

Speech to Gray's Inn
**“The European Court of Human Rights
as guarantor of a peaceful public order in Europe”**

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Ladies and Gentlemen,

It is a pleasure for me to have this opportunity to deliver a lecture to what one might call a *professional* audience, here in the prestigious surroundings of Gray's Inn.

For my theme this evening I have chosen to speak about Inter-State proceedings, which is perhaps the less well-known side of the jurisdiction of the European Court of Human Rights. In purely numerical terms, Inter-State cases represent a tiny fraction of the Strasbourg case-law. To adapt the usual phrase, Inter-State cases have been few, although they have not really been far between. Rather, they have tended to come in waves, and the Court is experiencing one such wave at present, as I shall explain later on.

The small number of such cases belies the legal significance of the case-law that they have generated, and I will illustrate this with some examples in my talk this evening. It also belies the intrinsic importance of the Inter-State procedure as a mode of Convention proceedings. Article 33 of the Convention casts the European Court of Human Rights in the very important role of guarantor of the peaceful public order in the greater Europe, a point that I will develop later on.

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I will, however, begin at the beginning, by looking back to the original Convention and the first Inter-State cases that were brought to Strasbourg. Let me recall that the Convention adopted in 1950 comprised three organs responsible for its implementation. Two of them were creations of the Convention itself – the European Commission of Human Rights and the European Court of Human Rights. The third was – and is – the Committee of Ministers of the Council of Europe. In its original form, there was a largely optional character to the supervisory mechanism. States were at liberty to declare their acceptance of the Commission's competence to examine individual cases, and that was a gradual process spread out over nearly 40 years.

The jurisdiction of the Court was likewise optional, and it was only by 1990 that all States had accepted it.

What this meant is that the only element of the supervisory system that was *mandatory* right from the beginning was the Inter-State procedure, then contained in Article 24, and now in Article 33. Under the procedure, the applicant State would refer its complaint to the

Commission for examination. The role of the Commission, generally, was to decide on the admissibility of cases, and thereafter to establish the facts, and also work with the parties towards a possible friendly settlement of the dispute. If this did not materialize, the Commission would then report to the Committee of Ministers, stating its own *opinion* – non binding – as to whether there had been a violation of the Convention. The formal power to rule that there had been a violation of human rights was conferred on the Committee of Ministers. It also had the express power to prescribe a time-limit for the State to take the necessary measures to redress the breach, and to assess the adequacy of the measures taken. The Committee's decisions in this respect were binding on States, by virtue of Article 32(4) of the original text of the Convention.

It did not take long for the Inter-State procedure to be activated. The Convention entered into force in 1953, and the Commission came into being the following year. It was in 1956 that the first case appeared, brought by Greece against the United Kingdom. The background to the case was the repressive measures taken by the colonial government of Cyprus at that time to deal with serious unrest on the island. These measures included whippings, collective punishments, curfews, arrest without warrant, detention and deportation.

Within a matter of weeks, the Commission declared the case admissible, the only significant point being that the rule of exhaustion of domestic remedies did not apply in the circumstances since the case concerned legislative measures and administrative practices.

It was the first ever decision of *admissibility* under the Convention.

The Commission pursued its examination of the complaint, and two years later it made its lengthy report to the Committee of Ministers. Commission reports were classified as confidential documents, only published by decision of the Committee of Ministers, or if the case was referred to the Court. So it was only in 1997 that the text of the first inter-State case was eventually placed in the public domain. It can now be accessed through the HUDOC website.

The Commission did not consider that there had been any breach of the Convention.

I would pick out two points for comment from its extensive analysis. The first is the Commission's conception of itself. Having noted that some of the measures complained of had been revoked during the time it had the case under examination, the question was whether the Commission should continue to examine them nonetheless. It took the view that it was not a judicial tribunal called upon to express opinions on an abstract point of law. Instead, its role was to exercise a *conciliatory function* with a view to ensuring the observance of the Convention and the maximum enjoyment of human rights. It therefore went no further than describing the measures concerned, noting that they had been revoked, and adding that it had acted on the assumption that they would not be revived. The Commission took another line later on, as we shall see.

The second point of note is the Commission's approach to Article 15, which permits States to derogate in times of war or emergency. It affirmed its competence to make its own determination of whether a public emergency threatening the life of the nation existed, an important assertion of the power of the Convention institutions. It expressed the point in the following terms:

“The Commission of Human Rights is authorized by the Convention to express a critical opinion on derogations under Article 15, but the Government concerned retains, within certain limits, its discretion in appreciating the threat to the life of the nation.”

And it added that the Government had not gone beyond these limits of appreciation.

This was, of course, the very first articulation at Strasbourg of what became the doctrine of the margin of appreciation.

There was a second Inter-State complaint in 1957, concerning the ill-treatment of a number of individuals in Cyprus. It was overtaken by events, however, since political settlement was reached on granting independence to Cyprus. Greece and the United Kingdom filed a joint request with the Commission to terminate the proceedings, which the Commission accepted. I will return to Cyprus in a few minutes, of course, it being the subject of 4 more Inter-State cases.

Before that I will turn to the case *Austria v. Italy*, a case that commenced in 1960. It arose out of the trial and conviction a number of young men from the German-speaking part of Italy for the murder of a customs officer. Austria principally alleged that the trial had breached Article 6 in several respects. The Commission concluded that there had not been any violation of the Convention. It simply made the suggestion to the Committee of Ministers that those convicted be shown a degree of clemency on account of their young age.

It is not the Commission's view on the merits of the case that is particularly remembered. Rather, it is its consideration of the admissibility of the case, which led the Commission to make some important statements about the specific nature of the Convention system.

Italy had argued that the case was outside the temporal jurisdiction of the Commission and therefore inadmissible. Their reasoning was that at the time of the trial, Italy was already bound by the Convention, but Austria had yet to ratify it. Therefore, Italy had had no treaty obligations towards Austria at the relevant point in time. It was an argument based on the classic notion of *reciprocity* in international law.

The Commission considered the point at length, in the light of the fundamental aim of the Convention, as reflected in the Preamble. This was not about reciprocal rights and obligations in the interests of the States themselves, but the establishment of “*a common order of the free democracies of Europe*”.

Convention rights were not limited to the nationals of the States party, but applied to all.

It followed that the obligations undertaken by States were essentially of an *objective* character, designed to protect the fundamental rights of individual human beings, not to create reciprocal and subjective rights among States. The supervisory mechanism was built on this premise, acting as a collective guarantee of human rights. Accordingly, an Inter-State case was not an exercise of a right of action to enforce the applicant State's rights, but was an action against an alleged violation of the public order of Europe.

Let me refer here the well-known passage in the Court's *Loizidou* judgment of 1995, in which it developed the idea by describing the Convention as a “constitutional instrument of European public order”.

The Commission's words ring as true today as the day they were written.

The next Inter-State application was the seminal *First Greek case*, brought in 1967 by Denmark, Norway, Sweden and The Netherlands to denounce the violations of human rights committed by the military régime in Greece. It was a colossal case, involving extensive fact-finding by the Commission and a final report that ran to more than a thousand pages. Among the many issues dealt with in the report, the Commission considered the validity of Greece's attempt to derogate under Article 15. It rejected the Government's claim that there was an emergency threatening the life of the nation – there would be no deference to an anti-democratic régime.

The Commission also made very important findings regarding Article 3 of the Convention. The meaning that it gave to the terms used in that cardinal provision - what is meant by “*torture*”? what is meant by “*inhuman*”? what is meant by “*degrading*”? – became established elements of the Strasbourg case-law. It concluded that the gravest of violations, acts of torture, had been committed in Greece. It also found violations of many other Convention rights.

The Commission’s report is dated 5 November 1969. A few weeks later, Greece denounced the Convention and withdrew from the Council of Europe. This happened before the Committee of Ministers commenced its consideration of the case, effectively stalling the Inter-State procedure. What the Committee did decide to do was to make the Commission’s report public at that stage.

The Second Greek case, filed in 1970 by the three Scandinavian States once again, and alleging violations of Article 3 and Article 6 regarding 34 opponents of the military régime, was of course affected by the Greek withdrawal. The Commission informed the Committee of Ministers that it could not adequately pursue its examination of the case. Following the restoration of democracy and the return of Greece to Strasbourg, the Commission assessed the new situation and decided that the case could be struck out.

Next came two cases brought by Ireland against the United Kingdom, alleging violations of Convention Rights in Northern Ireland at the beginning of the 1970s when political violence and unrest had become intense. In the annals of the Convention it is the first of these cases that remains a landmark, and I will confine my remarks to it.

The Commission once again invested great efforts in ascertaining the facts of the case, taking testimony in various places, including a secret location in Norway. It adopted its report on the case in early 1976 – a very detailed document of over 500 pages.

Its key finding was that acts of torture had been committed in Northern Ireland, through the combined use of five techniques. There were other violations of Article 3 in the form of inhuman and degrading treatment.

One may note the change in the Commission’s attitude compared the first Inter-State case. The fact that the five techniques had been discontinued did not stop it from assessing them. It said that it was “not only competent but bound to express an opinion” on this point.

Regarding the complaints about detention and internment without trial, these were rejected on account of the UK’s valid derogation under Article 15.

The importance of the case, already considerable, was boosted by its referral to the Court at the request of the Irish Government. This was the Court’s first Inter-State case, and the judgment remains an important precedent to this day. As is well known, the Court disagreed with the Commission over the existence of torture, and this despite the British Government accepting the Commission’s decision on all points. For the Court, while the five techniques constituted inhuman and degrading treatment, “*they did not occasion suffering of the particular intensity and cruelty implied by the word torture as so understood*”.

It is relevant to note here that in 1999 the Court signalled a new stance on the meaning of the word “torture”. In the *Selmouni v. France* judgment of 1999, and referring to the notion of the living instrument, it said: “*acts which were classified in the past as “inhuman and degrading treatment” as opposed to “torture” could be classified differently in future. It takes the view that the increasingly high standard being required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies.*”

The Irish case was, for the Court, an opportunity for self-definition. In explaining why it would examine the Article 3 complaints even though the UK had both accepted the Commission's ruling and put an end to the practice, it said:

“The Court’s judgments in fact serve not only to decide those cases brought before the Court but, more generally, to elucidate, safeguard and develop the rules instituted by the Convention, thereby contributing to the observance by the States of the engagements undertaken by them as Contracting Parties.”

It is an important statement about the very purpose of the European Court of Human Rights, and of the broader purpose served by its case-law, over and above its formally binding *inter partes* character. The continuing elucidation of the Convention, I might add, is crucial to achieving stronger subsidiarity in the protection of human rights continent-wide.

Time does not permit me to dwell on each of the four Inter-State cases brought by Cyprus against Turkey over a 20-year period, beginning with the invasion of 1974. Instead, I will approach this complex legal chapter from the other end, that is to say, from the vantage point of the recent judgment on just satisfaction given in the fourth case.

First, the scope of that judgment. In the main judgment in 2001, the Court found numerous violations of the Convention rights of Greek Cypriots. The question of a possible award of just satisfaction was touched on briefly, the Court considering that the point was not ready for decision – it adjourned it.

Cyprus took a first step in 2010, presenting a just satisfaction claim in relation to the persons missing since 1974 and their families. The Court found in the main judgment a continuing violation of Article 2 for failure to investigate the disappearance in life-threatening circumstances of nearly 1,500 Greek Cypriots, with a similar finding under Article 5. The intense suffering of the families of the disappeared was found to be in violation of Article 3. The amount claimed was not stated – the Court was asked to make an award at the standard rate in accordance with equitable principles, to be distributed by the Government among the victims.

The second part of the claim, in 2012, related to Greek Cypriots resident in the Karpas peninsula, victims of a series of Convention violations. The Cypriot Government asked that the sum of 50,000 pounds be awarded in respect of each victim, the overall number to be worked out by the two Governments.

Before examining these claims, it was necessary to address two objections from the Turkish Government. The first was the issue of delay. For Turkey, the matter was time-barred. Answering this point, the Court held that, in the context of Convention proceedings, the claim was not out of time. It had indicated to the parties at the outset of the procedure in 1999 and in the judgment that the issue was for separate, future consideration. It then considered the question in light of the relevant principles of international law – the ICJ judgment in the *Nauru v. Australia* case. But that case was distinguished, since the delay here did not concern the commencement of proceedings, but the passage of time between two stages of the procedure. The parties could not reasonably have expected the issue to remain unaddressed. Cyprus had not waived, explicitly or implicitly, its claim. And Turkey had not pointed to any real prejudice caused by the lapse of time.

The second objection was that Article 41 should not have any application at all to Inter-State cases, that only individual applicants could seek compensation, which typically relates to the personal consequences of a violation of human rights – distress, anxiety, frustration, feelings of injustice and so on. This was a novel point of law. The Court looked back to the *travaux*

préparatoires and to the principles of international law to confirm the reading of Article 41 that included inter-State cases. Yet the differences between a case brought by a State and one brought by an individual must be recognized, and so the judgment indicates a case-by-case approach to inter-State applications. Where the case is about the basic human rights of one or more persons, it may be appropriate to award just satisfaction, which is of course for the sole benefit of the real victims.

Having resolved these points, the Court – acting in equity – decided on the sums of 30 million euros to be paid to the families of the missing, and 60 million euros for those in the Karpas peninsula.

There is a final point in the judgment, and it comes from the fact that in parallel with the inter-State proceedings, the Court was also dealing with individual cases raising some of the same human rights issues. The issue of access to homes and respect for property rights was addressed in a series of cases that started with the *Loizidou* case in the 1990s through to the *Demopoulos* decision of inadmissibility in 2010. In that decision, the Court found that the domestic remedy in place had to be exhausted. What Cyprus wanted from the Court was a declaratory judgment to the effect that that determination did not discharge Turkey's obligations under the inter-State judgment in the matter of homes and properties. And a warning that Turkey must not take advantage of the property of Greek Cypriots in northern Cyprus, or let that happen.

Subject-matter aside, the question whether the Court has the competence to give such rulings is an interesting one. When applicants have sought specific remedial measures or consequential orders, the Court has generally refused, saying that its judgment is essentially declaratory. Here the answer was neither yes nor no. It came more as a clarification – the judgment recalls that Turkey must give full effect to the Court's findings on the property issue, not yet having done so. This obligation would not permit any sort of exploitation of these properties, and was not discharged or displaced by the *Demopoulos* decision.

This final passage in the judgment was hailed by nine members of the Court as heralding a “new era in the enforcement of human rights”, being “the first time in the Court's history” that it made “a specific judicial statement as to the import and effect of one of its judgments in the context of execution”.

I come to the last case decided, *Georgia v. Russia (No. 1)*, and I will present it briefly. It arose out of the expulsion of more than four-and-a-half thousand Georgian nationals from Russia in late 2006/early 2007, a time of high political tension between the two countries. The episode was amply documented by international observers – the judgment draws on the report of the Council of Europe's Parliamentary Assembly, human rights NGOs, direct testimony taken in Strasbourg, and other relevant sources. (Compared to the Commission's heroic efforts, today's Court appears somewhat frugal in its fact-finding, but times have changed and facts are to be found nowadays by many different, reliable means).

I would say that the judgment is fundamentally an exercise in fact finding. Once established, the legal issues proved to be relatively straightforward. The material before the Court was found to disclose a “coordinated policy of arresting, detaining and expelling” Georgians from Russia – an administrative practice. It followed from this that there had been a violation of Article 4 of the Fourth Protocol, which states: “Collective expulsion of aliens is prohibited”. Following from this was a violation of Article 5, since if the exercise was collective in nature, the mass arrests made as part of it were arbitrary, with no possibility to test their lawfulness.

A violation of Article 3 was also found, on account of the appalling conditions of detention ensured by many of those deported, who were held for up to two weeks before removal. This was inhuman and degrading treatment. The final ground was a violation of Article 13, there

being no effective remedy for the violations just mentioned. One last point about this case is that the question of just satisfaction has been reserved for a year.

The inter-State docket is by no means exhausted. The Court is currently seized of the case *Georgia v. Russia (No. 2)*, which was filed in the aftermath of the military conflict between the two countries in August 2008. The first judicial act in this case was the issue of an interim measure under Rule 39 of the Rules of Court, addressed to both States, calling on them to observe the Convention, above all Articles 2 and 3. That measure remains in force. The case was declared admissible in December 2011, and relinquished to the Grand Chamber in April 2012.

The recent conflict in Ukraine has given rise to three inter-State cases brought by Ukraine against Russia. The first relates to the events surrounding the annexation of Crimea and the fighting in the eastern part of the country. Again, the Court issued an interim measure at the outset of the proceedings. The other two concern specific incidents. One is about the removal of a group of schoolchildren and two teachers from Ukraine to Russia, who were returned some days later. The other concerns the detention of an individual in Simferopol.

Therefore, with 4 pending cases and one still pending as regards just satisfaction, the Court is facing a live docket under Article 33.

Looking at the cases as a whole, one can see a basic typology. As noted in the Cyprus case, there are cases in which the applicant State is in effect standing in the place of the direct victims of a violation of human rights – a form of subrogation. More correctly, we can regard as a form of diplomatic protection, even if that is more precisely covered by Article 36 of the Convention – this gives States the right to intervene in cases taken by one of their nationals against another State party. Diplomatic protection is a practice of long standing in international law, and no less vital or valuable today than in the past.

The second type of case, rarer it is true, is, and I quote from the recent Cyprus judgment, concerned with “vindicating the public order of Europe within the framework of collective responsibility under the Convention”. If I, as a French-speaker, may use a French term, it is *une action désintéressée*, i.e. action taken by one or more States (the Greek cases, and a similar case against Turkey in the early 1980s) seeking to uphold the rights that are the benchmark of the modern democratic state.

That simple typology is not definitive, for in truth, the types converge.

Nor is it complete, since practice shows that States may participate in the individual procedure so closely as to almost give it, in effect, an inter-State dimension. The clearest example of this may be the cases *Chiragov v. Armenia* and *Sargsyan v. Azerbaijan*, which are proceeding in parallel before the Grand Chamber and address the situation in Nagorno-Karabakh from both sides of the 1992 conflict. In each case, the other State has the status of third party.

There are other clear examples of the phenomenon – let me give that of *Janowiec v. Russia*, which has as its backdrop the massacre of thousands of Polish military officers by the Soviets during the Second World War, at infamous Katyn and other locations. Poland intervened to add its support to the legal case of the applicants, including their request to bring the case to the Grand Chamber. What this shows is that States have diverse means of utilising Convention procedures to put their arguments for the consideration of the Court. It may also be noted that some of the inter-State cases have been introduced simultaneously with

individual cases. I have already touched on this regarding Cyprus, and it is also true of the second Georgian case, and the first Ukrainian case.

As I draw to my conclusion, I would say that it is to Europe's great credit as a community of States, and to the benefit of its peoples, that the binding power of judicial proceedings may be deployed to protect and vindicate fundamental human rights. Let it be recalled, as stated in the preamble of the Convention, that fundamental freedoms are "the foundation of justice and peace in the world". In Europe, that is a collective endeavour, as the Convention organs have stressed over and over.

It is understandable that the European Convention and the European Court are often regarded from a bi-lateral perspective. I mean that, looking outwards from Britain, or any other country, Strasbourg is seen as "over there", and its actions can be viewed as external impositions on the domestic authorities. Appeals to the grand collective project that the Convention is might not carry much weight on such a view.

What I have sought to lay out before you this evening is another side to Strasbourg, in which its collective, international traits are more in evidence. For me, that aspect of its vocation is not simply equal in importance to the more familiar one of individual justice, it is integral to it, the one complementing and sustaining the other.

In protecting human rights, the Convention system upholds the rule of law and anchors democratic standards. It is by no means alone in its task, which is shared by the whole constellation of human rights mechanisms and systems in Europe, all working in the same direction. And their goal is to realize the vision of making Europe's public order a peaceful one.

Thank you.