

## Discussion Following the Presentation by Christian Tomuschat

**L. Wildhaber:** Just a few words on the Court's workload and backlog, which *Paul Mahoney* has recently qualified as "unmanageable". Indeed, the Court expects for the year of 2007 53.500 applications, it has 104.000 applications pending before it, 10.000 of which have been pending for more than 3 years and therefore constitute backlog. After 2 audit reports and a management report, we know that the Court is well managed, is productive and has streamlined its procedures again and again. All easy solutions have already been found.

Now every choice is difficult. Doing nothing will unavoidably be very difficult indeed in the long run. The audit reports have found that for the Court to cope with it would need 660 additional registry posts (at present there are 580 posts), i.e. more or less double the budget. That is not feasible politically. Even if the Court got all this money, I am less than sure that a mammoth court would be such a good idea. If it became known that applications could be handled within a year or less, I confidently forecast an avalanche of tens of thousands of new cases from all the new Member States in which citizens have no trust in national courts.

Let us therefore forget the idea of the double budget. What then? I begin by saying that the Russian refusal to ratify Protocol No. 14 has had a chilling effect on all reform attempts. Apart from that, there is not only Russia's resistance, but also the even stronger resistance of a motley group of self-styled "friends of the applicants and perhaps also friends of the Court". This group, composed of NGOs, academics and even a minority of judges, believes that they are principled and everybody else is pragmatic, and that they will not allow the right of individual petition to be cut down. They have unfortunately been extremely successful. Protocols Nos. 11 and 14, the Management Report of Lord Woolf and the recent Report of the Group of Wise Persons have all tinkered with short-term considerations and have largely accepted the ideology which I just described, that discussion of the Court's workload situation and of the insidious undermining of the Court's credibility must be refused at all costs. "It would break my heart", said one of

our judges, despite having been voted down by a clear majority of the judges repeatedly, “if I could not decide on all sorts of individual petitions”. Of course, this is precisely what the Court cannot do. It rapidly accumulates new cases which will not be decided without massive delay, and the delays get steadily longer. Is that what is meant with the claim that the right of individual petition must not be touched?

Did you know, incidentally, that there were arguments that the Court could not cope with all its cases, that this proved that the Court was managed badly, and that therefore its budget should be cut? Given the situation which I just described, there will hardly be any meaningful reform in the near future, if there will be any reform at all. There will not be a massive expansion in the Court’s budget. I grant that the Court itself could be more stringent when deciding on admissibility conditions, but again that will not happen easily, if it happens at all. One will have to be profoundly sceptical whether the “friends of the applicants” in their ideological rigidity will ever want to be also “friends of the Court”, although I would want to remind everybody that there is no alternative to the Court. To the viewpoint of the NGOs that one cannot accept the world as it is and that one wants a better one, I would comment: who wouldn’t want a better world, anyway?

**E. de Wet:** I would like to raise two questions. The first question relates to the fact that after the entering into force of the ECHR, several smaller States accepted the individual complaints procedure either immediately or very soon after ratification. This included countries like the Netherlands, which does not provide for constitutional review on the domestic level. However, this early embrace of the individual complaints procedure was not necessarily a reflection of an understanding of and commitment to the obligations contained in the ECHR at the time. In the Netherlands, for example, there was a general assumption at the time that the domestic laws and practices were already in accordance with the ECHR and that the country therefore had nothing to fear from the individual complaints procedure. It was only since the 1980s, notably after *Marckx v. Belgium*, that the Dutch legal establishment realized the potential impact of the ECHR on the Dutch legal system. My question therefore is whether the reluctance of States that initially refrained from accepting the individual complaints procedure was indeed or exclusively related to fears of diminished State sovereignty. Perhaps it also reflected a desire to first bring the national legal systems in harmony with the ECHR, in order to prevent a large number of complaints in Strasbourg.

If one applies this reasoning to the new Member States which have joined the Council of Europe in the 1990s, one could question the wisdom of early ratification (including of the individual complaints procedure). Had some of these States – with the support of the Council of Europe – attempted to bring their legal systems in accordance with the obligations under the ECHR *before* ratification, it might have prevented or limited the avalanche of cases with which the ECtHR is currently confronted.

The second question relates to Professor *Tomuschat's* reference to the *Bankovic* decision and the suggestion that the ECtHR is not inclined to bow to political pressure from Member States. One could question whether this really is the case, as the *Behrami and Saramati* decision may suggest otherwise. The manner in which the ECtHR attributed responsibility for the actions of KFOR exclusively to the United Nations is unconvincing. The delegation model on which the ECtHR relied acknowledges that the overall control exercised by the Security Council over the mandate of KFOR does not exclude effective control by the (Member States of) KFOR on the ground. If one regards attribution of responsibility and delegation of powers as two sides of the same coin (which the ECtHR seemed to do), the attribution of responsibility should reflect the fact that the (Member States of) KFOR were exercising effective control in Kosovo at the time that the alleged ECHR violation occurred. This would imply that responsibility for violations of the ECHR should first and foremost be attributed to the (Member States of) KFOR as opposed to the United Nations. This position is supported by United Nations practice, as the organisation has never before accepted responsibility for violations of international law by troops acting on its authority but under unified command and control (as is the case with KFOR). This means that the *Behrami and Saramati* decision results in an accountability vacuum, as the Member States are absolved from responsibility in a situation where no other entity is likely to assume responsibility. It has been alleged that the ECtHR's decision to attribute the responsibility for KFOR's actions exclusively to the United Nations resulted in part from political pressure exercised by those Member States that also constituted troop contributing States in Kosovo. If this were the case, it would indeed be a very worrying phenomenon.

**M. Villiger:** May I add an historical element to the presentation by Professor *Tomuschat*. Why did the number of applications at the outset remain stable and only later pick up? Professor *Tomuschat* mentioned

the “Frowein Commission”. Certainly, Professor *Frowein* brought in modern theories, modern views on human rights. He maintained rigorous standards of thought. But I think laurels should also go to the British lawyers. In the 1950s and in the 1960s, up to 50 per cent of the applicants were detained and 5 per cent were represented by lawyers. The scornful remark which the old Commission would hear would be: “you and your detainees”! This changed when British lawyers at the end of the 1960s and in the 1970s discovered the Convention, when they realized that the Commission’s report and the Court’s judgment could be a valuable tool in implementing their clients’ rights in the domestic sphere. With their polished, at times brilliant presentations in often spectacular cases, they drew the attention of other lawyers to the Strasbourg complaints system. And lawyers no longer invoked only Article 5, but all substantive provisions of the Convention. Suddenly, the Convention became respectable and more and more lawyers filed applications for their clients. By the 1990s, approximately 5 per cent of the applicants were detained. In certain Member States today, we see that over 40 per cent of the applicants are legally represented before the Court. And of course, the fact that lawyers introduce applications means that the cases are as a rule well prepared and will concern all aspects of modern society.

**H. Keller:** I’d like to come back to one point made by *Christian Tomuschat*: the situation in Germany. Against the background of the comparatively good human rights situation in Germany, you have drawn a picture of the good guys and the bad guys among the Member States of the European Council. I would like to question two assumptions that probably are underlying this picture. The first assumption is: the better the human rights system in a country on the national level, the lower is the number of cases going to Strasbourg. At first glance this might be convincing. However, this is wrong. The Court’s statistics tell us a different story. Even in the old Member States where we find a fairly good human rights system, the number of cases taken to Strasbourg is increasing. This is also true of countries like Germany, Austria or Switzerland. In these countries, we notice a shift in the character of cases. There, we do not find any classical human rights cases anymore but rather borderline cases or so-called fine tuning cases. The main issue is the balancing of interests. A good example for a fine tuning case in Germany is the *Caroline von Hannover* case and for Switzerland the *Stoll* case. What matters is the proportionality test and the balancing of

interests. In such situations the crucial question is: what is the right role for the Court in these cases?

The second underlying assumption I challenge is: the lower the amount of applications going to Strasbourg, the better is the system of rights protection on the national level. There is neither a clear nor a simple linkage between those two factors. Take the example of Poland. Poland has no record of gross human rights violations; nonetheless, it is one of the best clients in Strasbourg, just because the Convention is extremely popular and the mistrust *vis-à-vis* the national judges is tremendous in Poland.

**J.A. Frowein:** A short remark concerning history. I think one should understand that the restrictive attitude which prevailed during the first ten years in the European Commission of Human Rights had something to do with the fear that if the confidence of Member States would be lost, this would really have the result that the whole system would fail. I don't pronounce a judgment on that. I was not a member of the Commission at that time, but when the Commission in the 1970s took a new approach, it was very clear that members of the Commission felt that either that system is going to work or it will remain, as *Christian Tomuschat* stated it, a sort of facade system. A very important role concerning that issue was played by the *Ireland v. United Kingdom* case. And therefore, I am of the opinion that interstate applications, although they are very few, fulfil an enormously important role. I fully underline what Judge *Villiger* has just said concerning the importance of the role of British lawyers, who had no internal system to turn to because no constitutional court existed and no real administrative court existed. But the role of British lawyers in this *Ireland v. United Kingdom* case was told to members of the Commission in a very personal manner. Somebody who later became a member of the Commission, *Sir Basil Hall*, said: we were all convinced that this Commission of continental lawyers would never be able to handle the facts of such a case. But before the Court, the United Kingdom government did not in any way contradict the fact-finding of the Commission. So this case played an enormous role for the authority of Commission and Court. I join *Erika de Wet* in her remarks concerning *Behrami and Saramati*. I would have thought the same as *Christian Tomuschat*, detention of personnel must be jurisdiction in the sense of Article 1. Unfortunately, we know now it is not, at least according to the Grand Chamber of the Court. *Acquis conventionnel*, this was the reason why members of Commission and Court went to the new accession countries and delivered reports. Un-

fortunately, the Council of Europe looked into these reports only to a very limited extent. There were political reasons for that. I may come back to that later.

**J. Polakiewicz:** I would like to continue where Professor *Frowein* has just stopped, with a theme also mentioned by Professor *Tomuschat*, the *acquis* of the Council of Europe. I think, in theory, everything was there to prepare these countries for accession. There was the political will and also in practice the required procedures were in place, at least to a certain extent. As Professor *Frowein* just recalled, before signing and ratifying the Convention, the Parliamentary Assembly looked at the national situation, looked in particular at the legal and judicial system of the candidate countries.

Former or actual members of the Commission or Court went to the candidate countries and prepared reports on their compliance with Convention standards. In its opinions that were a prerequisite for the Committee of Ministers' decision to accept any new Member State, the Parliamentary Assembly requested precise commitments, in fact long lists. The lists became longer almost with each accession, identifying to a certain extent also the Council of Europe *acquis* in the sense that they explicitly named the conventions that the country had to sign or ratify. They also listed the main structural reforms, such as reforms of the penitentiary system, the judicial system and so on. Then all this was followed up on the inter-governmental level as well as through cooperation and assistance activities. So there were actually procedures in place.

Why did they not completely deliver all the expected results? I think there are many reasons. One is obvious: there was not enough money for all the required assistance activities and structural reforms that were really needed. Another reason was a sort of perverse effect of the Assembly's monitoring of the commitments, which was in principle a good thing. But at the same time, the countries wanted to get off the list of countries under monitoring. They wanted to finish the monitoring exercise as soon as possible. So they ratified quickly these conventions, sometimes without doing their homework properly. And so many countries ratified the ECHR when they were still in transition, without having fully implemented all the reforms they had committed themselves to go through.

A second remark: although money is not the solution for everything, money is required for the Court's proper functioning, but not only. I think we need adequate financial means even more at national level.

What the whole system in Strasbourg is about and what is also stressed continually by the Court is subsidiarity. The normal and natural Judge of the Convention should be the national Judge. Human rights protection starts and ends at home in the sense that the national authorities should first look at what the Convention rights are, respect and protect them. Secondly, when a judgment has been given in Strasbourg, the execution, the implementation of the judgment must be done through national authorities.

To finish with a final information remark, there is now an interesting initiative in the Council of Europe, which will be voted by the Committee of Ministers during the next weeks. This is the creation of a human rights trust fund, an initiative by the Norwegian government, which will allocate money through the Council of Europe Development Bank for structural reforms in the Member States to ensure better compliance with the Court's judgments. I think this is an important initiative.

**R. Grote:** My first remark is of a technical nature. Professor *Tomuschat*, you compared the number of judges of the European Court to the 9 Supreme Court judges of the US. I ask myself whether this comparison is technically correct because it is the task not only of the Supreme Court judges but of all federal judges to enforce the Constitution of the United States and the Federal Bill of Rights. So it is perhaps more adequate to compare the number of ECtHR judges to the total number of Federal judges in the US. If you pursue the analogy further – particularly with regard to the Federal Appeal Courts – it is worth considering whether one of the possible reforms of the European system should not have as its object a stronger regionalisation of the ECtHR. Since this is a Court whose jurisdiction stretches from the Atlantic in the West to the Bering Strait in the East, it is perhaps not a bad idea to provide for a substantial measure of regionalization within the Court structure itself, by creating regional chambers or fully-fledged first-instance courts composed of judges with a specialized knowledge of the domestic legal system and the political and cultural context which is relevant to the application of the European Convention in the case at hand.

This brings me to my second remark. Our topic can be approached from two different angles, the European and the national perspective. Regardless of the number and the scope of the reforms which may (or may not) be implemented at the European level – e.g. the increase of the number of judges serving on the ECtHR, the reform of the Court's procedure, including the introduction of a European version of the *cer-*

*tiorari* procedure, etc. – the relationship between the ECtHR and the domestic courts remains of fundamental importance. Without functioning enforcement mechanisms at the national level the Convention will not achieve its main objective, i.e. effective protection of human rights. This raises the question whether there is any real prospect for the harmonization of the existing judicial mechanisms for the enforcement of human rights at the national level. As far as I can see, the existing national protection systems are still characterized by a high degree of diversity. There are some systems, like the Czech and the Slovak system, which allow their national courts to review the constitutionality of statutory acts and government measures not only in the light of the domestic fundamental rights bills, but also on the basis of the European Convention and other international human rights treaties to which the respective country is a party, whereas other systems, like the German system, do not allow the constitutional courts to apply the Convention rights or other international human rights as such in the review of fundamental rights applications brought under the relevant national rules on judicial review. Even worse, there are still systems in which individuals do not have direct access to their constitutional courts in cases concerning the alleged violation of their fundamental rights. In France, for example, the Constitutional Council still does not have the power to entertain individual constitutional complaints. Thus it seems that the task of harmonization to be achieved at the national level is indeed a monumental one.

**F. Hoffmeister:** I would like to thank Professor *Tomuschat* for his excellent overview and ask a short question on the remedies surveyed at the end. You did away with Protocol No. 14 by saying that the Russian obstruction is going to last for a long time. So we may not expect its early entry into force. While this is certainly true, my question would be: is there room for provisional application? Certainly, in the final clauses of Protocol No. 14 there is nothing about it. But can one not think that at least those States which have already ratified, so all Council of Europe members but Russia, could agree on a provisional application on those cases which do not concern Russia? Is that, let's say – an idea to be floated? Or would you argue that institutional revisions cannot be applied provisionally among certain parties only because there is a need for one valid procedural device for all cases?

**K. Doehring:** Only a short remark which I would like to make here. The situation in Strasbourg we are meeting now reminds me of the old



and well-known story of the “Zauberlehrling”. Please forgive me that I use a German word because German is usually prohibited here. But I have no other example to do that. This “Zauberlehrling” first activated the ghosts and then nobody knows how to stop them. That reminds me that the same question arose concerning the right of asylum. First, we sought to protect exceptionally prosecuted people and later on we had immigration. The situation is very similar here. So I think it would be better to consider the consequences before establishing principles of such a fundamental character. But we will see whether anybody has consequences to present here.

**C. Tomuschat:** May I say a few words. We are all experts here and accordingly there is no need for me to comment on everything that has been put forward. I would just respond to what *Karl Doebring* said. To me the balance sheet reached until now is wonderful. It's very good. And I see very few negative sides. We only have to keep the record, the good record. This is a challenge now after a good start of 50 years, of half a century. The European Convention has played a tremendous role in improving and raising the level of human rights civilization all over Europe. So I do not see the parallel with the right of asylum under the German constitution, which may have to be criticized to some extent, but here I think we have to reflect on how to maintain the advantages we have gleaned from the system.

I go back. *Frank Hoffmeister*. I think the only possible remedy would be to put Protocol No. 14 in operation with 46 ratifications, just discarding in a way the refusal of Russia by arguing that a single Judge can operate with regard to 46 States. This is not totally impossible. But of course, Protocol No. 14 would have to be revised. The relevant clause would have to be amended, but juridically it could be done. Normally, if you bring about constitutional reforms, institutional reforms, you need the approval of all current States parties. But here it may be that we would eventually have parallel to one another two different systems. One for Russia and the other one, the system proper, which would be somewhat more easygoing, for the other 46 States. It's a challenge and I don't know what the Russians would say about it, but it could be done.

Addressing what was said by Mr. *Grote*. I did not really compare the US Supreme Court and the European Court, I said, we may compare the numbers of now 47, maybe 94 in the future, to the nine judges of the Supreme Court, but I also said that such comparison is inappropriate because the European Court has much more to do. Therefore, that

was just the start of my reasoning, and I added that this was a really inappropriate comparison.

Now, as far as *Helen Keller's* observations are concerned. I do admit that I would have to look more carefully into the Polish cases. Is there some red thread in those cases? Do they reveal a systemic deficiency or not? Since there are so many cases, I am not quite sure. I guess that some people are here who could enlighten us on the Polish cases. The first enlightenment comes from my left-hand side, but maybe it should be made explicit for all other listeners.

And now coming to *Erika de Wet*. It's true that some States have had a long period of preparation, in particular France, not less than 30 years. They could adapt, they could observe how is the system going to work. And is it an unacceptable risk? But I am quite happy now that Russia, in spite of all the problems which have been entailed by the Russian accession, is indeed a State party to the European Convention and has just to comply with the relevant obligations. If Russia had been awarded also a period of 30 years from 1996 to 2026 before acceding to the European Convention, there would be no remedy suited to control what is going on in Russia. There are so many cases, I admit, that's a real challenge. But now we do have those remedies, which are more than political remedies. I am quite happy that the Court has to deal with the Russian cases and that we know that the Chechen cases and many other cases are pending. I do not envy the Court. And I really don't know what the Court can do in a true investment protection case like the *Yukos* case which embodies a new kind of challenge. How can the Court really cope with its duty of protection in such a difficult, complex case? I guess that, if I were a Judge, I would really tremble in being assigned the *Yukos* case.

And then the second, the *Bankovic* case. We will certainly be discussing the *Bankovic* as well as the *Behrami and Saramati* cases. I must confess that I am not absolutely impartial on those cases because I represented the Federal government in *Saramati*. And I must also confess that I am not unhappy with the result of the proceedings. Not only because of my special role. *Saramati* was really a special case because that person had been detained by a KFOR and not a Norwegian commander or anyone else acting under national authority. It was very clear, it was the structure of KFOR which was responsible. Since KFOR is not an individual State the Court rightly came to the conclusion that its responsibility could not be challenged before the European Court. Well, I admit that this is very much open for further discussion.

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