

DIALOGUE BETWEEN JUDGES 2022



Human rights protection in the time of the pandemic: new challenges and new perspectives



EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

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Dialogue between judges

Proceedings of the Seminar
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*Human rights protection in the time of the
pandemic:
new challenges and new perspectives*

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Robert Spano

**President of the European Court
of Human Rights**

WELCOME SPEECH

Presidents of Constitutional and Supreme Courts, Distinguished speakers, Colleagues, Friends,

On behalf of all my fellow judges, may I welcome you to this seminar which marks the official, albeit postponed, opening of the judicial year. This is our 17th edition of the judicial seminar, which from the outset has aimed to maintain, strengthen and deepen our dialogue with you, national judges from your country's superior courts. It cannot be repeated too often that effective protection of human rights begins and often ends at the national level.

This year the topic which has been chosen for your discussions is the COVID-19 pandemic and in particular its impact on human rights' protection and on our work as judges. Unfortunately this is a subject which has not lost its relevance.

Nevertheless, I am happy to address you this afternoon without a mask and even happier to see so many of you here in person. The pandemic has taught us that while technology has many advantages, nothing can replace meetings in person.

Let me begin by warmly welcoming our guest speakers: Professor Yuval Shany, Lady Arden of Heswall and Professor Dr Katja Šugman Stubbs.

Of course, I would also like to express my thanks to this year's Judicial Organising Committee: Judge Armen Harutyunyan, Marko Bošnjak, María Elósegui, Ivana Jelić and Raffaele Sabato. Thanks are also due to Rachael Kondak, Tara Beattie, Valerie Schwartz and Tatiana Kirsanova.

My mandate as President of the Court began just a couple of months into the pandemic in May 2020. Responding to that pandemic was a major challenge for our Court, as well as for your courts.

The pandemic has put pressure on our member States to fulfil their positive obligations to protect life and health. Yet, as I have previously stated, there exists the risk of the pandemic being used as a pretext for abusing public power, imposing measures on the populace which, although intuitively persuasive in the face of an unprecedented threat to human life and well-being, is upon a closer look a manifestly disproportionate overreach which threatens the fundamentals of democratic life, societies governed by the rule of law and the protection of human rights. Balance is key.

We have a lot to learn from each other. This was one of the reasons why only a few months into the pandemic we organized an online seminar with our sister regional human rights courts: the African Court of Human and Peoples' Rights and the Inter-American Court of Human Rights to share experiences and perspectives.

Our own experience of adjudicating pandemic-related applications, as well as responding to interim measure requests, is set out in the very useful background document which accompanies today's discussions.

It shows the broad range of complaints we have received so far relating to curfew measures; vaccination passes; freedom of assembly and expression restrictions and financial damage to businesses. We can certainly expect more complaints to be lodged in the future, however, we have not received the tsunami of applications which we perhaps anticipated at the very beginning of the pandemic. There may be many reasons for this; some of which you will undoubtedly discuss today.

Like last year, I encourage you to actively take part in this afternoon's discussions. You are our partners in the Convention system; your views matter to us; we would like to hear from you.

Now let me give the floor to Judge Harutyunyan who will introduce the seminar on behalf of the Organising Committee.

I wish you all a productive and fruitful afternoon of discussions.



Armen Harutyunyan

Judge of the European Court of Human Rights

INTRODUCTION

Recent decades have seen a steady rise in trends which undermine the fundamental values that unite all the Council of Europe member States. Some countries have even started to put in place a series of systemic, planned measures aimed at weakening the democratic system of human rights based on the rule of law.

Against this background we should highlight the role of the ECHR, which, firstly, identifies systemic human rights issues; secondly, acts as an early-warning system for threats to the rule of law and democracy; and thirdly, obliges member States to bring their legal systems and the means of implementing the law into line with the requirements of the Convention and the Court's case-law. In other words, the European Court of Human Rights and its case-law strike a balance between freedom and the law.

As the Court sees it, democracy is a fundamental characteristic of the European *ordre public* emerging from the Preamble to the Convention. The Preamble establishes a very clear link between democracy and the Convention and asserts that human rights and freedoms are best realised and maintained by an effective political democracy and by a common understanding of human rights. According to the Preamble, European countries share political traditions and ideas and have a common heritage of freedom and the rule of law. The Court has repeatedly noted that the Convention is aimed at preserving and promoting the values of a democratic society.

Constitutional-law theory and political science have asserted that the existence of a democracy depends on respect for **civil and political** rights and freedoms. That is what characterises countries as democracies.

In that regard democratic countries can be classified not just as fully democratic or minimally democratic; other labels might be assigned to "minimal" democracies, such as "hybrid regimes", "competitive authoritarianism", "semi-authoritarianism", and so on. **However, the crux of the problem is that the dynamics of modern global processes, including at pan-European level, disclose a situation in which a challenge to human rights and democracy is wrapped up in democratic packaging.** This means that anti-democratic democracies are starting to emerge. Illiberal democracies of any kind, which are by nature "semi-democracies", pose a challenge to democracy. These "formal democracies" undermine the substance of the democratic form in the organisation of State power.

Democracy as a concept views human rights and freedoms as an inherent attribute of the individual. States may restrict human rights and freedoms, on condition, firstly, that such restrictions are based on the law; secondly, that they pursue a legitimate aim; and thirdly, that they are necessary in a democratic society.

In these circumstances, the COVID-19 pandemic has become a very serious challenge for the member States of the Council of Europe, as well as for the whole Convention system. However, the problem is not only that the pandemic carries objective difficulties for democracy and the rule of

law. The stability of the old systems of checks and balances is being severely tested. In this regard, conferences such as today's are important to share lessons learned and understand where the old mechanisms work and where a new approach is needed.

But besides these there is another, more dangerous, tendency when the pandemic is seen not as a challenge to the established system of human rights protection but as an opportunity to set aside human rights in favour of the interests of the authorities and to follow the path of legal positivism, thus changing the whole concept of law and drifting from the rule of law towards legal positivism.

This is why, within the Seminar, three sub-themes have been highlighted for discussion: (I) Restrictions on human rights during the time of the pandemic; (II) Positive obligations on States during a pandemic; and (III) Proceedings before courts.

The first topic this morning concerns the measures which States have put in place, often in an emergency context, in order to prevent and stem the spread and effects of COVID-19. These have involved restrictions on individual human rights and freedoms on a scale that is unprecedented in modern times, ranging from nationwide restrictions on free movement and assembly to mass tracing and data collection, as well as the implementation of national vaccination and health pass systems.

The second topic concerns the duties which States owe to individuals within their jurisdiction in protecting their rights in the context of a pandemic. Most obviously, this relates to the protection of a population's life and health, both in terms of taking adequate protective measures against the spread of the virus and in ensuring access to treatment and healthcare. Particular regard is to be had to the protection of vulnerable groups and those who are under the supervision of the State, such as detainees.

The third topic concerns the challenges faced and adaptations made in proceedings before the courts during the pandemic. At the regional level, the Court has reacted to the exigencies of the public health crisis and the measures put in place in its host State by changing aspects of its practice and functioning. It has also received applications relating to domestic court proceedings which, among other things, have been delayed, suspended or adapted in the light of the crisis.

Few areas of life have remained untouched by the coronavirus (COVID-19) pandemic which has swept across Europe – and the rest of the globe – over the course of more than two years. It therefore stands to reason that the health crisis and the action taken by member States in an effort to tackle it are profoundly linked to questions relating to upholding human rights. The aim of this year's Judicial Seminar is to discuss some of the most pertinent questions, with a focus on identifying the challenges posed by the COVID-19 pandemic and the new perspectives gained. It is hoped that, ultimately, these lessons can serve as guidance to ensure that actors are more prepared and human rights are better insulated from further pandemic or health crisis situations.

Let me conclude by thanking the members of this year's Organising Committee for the Judicial Seminar for their hard work and dedication to the cause: Judges Marko Bošnjak, María Elósegui, Ivana Jelić and Raffaele Sabato.

I wish you all a very interesting afternoon of discussions.



Yuval Shany

**Hersch Lauterpacht Chair in International Law
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RESTRICTIONS ON HUMAN RIGHTS DURING THE TIME OF THE PANDEMIC

Dear judges, colleagues, distinguished guests, friends,

I am grateful to have been invited to discuss with you questions relating to the application of human rights during the time of the pandemic. I sat on the United Nations Human Rights Committee during the first year of the pandemic and was instrumental in drafting its April 2020 statement on states of emergency, which adds to other statements made by the nine other global human rights bodies on the application of human rights during the pandemic. I will focus in my comments on the question of the application of restrictions on the enjoyment of human rights during the pandemic as reflected in the said statements. Lady Arden, who will be speaking after me, will discuss the proverbial “other side of the coin” – that is, positive obligations for States arising out of the pandemic.

There is little question that the COVID-19 pandemic created conditions which could justify restrictions or limitations under human rights instruments. The need to reduce infections has led in many countries to the adoption of restrictions on movement, such as lockdowns, limits on mass gatherings – including religious gatherings and political assemblies – physical distancing, and limited access to certain spaces, including workplaces, schools and hospitals, as well as international travel restrictions. A similar logic has also underlain other measures with a professed epidemiological rationale, which nonetheless have a serious impact on the ability of individuals to enjoy their basic rights; these include mask mandates, vaccination passports and contact-tracing programmes. Some governments have also invoked the fight against the pandemic as a reason for restrictive measures such as the criminalisation of disinformation or limits on political activity, whose compatibility with international law standards is highly questionable.

All pandemic-related restrictions have to be assessed through the prism of the various limitation and derogation clauses existing under the relevant human rights treaties – often mirroring similar legal restrictions existing under domestic law. These limitation and derogation clauses typically include conditions of legality, legitimacy, necessity and proportionality. Given the gap between, on the one hand, the slow reaction time of the global human rights system – which typically operates in a reactive manner through individual communications that take years to resolve (and involves a high threshold for the issuance of interim measures of protection) or through cycles of State reporting which now tend to average around eight years per State – and, on the other hand, the need to provide urgent guidance to States concerning the implementation of the treaties during the pandemic, all global human rights bodies have chosen to issue guiding statements. Such statements were issued sometimes alone and sometimes by working collectively across different committees and in cooperation with charter bodies such as special rapporteurs and with other UN officials. A review of these statements provides us with a snapshot of the main issues relating to limitations on rights during the pandemic that occupied the global system in “real time”, and the main normative approaches which the system has adopted.

The Human Rights Committee statement of 24 April 2000¹ dealt with the four aforementioned basic conditions for limiting rights, but within the context of a specific legal question: the invocation of emergency derogations pursuant to Article 4 of the ICCPR, which around twenty States parties formally made. The Committee was concerned, however, that many other States adopted emergency responses that appeared to exceed the scope of permissible limitations under the Covenant, without making explicit derogations – which invite, in turn, international supervision over whether the specific conditions for derogations have been met. These specific conditions include an official proclamation of emergency, notification to the Secretary-General, conformity with other international obligations, non-discrimination, and respect for non-derogable rights – which the Committee has construed so as to include also derogable rights that are essential for upholding non-derogable rights, such as the right of access to court or the right to an effective remedy.

The statement also underscored the objective previously articulated in the Committee's General Comment No. 29² of "restoration of a state of normalcy where full respect for the Covenant can again be secured", the need to limit the scope of derogations as far as possible and the need to consider the least harmful alternatives which would allow maximum enjoyment of Covenant rights.

Significantly, the statement also introduced an overarching "least harmful alternative" test – that is, that reliance on derogation should only be attempted when States are unable to simply rely on an available limitation under a relevant provision of the Covenant. In addition, the Committee reiterated the duty to treat all persons – including incarcerated persons – with humanity and respect for human dignity, and called on States to ensure that the discourse about the pandemic did not involve prohibited hate speech against marginalised or vulnerable groups including minorities and foreigners. Finally, the statement underscored the importance of preserving freedom of expression and open civic space as safeguards against abuse of emergency powers.

Other statements, issued by other treaty bodies, include the following.

- A call by the ten Chairs of the treaty bodies for all limitations to be applied within a valid legal framework³.

- Guidelines by the Working Group and Committee on Enforced Disappearance aimed at ensuring that the search for the disappeared remains a human rights priority even in times of pandemic, also stressing the need to ensure that limits on access to places of incarceration and changes in the manner of treatment of human remains due to the pandemic do not result in new cases of disappearance⁴.

- A statement by the Committee on the Elimination of Racial Discrimination⁵ underscoring the disparate impact (including domestic and sexual violence) of limitations on movement such as lockdowns on women, girls, persons with disabilities and women belonging to minority and indigenous groups, condemning the racially discriminatory manner in which certain limitations are enforced, and calling specifically for measures to ensure effective access to education in the face of restrictions imposed in the field. This is an issue that is highly relevant in situations involving a digital divide between different population groups within the State. Finally, it called for measures to promote the participation of minority groups in the design and implementation of the response to the pandemic.

1 Human Rights Committee, Statement on derogations from the Covenant in connection with the COVID-19 pandemic, 24 April 2020, UN Doc. CCPR/C/128/2 (2020).

2 Human Rights Committee, General Comment No. 29: U.N. Doc. CCPR/C/21/Rev.1/Add.11 (2001).

3 UN OHCHR Press Release, "UN Human Rights Treaty Bodies Call for Human Rights Approach in Fighting COVID-19", 24 March 2020, <https://www.ohchr.org/en/press-releases/2020/03/un-human-rights-treaty-bodies-call-human-rights-approach-fighting-covid-19?LangID=E&NewsID=25742>.

4 Key Guidelines on COVID-19 and Enforced Disappearances, 18 Sept. 2020, https://www.ohchr.org/sites/default/files/Documents/HRBodies/TB/COVID19/Guidelines_COVID-19_and_Enforced_Disappearance.pdf.

5 Committee on the Elimination of All Forms of Racial Discrimination, Statement on the coronavirus (COVID-19) pandemic and its implications under the International Convention on the Elimination of All Forms of Racial Discrimination, 7 August 2020, <https://www.ohchr.org/sites/default/files/Documents/HRBodies/TB/COVID19/Statement-CERD-COVID-19.docx>.

- Four statements by the Committee on Economic, Social and Cultural Rights⁶: the **first** statement called for responses based on the best available scientific evidence, for core obligations under the Covenant for Economic, Social, and Cultural Rights to be prioritised, and for access to justice and to effective legal remedies to be ensured. Special attention was devoted in this statement to concerns about profiteering in foodstuffs, access to accurate information, and to the need not to impose limits on the export of medical equipment and on the flow of necessary goods in a manner that would harm the world's neediest populations. The **second** statement called for the easing of international sanctions and for international debt relief. A **third** statement by the Committee called for improved access to vaccines and condemned discriminatory limits and priorities in accessing them. It also urged effective action to counter misinformation concerning vaccines and recommended public consultations in setting access priorities. The **fourth** statement condemned vaccine nationalism and called for intellectual property rights that impede access to medicines and vaccines to be relaxed.

- The guidelines issued by the Committee on the Elimination of Discrimination against Women⁷ focused on the disproportionate impact on women of the restrictive measures adopted, on the need to protect women against gender-based violence during confinement, on equal participation of women in shaping responses to the pandemic and on the need to ensure continuous access by women to education. The Committee also issued a statement⁸ directing attention, inter alia, to multiple discrimination due to the impact of restrictive measures in terms of fuelling nationalism, populism and the like, and to the adverse impact of border closures on international solidarity. It also expressed concerns about financial resources being diverted away from gender equality-promoting institutions because of the pandemic.

- A joint statement by the UN Committee against Torture and the Subcommittee on the Prevention of Torture, the UN Special Rapporteur on Torture and the Chair of the Board of Trustees of the UN Voluntary Fund for Victims of Torture⁹ drew attention to the vulnerability associated with the situation of persons detained in confined spaces, and expressed concerns about the use of excessive force to enforce curfews.

- The Subcommittee on Prevention of Torture also issued statements¹⁰ calling on States to reduce prison populations, maintain the operation of detention complaint procedures, provide for alternative visiting arrangements in places of detention, refrain from automatically using disciplinary isolation protocols for medical isolation purposes, and treat individuals in quarantine as free agents in all respects other than for enforcing the quarantine itself and regard them as persons deprived of liberty entitled to all fundamental safeguards.

6 Committee on Economic, Social and Cultural Rights, Statement on the coronavirus disease (COVID-19) pandemic and economic, social and cultural rights, 6 April 2020, UN Doc. E/C.12/2020/1; Statement by the Committee on Economic, Social and Cultural Rights, "COVID-19: UN Experts call for international solidarity to alleviate financial burdens of developing countries and the most vulnerable", 7 April 2020, https://www.ohchr.org/sites/default/files/Documents/HRBodies/TB/COVID19/COVID-19_Call_for_international_solidarity.docx; Committee on Economic, Social and Cultural Rights, Statement on universal and equitable access to vaccines for COVID-19, 27 Nov. 2020, UN Doc. E/C.12/2020/2 (2020); Committee on Economic, Social and Cultural Rights, Statement on universal affordable vaccination against coronavirus disease (COVID-19), international cooperation and intellectual property, 23 April 2021, UN Doc. E/C.12/2021/1 (2021).

7 Committee on the Elimination of All Forms of Discrimination against Women, Guidance Note on CEDAW and COVID-19, 22 April 2020, https://www.ohchr.org/sites/default/files/Documents/HRBodies/TB/COVID19/Guidance_Note.docx.

8 Statement of the Committee on the Elimination of All Forms of Discrimination against Women, "Call for joint action in the times of the COVID-19 pandemic", 21 April 2020, https://www.ohchr.org/sites/default/files/Documents/HRBodies/TB/COVID19/CEDAW_Call_for_joint_action.doc.

9 Joint statement issued by the UN Committee against Torture, the UN Subcommittee on Prevention of Torture, the UN Special Rapporteur on Torture and other cruel, inhuman or degrading treatment or punishment, and the Board of Trustees of the UN Voluntary Fund for Victims of Torture, "COVID-19 Exacerbates the risk of Ill-Treatment and Torture Worldwide", 26 June 2020, <https://www.ohchr.org/en/statements/2020/06/covid-19-exacerbates-risk-ill-treatment-and-torture-worldwide-un-experts?LangID=E&NewsID=25995>.

10 UN OHCHR Press Release, UN Torture Prevention Body: "COVID-19 Shows Need to Strengthen National Preventive Mechanisms", 2 July 2020, <https://www.ohchr.org/en/press-releases/2020/07/un-torture-prevention-body-covid-19-shows-need-strengthen-national?LangID=E&NewsID=26031>; Subcommittee on Prevention of Torture, Advice of the Subcommittee to States parties and national preventive mechanisms relating to the coronavirus disease (COVID-19) pandemic, 25 March 2020, UN Doc. CAT/OP/40/2 (2020).

- A statement by the Committee on the Rights of the Child¹¹ drawing attention to the health, education, economic and recreational impacts of extended pandemic-related restrictions, and calling on States to explore creative solutions such as outdoor activities and child-friendly broadcast services, to ensure access to online learning and to strengthen child protection services for children in lockdown. It also called on States to consider releasing children from detention if they could not be visited there, to refrain from detaining children for violating COVID-19 regulations and not to invoke financial difficulties as an impediment to the implementation of the Convention on the Rights of the Child.

- The Committee on Migrant Workers issued three statements¹² in collaboration with a series of other international bodies and officials working on migrants' rights. The first statement called for the implementation of special safeguards when responding to COVID, including by respecting the standards set out in the Convention on the Rights of All Migrant Workers and Members of their Families and by ensuring that emergency measures are necessary, legitimate, proportionate and non-discriminatory, providing virtual access to education to children of migrants, establishing "firewalls" between enforcement of immigration law and access to health and other public services, reducing immigration detention, and considering suspending deportations during the pandemic. The second statement called for the rights of migrants in detention facilities to be protected and for safe and dignified repatriation to be arranged; and the third statement called for equitable access of migrants to vaccines.

- The Committee on the Rights of Persons with Disabilities has also published two statements¹³. One statement (issued with another UN official) called for rapid de-institutionalisation of persons with disabilities and for the inclusion and effective participation of persons with disabilities in the planning of pandemic responses. The second statement endorsed a report by the Office of the High Commissioner for Human Rights calling for specific responses to the pandemic regarding persons with disabilities, in the light of best international practices that include exempting support persons for persons with disabilities from movement restrictions, relaxing confinement rules for persons with disabilities, and releasing prisoners with disabilities.

The upshot of these multiple statements is that global bodies have made only a limited push against the actual need to impose broad restrictions on human rights during the pandemic. However, they have made a stronger push towards establishing side constraints relating to the scope and design of the restrictions adopted, and an even stronger push still towards introducing corrective or harm-reducing measures. Let me address three key aspects that illustrate this general approach.

11 Statement of the Committee on the Rights of the Child: "The Committee on the Rights of the Child warns of the grave physical, emotional and psychological effect of the COVID-19 pandemic on children and calls on States to protect the rights of children", 8 April 2020, https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=INT/CRC/STA/9095&Lang=en.

12 UN Committee on the Protection of the Rights of All Migrant Workers and Members of their Families and UN Special Rapporteur on the human rights of migrants, Joint Guidance Note on the Impacts of the COVID-19 Pandemic on the Human Rights of Migrants, 26 May 2020, <https://www.ohchr.org/sites/default/files/Documents/Issues/Migration/CMWSPMJointGuidanceNoteCOVID-19Migrants.pdf>; UN OHCHR Press Release, "COVID-19: Governments must protect the rights of migrants during the pandemic and beyond, UN experts urge", 26 May 2020, <https://www.ohchr.org/en/press-releases/2020/05/covid-19-governments-must-protect-rights-migrants-during-pandemic-and-beyond?LangID=E&NewsID=25904>; UN Committee on Migrant Workers (CMW), UN Special Rapporteur on the human rights of migrants, Office of the United Nations High Commissioner for Human Rights (OHCHR), Special Rapporteur on Refugees, Asylum Seekers, Internally Displaced Persons and Migrants in Africa of the African Commission on Human and Peoples' Rights, Special Representative of the Secretary General on Migration and Refugees of the Council of Europe and Rapporteur on the Rights of Migrants of the Inter-American Commission on Human Rights, Joint Guidance Note on Equitable Access to COVID-19 Vaccines for All Migrants (2020), <https://www.ohchr.org/sites/default/files/Documents/Issues/Migration/JointGuidanceNoteCOVID-19-Vaccines-for-Migrants.pdf>; UN OHCHR Press Release, "Stranded migrants need safe and dignified return" – UN Migrant Workers Committee, 1 Oct. 2020, <https://www.ohchr.org/en/press-releases/2020/09/stranded-migrants-need-safe-and-dignified-return-un-migrant-workers?LangID=E&NewsID=26325>.

13 Joint Statement by the Chair of the United Nations Committee on the Rights of Persons with Disabilities, on behalf of the Committee on the Rights of Persons with Disabilities and the Special Envoy of the United Nations Secretary-General on Disability and Accessibility, "Persons with Disabilities and COVID-19", 1 April 2020, <https://www.ohchr.org/en/statements/2020/04/joint-statement-persons-disabilities-and-covid-19-chair-united-nations-committee?LangID=E&NewsID=25765>; Committee on the Rights of Persons with Disabilities, Statement on COVID-19 and the human rights of persons with disabilities, 9 June 2020, <https://www.ohchr.org/en/news/2020/06/statement-covid-19-and-human-rights-persons-disabilities?LangID=E&NewsID=25942>.

First, human rights restrictions in times of pandemic are seen by the global bodies as a "necessary evil" – something which governments not only can resort to, but should resort to in order to protect public health and the right to life. So, the question is not whether or not to restrict, but how to restrict and what to restrict. The statements show in this connection a major concern about operating within existing legal frameworks – domestic laws, including emergency laws, and limitation and derogation provisions of international treaties – and preserving access to judicial fora and to legal remedies and maintaining a civic space even during the pandemic. In other words, there is a strong push towards maintaining the rule of law during exceptional times, maintaining judicial control over the measures applied and preserving democratic institutions. In this respect laws, courts and law-enforcement facilities and, more broadly, the civic space where claims are articulated and voiced, are viewed by the treaty bodies as an essential service which cannot be shut down even in the face of a pandemic.

Second, the statements show considerable concern regarding the disparate impacts of pandemic-related measures – a concern about indirect discrimination, that is, that measures which on the face of it apply to everyone equally, affect in particularly harmful ways individuals in situations of vulnerability, including persons who may be subject to multiple or intersectional discrimination such as minority women or children with disabilities. The expertise and focus of the specialised treaty bodies on specific categories of victims – migrants, prisoners, disappeared persons and the like – help them to flesh out these specific harms and to call for mitigating steps and preventive measures such as the participation of women or minority groups in the design and implementation of response measures, or the release of persons from immigration detention.

Third, where the statements are relatively short is on the subject of abusive measures involving unnecessary or disproportionate responses to the pandemic, such as bans on political demonstrations, the use of non-voluntary surveillance programmes, the criminalisation of "fake news" and the suspension of parliament on grounds of health concerns. It is expected that such case-specific abuses will be reviewed by global bodies and by the European Court in the coming years. It is regrettable, for instance, that in its recent review of Israel¹⁴, the UN Human Rights Committee did not focus more intently on the use of the Israeli Security Agency (ISA) for contact-tracing or the abrupt closing of the borders, including for Israeli citizens left outside the country – both measures which have been taken in a similar or analogous manner by other governments.

In sum, the pandemic constituted not only a public health challenge and a humanitarian crisis; it was also a challenge to the very resilience of the international (and domestic) human rights framework. Whereas the legal framework seems to have remained applicable and adaptable, the quality of actual monitoring by global bodies – a system facing great difficulties and challenges even in ordinary times – has suffered considerably because of the disruption of treaty body activities in Geneva and the lack of effective alternatives to in-person meetings. Other regional and domestic courts have also confronted real difficulties. Regrettably, we may see, as a result, the human rights harms inflicted by the pandemic crisis for years to come.

Thank you for your attention.

14 Human Rights Committee, Concluding Observations on the Fifth Periodic Report of Israel, UN Doc. CCPR/C/ISR/CO/5 (2022).



Lady Arden of Heswall

**A Former Justice of the Supreme Court
of the United Kingdom**

POSITIVE OBLIGATIONS ON STATES DURING A PANDEMIC

1. OVERVIEW

In this contribution I discuss the concept of the positive obligation on a state, principally under Article 2 of the Convention, in the context of the COVID pandemic. I argue that the principles are: equality, fairness and practicality.

2. STATE'S DUTY IN MANAGING RISK TO ENJOYMENT OF CONVENTION RIGHTS

The leading authority on positive obligations in the context of the right to life is *Osman v. UK* (Case 87/1997/871/1083). It did not concern the pandemic: it arose from a murder committed by a non-state actor. The facts were that a schoolteacher who had demonstrated obsessive and disturbing feelings for a pupil killed the pupil's father. The family had already requested police protection. There was no remedy against the police under UK domestic law for not having provided that protection.

The Grand Chamber held that the positive duty was violated if 5 conditions were fulfilled:

1. There was a risk to life
2. The life was that of identified individuals
3. The risk was real
4. The risk was immediate and
5. The state knew or ought to have known of the existence of this risk.

The Grand Chamber (GC) of the European Court of Human Rights (the Court) clearly considered that in deciding what the state had to do in the interests of society on the one hand and in the interests of the individual on the other hand would have to be balanced, but that the Convention did not impose a duty on the state to do more than was reasonable. Not every claimed risk to life would lead to a reasonable suspicion that the state needed to take steps to protect life. The GC held:

"116. For the Court, and bearing in mind the difficulties involved in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources, such an obligation must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities. Accordingly, not every claimed risk to life can entail for the authorities a Convention requirement to take operational measures to prevent that risk from materialising.... For the Court, and having regard to the nature of the right protected by Art 2, a right

fundamental in the scheme of the Convention, it is sufficient for an applicant to show that the authorities did not do all that could be reasonably expected of them to avoid a real and immediate risk to life of which they have or ought to have knowledge."

The question whether the state had failed to discharge this positive obligation was fact sensitive:

"This is a question which can only be answered in the light of all the circumstances of any particular case." (*Osman*, para 116)

That is important because on the facts, the Grand Chamber held that the state had not breached its duty. The police had taken concrete measures which were reasonable to avoid the real and immediate risk to life materialising.

There are four notable points of principle for present purposes.

1. the state had a positive obligation to protect the right to life, not just a negative one. There is nothing in the Convention to show that a state's Convention obligations should be restricted to negative obligations. *Osman* is now a long-standing authority.
2. The critical issue is whether there was a real and immediate risk and whether the state took reasonable steps to address it. A real risk is not necessarily an immediate one but what is immediate will depend on the context. Moreover, because of the focus on "risk", positive obligations in this context are not so much about compensating for the results as examining the nature of the risk. The obligation is not one of result but of means.
3. In *Osman*, there was a conflict between the interests of society (the application of resources for policing) and the interests of the individual. The GC resolved this conflict by balancing the risk to individual rights, including the risk to the absolute right to life, against the interests of society. The margin of appreciation for the state is wide. Notwithstanding this, where there is more than one potential victim, the steps must not discriminate between them without proper justification. The Court will scrutinise the action which the state takes with great care (see *Safi v. Greece*, App no 5418/15, 7 July 2022, para 152).
4. There has been some refinement of the second condition in that it is no longer necessary to show a need to protect specific individuals, as opposed to society in general (see *Cevrioglu v. Turkey* (69546/12)).

3. DURING THE COVID CRISIS, THERE WERE NUMEROUS ISSUES FACING GOVERNMENTS

COVID was unlike any natural disaster recently seen in Europe. Here are some examples to remind of the difficulties governments faced:

- Should masks be made compulsory?
- Should there be a lockdown (confinement)?
- Should regular healthcare services be suspended to allow for the hospitalization of COVID patients?
- What should be done to protect the vulnerable during any lock down?
- What provision should be made for school children whose education might be severely affected?
- What should be done to protect prisoners and those in immigration detention?
- How should hospital treatment be prioritised between the young and the vulnerable?
- Should visiting friends and family in hospital or care homes be prohibited?

- Should elderly people be moved to or from rest homes?
- Should courts remain open and should the public be admitted?
- Should vaccination against COVID be compulsory and if so for whom?
- Should immigration and tourism be permitted?

And so on. There was plenty of room for error by the state. At the start of the pandemic, in the UK there was a considerable shortage of PPE (personal protective clothing) and there were appalling stories about health workers being inadequately protected against the risk of infection. The measures taken to address that shortage were widely criticised. In the UK, there are also issues as to the abuse of power by the executive acting under emergency powers without Parliamentary scrutiny. Moreover, on several occasions the legislation was unclear or contradictory. An official inquiry is due to start in January 2023 with Baroness Hallett as Chair to examine the UK's COVID response and the impact of the pandemic in the UK, and to identify the lessons for the future.

4. DIFFERENT APPROACHES OF GOVERNMENTS ACROSS THE WORLD TO CONTROLLING THE PUBLIC HEALTHCARE RISK

A further difficulty for the application was that different governments adopted different policies for dealing with COVID. For example, New Zealand closed its borders and had a policy of “zero covid”, but once someone brought in Omicron, the population was vulnerable. By contrast the Swedish government considered that only limited legislation was necessary. The rest was down to individual responsibility. There were also considerable scientific advances in treating the disease and in knowing how it spread and how it should be treated. The Court is not well qualified to assess which is the right policy in many situations. If it is reasonably open to a government to take a particular policy, it is not open to the Court to hold that it would have taken some different policy. It must respect the government's choice in most situations.

5. THE TEXT OF THE CONVENTION PROVIDES LITTLE HELP

Nothing is said in the Convention about any right to healthcare. The state's obligations must be deduced from the other provisions of the Convention, such as articles 2 and 3, and the Court's jurisprudence.

There is no obvious mention of the rights at stake in a pandemic in the text of the Convention although art 5 (1)(e) permits the lawful detention of persons “for the prevention of the spreading of infectious diseases”. Protection of those in detention may well be implicit in this, but no wider positive obligation towards the public at large can be inferred from art 5 (1)(e). Importantly and relevantly, detention under this head must be a matter of last resort: *Enhorn v. Sweden* (56529/00).

6. SOME SPECIFIC CASES:

Vavříčka v. The Czech Republic (47621/13) (Seminar background paper page 10)

This was not a case about COVID but it is about vaccination. Under Czech law, children must be vaccinated against some well-known diseases. If not, the parents face a criminal penalty and children, who could be vaccinated, cannot attend nursery school unless they have been vaccinated. The parents brought an article 8 challenge, but this was rejected. The Court considered the evidence in great detail and concluded that vaccination was in the interests of both the children and in the interests of society, since it was internationally supported and approved and was effective in promoting public health. It would not have been effective if it were voluntary only.

Vavříčka was a bold and innovative decision in the field of public health, but it was not an instance of mandatory vaccination. Vaccination raises the question of the individual versus the collective interest. There have been attempts in Europe and the US to impose COVID vaccination in relation to certain categories of workers but in Europe as I understand it those measures have not been pursued.

The voluntary COVID vaccination programme in the UK, as elsewhere, has been successful. It was accompanied by a substantial publicity campaign about the safety and benefits of vaccination against COVID. This was in part to ward off arguments raised by anti-vaxxers on social media and elsewhere. Measures also made it inconvenient in some circumstances for people not to be vaccinated. Mandatory vaccination, by contrast, would involve invading a person's bodily integrity and it would therefore be difficult to justify. Nonetheless, if a person chooses to work in a particular sector, and they are exposed to people who are vulnerable to COVID, then it would seem possible as a general rule (but not imposing an arbitrary blanket ban) to require employees to be vaccinated or wear masks where possible.

Q and R v. Slovenia (19938/20) (background paper page 23)

Communauté genevoise d'action syndicale (GCAS) v. Switzerland 21881/20 (background paper page 7)

R(Gardner) v. Secretary of State for Health and Social Care [2022 EWHC 967]. In this very recent case from the *Divisional Court of England and Wales*, there was a challenge to two sets of guidance by the secretary of state concerning the discharge of elderly patients from hospital to care homes. The claims based on Convention rights failed, but a challenge on domestic principles succeeded as the guidance did not point out that persons admitted to care homes could be asymptomatic and should be quarantined.

7. DRAWING THE THREADS TOGETHER – KEY FEATURES OF THE DUTY TO PROTECT IN A PANDEMIC

What are the relevant key features of the duty to protect?

1. **Inaction is not an option.** Where there is a real and immediate threat to life, the government cannot bury its head in the sand and say that COVID is just a form of flu and nothing to worry about. It must take steps to protect people's lives.
2. **Balancing:** Where the rights of the individual may conflict with those of society, there must be a balancing exercise. Regard should be had to resources. Some states are better placed, for example to provide vaccines, than others.
3. **Public health measures:** The government should not discriminate without justification.
4. **Wide margin of appreciation:**
 - a. **Resources and priorities** In public health, measures often require massive resources. In most situations, governments must be able to decide for themselves what needs to be done and what priority to give to various calls on public expenditure – funding hospitals or keeping in good health those who can no longer earn a living because of a lock-down or ensuring the minimum disruption to education, the economy and so on. The question is whether the government acted reasonably because of what they knew or should have known about the risks.
 - b. **Forms of protection:** *Osman* is about risk mitigation, not a duty to avoid all risks or to protect life in every circumstance. There are different ways in which the state can provide protection. In some contexts, it may be enough to put a regulatory system in place, but it must be an effective system. In other contexts, it may be enough to provide a civil remedy or to criminalise conduct.

5. **Duty to keep measures under review:** While there is no room for the judgment of hindsight, governments must keep pace with developments in science. Also, when the measures cease to be necessary, states should reduce or remove them.

In short, for the state to perform its positive obligations under art 2 of the Convention in response to the existential threat posed by a pandemic, there must be fairness, equality and practicality.



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of the Constitutional Court of Slovenia**

**PROCEEDINGS BEFORE COURTS:
THE DOMESTIC COURTS' EXPERIENCE**

I. INTRODUCTION

Like many courts around the world during the epidemic, the Slovenian Constitutional Court (hereinafter referred to as "the Court") has faced unforeseen challenges in deciding on the constitutionality of measures related to Covid-19. The epidemic caught us relatively unprepared. The main statutory basis for dealing with epidemics is the Communicable Diseases Act (CDA), adopted in 1995. On the basis of this statute the government began adopting numerous regulations with the purpose of limiting the epidemic. Very soon after the first regulations came into force, numerous individuals and legal persons started filing petitions with the Court. At times the Court was literally flooded with petitions to initiate a review of the constitutionality or legality of regulations.¹

In this presentation I will first provide an overview of the relevant Slovenian constitutional framework, then present and critically assess a few of our Constitutional Court's landmark cases and the methodological thinking behind them, and then put this case-law into a comparative perspective.

II. CONSTITUTIONAL FRAMEWORK

a. Principle of legality

According to the understanding shared by numerous continental European countries², the checks and balances of the different branches of State powers are implemented by means of the principle of legality. As expressed by Besselink, Pennings and Prechal, the principle of legality prescribes that: "the exercise of public authority over the citizens, whether in the form of administrative acts or as a form of binding regulation, requires a basis in an act of Parliament."³ Some authors see

¹ After the government introduced a measure making proof of vaccination or recovery mandatory for employees in State administration, the Court received 250 petitions to initiate a review procedure in less than a week. See: [Že 250 pobud za presojo ustavnosti pogoja PC v državni upravi - N1 \(n1info.si\)](#)

² The UK is a specific example, where, despite the fact that the branches of power share all the functions of legality, the principle of legality is not recognised as a ruling principle. L. Besselink, F. Pennings, S. Prechal, "Introduction: Legality in Multiple Legal Orders", in: *The Eclipse of the Legality Principle in the European Union* (L. Besselink, F. Pennings (eds)), Kluwer, Alphen aan den Rijn, 2011, p. 5-6.

³ *Id.*, p. 6.

legality as pivotal in maintaining the rule of law, alongside three other crucial elements on which modern society depends; the others in this quartet being democracy⁴, separation of powers⁵, and respect for human rights⁶.

The principle of legality, as a firm constitutional principle in numerous countries⁷, stems from the idea of the hierarchal organisation of legal norms. At the top there is the Constitution; underneath are the statutes (containing norms of statutory rank), adopted by a democratically elected parliament; and on the lowest level there are the so-called “sub-statutory” acts, that is to say, those legal acts which can be adopted by different authorities, among others by the executive branch (e. g. regulations, ordinances).⁸

Such organisation is built on the doctrine of the precedence of statute law, meaning (1) that both the executive branch and the judiciary⁹ are bound by statute law¹⁰ and (2) the acts of the executive have to conform with the statutes. This imposes a number of obligations on the executive branch: (1) actions of administrative authorities must be based on statute law (legislative branch);¹¹ (2) those authorities must act within boundaries set by the legislator. As a consequence, if the executive branch’s acts violate any of the higher-ranking acts (the Constitution or statutory norms) they are considered null and void. In other words, legal acts adopted by the executive branch, the government included, do not have a life of their own. Their legal existence is dependent on their legal basis, which is a given statute (and, at a higher level, the Constitution). If any sub-statutory act is deemed unconstitutional (for whatever reason) it will cease to exist. As a consequence, no court can base its decision on a sub-statutory act which is not in accordance with its relevant statutory basis and/or the Constitution (*exceptio illegalis*).¹² Governments may not, therefore, exercise any powers that are not provided for and specified by the legislator. By these means the legal system seeks to prevent the government from exercising arbitrary power.

The Slovenian legal system adheres to that doctrine, since Article 120 of the Slovenian Constitution demands that administrative authorities perform their work independently but within the framework and on the basis of the Constitution and laws. Article 153 of the Constitution (Harmonisation of legal acts) requires that implementing regulations and other general acts conform with the Constitution and laws (statutes). The Court has stated in numerous judgments that the principle of legality also binds the government as the highest authority of the State administration.¹³

In general, the legislature is free to choose in which areas it will adopt legislation; however, the Constitution requires that it be the exclusive body to legislate in the area of human rights¹⁴. The manner in which human rights and fundamental freedoms are exercised may only be regulated by law of a statutory nature. This holds true all the more so with regard to any limitations of human rights¹⁵. The principle of legality is therefore even more strictly applied to the acts of the executive branch when human rights are concerned: the competence to interfere with human rights must never be transferred to the executive branch.¹⁶

b. Methodological questions

The major constitutional problem facing the Court in Slovenia was how to assess the constitutionality of governmental regulations regarding epidemic-related measures. During the Covid epidemic, the whole reality of government changed and, in consequence, so did the nature of the petitions lodged with our Court to initiate a review procedure. Firstly, the predominant norm-creator became the government (instead of Parliament). We faced a weekly production of different regulations¹⁷, which were massively challenged in the Court by different petitioners.¹⁸ Secondly, for the first time in modern history, human rights and freedoms were infringed in an extensive and long-lasting fashion and were thus curtailed, above all, by governmental regulations.

In this respect the Court received two sorts of petitions to initiate a review of the constitutionality of regulations, most of which (1) challenged directly their constitutionality (proportionality) without challenging their statutory basis (claiming that, for example, the right to freedom of movement had been disproportionately breached); while only a few (2) actually challenged the statutory basis of those regulations (that is to say, their legality). In this second and smaller category of petitions, it was crucial to frame the challenge in the methodologically correct way. Since our constitutional system is, as presented above, based on the premise that sub-statutory acts (including governmental regulations) do not have a legal life of their own, but must always be based on a statute, it seems only logical to assess the constitutionality of their statutory legal basis first and consider their possible disproportionality later. However, when faced with those new challenges, the Court made what was, in my opinion, a methodological slip in its first important case.

4 M. Verhoeven, R. Widdershoven, “National Legality and European Obligations”, in: *The Eclipse of the Legality Principle in the European Union* (L. Besselink, F. Pennings (eds.)), Kluwer, Alphen aan den Rijn, 2011, p. 57.

5 The idea of the separation of powers originates in the Age of Enlightenment, beginning with Locke, who was amongst the first to criticise the idea of the king’s power originating from God, and conceptualised the separation of powers (with power ultimately inhering in the people) to the executive and legislative branches. The key idea of the separation of powers was further developed by Montesquieu in his book *The Spirit of Laws* (from 1748). Not only did Montesquieu draw a distinction between the legislative, executive (one can also say administrative), and judicial branches of power, but he also formulated the requirement that these functions must be distributed between different State authorities that are independent of one another. See, e.g., Sharon Krause, “The Spirit of Separate Powers in Montesquieu”, *The Review of Politics*, Vol. 62, No. 2, 2000, pp. 231–265, Céline Spector, Montesquieu, *Encyclopedia of the Philosophy of Law*, Sorbonne, hal-03149778.

6 U. De Vries, L. Francot-Timmermans, “As Good as it Gets: On Risk, Legality and the Precautionary Principle”, in: *The Eclipse of the Legality Principle in the European Union* (L. Besselink, F. Pennings (eds.)), Kluwer, Alphen aan den Rijn, 2011, p. 25.

7 *Id.* See also M. Verhoeven, R. Widdershoven, “National Legality and European Obligations”, in: *The Eclipse of the Legality Principle in the European Union* (L. Besselink, F. Pennings (eds.)), Kluwer, Alphen aan den Rijn, 2011, p. 57. The authors claim that this principle is also recognised as a general principle of European law by all member States.

8 See, regarding a similar concept in German law in G. Jurgens, M. Verhoeven, P. Willemsen, *Administrative Powers in German and English Law*, in: *The Eclipse of the Legality Principle in the European Union* (L. Besselink, F. Pennings (eds.)), Kluwer, Alphen aan den Rijn, 2011, p. 38-40.

9 In this paper we are focusing on the relationship between the executive and legislative branch and will therefore neglect the role of the judiciary.

10 G. Jurgens, M. Verhoeven, P. Willemsen, “Administrative Powers in German and English Law”, in: *The Eclipse of the Legality Principle in the European Union* (L. Besselink, F. Pennings (eds.)), Kluwer, Alphen aan den Rijn, 2011, p. 38-40.

11 *Id.*, p. 38.

12 See similar solutions in German law, *id.*, p. 39.

13 See, e.g., Decision of the Constitutional Court No. U-I-73/94, Para. 17 of the reasoning, and No. U-I-84/09, dated 2 July 2009 (Official Gazette RS, No. 55/09, and OdlUS XVIII, 31), Para. 8 of the reasoning.

14 See Decision no. U-I-79/20 below, pt. 71.

15 See, e.g., Decision of the Constitutional Court No. U-I-25/95, dated 27 November 1997 (Official Gazette RS, No. 5/98, and OdlUS VI, 158), Paras. 30 and 31 of the reasoning, Decision No. U-I287/95, dated 14 November 1996 (Official Gazette RS, No. 68/96, and OdlUS V, 155, Para. 8 of the reasoning), Decision No. U-I-346/02, dated 10 July 2003 (Official Gazette RS, No. 73/03, and OdlUS XII, 70), Para. 10 of the reasoning, and Decision No. Up-1303/11, U-I-25/14, dated 21 March 2014 (Official Gazette RS, No. 25/14, and OdlUS XX, 21), Para. 10 of the reasoning.

16 The only exception is a state of emergency (Articles 92 and 108 of the Constitution). In such an event, when the National Assembly is unable to convene due to a state of emergency or war, the President of the Republic may, on the proposal of the government, issue decrees with the force of law. Also in such an instance decrees with the force of law cannot be adopted directly by the government, and even when they are adopted, the President of the Republic must submit them to the National Assembly for confirmation immediately upon its next convening.

17 This was not only a result of a changing reality of epidemic, but also of the Court decision no. U-I-83/20 (from 16. 4. 2020) on suspension of regulations which required the government to assess on a weekly basis the need for covid-related measures.

18 Because of the short longevity of the regulations, the Court was *ab initio* faced with the challenge of how it could review legal acts that were no longer in force. Accordingly, the Court began by establishing an exception to the rule that it could only review legal acts still in force (under the second paragraph of Article 47 of the Constitutional Court Act). It carried out its review despite the fact that the ordinances it was considering had lapsed or expired during the Court’s proceedings. It did so by deciding that the petition before the Court raised a particularly important precedential constitutional question of a systemic nature on which the Court had not yet had the opportunity to take a position. The same question, the Court determined, could also arise in connection with possible future acts (ordinances or regulations) of a similar nature.

III. CASE-LAW¹⁹

a. Prohibition of movement and gatherings in public places and movement outside the municipality of one's residence (case no. U-I-83/20, August 27, 2020, adopted 5:4)

Chronologically, the first important case was one adopted after the first wave of the epidemic, at the end of August 2020. The Court reviewed the consistency with the Constitution of two regulations adopted by the government, both prohibiting movement and gatherings in public places and movement outside the municipality of one's residence. The question at issue was whether such prohibition of movement was consistent with the first paragraph of Article 32 of the Constitution, which guarantees freedom of movement to everyone.

The Court conducted the review (i) on the basis of the legitimacy test, which entails an assessment of whether the legislature pursued a constitutionally admissible objective, and (ii) on the basis of the strict test of proportionality, which comprises an assessment of whether the interference was appropriate, necessary, and proportionate in the narrow sense. The Court assessed that by restricting movement to the municipality of one's residence the government was pursuing a constitutionally admissible objective, i.e. containment of the spread of the contagious disease Covid-19 and thus the protection of human health and life, which this disease put at risk. The Court also assessed that the measures were proportionate: the demonstrated level of probability of a positive impact of the measure on the protection of human health and life outweighed the interference with freedom of movement.²⁰

b. Landmark case: restrictions on freedom of movement and of assembly and association (case no. U-I-79/20, May 13, 2021, adopted 5:3)

The petitioners challenged multiple governmental regulations restricting freedom of movement (Article 32 of the Constitution) and freedom of assembly and association (Article 42 of the Constitution) during the epidemic. They challenged the statutory basis of those regulations by alleging that Article 39 of the CDA was inconsistent with the Constitution, because the criteria for interfering with those two rights were too general and imprecise. Since the ruling on this petition established a new way of thinking, one which was later on confirmed by numerous other Covid-related cases, I will present the case in some detail here.

The statutory basis of the challenged regulations was Article 39 of the CDA, which reads as follows:

“(1) When the measures determined by this Act²¹ cannot prevent the introduction of certain communicable diseases into the Republic of Slovenia and the spread thereof, the Government of the Republic of Slovenia can also impose the following measures:

1. the determination of the conditions for travelling to a state in which there exists a possibility of infection with a dangerous communicable disease and for arriving from these states;

¹⁹ The vast majority of cases challenging Covid measures were not accepted by the Court. There were however some other interesting cases apart from those presented here, on the merits of which the Court decided. One example is the Court's decision that the Minister of Education had acted unconstitutionally in ordering that educational work generally, and more specifically educational work for children with special needs, be conducted remotely. These orders were deemed unconstitutional because of their vague legal basis and because of the Minister's failure to obtain expert advice before issuing these orders (case no. U-I-8/21, from 16. 9. 2021).

²⁰ The Court decided this without actually assessing the statutory basis of the assessed regulations, which was a major point of the objections made by four judges in their dissenting opinions.

²¹ The Articles preceding Article 39 describe in detail certain measures that may be taken in order to prevent the introduction or spread of certain communicable diseases: e. g. disinfection, special medical check, quarantine.

2. the prohibition or limitation of the movement of the population in infected or directly jeopardised areas;
3. the prohibition of the gathering of people in schools, cinemas, bars, and other public places until the threat of the spread of the communicable disease passes;
4. the limitation or prohibition of the sale of individual types of merchandise and products.

(2) The Government of the Republic of Slovenia must immediately notify the National Assembly of the Republic of Slovenia and the public of the measures determined by the previous paragraph.”

As we can see, the Article is rather general. The statutory basis it supplied acted as an “umbrella” that subsequently covered the great majority of later Covid regulations.

The Court, in assessing the case, firstly based the decision on the principle of legality, stating: “The principle of legality determined by the second paragraph of Article 120 of the Constitution contains two requirements: (1) implementing regulations and individual acts of the executive branch of power ... can only be adopted on the basis of the law, which means that they must be based on a (sufficiently precise) substantive basis in the law ... in accordance [with the first requirement] ... the executive power may only function on the basis of a substantive and sufficiently determinable regulation in the law. ... [the executive power] does need a sufficiently clear and precise statutory regulation of those questions whose regulation falls within the exclusive competence of the legislature, i.e. questions that are key, fundamental, and central for a certain legal system, but that are also not so important as to be regulated already by the Constitution. The executive power must not regulate these questions in an ordinary manner. ... Whenever the legislature authorises the executive branch of power to adopt an implementing regulation, it must first by itself regulate the foundations of the content that is to be the subject of the implementing regulation, and determine the framework and guidelines for regulating the content in more detail by the implementing regulation. ... A blanket authorisation granted to the executive branch of power (i.e. an authorisation not containing substantive criteria) entails the legislature's failure to legislate statutory subject matter, which is inconsistent with the constitutional order”²².

Later on it stressed the importance of the precise statutory basis where human rights are at stake. “The requirement of the precision of the statutory basis where a restriction of human rights and fundamental freedoms is at issue is even stricter. ...the Constitution determined that human rights and fundamental freedoms may be limited (the third paragraph of Article 15 of the Constitution), but limitations must be exceptional in nature and determined as precisely as possible. It follows from the second paragraph of Article 15 of the Constitution that the manner in which human rights and fundamental freedoms are exercised may only be regulated by law. This holds true all the more so regarding limitations of human rights.”²³

“...When ... human rights and fundamental freedoms are directly interfered with by a general act, i.e. an act that refers to an indeterminable number of individuals, that act must be a law. In fact ... the legislature can leave the more detailed regulation of less important and technical questions regarding the limitation of a certain human right or fundamental freedom to the executive branch of power, but – in view of the constitutional importance of human rights and the formulation of limitation clauses in the Constitution – in the law it must determine sufficiently precise criteria for such a regulation. ... The Constitutional Court has already adopted the position that the statutory authorisation granted to the executive branch of power must be all the more restrictive and precise the greater the interference with or effect of the law on individual human rights and fundamental

²² Pt. 69 of the Decision. All the quoted passages are from the official Constitutional Court translation, accessible at [u-i-79-209.pdf](#) (us-rs.si).

²³ Pt. 71 of the Decision.

freedoms. It must always be sufficiently precise in order to not allow the executive power to regulate in an original manner a limitation of human rights and fundamental freedoms... From the viewpoint of the state administration being bound by the Constitution and the law, a sufficiently precise statutory basis entails a key safeguard against arbitrary interferences by the executive power with human rights and fundamental freedoms."²⁴

"In accordance with the Constitution, state authorities have the duty to appropriately protect the health and life of people in the event a communicable disease occurs; if necessary, also such that they limit the freedom of movement and the right of assembly and association. However, in doing so they must take into consideration that these limitations must essentially be determined already in the law, and the possible authorisation granted to the executive branch of power to regulate these limitations in more detail must be sufficiently precise..."²⁵

The Court also made a reference to ECHR case law, stating: "... With respect to a number of Convention rights, the ECHR stresses that from the provisions of the European Convention, in accordance with which interferences with human rights must be prescribed by law, there follows not only the requirement that interferences be regulated by national law, but also that this law correspond with the principle of a state governed by the rule of law, which entails that it attains some quality criteria. The statutory regulation of interferences with human rights must be sufficiently clear, formulated with sufficient precision, accessible, and foreseeable."²⁶²⁷ "The freedom of movement is ensured by Article 2 of Protocol No. 4 to the Convention, which in its third paragraph expressly determines that in the exercise of the rights under this Article there must be no limitations except those determined by law. The freedom of assembly and association is ensured by Article 11 of the Convention, with regard to which it follows from the second paragraph of this Article that the exercise of these rights may only be limited by law. In order to assess whether there exists a sufficient statutory basis for an interference, the ECHR applies equal quality criteria as when assessing interferences with other Convention rights."²⁸

On the basis of all the above, the Court concluded that the challenged statutory regulation (points 2 and 3 of the first paragraph of Art. 39 of the CDA) did not fulfil the constitutional requirement of *lex certa*. In this respect it failed to provide legal certainty by allowing the government to choose, within its own discretion, the types, scope, and duration of restrictions which would interfere with residents' freedom of movement. The regulation permitted the government to freely assess in which instances, for how long, and in how extensive an area the gathering of people in public places might be permitted.²⁹

The Court decided that Parliament must remedy the established inconsistency within two months of the publication of the Decision. Until the inconsistency is remedied, points 2 and 3 of the first paragraph of Article 39 of the Communicable Diseases Act still apply. The Court therefore allowed for the use of the unconstitutional statutory basis for another 2 months. This decision was based on the wish to protect the life and health of people that, due to the absence of the statutory basis, could be at risk and to prevent an even graver unconstitutional situation. It also established

²⁴ Pt. 72 of the Decision.

²⁵ Pt. 76 of the Decision.

²⁶ See, e.g., the ECHR Judgments in *Roman Zakharov v. Russia*, dated 4 December 2015, Para. 228 et seq. of the reasoning; *Stafford v. the United Kingdom*, dated 28 May 2002, Para. 63 of the reasoning; *Dragin v. Croatia*, dated 24 July 2014, Para. 90 of the reasoning; and *Chumak v. Ukraine*, dated 6 March 2018, Para. 39 of the reasoning. See also S. C. Greer, "The Exceptions to Articles 8 to 11 of the European Convention on Human Rights", Human Rights Files No. 15, Council of Europe, Strasbourg 1997, pp. 9–13; J. Viljanen, *The European Court of Human Rights as a Developer of the Legal General Doctrines of Human Rights Law: Study of the Limitation Clauses of the European Convention on Human Rights*, Acta Universitatis Tampereensis 965, Tampere University Press, Tampere 2003, pp. 185–208.

²⁷ Pt. 77 of the Decision.

²⁸ Pt. 78 of the Decision..

²⁹ The dissenting judge criticised the decision above all for not giving sufficient consideration to the value of human life, claiming that times of epidemic were exceptional and that the CDA provided a sufficient statutory basis in such times.

that the challenged ordinances adopted by the government were inconsistent with the Constitution, namely in the part where they were adopted on the basis of an unconstitutional statutory regulation. It decided that the establishment of such inconsistency had the effect of abrogation.³⁰

We can therefore see that the Court adopted a different strategy when assessing the challenged regulations in the present case from the one it had followed in case U-I-83/20. It firstly assessed the statutory basis, Article 39 CDA. After ruling that it was not precise or specific enough, it concluded that the regulations based on it were unconstitutional as well. The fact that the regulations were deemed unconstitutional is an automatic result of the fact that the statutory basis was assessed as unconstitutional. As pointed out above, no sub-statutory act may exist without a valid statutory basis. The Court did not subsequently assess the proportionality of the challenged regulations, since it had already deemed them unconstitutional in any case.

c. Prohibition of public protests (case no. U-I-50/21, adopted on 17 June, 2021, adopted 6:2)

In this Decision the Court assessed the proportionality of multiple provisions of the governmental regulations in the parts which completely prohibited public protests between 27 February and 17 March³¹ and between 1 April and 18 April 2021, and then limited public protests to up to ten participants between 18 March and 31 March, as well as between 23 April and 14 May 2021. It established that due to their length and effects they severely interfered with the right of peaceful assembly and public gathering (Article 42(1) of the Constitution). It therefore went on to assess the proportionality of those measures despite the fact that already in case no. U-I-79/20 adopted a month earlier it had assessed that the statutory basis of those regulations was unconstitutional.

The Court explained that the two measures had been adopted in order to prevent the spread of a communicable disease, which was a constitutionally admissible objective for limiting the above-mentioned human right. In this respect, it stressed that when balancing the right to health and life, on the one hand, and the right of peaceful assembly and public gathering, on the other, the two rights are in opposition, and they both enjoy a high level of constitutional protection. The Court then decided that the two measures were not necessary because in comparative law there existed a whole set of measures by which it was possible to prevent the spread of communicable diseases at public protests and which interfered to a lesser extent with the right of peaceful assembly and public gathering than the complete prohibition of public protests or the limitation thereof to a maximum of ten people (e.g. the distribution of face masks and hand sanitisers to protesters, or the closing of public spaces and roads to ensure sufficient space for maintaining an appropriate interpersonal distance between protesters). Prior to the entry into force of the challenged measures, the government had not ascertained whether the objective of ensuring public health could be attained by milder measures and had not taken into consideration the positive duty of the State to ensure to a reasonable degree, in view of the circumstances, the exercise of the right of peaceful assembly, or the duty to cooperate with organisers of public protests.

d. Prohibition on the carrying-out of services (no. U-I-155/20), October 7, 2021 adopted

³⁰ The Court can either annul (*ex tunc*) or abrogate (*ex nunc*) regulations when they are deemed unconstitutional or not to be in accordance with the statute (Article 45(1) Constitutional Court Act).

³¹ Before that point, public protests were completely prohibited from 20 October 2020 onwards, therefore for more than 4 months before the first assessed regulation.

5:3)

A number of legal entities carrying out services challenged multiple governmental regulations restricting the rights to freedom of work and free enterprise (Articles 49 and 74 of the Constitution) during the epidemic. The petitioners claimed that the fact there was no statutory basis for the prohibition on carrying out services (since point 4 of the first paragraph of Art. 39 of the CDA only allowed for the limitation or prohibition of the sale of individual types of merchandise and products) allowed the government to act according to its own discretion and to decide on limitations of constitutional rights of its own volition, which was not in accordance with the legality principle.

Heavily drawing on the reasoning of case U-I-79/20, the Court concluded that the statutory basis failed to provide legal certainty by allowing the government to choose, within its own discretion, the duration and the restrictions which interfered with freedom of work and free enterprise. The statutory basis, moreover, did not provide for guarantees which would limit the discretion of the government, such as a duty to consult the professionals and duty to inform the public. The most important part of the decision was the ruling that the statutory basis (point 4 of the first paragraph of Art. 39 of the CDA) did not even provide for the grounds on which to prohibit services; only the grounds for prohibiting the sale of individual types of merchandise and products. In this respect the government did not have any statutory basis for acting at all.

e. Regulation making proof of vaccination or recovery mandatory for employees in State administration (case no. U-I-210/21, November 29, 2021, adopted 6:3)

The last important decision of the Court was taken on a request to review the constitutionality and legality of Article 10a of the Regulation on the Manners of Complying with the Recovered-Vaccinated-Tested Requirement, which determined that employees in the bodies of the State administration must fulfil the recovered-vaccinated requirement to perform tasks at their workplace. The Court established that this was a condition under labour law to perform work in the State administration and thus the situation was essentially comparable to situations where a vaccination was required as a condition under labour law to perform various types of work. The legal basis for regulating such a vaccination was Article 22 in conjunction with Article 25 of the CDA, which regulated different types of (mandatory) vaccinations. The Court assessed that the challenged measure, which the government had adopted by the Regulation and which applied to employees of the State administration, had not been adopted in conformity with the statutory requirement. It ruled that there was already an established statutory basis for regulating a mandatory vaccination and the government had bypassed it by regulating this question with a Regulation. The Court therefore decided that Article 10a of the Ordinance was inconsistent with the second paragraph of Article 120 of the Constitution.

By this Decision, the Court did not adopt a position as to whether the assessed measure – had it been ordered on the correct statutory basis – would be constitutionally admissible from the viewpoint of the principle of proportionality and the principle of equality before the law. Hence, the Decision does not entail that the vaccination of employees as a condition for performing certain activities or professions is necessarily a disproportionate measure. The ruling of the Court entails that the measure at issue should have been regulated in conformity with the law that determines the rules and conditions for all vaccinations, i.e. the CDA.

f. Regulations regarding the proof of recovery, vaccination or negative test result (case no. U-I-793/21, U-I-822/21, February 17, 2022 (9:0))

The Court unanimously ruled that the Regulation on Temporary Measures for the Prevention and Control of Infectious Disease, Infections COVID-19, by which an individual was required to fulfil one of the conditions (present proof of recovery, vaccination or negative test) in order to be able to access (certain) public spaces was not incompatible with the Constitution. The Court clarified that the Regulation provided for the fulfilment of any one of the conditions, as alternatives. The option of testing was widely available. Therefore, such Regulation did not have the effect of compulsory vaccination.

Under Article 32(1) in conjunction with Article 31(1) and (2) of the CDA, compulsory targeted health and hygiene examinations may be ordered in the event of an imminent risk of the spread of a communicable disease. Targeted health and hygiene checks on persons can also include the collection of human biological samples for laboratory examination. In the Court's view, there was a sufficient legal basis in the CDA for imposing the requirement of testing. The regulation under review also remained within the defined legal framework. It was therefore not incompatible with Article 120(2) of the Constitution.

The Court ruled that the testing did constitute an interference with physical integrity (Article 35 of the Constitution), therefore it carried out the assessment of this measure on the basis of a strict proportionality test. It concluded that in the existing circumstances, the interferences passed all three aspects of this test and were therefore compatible with the Constitution. The measure of testing was therefore appropriate to achieve the constitutionally permissible objective (to prevent spreading the contagious disease), and it was also proportionate in the strict sense (the benefits of the measure outweighed the intensity of the interference with the body).

g. Summary

The Court ruled that most of the above-presented measures (except for the proof of recovery, vaccination or negative test) were unconstitutional due to the vagueness, absence or evasion of an established statutory basis. In one case (U-I-50/21) the Court also assessed the proportionality of the regulation. The foundation of the Court's reasoning in all those decisions was the following: it is against the principle of legality (and also contrary to the principles of democracy and the separation of powers) for governmental regulations to infringe on human rights unless there is a clear and sufficiently elaborated statutory basis which authorises the executive branch to act in full and sufficiently reasoned conformity with the said statutory basis.

This is true even in times of epidemic, because the principle of legality is the milestone of a democratic society. In order for the government to adopt the necessary legislation, the Court allowed the unconstitutional statutory basis to remain in force for another 2 months after the first decision (13 May 2021). The previous legislature did not amend the law in this respect for nearly 2 years³². However, after the election in April 2022 the new government took immediate action to amend the CDA. The Amendment is now in the Parliamentary procedure.

³² Minor changes to the statute were adopted twice (in October 2020 and in May 2021) but the essential part, which the Court found unconstitutional, remained unaltered. An attempt to amend the statute was made in July 2021, but failed because the second house of the Slovenian Parliament vetoed it. At the second attempt, the government did not get the majority required for the statute to pass through Parliament.

IV. DISCUSSION

A. LEGALITY V. PROPORTIONALITY

As we can see from the Decisions presented above, the Court was at first hard set to find an appropriate approach in handling Covid-related cases. In the first case that it considered, it tackled the problem of assessing the constitutionality of regulations by reviewing the proportionality of a challenged regulation directly (case no. U-I-83/20). It assessed that the regulation was proportionate. Later on, in the landmark case no. U-I-79/20, it assessed that the statutory basis of the challenged regulation, which was exactly the same as that in case no. U-I-83/20, was unconstitutional. It is obvious that those two decisions are logically inconsistent. How could the regulations assessed in case no. U-I-83/20 have been in accordance with the Constitution if the later decisions found that their statutory basis was unconstitutional?

There is, therefore, a very important methodological lesson to be drawn from those decisions with respect to systems based on the legality principle. The key point to be made here is that assessment of the constitutionality of the statute or statutory basis of a legal act of lower hierarchical status (e. g. a regulation) must always precede an assessment of the proportionality of that legal act (be it a statute or regulation). In other words: the proportionality of a sub-statutory act interfering with a human right cannot be assessed before one decides whether the statutory basis of that act is constitutional. In the language of the European Convention, the standard of whether interference with a certain Convention right is “in accordance with the law” or “prescribed by law” has to come first. Only after assessing that a certain interference was in accordance with the law, can the court decide whether such interference was “necessary in a democratic society.”³³ Such a test includes the elements of what Slovenian legal doctrine understands as a proportionality test.

The meaning of the term «in accordance with the law» may differ from one specific legal system to another. The fact is that in legal systems influenced by Germanic law, as the Slovenian system is, every restriction of a human right may only be regulated by statute and not by a legal act of sub-statutory status, such as a governmental regulation. So far as such systems are concerned, “in accordance with the law” means only “on the basis and in the framework of the relevant statute”. Yet, as ECHR case-law teaches us, the law must be of certain “quality”. Among other criteria, the law must be formulated in a clear enough way, which enables citizens to foresee its exact scope or meaning.³⁴ The phrase has implications of a procedural nature as well (e. g. with regard to a statute being adopted by a certain procedure in Parliament).

If a statute is inconsistent with the Constitution, then the regulations adopted on the basis of such a statute cannot remain in force, regardless of their content. Even if such ordinances completely fulfilled all the criteria that a complete and constitutional law would need to satisfy, they would still not have an independent legal life. In other words: since implementing acts derive their existence from a law, they fail in the absence or inadequacy of a law, even if they are otherwise perfect in terms of their content.³⁵ The legal logic behind this reasoning is not in any way formalistic: it is deeply substantive, since it pertains directly to the principles on which a modern democratic State is founded.

33 “... the ‘necessity’ implies the existence of a ‘pressing social need’. This means that the interference must be proportionate to the legitimate aim pursued.” Y. Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR*, Intersentia, Antwerp, 2002, p. 11.

34 *Id.*, p. 9-11.

35 The question, of course, is whether they can actually be perfect without statutory criteria. In fact, if a law is empty to such a degree that it does not contain clear limitations on and directions for the executive branch of power, the question arises as to which criteria could be used in the assessment of, for instance, the proportionality of an implementing act.

B. COMPARATIVE DIFFERENCES

As pointed out above, not every legal system, not even in Europe, applies the principle of legality in exactly the same way. Different national legal systems understand the separation of powers principle and the connection between it and the principle of legality in different ways.³⁶ In some countries, acts of the executive can be a valid basis for restricting human rights, since in their systems such a solution is “in accordance with the law”³⁷.

Aware as they were of the legality problems, parliaments around Europe as a rule reacted swiftly by adapting the statutory bases of legal acts related to the epidemic. Kössler reports of “a rather extraordinary episode” in Austria, since there Parliament adopted the Covid-19 measures within less than 24 hours, on March 15, 2020³⁸. The governmental legal acts (ordinances) were from there on adopted on the amended statutory basis. Germany reacted in a similar fashion. The Federal Parliament declared an “epidemic situation of national importance” on 25 March 2020 and, two days later adopted the Law to Protect the Population during an Epidemic Situation of National Importance³⁹. In France as well, the Law on Public Health was amended already in March 2020 to allow for Covid-19-related measures.⁴⁰ This statutory basis allowed the Prime Minister and other Ministers to adopt certain measures provided by the statute to fight the Covid-19 epidemic. We can see that in all those countries the legislators reacted very quickly, realising that it was necessary to adapt the statutory basis for governmental measures in order to address the demands of the epidemic.

In some countries, a declaration of a state of emergency was permitted by their Constitution. In Italy, for example, the Council of Ministers declared a six-month state of emergency on 31 January 2020⁴¹. The Council of Ministers adopted decrees that introduced various measures with the purpose of preventing the spread of Covid-19. Later on the executive (e. g. Minister of Health and the Minister for the Interior) started issuing ordinances⁴². It is obvious that the Italian legal system allows for a state of emergency to be declared in such public health crises. In the Slovenian system, however, such a solution is only available when a great and general danger threatens the existence of the State (Article 92 of the Constitution) and this Article was at no time invoked during the epidemic.

Keeping all those differences in mind, the utmost care should be taken before one compares the seemingly similar measures and decisions taken by different national courts.

36 “The Executive – central and local – acquires its powers from Acts of Parliament. English legal doctrine however shows relatively little concern with the nature and the scope of the statutory basis.” G. Jurgens, M. Verhoeven, P. Willemsen, “Administrative Powers in German and English Law”, in: *The Eclipse of the Legality Principle in the European Union* (L. Besselink, F. Pennings (eds.)), Kluwer, Alphen aan den Rijn, 2011. p. 46. However, at the end of the day, the ultra vires doctrine, serves a similar purpose. *Id.*

37 Typically in the US legal system.

38 K. Kössler, “Managing the Covid-19 pandemic in Austria: From National Unity to a de facto unitary state?” In *Comparative Federalism and Covid-19*, (N. Steytler, ed.). Routledge, Abingdon, 2022, p. 75.

39 *Gesetz zur Verhütung und Bekämpfung von Infektionskrankheiten beim Menschen (Infektionsschutzgesetz - IfSG)*. See as well G. Färber, “Germany’s fight against Covid-19, The tension between central regulation and decentralised management”, In *Comparative Federalism and Covid-19*, (N. Steytler, ed.). Routledge, Abingdon, 2022, p. 52. Later on, in November 2020 a wider reform of the law took place.

40 *Loi d’urgence pour faire face à l’épidémie de Covid-19*.

41 Article 77 of the Italian Constitution.

42 A. Malandrino, E. Demichelis, “Conflict in decision making and variation in public administration outcomes in Italy during the Covid 19 crisis”, *European Policy Analysis*, 2020, no. 10, 10.1002/epa2.1093.

a. Reception and governmental reaction to the Court's case-law

Unfortunately, neither a swift legislative reaction, nor the national and political unity required to support it, was seen in Slovenia. As pointed out above, neither the Slovenian Parliament nor the government reacted to the Court's decision by amending the CDA (until the new government was appointed in June 2022). As is clear from the case-law above, the Court had no choice but to repeat the same message again and again. With little effect.⁴³

All of the Court's decisions received extensive media coverage and were subject to massive professional, public and political debate. The reactions ranged from positive and supportive responses and gestures (e. g. in professional commentary and symbolic public demonstrations of support) to numerous critical polemic, and in some cases extremely insulting, invective. The Court was criticised for underestimating the value of life, not understanding the urgent situation and even accused of being responsible for numerous Covid-related deaths (a charge levelled by leading members of the government and associated politicians).

The failure to amend the statutory basis of the relevant legislation for more than two years after the epidemic started and nearly 2 years after the landmark decision was a very sad reflection on the legal culture in the previous political situation in Slovenia. Such a situation led to a state of permanent governance by means of unconstitutional regulations based on unconstitutional law. This state of affairs undermined efforts to tackle the epidemic by means of necessary and appropriate measures. It also eroded trust in the judiciary. A very sad result for the rule of law...

⁴³ As pointed out above, the newly elected government acted immediately and the amendment of the CDA is now in the Parliamentary procedure.

**SOLEMN HEARING OF
THE EUROPEAN COURT OF
HUMAN RIGHTS
ON THE OCCASION OF
THE OPENING OF THE JUDICIAL YEAR**



Robert Spano

President of the European Court of Human Rights

OPENING ADDRESS

Madam President of the Hellenic Republic, Presidents of the Constitutional Courts and Supreme Courts, Mr Chairman of the Ministers' Deputies, Dear Ambassador of Ireland, Mr President of the Parliamentary Assembly, Excellencies, Ladies and Gentlemen,

Thank you for attending this solemn hearing of the European Court of Human Rights.

For the second time, we are gathering at an unusual time of the year, since the health situation at the end of January prevented us from meeting.

However, my colleagues and I were very keen to maintain the tradition and to hold a hearing in 2022.

In a moment, I will make the customary speech, and our speaker for 2022, Ms Dunja Mijatović, Council of Europe Commissioner for Human Rights, will take the floor. But first, I would like to address our guest of honour.

Madam President of the Hellenic Republic,

Your presence with us this evening makes this hearing exceptional. For many reasons, it seems only natural that you should be present.

First of all, you come from the country which invented democracy, the only political model envisaged by the European Convention on Human Rights and one which we constantly defend in our case-law. I will come back to the theme of democracy later in my speech.

Secondly, you are here among your peers, since before assuming the high office of Head of State, you were the first woman to chair the Greek Supreme Administrative Court.

This was in recognition of a prestigious career as a lawyer, during which you distinguished yourself in particular by your fights for environmental protection and in combatting discrimination, for example with regard to children.

It is therefore your former colleagues, the presidents of the superior courts of the Council of Europe member States, who surround you today.

Finally, the apogee of your career, is that you are the first woman in the history of Greece to become President of the Republic.

Your election was not only an acknowledgment of your outstanding legal skills, but also a step towards a new era of equality.

In taking office, you stated that you “aspire to a society that respects rights, under the Constitution, the European Charter of Fundamental Rights and the European Convention on Human Rights”. Our Court was particularly touched by this.

Madam President of the Republic,

This is a historic moment. We are all aware of that.

By taking the floor in this Hearing Room, you are marking in the most solemn way Greece's support for the European system of human-rights protection.

Your presence among us is a great honour and a great joy. We look forward to hearing from you now.

Esteemed guests,

Your presence here this evening demonstrates your commitment to our joint European human-rights project. A project which is needed now more than ever.

We meet here in Strasbourg at a transformative moment in our European history, a moment when the relative peace and security which we have taken for granted on our continent has been shattered by Russia's war in Ukraine.

When we celebrated the 70th anniversary of the European Convention in Athens in November 2020 we highlighted that the Convention constituted one of the greatest peace projects in human history.

I firmly believe that the work of the Council of Europe and its judicial control mechanism, the European Court of Human Rights, has contributed to stability, security and peace in Europe and will continue to do so. Whilst it is often said that the Court is the “jewel in the Crown”, the Crown must remain strong for the jewel to continue to shine.

It was therefore of immense importance that the Council of Europe reacted with speed, determination and clarity from the beginning of the war. Moreover, the Court has not remained a powerless witness to the shocking events.

Indeed, the Court immediately granted a number of important interim measures against the Russian Federation in the days and weeks following the invasion.

Furthermore, the Plenary Court, having regard to the decisions of the Committee of Ministers and the Parliamentary Assembly and in unison with those bodies, drew the consequences of the Russian Federation's expulsion from the organisation and declared in its Resolution of 22 March this year that, as from 16 September 2022, the Russian Federation would cease to be a High Contracting Party to the Convention.

It flows from this Resolution that the Court will continue to have jurisdiction to deal with applications concerning actions and omissions by the Russian Federation which may constitute a violation of the Convention, provided they occurred before that date.

It should be made clear that the Resolution states that it is without prejudice to the consideration of any legal issue, related to the expulsion, which may arise in the exercise by the Court of its competence under the Convention to consider cases brought before it.

In the coming months the Court will have to determine the most appropriate course of action for processing the approximately 17,000 cases against Russia which remain on the Court's docket, as well as possibly numerous other cases lodged as a result of the war in Ukraine. This will take time, and expectations need to be realistic. The challenge for the Court's work is unprecedented. Continued political and financial support from all stakeholders is vital.

As for the Court's statistics more generally, we currently have approximately 72,000 pending applications, which represents an 11% increase from this time last year. The three high case-count countries which account for almost 64% of these applications are, in this order: Russia, Turkey, and Ukraine.

Dear guests,

It is customary for the President of the Court at the solemn hearing to highlight some of the most important judgments delivered by the Court during the previous year.

In 2021 the Grand Chamber of the Court delivered twelve judgments and one decision. It also ruled for the first time on a request for an advisory opinion under the Council of Europe Convention on Human Rights and Biomedicine (the Oviedo Convention).

Let me begin by saying a few words about the inter-State rulings delivered by the Grand Chamber in 2021.

The judgment in *Georgia v. Russia (II)* concerned the jurisdiction of the attacking or invading State during the active combat phase of hostilities; the relationship between Convention law and international humanitarian law in the context of an armed conflict; the duty to investigate deaths occurring during the active combat phase; the definition of administrative practice; and the application of Article 2 of Protocol No. 4 to internally displaced persons.

In this inter-State application, the Georgian Government made a series of complaints concerning the armed conflict between Russia and Georgia in August 2008. The Court examined two phases of the impugned events separately, namely those before and after the ceasefire agreement of 12 August 2008. It held that the events which had occurred during the active phase of the hostilities (8-12 August) did not fall within the jurisdiction of the Russian Federation for the purposes of Article 1 of the Convention, whereas the events which occurred after the ceasefire and the cessation of the hostilities did fall within its jurisdiction. On the merits, the Court found that there had been an administrative practice, contrary to Articles 2, 3, 5 and 8 of the Convention, Article 1 of Protocol No. 1 and Article 2 of Protocol No. 4; a violation of the procedural limb of Article 2; as well as a failure to comply with the obligation to cooperate with the Court under Article 38 of the Convention.

In the inter-State application *Ukraine v. Russia (re Crimea)* the Ukrainian Government made a series of complaints about the events of 27 February 2014 to 16 August 2015, in the course of which the region of Crimea, including the city of Sevastopol, was purportedly integrated into the Russian Federation. In its decision, the Grand Chamber held that the impugned facts fell within the “jurisdiction” of the Russian Federation within the meaning of Article 1. It also addressed the “jurisdiction” of a respondent State in the context of a purported “annexation” of territory from one Contracting State to another and clarified the standard of proof applicable at the admissibility stage to the question of jurisdiction.

With fifteen pending inter-State cases and approximately 10,500 associated individual applications, inter-State work remains a very challenging part of the Court’s work and has implications for our authority and legitimacy moving forward. Indeed, at the beginning of this year, the Court held a hearing on admissibility in still another important inter-State case, that of *Ukraine and the Netherlands v. Russia*, concerning events in eastern Ukraine, including the downing of flight MH17.

The next two Grand Chamber cases I would like to highlight are the landmark judgments in *Big Brother Watch and Others v. United Kingdom* and *Centrum för rättvisa v. Sweden*. Both cases concerned the bulk interception of cross-border communications and safeguards against abuse, and in addition *Big Brother Watch and Others* concerned the receipt of intelligence from foreign intelligence services.

In both judgments, delivered on the same day, the Court importantly concluded that bulk interception regimes were, in principle, permissible under the Convention. However, it set out the fundamental safeguards required of these regimes under the “private life” provision of the Convention. In particular, the Court found that at the domestic level, the supervision and review process had to be subject to “end-to-end” safeguards. In the *Big Brother and Others* case, the Court also developed Convention requirements for the protection of confidential journalistic material. Moreover, the Court defined the safeguards to ensure compliance with the Convention in respect of the receipt of intelligence from foreign intelligence services.

It is of importance to highlight the fact that in its judgments the Court paid a great deal of attention to the work and specific findings of the national authorities and the domestic courts engaged in intelligence work. These cross-references are an important part of our dialogue and the best way in which we can understand and balance the competing concerns at play.

To conclude this overview of cases in 2021, I will mention two particularly important Chamber cases, as they concern one of the most fundamental aspects of the rule of law, namely the independence of the judiciary and, more specifically, the conditions of appointment of judges and the development of their careers.

In *Xero Flor v. Poland*, the Court dealt with a complaint concerning the alleged invalidity of the appointment of a Constitutional Court judge. It held that there had been a violation of Article 6 § 1 as regards the applicant company’s right to a “tribunal established by law” on account of the presence on the bench of the Constitutional Court of the Judge in question, whose election it found to have been vitiated by grave irregularities.

In *Reczkowicz v. Poland* the Court found that the procedure for appointing judges had been unduly influenced by the legislative and executive powers. This amounted to a fundamental irregularity which adversely affected the whole process and compromised the legitimacy of the Disciplinary Chamber of the Supreme Court, which had examined the applicant’s case. This Chamber was not therefore a “tribunal established by law” within the meaning of the European Convention.

More recently, I should also note that the Court delivered its first Grand Chamber judgment on the judicial reforms in Poland in the case of *Grzęda v. Poland*, which I am sure will be elaborated upon further by my successor in office in next year’s speech at the Court’s solemn hearing to mark the opening of the judicial year.

All of these cases follow on from the very important Grand Chamber judgment in the case of *Guðmundur Andri Ástráðsson v. Iceland* from 2020.

These judgments on the independence of the judiciary, which concern a growing number of countries, alert us to a worrying regression in the rule of law. It bears repeating that sometimes courts, whether at the domestic or the international level, find themselves in the spotlight, praised by some quarters and criticised by others. The European Court of Human Rights is no exception and recent events have provided clear examples. Let us be clear. The rule of law is based on a very simple and important premise: those who are entrusted with wielding governmental power must themselves be circumscribed by the law and it is the role of the courts to state what the law is if a dispute arises. When it comes to the European Court of Human Rights, this is the logic of the system to which the Member States have signed up, based on their own sovereign choice. The Court has demonstrated in recent years an acute awareness of the role of national authorities under the principle of subsidiarity, but sometimes the Court’s rulings must draw a line in the sand. Indeed, that is the whole point of why the system was put in place more than 70 years ago. This role can be unpopular with the government in question or even sometimes with the majority of a country’s population, if the outcome is not to their liking. But this is inherent in the work of a Human Rights Court which is tasked with verifying the Convention-compliance of the use of governmental power.

Ladies and gentlemen,

A Europe in which the separation of powers has been eroded by those in power;

A Europe where sustained public expressions of hostility or outright refusal to abide by court judgments are commonplace;

A Europe where judges are simply unable to do their jobs independently and impartially for fear of reprisals or attacks resulting in unfettered governmental power:

This is a Europe in which the rule of law is at risk of disappearing. This is a Europe in which we will no longer be free, as recent events have once again shown us.

Dear guests,

As has been said, dialogue between the Court and national courts is part of our DNA. Today I would like to update you briefly on two pillars of that dialogue: our Superior Courts Network and requests for advisory opinions under Protocol No. 16.

We have a truly outstanding figure of 102 courts from 45 States which are now active members of our network. I am particularly pleased to have welcomed the Court of Justice of the European Union, which recently joined as an observer.

The other pillar of dialogue with national courts is Protocol No. 16. This Protocol, which entered into force in 2018, extended the jurisdiction of the Court to give advisory opinions at the request of the highest national courts.

What is the state of play so far in relation to these advisory requests?

The Court has adjudicated four such requests so far: one on the question of surrogacy and legal recognition¹, another on the interpretation of a provision of a domestic Criminal Code in the light of Article 7 of the Convention², the third concerning legislation on impeachment³, and the fourth on the statute of limitations and torture⁴. One request was not accepted by the Grand Chamber Panel, and one is currently pending, having been submitted by the French *Conseil d'État*.

The advisory opinion procedure under Protocol No. 16 is still at the development stage within the Court, as well as within the relevant national superior courts already participating in the procedure. It will take some time for the system to become fully efficient and operational in all its essential elements. The Court is committed to being able to process these requests in a sufficiently quick manner so as to enable you, the highest domestic courts, to resume your own decision-making on the cases in question.

Dear guests,

The time has come for me to hand over to our guest of honour. This evening we welcome Ms Dunja Mijatović, the Council of Europe's Commissioner for Human Rights.

Her mandate goes to the heart of the functioning of the Convention system. Her country work, thematic monitoring and awareness-raising assist member States on their own journey towards human-rights compliance.

Her insights following country visits are sometimes translated into third-party observations which provide a precious contribution to the work of the Court.

I would like to commend her courage, dynamism and energy in defending our common European values. Commissioner Mijatović, dear Dunja, the floor is yours.



Katerina Sakellariopoulou

President of the Hellenic Republic

President of the European Court of Human Rights, Members of the Court, Excellencies, Ladies and Gentlemen,

It is a great honor and joy to be here today and address the European Court of Human Rights. My personal interest and perception of the utmost importance of the Convention has arisen during my longtime career as a judge and President of the Greek Council of State. As the President of the Greek Republic, I am very pleased to confirm that the bonds between my country and the Council of Europe remain strong and undisputed.

Greece ratified the European Convention of Human rights initially in 1953 and finally in 1974, after the end of the dictatorship of the colonels. The famous "Greek case" has been a decisive moment for the protection of human rights and accordingly the shaping of policies and standards. The withdrawal of Greece spotlighted the value of freedom and as a result the delegitimization of the Junta, at home and abroad, was accelerated. At the beginning of the post-dictatorship era, which in Greece is called "Metapolitefsi", the judicial reception and interpretation of the text was reluctant, to say the least. The Greek legal order and the judicial system were not acquainted with the normative status and context of the Convention. Nonetheless, progressively the European Convention turned into a valuable tool for understanding not only European law and human rights doctrines, but also the meaning of our own constitution. Moreover, it has been recognized as a part of our ordinary language and common legal discourse, mostly after the individual complaint mechanism was set up. During these years, distinguished Greek legal scholars have served the Court and Greek controversial cases made the headlines. The Convention's case-law has proved to be a force of reform for national legislation and domestic law in general. Especially, concerning Greece, religious liberty, property rights, and fair trial guarantees have been more effectively safeguarded thanks to the implementation of the Court's judgments. Applying the Convention has also led to constitutional change: an interpretative statement has been added to article 4 in virtue of the recognition of contentious objectors, after the respective decision. Article 57 of the Greek Constitution has been amended, in order to comply with another significant judgment of the Court regarding professional activity of Members of Parliament. The Convention has enhanced national respect of minorities rights and identities, promoting and imposing inclusive policies such as the extension of the cohabitation pact to same-sex couples. Furthermore, constant and interactive dialogue between the European and national authorities has ensured a greater involvement of national courts in the convention system. Thus, conventionality control has become a significant part of the actual judicial review, so as to prevent human rights violations and comply with European Convention standards. Taking into account the Strasbourg case law is an essential obligation of the Courts and of national authorities.

The concept that the European Convention of Human Rights is a dynamic text and a living instrument has been a crucial feature of Strasbourg's case law from its very start. Evolutive interpretation is inherent to the Court's role and legitimacy. Furthermore, this fundamental idea reflects the progress and depth of the European social contract. The Convention and the Court's decisions establish our common ground, exceeding the boundaries of the law and forging our European culture and way

¹ Request no. P16-2018-001.

² Request no. P16-2019-001.

³ Request no. P16-2020-002.

⁴ Request no. P16-2021-001.

of life, without effacing national identities or underestimating the fair balance between cosmopolitanism and patriotism. The conciliation of realism and idealism seems to be the major and demanding task of the legislature, the executive and the Courts.

The consecutive crises of the last decade have questioned the protection of human rights and redefined the concept of general interest and the doctrine of the margin of appreciation, along with the fundamental principle of “democratic society”. According to the recent annual report by the Council of Europe’s Committee of Ministers, the human rights protection system faces several challenges, with more complex cases coming to the Court and governments finding it increasingly difficult to respond quickly to judgments. The departure of Russia from the Council of Europe will have consequences, whilst emphasizing the prominence of the human rights convention. The pandemic of Covid-19 has not only severely exposed public health but also the limits of democracy and the rule of law. On one hand, the serious interference on our liberties and the derogation of some member states from the Convention display the emergency of the crisis-law, a change of paradigm which is rather pessimistic for the future of human rights. On the other, preservation, from a republican point of view, of public health as a common good captures the vital and urgent need to guarantee social coherence. The pressure on rights and the extreme recent circumstances, in other words the atypical or formal state of necessity, impose legislative and judicial pragmatism. However, our common values and beliefs, freedom, equality and solidarity, shall not be undermined nor marginalized. The *Vavrička* judgment was seminal in light of national litigation regarding mandatory vaccination and the Court proved a true leader in this matter, underlining the notion of social solidarity in favor of the vulnerable. Also, with regard to the most recent acts of invasion committed by Russia against its neighboring countries the ECHR stood again the test issuing interim measures against Russia regarding the war in Ukraine.

Today, the European *acquis* of the rule of law is widely contested, even within the European frontiers. The Secretary General of the Council of Europe has warned us about this “democratic backsliding”. New authoritarian and populist regimes are targeting freedom of expression and judicial independence and oppose to the foundations of liberal democracy in the name of the majoritarian principle. The Court has developed significant case law concerning the impartiality and independence of justice. The same applies to the migration issue, where the Court has highlighted the obligation of the States to respect the Convention and the principle of non-refoulement.

Ladies and gentlemen,

The safeguarding and consolidation of democracy and the rule of law at a time of crisis is not a purely procedural question. To rise to the new challenges we need to preserve our essential and common values, forming the core of our European way of life and of our mutual understanding which continues to make Europe a privileged region of our planet. The inexhaustible heritage of our founding fathers, here in Strasbourg, is the source of the power and vitality of our common destiny.

Thank you.



Dunja Mijatović

Council of Europe Commissioner for Human Rights

**AT THE CROSSROADS –
DEMOCRACY, HUMAN RIGHTS AND THE RULE OF LAW**

President Spano, President of the Hellenic Republic, Distinguished Judges, excellencies, ladies and gentlemen,

As Commissioner for Human Rights, I attach crucial importance to dialogue with the Court. There have been many occasions on which I have had the honour to come to this room (but also to address this Court remotely by taking part in the first digital hearing in the history of this institution). It is always a special feeling to be present in the place where decisions are taken on matters which not only bear great importance for the individuals concerned but also reflect topical issues with which democratic societies are confronted, and that is why it is an immense honour to have been invited to deliver an address at today’s Solemn Hearing. I see this invitation as a sign of particular attention to the current human rights challenges, but also as a result of the continuous dialogue that has been established between our institutions. I consider it a good example of synergies that, each within its own mandate, contribute to the good functioning and sustainability of the Convention system.

It is perhaps not an exaggeration to say that the need for this system today is as pressing as it was when it was established more than 70 years ago. Back then, the leaders of European countries took the foresighted decision to create a system for the collective enforcement of human rights with the aim of safeguarding individuals from state abuse and newly established democracies from the risks of backsliding into totalitarianism. We should not forget this.

When the Convention was adopted, our continent looked very different. The death penalty was widely legal and operative. Hundreds of thousands of Europeans were still waiting to be repatriated or resettled after WWII, while thousands of new refugees were escaping through the Iron Curtain. In several countries homosexuality was criminalised.

If today’s picture looks much better, it is largely thanks to the Convention system and the Court’s dynamic and evolutive interpretation doctrine that has been instrumental in applying a text adopted in 1950 in light of major societal changes which happened along the past seven decades. No wonder then that the Convention, its Protocols, the Court and the whole human rights protection system that the Council of Europe has established have become a lodestar for those pursuing justice, dignity and equality.

But success stories, too, come with obstacles to overcome: the Convention system has been repeatedly attacked and delegitimised in some European countries; key judgments of this Court have still not been implemented; and states often fail or do not even try to address the structural problems that deprive people of their Convention rights.

In the long run, the non-enforcement of the Convention rights and the disregard of basic principles of international law can lead to deleterious consequences.

The case of the Russian Federation stands out in Europe as one of the worst examples of disregard for human rights. Today’s hearing takes place in extraordinary circumstances for the values our Organisation represents. Exactly four months ago, Russia started a brutal military

attack on Ukraine, which has caused terrible human suffering to millions of people. Many thousands were ruthlessly killed, including hundreds of children, and millions of people saw their lives turned upside down.

I could see for myself the traces of the atrocities committed in Ukraine during my visit at the beginning of May. In Kyiv, Irpin, Bucha and Borodyanka I listened to shocking stories of extrajudicial executions, violence and destruction.

The current situation is the tragic epilogue of years of departing from agreed human rights standards. For years, the government of the Russian Federation has ignored judgments of this Court and recommendations from our Organisation, including my Office. The unresolved impunity for the grave human rights violations stemming from the war in Chechnya, the brutal internal repression of dissent and free expression and now this ruthless aggression against Ukraine and its people are painful illustrations of what can happen when a state disregards international law and order and ignores human rights standards and the common rules established to guarantee international peace.

It is an extreme case, hardly comparable with other situations in our member states. There are, however, signs of an increasing lack of compliance with the most basic human rights standards of our Organisation in member states, which requires serious attention and more resolute action on the part of states within the collective system of our Organisation.

One worrying trend I have observed during my mandate as Commissioner is the erosion of the rule of law in a growing number of our member states. I think we all agree that without full respect of the rule of law, it is not possible to protect human rights.

The erosion of the rule of law manifests itself when governments refuse to abide by court decisions, undermine public confidence in the judiciary, violate judicial independence, weaken judicial bodies, pressure individual judges, and reduce parliaments to a rubber-stamp.

Invariably, it goes hand in hand with a hardening of governments against the standards set in the Convention and by the institutions of the Council of Europe.

Standards on freedom of expression, freedom of association and freedom of assembly are a case in point. As part of my mandate, I work constantly with human rights defenders, civil society and the press. Their reality is far from reassuring.

The case of Osman Kavala is emblematic. He has been in detention in Türkiye for almost the past 56 months despite a judgment of this Court from 2019, as well as nine decisions and one interim resolution by the Council of Europe Committee of Ministers. His case shows the wrongs and unfair treatment that individuals may face when the judiciary provides tools for repression instead of remedies against it. It also shows the limits of what an international system can achieve. In the end, the ultimate responsibility for upholding human rights norms lies with states.

Just last week this Court issued its judgment in the case of *Ecodefence and Others v. Russia* - a long awaited one which is also very important for civil society.

Non-execution of judgments sometimes affects not only individual applicants, including human rights defenders, but also the broader democratic fabric of a society. For almost thirteen years now, the judgment of this Court in the case of *Sejdic and Finci against Bosnia and Herzegovina* has remained a dead letter, mainly because of a lack of political will. The non-implementation of that judgment and of others like *Zornić, Šlaku and Pilav* dealing with the discriminatory nature of the country's electoral system is one of the factors that sustain a status quo based on the ethnic divisions that represent a constant threat to peace and stability in Bosnia and Herzegovina.

Judgments of this Court on individual complaints as well as more broadly those which reveal systemic problems set the record straight and give visibility and recognition to victims. These judgments are also an authoritative counterweight to the forces that seek to evade justice by discrediting the international system of human rights protection and by adopting laws that stifle dissent as well as individual and associative rights.

I have observed other systemic problems that illustrate the hardening of certain governments against the spirit and the letter of the Convention: fixing these problems is primarily the member states' responsibility. Everyone should be able to seek and receive justice at home, in line with the subsidiarity principle. Recourse to an international court should be seen for what it is – essentially a failure by a state to provide proper national remedies.

But we all have our role to play. As an institution enshrined in the Convention since the entry into force of Protocol No. 14 in 2010, I share the responsibility to help make Convention rights a reality for all.

The Convention has been a permanent reference point in my work, be it in my country monitoring, thematic work or third-party interventions before this Court. As *amicus curiae*, my role is obviously not to provide this Court with a specific assessment of a case before it. However, as stressed in the explanatory report to Protocol No. 14, the Commissioner's work and experience may "help enlighten the Court on certain questions, particularly in cases which highlight structural or systemic weaknesses in the respondent or other High Contracting Parties". These elements, and the protection of the "general interest" to which the explanatory report to Protocol No. 14 also refers, are my compass while selecting the cases on which, as a friend of this Court, I submit observations. So far, I have made 16 *amicus curiae* interventions. Most of them have dealt with harassment of human rights defenders, the denial of migrants' rights, gender inequality and limitations to women's rights. They have also covered several countries, including Azerbaijan, Croatia, Denmark, France, Italy, Moldova, Poland, Portugal, Romania, the Russian Federation, Spain, Sweden and Türkiye.

Much has been said about the Convention as a living instrument. Therefore, I will not dwell on this aspect. Suffice here to say that this Court's dynamic and evolutive interpretation has made the Convention system a source of inspiration within Europe and beyond.

Such a dynamic and evolutive interpretation has brought a contemporary reading of the rights protected and of the obligations of the High Contracting Parties, also in the face of new challenges emerging in society. Particularly noteworthy in this context is the role of this Court in assessing the compliance of measures adopted during the COVID-19 pandemic by several High Contracting Parties which was discussed at your seminar this afternoon.

If new challenges in society put the evolutive interpretation of the Convention to the test, old ones pose a more existential threat to the Convention system. I refer here to situations in which a High Contracting Party violates the right to individual applications or refuses to recognise the binding nature of judgments and the obligation to execute them.

Here too the Court has been able to adapt and defend foundational principles. I consider of particular importance for example the Court's principled case-law in terrorism-related cases where it reaffirmed the duty states have to comply with their Convention obligations even when this may lead to unpopular decisions. In the same line, the Court's role in the protracted non-compliance of its judgments by states represents a bulwark against arbitrariness.

The Court has also been innovative in addressing emerging challenges and exploring new avenues, like the reinforcement of the dialogue between courts, including the Supreme Courts Network, and in giving a voice to NGOs and civil society, which are often the first in bringing human rights violations to light.

This is all important and has already been stressed.

What I think should be stressed more is the role of the Convention as a life-saving instrument. Here I would like to provide a few examples from my field work that show the impact that the Convention system can have on people's lives.

In November 2021 I was in Poland to assess the human rights situation of asylum-seekers and migrants on the border with Belarus. Late one night, I accompanied human rights defenders in the border areas and witnessed how a group of asylum-seekers, who had been stranded in the cold and wet woods for many weeks and pushed back to Belarus many times, could finally

safely leave the woods thanks to the protective guarantee of the Court's interim measures. It is evident to me – and has also been stressed by many activists and lawyers helping asylum-seekers that I have spoken with – that for many of these people, the Court's interim measures were the only protection from an immediate return across the border. These people would have otherwise been left in freezing conditions and without access to even the most basic humanitarian assistance, and possibly subjected to severe ill-treatment at the hands of the Belarusian authorities.

Several of the interim measures addressed to the Government of Greece urging the protection of the health, life and physical integrity of asylum seekers held in several reception facilities were equally life-saving. Having been in such reception facilities in Lesbos, Samos, and Corinth, I cannot but attest to the importance of your decisions.

I do not have the slightest doubt that interim measures have saved many human lives across our continent.

These are some examples that speak for the ability of this Court to interpret the Convention in the light of emerging problems and the potential of the Convention system to remain a life-saving instrument. These aspects must be protected. We all have a role in that: the Court, monitoring bodies, my Office. But the primary responsibility rests on the shoulders of all state Parties' institutions: the executive, the legislative and the judiciary.

I think this message resonates with the President of the Republic of Greece, Ms Katerina Sakellariopoulou, whom I am happy to see among us today. Madam President, you took a clear stance on several occasions on the need to protect human rights and the rule of law to ensure a healthy democracy. Such messages coming from high level state officials are crucial to influence the commitment of state authorities to render the Convention rights practical and effective at national level. Because for all the international mechanisms that we may have to protect human rights, the reality is that the best human rights protection is one which happens at national level.

To their credit, member states have been foresighted in establishing the Convention and its mechanisms over the past 73 years. They have enriched the Convention with additional Protocols, they have created a unique mechanism in the world where individuals, NGOs or groups of individuals can hold states accountable. Thanks to Protocol 14 and the adoption of Rule 9 by the Committee of Ministers, states gave my office *motu proprio* access to the Court and the possibility to intervene in the process of the execution of judgments. With Protocol 16, they laid down the basis for a more harmonised integration of human rights law at national level through the possibility for the Court to give advisory opinions to the highest courts and tribunals of Contracting Parties. This has a huge potential to reinforce both the principle of subsidiarity and the role of national judges in protecting the rights of the Convention.

The challenge now is how to enforce this unique system of collective responsibility to improve human rights protection. I think that one of the main steps that member states should take is to remove obstacles which impede or slow down the implementation of judgments.

The problem of non-implementation or cherry-picking Court judgments is one stark illustration of the faltering commitment to upholding human rights standards in many of our member states. The failure to implement some of the interim measures ordered by this Court is also part of this trend. At the root of this problem lies a misplaced belief by politicians that they enjoy a higher democratic legitimacy than the judiciary. This often results in the adoption of legislation which is not aligned with international or even national jurisprudence, the dismantling or the control of democratic institutions and the subordination of human rights standards to a state's interest. Such trends undermine the democratic fabric of our societies, and must be reversed.

I have said this on other occasions, and I think it is worth repeating it in this room of justice: states should no longer procrastinate in realising human rights for all.

They should recommit to the values and norms of our Organisation. State authorities - and I include here the three branches of power – should become more robust defenders of human rights and of the collective system put in place to protect, promote and fulfil them.

I see in particular four areas where states should intervene.

One crucial step is to embed the standards of our Organisation and the case-law of this Court into national legislation, jurisprudence and practice.

The prevention of violations and the provision of effective remedies at national level is another key area of intervention. To this end, the independence and impartiality of the judiciary should be respected and reinforced and cooperation with National Human Rights Institutions, NGOs and civil society improved.

National judges should be frontline actors in giving effect to Convention rights. They should be supported – not constrained – in this endeavour. In this sense, following the tabling of the Bill of Rights Bill by the United Kingdom government earlier this week, I cannot but feel concerned at the restrictions it appears to entail on the national judges' ability to interpret the Convention rights as ordinary judges, and to take this Court's case-law fully into account while preserving it as a living instrument. The adverse impact of this on individual access to Convention rights, and on the principle of subsidiarity must also be mentioned in this context.

Third, I see the need for increased awareness and education about the standards of the Convention system, both among the public and legal practitioners. This is particularly important at the present juncture because the shorter time available to lodge a complaint introduced by Protocol 15 may complicate the exercise of the right to individual applications, which carries the risk of reducing the effectiveness of the Convention system.

Lastly, I think that member states should make better use of the tools of the Organisation to exert the necessary pressure to ensure respect for democracy, human rights and the rule of law by their peers.

Mr President,

Reaching the conclusion of my intervention, I would like to quote you when, in a recent speech given in Oslo, you said that: "Bringing rights home is an integral part of the system itself and we should embrace it and attempt to make this transformative change as smooth as possible."

This is the key to giving effective meaning to the Convention system.

Mr President, ladies and gentlemen,

The key principles of the Convention system, in particular respect for human rights for all and the guarantees provided by a solid rule of law, are the lifeblood of our democracy. They are not an abstract concept, but indispensable nutrients of just and thriving societies.

The Council of Europe and its Court are the main protectors and promoters of this system. It is therefore necessary that member states, both within their borders and as part of a community, strengthen their commitment to the founding values and institutions of our Organisation and to the universal protection of human rights.

The Convention system stems from the vision and courage of leaders who understood that defining common European norms and applying them at national level was the best antidote for oppression.

The times of those leaders were not easier than ours. Our task is not bigger than theirs. It is now our turn to give renewed impetus to the ambition of safeguarding a system "based upon justice and international co-operation".

PHOTOS



PREVIOUS DIALOGUES BETWEEN JUDGES

- Dialogue between judges - 2021
- Dialogue between judges - 2020
- Dialogue between judges - 2019
- Dialogue between judges - 2018
- Dialogue between judges - 2017
- Dialogue between judges - 2016
- Dialogue between judges - 2015
- Dialogue between judges - 2014
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- Dialogue between judges - 2005