Speech

Seminar on Human Rights and Access to Justice
“The European Court of Human Rights and the Domestic Courts”

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Ladies and gentlemen,

[...]

The organizers of this conference asked me to focus my presentation on the relationship between the European Court of Human Right and the domestic courts. A relationship which is governed by the principle of subsidiarity. What I propose to do is

- to give a short description of how the principle of subsidiarity is currently reflected in the present Convention mechanism.

- Then I would like to focus on the recent reform process of the Convention mechanism which sought to further strengthen the principle of subsidiarity.

- And finally, I would like to highlight certain aspects of ‘dialogue’ between the Convention mechanism and the High Contracting Parties since in my view it is an intrinsic feature of the principle of subsidiarity.
1. The principle of subsidiarity in the Convention system

The principle of subsidiarity is one of the underlying foundations of the Convention mechanism. Article 1 of the Convention states that the High Contracting Parties shall ensure the respect of the rights and freedoms laid down in the Convention. The primary responsibility for implementing and enforcing the guaranteed rights and freedoms is thus laid on the national authorities.¹ The European Court of Human Rights serves as a subsequent ‘safety net’. Such a division of responsibilities is a logical consequence of the manner in which the rights and freedoms of the Convention are formulated and of the very nature of the legal instrument. In contrast to EU law, the Convention mechanism was never intended to be a supranational legal order stipulating detailed rules harmonising the legal orders of the various countries.² The Convention is the product of a traditional purely intergovernmental international organisation laying down standards of conduct leaving a “spectrum of choices available to

¹ ECtHR 26 October 2000, Kudla v. Poland (appl. no. 30210/96), para. 152.

² See for example the Grand Chamber in the Taxquet v. Belgium case (16 November 2010, appl. no. 926/05): “This is just one example among others of the variety of legal systems existing in Europe, and it is not the Court’s task to standardise them”. Obviously, this is not to say that judgments of the Strasbourg Court may never have harmonising effects (they do), but harmonisation is never an aim in itself.
the national authorities for fulfilling their duty of implementation”.\textsuperscript{3} As a consequence, national authorities retain primary responsibility for finding the most appropriate means of implementation. The task of the Court is not “to substitute its own view for that of the national authorities but rather to review [...] the decisions they delivered in the exercise of their discretion”.\textsuperscript{4} To a certain degree the principle of subsidiarity protects the Convention system against the criticism that the international judge too easily ignores democratic (majoritarian) discretion by elected bodies.

The principle of subsidiarity is reflected in various ways in the text of the Convention and standing case-law of the Court

\textbf{Article 13 ECHR}

Article 13 of the Convention guarantees the availability at national level of a remedy to enforce the substance of the Convention rights and freedoms in whatever form they may happen to be secured in the domestic legal order. As the Court

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\textsuperscript{3} P. Mahoney, “Marvellous Richness of Diversity or Invidious Cultural Relativism?”, 19 HRLJ 1 (1998) at p. 1.
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\textsuperscript{4} E.g. ECtHR 30 January 1998, \textit{United Communist Party of Turkey and others v. Turkey} (appl. no. 19392/92), para. 47.
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has noted, if States fail to provide effective remedies, “individuals will systematically be forced to refer to the Court in Strasbourg complaints that would otherwise ... have to be addressed in the first place within the national legal system. In the long term the effective functioning, on both the national and international level, of the scheme of human rights protection set up by the Convention is liable to be weakened”.  

Providing effective domestic remedies allows the Strasbourg Court to fulfil its supervisory role and should permit a reduction in the Court’s workload.  

As an example: the Court held in the case of Ümmühan Kaplan that Turkey faced a structural problem on account of the excessive length of judicial proceedings and the lack of an effective remedy by which to complain of that length. The Court noted at the time that over 2,700 applications stemming from the

5 ECtHR 26 October 2000, Kudla v. Poland (appl. no. 30210/96), para. 155.  

6 See the Guide to good practice in respect of domestic remedies (adopted by the Committee of Ministers of the Council of Europe on 18 September 2013) at page 7.  

7 ECtHR 20 March 2012, Ümmühan Kaplan v. Turkey (appl. no. 24240/07).
same issue had been pending before the Court.\textsuperscript{8} Against that background, the Court held that Turkey had to put in place, within a year, an effective remedy affording adequate and sufficient redress in cases where judicial proceedings exceeded a reasonable time. The Turkish authorities responded by the enactment of Law no. 6384 covering all criminal-law, private-law and administrative-law cases that had exceeded a reasonable time. Following the introduction of that Law, the Court held that applicants were required to apply to the Compensation Board set up by Law no. 6384 in so far as this was apparently an accessible remedy capable of offering them a reasonable chance of redress for their complaints, even if their applications had been lodged before Law no. 6384 had come into force. This example demonstrates the importance for the proper functioning of the principle of subsidiarity that effective domestic remedies are put in place.

In early case-law of the Convention bodies, Article 13 of the Convention did not receive a lot of attention. The Court would very often find a violation under a separate provision of the Convention (for example, Article 6) and subsequently rule that it was not necessary to also examine the applicant’s case under Article 13 of the Convention.

\textsuperscript{8} Ibidem, para. 64.
The more autonomous role of Article 13 of the Convention was highlighted by the Court in its 2000 judgment in the case of Kudla v. Poland⁹. The Court announced that "the time has come to review its case-law in the light of the continuing accumulation of applications before it in which the only, or principal, allegation is that of a failure to ensure a hearing within a reasonable time in breach of Article 6 § 1".¹⁰ The ‘upgrading’ of Article 13 was therefore a direct result of the quantity of ‘length of proceedings’ cases before the Court.¹¹ Or, as the Court phrased it in the Scordino judgment¹²: "[...] the reason [the Court] has been led to rule on so many length-of-proceedings cases is because certain Contracting Parties have for years failed to comply with the “reasonable time” requirement under Article 6 § 1 and have not provided a domestic remedy for this type of complaint”.

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⁹ ECtHR 26 October 2000, Kudla v. Poland (appl. no. 30210/96).

¹⁰ Ibidem, para. 148.


¹² ECtHR 29 March 2006, Scordino v. Italy (No. 1) (appl. no. 36813/97), §§ 174-175. See also ECtHR [GC] 8 June 2006, Sürmeli v. Germany (appl. no. 75529/01), paras. 97-101.
The growing importance of effective domestic remedies was also underlined on the political level. The Heads of State and Government at the Third Summit of the Council of Europe (Warsaw, 16-17 May 2005) highlighted the issue in the Summit’s Action Plan and this was reiterated in the Declaration adopted at the Brighton Conference (19-20 April 2012) which expressed in particular “the determination of the States Parties to ensure effective implementation of the Convention” by “considering the introduction if necessary of new domestic legal remedies, whether of a specific or general nature, for alleged violations of the rights and freedoms under the Convention”, and also by “enabling and encouraging national courts and tribunals to take into account the relevant principles of the Convention, having regard to the case law of the Court, in conducting proceedings and formulating judgments; and in particular enabling litigants, within the appropriate parameters of national judicial procedure but without unnecessary impediments, to draw to the attention of national courts and tribunals any relevant provisions of the Convention and jurisprudence of the Court”.

Article 35 ECHR

Article 35 of the Convention requires applicants to exhaust all available (and effective) domestic remedies before being able to
bring a case to the European Court because the respondent State must first have “the opportunity to put right the violations alleged against them”.\(^{13}\) Or as the Court phrased it in a rare Grand Chamber decision on admissibility:

“It is primordial that the machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights. This Court is concerned with the supervision of the implementation by Contracting States of their obligations under the Convention. It cannot, and must not, usurp the role of Contracting States whose responsibility it is to ensure that the fundamental rights and freedoms enshrined therein are respected and protected on a domestic level. The rule of exhaustion of domestic remedies is therefore an indispensable part of the functioning of this system of protection. States are dispensed from answering before an international body for their acts before they have had an opportunity to put matters right through their own legal system and those who wish to invoke the supervisory jurisdiction of the Court as concerns

\(^{13}\) See ECtHR 6 November 1980, Van Oosterwijck v. Belgium (appl. no. 7654/76), para. 34. This line of reasoning had already been applied by the European Commission of Human Rights in the Fifty-seven inhabitants of Louvain v. Belgium case (appl. no. 1994/63, to be found in the Yearbook of the ECHR 1964, p. 252): “[the respondent State] must first have an opportunity to redress the situation complained of by its own means and within the framework of its own domestic legal system”).
complaints against a State are thus obliged to use first the remedies provided by the national legal system [...]. The Court cannot emphasise enough that it is not a court of first instance; it does not have the capacity, nor is it appropriate to its function as an international court, to adjudicate on large numbers of cases which require the finding of basic facts or the calculation of monetary compensation – both of which should, as a matter of principle and effective practice, be the domain of domestic jurisdictions.” 14

The Court’s reasoning clearly indicates that this admissibility criterion is a clear manifestation of the principle of subsidiarity.

Margin of appreciation doctrine

Manifestations of the subsidiary nature of the Convention mechanism can also be found in the case-law of the European Court, most notably the famous (or infamous) margin of appreciation doctrine. The jurisprudence of the Court makes clear that the States Parties enjoy a margin of appreciation in how they apply and implement the Convention, depending on – inter alia – the rights and freedoms engaged, the circumstances of the case,

the seriousness of the infringement, the existence of a European consensus, and the thoroughness of the analysis carried out by the domestic (judicial) authorities.\(^\text{15}\)

The rationale of the margin of appreciation doctrine is the manifestation of the principle of subsidiarity. In the words of Sir Humphrey Waldock, former President of the Court: “The doctrine of the ‘margin of appreciation’ […] is one of the more important safeguards developed by the Commission and the Court to reconcile the effective operation of the Convention with the sovereign powers and responsibilities of governments in democracy”.\(^\text{16}\)

The doctrine is an interpretational tool to acknowledge that (a) implementation of Convention standards often requires policy choices to be made, (b) that national authorities are in principle best placed to make these policy choices because of their direct contact with their societies\(^\text{17}\), (c) that these national authorities in


\(^{16}\) H. Waldock, “The Effectiveness of the System Set up by the European Convention on Human Rights”, 1 HRLJ 1 at 9 (1980).

\(^{17}\) See for example ECtHR [GC] 18 September 2009, Varnava a.o. v. Turkey (appl. nos. 16064/90 a.o.), para. 164.
addition have a democratic legitimacy that an international judicial body does not possess, and hence (d) that a certain judicial self-restraint is called for.\textsuperscript{18} This description implies the following:

(a) The doctrine presupposes a situation in which it is legitimate for national authorities to make policy choices on the domestic level, i.e. it does not apply to situations in which the Convention has to offer protection against “naked, bad-faith abuse of power by governmental authorities”\textsuperscript{19}.

(b) The doctrine equally presupposes the proper functioning of democratic processes at national level. Deference to national discretion because of its democratic legitimacy only makes sense if there is a proper functioning of those democratic institutions. And this may well explain why the Court’s case-law is sometimes more preoccupied with the procedural fairness of a solution found on the national level (including the issue whether clear reasons for the decision taken are given) than the substantive choices that have been made on

\textsuperscript{18} See also P. Mahoney, “Judicial Activism and Judicial Self-restraint in the European Court of Human Rights: Two Sides of the Same Coin”, 11 HRLJ 1-2 (1990), pp. 57-88.

\textsuperscript{19} Paul Mahoney, “Marvellous Richness of Diversity or Invidious Cultural Relativism?”, 19 HRLJ 1 (1998) at p. 4.
the domestic level.\textsuperscript{20} In \textit{S.H. v. Austria}, for example, the Grand Chamber ruled that it falls to the Court “to examine carefully the arguments taken into consideration during the legislative process and leading to the choices that have been made by the legislature”.\textsuperscript{21}

Other interpretational tools reflecting the principle of subsidiarity

Besides the margin of appreciation doctrine, there are other examples to be found in the Court’s case-law which equally reflect the emphasis on subsidiarity. Frequently, the Court states that it is not a ‘fourth instance’.\textsuperscript{22} Its role is not to act as a court of appeal: “it is not its function to deal with errors of fact or of law allegedly committed by a national court unless and in so far as they may have infringed rights and freedoms protected by the


\textsuperscript{22} See also point 9 of the Action Plan adopted at the Interlaken Conference inviting “the Court to […] avoid reconsidering questions of fact or national law that have been considered and decided by national authorities, in line with its case-law according to which it is not a fourth instance court”.


Convention”. Likewise, the Court is reluctant to be drawn into a situation where it has to pronounce itself on the correct interpretation of domestic law or on the correct establishment of facts by the national courts: “It is generally unsatisfactory for this Court to find itself in the position of being asked to pronounce on the correct interpretation of domestic law.” In summary, the Court will exercise self-restraint in particular with regard to the following: (a) the establishment of the facts of the case; (b) the interpretation and application of domestic law; (c) the admissibility and assessment of evidence at the trial; (d) the substantive fairness of the outcome of the proceedings before the domestic court (including the guilt or innocence of the accused in criminal proceedings).

In conclusion, the principle of subsidiarity was already firmly rooted in the Convention mechanism before the recent negotiations on the reform process commenced.

23 ECtHR 12 July 1988, Schenk v. Switzerland, appl. no. 10862/84.

24 ECtHR 20 October 2015, Sher a.o. v. UK, appl. no. 5201/11, par. 135.
2. **Further strengthening of the principle of subsidiarity in the recent reform process**

I have been involved in the negotiations on the reform process of the system established under the European Convention on Human Rights for the last decade or so. During 2014-2015 as the Chair of an intergovernmental working group within the Council of Europe on the longer term future of the Convention mechanism. Despite the fact that the principle of subsidiarity was already firmly rooted in the Convention mechanism, it is fair to say that one of the aims of the recent reform negotiations has been to strengthen the principle even further. One may wonder why. Two main reasons can be discerned in this regard.

1. Improving the Convention system’s ability to deal with the increasing number of applications was one of the principal aims of the reform process, i.e. the discussions were driven by the aspiration to reduce the numbers. Those numbers were alarming. On 1 September 2011 the number of applications pending before the Court had increased to 160 200, and – even more worrisome – that number was increasing by approximately 1 500
applications per month. No international system is able to maintain its authority when faced with such numbers. Increasingly, policy makers realized that the reform process should not (exclusively) focus on the functioning of the Court itself, but the entire Convention mechanism, i.e. including better implementation of the Convention acquis on the domestic level and better execution of Court judgements in order to reduce the number of repetitive cases.

2. Having said that, I think it is fair to say that some policy makers have put ‘subsidiarity’ high on their agenda because they put greater emphasis on the flip side of the principle of subsidiarity, i.e. the margin of appreciation that should be granted to domestic authorities by an international tribunal. Some policy makers have argued that the Strasbourg Court too easily overturns decisions taken by democratically elected representatives in national parliament. Others are concerned with what they consider ‘mission creep’ by the European Court. The Convention, being a living instrument that needs to be interpreted in the light of present day conditions, has been held to apply to situations that were not foreseeable when the Convention was first adopted, such as the use of new information

technology or artificial procreation, and to situations that were in fact foreseeable, but where there have been societal developments since the adoption of the Convention, such as in cases relating to sexual orientation. Some view such a ‘dynamic’ interpretation of the Convention as ‘mission creep’; ‘this is not what we signed up for’. However, one has to realise that without a ‘living instrument doctrine’ the practical significance of the Convention would be greatly reduced. A dynamic interpretation method is called for in light of the fact that Convention rights which were drafted in 1950 need to be applied to societal problems in the present day.

Whatever the rationale, the end result has been the same: the reinforcement of the principle of subsidiarity. In the 2010 Interlaken Declaration the subsidiary nature of the supervisory mechanism established by the Convention was ‘stressed’, called for ‘a strengthening of the principle of subsidiarity’, and invited the Court to “avoid reconsidering questions of fact or national law that have been considered and decided by national authorities, in line with its case-law according to which it is not a fourth instance court”. 26 A similar call is to be found in the 2011 Izmir Declaration inviting the Court to “confirm in its case law that it is not a fourth-instance court, thus avoiding the re-examination of issues

of fact and law decided by national courts”. In this regard it should be noted that there was a vivid debate at the time among member states whether it was legitimate for states to ‘interfere’ with interpretational tools belonging in the – at least by some perceived to be – exclusive domain of the Court itself. The strongest language came in April 2012 in the Brighton Declaration ‘encouraging’ the Court “to give great prominence” to principles such as subsidiarity and the margin of appreciation. It also called for inclusion of the principle of subsidiarity in the Preamble to the Convention, which would be realized in Protocol 15.

Protocol 15

Article 1 of Protocol 15 adds at the end of the Preamble to the Convention a new recital containing a reference to the principle of subsidiarity and the doctrine of the margin of appreciation. It is intended to – and I quote the explanatory memorandum –


29 Ibidem, B.12.b.

30 CETS No. 213, opened for signature on 24 June 2013.
“enhance the transparency and accessibility of these characteristics of the Convention system”.\textsuperscript{31} The importance of these principles is confirmed without calling into question its scope or how broad or narrow the margin of appreciation afforded to domestic authorities should be. Although the symbolic value of Protocol 15 cannot be denied, it remains to be seen whether or not the new recital added to the Preamble will have any practical impact.

Protocol 16
A potentially more radical alteration to the functioning of the Convention system, including the division of responsibilities between the Court and the domestic actors, is laid down in Protocol 16 (CETS No. 214, opened for signature on 2 October 2013). It allows certain highest courts and tribunals of a State Party to request the Court to give advisory opinions on questions of principle relating to the interpretation or application of the rights and freedoms defined in the Convention. The Protocol entered into force on 1 August 2018. It has been ratified by Albania, Armenia, Estonia, Finland, France, Georgia, Lithuania, the Netherlands, San Marino, Slovenia and Ukraine. Another 11

\textsuperscript{31} The same wording appeared also in the Brighton Declaration.
countries have signed the protocol but have not yet ratified it (for example: Belgium, Bosnia and Herzegovina, Greece, Italy, Moldova, Romania and the Slovak Republic). In October 2018 the French Court of Cassation submitted the first request for an advisory opinion.

Protocol 16 seeks to reinforce the principle of subsidiarity. In the CDDH report setting out the arguments in favour of (and against) the introduction of a system of advisory opinions, this was formulated as follows:

“The continuing primary responsibility of the national court (the case remaining within the national system) to act on the Court’s advisory opinion, in accordance with the legal, social and political context of the country concerned, may have the effect of enhancing the authority of the Court and its case-law in the member States whilst fostering dialogue between the Convention mechanism and domestic legal orders, thereby reinforcing the principle of subsidiarity.”

Protocol 16 intends to strengthen and institutionalize the interaction between the Court and national judicial authorities. Former President Spielmann therefore repeatedly referred to Protocol 16 as the ‘protocol of dialogue’.

CDDH report on the longer term future of the system of the European Convention on Human Rights

Whereas ‘Brighton’ and Protocol 15 put greater emphasis on granting (ample) margin of appreciation to national authorities when dealing with human rights matters, focus in the subsidiarity discussion started to shift to the other side of the coin in 2014-2015. Over the course of these two years, work was carried out by a drafting group called GT-GDR-F to draft a report on the longer-term future of the Convention system. In the same period, the Belgian Chairmanship of the Council of Europe organized the high level conference in Brussels in March 2015. The importance of the principle of subsidiarity was once again reiterated in the Brussels Declaration, but interestingly the wording had become somewhat different. It stressed the “primary role played by national authorities, namely governments, courts and parliaments” to do their part.

A similar shift can be discerned in the CDDH report on the longer term future of the system of the European Convention on Human Rights. The report qualifies inadequate national implementation of the Convention “among the principal challenges or […] even the biggest challenge confronting the Convention system”

(paragraph 34 of the report). Both the CDDH report and the Brussels Declaration aim to strengthen the principle of subsidiarity by reinforcing the machinery on the national level when implementing Convention acquis. Some proposals are admittedly not very innovative, such as the call to improve or where necessary create effective domestic remedies or the call to increase efforts as regards professional trainings and awareness-raising activities concerning the Convention and the Court’s case law. But other proposals focus on issues which were less developed in previous documents. Let me briefly mention four issues.

First, in the past there has been a slightly one-dimensional focus on the interaction between the Strasbourg Court and one branch of the trias politica, i.e. domestic courts. The CDDH report places greater emphasis on the role of the legislative process and the role of national parliaments. Governments should systematically check the compatibility of draft legislation with Convention standards at an early stage in the drafting process before a policy is set in stone, including if necessary by means of consultation. Given the increasing use of administrative practice (in the form of inter alia regulations, orders and circulars), the CDDH stresses that this compatibility check should also be conducted in case of such administrative practice. In order to facilitate an informed parliamentary debate on Convention matters it is suggested to explain in the explanatory memorandum to draft laws why the
draft bill is deemed compatible with the requirements of human rights standards. In order for each parliament to fulfil its task, it is essential that sufficient expertise on Convention matters is available to its members. What is needed is a “human rights institutional memory”. The Legal Affairs Committee of the Parliamentary Assembly has urged parliaments to create “dedicated human rights committees or appropriate analogous structures, whose remits shall be clearly defined and enshrined in law”. Access to human rights expertise may also be guaranteed when parliamentary bodies are provided with the support of a specialised secretariat and/or access to impartial advice on human rights matters. Attention is also drawn to the Venice Commission, which offers the possibility of assessing compliance of legislation with Convention standards.

Second, the CDDH report touches on the sensitive issue of a more country specific approach. Is it not time to acknowledge that the ‘top-5’ countries (Russia, Romania, Ukraine, Turkey and Italy) account for 68.7% of all pending cases34. If we complete the ‘top-10’ we can add an additional 15.8%. This means that the remaining 37 countries account for 15.6% of the total workload.

34 Annual report ECtHR 2018, p. 169.
The related statistic that cannot be ignored is that repetitive cases account for almost half of all pending applications.  

Third, the CDDH report also touches upon the sensitive issue of the *de facto erga omnes* effect of Court judgments (or *res interpretata*). Discussion on this issue did not prove to be easy. Some countries had significant difficulties with the concept of *de facto erga omnes* effect and the proposal to include a Convention-based legal obligation upon States Parties to abide by final judgments of the Court in cases to which they were not parties met with widespread opposition. However, the CDDH did note that “there would appear to be scope to better take into account the general principles found in the Court’s judgments in cases against other High Contracting Parties, in preventive anticipation of possible violations”.  

Fourth, it is perhaps a minor point on the grand scale of things but it could be a low threshold proposal with great potential: the establishment of ‘contact points’ within various branches of a State Party, specialised in human rights matters. The advantage

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35 The Interlaken process and the Court, 2015 Report, p. 3.

is that not every colleague needs to maintain up-to-date knowledge of the entire body of case-law of the Court. For example, in Dutch courts a coordinator for European law ('GCE') is designated within each court. They are responsible for keeping their colleagues informed about relevant developments in the case law of the European courts. Especially, the newsletter of the court of appeal of Amsterdam is distributed widely (and won 2nd prize on 17 October 2014 at the 2014 Crystal Scales of Justice Prize awarding of the Council of Europe).\textsuperscript{37}

\textsuperscript{37} See the website http://europeancourts.blogspot.nl/ for more information. The newsletters themselves are in Dutch.
3. Dialogue

A third dimension of the principle of subsidiarity is the dialogue between both jurisdictional layers as regards the pre-arranged division of responsibilities.

In the Convention system that attributes responsibilities to various jurisdictional layers tensions between those layers are unavoidable. Since policy makers do not wish to emphasize any hierarchy in the multi-layered legal order (with the exception of Article 46 ECHR on the binding force of judgments of the Court), it is important to guarantee that these tensions do not evolve into conflicts. Even more so because a conflict – once it has materialised – cannot be that easily solved. For that reason, the various layers should develop practical tools in order to ‘soften’ those tensions. And in this regard, “dialogue” is the new buzz word. I already discussed Protocol 16, but there are numerous manners in which ‘dialogue’ between the Convention mechanism and the national legal system can materialize.

Judicial dialogue

There is the annual seminar 'Dialogue with judges' preceding the Opening of the Judicial Year of the Court where the highest national courts of most member states are represented. There
are many occasions where representatives of the domestic judiciaries visit the Strasbourg Court. But there is an additional form of judicial dialogue, i.e. via the case-law of the European Court of Human Rights and that of domestic courts.

A ‘good example’\(^{38}\) of such judicial dialogue is the case of *Al-Khawaja and Tahery*\(^ {39}\). In the early 2000s, Mr Al-Khawaja was convicted of indecent assault and Mr Tahery of wounding with intent to cause grievous bodily harm. Their convictions had in common that they were principally based on hearsay evidence, or so the applicants claimed. A chamber of 7 judges ruled in January 2009 that Article 6 of the Convention had been breached. It reached that conclusion unanimously. Nonetheless, leave to appeal was granted and the case was referred to the Grand Chamber. Before the Grand Chamber decided the case, however, the Supreme Court of the United Kingdom had the possibility in the case of *R. v. Horncastle and Others*\(^ {40}\) to comment on the Chamber judgment. The Grand Chamber was subsequently able to take into account the comments of the domestic judges

\(^{38}\) Concurring opinion Judge Bratza in the Grand Chamber judgment in the case of Al-Khawaja and Tahery.


directed at the very judgment referred to it. The outcome is known: the Grand Chamber concluded that there had been no breach of the Convention by fifteen votes to two. I acknowledge that the situation in the case of Al-Khawaja was quite exceptional, but it demonstrates that judicial dialogue is a reality in the Convention mechanism.

One of the aims of Protocol 16 allowing certain highest courts and tribunals of a State Party to request the Court to give advisory opinions on questions of principle relating to the interpretation or application of the rights and freedoms defined in the Convention, is to increase such judicial dialogue and to provide an institutional framework for it. In this regard I also like to refer to the establishment of a case law information Network open to superior courts, created by the Court at the end of 2015, under the responsibility of its Jurisconsult, to ensure the exchange of information on the case law of the Convention.

**Dialogue between the Court and domestic legislators**

A second modality of dialogue concerns the dialogue between the Strasbourg system and the national legislator. Again I turn to a British example. The case of *Animal Defenders International* was concerned with the refusal of permission for a non-governmental organisation to place a television advert owing to a statutory prohibition of political advertising in the United Kingdom. The
Court held that “in order to determine the proportionality of a general measure, the Court must primarily assess the legislative choices underlying it. The quality of the parliamentary and judicial review of the necessity of the measure is of particular importance in this respect, including to the operation of the relevant margin of appreciation.”41 I.e. a well-reasoned balancing of interests in the legislative process may lead to a greater margin of appreciation awarded by the European Court. The domestic authorities demonstrate in a transparent manner that they have carefully considered the manner of implementation of Convention rights and the choices that they made in that process. Given the subsidiary character of the Convention mechanism the European Court is then more likely to accept the choices made on the domestic level.

Informal dialogue

Let me finally say a word or two about other more informal means of dialogue between the Court and domestic actors. In 201642, the President of the Court had private meetings with

41 ECtHR [GC] 22 April 2013, Animal Defenders International v. United Kingdom, appl. no. 48876/08, par. 108.

42 According to the President’s activities to be consulted on the Court’s website; http://www.echr.coe.int/sites/search_eng/Pages/search.aspx#1%22sort%22:1%22createdAsDate%20Descending%22
representatives of 27 High Contracting Parties in total. In addition, there are the annual meetings with the Agents before the Court, as well as with civil society such as Human Rights Watch, Amnesty International, International Commission of Justice, the AIRE Centre.

A similar dialogue between the Court and government representatives exists via the reform process itself. The negotiations did not only produce two amending protocols, an additional optional protocol and various declarations of high-level conferences. Perhaps more importantly, many things that were discussed in the various working groups were picked up by the Court without any formal decisions by the Committee of Ministers or amendments to the Convention. In that sense, the reform negotiations themselves serve a very useful purpose of facilitating a continuous dialogue between State representatives, the Court, civil society and other stakeholders such as the Parliamentary Assembly.

For example, in the discussions held in the Agora building in Strasbourg representatives of the States often complained about the lack of transparency concerning certain (statistical) information. Accurate and reliable statistical information is essential when analysing a problem and advising politicians what
action to take. There are so many myths going around that it is of primordial importance to have reliable figures at hand. In recent years – and with the support of the former Registrar of the Court, Erik Fribergh – the Court has responded to this criticism. There is a lot more (statistical) information made available, for example through the Court's website.

At the same time, certain issues that were discussed in the CDDH – and even received considerable support from High Contracting Parties – were dismissed following feedback from the Court in its position papers or from representatives of the Registry of the Court at the meetings themselves.
4. Some final thoughts

The relationship between the European Court and the domestic courts is governed by the principle of subsidiarity which should be accompanied by respect for the agreed division of responsibilities. It would be wrong to invoke considerations of subsidiarity to deny the appropriate division of responsibilities.

In this regard reference should be made to the opinion of the Venice Commission on the 2015 amendments to the Constitutional Law on the Constitutional Court of the Russian Federation. These amendments empowered the Constitutional Court to declare judgments of the European Court of Human Rights as “unenforceable” if the ruling of the Strasbourg Court is deemed to be incompatible with the “fundamentals of the Russian constitutional system” and the “human rights regime established by the Constitution of the Russian Federation”. The consequence of such a finding by the Constitutional Court would be that “no actions/acts whatsoever” aimed at enforcing the international decision may be taken/adopted in the Russian Federation. This

comprises both general and individual measures of execution as well as future decisions. As the Venice Commission has pointed out such a declaration of unenforceability of a judgment of the European Court of Human Rights violates Article 46 of the European Convention on Human Rights, which is an unequivocal legal obligation and includes the obligation for the State to abide by the interpretation and the application of the Convention made by the Court in cases brought against it. One could argue that such a system is a denial of the division of responsibilities as they are laid down in the Convention system as willingly ratified by the High Contracting State concerned. Subsidiarity remains to be based on the premise that both levels of jurisdiction play a meaningful role and are engaged in a relationship built on mutual respect.

Ladies and gentlemen, I thank you for your attention!