical or mental harm, and “substantial impairment of their fundamental rights” through abuse of power. The Declaration specifically pro-

129 Factory at Chorzów, Merits.

130 This dual purpose of the right to a remedy will be explained in Part [x]. See also, Dinah Shelton, Remedies in international human rights law, p. 7-10.

131 *Velásquez-Rodríguez v. Honduras*, 1988 Inter-Am. Ct. H.R. (ser. C) No. 4, 134 (July 29, 1988).

132 See M. Ginsberg, *On Justice in Society* (1965), 74; I. Jenkins, *Social Order and the Limits of Law* (1980), 247.

133 W. Hohfeld, *Fundamental Legal Conceptions* (W. Cook (ed.), 1919), 38.

134 Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, G.A. Res. 40/34, Annex, U.N. Doc A/RES/40/34/Annex (Nov. 29, 1985).

vides that victims should receive restitution from the State whose officials or agents are responsible for the harm inflicted. Abuse of power that is not criminal under national law but that violates internationally recognised norms relating to human rights should be sanctioned and remedies provided, including restitution and/or compensation, and all necessary material, medical, psychological, and social assistance and support.

Three years later, the UN started work on the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (“*Basic Principles*”),¹³⁵ adopted by the General Assembly 2005. The UN Basic Principles reaffirm “the duty to... [p]rovide effective remedies to victims, including reparation”.¹³⁶ The text expressly indicates that it does not create any new substantive international or domestic legal obligations, but instead identifies mechanisms, modalities, procedures and methods for implementing existing legal obligations. The various forms of reparation identified are restitution, rehabilitation, compensation, satisfaction and guarantees of non-repetition. Part IX which details the forms of reparation and other appropriate remedies affirms that reparation should be proportional to the gravity of the violations or the harm suffered as well as the scope of the injury. Although the Basic Principles appear directed primarily at States, this should not exclude their application by international human rights tribunals whose jurisdiction depends on the failure of local remedies to afford the required reparations. Since their adoption, the Basic Principles have influenced UN instruments and treaty bodies, as well as regional tribunals and State policy.

135 Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, G.A. Res. 60/147, at 1, U.N. Doc A/RES/60/147 (Mar. 21, 2006) [hereinafter Basic Principles].

136 United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, *supra* footnote 99, Principle 3.

In 1992, the Sub-Commission took up the question of the impunity of perpetrators of violations of human rights.¹³⁷ The final report submitted in 1997 speaks of three fundamental rights of victims: the right to know, the right to justice, and the right to reparation.¹³⁸ The report refers to “the right of victims or their families to receive fair and adequate compensation within a reasonable period of time”¹³⁹ and annexes a set of principles on this topic, including issues directly relating to the right to restitution, compensation and rehabilitation of victims.¹⁴⁰ In resolution 2003/72, the Secretary-General appointed an independent expert to study best practices and make recommendations concerning the problem of impunity. The 2004 study contains a chapter on the right to reparation,¹⁴¹ which it refers to as a fundamental tenet of international human rights law.

137 Sub-Commission Resolution 1992/23 of August 1992, approved by the Commission on Human Rights in resolution 1993/43 of 5 March 1993. The 1992 Vienna Conference on Human Rights supported the efforts of the Commission and Sub-Commission to intensify opposition to the impunity of perpetrators of serious violations of human rights. See the Vienna Declaration and Program of Action, A/CONF/157/3, para. II.91. The special rapporteurs, El Hadji Guisse and Louis Joinet, prepared an interim report for the 1993 session. E/CN.4/Sub.2/1993/6. In 1994, the Sub-Commission split the study into two parts, asking Mr Guisse to complete the report in regard to economic, social and cultural rights, and Mr. Joinet to undertake to report on civil and political rights. Resolution 1994/34 of 26 August, 1994, E/CN.4/Sub.2/1994/56, p. 81. Each rapporteur presented reports in 1995 and 1996. See: E/CN.4/Sub.2/1995/19; E/CN.4/Sub.2/1996/15; E/CN.4/Sub.2/1995/18.

138 The right to know includes the right to the truth and the duty to remember. Two specific proposals call for the prompt establishment of extrajudicial commissions of inquiry as an initial phase in establishing the truth, and taking urgent measures to preserve access to archives of the period of violations. The right to justice implies the denial of impunity. The right to reparation refers to individual measures intended to implement the right to reparation (restitution, compensation and rehabilitation) as well as collective measures of satisfaction and guarantees of non-repetition.

139 E/CN.4/1998/68, Chapter II, section K.

140 E/CN.4/Sub.2/1997/20 of 26 June 1997 and E/CN.4/Sub.2/1997/20/Rev.1 of 2 October 1997.

141 *Independent Study on Best Practices, including Recommendations, to Assist States in Strengthening their Domestic Capacity to Combat all Aspects of Impunity*, by Professor Diane Orentlicher, E/CN.4/2004/88, 24 February 2004.

The International Law Commission (“ILC”) also addressed reparations in its 2001 articles on State Responsibility,¹⁴² establishing that “full reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction, either singly or in combination.”¹⁴³ The articles also reinforced international community interest in upholding the rule of law, recognising that reparations not only help address the needs of the injured party, they avoid a climate of impunity and preserve the principle of legality. In this respect, reparation for human rights violations provides a remedy for past abuse, but also may help persuade those in power to comply with human rights norms in the future and thus reduce the incidence of violations and the caseload of human rights tribunals.

The Basic Principle and other texts cited should carry weight with the European Court because, as the Court noted in its *Demir and Baykara* judgment, “the consensus emerging from *specialised international instruments* and from the practice of Contracting States may constitute a relevant consideration for the Court when it interprets the provisions of the Convention in specific cases” (para. 86).

Recent treaties reflect the formulation of the Basic Principles and articles on State Responsibility. The International Convention for the Protection of All Persons from Enforced Disappearance provides for compensation, restitution, rehabilitation, satisfaction and guarantees of non-repetition.¹⁴⁴ The Convention on the Rights of Persons with Disabilities calls for “all appropriate measures to promote the physical, cognitive and psychological recovery, rehabilitation and social reintegration of persons with disabilities” in the event of exploitation, violence or abuse.¹⁴⁵

142 Draft Articles on Responsibility of States for Internationally Wrongful Acts, pt. 2, Arts. 28-41, in Report of the International Law Commission on the Work of Its Fifty-third Session, UN GAOR, 56th Sess., Supp. No. 10, at 43, UN Doc. A/56/10 (2001), available at <www.org.un/law/ilc>, reprinted in James Crawford, *The International Law Commission's articles on State responsibility: introduction, text and commentaries* (2002).

143 Article 34, Draft Articles on the Responsibility of States for Internationally Wrongful Acts, Report of the International Law Commission on the Work of its Fifty-third Session, UN GAOR, 56th Sess., Supp. No. 10, UN Doc. A/56/10 (2001), available at http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf [hereinafter ILC Articles]. It should be noted that the ILC separates from “reparation” the concepts of cessation of ongoing violations and “guarantees of non-repetition”—such as orders to investigate violations and reform legislation. This is done to clarify that cessation and guarantees of non-repetition are obligations that States have independent of victims; they must be carried out, as appropriate, when an offense is committed.

144 International Convention for the Protection of All Persons from Enforced Disappearance (2006), Article 24.

145 Convention on the Rights of Persons with Disabilities (2006), Article 16(4). See also Article 4(3): “In the development and implementation of legislation and policies to implement the present Convention, and in other decision-making processes concerning issues relating to persons with disabilities, States Parties shall closely consult with and actively involve persons with disabilities, including children with disabilities, through their representative organizations.” *Id.*

Several earlier texts expressly require that compensation be paid to victims. The United Nations Convention against Torture,¹⁴⁶ Article 14, specifies that any victim of an act of torture has a right to redress and an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. Among treaties adopted by the specialized agencies, the ILO Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries¹⁴⁷ also refers to “fair compensation for damages” (Article 15(2)), “compensation in money” (Article 16(4)) and full compensation for “any loss or injury” (Article 16(5)). The Rome Statute of the International Criminal Court contains provisions that require the establishment of “principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation”, oblige States Parties to establish a trust fund for the benefit of victims of those crimes within the Tribunal’s jurisdiction, and order the Court “to protect the safety, physical and psychological well-being, dignity and privacy of victims.”¹⁴⁸

Applying these and similar provisions, nearly all UN treaty bodies have identified the kinds of remedies required, depending on the type of violation and the victim’s condition. All of them adhere to the view that substantive reparation is a right of victims. The Human Rights Committee has supported the Basic Principles through General Comments on rights and duties established by the Covenant and various recommendations to States.¹⁴⁹ In response to individual cases of human rights violations, the Committee has specifically called on States to provide compensation, public investigation and prosecution, legal reform, restitution of liberty, employment or property, and medical care.¹⁵⁰

Pursuant to CEDAW, in General Recommendation No. 5¹⁵¹ the Committee on the Elimination of Discrimination against Women announced that States Parties should make more use of temporary special remedial measures such as positive action, preferential treatment, or quota systems to advance women’s

146 Adopted on 10 December 1984, in force 26 June 1987) 1465 UNTS 85.

147 Adopted 27 June 1989, in force 5 September 1991), (1989) 28 I.L.M. 1382.

148 Rome Statute of the International Criminal Court arts. 68(1), 75(2), 79, July 17, 1998, 2187 U.N.T.S. 3 [hereinafter Rome Statute]. Furthermore, Article 68 provides that participation of victims will be allowed at all stages of the proceedings “determined to be appropriate by the Court.” *Id.* Article 68.

149 See, e.g., UN International Covenant on Civil & Political Rights, *The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, 16, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (Mar. 29, 2004) (affirming that reparation to victims not only entails compensation, but also “can involve restitution, rehabilitation and measures of satisfaction, such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices, as well as bringing to justice the perpetrators of human rights violations”).

150 See Dinah Shelton, *Remedies in International Human Rights Law* 184-185 (2d ed. 2005).

151 ICERD, 7th Sess. 1988, UN Doc A/43/38.

integration into education, the economy, politics and employment. The Working Group on Involuntary or Enforced Disappearances similarly made a reference to non-monetary remedies in a commentary on Article 19 of the 1992 UN Declaration on the Protection of All Persons from Enforced Disappearance, especially the duty to establish the fate and whereabouts of disappeared persons. The right to “adequate” compensation is recognised, meaning compensation that is “proportionate to the gravity of the human rights violation (e.g. the period of disappearance, the conditions of detention, etc.) and to the suffering of the victim and the family”. Amounts shall be provided for any damage, including physical or mental harm, lost opportunities, material damages and loss of earnings, harm to reputation, and costs required for legal or expert assistance. In the event of the death of the victim, as a result of an act of enforced disappearance, the victims are entitled to additional compensation. Measures of rehabilitation should be provided, including medical and psychological care, rehabilitation for any form of physical or mental damage, legal and social rehabilitation, guarantees of non-repetition, restoration of personal liberty, family life, citizenship, employment or property, return to the place of residence, and similar forms of restitution, satisfaction and reparation that may remove the consequences of the enforced disappearance. This list of measures may be usefully compared to the European Court’s judgment in *Varnava v. Turkey*.

UN special rapporteurs also have noted or emphasized the right to reparation. The Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment has discussed remedies for victims¹⁵² in annual reports. The Rapporteur has recommended that an inquiry always be undertaken when there is a complaint of torture. If the complaint is well-founded, it should result in compensation to the victim or relatives and the trial of anyone suspected of committing torture or severe maltreatment.¹⁵³ Paragraph (l) of the recommendations details the various forms of redress:

Legislation should be enacted to ensure that the victim of an act of torture obtains redress and fair and adequate compensation, including the means for the fullest rehabilitation possible. Adequate, effective and prompt reparation proportionate to the gravity of the violation and the physical and mental harm suffered should include the following elements: restitution, compensation, rehabilitation (including medical and psychological care as well as legal and social services), and satisfaction and guarantees of non-repetition. Such legislation should also provide that a victim who has suffered violence or trauma should benefit from special

152 The current mandate is described in *Report of the Special Rapporteur on the question of torture submitted in accordance with Commission resolution 2002/38*, E/Cn.4/2003/68, 17 Dec. 2002, para. 3.

153 E/CN.4/2003/68, p. 12.

consideration and care to avoid his or her retraumatisation in the course of legal and administrative procedures designed to provide justice and reparation.¹⁵⁴

► 2.2) Developments in Europe

It is clear that international law insists today on the *right* to redress for victims of human rights violations and that redress must aim to make *full* reparation for the harm caused. That alone should influence the Court's jurisprudence in the future. The Court confirmed, in the *Saadi v. the United Kingdom* judgment, that when it considers the object and purpose of the Convention provisions, it also takes into account the international law background to the legal question before it. As the Court said, "the common international or domestic law standards of European States reflect a reality that the Court cannot disregard when it is called upon to clarify the scope of a Convention provision that more conventional means of interpretation have not enabled it to establish with a sufficient degree of certainty." This surely requires a re-examination of the jurisprudence concerning Articles 13 and 41.

Nothing in the drafting history of the former Article 50 is to the contrary; indeed, it suggests a broader role for the Court, independent from developments in the system and in general international law. The Committee of Experts on Human Rights which first met in February 1950 worked on "the competence of the Court to pronounce judgments according damages, reparations (*restitutio in integrum*) or moral damages." In the end the Committee recommended the adoption of a provision substantially like Article 41. The Committee noted in its report to the Committee of Ministers that "the Court will not in any way operate as a Court of Appeal, having power to revise internal orders and verdicts."

At the Second Session of the Consultative Assembly a proposal was made to enlarge the powers of the Court to give it "appellate jurisdiction," so that "the Court may declare the impugned judicial laws to be null and void." The Committee rejected the proposal by majority vote, retaining language that was derived from treaty provisions on the enforcement of arbitral awards in interstate proceedings, notably Article 32 of the 1928 General Act on Arbitration. The reliance on precedents from arbitration agreements may have been based on an expectation that adjudication before the Court would be primarily interstate in nature, rather than based on individual communications, and that earlier arbitral practice would therefore be particularly relevant.

Arbitral agreements often reflected international practice in regard to State responsibility for injury to aliens. In this body of law, satisfaction had often required punishment of the guilty and assurances as to future conduct, monetary awards, as well as a declaration of the wrong, especially when coupled with

154 *Ibid.*

an apology from the offending State. Many nonmonetary remedies afforded under the heading of satisfaction in interstate proceedings are now applied in the human rights context, especially apologies, guarantees of non-repetition, and/or punishment of wrongdoers. In sum, Article 50, now Article 41 of the European Convention was intended to deny the European Court the power directly to repeal Member State laws or annul domestic decisions in conflict with the Convention. The provision does not deprive the Court of the function and power to rule that the State must itself, by means of its domestic procedures, amend or nullify measures contravening the Convention in order to cease its violation.

In addition to the drafting history and the general international law framework that should influence the Court, three developments in the European system should lead the Court to reform its approach to redress.

First, the role of the victim and nature of cases has changed from inter-state to individual applications. The system at its origin made both the Court's jurisdiction and individual petitions optional with each Contracting Party. The "default setting" was therefore one of an interstate complaint before the European Commission. Complaining States were not the injured parties, except in the sense of a legal injury caused by the breach of an international obligation owed to all the Contracting States. Reparations and redress would not be an issue in the interstate cases. Today, as the Court emphasized in a recent case, the framework of the system is fundamentally different:

The Court would stress that although the Convention right to individual application was originally intended as an optional part of the system of protection, it has over the years become of high importance and is now a key component of the machinery for protecting the rights and freedoms set forth in the Convention. Under the system in force until 1 November 1998 the Commission only had jurisdiction to hear individual applications if the Contracting Party issued a formal declaration recognising its competence, which it could do for a fixed period. The system of protection as it now operates has, in that regard, been modified by Protocol No. 11, and the right of individual application is no longer dependent on a declaration by the Contracting States. Thus, individuals now enjoy at the international level a real right of action to assert the rights and freedoms to which they are directly entitled under the Convention.¹⁵⁵

This "real right of action" must include the right to an effective remedy and full reparation.

Second, Protocol 14 amended Article 35(3) to allow the Court to declare inadmissible any individual application submitted under Article 34 if it considers that

¹⁵⁵ *Mamatkulov & Askarov v. Turkey* [GC], (App. Nos. 46827/99 and 46951/99), Judgment of 4 February 2005, Eur. Ct. H.R., para. 122.

“the applicant has not suffered a significant disadvantage, unless respect for human rights as defined in the Convention and the Protocols thereto requires an examination of the application on the merits and provided that no case may be rejected on this ground which has not been duly considered by a domestic tribunal.” The last phrase will be deleted with entry into force of Protocol 16. The new admissibility criterion of “significant disadvantage” means that henceforth applicants in admissible cases will always have suffered harm that should be redressed and that domestic proceedings have failed to provide the necessary remedies.

Third, the nature of cases and the identity of the defendant States most frequently brought before the Court have changed. It can no longer be assumed with any great confidence that States will “in the manner of their own choosing” repair the damage caused by the violation and take action to prevent similar cases from arising in the future. Repetitious cases continue to arrive precisely because the States in question have not complied with the general measures necessary to repair the harm. The added value of a binding judgment setting forth the measures necessary, including full reparation to the applicants, may have an additional deterrent effect, both because the measures are in a binding judgment and because the costs of the violations increase. The result could serve to decrease the number of repetitious cases in the future.

It is not easy to overturn a long line of settled jurisprudence, but the Court understands that its jurisprudence must change with evolutions in the conditions and the legal framework. It has noted that in the interests of legal certainty and foreseeability, it should not depart, without good reason, from its own precedents.¹⁵⁶ Nonetheless, as it has stated, “it is of crucial importance that the Convention is interpreted and applied in a manner which renders its rights practical and effective, not theoretical and illusory. It is a living instrument which must be interpreted in the light of present-day conditions.”¹⁵⁷ With this in mind, in 2005, the Court reversed its earlier judgments about the juridical status of interim measures, citing the evolution of these measures in the jurisprudence of the International Court of Justice, the Inter-American Court of Human Rights, the Human Rights Committee and the Committee against Torture of the United

156 *Chapman v. the United Kingdom* [GC], no. 27238/95, § 70, ECHR 2001-I; and *Christine Goodwin v. the United Kingdom* [GC], no. 28957/95, § 74, ECHR 2002-VI).

157 *Tyrer v. the United Kingdom*, judgment of 25 April 1978, Series A no 26, pp. 15-16, § 31; and *Christine Goodwin*, cited above, § 75.

Nations.¹⁵⁸ The Court also referred to the needs of “the proper administration of justice” in overturning its prior case-law. It should similarly re-examine its jurisprudence on remedies.

Conclusions

The right to receive reparation for human rights violations is now widely acknowledged. Given the general recognition of the right to a remedy in law and practice, many consider it to be a norm of customary international law. Where States fail to provide the necessary remedies for human rights violations, international institutions are the forum of last resort. The authority of human rights tribunals to afford remedies is uncontested. Judicial bodies have inherent power to remedy breaches of law in cases within their jurisdiction. In addition, human rights treaties sometimes confer explicit competence to afford redress on the organs they create to hear cases.

The ancient adage *ubi jus, ibi remedium* (where there is a right there is a remedy) is reflected in the importance given in international human rights law to the existence of effective remedies, which are seen as necessary in order to ensure the full enjoyment of other rights. The international attention to remedies reflects a concern for upholding and ensuring the effective enjoyment of guaranteed rights.

The emphasis on remedies has evolved with the need to ensure the rule of law and promote compliance by States with their human rights obligations. International tribunals like the European Court are also increasingly concerned with reducing their growing caseloads by emphasizing remedies at the national level. There is thus a need to eliminate systemic violations through changes in domestic laws, in addition to compensating the individual applicant who brings a case to court. Other international tribunals are promoting and using innovative and specific non-monetary remedies, including requirements that the government acknowledge its responsibility and issue an apology, create a memorial to the victims, establish development or scholarship funds, build and operate medical clinics and schools, and provide medical treatment or other forms of rehabilitation.

As for the European Court, it must determine the responsibility of the States in accordance with the principles of international law governing this sphere,¹⁵⁹ while taking into account the special nature of the Convention as an instrument

158 *Mamatkulov & Askarov v. Turkey* [GC], (App. Nos. 46827/99 and 46951/99), Judgment of 4 February 2005, Eur. Ct. H.R.

159 Vienna Convention of 23 May 1969 on the Law of Treaties, Article 31 § 3 (c) States that account must be taken off “any relevant rules of international law applicable in the relations between the parties” in interpreting a treaty.

of human-rights protection.¹⁶⁰ In respect to the right to a remedy, as with respect to other rights, the Convention must be interpreted so far as possible consistently with the principles of international law of which it forms a part.¹⁶¹

Comments/Observations

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In both her paper and her presentation, Professor Shelton has put forward a vision that would give the European Court of Human Rights (“the Court”) a dominant role in the system for the supervision of the European Convention on Human Rights (“the Convention”).^{162, 163} It is to be welcomed that the work on the longer-term future of the Convention system has the benefit of a wide range of perspectives, especially when underpinned by such experience and expertise. All ideas must be thoroughly examined and placed before the Committee of Ministers, as the foundations for its later decisions on the further reform of the Convention system.

In light of this, I do not propose to present my own view on each of Professor Shelton’s proposals. Instead, in this response, I shall first examine the understanding of the purpose of the Convention system on which Professor Shelton’s proposals are founded, and then consider some of the consequences that might flow from her vision of the future role of the Court.

The purpose of the Convention system

It is well documented that the Convention’s development has been influenced by competing and evolving understandings of its purpose, although these understandings have rarely been articulated clearly – and indeed have not always been shared – by those involved in the creation of the Convention system as it is

160 *Golder v. the United Kingdom*, judgment of 21 February 1975, Series A No. 18, § 29.

161 *Al-Adsani v. the United Kingdom* [GC], No. 35763/97, § 60, ECHR 2001-XI.

162 “Making Remedies in the European Court Consistent with International Law”.

163 Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950 (CETS 5), as amended by Protocol Nos. 11 and 14.

today.¹⁶⁴ The only authoritative statement of purpose from the framers of the Convention in 1950 is that they sought “to take the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration [of Human Rights]”.¹⁶⁵

In academic literature, some authors have addressed the question, “what is the purpose of the Court?”.¹⁶⁶ When considering the practicalities of the reform process, however, this is the wrong question with which to start, especially if one approaches the question as if the Court *is* the Convention system. It is certainly true that the purpose of the Court is indivisible from that of the whole Convention system, but the Court is only one part of that system in Strasbourg, alongside not only the specific powers and responsibilities as set out in the Convention of the Committee of Ministers, the Secretary General, the Commissioner for Human Rights and the Parliamentary Assembly, but also the wider functions of these actors. However, perhaps the most important part of the Convention system is as expressed in Article 1: the responsibility of the Contracting Parties to “secure to everyone within their jurisdiction the rights and freedoms” under the Convention and the Protocols thereto.

And it is through Articles 1 and 13 of the Convention that one can best define a way to assess the effectiveness of the Convention itself: to what extent are the rights and freedoms enjoyed in practice within the *espace juridique* of the Convention, and to what extent is an effective remedy provided where violations of those rights and freedoms occur? It is worth noting that neither of these questions can be adequately answered by statistics alone: in particular, neither the number of applications made to the Court nor the number of violations found by the Court presents an unambiguous picture of the practical enjoyment of rights by the 850 million people within the jurisdiction of the 47 Contracting Parties to the Convention.

The principle of subsidiarity gives practical expression to this understanding of the Convention’s purpose: in the words of Protocol 15 to the Convention, the Contracting Parties “have the primary responsibility to secure the rights and freedoms defined in [the] Convention and the Protocols thereto”.¹⁶⁷ This

164 See generally Ed Bates, “The Birth of the European Convention on Human Rights – and the European Court of Human Rights” in Jonas Christoffersen and Mikael Rask Madsen (eds.), *The European Court of Human Rights between Law and Politics* (Chapter 2, pp. 17-42, Oxford University Press 2011), and specifically Danny Nicol, “Original intent and the European Convention on Human Rights” [2005] PL 152.

165 European Convention on Human Rights, Preamble.

166 For example Stephen Greer, “Constitutionalising Adjudication under the European Convention on Human Rights” (2003) 23 OJLS 405; Başak Çalı, “The purposes of the European Human Rights System: one or many?” [2008] EHRLR 299; Fiona De Londras, “Dual functionality and the persistent frailty of the European Court of Human Rights” [2013] EHRLR 38.

167 Protocol No. 15 amending the Convention on the Protection of Human Rights and Fundamental Freedoms, 24 June 2013 (CETS 213), Article 1.

acknowledges that the rights and freedoms are best secured through “an effective political democracy”, given effect by national authorities with their “direct and continuous contact with the vital forces of their country”, in particular their local, cultural and social traditions.^{168, 169} It also acknowledges that, with those 850 million people spread across every continent and through 47 countries and their territories, and of course speaking many different languages, the only practicable way in which to offer timely and effective remedies is to do this predominantly at the local level.

It is therefore the direct corollary of the principle of subsidiarity that the role of the Strasbourg elements of the Convention system as described above should complement the effective implementation of the Convention at national level, rather than try to supersede it. On this basis, the Court is best viewed as a means to an end, rather than an end in itself. The question provoked by Professor Shelton is how the Court can play the most effective role in that context.

It is of course entirely true that the changes of the 1990s judicialised the Convention system, in comparison to what had been established by the original Convention and gradually adjusted until 1994.¹⁷⁰ Even at the time of Protocol 11, it was questioned whether this judicialisation was wise.¹⁷¹ With the benefit of hindsight, we have been able to see – and we have had to address – the administrative and organisational challenges that it created.

But the judicialisation of the Convention system has been partial and specialised: partial, because the Convention does not place certain key functions in judicial hands, including the design of individual remedies as Professor Shelton identifies in her paper; and specialised, because the system continues to use individual applications as the exemplars through which to address wider systemic issues. While the Court has been granted a limited jurisdiction to order individual remedies, the effective implementation of the Convention is predominantly addressed through securing appropriate general remedies, a focus that entirely accords with the overall purpose of the Convention system as described above.¹⁷²

168 European Convention on Human Rights, Preamble.

169 *Handyside v. the United Kingdom* Application 5493/72, judgment of 7 December 1976, at 48.

170 Notably through amending Protocol Nos. 3, 8 and 9 to the Convention.

171 Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, restructuring the control mechanism established thereby. Contemporary criticism of Protocol No. 11 is conveniently summarised in Henry G Schermers, “Adaptation of the 11th Protocol to the European Convention on Human Rights” (1995) 20 EL Rev 559.

172 It is notable in this regard that the Convention itself, in Article 41, emphasises the subsidiary role of the Court in the provision of a remedy: “if the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party” (emphases added). It is therefore indeed also questionable to what extent the Court could in practice implement the proposals in Professor Shelton’s paper without the amendment of this provision of the Convention.

This focus is also reflected in the procedures of the Court itself. It is notable that, when compared to other judicial bodies, the procedures of the Court assume a high degree of co-operation on the part of the authorities of the Contracting Parties. For example, the Court is able to eschew extensive fact-finding exercises through the co-operative framing of agreed facts and issues, often assisted by Government Agents producing key background documents or even undertaking specific research to aid the Court's understanding; and the Court expressly relies upon the assistance of national authorities in its new procedures to process repetitive applications in large quantities in summary form.

In summary, therefore, while the present Convention system has become increasingly judicialised, one might conceptualise this judicialisation as still being framed by the context of a co-operative endeavour in which the Contracting Parties and the Court are part of the same system that seeks to establish a consistent interpretation of the Convention, and the appropriate parameters for its application in practice across Europe: in other words, a judicialisation that remains within the purpose of the Convention itself as described above.

The changing roles of the Strasbourg bodies

In some aspects, Professor Shelton's proposals envisage further judicialisation of the Convention system. What is more significant, however, is that they assume a further evolution in the nature of the judicialisation of the Convention system.

In some ways, Professor Shelton is justified in pointing to recent practice of the Court as indicating this direction of travel. In its traditional approach, the Court confined itself to delivering judgments that were essentially declaratory in nature, leaving it to the Contracting Party in question to determine how to fulfil its obligation under Article 46 to abide by the judgment, and to the Committee of Ministers to supervise this implementation process.¹⁷³ In the last decade, however, the Court has demonstrated an increasing appetite for indicating, in more or less direct terms, the measures that the Contracting Party should take to implement the judgment, starting with the pilot judgment procedure but also now expanding into "one-off" violations.¹⁷⁴ The recent high water mark was

173 See, for example *Marckx v. Belgium* Application 6833/74, judgment of 13 June 1979. The Courts describes its own approach well in *Scozzari and Giunta v. Italy* Applications 39221/98 and 41963/98, judgment of 13 July 2000, at 249.

174 The position as of 2005 is summarised in Philip Leach, "Beyond the Bug River – a new dawn for redress before the European Court of Human Rights?" (2005) 148. Subsequent examples include *L v. Lithuania* Application 27527/03, judgment of 11 September 2007; *Ghavidze v. Georgia* Application 23204/07, judgment of 3 March 2009; and *Del Río Prada v. Spain* Application 42750/09, judgment of 21 October 2013.

reached in the *Volkov* case, in which the Court not only awarded just satisfaction in respect of non-pecuniary damage, but directed Ukraine to “secure the applicant’s reinstatement in the post of judge of the Supreme Court at the earliest possible date”, having formed the view that “the situation found to exist in the instant case does not leave any real choice as to the individual measures required to remedy the violations of the applicant’s Convention rights”.¹⁷⁵

These increasingly frequent departures from the basic architecture of the Convention system were recently noted in a background paper prepared by some Judges of the Court, and justified as follows:

In some cases the Court considers the individual remedial measure to be self-evident to the point that any real choice is excluded. In these circumstances to leave such a measure to be identified through a lengthy process of dialogue between the Committee of Ministers and the respondent government runs counter to the principle of effectiveness which guides the Court in much of its work. In addition, in cases such as those involving continuing arbitrary detention any delay in taking appropriate action serves to compound the original violation.¹⁷⁶

I do not propose to address here whether this approach falls within the letter and the spirit of the Convention as it is currently framed, although it is very much an open question. I shall also note only in passing, having described above the cooperative relationship between the Court and the Contracting Parties, that with any change in the focus of the Court from interpretation to remedy there is an attendant risk of fundamentally altering the nature of this relationship. Instead, in the spirit of looking to the future, I should like to suggest certain implications for the procedures of the Court that would arise from its taking an increasingly assertive role in relation to individual measures.

As a matter of practicality, the design of an individual remedy requires a full understanding of the loss suffered by the victim, and the reconciliation of any dispute between the parties as to its extent. It also requires a proper appreciation of the steps that would be feasible and effective to address this loss. It is presently in most cases relatively straightforward for the Court to quantify a sum of money, in the form of just satisfaction, that reflects the actual loss suffered by the victim, even if this often necessarily involves a broad degree of estimation within

¹⁷⁵ *Oleksandr Volkov v. Ukraine* Application 21722/11, judgment of 9 January 2013, at 9 of the operative provisions and 208.

¹⁷⁶ European Court of Human Rights, “Seminar background paper: Implementation of the judgment of the European Court of Human Rights: a shared judicial responsibility?” (Opening of the Judicial Year of the European Court of Human Rights, Strasbourg, 31 January 2014), at 10. This paper, prepared by Judges Laffranque, Raimondi, Bianki, Nußberger and Sicilianos, does not reflect the views of the Court.

the parameters defined by the parties' submissions. By contrast, should the Court embark on the development of a scale of "moral damages", or even just a more expansive approach to non-pecuniary loss, this would involve the Court's undertaking much deeper fact-finding than it does at present.

Likewise, the more that the Court would involve itself in indicating or even directing specific individual measures that a Contracting Party should take to rectify an applicant's situation, the more it would need to take account of certain factors with which it does not currently routinely engage in the argument of cases. First, as noted above, the Court would need to explore the extent to which a proposed individual remedy would be capable of being granted in practice: for example remedies may require the co-operation of non-governmental actors, to whom the obligation under Article 46 does not extend, or may require the redeployment of resources at the expense of other priorities. Second, the Court would also need to examine with the assistance of the parties whether the remedy that it may propose is the most effective, or indeed only a means of remedying the violation. Third, bearing in mind the nature of proceedings before the Court, the Court would need to assess in full the effect of any proposed remedy on the rights and interests of other persons not party to the proceedings before the Court.

This last point is particularly engaged where the proceedings before the Court arise from earlier civil or administrative proceedings before the domestic courts of the Contracting Party in question, and has previously been explored in the context of the reopening of domestic proceedings following a judgment of the Court. The considerations that can arise are well illustrated by the facts of *JA Pye Ltd v. the United Kingdom*.¹⁷⁷ In this case, the applicant company lost agricultural land with development potential to their neighbouring landowners, Mr and Mrs Graham, by virtue of the Grahams' unchallenged possession of the land for more than twelve years, in accordance with the law of adverse possession then in force in England and Wales. Judgment in favour of the Grahams was originally given in the High Court in February 2000 and, having been reversed in the interim by the Court of Appeal, was ultimately confirmed by the House of Lords in July 2002.¹⁷⁸ The applicant company applied to the Strasbourg Court in December 2002 alleging a violation of Article 1 of the Protocol to the Convention and, in November 2005, received a Chamber judgment finding a violation by four votes to three, but deferring the question of the application of Article 41 of the Con-

177 *JA Pye (Oxford) Ltd & JA Pye (Oxford) Land Ltd v. the United Kingdom* Application 44302/02, judgment of 30 August 2007.

178 [2002] UKHL 30. The judicial functions exercised at this time by the Appellate Committee of the House of Lords, which were distinct from the House's legislative function, have since 2009 been exercised by the United Kingdom Supreme Court.

vention. The case was referred to the Grand Chamber at the government's request, which found no violation of the Convention by ten votes to seven in August 2007.

From the perspective of the Grahams, however, this matter was closed five years earlier, when they took full legal ownership of the land in question: they took no part in the proceedings before the Strasbourg Court. Therefore, had two Judges of the Grand Chamber voted differently, would it have been fair and appropriate for the Court to order literal *restitutio in integrum*, in the form of the transfer of ownership of the land back to the applicant company? It is also worth noting that even the question of pecuniary just satisfaction was complicated as the value of the land in question depended heavily on its future use, a dispute noted by the Court in its judgment but not otherwise explored in detail:

The applicant companies put their pecuniary loss at over GBP 10 million. The Government put the value of the land in 1996 (when the twelve-year limitation period expired) at GBP 785 000, and in July 2002 (when the House of Lords judgment was delivered) at GBP 2.5 million.¹⁷⁹

In analogous proceedings before national courts, of course, the considerations set out above would usually be exposed and examined, with all the affected parties present and with the assistance of experts, if required. In the United Kingdom Supreme Court, for example, the Justices engage in an extensive dialogue with the counsel for the parties appearing before it, in the course of which they test not only the merits of the legal arguments, but also the hypothetical implications of the possible different conclusions that they might reach.¹⁸⁰ Given the comparatively rigid exchange of observations practised by the Strasbourg Court, and particularly the limited nature of the oral argument on the rare occasions that a hearing is held, the Judges of the Court are not given the same opportunity to engage in this flow of ideas, nor to deepen their understanding of the wider legal, social, cultural and political context of the case. It is of course the case that, in appropriate cases, exchanges of this sort do take place in the Strasbourg part of the Convention system – but they are conducted by the Committee of Ministers when considering the implementation of a judgment, in a context that is both less adversarial and less judicialised.

In the same vein, the risks of extensive fact-finding by the Strasbourg Court were highlighted by the Administrative Court in England and Wales in its most recent judgment in the long-running *Aswat* litigation, in which the Administra-

179 Pye (footnote 176).

180 The dialogue between the Supreme Court (and, before 2009, the Appellate Committee of the House of Lords) and counsel is excellently described in Alan Paterson, *Final Judgment* (Hart Publishing Ltd 2013), Chapter 2.

tive Court found itself constrained by the approach taken by the Strasbourg Court. As the Lord Chief Justice observed:

This case involved an intensive and difficult fact-finding exercise. I would respectfully venture to suggest that for the future such fact-finding exercises are best undertaken by a national court. A national court is much better equipped to hear the evidence and clarify difficulties through a trial process conducted by a national judge, with questioning of the relevant witnesses in that process, if necessary. The approach that I have set out in the preceding paragraph in respect of a person whom it is agreed has a serious mental illness is but one example of the procedural processes which a national court can deploy to ascertain the facts. This case illustrates, therefore, a real and substantial difficulty that can arise when such a fact-finding exercise is undertaken by the Strasbourg Court in place of the national court.¹⁸¹

There are also more mundane implications from giving the Court the more extensive role that Professor Shelton envisages: for example, the Court continues to be bedevilled by its pending caseload of around 39 000 non-repetitive potentially admissible applications, which still represents a considerable challenge for the Court even under its current procedures. Indeed, it should be questioned whether the proposals made by Professor Shelton in her paper in particular could ever be properly implemented without a substantial change in either the duties or structure of the Court, or indeed both: if a Court composed of one judge from each Contracting Party that is obliged to give a judicial determination to each application continues to struggle with its current workload, it is perhaps not realistic to expect the Court to take on additional functions without either a considerable increase in its capacity or an attenuation of its obligation to consider every application.

None of this is to say that Professor Shelton's proposals are intrinsically unacceptable or unworkable: they constitute an entirely legitimate vision of the future role of the Court in the Convention system. It is however reasonable to question whether they can constitute a legitimate vision of the role of the Court as it is *currently constituted* within the Convention system, and indeed whether they represent the most effective means by which the Convention system can in future pursue the purpose of the Convention.

The expanding functions of the Court

There has been an increasing tendency in recent years for other actors to expect ever more of the Court, and for the Court itself to take on additional func-

181 *R (Haroon Aswat) v. Secretary of State for the Home Department* [2014] EWHC 1216 (Admin), at 46.

tions, particularly in the present context of the implementation of judgments. The Judges of the Court in their paper present this expanding remit as an inevitable expediency:

...As the effects of the enlargement of the Council of Europe began to be felt, and following the entry into force of Protocol No. 11, new problems emerged for which the traditional mechanism seemed not always sufficiently well-equipped. Deep-seated structural problems and very serious violations of core rights became more frequent. At the same time, in a new political climate, there appeared to be growing reluctance on the part of some States, including among the “old democracies”, to accept rulings by the Court on certain politically sensitive issues. These phenomena led the Court to envisage new solutions and to take a more proactive role.¹⁸²

Even if there remains the tension, explored in other sessions of the Conference, between the two functions – interpretative and remedial – of the Court, this does not imply that the Court as currently constituted is capable of assuming effectively any and all functions that could come within its purview, especially functions such as those in relation to the implementation of judgments that would take it beyond its two core functions. Some functions may require new procedures, some may require substantial additional resources, and some may be fundamentally difficult to shoehorn into the current judicial model of the Court. A jack of all trades, as the saying goes, is the master of none – and it is important to guard against creating a Court that ends up attempting to perform ever more tasks for which neither its composition nor its procedures are properly specialised.

As an analogy, one might perhaps remember the salutary lesson of the teasmade, a bedside device that was unaccountably popular in the the United Kingdom in the 1970s and 1980s. In the morning, the teasmade would wake you up with an alarm clock, and turn on the radio. It would also, as its name suggests, make a cup of tea, in an attempt to make the morning less unbearable. But the teasmade rapidly fell out of favour. Quite apart from the troubling idea of having boiling water that close to one’s head when asleep, the alarm clock tended to keep bad time, the radio tended to have a bad signal, and the tea tended to be unpalatable, this last being particularly unforgivable from the perspective of this Englishman. The teasmade tried to combine three different tasks in the same unit

182 European Court of Human Rights, “Seminar background paper: Implementation of the judgment of the European Court of Human Rights: a shared judicial responsibility?”, at 4.

but, being therefore specialised for none of the tasks, did none of them very well.¹⁸³

Ultimately, therefore, the goal has to be to design a Convention system that is fit for purpose, and then to establish the role of each element of that system. The principle of subsidiarity dictates that this should predominantly centre on the securing of the rights and freedoms, and the delivery of appropriate remedies for violations, at national level, throughout the *espace juridique* of the Convention. How the Strasbourg actors of the Convention system operate should support this overall purpose of the Convention system. Insofar as it is necessary to develop the role of those actors to increase the effectiveness of the Convention system as a whole, this development must not assume that either the composition or procedures of those actors can remain fixed, but nor can it be assumed that any given function is best subsumed into a judicialised environment.

When we discuss how the Court could perform any given role within its current basic composition, we are sometimes trying to jam a square peg into a round hole. The guiding light of the reform process must therefore be to consider the appropriate functions at each level of the Convention system as a whole in light of the Convention's overall purpose, and then – to borrow Louis Sullivan – to have form ever follow function.¹⁸⁴ The function of individual remedy is important within the Convention system, as Professor Shelton highlights and Article 13 recognises, but it is not necessarily implicit that this should take the form of being achieved in an increasingly judicialised manner at the international level.

183 Since using this analogy in my remarks, I have received a surprising amount of correspondence on the subject of the humble teasmade. In light of this, I should perhaps clarify that I was using “teasmade” in a generic sense, and not with reference to any particular brand, though I acknowledge that certain trademarks may exist. I also acknowledge that a radio was not originally a standard feature of a teasmade (which rather strengthens the present metaphor), and I note with concern suggestions that the teasmade is reported to be “enjoying a revival”.

184 Louis H Sullivan “The Tall Office Building Artistically Considered” in Lippincott’s Magazine March 1896.

Helen Keller

Judge, European Court of Human Rights/Juge, Cour européenne des droits de l'homme

Introduction

The organisers asked me to elaborate on the roles of the Court with respect to the implementation of its judgments. The aim of my presentation is to give you an overview of the different instruments at the disposal of the Court in order to influence the domestic implementation process. For that purpose I invite you to take a broad perspective on the topic and would like to distinguish three different stages: The pre-judgment stage and the adoption of interim measures (Rule 39), the stage of the judgment itself and the remedies afforded under Article 41 and/ or 46 ECHR, and the post-judgment stage and the review of compliance.

I will, for each stage, briefly recall the Court's practice, point out the inherent advantages and disadvantages and suggest some proposals for the future before drawing my overall conclusion.

The Pre-judgment Stage: Application of Rule 39

The instrument of interim measures offers the Court an important tool to secure the implementation of an eventual judgment already at an early stage by protecting the applicant from harm that would not be reparable at the stage of the merits.¹⁸⁵ The Court has held in several cases that *resitutio in integrum* is usually the most appropriate form of reparation.¹⁸⁶ Rule 39 orders, which are binding on States, may help in ensuring that such restitution remains possible.¹⁸⁷

Assessment:

While interim measures are of great importance for preventing irreparable violations of the Convention, they are only applied in a limited field; not least because they are seen as rather intrusive measures vis-à-vis States. Despite their binding nature, States do not always comply with them. The Court should render the use of interim measures more transparent by publishing a summary of the reasons for which interim relief was granted or denied over a given period.

185 *Mamatkulov and Askarov v. Turkey* (GC), Nos. 46827/99 and 46951/99, 4 February 2005, ECHR 2005-I, § 108.

186 See, for example, *Papamichalopoulos and Others v. Greece* (Article 50), 31 October 1995, § 34, Series A No. 330-B.

187 Keller Helen/Marti Cedric, "Interim Relief Compared: Use of Interim Measures by the UN Human Rights Committee and the European Court of Human Rights", 73 *Heidelberg Journal of International Law* (3) 2013, 325-372.

The Judgment Itself: Affording Remedies under Articles 41 and/or 46 ECHR

In line with the ILC Draft Articles on State Responsibility, the Court regularly reiterates that there is a duty to cease, repair and prevent violations of the Convention.¹⁸⁸ Traditionally, however, the Court has located the concretization of this duty at the national level and, consequently, abstained from determining specific remedies itself.¹⁸⁹ Hence, the Court has long held that its judgements are: essentially declaratory in nature and that, in general, it is primarily for the State concerned to choose, subject to supervision by the Committee of Ministers, the means to be used in its domestic legal order in order to discharge its obligation under Article 46 of the Convention, provided that such means are compatible with the conclusions set out in the Court's judgment.¹⁹⁰

This approach reflects the principle of subsidiarity, which underpins the Convention system.¹⁹¹ However, particularly in recent years, the Court has gradually become more active in directing domestic implementation by providing specific remedies.¹⁹² Firstly, in terms of non-monetary remedies, it has started *recommending*, and in some instances even *ordering*, specific individual measures by means of which a State should afford restitution. Examples are the re-opening of criminal proceedings¹⁹³; the release of applicants from detention¹⁹⁴; or the restitution of property¹⁹⁵. Secondly, with a view to preventing future violations, the Court has developed a practice of indicating *general measures* in the context of the pilot judgment procedure.¹⁹⁶ Frequently, such general measures are accompanied by time limits for their adoption and call for legislative reforms in the State concerned. Today, the indication of general measures is no longer limited to pilot-judgments.¹⁹⁷ And thirdly, the Court can, where restitution fails or is not sufficient, award monetary compensation itself by awarding just satisfaction under 41 ECHR.

188 *Ibid.*

189 Except for the awarding of just satisfaction under Article 41 ECHR.

190 *Oleksandr Volkov v. Ukraine*, No. 21722/11, 9 January 2013, § 194.

191 High Level Conference on the Future of the European Court of Human Rights, Brighton Declaration, 20 April 2012, paras. 26-29.

192 For an overview see Leach Philip, "No longer offering fine mantras to a parched child? The European Court's developing approach to remedies" in: Føllesdal, Peters, & Ulfstein (eds), *Constituting Europe: The European Court of Human Rights in a National, European and Global Context*, 142 ff.

193 *Gençel v. Turkey*, No. 53431/99, 23 October 2003, § 27.

194 *Assanidze v. Georgia* [GC], No. 71503/01, 8 April 2004, ECHR 2004-II, § 202-203.

195 *Brunărescu v. Romania* [GC] (Just satisfaction), no. 28342/95, 23 January 2001, § 22-23.

196 *Broniowski v. Poland* [GC], No. 31443/96, 22 June 2004, Reports 2004-V.

197 See, for instance, *Oleksandr Volkov v. Ukraine*, No. 21722/11, 9 January 2013.

Assessment:

General and individual measures may assist States in speedy implementation and facilitate the supervisory task of the Committee of Ministers. Particularly general measures and pilot judgments are an effective approach for dealing with systemic problems and can lead to a constructive dialogue between Strasbourg and national courts. Overly specific measures, however, and *ordering* instead of *suggesting* measures may be intrusive and contradict the principle of subsidiarity as it means less leeway for States. In particular the implementation of far-reaching general measures is very challenging and the time limits set by the Court for legislative reforms are sometimes not realistic.

Monetisation under Article 41 is not always the right approach as there is a risk of States “buying themselves off” instead of resolving the underlying problem. The Court should develop a more *coherent* approach to remedies. It should create guidelines to clarify in which cases non-monetary measures/remedies are indicated and in what form (recommendation vs. order). It should, however, also develop a more *comprehensive* approach. This means clarifying the interplay between monetary and non-monetary remedies, and between remedies afforded at national level and those indicated by the Court. In light of the principle of subsidiarity, consequential orders such as in *Volkov* should remain the exception.¹⁹⁸

The Post-judgment Stage: Review of Compliance

The division of competences between the Committee of Ministers and the Court allows the latter to play only a limited role with respect of the supervision of its judgements.¹⁹⁹ To date, there exist three possibilities through which the Court has intervened in the supervision of the execution of its judgment. Firstly, the Court has examined whether a previous judgment was duly implemented in the context of a new case related to the same underlying issue and resulting in a fresh violation of the Convention.²⁰⁰ Secondly, by dissociating the examination of the merits from the award of just satisfaction, the Court can inquire into whether the judgment on the merits was implemented or not and take into account its finding in a separate judgment on just satisfaction.²⁰¹ Thirdly, under

198 For an interesting assessment see Jahn Jannika, “Ruling (in)directly through individual measures?: Effect and legitimacy of the European Court of Human Rights’ New Remedial Power”, 74 *Heidelberg Journal of International Law* (1) 2014, 1-39.

199 According to Article 46(2) ECHR the Committee of Ministers bears the primary responsibility for the supervision of the execution of judgements.

200 *Emre v. Switzerland (No. 2)*, No. 5056/10, 11 October 2011; *Hirst (No. 2) v. the United Kingdom*, No. 74025/01, 6 October 2005, ECHR 2005-IX; see Article 35(2)(b) ECHR.

201 See, for example, *Pelipenko v. Russia*, No. 69037/10, 16 January 2014; the same possibility exists when the Court examines a friendly settlement.

paras 3 and 4 of Article 46 ECHR, the Court can be seized with a question concerning the interpretation of a judgment or with a view to establishing whether a State has failed to execute a judgment (so-called infringement procedure).²⁰²

Assessment:

Over recent years, one can witness a *judicialization and depolitization* of compliance questions. In an individual case, a finding of non-compliance by the Court may indeed put additional pressure on the defiant Government. More generally, however, this development may interfere with the Committee of Minister's competences, unless there is a mandate under the infringement/interpretation procedure. The *Emre (No. 2)* practice has shown that it is sometimes difficult to delimit fresh violations of the Convention from simple non-implementation of a previous judgment (admissibility question under Article 35(2)(b) ECHR). Also, regularly splitting Article 41 off from a judgment on the merits would mean an increased workload for the Court.

The current political hurdle of a two-thirds majority in the Committee of Ministers for the infringement procedure is very high, and the individual concerned has no standing. It would therefore be worth reconsidering both the adequacy of the two-thirds requirement for the infringement and interpretation procedure, as well as the position of the individual in the execution process.

Conclusion

The Court's position with respect to domestic implementation is multifaceted. The roles it can play must be assessed both against the background of the principle of subsidiarity and the limited competences of the Court in this field. In cases of isolated violations of the Convention, it seems to me that the Court disposes of sufficient and adequate instruments to secure effective and speedy implementation of its judgments, although it must render its practice more consistent and coherent in certain areas. On the other hand, however, the Court is almost powerless when faced with "persistent or tacit objectors", namely those States which, on a large scale, refuse or fail to cooperate with the Court and abide by its judgments. Here, it might be necessary to further submit the supervision of the execution of judgments to judicial review, or even to introduce some sort of financial sanctions. After all, compliance control is a centrepiece of the Convention system.

202 For a recent analysis see Larsen Kjetil Mujezinović, "Compliance with Judgments from the European Court of Human Rights: The Court's Call for Legislative Reforms", 4 *Nordic Journal of Human Rights* 2013, 496 ff.

Role of the Committee of Ministers/ Le rôle du Comité des Ministres

The responsibility to ensure the proper implementation of judgments lies with the Committee of Ministers. The CM has a growing number of cases on its agenda, and implementation often takes considerable time. Should the CM process be made more efficient, and does the Committee have adequate resources and sanctions?

Le Comité des ministres est responsable de surveiller la mise en œuvre satisfaisante des arrêts de la Cour. Le nombre de cas devant le CM augmente, et la mise en œuvre peut prendre beaucoup de temps. Devrait-on rendre la procédure du CM plus efficace ? Le CM dispose-t-il de ressources et sanctions adéquates ?

Elisabeth Lambert-Abdelgawad²⁰³

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En introduction, je souhaite commencer par reconnaître que globalement, le mécanisme qui, depuis l'origine, repose essentiellement sur deux organes à ne pas confondre, à savoir le Comité des Ministres comme organe de décision et le Service de l'exécution des arrêts (ce dernier conseillant le Comité et assistant les États), fonctionne plutôt bien ; dans la pratique, il faut également désormais compter sur d'autres acteurs ; la conférence d'Oslo des 7 et 8 avril 2014 en a couvert successivement trois, la Cour, le Comité des Ministres et l'Assemblée parlementaire, mais il y a en a d'autres aussi, et la question du nécessaire renforcement des synergies entre ces acteurs est fondamentale. La surveillance est donc le fruit d'un mécanisme pluri-institutionnel et non plus uni-institutionnel comme peut le laisser transparaître la lecture de l'article 46(1) de la CEDH.

La pratique antérieure a montré combien l'exécution et son contrôle peuvent être assez complexes et longs, tant eu égard au paiement de la satisfaction équi-

203 L'auteur tient à remercier les diverses personnes qui ont aidé, par leurs précieux conseils, à améliorer la rédaction de ce rapport. Les remerciements s'adressent également à Amanda Haight, stagiaire en poste au laboratoire SAGE, pour l'élaboration de certaines statistiques. L'auteure peut être jointe à l'adresse suivante : e.lambert@unistra.fr.

table qu'à l'adoption d'autres mesures individuelles et générales (en raison par exemple de l'évolution rapide de la situation entre le moment où l'arrêt est rendu et celui où son exécution est discutée, en raison du fait qu'on est souvent face à des exécutions partielles et non complètes). Le Comité des Ministres a ainsi réaffirmé lors de sa 120^e session de mai 2010, dans le cadre du processus initié par la Conférence de haut niveau d'Interlaken de février 2010 (voir chapitre IV), « dans l'exécution des arrêts et décisions de la Cour, la diligence et l'efficacité revêtent une importance fondamentale pour la crédibilité et l'efficacité du système de la Convention et pour réduire les pressions sur la Cour. Cela requiert des efforts conjoints des États membres et du Comité des Ministres »²⁰⁴.

La parution du dernier rapport annuel (le septième, sorti le 2 avril)²⁰⁵ permet de citer les chiffres les plus récents. Le nombre d'affaires pendantes a atteint un pic fin 2012 avec 11099 affaires, et connaît pour la première fois dans l'histoire une très légère baisse en 2013 avec 11018 affaires. Le nombre d'affaires terminées par une résolution finale n'a jamais été aussi élevé qu'en 2013 (1398 affaires, contre 163 en 2004, soit plus de 8 fois plus). Toutefois, l'inquiétude vient du fait que le nombre d'affaires de référence closes par résolution finale baisse sur les trois dernières années²⁰⁶. Ainsi la proportion d'affaires de référence pendantes augmente (14 % désormais de toutes les affaires, soit 1496 affaires) et celles pendantes depuis plus de cinq ans est également en hausse. Si le budget du Service de l'exécution des arrêts a quelque peu accompagné l'augmentation du nombre d'affaires pendantes²⁰⁷, ramené au nombre d'affaires de référence qui sont les plus chronophages, il connaît un certain tassement.

Nous allons évoquer respectivement les avantages du système actuel, puis ses lacunes et ainsi nous formulerons un certain nombre de recommandations.

I. Les avantages du système actuel

Cinq avantages principaux du système actuel méritent d'être relevés.

Premièrement, le Comité des Ministres, dans la logique historique de garantie collective, qui doit clore toutes les affaires par l'adoption d'une résolution finale, continue à jouer son rôle de levier et de stimulateur pour les affaires les plus problématiques (par exemple, pour faire admettre la réouverture de la procédure judiciaire interne dans des cas exceptionnels suite à un arrêt de la Cour

204 Décision, 120^e session, Suivi de la Conférence à haut niveau sur l'avenir de la Cour européenne des droits de l'homme (Interlaken, 18-19 février 2010), 11 mai 2010, point 8.

205 Surveillance de l'exécution des arrêts et décisions de la Cour européenne des droits de l'homme, 7^e rapport annuel du Comité des ministres 2013, Conseil de l'Europe, mars 2014 (ci-après 7^e rapport annuel).

206 2011 : 322, en 2012 : 185 et 182 en 2013.

207 Passant de 1 358 000 en 2004 à 4 863 800 euros en 2014.

européenne des droits de l'homme, comme par exemple assez récemment en Italie). D'ailleurs, les Délégations s'entourent de plus en plus d'experts²⁰⁸, preuve, s'il en fallait, qu'ils prennent au sérieux ces réunions Droits de l'Homme, cet élément favorisant une approche moins politisée et plus juridique. Il apparaît donc utile de conserver ce « format », qui a le soutien de certains États comme affirmé par le Royaume-Uni en 2013²⁰⁹, même s'il peut être utile de s'interroger sur le nombre de jours de réunions. Il est également pertinent de s'interroger sur le point de savoir si le Service de l'exécution des arrêts ne pourrait pas se voir attribuer la compétence de clore les affaires classées en procédure standard dès lors que toutes les mesures appropriées ont été adoptées et précisées dans le bilan d'action.

Deuxièmement, les méthodes de travail ont considérablement évolué dans les années 2000 en faveur de plus de transparence et d'assistance aux États, ce qui a supposé un investissement massif de la part du Service de l'exécution, dont l'impact positif est réel. Notamment la nouvelle procédure de surveillance à deux axes offre l'avantage de responsabiliser davantage les États, et pour le Comité des Ministres de se focaliser sur les affaires les plus compliquées. Les États doivent envoyer un plan ou bilan d'action (qui sera publié) dans les six mois du prononcé de l'arrêt, jouent-ils bien le jeu ? Le bilan est assez mitigé mais plutôt positif. « Du 1^{er} janvier au 31 décembre 2013, 229 plans (158 en 2012) et 349 bilans d'action (262 en 2012) avaient été transmis au Comité »²¹⁰. L'aspect positif provient du fait qu'« En 2013, des lettres de relance ont été adressées à 29 États concernant 125 affaires/groupes d'affaires (97 en 2012). Pour 105 de ces affaires/groupes d'affaires, un plan/bilan d'action a été rapidement transmis au Comité des Ministres »²¹¹. Il semble indispensable de rester extrêmement vigilants concernant le passage d'un contrôle à un autre, puisque dès lors que la procédure est très formatée, le non-respect des règles devrait être sanctionné par le passage en contrôle soutenu. On peut être surpris par le fait que seulement 22 % des affaires de référence actuellement pendantes sont en contrôle soutenu²¹². De même, le

208 Leur nombre et les noms figurent dans les ordres des travaux de chaque réunion Droits de l'Homme.

209 Document GT-GRD-E(2013)009, 11 juillet 2013, Compilation of comments on whether more effective measures are needed in respect of States that fail to implement Court judgments in a timely manner, p. 10.

210 7^e rapport annuel, p. 63.

211 7^e rapport annuel, p. 63.

212 7^e rapport annuel, p. 16 : « En effet, après les classifications des affaires opérées lors de la dernière réunion DH 2013 (3-5 décembre 2013), sur le nombre total des affaires de référence pendantes (1 469) devant le Comité des Ministres pour surveillance de leur exécution, 22 % (329) étaient sous surveillance soutenue. L'importance de cette surveillance soutenue était soulignée par le fait que ces 22 % engendraient un nombre important d'affaires répétitives, soit 61 % (6 577) du total d'affaires pendantes (10 732) ».

passage en contrôle standard a pu être décidé de façon très rapide par le Comité des Ministres. Ainsi, dans l'affaire *Hulki Günes c. Turquie* pendante depuis 2003, le contrôle standard a été décidé suite à l'adoption de la loi sur la réouverture et à la demande de réouverture par le requérant, sans attendre l'issue de cette nouvelle procédure²¹³ ; à l'opposé, très peu de transferts en contrôle soutenu sont décidés alors même que les problèmes persistent²¹⁴.

Troisièmement, des efforts importants ont été opérés pour développer un arsenal de mesures progressives visant à inciter l'État à exécuter un arrêt en cas de retard prolongé, à le « pointer du doigt », avec des résultats variables²¹⁵. Je mentionnerai la dernière nouveauté : les auditions de ministres ou responsables politiques d'un certain rang, que nous avons appelées de nos vœux à la lumière de la pratique développée par la Cour interaméricaine des droits de l'homme. Ces auditions ont été initiées en 2013 dans certaines affaires, comme *DH c. République tchèque*²¹⁶ et *Manushaqe Puto et autres c. Albanie* (arrêt pilote)²¹⁷. Ces interventions d'acteurs supplémentaires, comme ce sera le cas aussi avec la société civile, auront l'intérêt de jouer le rôle d'antennes sur le monde extérieur.

Quatrièmement, des synergies ou complémentarités des actions menées par le Service de l'exécution des arrêts (et/ou beaucoup plus rarement par le Comité des Ministres) avec d'autres acteurs, tels que l'Assemblée parlementaire²¹⁸, le Commissaire aux droits de l'homme, la Commission de Venise²¹⁹, ont un réel impact positif. Certains États sont assurément demandeurs de plus d'assistance technique, y compris d'autres organes comme la CEPEJ, voire le CPT. Il faut aussi

213 *Hulki Günes et autres affaires similaires c. Turquie*, 7^e rapport annuel, p. 133, dans ces graves affaires de condamnations à de longues peines de prison devant des tribunaux n'offrant pas les garanties de 6(1).

214 Par exemple, comme rare illustration pour 2013 : 7^e rapport annuel, p. 152 : *Oya Ataman et autres affaires similaires c. Turquie*, concernant l'usage disproportionné de la force contre les manifestants, requête n° 74552/01, arrêt définitif le 5 mars 2007, l'affaire a été transférée en contrôle soutenu.

215 Voir notamment le détail dans CDDH(2013)R79 Addendum I, para. 32, 29 novembre 2013, rapport du CDDH sur la question de savoir si des mesures plus efficaces sont nécessaires à l'égard des États qui ne donnent pas suite aux arrêts de la Cour dans un délai approprié.

216 Premier vice-ministre de l'Éducation présent lors de la réunion de décembre 2013. DH et autres affaires similaires (voir tableau des affaires principales C.2), requête n° 57325/00, arrêt définitif du 13 novembre 2007, 7^e rapport annuel, p. 162.

217 Présence du ministre de la Justice albanaise lors de la réunion de décembre 2013 : 7^e rapport annuel, p. 126 (non-exécution des décisions de justice sur la restitution ou indemnisation des biens nationalisés).

218 Dont l'investissement a été salué par le Directeur général de la Direction générale Droits de l'Homme et État de droit du Conseil de l'Europe, P. Boillot à la Conférence d'Oslo, discours de clôture du 8 avril.

219 Affaire *Mahmudov et Agazade & Fattulayev c. Azerbaïdjan*, requêtes n°s 35877/04 et 40984/07, arrêts définitifs le 18 mars 2009 et 4 octobre 2010, 7^e rapport annuel, p. 147 : assistance de la Commission de Venise concernant la réforme de la législation sur la diffamation ; cette affaire a donné lieu à l'adoption d'une résolution intérimaire en septembre 2013.

mentionner l'aide non négligeable apportée par certaines ONG et certains avocats quant à l'information/l'expertise apportée à la connaissance du Service de l'exécution via la nouvelle règle 9 des règles adoptées au titre de l'article 46, complément utile aux informations soumises jusqu'alors surtout par les sources gouvernementales. Dans des cas spécifiques, l'exécution est le résultat d'une concertation à trois, État, greffe de la Cour et Service de l'exécution des arrêts, comme dans l'affaire *Athanasiu Marshall c. Roumanie*²²⁰. Enfin et surtout, le travail opéré par la Cour sur le fondement de l'article 46 s'est révélé efficace. L'indication de mesures individuelles et générales par la Cour aide le Comité des Ministres puisque c'est une pression supplémentaire, à condition que de telles mesures individuelles soient prescrites *plus systématiquement* (sinon l'État peut déduire du silence de la Cour l'absence d'obligation supplémentaire à celle de payer²²¹). Concernant les mesures générales, s'il est difficile pour les juges d'en prévoir le contour de façon assez précise, l'indication de délais (ce que le Comité des ministres n'ose toujours pas faire) est fondamentale. J'ai pu constater que quand la Cour a émis des recommandations (voire injonctions) sous l'angle de l'article 46, d'une part les États vont en général faire preuve d'une diligence spéciale²²², d'autre part une attention toute particulière est accordée par le Comité des Ministres qui va examiner l'affaire plus rapidement et de façon plus rigoureuse, comme si le Comité se sentait aussi redevable vis-à-vis de la Cour²²³. Dans un certain nombre d'affaires, c'est un second arrêt de la Cour traitant de la même question avec cette fois une indication de mesures (et/ou éventuellement une

220 Requête n° 21305/05, arrêt du 23 juin 2009, en procédure soutenue.

221 Par exemple, comment interpréter la différence de stratégie de la Cour entre les affaires Fattulayev et Tymoshenko, puisque ce n'est que dans la première qu'elle ordonne la libération du requérant. Dans l'affaire Tymoshenko ; la requérante s'est vue opposer, pour des raisons formelles, un refus de réouverture de la procédure judiciaire interne (7^e rapport annuel, p. 135). L'adoption de mesures individuelles s'annonce difficile dans cette affaire.

222 Affaire Del Rio Prada, requête n° 42750/09, arrêt du 21 octobre 2013, où la requérante a été libérée le lendemain, la Cour ayant demandé sa libération dans le jugement (7^e rapport, p. 138). Également, 7^e rapport, pp. 156-157, *Lindheim et autres c. Norvège* : « Le CM a noté avec satisfaction les informations fournies par les autorités dans leur plan d'action d'avril 2013, en particulier les mesures rapidement prises afin de remédier aux lacunes de la législation interne, y compris les mesures provisoires prises dans l'attente de l'adoption d'un nouveau cadre législatif » (concernant les lacunes dans la législation sur les baux fonciers de longue durée). De même, *Gladysheva c. Russie*, 7^e rapport, p. 157, où l'affaire a été transférée en contrôle standard car « le Comité des Ministres a pris note que la requérante s'était vue restaurer son droit de propriété sur son appartement et que l'ordonnance d'expulsion avait été annulée ». Voir aussi *Grudic c. Serbie*, requête n° 31925/08, arrêt définitif le 24 septembre 2012, 7^e rapport, p. 158, concernant le versement des pensions par la Caisse serbe de retraites et d'invalidités. Les autorités ont déployé des efforts pour respecter le nouveau délai fixé par la Cour.

223 Par exemple, affaire *R.R. c. Hongrie* : arrêt du 29 avril 2013, examen d'urgence en juin puis en septembre 2013 par le Comité des Ministres alors que le secrétariat est rentré en contact avec les autorités hongroises dès le 2 mai : 7^e rapport, p. 85, concernant des mesures individuelles urgentes requises sous l'angle de l'article 2. Également, *Vyerentsov c. Ukraine*, 7^e rapport, p. 152 : requête n° 20372/11, arrêt définitif le 11 juillet 2013.

procédure pilote²²⁴, avec ou non prescription de délais) qui va servir de déclencheur pour prendre des mesures d'exécution qui concernent aussi l'arrêt inexécuté rendu plusieurs années auparavant²²⁵. J'ai pu remarquer que ces indications de la Cour dans un deuxième arrêt sont plus efficaces qu'une résolution intérimaire du Comité des Ministres²²⁶, et que tous les arrêts pilote ont été à peu près exécutés de façon satisfaisante, les États ayant été pressés d'adopter des mesures générales²²⁷, à telle enseigne que même le passage en contrôle standard a été décidé pour une affaire en 2013²²⁸. A titre illustratif également, on peut citer les affaires relatives à l'inexécution des décisions de justice interne en Ukraine, datant de 2004, puis ayant débouché sur un arrêt pilote en 2009 à la suite de quoi l'affaire fut inscrite à l'ordre du jour de presque toutes les réunions droits de l'homme et où furent adoptées pas moins de cinq résolutions intérimaires²²⁹.

224 Affaires bulgares de durée de détention et durée de procédures judiciaires pénales et civiles : Kitov et autres affaires similaires (2003), Djangozov et autres affaires similaires (2004), puis deux arrêts pilote en 2011 : Dimitrov et Hamanov et Finger et autres affaires similaires, 7^e rapport, p. 113 : un recours administratif et un recours judiciaire compensatoire ont été mis en place en 2012. Ici l'adoption d'une résolution intérimaire n'a pas été efficace.

225 Affaires de détention provisoire contre l'Ukraine : affaire Nevmerzhtsky (pendantes depuis 2005) dont l'exécution a bénéficié de l'affaire Kharchenko, 7^e rapport, p. 101, où la Cour avait donné des délais pour l'adoption de mesures générales (délais respectés par les autorités).

226 Affaires de durée excessive de procédure devant les juridictions administratives grecques : Manios et autres affaires similaires, 1^{er} arrêt en 2004, puis résolution intérimaire sans effet, puis arrêt pilote de la Cour : Vassilios Athanasiou et autres affaires similaires, la loi mettant en place un recours effectif accélératoire et un autre recours compensatoire a été adoptée dans le délai d'un an (7^e rapport, p. 115).

227 Ex : *Kurić et autres c. Slovénie*, requête n° 26828/06, arrêt définitif le 26 juin 2012, 7^e rapport, p. 166 (privation du statut de résident). L'affaire a été transférée en contrôle standard et le ministre a tenu à être présent lors des trois dernières réunions DH : 7^e rapport, p. 167, « Le Comité des Ministres s'est en particulier félicité de la présence, lors de ses trois dernières réunions, du Ministre de l'Intérieur de Slovénie, qui atteste de la volonté et de la détermination de ses autorités d'exécuter cet arrêt ».

228 *Ümmühan Kaplan c. Turquie*, arrêt définitif le 20 juin 2012, concernant la durée des procédures judiciaires, 7^e rapport, p. 122.

229 Zhovner et autres affaires similaires & Yuriy Nikolayevich Ivanov (arrêt pilote), 7^e rapport, p. 129. Cette affaire a donné lieu à des consultations tripartites : « des consultations de haut niveau ont été organisées, le 12 septembre 2013, à Kiev avec la participation de représentants du Greffe de la Cour, du Service de l'exécution des arrêts de la Cour et du Secrétariat du Comité des Ministres, en vue de discuter de solutions possibles aux problèmes toujours en suspens » (7^e rapport, p. 130), qui ont eu un impact visiblement positif pour l'adoption de nouveaux amendements législatifs. Mais les mesures individuelles (y compris le paiement de la satisfaction équitable) ne semblent pas avoir été obtenues dans ces affaires.

Suite à l'arrêt *Mandic c. Slovénie*, des mesures générales rapides ont été adoptées par les autorités étant donné les indications par la Cour sur le fondement de l'article 46 en matière de surpopulation carcérale²³⁰. L'affaire *Yordanova c. Bulgarie*, définitive le 24 juillet 2012, a vu l'adoption de mesures gouvernementales avant l'expiration d'un délai d'un an²³¹. Dans l'affaire *Volkov*, si l'indication de la Cour au niveau des mesures individuelles semble problématique, cela pourrait avoir des répercussions positives au moins au niveau des mesures générales²³².

Enfin, la mise en place du Fonds fiduciaire pour les droits de l'homme a pu relancer l'exécution dans certaines affaires en souffrance, telles les affaires moldaves sur les mauvaises conditions de détention²³³, ou aide assurément dans d'autres affaires structurelles. En effet, un soutien tant financier que technique peut s'avérer fondamental dans certaines situations.

II. Les lacunes ou échecs du mécanisme actuel

Nous souhaitons également mettre l'accent sur cinq éléments.

Premièrement, le mécanisme de supervision actuel connaît des angles-morts. En effet, l'exécution des déclarations unilatérales n'est pas contrôlée, ce qui est problématique, puisque au-delà même des difficultés à faire exécuter le paiement de la satisfaction équitable, certaines déclarations unilatérales comportent des engagements précis, comme celles validées dans des affaires géorgiennes²³⁴. En chiffres, cela représente le nombre impressionnant de 1 718 affaires sur les trois dernières années !

230 7^e rapport, p. 97.

231 7^e rapport, p. 139. Également *M.D. et autres c. Malte*, arrêt définitif le 17 octobre 2012 : suite aux indications par la Cour dans l'arrêt, les autorités ont rapidement présenté des modifications législatives (7^e rapport, p. 147).

232 7^e rapport, p. 136 ; pourtant deux postes vacants ont dû être comblés en novembre 2013, mais le requérant n'en a pas bénéficié.

233 7^e rapport, pp. 93-94, affaire *Ciorap, Paladi et Becciev et autres affaires similaires c. Moldova*, affaires datant de 2006 et 2007.

234 Voir notamment *Oniani c. Géorgie*, décision du 9 avril 2013 : En plus du paiement de la satisfaction équitable, "The Government undertakes to: ensure the applicant's post-surgery treatment under the requisite medical supervision; ensure the supervision of the applicant's general and psychiatric state of health before the final decision on the commencement of anti-viral treatment; ensure the repetitive assessment of the applicant's state of health by the medical concillium consisting of the specialists of the civilian clinic; the applicant's family members and the lawyer will also be invited to attend the concillium; ensure the applicant's treatment for hepatitis C immediately as soon as the applicant's psychiatric condition is improved".

Deuxièmement, les actions sur le terrain par le Service de l'exécution, dont on sait combien elles sont essentielles et bien plus efficaces que des rapports bureaucratiques ou l'envoi de dizaines de documents, ou conversations téléphoniques²³⁵, du fait de l'importance de renforcer les rapports humains et du besoin d'assistance technique en raison de la complexité de la matière, demeurent insuffisantes²³⁶, faute de moyens²³⁷.

Troisièmement, les synergies du Comité des Ministres avec les autres acteurs sont clairement lacunaires. Ainsi, les réunions tripartites Comité des Ministres, Assemblée parlementaire et Commissaire aux droits de l'homme n'ont jamais fonctionné. En se tournant du côté de la Cour, les interactions, au sens d'échanges d'informations mériteraient parfois d'être renforcées : par exemple, peut-on imaginer une meilleure communication du greffe de la Cour concernant le nombre d'affaires répétitives à une affaire pendante devant le Comité des Ministres. De surcroît, quand un nouveau recours interne est mis en place par un État et que la Cour doit décider s'il est effectif et ainsi clore toute une série d'affaires pendantes par une décision d'irrecevabilité, peut-on imaginer une consultation du Service de l'exécution, assurément expert sur la question de savoir si un tel recours met fin à l'affaire²³⁸ ? Le Service de l'exécution pourrait également être invité à se joindre à des réunions au sein de la Cour sur ces questions d'exécution, au moins pour faire entendre son avis. Dans les affaires répétitives qui représentent une part très conséquente des affaires pendantes, la Cour devrait accroître les sommes dues par l'État afin d'exercer une pression supplémentaire en raison de cette circonstance aggravante, puisque cet État met en péril la viabilité du système. La Cour pourrait ainsi tirer des conclusions de l'exécution insatisfaisante d'affaires similaires précédentes, ce qu'elle fait déjà avec la procédure pilote et le gel des affaires pendantes, et la récente affaire *Kurić*²³⁹ montre que la Cour est disposée à faire plus. Un État comme le Royaume-Uni semblait suggérer en 2013 que l'État doit supporter le surcoût du traitement de

235 Cf. le témoignage de la Bosnie-Herzégovine, document GT-GRD-E(2013)009, 11 juillet 2013, "Compilation of comments on whether more effective measures are needed in respect of States that fail to implement Court judgments in a timely manner".

236 Comme exemple cité dans le 7^e rapport, p. 94 d'actions sur le terrain : affaire *Horych c. Pologne*, régime carcéral spécial des détenus « dangereux ».

237 Environ 50 000 euros en 2007, et six fois plus, soit 300 000 euros en 2014.

238 Par exemple, concernant l'effectivité du nouveau recours grec pour lutter contre la durée des procédures administratives, la Cour l'a jugé effectif, ce qui n'est peut-être pas si certain, dans l'affaire *Techniki Olympiaki A.E. c. Grèce* (requête n° 40547/10), décision d'irrecevabilité du 1^{er} octobre 2013.

239 *Kurić et autres c. Slovénie* (GC), 18 mars 2014, arrêt (satisfaction équitable).

ces affaires répétitives²⁴⁰. L'audit externe sur l'année 2012 notait aussi que pour les affaires répétitives, « il semblerait possible d'imaginer une nouvelle procédure de traitement ou de suivi »²⁴¹. Sur un autre terrain, il nous semble aussi fondamental que la Cour rappelle à l'État défendeur l'obligation d'exécuter les arrêts *ex tunc*, ce qui implique l'obligation d'adopter des mesures transitoires urgentes s'il lui est impossible de prendre les mesures générales définitives dans des délais raisonnables, en vue d'éviter le contentieux répétitif. Le Service de l'exécution pourrait ici aider l'État à identifier les mesures transitoires adéquates, mais le rappel par la Cour de cette obligation aiderait assurément.

Quatrièmement, l'inscription des affaires à l'ordre des travaux est devenue stratégique, vu le nombre d'affaires, ce qui signifie que l'exécution de certains arrêts n'est pas examinée pendant de nombreux mois. Très peu d'États ont usé de leur possibilité de demander l'inscription d'affaires à l'ordre des travaux²⁴². En 2013, 114 affaires ou groupes d'affaires (en comptant les répétitions, 76 affaires en chiffres réels) concernant 27 des 31 pays ayant des affaires en surveillance soutenue ont été examinés sur 2013²⁴³. Selon notre étude exhaustive sur les trois dernières années, le Comité des Ministres s'est focalisé plus ou moins sur les mêmes affaires ou groupes d'affaires (126 affaires en chiffres réels de mars 2011 à décembre 2013, soit environ 65 % des affaires de référence pendantes). En cela, le mécanisme est perfectible et il faudrait songer à améliorer la procédure.

240 Document GT-GRD-E(2013)009, 11 juillet 2013, p. 13: "Financial penalties or punitive damages: as noted by the DH-GDR, it is important to distinguish two different concepts: (a) the use of financial penalties to force implementation of a judgment, by way of a punishment for non-implementation; and (b) specifically where the Court is required to spend its limited resources processing repetitive applications as the result of non-execution of a judgment, payments by the respondent State to cover the Court's costs of doing so".

241 CM(2013)100, para. 176, p. 88.

242 Cf. les ordres des travaux annotés des réunions DH.

243 7^e rapport, p. 64.

Cinquièmement, s'il est exceptionnel qu'un État refuse initialement catégoriquement d'exécuter un arrêt, par contre il existe des problèmes importants quant à la durée requise pour mettre en œuvre un certain nombre d'arrêts²⁴⁴. Des affaires datant de 1996/1998 sont encore partiellement inexécutées : le Comité des Ministres en fait-il assez ? Assurément la question doit être posée et, selon notre analyse, répondue par la négative. Il est évident que le Comité des Ministres n'utilise pas à bon escient sa « boîte à outils », y compris en cas d'urgence

244 C'est le même bilan dans le cadre interaméricain : A. A. Cançado Trindade, "Compliance with judgments and decisions – The experience of the Inter-American Court of Human Rights: a reassessment", Seminar of 31 January 2014, en ligne sur le site de la Cour. On peut citer notamment à titre illustratif (cette liste n'étant pas exhaustive) : record probablement avec une affaire qui a déjà la majorité de 18 ans... Affaires sur la durée des procédures judiciaires italiennes : 7^e rapport, p. 118 ; *İncal c. Turquie*, affaire pendante depuis 1998, soit 16 ans : 7^e rapport, p. 149 ; *Al-Nashif et autres*, et autres affaires similaires, affaires pendantes depuis 12 ans contre la Bulgarie (7^e rapport, p. 103), (absence de contrôle indépendant des mesures d'expulsion ou d'éloignement) ; *Demirel et autres affaires similaires c. Turquie*, affaire définitive depuis 2003, 7^e rapport, p. 100 : il a même fallu un nouvel arrêt Cahit Demirel en 2009 pour (re)lancer le processus d'exécution de Demirel ! *Corsacov c. Moldova*, affaire datant de 2006 (7^e rapport, p. 79) ; *Anghelescu Barbu n° 1 et autres affaires similaires de 2005 c. Roumanie*, affaire de 2005, 7^e rapport, p. 80 ; *Mikheyev et autres affaires similaires c. Fédération de Russie* datant de 2006, 7^e rapport, p. 82 ; *Bati et autres affaires similaires c. Turquie*, affaire datant de 2004, 7^e rapport, p. 82. Affaire *McKerr et autres affaires c. Royaume-Uni*, 7^e rapport, p. 84, affaires datant de 2001 concernant les opérations des forces de police en Irlande du Nord (question des mesures individuelles). Plusieurs résolutions intérimaires ont été prises, mais la dernière date de 2009. *Gongadze c. Ukraine*, arrêt datant de 2006, toujours blocage au niveau des mesures individuelles, 7^e rapport, p. 86, deux résolutions Intérimaires ayant été adoptées en 2008 & 2009 ! Affaire *Groni c. Albanie*, datant de 2008 et 2009, 7^e rapport, p. 88, qui relève depuis plus de trois ans l'absence de réaction de l'État sur les mesures attendues concernant les articles 5 et 34. *Kehayov et autres affaires similaires c. Bulgarie*, datant de 2005, concernant les conditions de détention, 7^e rapport, p. 89, mesures générales encore insuffisantes. Affaires relatives aux mauvaises conditions de détention en Ukraine : *Nevmerzhitsky, Yakovenko, Melnik, Logvinenko & Isayev c. Ukraine*, affaires datant de 2005, 2006, 2008, 2009 et 2011. Affaire *Yankov et autres affaires similaires c. Bulgarie* définitive depuis 2004, 7^e rapport, p. 98, qui vient d'être close en 2013 ! *Şarban et autres affaires similaires c. Moldova*, datant de 2006, sur les détentions illégales, 7^e rapport, p. 99, en dépit de coopérations importantes et du support du Fonds fiduciaire ; *Dumont et autres affaires similaires c. Belgique*, affaire datant de 2005, sur la durée des procédures judiciaires civiles et pénales, 7^e rapport, p. 112 ; *Fuchs et autres affaires similaires c. Pologne* datant de 2003 sur la durée des procédures judiciaires administratives, 7^e rapport, p. 119 (mission sur place en mars 2013 sans effet ; idem en matière civile et pénale : *Podbielski et autres affaires similaires*, et *Kudła et autres affaires similaires* (1998/2000), 7^e rapport, p. 119. Affaire *Oliveira Modesto et autres affaires similaires c. Portugal* de 2000, pourtant deux résolutions intérimaires (durée excessive de procédures judiciaires), 7^e rapport, p. 120.

entre deux réunions Droits de l'Homme²⁴⁵. Une série de mesures dissuasives ne semblent pas être utilisées²⁴⁶, comme par exemple « la faculté de mettre des délais dans ses décisions ou sur demande de l'État défendeur d'indiquer dans ces décisions les autorités concernées », ou refuser de permettre à l'État concerné d'occuper des positions de premier plan au niveau de l'Organisation (présider des groupes de rapporteurs, organiser un événement, user de son droit de vote, etc...). Tout aussi grave, le Comité des Ministres a pu clore des affaires prématurément²⁴⁷, contre l'avis du Service de l'exécution. Assurément, la présence d'agents du gouvernement, d'experts, mais aussi l'envoi de notes circonstanciées par les ONG, avocats et Instituts nationaux de droits de l'homme selon la règle 9 des règles adoptées au titre de l'article 46, permettent de recadrer le débat sur les enjeux juridiques. Le Comité des ministres donne ainsi l'impression d'un organe politique qui n'a pas toujours montré le courage nécessaire afin de mettre plus de pression sur les États récalcitrants. Certes, il adopte beaucoup plus de décisions sur un nombre croissant d'affaires depuis les trois dernières années²⁴⁸, mais les résolutions intérimaires sont devenues très rares²⁴⁹, et le recours en manquement n'a jamais été utilisé²⁵⁰.

Le temps de réformes supplémentaires est ainsi ouvert.

III. Quelles réformes à impulser ?

Avant d'émettre un certain nombre de recommandations, il nous semble qu'une mesure devrait être écartée, à savoir la suggestion consistant à instituer une nouvelle autorité, un représentant spécial pour l'exécution. En effet, nous

245 Affaires russes actuelles de déportation illégale des individus. GT-DH-PR A(2008)002, "Inventory of tools allowing the Committee to react, if necessary, to situations of slowness in execution", document prepared by the Department for the execution of judgments of the Court, para. 37.

246 7^e rapport, p. 178.

247 Comme pour les affaires *Gebremedhin c. France*, *A. c. Royaume-Uni* ; *Hirsi Jamaa c. Italie*. Cf. aussi A. Bultrini, Contribution au titre de l'appel du CDDH, p. 2 (en ligne sur le site du CDDH).

248 Cf. les ordres des travaux annotés et décisions adoptées des réunions Droits de l'Homme ; par exemple pour le dernier, CM/Del/Dec(2014)1193, 7 mars 2014.

249 5 en 2013, 2 en 2012, 4 en 2011, contre 14 en 2007, 14 en 2005, 7 en 2004. Cf. le graphique en annexe.

250 Par exemple, *Sejdić et Finci c. Bosnie-Herzégovine* (arrêt définitif le 22 décembre 2009, 7^e rapport, p. 160 : inéligibilité aux élections en raison de la non-appartenance à l'un des peuples constituants. Des discussions ont inclus le Secrétaire général du Conseil de l'Europe, des partenaires de l'Union européenne, le Commissaire du Conseil de l'Europe. Trois résolutions intérimaires (2011, 2012, 2013) ont été adoptées, des contacts au plus haut niveau, une audition du ministre de la Justice en septembre ont eu lieu, mais toujours pas de réforme électorale ! Il s'agit d'une claire violation de l'article 46 para. 1, comme précisé lors de la réunion de mars 2014 : CM/Del/Dec(2014)1193, 7 mars 2014, p. 26.

sommes profondément convaincues que, ce dont il est besoin, ce n'est point d'une nouvelle institution²⁵¹, mais d'un renforcement, d'un perfectionnement des mécanismes actuels, avec une meilleure synergie entre eux, car ces mécanismes ont fait leur preuve. L'apport d'une telle proposition serait en effet minime, voire nul, car au final le Comité des Ministres conserverait le pouvoir de prendre toutes les décisions dans les mêmes conditions. Le contrôle de l'exécution suppose une bonne maîtrise des 47 droits nationaux ; une personne ne peut à elle seule améliorer ce système si complexe.

En vue d'améliorer l'efficacité du mécanisme de contrôle de la CEDH, les propositions suivantes méritent selon nous d'être discutées. Certaines requièrent des actions à court terme, d'autres à moyen ou plus long terme.

Premièrement, il est devenu urgent d'aligner le régime des déclarations unilatérales sur celui des règlements amiables en modifiant l'article 39 de la CEDH²⁵², tout en prenant conscience qu'il s'agit d'une charge supplémentaire de travail pour le Service de l'exécution des arrêts ; cette grave lacune n'est en effet pas justifiée, et concerne de plus en plus d'affaires. Par contre, le contrôle du respect des mesures provisoires (parce qu'elles interviennent avant jugement) devrait être du seul ressort de la Cour elle-même²⁵³, qui pourra condamner l'État qui ne les a pas respectées, à une somme aggravée pour violation de la règle 39 et donc de l'article 34, comme la Cour l'a reconnu dans sa jurisprudence²⁵⁴.

251 D'ailleurs le CDDH s'est montré sceptique sur cette proposition (CDDH(2013)R79, Addendum 1, 29 novembre 2013, rapport du CDDH sur la question de savoir si des mesures plus efficaces sont nécessaires à l'égard des États qui ne donnent pas suite aux arrêts de la Cour dans un délai approprié. Cette proposition a été essentiellement soutenue par le Professeur Bultrini, document GT-GDR-E(2013)006, 16 mai 2013, "Proposals by A. Bultrini concerning supervision by the Committee of Ministers of execution of judgments". Selon cette proposition, ce représentant, serait nommé par le Comité des Ministres et toute décision reviendrait au Comité.

252 Voir en ce sens aussi D. Bychawska-Siniarska, "Unilateral Declarations : the need for greater control", EHRLR, 2012, 6, 673-678, citant *Sroka c. Pologne* (42801/07), 6 mars 2012, où suite à une violation de l'article 10 le requérant souhaitait obtenir une réouverture du procès, et *Rutecki c. Pologne* (18880/07), 9 novembre 2009 concernant les mauvaises conditions de détention des handicapés où des mesures générales seraient utiles.

253 Cf. l'intervention du juge Helen Keller à cette même conférence en ce sens.

254 A cet égard, il peut être utile de faire adopter par les États une législation spécifique imposant le respect des mesures provisoires enjointes par la CourEDH, comme ce fut le cas en Suède. H. Keller & C. Marti, "Interim Relief compared: use of interim measures by the UN Human Rights Committee and the European Court of Human Rights", ZaöRV (2013)325, 365, 369, même si le non-respect a également été signalé notamment au Président du Comité des Ministres par l'envoi d'un courrier. C'est également l'opinion de l'Assemblée parlementaire, document 13435, 28 février 2014, « Nécessité de s'occuper d'urgence des nouveaux cas de défaut de coopération avec la CourEDH ».

Deuxièmement, il est tout aussi urgent d'augmenter les ressources en personnel et en budget du Service de l'exécution des arrêts afin de lui permettre de mieux exercer ses deux grandes missions (conseiller le Comité des Ministres et assister les États), pour le recrutement de plus de juristes et d'assistants, pour plus d'actions sur le terrain et d'assistance aux États par des contacts bilatéraux plus intenses, et pour étendre son contrôle aux déclarations unilatérales. Cette recommandation reprend celle formulée par l'auditeur externe pour l'année 2012²⁵⁵. Avec actuellement 11 000 affaires pendantes et 24 juristes permanents, cela représente environ 400 affaires ou groupes d'affaires par personne à traiter, en ayant particulièrement à l'esprit le fait que les affaires de référence, en hausse, sont extrêmement chronophages. Les appels pour mise à disposition n'ont reçu que peu d'écho favorable et les capitales devraient donner le choix au Service de l'exécution pour des mises à disposition de magistrats ou d'experts indépendants, en évitant les personnes issues des ministères pour lesquelles des conflits d'intérêt se posent. De telles mises à disposition doivent ainsi rester ponctuelles et ne sont pas une solution au risque d'asphyxie du Service, les affaires pendantes ne devant pas baisser véritablement les prochaines années. Il faudrait donc accéder à la demande de création d'une troisième division juridique au sein du Service. Parallèlement à l'effort fait il y a quelques années pour renforcer le greffe de la Cour – puisque nous sommes dans un système de vases communicants, le même effort doit être opéré aujourd'hui pour ce Service.

Troisièmement, il est utile de clarifier et renforcer le mandat du Service de l'exécution des arrêts pour assurer sa plus grande autonomie, dont le mandat est défini actuellement de façon très vague. Les avis du Service de l'exécution doivent être transmis tels quels au Comité des Ministres. Les première et dernière recommandations formulées par l'auditeur externe vont dans le même sens²⁵⁶. La dernière recommandation de l'audit sur l'exercice 2012 avait trait à la demande de précision de la répartition des tâches entre le Service de l'exécution et le Secrétariat du Comité des Ministres²⁵⁷. Ce document fait mention d'une

255 CM(2013)100, Recommandation n° 11, p. 87 : « Le commissaire aux comptes recommande au Conseil de l'Europe : (a) de renforcer les ressources pérennes allouées au Service de l'exécution des arrêts en raison de la nature même des missions exercées (...) ».

256 CM(2013)100, p. 86 : « Le commissaire aux comptes recommande au Conseil de l'Europe de réviser le mandat du Service de l'exécution des arrêts afin d'en préciser : (a) le contenu, notamment son rôle de conseil au Comité des ministres et de soutien auprès des autorités nationales dans leurs efforts d'exécution ; et (b) les modalités opérationnelles lui permettant de remplir ces fonctions de manière efficace ».

257 CM(2013)100, p. 97, para. 238, en demandant de favoriser les « synergies entre ces deux entités ».

rencontre organisée en septembre 2012 par le cabinet du Secrétaire général entre ces deux secrétariats afin de renforcer les synergies. Il est également pertinent de confier à moyen terme la compétence au Service de l'exécution des arrêts de clore les affaires en contrôle standard pour lesquelles les mesures ont été adoptées, sans examen par le Comité des Ministres.

Quatrièmement, selon la logique nouvelle du New Public Management, dans les documents budgétaires, le Service de l'exécution et le Comité sont tenus par une politique du chiffre²⁵⁸. Il faut veiller à ce que les critères et indicateurs de performance ainsi retenus prennent en compte une dimension qualitative et pas seulement quantitative et ne soient pas contre-productifs : par exemple, l'exigence de passage accru en contrôle standard, n'est pas réaliste en l'état actuel des choses, même si elle doit rester un objectif à atteindre mais ne peut être que le résultat d'une mise en œuvre plus rapide et satisfaisante des arrêts par les États.

Cinquièmement, il faut effectivement développer les invitations aux ministres ou responsables étatiques (une demi-journée par réunion Droits de l'Homme pourrait y être consacrée) à venir s'expliquer, comme cela fut inauguré en 2013, avec la présence, si opportun, d'un représentant de l'Assemblée parlementaire (si une question implique le législateur), du Secrétariat du CPT, de la CEPEJ, de la Commission de Venise et/ou du Commissaire aux droits de l'homme selon les enjeux. De telles auditions ont pu se révéler efficaces dans le cadre interaméricain²⁵⁹. Plus globalement, les Délégués des Ministres doivent veiller à utiliser tous les outils à la disposition du Comité des Ministres pour que joue pleinement sa responsabilité collective. Il en va de la crédibilité du système. Il faut aussi veiller à renforcer les synergies du Comité des Ministres avec les autres acteurs, et avec les programmes de coopération du Conseil de l'Europe et de l'Union européenne.

Sixièmement, il est fondamental et légitime de renforcer la place des requérants, de leurs représentants et des ONG/Instituts nationaux des droits de l'homme qui sont les acteurs au cœur du processus que représente le droit de recours individuel. Ainsi, en cas de mesure individuelle urgente requise qui n'est pas adoptée, le Comité des Ministres devrait permettre au représentant du requérant d'être entendu (éventuellement par visio-conférence) aux réunions Droits de l'Homme. Il en irait de même pour les ONG eu égard aux mesures générales, ces interventions étant séparées des auditions des ministres. Le

258 Programme et budget 2012-2013 du Conseil de l'Europe, p. 24 ; programme et budget 2014-2015 du Conseil de l'Europe, p. 22. On note d'ailleurs une évolution entre ces deux programmes quant au choix des indicateurs.

259 J. Schneider, "Implementation of judgments: should supervision be unlinked from the general assembly of the Organisation of American States?" *Inter-American and European Human Rights Law Journal*, vol. 5 (1), pp. 197 et s., p. 205-206.

Service de l'exécution des arrêts soulevait en 2008 la question d'ouvrir plus les portes au requérant et à la société civile²⁶⁰. "In an ideal world, representatives of civil society would be present in the Committee of Ministers' meetings that consider the execution of judgments"²⁶¹. Ce sont les termes du Royaume-Uni. Dès lors que les ministres demandent à être invités et sont effectivement auditionnés, les représentants des requérants doivent disposer de cette même faculté, et en formuler la demande à l'occasion de communications envoyées sur le fondement de la règle 9 des règles de l'article 46.

Septièmement, plus de 80 % des affaires pendantes devant le Comité des Ministres émanent de huit États²⁶². Ce sont plus ou moins ces mêmes États qui ont un contentieux très important devant la Cour²⁶³. Aussi, des mesures spécifiques (d'assistance mais aussi des mesures incitatives) doivent être prises concernant ces quelques États. Je pose aussi la question de savoir si la part que doit prendre chaque État à financer la Cour et le Service de l'exécution des arrêts ne devrait pas prendre en compte certains critères objectifs : on pourrait suggérer une part déterminée par moitié par exemple selon les critères retenus pour le budget global du Conseil de l'Europe, et pour l'autre moitié, la part dépendrait, pour l'exécution des arrêts, du nombre d'affaires pendantes, du nombre d'affaires pendantes par rapport à la population²⁶⁴ et de la part d'affaires en contrôle soutenu devant le Comité des Ministres, ce qui suppose de réévaluer le

260 GT-DH-PR A(2008)002, "Inventory of tools allowing the Committee to react, if necessary, to situations of slowness in execution", document prepared by the Department for the Execution of Judgments of the Court, para. 39: "(...) it is legitimate to ask whether in the Committee's current practice the applicant is given a sufficient hearing. Likewise, as regards general measures, a reflection may be useful on the role that civil society could play in clarifying certain causes of slowness or deadlock in execution to the Committee". Egalement, para. 40 : "Could it be appropriate for the Committee, in situations of slowness, to solicit information from the applicant on his/her individual situation or clarification from civil society on the general situation put in question by the Court's judgment?"

261 Document GT-GRD-E(2013)009, 11 juillet 2013, p. 15.

262 Italie, Turquie, Russie, Ukraine, Pologne, Roumanie, Grèce, Bulgarie. Les principaux États ayant des affaires sous contrôle soutenu, sur la base du nombre d'affaires de références, sont au 31 décembre 2013 : Turquie (13 %), Fédération de Russie (11 %), Ukraine (8 %), Bulgarie (7 %), Roumanie (6 %), République De Moldova (5 %), Italie (5 %), Grèce, Pologne et Croatie (4 % chacun) : 7^e rapport annuel de 2013, mars 2014, p. 61.

263 Au 28 février 2014, les plus gros contributeurs sont dans l'ordre : Ukraine, Russie, Italie, Serbie, Turquie et Roumanie.

264 Pour 2013, si l'on prend en compte ce ratio, les États suivants sont parmi les plus gros contributeurs : Serbie, Croatie, Roumanie, République de Moldova, Ukraine, « ex-République Yougoslave de Macédoine », Slovénie, Monténégro, Monaco, Liechtenstein. A l'opposé, les États suivants ont des taux très faibles : Allemagne, Danemark, Irlande, France, Royaume-Uni, Espagne.

chiffre chaque année. Ce serait en quelque sorte une prime/un bonus à la mise en œuvre efficace de la subsidiarité, et un malus dans les cas inverses.

Huitièmement, il y a urgence à amender le recours en manquement, mort-né tel qu'il est actuellement réglementé. Indubitablement des mesures plus efficaces doivent être rendues possibles²⁶⁵. Nous proposons ainsi d'amender le paragraphe 5 de l'article 46 pour clarifier les conséquences du constat de manquement par la Cour, et le paragraphe 4 afin d'élargir et de faciliter/dédramatiser, comme nous l'avons écrit précédemment, l'usage du recours en manquement :

Le paragraphe 5 pourrait être modifié comme suit : « Si la Cour constate une violation du paragraphe 1, elle condamne l'État à payer une cotisation compensatoire au Fonds fiduciaire pour les droits de l'homme dont le versement sera contrôlé par le Comité des Ministres ». La somme est ainsi reversée dans le « pot commun » qui sert à financer des assistances techniques pour des programmes structurels aux États qui en ont le plus besoin conformément à la logique collective. Il faut ajouter la précision que « Pour les autres mesures individuelles et/ou générales qui restent à exécuter, le Comité des Ministres poursuit son contrôle ». La dernière phrase actuelle du paragraphe 5 devrait être biffée, car elle est ambiguë.

Concernant le paragraphe 4, la formulation nouvelle serait la suivante : « Lorsque le Comité des Ministres ou l'Assemblée parlementaire estime qu'une Haute Partie Contractante ne se conforme pas à un arrêt définitif de la Cour auquel elle est partie, chaque organe peut, par décision prise par un vote à la majorité des deux tiers, après avoir mis en demeure cette Partie, saisir la Cour afin de faire constater le manquement à exécuter un arrêt. La Cour peut être également saisie par un requérant²⁶⁶ qui justifie ne pas avoir obtenu l'exécution des mesures individuelles requises au titre d'un précédent arrêt dans un délai raisonnable compte tenu de l'urgence et de la gravité de la situation ».

En effet, si des efforts ont été opérés conformément au principe de subsidiarité ces dernières années visant à faire plus confiance à l'État, en contrepartie, les limites doivent être claires, et la ligne rouge à ne pas dépasser doit être sanctionnée, car le système, du fait de la pression actuelle, ne peut pas se permettre de survivre avec un tel arriéré. Il en va de sa légitimité et de sa survie.

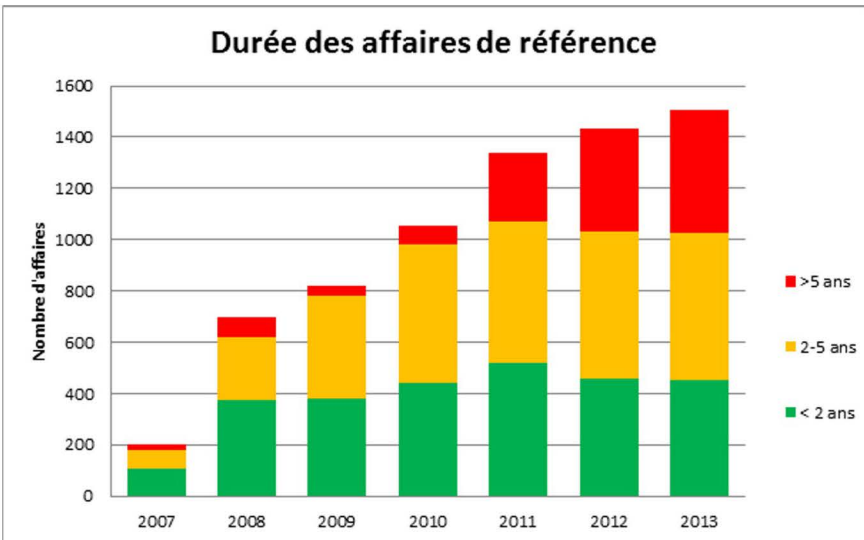
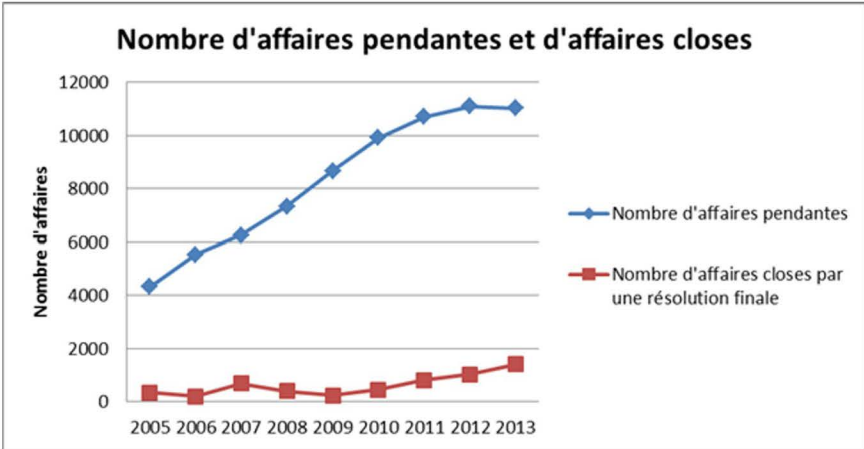
Enfin, si le système actuel ne devait pas faire preuve de sursaut (de la part des États et du Comité des Ministres) dans les trois prochaines années, il faudrait sérieusement repenser l'ensemble du processus de supervision et confier au Service de l'exécution (pour les affaires standard) et à une section spécialisée de

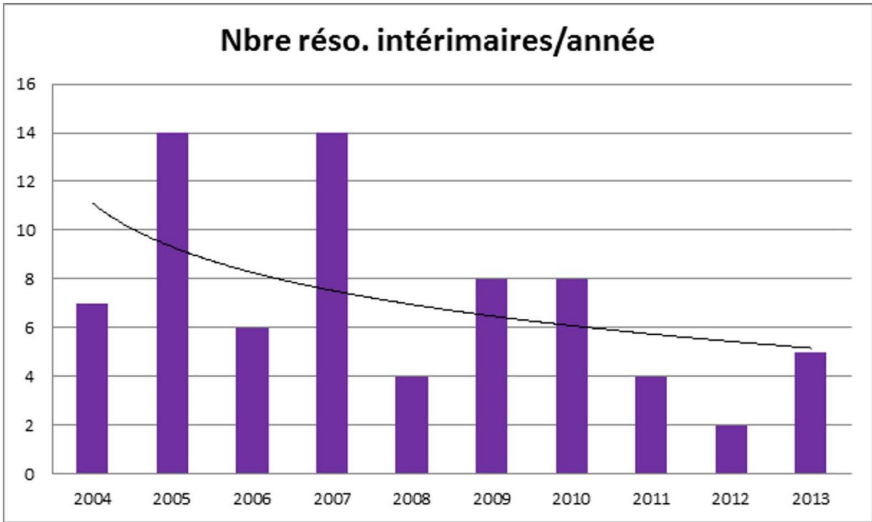
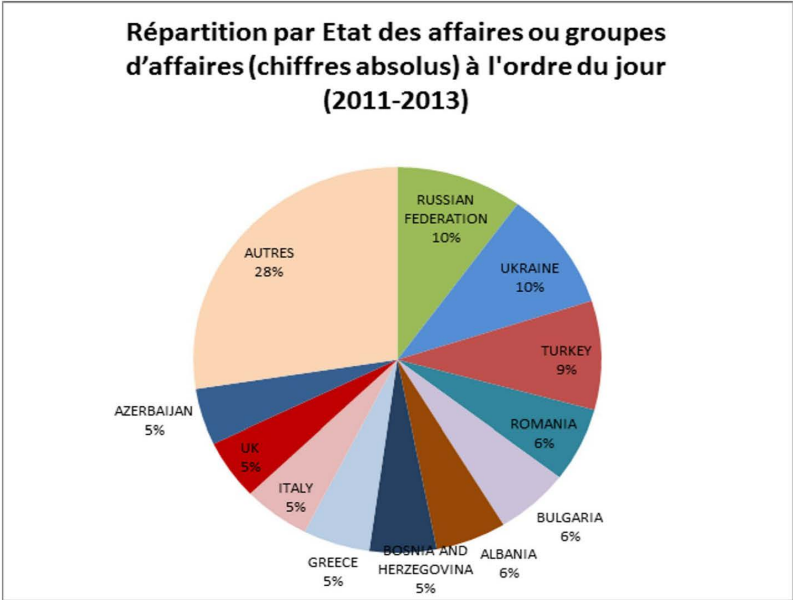
265 Cf. discours du Président Dean Spielmann à la Conférence d'Oslo regrettant que la Cour n'ait pas été saisie par le Comité des Ministres d'un recours en manquement.

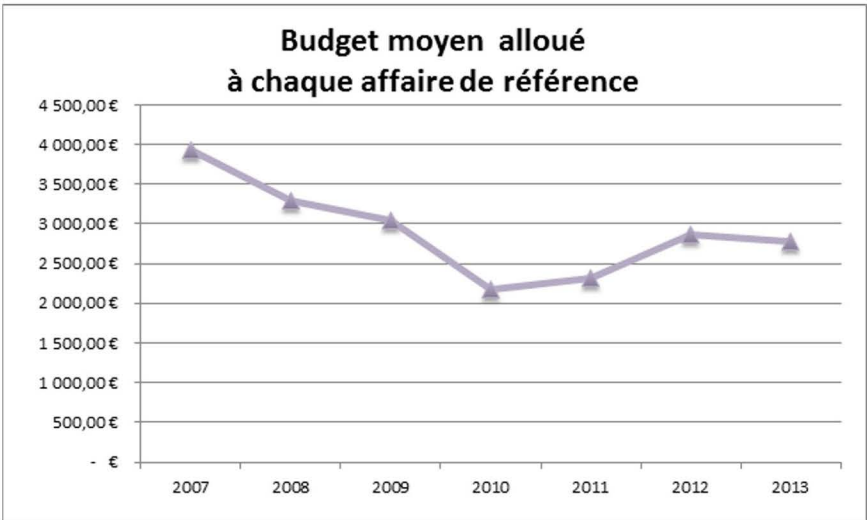
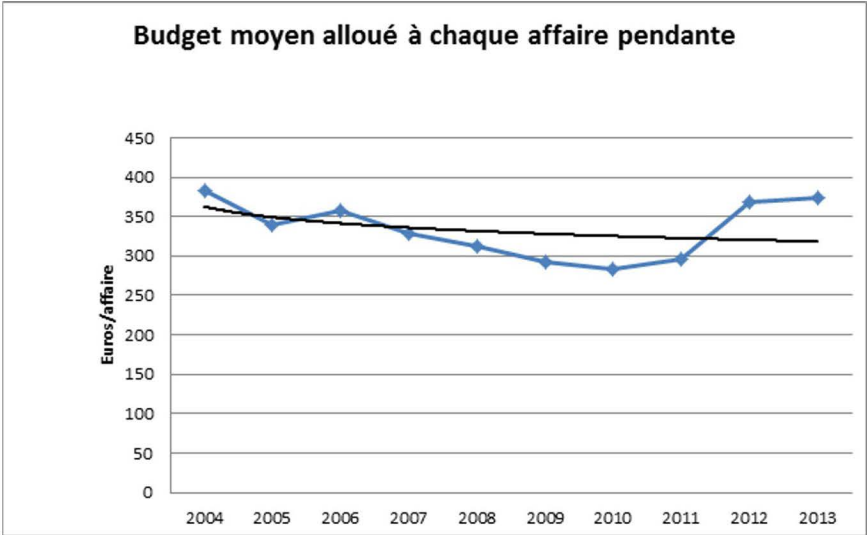
266 Également en faveur de cette faculté : Contribution of the National Council of Legal Advisers (Poland) to open call for information, disponible sur le site internet du CDDH.

la Cour (pour les autres affaires problématiques) le contrôle de l'exécution des arrêts. En effet, dès lors que le Comité privilégie une dimension politique à sa mission noble de contrôle des obligations juridiques dues par les États parties aux arrêts (une obligation internationale fondée sur le principe du respect de l'autorité de chose jugée et de l'engagement de la responsabilité internationale qui ne peut souffrir d'aucune exception), une judiciarisation du système sera la seule issue possible afin de garantir la protection effective des droits fondamentaux en Europe.

ANNEXE : STATISTIQUES SUPPLÉMENTAIRES
(par rapport à celles disponibles dans le 7^e rapport annuel) :







Comments/Observations

Carl-Henrik Ehrenkrona

Permanent Representative of Sweden to the Council of Europe/Représentant permanent de la Suède auprès du Conseil de l'Europe

I would like to express my thanks for having been given this opportunity to comment on this theme in our discussion.

Since I have worked as a practitioner with the European Convention for several years, both as Government Agent of Sweden and in the Steering Committee for Human Rights, together with, among others, Morten Ruud, I hope to be able to give a contribution which could be of some use for the future reform work.

Speaking here in my private capacity I could also say, since Morten Ruud touched upon this issue, that I belonged and still belong to those who were not convinced about the ideas resulting in the adoption of Protocol 11 merging the Commission and the Court to one permanent body. But that is history now.

Years passed from the entering into force of Protocols 11 and 14 to the two protocols adopted last year as a result of the Brighton Declaration; the reform work has been very focused on the work of the Court and the concerns raised about the ever increasing backlog of cases since the late 1980s up to recent years. I think president Spielmann would agree that today we should focus and concentrate more on other issues and let the Court do its work peacefully following the new instruments it now has at its disposal. This said I would add that I have great esteem for some of the ideas put forward by Professor Wildhaber here today as regards the future tasks of the Court.

As has been said, the loyal implementation or execution of judgments is crucial for the credibility of the whole Convention system. Without proper implementation of judgments, the system will serve no purpose but be more of an academic interest, without any political significance. This must of course be avoided. So I was a bit worried to hear today participants talking about the possibility of the non-compliance with judgments giving rise to political difficulties, and where a State considers that the Court has overstepped its discretion or set aside the principle of subsidiarity as a kind of civil disobedience. The concept of "civil disobedience" can most probably not be attributed to States under international law, and I am afraid that introducing such a principle would make us

enter a very slippery slope. I am more concerned about the future of the control machinery when it comes to supervising the execution of the judgments.

Since the Court has increased its capacity in delivering judgments, the workload of the Committee of Ministers in supervising the execution will also increase. There are at present about 11 000 cases pending on the table of the Committee of Ministers. Most of them are of course not so controversial or difficult, and most judgments are executed without major difficulties.

But I believe that in recent years we have seen a worrying development in that quite a number of judgments has not been implemented within the prescribed time limits. And the task of the Committee of Ministers in this field has become increasingly more difficult. We are talking here not about the payment of compensation which has been afforded to applicants in a judgment, but about what we call general measures to prevent similar violations from occurring in the future.

In my view there are three main reasons for not implementing judgments:

- ▶ The State lacks the resources necessary to finance the proper implementation of a judgment;
- ▶ The issues become so complex or a State so it does not really know how to handle the situation through legislation and/or by other means;
- ▶ There is no political will to implement a judgment, since the Court's findings are not really accepted in the State concerned, by its government and/or by its parliament.

It is of course the third reason for non-implementation that poses the real challenge for the Committee of Ministers. But the lack of financial resources might also constitute real difficulties.

In my view the Committee of Ministers does not really have the tools for dealing with serious cases of non-implementation. There are no real sanctions that can be used. Article 46 p. 4 of the Convention could be seen as such a tool, but it has so far never been applied. Since we are diplomats sitting in the Committee of Ministers there is a special sensitivity to expressing open criticism against a Member State which has not done its homework. Sometimes aspects not really relevant to the problem of execution affect the decision-making. And there are different views within the Committee of Ministers on how you look at the role of the Committee of Ministers in this area. Some see it as purely political while others underline the Committee of Ministers' legal responsibility under the Convention.

I would like to outline a few suggestions with a view to improving the situation, and which address some of the concerns expressed also by Professor Labmert-Abdelgawad here today.

- ▶ Could the routine examination of execution be formally entrusted with the Secretary General (i.e. the Secretariat) without the involvement of any other State than the respondent State(s), and the role of the Committee of Ministers be limited only to controversial cases in which there are problems with execution, following a referral to it from the Secretariat or a Member State?
- ▶ Should Article 46, para. 4, be made use of more frequently in cases of non-execution? Should the requirements of this article be alleviated to facilitate the use of the infringement procedure in cases of non-execution? In particular should the majority of requirements for making decisions in this field be eased?
- ▶ Should such decisions be supplemented with a possibility to impose financial sanctions in cases where there is a flagrant political unwillingness to implement a judgment, to be decided by the Court upon request from the Committee of Ministers?
- ▶ Should the Parliamentary Assembly be given a role in the supervision of the execution of judgments?
- ▶ Should there be a different procedure for the supervision of the execution of judgments in interstate cases as compared to ordinary cases?
- ▶ Should the Committee of Ministers be involved at all in the supervision of execution or should that task be entrusted with some other body? Could for instance a special execution department be set up within the Court to deal with this issue? Should such a (judicial) body be entrusted with the task of imposing financial sanctions as above?

These are some ideas which I think merit further consideration. Some of these are already under consideration; and some of them will probably meet rather fierce resistance at political level. Nevertheless, I think we have to think outside the box in order to address the challenge of how to create a more functional system for addressing the challenge with the supervision of judgments in order to make it more credible. As the system works today I do not think it is realistic at all to refer the so-called repetitive cases directly to the Committee of Ministers, as was suggested here today.

But as a first step I would appeal to Member States to take this task of the Committee of Ministers seriously. This is not always the case, and there are only about 12 States or so that actively participate in the supervisory work. The supervision is not only about engaging in the examination of judgments against your own country. The Convention system provides for a collective responsibility of the Convention States to secure that the judgments of the Court are implemented. However, when it comes to general measures it is not always so easy to

assess what measures are actually required in order to be able to conclude that the judgment has actually been executed. Sometimes perhaps the Committee requires more from the State than is actually required according to the judgment. The examination is carried out under Article 46 of the Convention and should not be widened to take into account also the States' general obligations under Article 1, which is a different matter. In order to be able to follow discussions of this kind and to read and interpret the judgments, you need to have some basic knowledge of the Convention and the Court's jurisprudence. That kind of experience you find in most States in the office of Government Agents in capitals. There is nothing preventing States from reinforcing the judicial competence of delegations, for instance, by letting their agents participate in meetings of the Committee of Ministers when dealing with the supervision of the execution of judgments, or involving them more closely in the work. Indeed there are States who do that. And that should be encouraged. This work is quite time consuming and competes with all other tasks on the table of the Committee Ministers.

Thank you.

Christos Giakoumopoulos

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Surveillance de l'exécution : vue de l'intérieur

La Conférence sur l'avenir de la Cour européenne des droits de l'homme qui s'est tenue à Brighton a consacré une part importante de ses travaux à l'exécution des arrêts de la Cour par les États parties à la Convention européenne des droits de l'homme (CEDH) et à la surveillance de cette exécution par le Comité des Ministres (para. 26 à 28 de la Déclaration de Brighton). Quant à l'avenir à plus long terme du système de la Convention et de la Cour, la Conférence a invité « *les États parties, y compris à travers le Comité des Ministres, à initier un examen exhaustif de la procédure de surveillance de l'exécution des arrêts de la Cour et du rôle du Comité des Ministres dans ce processus* » (para. 35.f) de la déclaration).

Avant d'aborder la question de l'exécution des arrêts de la Cour à plus long terme, certaines observations préliminaires s'imposent :

L'exécution, en tant que telle, d'un arrêt de la Cour et la surveillance de l'exécution sont deux choses différentes : l'exécution des arrêts concerne les États parties et la responsabilité de celle-ci leur incombe entièrement. Le Comité des

Ministres n'est compétent que pour surveiller cette exécution. Il peut, dans ce contexte, constater que l'exécution a bien eu lieu et clore l'examen d'une affaire ou constater qu'elle n'a pas encore eu lieu et poursuivre l'examen de l'affaire. Il ne peut pas lui-même prendre une quelconque mesure d'exécution ; tout au plus, il peut contribuer au processus national en encourageant la prise par l'État concerné des mesures appropriées. En outre, ce n'est pas parce que le Comité des Ministres se penche sur une affaire ou sur toutes les affaires pendantes devant lui, lors de ses réunions consacrées à l'exécution des arrêts (les réunions « CM-DH »), que l'exécution, en tant que telle, devient plus efficace.

On s'accorde depuis quelques années à dire qu'il y a un problème d'exécution dans le système de la CEDH et cette constatation est sans doute vraie. Encore faut-il la nuancer.

L'existence du problème de l'exécution serait démontrée, d'une part, par les nombreuses affaires répétitives qui sont portées devant la Cour et, d'autre part, par le chiffre – impressionnant, sans doute – des 11 018 affaires dont l'exécution est toujours surveillée par le Comité des Ministres, à la fin de 2013 (cf. 7^e rapport annuel du Comité des Ministres sur la surveillance des arrêts et décisions de la Cour). Si l'exécution lente ou défectueuse de certains arrêts est souvent à l'origine de requêtes répétitives, celle-ci n'est toutefois pas la cause exclusive des requêtes répétitives. La production d'affaires répétitives est en effet inhérente dans le système de la CEDH. Certes, si au lendemain d'un arrêt constatant une violation un nouveau système législatif compatible avec la CEDH est immédiatement mis en vigueur et, en même temps, un recours interne efficace est mis en place permettant de traiter le problème identifié, il n'y aurait pas d'affaires répétitives. Or on ne peut pas raisonnablement s'attendre à une telle réactivité de la part des États parties. L'adoption et la mise en vigueur d'une nouvelle législation ou la mise en place d'un nouveau recours prennent du temps et pendant ce temps des affaires répétitives s'accumulent. Les affaires répétitives sont un phénomène naturel dans le système de la CEDH, lié au caractère « *ex tunc* » des violations constatées par la Cour et au caractère déclaratoire de ses arrêts.

Par ailleurs, si le chiffre de 11 018 affaires pendantes devant le Comité met en évidence un vrai problème d'exécution, il ne révèle pas nécessairement un problème de surveillance. En effet, on pourrait s'inquiéter si, par une approche laxiste ou complaisante, le Comité des Ministres décidait de clore la surveillance de certaines affaires avant que toutes les mesures nécessaires ne soient prises. Manifestement, tel n'est pas le cas. Les incidents dans lesquels la Cour a dû constater à nouveau une violation de la CEDH, alors que le Comité avait considéré l'exécution suffisante, sont extrêmement rares. La surveillance de la part du Comité des Ministres est donc suffisamment scrupuleuse.

Il n'empêche que le 7^e rapport annuel du Comité des Ministres, tout comme le rapport du professeur Elisabeth Lambert-Abdelgawad et les commentaires de

l'ambassadeur Carl-Henrik Ehrenkrona lors de cette conférence, montrent bien qu'il y a certaines lacunes et des « poches » de véritable « résistance » à l'exécution, entraînant une accumulation d'affaires non entièrement exécutées et d'affaires répétitives devant la Cour, susceptibles de porter préjudice à l'efficacité du système de la CEDH.

Que peuvent faire, à long terme, la Cour et le Comité des Ministres face à cette situation ?

La Cour a déjà beaucoup fait :

Les arrêts pilotes, l'identification des problèmes structurels ou systémiques dans ses arrêts, les considérations relatives à l'article 46 de la CEDH et enfin l'indication – quoique prudente, voire exceptionnelle – de certaines options de mesures d'exécution dans le dispositif de l'arrêt ont grandement facilité le processus d'exécution et il faut s'en féliciter, même si ces approches n'ont pas toujours été aussi systématiques qu'on aurait pu le souhaiter.

A plus long terme, la Cour pourrait, au-delà de la constatation de la violation, préciser davantage les effets de ses arrêts. Il est désormais acquis que l'exécution pleine et entière d'un arrêt de la Cour pourrait exiger, au-delà du paiement de la satisfaction équitable éventuellement accordée, des mesures individuelles permettant d'effacer les conséquences de la violation pour la victime (« *restitutio in integrum* ») et des mesures générales susceptibles d'éviter que la violation se produise à nouveau dans le système juridique de l'État défendeur. Ces dernières s'analysent souvent en des réformes législatives (et parfois même constitutionnelles) ou en des changements de la jurisprudence nationale ou des pratiques judiciaires ou administratives. On parle d'ailleurs de plus en plus de l'« effet *erga omnes* » ou de l'autorité « *res interpretata* » des arrêts de Cour, étendant ainsi les conséquences de l'interprétation jurisprudentielle de la CEDH par la Cour à l'ensemble des États parties. Dans ces conditions, il semble envisageable que la Cour indique de manière systématique dans le dispositif de son arrêt non pas **quelles** mesures sont attendues mais **si** des mesures générales et/ou des mesures individuelles sont exigées pour l'exécution de celui-ci, en plus du versement de la satisfaction équitable. Ce faisant, la Cour ne déterminera pas, bien sûr, quelles doivent être ces mesures concrètes ; elle laisserait à l'État concerné le choix des moyens d'exécution, en conformité parfaite avec l'esprit de la CEDH et le principe de la subsidiarité. Mais ces indications de la Cour, incorporées dans l'arrêt, détermineront nécessairement les mécanismes et procédures d'exécution qui seront déclenchés au niveau national pour l'exécution et ceux-ci seront vraisemblablement différents selon qu'il s'agisse du paiement d'une indemnité, d'une réouverture d'une procédure nationale, ou d'une réforme législative.

Dans la même logique on pourrait envisager qu'à plus long terme la procédure devant la Cour elle-même soit adaptée aux conséquences prévisibles de l'éventuelle constatation d'une violation. Une affaire qui pose la question de savoir si

la législation en vigueur au moment des faits de la cause doit changer, ou une affaire qui exige la réouverture d'une procédure de divorce ou d'une enquête pénale (avec les problèmes que ceci peut poser au regard des droits des tiers, de la présomption d'innocence, du principe *non bis in idem*, de l'autorité de la chose jugée en droit interne etc.) peuvent bien exiger une approche procédurale différente de celle qui pourrait être suivie dans les affaires ou le seul effet prévisible de la constatation d'une violation serait le paiement d'une satisfaction équitable. Que l'objet du litige et les effets potentiellement générés par la décision judiciaire y relative déterminent la procédure judiciaire est en effet un phénomène fréquent et logique. Ce sont ces éléments qui déterminent la nature et la composition de la juridiction appelée à décider, les droits d'intervention éventuels, le processus de délibération et de prise de décision, les majorités nécessaires etc. Il ne serait donc pas inutile de réfléchir si une procédure particulière, ne devrait être suivie, lorsque par exemple la Cour est appelée à décider une question qui peut entraîner des changements importants et profonds pour le droit et la pratique d'un (ou même de plusieurs États), procédure qui serait différente de celle suivie dans des affaires où les effets de la violation se limiteraient au cas d'espèce. Dans une certaine mesure, les nouveautés introduites par le Protocole n° 14 à la CEDH quant aux formations de la Cour et le droit d'intervention du Commissaire aux droits de l'homme s'inscrivent dans cette logique d'adaptation. Néanmoins c'est surtout la complexité de la matière ou la nouveauté du problème posé qui ont jusqu'ici déterminé ces aspects procéduraux et non les effets potentiels de l'arrêt dans l'ordre juridique des États parties. Des propositions ont été faites au cours de cette conférence portant sur des majorités qualifiées pour la prise de certaines décisions ou la mise en place de procédures différentes pour la constatation de la violation en tant que telle et pour la détermination des effets de l'arrêt, y compris de la satisfaction équitable. Quel que soit le sort de ces propositions, ce qui me semble nécessaire d'en retenir c'est que le type de procédure qu'il conviendra de suivre lors d'un litige devant la Cour devra, à plus long terme, dépendre davantage des effets potentiels de l'arrêt que de la complexité de la matière abordée. Le processus de l'exécution par les États concernés et la surveillance de l'exécution par le Comité des Ministres bénéficieront grandement d'un tel développement, sans que leur marge d'appréciation respective n'en soit réduite.

Venons-en au Comité des Ministres :

La question a été posée de savoir si le Comité est capable de contribuer valablement à une meilleure exécution ou si, alternativement, il faudrait inventer une autre institution pour le remplacer ou l'assister.

La surveillance de l'exécution est, certes, un processus juridique mais elle s'inscrit aussi dans un contexte politique, économique et social. Certes, il y a des questions juridiques complexes, souvent dues au fait que la violation constatée

concerne des faits qui, au moment de l'exécution, sont déjà dépassés et des situations juridiques qui ont évolué depuis l'arrêt de la Cour. Mais ce n'est pas cela qui pose le plus de problèmes. Les États membres ont toutes les compétences pour faire l'analyse juridique complète d'un arrêt et en tirer les conséquences juridiques qui s'imposent et le Conseil de l'Europe, à travers le Service de l'exécution des arrêts, peut appuyer ces efforts. Ce qui pose problème, le plus souvent, c'est l'inertie ou la prudence politique excessive et ces questions dépassent le cadre exclusivement juridique d'une affaire.

Vu sous cet angle, le Comité des Ministres est nécessaire. Il exerce une pression des pairs et engage une action de levier pour renforcer la volonté politique faible ou défaillante, pour dépasser l'inertie et pour faire remonter la question de l'exécution dans la liste des priorités nationales. Le Comité est, de surcroît, capable de fournir une direction et une « guidance » en exploitant sa position dans le mécanisme de la CEDH en soutenant les choix opérés, encourageant la prise de certaines mesures, ou regrettant certains développements. Sa connaissance comparée des solutions apportées par d'autres États à des problèmes similaires mais aussi son rôle en tant qu'organe décisionnel du Conseil de l'Europe sont des atouts non négligeables pour favoriser une exécution rapide et complète. Si certains regrettent que le Comité n'ait pas encore utilisé tous les outils qu'il possède – et notamment le recours en manquement prévu à l'article 46.4 CEDH – le remplacer par un organe d'experts ou un organe juridictionnel n'ajouterait rien au processus.

Si le Comité des Ministres est l'organe approprié pour surveiller l'exécution, on peut encore se demander si les procédures qu'il suit sont adaptées à ses défis. Il a été en effet proposé que le Comité examine lors des réunions CM-DH toutes ou la plupart des 11 000 affaires pendantes ; cela ajouterait à la transparence du processus. Or, d'une part, tel est déjà le cas : d'un point de vue technique, toutes les affaires sont inscrites à l'ordre du jour du Comité et peuvent faire l'objet d'un examen détaillé à la demande de toute délégation d'un État membre. Avoir un débat lors des réunions CMDH sur ces 11 000 affaires n'est toutefois ni possible (à moins d'avoir peut-être une formation du Comité en réunion permanente et des moyens très largement supérieurs à ceux dont le Service d'exécution dispose aujourd'hui) ni même souhaitable. Que ferait en effet un CM-DH qui se réunirait plus souvent, voire en permanence, si ce n'est adopter plus de décisions et des résolutions intérimaires, avec l'effet potentiellement indésirable de noyer les quelques affaires à problème dans la masse des affaires traitées ? Ce serait un gaspillage d'énergie et de ressources, alors que le grand pourcentage d'affaires placées en procédure « standard » montre bien que, dans l'immense majorité des cas, les États membres exécutent les arrêts sans besoin d'une intervention musclée de la part du Comité « surveillant ». Il semble davantage efficace de miser sur le rôle politique et décisionnel du Comité pour passer d'une logique de

surveillance / sanction à une logique de surveillance / solution : le Comité pourrait en effet, d'une part, devenir plus décisif (par exemple en fixant des délais pour certaines actions attendues) et, d'autre part, demander au Secrétaire général de proposer à l'État concerné des projets calibrés et ciblés de coopération pouvant donner des résultats probants à court terme. La Déclaration de Brighton encourage d'ailleurs ce type d'action (para 9.g).

Si une telle approche peut améliorer à court terme l'efficacité du processus de surveillance, à plus long terme, la procédure devant le Comité des Ministres sera aussi appelée à s'adapter et peut-être même changer profondément. On pourrait en effet se demander s'il ne convient pas de renforcer la responsabilité primaire des États non seulement dans l'exécution, en tant que telle, mais aussi dans la surveillance de celle-ci. Une telle approche semble moins révolutionnaire aujourd'hui qu'il y a quelques années, surtout si l'on tient compte des appels à un renforcement de la subsidiarité dans les Déclarations successives d'Interlaken, d'Izmir et de Brighton ; des Protocoles n^{os} 15 et 16 à la CEDH ; du développement des capacités du Conseil de l'Europe de s'engager dans des projets de coopération ciblée en matière de droits de l'homme visant tout particulièrement l'exécution des arrêts ; et du développement des institutions nationales des droits de l'homme dans les États membres. On pourrait en effet envisager la mise en place d'un mécanisme au niveau national, inspiré de la Recommandation CM(2008)2, chargé de surveiller l'exécution des arrêts de la CEDH. Le fonctionnement et la composition de ce mécanisme restent à définir mais il semble essentiel que celui-ci assure, dans la mesure du possible, la participation non seulement du gouvernement et du parlement nationaux mais éventuellement aussi de la victime concernée, des ONG, des autorités indépendantes (notamment du médiateur/ombudsman) et de la société civile, reproduisant ainsi au niveau national une dynamique analogue à celle créée, au niveau international, au sein du CM, avec l'avantage d'être plus proche des réalités juridiques, politiques, sociales et économiques nationales. Ce mécanisme serait compétent pour examiner notamment

- ▶ si les conséquences que tire le gouvernement d'un arrêt de violation sont suffisantes, surtout en ce qui concerne les mesures générales ;
- ▶ si le choix des moyens préconisés par le gouvernement est adéquat ;
- ▶ si des mesures individuelles sont nécessaires au-delà du paiement de la satisfaction équitable ;
- ▶ si ces mesures individuelles sont prises à temps et leurs éventuels effets sur des tiers ;
- ▶ si la satisfaction équitable est dûment versée.

Le même mécanisme devrait se prononcer sur la nécessité ou non de prendre des mesures suite à un arrêt qui ne concerne pas l'État en question, assurant ainsi de l'effet « *erga omnes* » de l'interprétation de la CEDH. Le mécanisme pourrait s'adresser, le cas échéant, au Comité des Ministres pour recevoir assistance ou guidance et lui fera dans tous les cas rapport. Le Comité à son tour, se prononcera sur la clôture ou la poursuite de l'affaire ou éventuellement sur la nécessité de prendre des mesures supplémentaires, exerçant ainsi des fonctions à la fois subsidiaires et plus substantielles de surveillance : mieux informé des dimensions juridique, politique, économique et sociale de l'exécution, le Comité pourra pleinement jouer son rôle en tant qu'organe qui matérialise la garantie collective du respect des droits de l'homme dans l'espace du Conseil de l'Europe.

Role of National Parliaments/ Le rôle des parlements nationaux

The responsibility to respect and implement the judgments of the Court lies with the governments. It differs considerably if and to what extent national parliaments are involved, i.e. to supervise implementation. What can be done by the parliaments, and by other national institutions or bodies to encourage and facilitate swifter implementation?

Les gouvernements nationaux sont responsables de respecter et de mettre en œuvre les arrêts de la Cour. Les parlements nationaux sont inclus dans ce processus à un degré variable, entre autre dans la surveillance de la mise en œuvre. Comment les parlements et d'autres institutions nationales peuvent-ils encourager et faciliter une mise en œuvre plus rapide ?

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The question I will address is: what can be done by national parliaments to ensure fuller and swifter implementation of judgments of the European Court of Human Rights ("the Court")? I will explore this question in three parts. First I will examine the wider context within the Council of Europe that has seen increasing

emphasis – at least at a rhetorical level – on the role of national parliaments. Secondly, I will look at whether there is, in fact, any political impetus towards greater parliamentary engagement at national level. Finally, I will discuss some of the broader political debates that surround the issue of democratic engagement in the implementation process: why does it *matter* that parliaments are involved?

I will draw on research that I have conducted with my colleague Professor Philip Leach on the role of national parliaments, which focuses on five States: Ukraine, Romania, Germany, the Netherlands and the United Kingdom.²⁶⁷

I. The Council of Europe

The executive arm of the Council of Europe has placed ever more emphasis on the subsidiary nature of the Convention system from Interlaken onwards, culminating in Protocol 15. However, States' recognition of the parliamentary dimension of subsidiarity has been scant and belated: there was passing reference to it at Interlaken²⁶⁸ and none at Izmir. Brighton was the first high-level declaration to urge States to do what they need to ensure parliaments can play this oversight role,²⁶⁹ and to welcome the role of the Parliamentary Assembly in the supervision process.²⁷⁰ Furthermore, governmental engagement with the parliamentary dimension has not extended much beyond such declarations; for example, a recent report by the Steering Committee for Human Rights (CDDH) on what more could be done to speed up the implementation of Court judgments barely mentions the role of national parliaments.²⁷¹

The Parliamentary Assembly of the Council of Europe (PACE) – and especially its Committee on Legal Affairs and Human Rights – has assumed an important role in supervision and in galvanising parliamentarians at national level. Its approach has been both to “name and shame” recalcitrant States, and also to build the capacity of national parliaments. In the last two years, the Committee has held innovative open hearings at which national parliamentary delegations had to account for their States' record in the non-execution of judg-

267 See www.nuffieldfoundation.org/democratic-legitimacy-human-rights-implementation.

268 High Level Conference on the Future of the European Court of Human Rights, Interlaken Declaration,

19 February 2010, PP 6, p. 1.

269 High Level Conference on the Future of the European Court of Human Rights, Brighton Declaration, 20 April 2012, paras. 9(c)(ii) and 29(a)(iii).

270 *Ibid*, para. 29(e).

271 Steering Committee for Human Rights, *CDDH report on whether more effective measures are needed in respect of States that fail to implement Court judgments in a timely manner*, CDDH(2013)R79, Addendum I, 29 November 2013 at para. 36.

ments.²⁷² The current rapporteur on the implementation of judgments has proposed that the Parliamentary Assembly of the Council of Europe start to act preventatively by focusing on States with evident structural problems but where the number of cases pending before the Committee of Ministers has not yet reached unmanageable proportions.²⁷³

In recent years, the European Court of Human Rights has also taken on a greater role in recommending, or even ordering, specific measures to be taken by States, signalling a shift from its previously more limited, declaratory approach to redress. The most significant innovation is the “pilot judgment” procedure, allied to the greater use of the so-called “Article 46” judgments. The Court’s more expansive approach to the identification of remedies will increasingly require parliamentary engagement in the implementation of judgments. This is a welcome development in the sense that greater clarity or specificity in judgments makes it clearer exactly to national authorities what they need to do and less easy for them to prevaricate. But there may be political objections to perceptions of a more directive or even prescriptive approach being adopted by the Court – the judgments on prisoner voting rights in the United Kingdom being a prime example.²⁷⁴

Another facet of the Court’s role is the extent to which parliamentary scrutiny of questions arising in human rights cases is a factor in its adjudications – a factor which may, in turn, incentivise both executives and parliaments to ensure greater parliamentary engagement in human rights matters. Two United Kingdom judgments illustrate this perfectly: at one end the spectrum is the *Animal Defenders* judgment, in which the Grand Chamber upheld the United Kingdom’s ban on political advertising on television and radio as a necessary interference with the right to free expression, principally because of the exceptional level of rights-based scrutiny by parliament when it debated the justification for the ban.²⁷⁵ At the other end of the spectrum is the *Hirst* judgment on prisoner voting rights which found no evidence that the United Kingdom Parliament had ever sought to weigh the competing interests or to assess the proportionality

272 Committee on Legal Affairs and Human Rights, Implementation of Judgments of the European Court of Human Rights, Extracts from the Minutes of hearings, organised by the Committee, held in Strasbourg in April 2012, in June 2012, in October 2012 and in January 2013, AS/Jur (2013) 13, 28 March 2013.

273 Committee on Legal Affairs and Human Rights, Implementation of judgments of the European Court of Human Rights: preparation of the 8th report – Stock-taking and proposals by the Rapporteur (Rapporteur: Mr Klaas de Vries), AS/Jur (2013) 14, 10 May 2013 at para. 14.

274 *Hirst v. the United Kingdom* (No. 2) No. 74025/01 [GC], 6 October 2005; *Greens and MT v. the United Kingdom*, Nos. 60041/08 and 60054/08, 23 November 2010.

275 *Animal Defenders International v. the United Kingdom*, No. 48876/08[GC], 22 April 2013.

of a blanket ban on the right of a convicted prisoner to vote.²⁷⁶ These contrasting examples illustrate the potential impact at the domestic level of the Court demonstrating explicitly in its judgments that both the extent and quality of parliamentary scrutiny are factors that inform its application of the margin of appreciation. They vindicate the Court's position of attaching no special or automatic weight to parliamentary deliberation, but demonstrating in its judgments when it has examined parliamentary materials and found cause to defer to the reasoned arguments advanced therein.

To return to the post-judgment process of supervision, it is clear that the Committee of Ministers is coming under some pressure from both the Court and the Parliamentary Assembly of the Council of Europe with respect to its formerly exclusive, and still dominant, role in supervising execution. Given their traditional reticence to intrude upon the role of the Committee of Ministers – enshrined as it is in Article 46(2) of the Convention – the willingness of both the Court and the Parliamentary Assembly to exert more influence is indicative of their frustration with the problems of implementation. More positively, there is potential for co-ordination among the various arms of the Council of Europe in exerting pressure on States. However, there is little sign of this happening. Certainly, there is a need for them to act in concert rather than competition, given the institutional pressures throughout the system.

II. Developments at national level

National parliamentary involvement in the implementation of judgments is most usefully viewed in terms of functions and principles, rather than institutional structures. Different national systems will require different models – and structures do not always lead to action.

The Parliamentary Assembly of the Council of Europe recommends the establishment, where possible, of parliamentary committees or sub-committees whose status is permanent and whose remit is enshrined in law and clearly defined so as to permit broad oversight of human rights in the domestic context – including, as a core function, oversight of the executive's response to judgments.²⁷⁷ Crucially, such committees should be supported by permanent legal advisers who are politically-neutral and possess specific human rights competence. This ensures the creation of an “institutional memory” attached to a human rights committee, both in relation to substantive issues and working

²⁷⁶ *Hirst v. the United Kingdom* (No. 2) at para. 79.

²⁷⁷ Parliamentary Assembly of the Council of Europe, Committee on Legal Affairs and Human Rights, National Parliaments – guarantors of human rights in Europe, Doc. 12636, 6 June 2011 (Rapporteur Mr Christos Pourgourides).

methods. The committee should be independent of the executive and should act in concert with other national actors such as national human rights commissions or ombudsmen and civil society.

There is a spectrum of models that might achieve these functions. At one end is the specialised, standing committee with a remit covering human rights, like the Joint Committee on Human Rights in the United Kingdom; at the other is a fully mainstreamed or diffused model, as exists in the Dutch Parliament. More often there are hybrid models, in which committee/s with an express human rights mandate exist, but do not play the principal role in screening legislation for human rights compliance or scrutinising government responses to judgments (generally because this role is performed by a justice or legal affairs committee). I suggest that we should not view “specialisation” and “mainstreaming” as either/or options; in the United Kingdom, the aspiration of the JCHR – the epitome of the specialised model – is to spread human rights expertise throughout parliament so that other committees are also alerted to the human rights implications of the legislation or of relevant judgments. But this remains an aspiration – and the JCHR remains something of a human rights “silo” within the United Kingdom Parliament.

Parliament cannot perform its scrutiny role unless the executive informs it promptly and systematically about adverse judgments and the ministers’ proposed response. Several governments – for example the United Kingdom, Germany and the Netherlands, and, most recently Poland – report annually to parliament in this way. The Dutch and German Governments go further by reporting to parliament on judgments against other States that might have implications for the domestic legal order. Such reports are to be welcomed for their explicit recognition of the interpretive authority of the Court. However, these are the exceptions, and their authors acknowledge that – with rare exceptions like the *Salduz* judgment²⁷⁸ – it is a difficult task both to identify relevant judgments and to transpose them from one jurisdiction to another in terms of the action that may need to be taken.

It is difficult to identify tangible impacts resulting from these annual reports; parliaments do not tend to debate them, and therefore there is a risk that they become more ceremonial than substantive. However, reporting mechanisms may have longer-term impacts, such as encouraging both executives and parliaments to be more systematic in their approach and creating an accessible public account of a State’s implementation record. Certainly, it would be a retrograde step to abandon such mechanisms where they exist, since that would discourage moves to strengthen the accountability for human rights in newer Council of Europe States.

278 *Salduz v. Turkey*, No. 36391/02 [GC], 27 November 2008.

Retrospective reporting mechanisms do not allow parliaments to scrutinise or influence the executive response to adverse judgments in “real time”. However, this can potentially be achieved by means of the action plans (or action reports) that States are bound to submit within six months of a judgment. These are usually the first point in the implementation process at which a State must give a reasoned, public explanation for the action it proposes to take (or has taken) in response to a judgment. Routine provision of action plans to parliaments at the same time as they are submitted to the Committee of Ministers has considerable potential to strengthen implementation. Action plans can be revised at any time, meaning that the State can incorporate subsequent recommendations made by parliament or other national actors. Yet despite the increasing centrality of action plans to the process of supervision, as far as I know, only in the United Kingdom has the government agreed to share action plans with parliament at the earliest opportunity. This seems to be a missed opportunity and something that could be promoted at Council of Europe level.

III. Why does national parliamentary engagement matter?

I began by saying that national parliaments are increasingly recognised as critical to safeguarding the effective operation of the Convention system. The Committee of Ministers has declared this to be so, and the Parliamentary Assembly of the Council of Europe has used both carrot and stick to bring it about. Yet with a few exceptions, national parliamentary mechanisms are still embryonic and progress in this direction is, at best, incremental. The Parliamentary Assembly has identified just a handful of States with some element of good practice – most recently Poland, whose parliament has established a permanent sub-committee for the implementation of judgments.

Why does parliamentary involvement matter? Or perhaps we should first ask: *does it matter?*

During our research in Council of Europe States, we have encountered scepticism among government and civil society groups about both the merits and feasibility of getting parliaments more involved. Even where parliamentary human rights structures exist, they may not be viewed as a productive forum to advance implementation; for example in Ukraine and Romania, our interlocutors referred to corruption and the relative weakness of parliament vis-à-vis the executive, as well as a lack of expertise. In addition, human rights committees are invariably viewed as having politically-low profile and not among the “big hitters” in parliament.

Certainly, it cannot be assumed that parliamentarians will invariably urge the executive towards full or swift compliance with a judgment. Sometimes, the opposite is the case; for example, in Ukraine, the delay in implementing the

Ivanov pilot judgment²⁷⁹ – concerning the non-enforcement of domestic legal decisions – was partly due to the fact that MPs had a financial interest in maintaining the status quo.

So here we come up against the political nature of the implementation process. Given the discretion inherent in the supervision mechanism, once a judgment is open to political consideration, there may be calls for more *radical* implementation; more *restrictive* implementation – or, exceptionally, *non-implementation*.

In any national system, an intricate relationship exists between the executive, parliament and the judiciary. Judgments requiring complex reform may require action from all three and it may not always be immediately evident whether legislation is required or whether the violation can be remedied via the judicial route alone. Where judgments are politically contentious, the process of responding can be exceptionally challenging for the co-ordinating authority within a State.

I will conclude by suggesting two broad justifications why, despite these complications and the consequent temptation to keep judgments under the political radar, the role of national parliaments does matter.

The first is efficiency. It is the responsibility of all arms of the State – the executive, the courts and parliament – to prevent or remedy human rights violations at national level. Parliament clearly has a role in prevention, by scrutinising legislation for its compatibility with the Convention. It also has a role in remedial action, when the only remedy available is a change to the law. In these cases it is parliament's role to influence the direction and priority of legislation and to exercise effective oversight of the action – or inaction – of the executive.

The second justification relates to the normative value of parliamentary engagement. The Joint Committee on Human Rights in the United Kingdom argues that such involvement raises the political visibility of the issues at stake and provides an opportunity for public scrutiny of the justifications offered by ministers for their proposed response – or lack of response – to a judgment.²⁸⁰ This helps both to ensure a genuine democratic input into legal changes following Court judgments and to address the perception, where it exists, that changes in law or policy as a result of Court judgments lack democratic legitimacy.

As is well known, there have been sustained attacks by some UK politicians and judges, and sections of the press, on the legitimacy, competence and authority of the Court, including threats to consider withdrawal from the Conven-

279 *Nikolayevich Ivanov v. Ukraine*, No. 40450/04, 15 October 2009.

280 Joint Committee on Human Rights, Fifteenth Report of Session 2009-10, *Enhancing Parliament's role in relation to human rights judgments*, HL Paper 85, HC 455 (London, The Stationery Office, 2010) at paras. 15-17.

tion.²⁸¹ I have argued elsewhere that these critiques are frequently politically-motivated and ill-informed, and risk damaging the Convention system as a whole.²⁸² Such attacks are the exception, not the norm, within the Council of Europe. But, as demonstrated by responses to the recent consultation organised by the Council of Europe's Committee of experts on the reform of the Convention system, they are causing increasing disquiet in many quarters.²⁸³

It is here that both the practical and normative arguments for greater parliamentary engagement in human rights implementation coincide. Structures which embed parliamentary consideration of judgments (and promotion of Convention standards) may help to pre-empt opportunistic attacks on the Convention system by obliging parliamentarians to engage over time with reasoned, justificatory arguments and the often finely-balanced arguments as to the scope of rights and the necessity and proportionality of restrictions upon them. Such an approach would have the effect of building knowledge and understanding of the Convention system among both parliamentarians and the constituencies they represent.

Despite the concerns about the efficacy of parliamentary engagement, it is neither feasible nor desirable to seek to shield human rights questions from political debate. The imperative, rather, is to equip parliamentarians to hold governments to account for their action, or inaction, in responding to human rights judgments.

281 See, for example, "Grayling says European court of human rights has lost legitimacy", *The Guardian*, 30 December 2013.

282 A. Donald, J. Gordon and P. Leach, *The United Kingdom and the European Court of Human Rights*, Research Report 83 (Manchester, Equality and Human Rights Commission, 2012), Chapter 9.

283 See www.coe.int/t/dghl/standardsetting/cddh/reformechr/GT-GDR-F/Online%20table_all%20contributions.asp.

Comments/Observations

Liselot Egmond

Deputy Agent for the Government, Ministry of Foreign Affairs of the Netherlands/Co-Agent du Gouvernement, Ministère des Affaires étrangères des Pays-Bas

First of all, I would like to thank the organisers of this conference for inviting me to comment on the subject of the Role of national parliaments.

As has been said many times before, in order to ensure the long-term effectiveness of the Convention system, there is a need to strengthen and enhance the authority of Convention rights at national level, to improve the effectiveness of domestic remedies in States with major structural problems, and to ensure rapid and effective implementation of the judgments of the Court.

National parliaments have a particularly important role to play in the implementation process as parliaments are capable of reducing the amount of applications submitted to the Court, for two reasons: (1) parliaments are responsible for ascertaining that new draft legislation is in conformity with the Convention and (2) parliaments may hold governments to account for prompt and effective implementation of the Court's judgments, as well as to swiftly prepare the necessary legislative amendments.

The Parliamentary Assembly has various times called upon parliaments to establish appropriate internal structures to ensure rigorous and regular monitoring of States' compliance with international human rights obligations. The Parliamentary Assembly of the Council of Europe called in particular for the effective parliamentary oversight of judgments of the European Court of Human Rights.

Unfortunately, there are still various national parliaments that are not actively participating in the implementation process. The blame is not only on the parliaments, since for parliaments to effectively oversee the implementation of the Court's judgments, they need to receive information from the government concerning the implementation of the Court's judgments. In the Netherlands we started submitting annual reports to the parliament concerning judgments and decisions against the Netherlands in 1996, after a request from our parliament. At first the report was quite short. In later years, following requests of several of our parliamentarians, we added more information, such as the measures taken that year to implement adverse judgments and information and statistics on

pending cases, and also information on judgments against other Member States that might have an impact on Dutch legislation or policy. This year, we expanded the report to also include the “other” international human rights procedures – for example cases before the European Committee on Social Rights and the UN Treaty bodies.

A quick survey has shown that a number of Agents from the Council of Europe Member States send annual reports to their parliament. Some do not send annual reports to parliament, but they do answer written parliamentary questions. And from a few Agents I have heard that the only reason why they don’t submit an annual report is that they have such a small number of cases against their countries that such a report is not justified.

I think it is important to note that even if governments are not informing their parliaments about the implementation of adverse judgments, national parliaments are not powerless to effectively oversee implementation.

Indeed, there are other sources of information concerning the implementation of Court judgments. The Parliamentary Assembly’s Committee on Legal Affairs and Human Rights has submitted various reports on this issue.

Another possible source of information for parliaments was noted by visiting Professor Murray Hunt in his contribution sent in reply to the “open call” at the end of 2013. According to Hunt, a way of addressing the serious lack of direct information to national parliaments may also be to invite the judge of the Court to appear before a relevant committee of the national parliament. He emphasizes that the purpose of such a visit would explicitly not be to hold that judge accountable for his or her judicial performance in Strasbourg, but to inform the parliamentarians about the work of the Court and to give them an opportunity to engage directly with the work of the Court and the issues facing it. As far as I know, the Dutch Parliament has never invited the Dutch judge to appear before it, but former president Sir Nicholas Bratza did appear for this purpose before the United Kingdom’s Joint Committee on Human Rights in 2012.

In response to what Ms Donald has said about sending action plans to the parliament at the same time as they are submitted to the Committee of Ministers, I would note that in the Netherlands we are not used to doing that. I think that there are other ways to achieve the same goal, that is to seek the parliaments’ active participation in the possible ways of implementing adverse judgments. For example, in the Netherlands, we receive written parliamentary questions following almost every adverse judgment against the Netherlands. In the answers to those questions, the government often already outlines to Parliament in what way it intends to implement that judgment. So you could say that in such cases our parliament is actually informed about what individual and general measures the government intends to take **before** it informs the Committee of Ministers about it.

I don't think that there is one "best" way in which governments may keep their parliaments informed. But active participation of national parliaments in the implementation of the Court's judgments is a vital part of the effective implementation of international human rights norms at national level. In my view, national parliaments need to seek the necessary information themselves if their governments don't send reports to them. The parliaments could do this either by asking the governments to submit reports, like the Dutch Parliament did in 1996, or by looking at other sources.

One last remark, the Dutch annual report has changed considerably since we started submitting it, and we still consider it a work in progress and welcome any suggestions to improve it. However, it is sometimes difficult to say how much impact the annual report has on our parliament, since we have in the past received comments from parliamentarians to add more information to it, but there is not a regular debate following the submission of the report. The government will continue sending annual reports, in particular since we do not only submit it to Parliament, but we also send it to other relevant ministries and our national courts. In that way we find that the report contributes to the active participation of the government, parliament and also the judiciary in the implementation of judgments.

CLOSING THE CONFERENCE – SUMMING UP / CLÔTURE DE LA CONFÉRENCE – RÉSUMÉ

Geir Ulfstein

Professor, Co-director of PluriCourts, University of Oslo/Professeur, Co-directeur de PluriCourts, Université d'Oslo

This conference has confirmed several of the great achievements of the European Court for the protection of human rights. It has also shown that the Convention has been a “living instrument” and has adapted to changing circumstances.

The main focus of the conference has been on the challenges the Court currently faces, and will continue to face toward 2030, together with possible measures and paths to address those challenges. Three essential issues we have discussed are:

- ▶ The backlog of the Court’s caseload;
- ▶ The backlash in the form of eroding political support in some political quarters; and
- ▶ The accession of the EU to the Convention.

The ideas discussed have had different characters: from incremental changes to more radical thinking about the future character of the Court.

We have principally focused on the Court, but one of the main conclusions of the conference is that the reform process should not be limited to the Court, but include other organs of the Council of Europe, including the Committee of Ministers, and, not least, national implementation of the Convention rights.

Let me say a few words about the three main challenges facing the Court, and some of the measures we have discussed.

Backlog

There are at least three challenges facing the Court:

- ▶ to reduce its own backlog;

- ▶ but also to promote compliance by the States with the decisions made, including to implement structural reforms;
- ▶ and, finally, to reduce the number of well-founded complaints coming in, by strengthening domestic rule of law institutions.

The most important way to address the overload of cases is that Member States take effective measures in domestic legislation and practice. This is in conformity with the principle of subsidiarity: States have the principal responsibility to protect the rights covered by the ECHR.

But it is also a question about whether the Court can do more – it has already done a lot.

- ▶ First, it is important to determine what should be the responsibility of the Court as a judicial organ, and what should be left to the Committee of Ministers when it comes to the effective implementation of judgments;
- ▶ Second, the Court has to prioritise between cases and acknowledge that certain cases are more urgent and/or important than other cases, and possibly restrict the number of cases it shall deal with;
- ▶ Third, the Court must design its procedures so that they fit the relevant cases, i.e. more tailor-made procedures for the different kinds of cases, and perhaps for the different States whether they are repetitive, grave breaches of human rights, or raise general questions of interpretation; and
- ▶ Fourth, it is a question whether the Court should focus more on the countries with the most extensive violations of the ECHR – whether there is anything more or anything else that the Court can do.

Backlash

The Court – in accordance with the principle of subsidiarity – has to “balance” respect for national decision-making and democracy and the effective protection of ECHR rights. The principle of subsidiarity is reflected in the need to exhaust local remedies, the margin of appreciation as regards the interpretation and application of the substantive rights, and the design of remedies by the Court.

What should be the appropriate relationship between Member States and the Court?

The content and application of the margin of appreciation should continue to be the subject of legal and political focus.

The Court should only act if the States do not respect the ECHR. But, as already stated, this requires that the States effectively protect the rights of the

Convention. The Court is anyway important when it comes to developing the Convention through interpretation; adopting precedents about how the rights should be understood; and balancing between different rights. But for States that are or become more able and willing to protect the rights, the Court can be more deferential to national decision-making – and even be open to learning from the interpretation made by national organs.

The European Court of Human Rights is not – and will not be – a constitutional court, but it serves several functions comparable to such a court. However, this does not mean that it should not also serve individual justice. The challenge is to determine the “balance” between the different functions and to ensure that the Court perform the different functions better.

EU accession

EU accession to the ECHR means that the EU can be held to account by the European Court of Human Rights. But special issues arise from the fact that the EU is not a State, but an international organisation. This means, for example that the principle of subsidiarity is not applicable as such as a guide for the relationship to the Court. The standard of review to be applied by the European Court of Human Rights should be the subject of further reflection, assuming that the current “Bosphorus” principle should be discarded with the EU accession.

All three issues mentioned indicate that the Council of Europe – and academics – must continue to think hard about the relationship between the Court and those authorities it shall assist in the protection of human rights in European democracies.

The reform process should preserve the best and well-functioning parts of the European Court of Human Rights while adjusting to the changes required by new needs – and allow flexibility as regards changing circumstances.

Special emphasis should also be placed on the ways of adopting and implementing changes, either through the formal amendments, ministerial declarations, decisions by the Committee of Ministers, and/or the practice of the Court.

This conference has confirmed the importance of engaging States, the Council of Europe, including the Court, national parliamentarians and judges, civil society and scholars in discussing the future of the European Court of Human Rights. PluriCourts is very happy with the encounter between these different actors, and hopes to continue the “dialogue”.

Philippe Boillat

*Director General, Directorate General of Human Rights and Rule of Law,
Council of Europe / Directeur général, Direction générale Droits de l'Homme et
État de Droit, Conseil de l'Europe*

Ladies and Gentlemen, Dear Colleagues, Dear Friends,

It is always a daunting privilege to be invited to make the closing remarks or summary at the end of a conference. The exercise has been made that much more difficult by the very high quality of this conference and the substantial nature of presentations and debates.

I do not aspire to being exhaustive, all the more so as we are not required to adopt formal conclusions. In reality, it is more a matter of brainstorming, a breath of fresh air in the intergovernmental discussions which have already been ongoing for some time. Not all interventions were focused on the future of the European Court of human rights, the main topic of this Conference. We have heard proposals relating to the short, medium and even long-term future of the control system. Several have already been highlighted by Professor Ulfstein in his summary. The comprehensiveness of my observations is even less of a necessity as all presentations will be published in the coming weeks. This publication will be particularly useful for nourishing the ongoing debates within the CDDH and its subordinate bodies, following the invitation made at the Brighton conference and terms of reference given by the Committee of Ministers. Having made these preliminary remarks, I will now highlight those items I found most striking in the course of our work.

Beyond the longer-term future of the Court, participants in the Conference immediately appreciated, and rightly so, that it was a question of the future of the Convention control system as a whole. It is indeed appropriate to consider, prior to case-processing in Strasbourg, the primordial, principal role that States are required to play in the full implementation of the Convention at national level, in accordance with the principle of subsidiarity. Likewise, further to the Court's judgments, participants stressed the urgent need for their complete execution.

Adopting a more general approach, several participants highlighted, on the one hand, the symbiosis between the Court and the other bodies of the Council of Europe. Indeed, the Court does not operate in a vacuum. It is surrounded by a number of monitoring bodies. Moreover, the Convention system benefits, in the medium and long-term, from the results obtained through our programmes of co-operation with Member States.

On the other hand, many speakers highlighted the Court's indispensable dialogue with national courts, as well as the need for it to be attentive to them so as to ensure the best possible interaction. Enhanced dialogue that is indispensable, independently from the entry into force of Protocol No. 16, but which can go hand in hand with it.

The basics – if you'll pardon the expression – of the control system were recalled:

- ▶ substantive rights are untouchable;
- ▶ the Strasbourg Court does not replace national jurisdictions – its role is subsidiary to them;
- ▶ the right of individual application – which some believe should be reframed and remodelled – seems also to be established;
- ▶ to this one may add the judicial processing of applications, the compulsory jurisdiction of the Court, and the binding nature of its judgments;
- ▶ finally, no-one seems to challenge the obligation to execute judgments and the collective guarantee of the Parties to the Convention. There was one dissenting voice: the possibility of refusing to implement a judgment, justified as what has been called “civil disobedience”, a concept which remains unclear.

I would also like to point out a number of innovations that can be considered successes, albeit fragile ones, in improving the efficiency of the system. That said, should these innovations be regarded as temporary palliatives, or are they destined to be consolidated and confirmed in the long-term?

Turning firstly to the Court:

- ▶ certain pilot judgments have led to the implementation of effective remedies, thereby helpfully supporting the execution process. The Court should also rely on best practices of pilot judgments and their execution by Member States, whilst drawing lessons equally from less positive experiences.

Turning next to the Committee of Ministers:

- ▶ in its role supervising the execution of judgments, new working methods have been introduced to enable the prioritisation of cases: on the one hand, through the twin-track approach, and on the other, by developing synergies and implementing targeted co-operation activities to facilitate the execution of certain judgments which remain pending.

In reality, the question seemingly at the heart of these debates is the following: what profile should the Court have in the long-term? A Court limited to the protection of individual rights in the specific cases submitted to it? Or a truly con-

stitutional court, which would focus primarily on the interpretation of the Convention, with a scope going well beyond the instant case? It was recalled in this context that, according to the jurisprudence of the Court, the Convention is a constitutional instrument of European public order.

It has been noted that today, the Court finds itself in a system which could be described as mixed. For several speakers, these two roles must go hand in hand. Some participants highlighted the fact that the interpretative function of the Court has substantial preventive potential and should hence – in principle – limit the need to have recourse to its classical judicial function. Following this approach would imply going beyond the authority of the judgment on the facts (*res judicata*), to the authority of the legal interpretation (*res interpretata*), thus leading to an *erga omnes de facto* effect which would encourage States to apply in anticipation the Court's case-law, so as to avoid new findings of violations.

Are we then to revolutionise the current Court or to promote its evolution? Is it a question of leaving it as it is, or transforming it root and branch; perhaps even creating new bodies? Have we not been invited to think “outside the box”? In this context, a proposal was made which is in certain respects innovative: a body should be created within the Court, specialising in the processing of cases that could be decided on the basis of existing jurisprudence, along with a further body which would become a genuine constitutional court. In any event, it must be borne in mind that the ultimate aim would be to ensure the best possible protection for the rights and freedoms enshrined in the Convention.

A certain number of proposals and suggestions have been made to amplify the dual nature of the Court's role and to adapt the modalities of its engagement according to the matter before it:

A first proposal would involve introducing differentiated procedures according to the alleged violation. An accelerated procedure would lead to a swift decision on cases involving the most serious violations of the Convention, namely violations that could threaten democracy. Other applications would be processed according to a less rapid procedure.

A second proposal: confronted with the striking differences between States with regards to the volume of applications, the Court should further develop solutions that are “tailor made” solutions, but always on the basis of objective criteria, in order to take account of these differences.

Finally, a third proposal: when tension arises between, on the one hand, the judicial authority of the Court and, on the other, the democratic legitimacy of contested legislation, it would be appropriate to qualify majority votes within the Court in order to find a violation, for example by a two-thirds majority.

These are suggestions which raise interesting and sensitive questions, and have the great merit of opening up new avenues for reflection.

One thing seems certain: whatever reforms we may end up introducing, the independence of the Court and the quality of its decisions and judgments must in any case be guaranteed. In this context, the means of selecting judges assumes particular significance. We must also ensure that the Court's case-law is more persuasive, consistent, and respectful of States that take a minority, but defensible and justifiable position with respect to Convention obligations as compared to an emerging European consensus. Finally, the current situation clearly requires further development of avenues of communication between the Court and all other actors in the system, so as to achieve a better common understanding and reach efficient solutions for the underlying issues in Member States. The development of the third-party intervention mechanism in the Court's proceedings has been mentioned as one of the many possibilities to be explored to this end.

I turn now to the supervision of the execution of judgments of the Court. The key question is that of determining whether the Committee of Ministers is the most appropriate body for exercising this control.

Whilst original and innovative proposals have been put forward, most speakers answered this question in the affirmative. They highlighted, on the one hand, the peer-pressure exercised by the Committee of Ministers, and on the other, its comparative knowledge of the solutions implemented in analogous situations across the States Parties. Furthermore, before inclining towards the replacement of the Committee of Ministers by a body of experts or a judicial body – an issue to be examined with care – one should take into account the Committee of Ministers' capacity for understanding and evaluating the political, economic, and social realities which underlie a defending government's choice of means to be implemented to execute a judgment.

Is it then possible to improve the supervision of the execution of judgments? Several ideas were suggested:

A first concerns the Committee of Ministers' approach: is it too patient with dilatory or unwilling States? Does it have the means necessary for responding to such situations? Should it, for example, be given the possibility of imposing sanctions, in particular financial ones? The sums thus obtained could benefit the Human Rights Trust Fund. A system of bonuses and penalties could also be explored in this context.

More radically, should the procedure be changed so as to enable the Committee of Ministers to focus on the more controversial cases, the others being left to the Secretary General and the Department for the Execution of Judgments?

The tools available to the Committee of Ministers could certainly be improved, but it is clear that they are already numerous and allow it to exercise a progressive pressure, possibly leading to infringement proceedings, of which some regret the fact that they have not yet been employed. These proceedings,

however, raise fundamental questions with regards to their scope and above all their consequences, which should be carefully analysed. Their reformulation would, of course, require a protocol of amendment.

Another suggested improvement concerns the role of the Court and its interaction with the Committee of Ministers. Should the Court be more incisive in the execution process? Should the Court in the future be even more explicit as to the measures expected, or be instructed to specify the effects it intends to be given to its judgments? Would this tend towards unbalancing the Convention's control system? It appears that opinions differ on this point and that the issue merits specific attention.

Finally, the issue of reinforcing the principle of subsidiarity in the supervision of the execution of judgments was raised. In this regard, the idea was put forward of ensuring at national level an independent mechanism that would ensure that the government drew the necessary conclusions from the judgment and took the required measures without delay. Such a mechanism, acting as a national relay of the Committee of Ministers, could generate a new dynamic, by placing the execution of judgments at the centre of the debate between the key national actors, who are better informed and better equipped to act and react when necessary.

Whatever the future of this proposal, what is certain is that special attention must be given to the role of co-ordinator foreseen in Committee of Ministers' Recommendation (2008)², as well as to the increasing role that national parliaments must play in this area. In this regard, we took note of the best national practices that could usefully be disseminated. In addition, the Parliamentary Assembly of the Council of Europe could be called upon to play a more important role in the overall execution process.

We must pursue our reflection. It is a necessity and also the response to the mandate received by the CDDH from the Committee of Ministers with a view to securing the full implementation of the Convention and ensuring its long-term effectiveness.

A final observation: whatever may be the proposals that we ultimately put forward in the framework of our work on the long-term future of the Court and control system, their implementation will depend entirely on the political will of the Member States to ensure the effectiveness of the system.

It is on this condition that the Convention system will maintain its current quality and appeal, as well as its continent-wide integrity, thus avoiding any risk of "regionalisation", or even fragmentation, which would be fatal for it.

Ladies and Gentlemen, Dear Colleagues, Dear Friends,

Before closing this speech, please allow me warmly to thank the organisers of this conference, in particular PluriCourts, for their hospitality and warm welcome. My thanks extend also to the representatives of the Norwegian Ministry for Justice and my colleagues from the Directorate General who have actively participated in the preparation of this conference.

I would also like to thank all those working behind the scenes whose efforts are essential to the smooth running of such an event. My heartfelt thanks also to the speakers and participants for their active participation. And of course I would not forget to include our interpreters for their excellent work. Finally, I would like to thank you, Chairman, dear Morten, for your restrained, but oh, so effective chairmanship.

For those who will be leaving us this afternoon, I wish them a very good journey home. As to the members of the CDDH, I look forward to seeing them again at the imminent meeting.

APPENDIX/ANNEXE

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What are the future challenges to the enjoyment of the rights and freedoms guaranteed by the Convention?

How can the Court best fulfill its twin role of acting as a safeguard for individuals and authoritatively interpreting the Convention?

The Oslo Conference 7 and 8 April 2014, arranged by the MultiRights project and the PluriCourts centre of excellence at Oslo University, under the auspices of the Council of Europe, intends to inspire and facilitate this task, through a dialogue between scholars, judges and governmental experts.

Quels sont les défis futurs pour la jouissance des droits et libertés garantis par la Convention ?

Comment la Cour peut-elle s'acquitter au mieux de son double rôle de garante des droits des individus et d'interprétation authentique de la Convention ?

La Conférence d'Oslo des 7 et 8 avril 2014, organisée par le projet MultiRights et le centre d'excellence PluriCourts de l'Université d'Oslo, sous les auspices du Conseil de l'Europe, a eu pour vocation d'inspirer et de faciliter cette réflexion par un dialogue entre chercheurs, juges et experts gouvernementaux.

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