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Conference report
High-Level Expert Conference

2019 and Beyond: Taking Stock and Moving Forward from the Interlaken Process

Wednesday 22 to Friday 24 November 2017
Kokkedal Castle, Denmark

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Introduction

The aim of the Expert Conference was to explore how the promotion and protection of human rights under the Convention system can be developed and improved in both the short-term and long-term. Following the main tracks laid out in the Interlaken Process, the Conference addressed both the question of how to ensure a more sustainable functioning of the Convention system and ways of strengthening the authority of the system.

At the Conference, representatives of Council of Europe Member States met with representatives of the European Court of Human Rights (the Court), including the President and the Registrar, officials of the Council of Europe, national parliamentarians and judges, as well as leading legal experts from academia and civil society, to address both the immediate problems facing the Convention system and develop ideas for the long-term future.

Main issues discussed at the Conference include:

- To what extent have the objectives set forth in the Interlaken Process been accomplished?
- What measures are needed in order to reach our common vision of a Court that can focus its efforts on serious or widespread violations, systemic and structural problems, and important questions of interpretation and application of the Convention?
- How can we work to ensure strong and long-term support and ownership of the Convention system at a time when populations and decision-makers in a number of countries are increasingly questioning the authority of the Convention system?
- Should new avenues be explored in order to meet the challenges that the Convention system is likely to face in the future?

Context

The current Interlaken reform process, including the results of the High Level Conferences in Interlaken (2010), Izmir (2011), Brighton (2012) and Brussels (2015), has brought notable progress, inter alia through strengthening subsidiarity, improving the efficiency of the Court and addressing the need for more effective implementation. The Convention system, however, continues to face considerable challenges. The caseload remains a serious problem. The same applies to the failure to implement judgments, many of which deal with systemic and structural problems in the Member States. At the same time, the authority of the Court is being challenged from different perspectives.

The member states have agreed that by the end of 2019, the Committee of Ministers should decide on whether the measures already adopted within the existing reform agenda have proven to be sufficient to assure sustainable functioning of the control mechanism of the Convention or whether more profound changes are necessary.

Approaching this deadline, the Danish Chairmanship wishes to ensure that the measures already adopted are effectively implemented, including through the entering into force of Protocol 15, and initiate a renewed discussion on the future of the Convention system looking beyond the 2019 deadline.

A specific priority for the Danish Chairmanship is to discuss the need for an enhanced dialogue between the member states and the Court on their respective roles and on the development of the Convention system. National Human Rights Institutions and civil society should also be included in this dialogue.

Based on the Expert Conference, and subsequent dialogue with stakeholders, the Danish Chairmanship will hold a meeting of ministers in Denmark in April 2018 hosted by the Danish Minister of Justice. The purpose will be to adopt a political declaration that takes stock of the current reform process, proposes new measures to strengthen the Convention system, and provides guidance for further reform work.

The Conference Report

This report provides summaries of the speeches and discussions at the Kokkedal Conference. It has been elaborated by the organisers in consultation with the speakers. The report reflects the organisers understanding of the views expressed during discussions, which took place under the Chatham House Rules. Any mistakes, remain the responsibility of the authors.

Keynote speeches

- Opening speech by **Søren Pape Poulsen, the Danish Minister of Justice** (abstract):

Denmark is a strong supporter of the European Human Rights System and we have placed continued reform of the Convention system at the center of our Chairmanship to ensure that the Convention system remains relevant and effective in the future. Although the Interlaken Process has brought real progress the Convention system continues to face considerable challenges in regard to the caseload, the failure to implement judgments, many of which deal with serious systemic and structural problems, and to the authority of the Court – even in countries with strong support for human rights.

During the Interlaken Process, great emphasis has been put on the principle of subsidiarity. And for good reason. The shared responsibility between member states and the Court is vital if we are to future-proof the Convention system. It is key to fulfil the common vision of a more focused, effective and balanced system. It would be practically impossible for 47 judges to handle appeals from more than 800 million people and more importantly, this is not the idea of the Convention system. Member states are the primary providers and guarantors of the Convention rights and in doing so they enjoy a margin of appreciation. Subject, of course, to the supervision of the Strasbourg system.

There are two sides of the coin of subsidiarity. Subsidiarity affects not only the way in which the Court should conduct its review, leaving more room to national courts and parliaments. It also affects the way in which states are expected to honour their obligations. Only states who take human rights seriously can expect deference. The two sides of subsidiarity has been a recurring theme throughout the Interlaken

Process. It should also be so during the Kokkedal Conference. There is a need to discuss both the responsibility of member states and the role of the Court.

There is a third element too, which we maybe sometimes overlook. A system of shared responsibility can only work if there is an ongoing effective dialogue between the Court and the member states on their respective roles and on the development of the Convention. Criticism of the Convention system in countries like Denmark to a large degree stem from feelings of detachment from the Convention system: Populations and decision-makers feel they are not being involved and listened to. National politicians sometimes feel like bystanders to a system that was created by member states. Some of this criticism may be unfair but there is a point too. Through its judgments, the Court today has influence on policy areas of great importance to member states and to our populations. It has impact on our legal systems, on our societies, and on our lives. The Court generally does a good job. Yet, one cannot ignore the fact that sometimes when applying or interpreting the Convention, the Court may get it wrong. The Court is not a perfect, flawless institution and it would be unrealistic to expect that. It may fail to understand the full consequences of its decisions and it may miss important and valid arguments. This should not come as a surprise, nor be controversial, because the Court is dealing with hard cases, involving difficult dilemmas and a delicate balancing of rights and interests.

There is a fundamental need for an ongoing constructive dialogue between the Court and member states, including civil society, on how the Convention should be developed. No one has an interest in a Convention system that is perceived as 'out of sync' by member states and the broad public. Least of all the Court itself. Ensuring such dialogue is a shared responsibility too. We as member states must also look inwards. If we want the Court to listen more to us, we must also communicate more clearly with the Court and not just voice our concerns in local parliaments and the press. Enhanced dialogue must respect the Court's role and independence and take place through appropriate and well-functioning channels. The key value of the Strasbourg system lies in having an independent Court, whose authority is uncompromised, and whose decisions we accept as legally binding. Changing this is not up for discussion. We need to find ways to communicate better within the current framework.

The question is how to do this in the best possible way? This is something that has been discussed for some time in Denmark, in a debate involving both politicians, judges and experts, such as the Danish Institute of Human Rights and iCourts of the University of Copenhagen who both take part in the Conference. We hope the discussions here in Kokkedal will take us further on this important issue.

Our ambition is to adopt a political declaration that takes stock of the current reform process, proposes new measures to strengthen the Convention system and provides guidance for further reform work. The goal is to ensure a strong and effective European human rights system for future generations. With broad support and ownership. Europe deserves and needs that.

- Keynote speech by **Guido Raimondi, President of The European Court of Human Rights** (abstract):

The Interlaken process has fundamentally been constructive. Opening up a wide-ranging and long-lasting discussion on the protection of human rights carries with it "a risk of retrenchment". The process did not go that way. Instead, it was characterised by the express commitment of States to work towards a system that is stronger overall, which the speech of the Danish Minister of Justice confirmed.

Constructive does not mean "uncritical". On the contrary, all stakeholders have to direct their critical faculties to the Convention system, to its international components, and to the whole national dimension as well. The engagement needs to be a critical

one, the analysis thorough and rigorous, and the discussion a frank one. That is how progress is made.

The Interlaken process has been characterised by a spirit of inventiveness. The process of reform must have a practical, problem-solving side that needs to go hand in hand with more conceptual discussions of legal principles and the reckoning with political realities. We need to be problem-solvers too, making good use of the tools available and crafting new ones too.

The full effects of the reform outcomes of the Interlaken process, e.g. Protocols No. 15 and 16 will only be seen and felt in the longer-term, at some point beyond 2020. There have been other tangible and inventive outcomes as well. The Advisory Panel of Experts on Candidates for Election as Judge to the Court (the Panel) is an example. The Panel has been at work since 2011, and has been of great value in relation to the quality of judges. Enhancing the role and the positive influence of the Panel is an idea that finds much support among States. The role of the Panel in the institutional landscape of the Convention should be consolidated. There is also reason to praise the remarkable success of the single judge formation, which has proved to be a sort of rescue from a caseload that had reached dire proportions. The Superior Courts Network is another result. And it goes in the same direction as the guiding spirit of the Interlaken process towards increased subsidiarity.

Subsidiarity is the quintessence of the Interlaken process. Its essential meaning is given at the outset of the Interlaken Declaration: A shared responsibility between the States Parties and the Court to fully secure Convention rights and freedoms. As the Danish Minister said, subsidiarity is a two-sided coin. One side for the national level, and one for the international level.

Subsidiarity has been increasingly influential in the Convention case-law in recent years. A widely-read article of Judge Spano has described this as an “Age of subsidiarity”. And indeed, the notion has come to a new prominence in the Court’s reasoning. At a more general level, what has been seen in recent years is subsidiarity functioning as an organising principle for the European human rights system.

The reality of the system is that it is made up of States with varying qualities of domestic safeguards, and varying degrees of compliance with international human rights law. Subsidiarity is noticed more when the Court responds to States with a high level of human rights protection. When it is shown that the law-making process in a country involves due consideration of the impact of new legislation on Convention rights, as part of the democratic debate in Parliament. And when the domestic courts decide human rights cases on the basis of the principles and the methods well-established in the Court’s case-law. That integrating trend is present in many Convention States. And, thanks to the national dimension of the Interlaken process, it should continue to develop. That is the other side of the coin.

The reform process has fundamentally been constructive because its key notion, subsidiarity, denotes a consolidation of human rights, not a concession. It does not impose deference, but fosters the conditions that reduce the need for corrective action from the European level.

The Danish Minister’s comment that national politicians can feel relegated to the role of bystanders in the Convention system is a point one cannot overlook. The deepening of understanding among all actors of the concept of subsidiarity is the best answer to that.

One of the most salient features of the Interlaken process has been an intensification of the dialogue with national courts. In this, the Court has acted according to the letter and spirit of the Brussels Declaration, and this degree of engagement will be maintained.

There is indeed a case for more, and more effective, dialogue being at the same time mindful that such interaction has to take place within certain limits. Such concerns need not arise regarding the possible development of third party intervention, a familiar feature of proceedings in our Court. A broader legal debate should, in principle, be a better legal debate, which is desirable.

The development in the caseload of the Court has recently been out of the ordinary. From 80,000 cases in January, to 93,000 cases in June, to 84,000 cases in September, and dropping by another 20,000 cases since then. These unusual fluctuations are due to developments regarding Turkey and Ukraine, and again they reflect the Court's understanding that widespread and structural situations have to be resolved at the national level. In a word, this is subsidiarity in operation.
From Turkey, the Court received 32,000 applications deriving from the measures taken after the attempted coup last year. Most of these were declared inadmissible for non-exhaustion of the relevant domestic remedies, the key component of subsidiarity. However, the potential for a massive influx of cases later on is there. As for Ukraine, the Burmych case struck out more than 12,000 applications, the Court deciding that these are to be dealt with in the framework of the general measures of execution of the Ivanov pilot judgment.

The recent monthly figures showed a total of 64,000 applications pending which is the lowest number in 10 years. There are about 5.500 cases before a single judge. They will be decided within a short timeframe. The next group is 15,000 simple repetitive cases, for which the Court now has efficient working methods in place. Next come the high priority cases, currently numbering 24,000. Of these, there are some 17,000 cases about prison conditions, largely concerning Hungary and Romania. For both these countries, the pilot judgment procedure is currently operating, and remedial measures are in hand at the domestic level. The aim, of course, is to reach a situation permitting the repatriation of most of these applications. This means that the core challenge of the Court's backlog lies in the seven or eight thousand priority cases that are not due to systemic or structural problems, and the approximately 20,000 standard cases now pending at Chamber level.

The objective is to press ahead towards a situation in which the Court can devote sufficient time and resources to the most important cases, and to deliver those judgments that will have the most far-reaching impact. At the same time, the backlog needs to be treated. The Court's intention is to maximise exploitation of the procedural tools that Protocol No. 14 provided.

- Speech by **Frank Schürmann, Swiss Government Agent** (summary):

In his speech, Frank Schürmann looked back to the year 2009, when the idea of a High Level Conference in Switzerland took concrete shape. Originally, the idea had been to hold a colloquium bringing together the key players of the Convention system, but then President Costa made a strong plea to the Swiss Government for a 'Grande Conférence politique'. This was at a time when 120.000 applications were pending and 10 years after the Rome Conference. There was a strong feeling that "something has to be done", and that "it is now or never".

Reflecting on the Interlaken Process Schürmann noted that of the three key players involved in the reform process (Member States, the Court and the Committee of Ministers), it may be argued that the Court has made the most significant efforts. Unfortunately, at the level of the Member States, subsidiarity does not always work, as it should. In the Interlaken Declaration, already, focus had been on national implementation and ensuring the effective execution of judgments. The overall result after 7 years was quite sobering, which shows the limits of what the Committee of Ministers can do today, if a Member State does not abide by its commitments. When discussing "more profound changes" maybe focus should be on this point, although inherently difficult.

Schürmann noted that the Court still has to deal with too many cases. This was in spite of Protocol No. 14 and the impressing output of the single judge formation. There is also a challenge in assuring the coherence of the case law, especially when it comes to the application of open concepts, laid down in the Convention itself such as "necessary in a democratic society", or concepts developed in the case law, such as positive obligations.

Criticism directed at the Court is according to Schürmann still a reality and it does not only come from politicians who do not like foreign judges. We need to take that seriously. In 2014, the Swiss Government had presented a stock taking report to Parliament, 40 years after ratification of the Convention. The report was a clear commitment to the Convention, but also highlighted challenges. Two aspects were highlighted: The 'fourth instance'/subsidiarity and dynamic interpretation. These aspects also formed an important part of the Interlaken and subsequent Declarations, especially the Brighton Declaration. In regard to subsidiarity and fourth instance the discussions since Interlaken have left traces in the case law, e.g. in S.A.S v. France, Lautsi v. Italy and Ndidi v. the United Kingdom. The question is what exact criteria must be met on the domestic level for this approach to be applied, and how to assure its coherent application.

Regarding dynamic interpretation, Schürmann pointed out that two understandings of the concept needed to be distinguished from each other. In the first, the Court, when interpreting the Convention as a living instrument, has to find answers to new challenges – e.g. in the field of bioethics or IT. The second concerned ordinary litigation of civil, criminal or administrative nature, not containing new challenges, as such, but being examined by the Court in the light of human rights standards. It is this second kind of dynamic interpretation that most often received criticism. An example are social rights. The positive obligations deduced from Article 8, could potentially lead to a little "Social Charter". In light of the very high number of cases still coming to the Court, many of them raising serious human rights issues, it would, according to Schürmann, be wiser to consolidate the case law rather than to develop it further.

Schürmann finally noted that the Court already has done a lot in order to improve the management of cases. The potential for further optimisation, although the Court has proven to be quite inventive, would sooner or later be exhausted. Many of the improvements within the Court have gone hand in hand with a de facto weakening of the right of individual application. This right to individual complaint is considered to be the cornerstone of the system. In reality, the cornerstone is already perforated today. Some even speak of a fiction. Accepting this reality is the prerequisite for truly "thinking out of the box".

- Keynote speech by **Başak Çalı, Professor of International Law, Hertie School of Governance** (summary):

The focus of Başak Çalı was on four important themes in the Interlaken process. Two of these were ongoing concerns, which still needed continued attention, and the other two were new concerns.

The first theme was the non-implementation of judgments, which was a long-standing and ongoing concern within the Convention system and is intrinsically linked to the Court's rising case law of repetitive cases. A specific point of concern related to the "implementation crisis" is the fact that the number of states who are outright ignoring or arguing that they do not need to comply with all judgments of the Court, have considerably increased over the years.

A second theme is the need for collective and strong signals in support of the European human rights system and the authority of the Court. This was needed in 2010, and it is still needed today for the system to work for everyone. It is necessary

to explicitly promote the message that the system is for everyone, because this is fundamentally what has made the Convention system a success for so long.

The third theme was to develop a better understanding of the subsidiarity principle. The Court has responded to attitudinal changes towards the Convention system both through formal channels of communication with its political masters, as well as in writing and speeches by its individual judges. It has, however, also gone beyond these communicative gestures and shown increased willingness to respond to the attitudinal shifts in its national audience through its substantive case law, departing from what may be termed as its "standard jurisprudence". As Professor Mikael Rask Madsen's research has shown, the principle of subsidiarity is widely incorporated into the Court's case law. New procedural review standards have been developed that allow the Court to defer to national authorities due to the quality of decision-making at the national level. However, there is still a lack of a full and thorough understanding of whether the application of the principle is being done adequately. There is a need to move away from supporting subsidiarity as beneficial in and of itself, and rather to begin to consider when it is adequate and when it is not, and furthermore how the Court can apply the principle in a coherent way with the rest of the Convention principles.

The fourth and last focus theme related to bad faith attitudes towards the Convention, which was something quite new. There was a need to pay systematic and close attention to those countries who seek to undermine the Convention system or restrict rights for ulterior motives. In this context, it has been interesting to see the emerging novel bad faith jurisprudence under Article 18 of the Convention through which the Court is able to identify not only that a Convention right was violated, but also that it was violated in bad faith.

- Keynote speech by **Mikael Rask Madsen, Director of iCourts, University of Copenhagen** (abstract):

The 2012 Brighton Declaration sets out a series of objectives with regard to rebalancing European human rights. Most notably it increases subsidiarity in the system, as well as it advises that the court should be more focused and centre its activities on the most serious cases and thereby delivering fewer judgments.

Has the Court become more focused in terms of having reduced the backlog of pending cases following Brighton? Immediately following Brighton yes, but by 2016 the number of cases reached 80.000 and went above 93.000 in June 2017. The recent Burmych case helped reduce the number of pending cases below 60.000 cases. Furthermore, the return of a significant number of Turkish cases, arising from the failed July Coup, to exhaust local remedies also reduced the number of pending cases. What is more, both of these recent developments reflect new approaches to subsidiarity.

Using a "throughput" indicator (defined as the number of applications judged + dismissed cases + cases struck off the list divided with the input, defined as the number of new cases allocated to a judicial formation), simple mathematics suggests that the throughput should be higher than 100 pct. if the case backlog is to be reduced, meanwhile the system is taking care of new cases. That has only occurred in recent times – in the aftermath of the Brighton Declaration, yet the rate then dropped to 72 pct. In 2016, the court once again was accumulating a backlog of cases. Until the Burmych case and the return of the Turkish cases, the number of backlog cases were worrying. Prospectively, if the current backlog is some 65.000 cases and these should be reduced within a reasonable period, e.g. 3 years, the throughput should be roughly 130 pct.

The difficulty predicting the development of pending cases pertains to striking fluctuations in the number of pending cases following instability in a number of member states. Currently cases are particularly emanating primarily from the conflicts

in Eastern Ukraine, Ossetia, Karabakh, and Turkey resulting in both sudden peaks in the pending cases – and eventually backlog as it can take a long time to finalize those cases. The fact that the Court's main access point is individual complaints makes it in practice very difficult to create broader solutions in these regards. It is, therefore, relevant to consider other ways of dealing with conflict cases than what is currently the appraoch.

A way of measuring the Court's capacity – its 'horsepower' – is by assessing its average output over time in terms of the number of applications judged + dismissed cases + cases struck off the list. Using this measure, the average capacity before Brighton was 28.746 applications; the average capacity after Brighton was 70.645 applications. The court has in other words increased its capacity dramatically since Brighton primarily through the following actions: The dismissal of a significant number of cases in the immediate period following Brighton, the Burmych approach, and stricter admissibility criteria. Yet, in the years when those approaches were not used, the capacity was lower (2015-16). One should keep in mind that the option of striking off the list a massive number of cases à la Burmych might have been used up, leaving the court with a significant amount of cases in the lower priority categories, notably Cat. IV cases. Creating new capacity in those regards requires coming up with new ways of establishing for instance "leading cases". Or, alternatively, focusing on settling cases with member states.

How long do applications have to wait for being solved? There are currently many backlog cases dating back quite some years. A few countries stand out, having an average age of cases of more than 4 years. Other cases, many from the conflict over Ossetia, go back 8 years. Only few countries have many old cases, and the bulk of all old cases derive from those countries. If the Court is to reduce this backlog of seriously old cases, meanwhile performing its job with regard to new cases, it needs significant capacity. Of the total of cases older than 3 years, that is a total of some 11.165 cases, 8.624 are category IV cases – that is 77 pct. And 1.844 cases are Cat III - 16.5 pct. How can this backlog be cleared? The clear starting point is that Category IV cases have to be dealt with individually, unless they are re-classified as priority V, following a new leading judgment or pilot judgment. Or a negotiated solution can be found and they will be struck off the list.

Another way the case-situation has changed in recent years is by the development of a new subsidiarity doctrine. According to statistics, the use of margin of appreciation remains roughly the same in absolute numbers. Yet in relative terms, it is steadily increasing, particularly in two areas of law. First with regard to Art. 8 there is a significant increase in the evocation of margin of appreciation. Second, the development is linked to the emergence of a new standard for the exhaustion of domestic remedies. We are starting to see a new more stringent standard that emphasises the responsibility of the claimant to argue the case in such terms that the domestic judge has had a real chance to consider the Convention issues arising from it. To exhaust domestic remedies in the new landscape of subsidiarity, the claimant and the judge need to conduct a more thorough examination of the relevant Convention case law.

- Keynote speech by **Jonas Christoffersen, Director of the Danish Institute of Human Rights** (abstract):

Democratic debate on human rights is necessary. The domestic debate varies significantly from country to country, and from time to time. The Brighton Declaration welcomed and encouraged open dialogues, and the key question is how to improve the dialogue.

A European dialogue on human rights makes sense only if the European Court of Human Rights is willing and able to engage. The Court has always engaged in dialogue as reflected in the doctrine of direct (Wemhoff) and subsidiary review

(Belgian Linguistic case). The Court refined its subsidiary review around 2003 and today the most important question revolves around the complex interaction between normative standard, domestic procedures and democratic legitimation.

Integrated review of procedure and substance revolves around the two limbs of subsidiarity: it encourages states to implement the Convention just as it encourages the Court to exercise a measure of restraint. The integrated review of procedure and substance can be seen in many areas of case-law. The development is reflected in the Court's view, that if domestic courts exercised a careful balancing act, then strong, serious reasons are required to depart (von Hannover/Ndidi). The role of the domestic policy-maker should be given special weight in matters of general policy (Hatton/Maurice/Draon/Animal Defenders/SAS). The Court has attached special weight to the absence of a good judicial and/or political process (Hirst). The Court's review is not purely procedural, and the Court has been consistent in upholding a substantive caveat (e.g. Bosphorus).

The Court is still required to develop and refine international standards, but new ways should be found by the Court to be more tactical and diplomatic, since the Court's authority is being challenged when it changes and develops case-law. If new standards are developed by a chamber, it allows for a measure of debate before the development is accepted or rejected by a Grand Chamber (Hatton/Lautsi/Al-Khawaja). If this is not possible, other tools should be explored to ensure sufficient involvement and democratic debate. Otherwise, the risk of losing democratic support may be too high. New standards could also be developed incrementally e.g. by adopting a general interpretation and indicate to the responding state that the area should be kept under review (Zdanoka).

- Keynote speech by **Ingo Venzke, Director, Amsterdam Center for International Law, University of Amsterdam** (abstract):

The public authority of international courts such as the European Court of Human Rights requires democratic justification, which in turn draws attention to modes of participation in the Court's practice. Just like the Convention is a dynamic, living instrument, the Court's democratic justification must likewise be dynamic and cannot be confined to a few points in time.

Democratic constitutional states remain the primary locus for democratic decision-making and for the justification of international public authority, such as that exercised by the Court. With regard to the Court, strands of democratic legitimacy that connect to member states run via (1) the fact that states ratified the Convention and subsequent Protocols; (2) their consent to the jurisdiction of the Court and its procedure; (3) the role they play in the nomination and election of judges. Convention states thus contribute to justifying the Court (ad 3) personally, (ad 2) institutionally and (ad 1) substantively.

But these strands of democratic legitimacy do not settle questions about the democratic justification of the Court's public authority. The justification that flows from states' acts of ratification is curtailed by the fact that the Convention evolves in the practice of the Court. Large parts of the debates about the Court's legitimacy at present are precisely about the supposed gap between states' one-time ratification and later developments in the law that seem to be largely withdrawn from their reach. Increased possibilities of participation and politicisation are therefore needed to complement the judicial development of the Convention.

A procedural approach to the margin of appreciation would essentially probe the democratic quality of domestic decision-making and adjust the margin of appreciation accordingly. Plus, the stronger the European consensus on a certain issue, the stronger would be the burden on domestic democratic processes to possibly stem

themselves against that consensus. These are ways of strengthening the Court's interaction with domestic political processes.

Neither other member states nor a general public are however part of that interaction. As a 'constitutional instrument of European public order', the Convention belongs to a broader community of which the Court is the judicial organ. In addition to domestic political processes in any single member state, the Convention's interpretation and application therefore needs to be embedded within international, European political processes.

Publicness and transparency are the primary conditions for any strategy of increased participation or politicisation. The Court's procedure and practice already cater to such demands. But the additional potential may be considered of presenting draft judicial decisions for comments in order to counter surprise and to point to consequences that judges would not otherwise have anticipated.

Through third party interventions and amicus curiae, the Court's statute permits 'every person concerned' not only to participate in oral hearings, but – with the President's permission – also to submit written comments. In comparison with other international courts, the Court does exceptionally well in summarising those comments and in engaging with them in its decisions. It is noteworthy, however, that states rarely intervene in proceedings. This reluctance also contrasts with the practice in other fora, such as the World Trade Organization (WTO) where the EU and the US intervene in almost every single case in full recognition of the law-making dimension of international adjudication. NGOs intervene more often before the Court; and they also have the potential to introduce the voice of the general public. That could also be the role of the Commissioner for Human Rights. The long-standing proposal of introducing a General Advocate could be reassessed in this context.

Several dimensions of a judicial remedy contribute to the democratic justification of a court's public authority: It ties judges closer to the law that they are bound to apply; it corrects wrong decisions; and it can promote the consistency of adjudication, which in turn severs the goal of equality. With a view to increased participation and politicisation, the existence of a legal remedy allows for responsiveness, and it provides a focal point for third states and for a critical public.

In relation to the political embedding of judicial practice, it is noteworthy that neither the Committee of Ministers, nor the Parliamentary Assembly, nor any other body, provides a forum for the discussion of developments in the Court's jurisprudence. It is clear that the Committee's task of supervising the execution of the Court's final judgment is precisely a matter of implementation and not of discussing the judgments as such. By comparison, the WTO Dispute Settlement Body (DSB) regularly discusses the reports of the panel and Appellate Body. Adjudicators in the WTO then can (and do) react to those discussions. If there were a European forum for the discussion of the Court's case law – for discussing how the norms of the Convention should be interpreted – it would provide a repository of reasons on which judges would be free to draw, without putting into doubt judges' independence or their monopoly over the final decision. Such a forum would also provide the possibility of norm-contestation that could work against the contestation of the Convention, the Court, or the System per se.

A dynamic, living Convention at the heart of the Court's practice requires a dynamic, democratic justification of the Court's authority. Emphasis should thus be placed on the interaction between the Court and political processes at the domestic level and – even more so – at the European level. The Court's judicial practice should be embedded within political processes.

- Keynote speech by **Robert Spano, Judge and President of Section, European Court of Human Rights** (abstract):

The intervention was based on two inter-related claims. Firstly, that the Court for the better part of its history to date has been engaged in 'embedding' Convention principles into national systems. Secondly, that this 'embedding phase' has now, in general, shifted towards a new historical phase in which the Court has begun to realign its project away from its decades-long embedding work towards the domestic enforcement of already settled principles and the domestic empowerment of Convention stakeholders at national level, the 'procedural enforcement phase'.

This two-dimensional historical trajectory is both descriptively correct and normatively justified; first, as a matter of empirical fact, the rendition of Convention history did in fact take place, and, secondly, and more importantly, this trajectory is to be lauded from a normative point of principle for the future of the Convention system, its sustained legitimacy and continued effectiveness.

The embedding of Convention principles by the Court has been a functional process aimed at progressively creating the necessary foundations for the realisation of the Convention´s overarching institutional structure manifested in the principle of subsidiarity, so as to trigger the full engagement of the member states with their obligations under Article 1 of the Convention as the primary guarantors of human rights and freedoms. The concept of ´embeddedness´ used here is therefore not a description of the end result of this process, i.e. the actual and full domestication of Convention principles, but rather a term used to describe the function or purpose of the process itself as it has developed historically in the last forty years or so.

The perceived legitimacy problem of the Convention system comprises two components.

The first component postulates that the embedding phase, although necessary for the creation of the edifice of human rights forming the basis of the Convention system, has been, as some have argued, an inherently top-down, juridical project. The argument suggests that placing an international court at the vanguard of formulating and giving life to legal norms impacting the day to day life of democratic societies across Europe may have given rise to a 'crisis of legalism'. Convention rights have thus, as the argument proceeds, been developed through language formulated by international jurists and judges and above national democratic political life as constituting pre-political or supra-political legal norms in the sense of being created in isolation from the political community to which they belong.

The second component is grounded in the doctrine of original expectations of the member states. The argument goes that the Court's interpretations have lost their rational connection to the expected original meaning held by the ratifying States, perceived as a sovereignty or a separation of powers problem. This component also manifests itself in the rejection of the idea that whilst it is accepted that the Court has an important role in giving life to the rights protected by the Convention, it is not its role to apply strict scrutiny to the domestic assessment of the necessity of their restriction. In other words, it is claimed that at the stage of balancing individual rights and the public interest and employing the principle of proportionality, the legal aspect of the assessment has in the strict sense ceased, and solely political and policy factors come into play, in the adjudication of which the Court is not in a more knowledgeable position than the domestic decision-maker.

There is a need for some conceptual clarifications when accounting for the procedural enforcement phase. In contrast to the Court engaging in strategically attempting to embed Convention principles domestically, and thus invariably having to strictly review domestic decision-making and to substitute its judgment for the national authorities, the current era, the procedural enforcement phase, manifests itself in the

Court taking a more framework oriented or abstract role when reviewing domestic decision-making. This may be termed process-based review.

There seems to be empirical grounding for the conclusion that such development has in fact taken place, although the complex case-law of an international court like the Court can never maintain a fully linear trajectory. More importantly the development may also seem as normatively justified on both institutional and substantive grounds.

Regarding the latter claim, one can take the view that criticism of the Convention system is a natural consequence of an international system for the collective enforcement of human rights, and that the Court and the Convention system should not be concerned by, nor react to, such criticism. That is not the right approach to take. Every international system of law, as a system that by definition is not embedded politically and historically in a national constitutional framework, is from time to time confronted with the threat of losing its effectiveness at national level if a critical mass of distrust and a perceived lack of legitimacy pervades its work. The historical trajectory of the Convention system has, by its very nature and current status, thus called for a shift of focus to secure the increased effectiveness of human rights protections at national level, by moving from the embedding of Convention principles towards a bottom-up strategy empowering national rights-holders and decision-makers to take the lead in enforcing and guaranteeing human rights.

There are three main elements of process-based review within the procedural enforcement, one might argue, that the Court is currently deploying to effectuate an approach allowing for increased domestic empowerment of Convention rights:

Exhaustion of domestic remedies: Firstly, at the technical level, the Court has in recent years developed its exhaustion of domestic remedies jurisprudence under Article 35 of the Convention, in particular with its Grand Chamber judgment in *Vučković and* Others v. Serbia which, while confirming already settled principles, may be interpreted as requiring applicants to be more diligent in raising their Convention complaints for domestic remedies to be properly exhausted than transpired from previous case-law.

Criteria-based Guidance for Convention Based Assessment at Domestic Level: The second element of the procedural enforcement phase manifests itself in important case-law, in particular Grand Chamber judgments, increasingly being formulated in terms of providing, in the general principles part, objective interpretational criteria that can guide national decision-makers in their application of the Convention at ground level.

Qualitative Democracy-Enhancing Approach to Legislative Deference: The third element of the Court's procedural enforcement phase is its refusal to draw any distinction of principle between the subsidiarity-based deference that may be afforded to national authorities of a judicial or executive nature on the one hand, or, on the other, domestic parliaments producing legislative norms that are facially challenged before the Court.

Under process-based review, the Court may grant deference if national decision-makers apply the general principles, are structurally capable of fulfilling that task and respect the rule of law. Will the future of process-based review in Strasbourg inevitably lead to double standards of human rights protections within the Council of Europe? That of course depends on what is meant by 'double standards'. The Convention's general principles apply equally in all member states and the Court's process-based supervision of their domestic enforcement is, at the level of principle, the same for each State.

In conclusion, there are clear signs that the historical trajectory of the Convention system, from the embedding phase to the current procedural enforcement phase, is an empirical reality, but more importantly a development that is normatively justified

on both institutional and substantive grounds. It will sustain and support in the long run the system's overall legitimacy for the peoples of Europe and, hopefully, at the same time result in the progressive decrease in the number of applications to the Court. This should lead to a commensurate enhancement of Convention protections at national level, at least in those member states that take their obligations seriously and apply the general principles set out by the Court in good faith.

Breakout Sessions

- **Dealing with systemic and structural problems – the case of prison conditions**

The breakout session discussed the question of how the Convention system can become more effective in dealing with systemic and structural human rights problems in member states. The need to ensure implementation of general measures that solve structural problems has been a key issue throughout the Interlaken Process. In the Brighton Declaration the member states agreed that future reforms must enhance the ability of the Convention system to address serious violations promptly and effectively, focusing efforts on serious or widespread violations, and systemic and structural problems. Using the case of prisons conditions, it was discussed how we more effectively may solve structural and systemic problems identified by the Court e.g. through pilot judgements. A number of questions were raised in the session including whether there is a need to increase the Council of Europe's capacity in the field of co-operation and assistance to member states? And/or whether we need to take a stricter approach to member states that fail to implement judgments that have identified systemic and structural problems? Different national approaches and practices were discussed. It was then discussed how dialogue and co-operation programmes between Governments and the Council of Europe institutions could help design the right process. Some participants shared member state experiences of good cooperation and dialogue with the Committee of Ministers and the execution department. It was the overall understanding among the participants that the pilot judgment procedure generally works well and that deadlines in the process help motivating the national authorities to execute the judgments speedily. It was pointed out by some participants that when judgments are not executed at the national level this is only rarely because of a lack of political will but rather a question of prioritisation. The problem is quite often the incapacity to put in motion a domestic political process which would secure participation of all national actors with a view to resolving a structural deficiency. Yet another judgment or interim resolution is not enough to achieve this goal. The general view was that there was no need for a new special track within the Court for cases concerning systemic and structural problems. However, it could be necessary for all involved actors, including the Court, to be inventive in order to induce domestic decision-makers to pursue appropriate policies. The Council of Europe cooperation projects aiming at a permanent dialogue with the national authorities concerned need to be further exploited to that effect. This was raised to point to the fact that lack of knowledge of the Convention system, at the national level, remains a real problem in many countries, in particular among domestic judges. National Parliaments may also not be aware of which measures are the appropriate ones for solving systemic and structural problems. Better training and translation of judgments could therefore beneficially be prioritised.

- **Pilot judgments and the Burmych case – a new institutional balance?**

The breakout session dealt with the recent case of Burmych and Others v. Ukraine where the Court referred specifically to the Interlaken, Izmir, Brighton and Brussels Conferences. With the judgment the Court has devised a new approach, in line with the principle of subsidiarity, for dealing with repetitive cases, stemming from non-execution of a pilot judgment. One of the questions raised was what the potential of this approach is? Could it be a solution for solving the Court's backlog? Other questions concerned the implications of this approach both for the Committee of

Ministers and other stakeholders, notably the applicants? The general view of the participants was that pilot judgments are a good and necessary tool for the Court and member states alike. Some participants had, however, been genuinely surprised by the Court's new approach in dealing with non-execution of pilot judgments and felt that it would have been useful with a preceding dialogue between the Court and the Committee of Ministers. Some expressed concern about the situation of the individual applicant after Burmych, but there was also a broad acknowledgement of the challenges faced by the Court when a pilot judgment is not implemented and repetitive cases keeps pulling heavily on the Court's resources. There was a clear sense that the discussions about the implications and handling of the Burmych judgment was just starting and would continue in the coming period, with many questions remaining unanswered.

- **Admissibility on the road to Protocol 15**

The breakout session concentrated on the fact that the Court is, and for a long time has been, overwhelmed by the ever-increasing amount of applications. In the Interlaken Process it has continuously been stressed that the Court should apply the admissibility criteria strictly and consistently in order to ensure balancing of the number of pending cases with the Court's actual capacity also in order to maintain confidence in the rigour of the Convention system. It was discussed whether the Court is living up to this requirement or if more could and should be done? The implications of Protocol 15 entering into force was also debated. How is it ensured that the new and tightened admissibility criteria regarding 'significant disadvantage' have the intended effect? And would new approaches to admissibility be necessary in the future? Participants noted that one of the aspects the Court had recently started to focus on was exhaustion of domestic remedies. An example of this was the many post-coup cases that had been returned to Turkey. Participants also noted that the Court had begun to apply more strictly the approach that if an applicant had not raised a certain Convention point during the domestic proceedings, the applicant would be prevented from doing so in Strasbourg. This too was seen as an important and necessary development. Another trend detected by participants was that the Court generally seemed more inclined to reject cases where the applicant has failed to give sufficient reasons for his complaint. This too was seen as important. Previously, the Court had generally seemed more willing to interpret a given complaint in a way that made it fit within the provisions of the Convention. As an interesting example of the Courts recent application of the "significant disadvantage" criteria the case of Anthony France and Others v. the United Kingdom was mentioned during the discussions. It was generally agreed that Protocol No. 15 would be a further and important step in the direction of reducing the Court's workload. Hopes for a speedy ratification from the last few countries were therefore expressed.

- **The art of the possible: Setting ambitious, yet realistic goals for the future**

The breakout discussion focused on the actual capacity of the Court. There was a broad acknowledgement that the new data presented at the Conference was of great interest. A key question is how many cases a Court with 47 judges can realistically deal with each year. In relation to this, it was discussed if further optimising and rationalising is at all possible within the current set-up without jeopardizing the judicial quality of the Court's work. A question was posed whether it is for example acceptable that victims of human rights violations may have to wait 5 or even 10 years for their case to be decided? And if there is a limit as to how brief the reasoning of judicial decisions can be in order to be meaningful? The participants found the figures presented by Professor Mikael Rask Madsen estimating that the Court can deliver judgments in approximately 2,000 substantive (Chamber and Grand Chamber) cases each year very interesting. There are fundamentally two ways to bring down the Court's workload: either by adjusting the input or the output of cases. It was generally felt that more focus should be put on the input side of the equation. A number of

different measures were discussed to lower the input/number of incoming cases from the Court, or to solve them by other means than through judgments, including mediation at the national level and negotiated solutions with the Court. Regarding the output, an increased use of technological developments to find patterns and improve processes was mentioned as potentially worth exploring by some participants. A point was made that even though 5 or 10 years was objectively a very long time to wait for a judgment, the value for the applicant of receiving the judgment could be very important regardless of the time passed. This was just one of the issues that made it difficult to establish the right indicators for measuring the Courts performance. It was felt that more work and analysis was needed on this topic.

- **Selection and election of judges**

The breakout session dealt with the question of selection and election of judges to the Court. The quality of judges appointed to the Court has been emphasised on many occasions, including in the Declarations adopted in Interlaken, Izmir, Brighton and Brussels, as well as in the CDDH follow-up report on the longer-term future of the Convention system. On the basis of recent discussions on the election and selection of judges at four meetings in the DH-SYSC-I working group and the decision of the Parliamentary Assembly to re-examine the Assembly's rules on election of judges with a view to re-stating and updating them the breakout discussions focused on how to further improve the selection and election process. It was pointed out that one of the fundamental problems underlying all other issues on selection and election is that member states have not agreed among themselves what kind of qualities they are looking for in a judge. The participants generally felt that such a clarification was desirable. In this conjunction the point was raised if the criteria for holding office in Article 21 of the Convention requiring that judges must possess the qualifications required for appointment to high judicial office or jurisconsults of recognised competence should be amended to say "highest" judicial office and that proficiency in international law should be a Convention requirement. To improve the procedure in the short term it was generally the view that member states should be more aware of the criteria used by the Advisory Panel of Experts on Candidates for Election as Judge to the Court and that Member States should not bypass the Panel when presenting the list of candidates. Furthermore interaction and cooperation between the Panel and the Parliamentary Assembly should be strengthened to better ensure the expert input from the Panel in the political process. This could be done in several ways, including by participation of representatives from the Panel at the hearing of the candidates in the Committee on Selection of Judges to the Court and by giving Panel representatives the possibility to explain the Panel's views on the candidates to the Committee.

- **The need for a clear and commonly accepted framework – dynamic interpretation and its limits**

The breakout session focused on the Court's dynamic interpretation and possible improvements and developments in this regard. The premise for the discussion was that the Court's judgments should guarantee effective protection of human rights and that this may require a certain flexibility such as the "present-day conditions"-approach when interpreting the Convention. As basis for the discussion, the attention was directed to the rules of interpretation in Articles 31-33 of the Vienna Convention on the Law of Treaties that governs the Court's interpretation of the Convention and may hold an important potential for legitimation of the Court's decisions. From a more general perspective, the suggested basis for the discussion was, that the Court's interpretation should not stray away from the general principles of treaty interpretation, and that, from a more practical perspective, the Court's dynamic interpretation should proceed in a careful and balanced manner that ensures the appropriate and measured development of international human rights standards. A number of participants highlighted the need for dynamic interpretation, for example when new technologies emerge and when moral standards change. Other

participants gave examples of situations where the Court had stretched the limits of interpretation and made remarks on whether social rights and positive obligations should be interpreted into the Convention or if the extraterritorial application of the Convention had gone too far. The participants generally asked for a clear reasoning from the Court when dynamic interpretation is being applied. The participants also expressed an interest in having the concept of "European consensus" clarified by the Court, including what it precisely means and how it is applied so as to secure to every possible extent the acceptance of the judgment at the national level. Participants also raised as a general point that the Court should find ways to inform member states before it made changes in interpretation since this could allow member states to engage in a dialogue with the Court, through third party interventions or by other means.

- **Addressing the element of surprise – keeping member states informed and involved**

The breakout session focused on the benefits of keeping member states informed and involved in developments at the Court. The premise for the discussion was that consistency in case law, legal certainty and predictability – as well as transparency – are key factors with regard to the legitimacy of any legal system. In the Convention system, notwithstanding the fact that there is no "erga omnes" effect, judicial decisions may still have an impact on stakeholders beyond the parties of a case, which raises questions about participation and transparency. Ideas discussed in the session included whether the Court should give reasons for referral of cases to the Grand Chamber? And if Grand Chamber hearings could be improved to ensure a more meaningful debate, including at the stage of oral hearings? It was also discussed whether a new procedure should be introduced that would allow a larger group of member states to bring controversial Chamber decisions before the Grand Chamber (where these states would then appear as third parties before the Grand Chamber)? Some participants noted that even though legal certainty surely was desired, a certain element of surprise is inherent in any court system. It was equally clear that adequate and timely information is a natural prerequisite for participation and generally desired by all. Participants generally felt that it would be desirable to have the Court send out notifications to member states about which cases are pending before the Grand Chamber, including the set deadline for intervention and other relevant information. It was felt that this would not put too much of a burden on the Court. Some felt that the establishment of an Advocate General at the Court was an idea worth revisiting. The Government Agents' network was highlighted by some participants as another good supplementary tool to keep the member states informed. Restructuring the Court's website to a more user-friendly format and an easier use of modern-day devices were also mentioned. Some participants found it desirable if the Court could give reasons as to why a given case is being referred from a Chamber to the Grand Chamber. While others expressed certain reservations in this regard. Regarding the possibility for a larger group of states to demand a case tried at the Grand Chamber, this was an interesting idea. There was a discussion if it would require changes to the Convention. Some believed that this would be the case. There could, however, be other ways to achieve the same aim, one being to approach the Court with a grouped request under the present rules with the expectation that it would be accommodated by the Court.

- **Advocating the Strasbourg system – a shared responsibility**

The breakout discussion focused on how to better advocate the Strasbourg system in light of the common understanding that a lack of clear communication – as well as unbalanced communication – may play out negatively with regard to national audiences' perception and accept of the Convention system. This can, inter alia, lead to misunderstandings on the scope of judgments and provide a wrong picture of how the system works, including the importance of reforms already carried out. A number of factors and dynamics may add to this problem. Questions posed included: Are we

good enough at explaining what goes on in Strasbourg? Could we be better at explaining the advantages of the Convention system to the broader public? Could more be done at the Strasbourg level, e.g. by appointing a spokesperson for the Court or a more active use of social media? Could the communication between the Court and the Government Agents be improved? How can national decision-makers, authorities and civil society play a constructive role in this regard? Some participants expressed the view that the Court should be sensitive to the implications that its judgments have even though the Court is, naturally, not there to please the member states. The point was made that member states should engage in the dialogue with the Court in good faith and never deliberately misinterpret the Convention. It was highlighted during the discussion that there is a fundamental difference between advocating the Strasbourg system as such and explaining a single specific judgment. Single judgments can often be much more controversial and difficult to explain. Many participants found that member states need to reiterate and emphasise why it is beneficial for them to be part of the human rights system. In this regard, training and education were considered to be very important elements. Participants identified National Human Rights Institutions as important actors in advocating the Strasbourg system and there were perhaps still untapped resources to be found there. The point was raised that it is generally important to not only focus on what the Court has said, but also what the Court has not said in a specific case, so as to avoid misinterpretations of the Court's judgments. Regarding the Court's possible use of social media, it was raised as a point that it would require considerable resources to communicate a given judgment on, for example, Twitter as it requires a very thorough analysis to communicate in such a short format.

- **Increasing third party interventions by member states**

The breakout discussion focused on how to make it easier for member states to intervene and participate in important and principled cases before the Court on the assumption that this may provide important means for strengthening the legitimacy of the Convention system. It was discussed if the Court could do more to inform member states or actively invite member states to intervene in cases that raise questions for a wider number of states? It was also discussed whether it is a problem that the Court does not provide any reasoning for referrals to the Grand Chamber and what member states themselves can do to co-ordinate their participation in important cases? The participants agreed that third party intervention is a useful tool that should be used more. It allows member states to present their views and concerns directly to the Court. It is noteworthy that the instrument of third party interventions is not used more widely by member states. The participants generally felt that the focus of third party interventions should be at the Grand Chamber level where the real difficult legal issues are most often being dealt with. Better information about these cases to member states would be central for an increased use of the instrument. In this regard participants identified it as a particular challenge when a Chamber relinquishes its jurisdiction in favour of the Grand Chamber and no information is given as to why this is the case. It was generally felt that the Court in these instances should inform about the reasons for relinquishment to allow member states to assess the relevance of a third party intervention from their side.

- **Increasing third party interventions by civil society, NHRIs and IOs**

The breakout session focused on interventions by civil society, National Human Rights Institutions (NHRIs) and International Organisations (IOs) and how these interventions may enhance the quality of the Court's argumentation and contribute to the legitimacy and authority of the Court's judgments. The workshop debated how to ensure a further participation by civil society, NHRIs and IOs in important cases before the Court. It was acknowledged and accepted that the Court has limited resources, and that such interventions can be a very useful tool for the Court to gain valuable background information on a particular state policy, practice or situation. Furthermore, such interventions may provide additional perspectives and contribute to discussions

mobilising the general public. The participants were generally very positive towards the practice of third party interventions, highlighting that the interveners can endow legitimacy to a judgment but also act as factfinders in a given case. Some participants mentioned that it could give cause to a certain frustration among non-governmental organisations when their submission for third party intervention was rejected and no reason for this was provided by the Court. The participants generally felt that the 12-week deadline for intervention was short, especially if one only became aware of the case at a later stage of the process. Due to this, and because of the desirability to better be able to assess relevant cases with regard to possible intervention, it was generally felt that the Court should consider providing more information about pending cases at an early stage.

- **A new role for the Committee of Ministers?**

The breakout session considered whether, for example, the Committee of Ministers should be used to discuss developments in the jurisprudence of the Court. The point of departure was that international courts do not operate as parts of polities that include functioning political legislatures (as we know from the national level). Once an international agreement is in place, it is largely withdrawn from the grasp of its individual makers. This profoundly changes the relationship between law and politics. Although it is, in principle, possible for member states to amend the Convention, it is in practice often a difficult path. The thesis put forward was that the lack of political-legislative inputs could constitute a challenge to the long-term authority of the Convention system. Seeking the right institutional balance within the system is a challenge and various institutional means need to be considered to that effect. One possible way to address this challenge could be to create new channels for a more pointed communication between the political and legal levels with regard to the understanding of the Convention and its evolution. One among more options could be to use the Committee of Ministers in this regard. It was put forward as a premise that such debates should never be about specific judgments, but rather concern the general understanding of the Convention on questions of importance for member states. The reasoning behind such a proposal being that it, within the existing institutional framework, could create a more direct dialogue between the Court and the member states. This would give the Court a clearer picture of consensus among governments on certain areas of law, and thereby help solving some of the challenges of applying “treaties over time” and anchor the development of European human rights in a more democratic structure. The debate among the participants was very lively. It was clarified during the discussion that what was being proposed and debated was not a direct dialogue between the Ambassadors of the 47 member states and the 47 judges of the Court physically being in the same room, but rather a less indirect dialogue than what is currently the case. Many participants, however, still expressed reservations about using the Committee of Ministers for discussions about the developments in the jurisprudence of the Court. Some of the points raised were that the Committee would then be given too many roles, that discussions in the Committee would most likely evolve around dissatisfaction with single judgments, that such discussions might infringe upon the independence of the Court and that member states already have the possibility to express views on topical issues through existing structures within the Convention system. At the same time, participants generally declared that they were open to more dialogue about the case-law of the Court, but maintained that the Committee of Ministers was not the right platform for such dialogue. Instead, some participants suggested to having such a dialogue in a more informal setting where civil society could also be included. The conclusion was thus that the diagnosis was right, but more recipes had to be considered.

- **Codifying subsidiarity in the light of recent case law**

The breakout session discussed how the Court’s application of the principle of subsidiarity has undergone significant development since the early days of the Court as well as more recently following the Brighton Declaration and the adoption of

Protocol No. 15. Important cases include Animal Defenders International v. the United Kingdom, S.A.S. v. France, and recently, on the question of deportation of foreign criminals, Ndidi v. the United Kingdom. It follows from this practice that the Court, premised on actual and good faith domestic engagement with Convention principles, exercises restraint in light of various factors, including the direct democratic legitimation of domestic policy-makers, the domestic decision-making process, the domestic assessment of evidence and facts as well as the various European and international standards of protection. The session discussed this development and how to use it with the goal of further refining and codifying the key concept of subsidiarity. The participants generally did not find that the concept of subsidiarity should be codified as such, since this may freeze the concept and restrain the Court in its continued usage of the concept. Some participants also questioned if it would actually be possible to draft a wording that would accurately capture the concept. While most participants, thus, did not support codification in a strictly legal sense there was broad support to the idea that developing a more robust concept of subsidiarity is important for the further development of the Convention system and that positive developments in this regard should be supported and acknowledged.

- **Judicial dialogue post Protocol 16**

The breakout session discussed the optional Protocol No. 16 as a tool for enhancing judicial dialogue, using requests for advisory opinions, as a new and direct channel for communication between the highest domestic courts and the Court. The Protocol introduces an option for the domestic courts to ask the Court for non-binding advisory opinions on questions of principle relating to the interpretation or application of the rights and freedoms enshrined in the Convention. The discussion took place in the context of the expectation of entry into force of the Protocol within the near future in light of the recent French announcement of its intention to ratify Protocol No. 16. The participants primarily discussed possible positive and negative aspects regarding the Protocol. Some of the positive aspects highlighted during the discussion were that the Protocol could enhance the coherent application of the Convention; could prevent violations of individual rights from occurring already at the national level; may enrich the agenda of the Court; could be seen as a feedback mechanism to the Court; could enhance a better structured judicial process and may enhance the role of third parties and their interventions, including the Commissioner for Human Rights. Regarding the workload of the Court, the point was raised that, at the initial stage, the Protocol might increase the workload, but that the workload might be reduced in the long run because the national courts are applying the Convention better. Some of the negative aspects highlighted during the discussion, were the risk of undermining the authority of the national courts; the uncertainty about whether the Court would in fact provide an advisory opinion or not; the uncertainty of the consequences if the Court did not issue an opinion, and that confidential information may be revealed to the applicant and other parties in connection with the Court's treatment of a request for an advisory opinion. There was broad agreement among participants in the session that uncertainty about how the arrangement will work in practice was a major reason behind the limited number of ratifications so far. Many had for this reason adopted a "wait and see" approach. Another uncertainty was the Opinion 2/13 by the EU Court of Justice on the EU's accession to the Convention. Participants noted that Protocol No. 16 is not an easy instrument and that a comprehensive guide from the Court's would be welcomed.

- **Subsidiarity – parliaments as key interlocutors**

The breakout session focused on how, when dealing with policy issues, it is becoming increasingly recognised in the case law of the Court that effective parliamentary engagement in the "pre-interference assessment" of human rights, i.e. the assessment by the legislator of the possible human rights implication of draft legislation, is fundamental. The role of national parliaments has been addressed in several prominent cases, such as Animal Defenders International v. the United

Kingdom and S.A.S. v. France. In the latter case, the Court, inter alia, stated that: “In matters of general policy, on which opinions within a democratic society may reasonably differ widely, the role of the domestic policy-maker should be given special weight”. On the basis of the Court's recent case-law, it was discussed how the quality of the parliamentary process can provide the basis for a more robust concept of subsidiarity. It must be acknowledged that many contemporary human rights issues facing European societies today involve questions of public policy that cannot only be resolved in the legal sphere (neither by national nor international courts). Democratic engagement with human rights issues is therefore important. There is of course an important distinction between absolute human rights, e.g. the prohibition of torture, which the political level may never abrogate, and human rights that allow for restrictions in the interest of public policy considerations. The breakout addressed questions such as how a human rights culture can be fostered within parliaments, making it a natural part of the legislative process to consider Convention issues, and how to ensure that the necessary knowledge and expertise on Convention law is present in the legislative process? Participants observed that both the Brighton and Brussels declarations made specific reference to the role of national parliaments, inter alia by agreeing on a number of practical measures designed to achieve better national implementation of the Convention, including by providing national parliaments with information about the compatibility with the Convention of draft legislation. A number of participants questioned whether national parliaments have the necessary motivation to get involved in human rights issues. Parliamentarians, it was pointed out, do not always see the connection between their work and the development of human rights standards. They therefore need support. In this regard it was important to be aware of the fact that Members of Parliament often play a dual role, being defenders of international human rights on the one hand, but also national politicians having to meet sometimes conflicting expectations of their democratic electorate, on the other hand.

Appendix

- Programme, High-Level Expert Conference *“2019 and Beyond* – Taking *Stock and Moving Forward from the Interlaken Process”*, 22 to 24 November 2017, Kokkedal Castle

- List of Participants, High-Level Expert Conference *“2019 and Beyond – Taking Stock and Moving Forward from the Interlaken Process”*, 22 to 24 November 2017, Kokkedal Castle