

**THE EUROPEAN COURT OF HUMAN RIGHTS**  
**AT A TIME OF CRISIS IN EUROPE**

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**by**

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Thank you, President Spielmann. Before I begin, I would like to thank you most cordially for agreeing to introduce and chair this session today. I am also grateful to the officials of the Court for encouraging me and for contributing to the organisation of my lecture, and to the European Society of International Law, which has kindly incorporated it into its “ESIL Lecture Series”.

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There is no doubt that Europe is currently experiencing a serious crisis. Until recently it was thought that this crisis was primarily an economic one. The movement of refugees, unprecedented since the Second World War, has added a new dimension to the situation. Moreover, as has been clearly shown by the events in Paris in January, in the Isère, in Tunisia and in Kuwait in June 2015, and again in Turkey last Saturday, the rise in extremism and terrorism, with its barbaric violence, has taken on increasingly worrying proportions. In parallel, new armed conflicts have broken out, together with ongoing older conflicts, on our continent and in neighbouring regions. There are, of course, other factors which contribute to the rather sombre picture of contemporary Europe. It seems to me, nevertheless, that these four aspects – the economic crisis, the refugee crisis, the rise in terrorism and the armed conflicts – are the most salient features in the current circumstances. All these problems entail untold human suffering, with serious and often horrendous breaches of human rights.

In those conditions it may legitimately be wondered whether the legal and institutional framework set up to protect our “common heritage of ideals and political traditions” is strong enough to rise to the challenge. If it is agreed that the European Convention on Human Rights is one of the most precious treasures created by European civilisation and that the European Court of Human Rights is the finest possible organ to

ensure compliance with the commitments entered into under that instrument, the question then arises as to what role should be played by our Court at this time of crisis.

From the Interlaken Conference up to that of Brussels, much has been said over the past few years about the Court's operational difficulties, about absorbing the backlog of pending cases, about the Court's productivity, and so on. We tend to forget that the Strasbourg Court has been confronted with the most difficult problems of our continent: that it has been called upon to address the human consequences of the economic crisis; that it has increasingly become a major actor in the context of the refugee crisis; that it has had to deal on occasion with the most sensitive and dramatic terrorism cases; that it has been asked to rule on various armed conflicts waged on our continent over the past few decades, including the conflict in Ukraine, which has given rise to four inter-State applications and over 1,400 individual applications. Instead of looking at the procedural or other aspects of the Court's functioning, I thus intend to focus today on the real challenges with which it is confronted, starting with the economic crisis.

## **I. The economic crisis: a prudent but firm attitude**

### *(A) Impact of the economic crisis on Convention rights*

The first point to be emphasised in this connection is the considerable impact that this crisis has had on Convention rights. The traditional approach according to which civil and political rights do not have a significant cost and that, as a result, they are not overly affected in the event of economic difficulties, has now proved to be more erroneous than ever. The effective protection of human rights guaranteed by the Convention comes at a cost. It is even quite expensive. The Convention can certainly be read in a financial light; in other words any pressure on the State budget will have a concrete and direct impact on a series of rights which are recognised therein.

It is well known that, according to the Court's case-law, a number of those rights impose positive obligations on States. All such State obligations will necessarily entail public expenditure because they presuppose the provision of the requisite public services.

This can be said, for example, about the State's obligation to ensure detention conditions that comply with Article 3 of the Convention. One only needs to consult the most recent penal statistics of the Council of Europe to see that the economic crisis has negatively affected those conditions in European prisons, including in stronger States such as Italy or

France. The large number of individual applications on the subject of detention conditions in Croatia, Greece, Hungary, Poland, Romania, Russia or Ukraine, clearly reflects the extent of the problem.

A similar situation can be found, *mutatis mutandis*, in relation to the right to a fair trial. It is obvious that such a trial, with all the safeguards guaranteed by Article 6 of the Convention, carries a substantial cost.

The situation is also worsening – quite spectacularly– as regards the treatment of migrants and asylum seekers. In the case of *Hirsi Jamaa and Others v. Italy*, the Grand Chamber expressly emphasised the dimension of the problem when it observed, back in 2012, that “[t]he economic crisis [had] throw[n] up new challenges for European States in terms of immigration control”. I would even go further by saying that the economic crisis, together with the migration crisis, has led to a sudden rise in xenophobic and extremist reactions; reactions which, in their turn, threaten the very pillars which underpin the Convention – democracy and the rule of law.

Going beyond this particularly worrying situation, the economic crisis has led States to take major decisions in economic matters, often with painful effects on the rights of our fellow citizens to the enjoyment of their possessions. What has the Court’s attitude been when faced with this predicament?

*(B) The Court’s self-limitation when addressing major economic decisions*

It should first be noted that the Court has examined a number of applications in the context of legislative measures affecting salaries and pensions: cases against Romania, Bulgaria, Greece, Portugal, Hungary or Lithuania.

The case of *Koufaki and Adedy v. Greece* from 2013 has perhaps been the most significant, because it concerned a whole series of reductions in salaries, pensions and other benefits following the austerity measures adopted in 2010-2011. The case is quite banal and yet extremely important: banal in the sense that it follows the settled case-law to the effect that the right of property does not guarantee a salary or pension of a given amount; but important, as the Court expressly places itself here in the context of “an exceptional crisis without precedent in recent Greek history” – a crisis which has “undermined the country’s credibility” while “posing a serious threat to the national economy”.

The Court’s tone is grave. It stems from the well-known difficulties that currently prevail. And the Court finds that in those circumstances the decision to enact laws to balance

State expenditure and revenue will commonly involve consideration of political, economic and social issues. The legislator has a “wide margin of appreciation” in such matters. Unless it is arbitrary or unreasonable, the legislator’s decision at a time of crisis falls within this latitude. The European Court, invoking the principle of subsidiarity, adopts an approach of self-limitation. It is not its role to make economic policy. This decision has been cited on several occasions, for example in cases concerning austerity measures in Portugal (including a decision of 2015), and in *Savickas v. Lithuania* concerning a reduction in the salaries of judges.

It was only in one case against Hungary (*N.K.M. v. Hungary*, 2013) that the Court found a violation of the right to the enjoyment of possessions in the context of austerity measures. It concerned a severance payment of which a portion had been taxed at 98%. It thus appears that it is only sparingly and in very exceptional situations – as in the Hungarian case – that the Court intervenes in the choice of priorities and of major economic measures.

*(C) Non-derogable rights, the rule of law and non-discrimination*

By contrast, the Court shows intransigence when it comes to preserving the essence of the Convention, and primarily the non-derogable rights.

As regards respect for core Convention rights, it can be noted, firstly, that the Court has focussed its attention on the impact that the economic crisis has had on conditions of detention. Thus, for example, in *Orchowski v. Poland*, the Court stated that the lack of resources could not justify detention conditions that were incompatible with Article 3 of the Convention (prohibition of torture and inhuman or degrading treatment). States had to organise their penal system in a manner that ensured respect for the dignity of detainees, “regardless of financial or logistical difficulties”.

The Court concluded that if the State were unable to ensure that prison conditions complied with the requirements of Article 3 it would have to abandon its strict penal policy in order to reduce the number of incarcerated persons. In other words the Court imposes on States a kind of obligation of result, to ensure that in all circumstances the conditions of detention continue to meet the requirements of Article 3, even if that means changing penal policy.

Similar reasoning applies *mutatis mutandis* to the right to a fair trial, which constitutes the cornerstone of a system governed by the rule of law. A State cannot use the pretext of a

lack of resources to justify excessive delays in domestic proceedings. Nor can a State rely on an economic shortfall to refuse to honour a judgment debt.

It should lastly be noted that the Court does not accept the pretext of a lack of resources as justification for discrimination against vulnerable groups. It has emphasised, for example, that unlike other forms of welfare, education is a right that is directly protected by the Convention – an essential right for each individual’s personal development. In those conditions, the obligation for a foreigner without a resident permit to pay fees for secondary education constituted discriminatory treatment. The attachment to the principle of non-discrimination is all the more important as it is a transversal principle in the international system of human rights protection.

Faced with the economic crisis, the Court has thus adopted a position which is both prudent and firm. It highlights the impact of the crisis on a series of Convention rights. At the same time it invokes the principle of subsidiarity to avoid intervening in large-scale decisions reflecting major political choices in economic matters – choices which ultimately fall within the sovereign power of the State. However, the Court is careful to preserve the core Convention rights and refuses to enter into economic considerations when it is necessary to protect non-derogable rights, principles related to the concept and values of the rule of law, or the principle of non-discrimination.

## **II. The migrant and refugee crisis: a compass for the States and the EU**

I now turn to the second chapter of my talk – the migrant and refugee crisis. It should first be pointed out that, unlike the Charter of Fundamental Rights, the Convention system does not provide for a right of asylum. Moreover, apart from a few scattered provisions relating to the removal of aliens, the Convention and its Protocols do not grant any rights to foreigners as such. The Court has thus reiterated many times that States are in principle free to control the entry, residence and expulsion of aliens as they see fit. However, to use the Grand Chamber’s wording in *Georgia v. Russia (I)*, without “call[ing] into question the right of the States to establish their own immigration policies ..., problems with managing migratory flows cannot justify a State’s having recourse to practices which are not compatible with its obligations under the Convention”.

This sentence sums up the Court’s approach in such matters: on the basis of the general provisions of the Convention, the Court has progressively created a set of standards which serve as a compass for the States parties, but also for the European Union. This case-

law strengthens the 1951 Geneva Convention relating to the status of refugees and highlights the limits of the Dublin Regulation, while providing guidance for the migration policies of States.

*(A) Strengthening the Geneva Convention on the status of refugees*

It is well known that the cornerstone of the Refugee Convention is the principle of *non-refoulement*. This principle, as enshrined in Article 33 of that Convention, is not absolute, however. Refugees may exceptionally be removed from a country when they represent a danger to that country's security or, having been convicted of a particularly serious crime, constitute a danger to the community of that country. By contrast, the ECHR as interpreted by the Court, imposes an absolute prohibition on the removal of an individual who would be exposed in the destination country to a real risk of treatment in breach of the right to life or the prohibition of torture. As the Court has observed, the prospect that an individual may pose a serious threat to the community if not expelled does not reduce in any way the risk of ill-treatment to which he or she may be subject in the destination country (*Saadi v. Italy*).

Moreover, that absolute prohibition on removal applies not only to refugees and asylum seekers but also to individuals who have not even been able to apply for such status. The 2014 judgment in *Sharifi and Others v. Italy and Greece*, concerning automatic returns from Adriatic ports, illustrates the latter situation in a striking manner. In exceptional circumstances, the existence of a context of general violence or armed conflict has been found sufficient in itself to preclude a person's removal. The case of *Sufi and Elmi v. the United Kingdom*, concerning the indiscriminate violence in Somalia, is a leading example of such case-law, which could be transposed *mutatis mutandis* to certain current conflicts. It can thus be said that the prohibition of removal under the Convention is both stronger and broader than the *non-refoulement* principle in the Geneva Convention.

It will also be recalled that in the Grand Chamber judgment in *M.S.S. v. Belgium and Greece* the Court found that there had been a violation of the Convention on several counts because of the applicant's inability to have access to the asylum procedure, together with a risk of *refoulement* to a country where he might be subjected to ill-treatment. In other words, even though the right of asylum is not recognised as such in the ECHR, any serious shortcoming in an asylum procedure is regarded as constituting an autonomous violation of the Convention.

*(B) Highlighting the limits of the Dublin Regulation*

That conclusion leads us to the Court's case-law on the subject of the Dublin Regulation. Even though its text has been amended and updated over the years, its underlying philosophy remains the same as that of the 1990 Dublin Convention. While it may be seen as an essentially procedural instrument – merely determining the State responsible for examining an asylum application – the Regulation actually reflects a very important political choice. It imposes a considerable burden on States that are on the frontline when it comes to the arrival of asylum seekers. However, the Regulation provides for a way to circumvent this problem through its “sovereignty” clause, enabling States to derogate from the established criteria and to assume responsibility themselves for an asylum application.

It was on the basis of that clause that the Court found in *M.S.S. v. Belgium and Greece* that when they applied the Dublin Regulation the States had to ensure that the asylum procedure of the transit country – in that case Greece – afforded sufficient guarantees that an asylum-seeker would not be removed to his country of origin without any evaluation of the risks faced. The Court thus found “structural deficiencies” in the asylum procedure in Greece. The term “systemic deficiencies” has since been used by the Court of Luxembourg in its *N.S.* judgment and an analogous term is now to be found in the Dublin III Regulation. In other words, our Court's case-law has had a direct influence on the evolution of that EU instrument.

In the case of *Tarakhel v. Switzerland*, the Court's Grand Chamber emphasised that the requirement of “special protection” for asylum seekers was particularly important when the persons concerned were children. The Court took account of the special needs and extreme vulnerability of the applicants' family. Although the reception conditions in Italy did not reveal any structural deficiencies similar to those in *M.S.S.*, they were nevertheless highly problematic. In those conditions, the Court required the Swiss authorities to obtain individual guarantees before sending the family back to Italy – assurances that the applicants would be taken charge of in a manner adapted to the age of the children and to the preservation of the family unit. In other words the Court dismissed the “automaticity” inherent in the Dublin system, to ensure that the children's best interests prevailed in the context of Article 3 of the Convention.

Lastly, in the case of *Sharifi and Others v. Italy and Greece* the Court reiterated that the Dublin system had to be applied in a manner that was compatible with the ECHR. No form of collective removal could be justified with reference to that system.

It can thus be seen that the Court highlighted the need to rethink the Dublin system well before the refugee crisis reached its current dimensions. Since then a number of voices have made themselves heard, including that of the Commissioner for Human Rights of the Council of Europe, to call for a “fundamental overhaul” of the Dublin Regulation.

*(C) Providing guidance for migration policy*

Going beyond that important aspect, the Court’s case-law has provided a series of benchmarks for the migration policy of the States, while also influencing that of the European Union. This is particularly the case in relation to the conditions of detention of migrants or asylum seekers in holding centres. The recent judgment in *Khlaifia and Others v. Italy*, concerning *inter alia* the poor conditions of detention on the island of Lampedusa, is particularly significant. Faced with a situation described as a humanitarian crisis, the Italian Government sought to exonerate themselves by expressly invoking the state of necessity. While acknowledging that the Italian authorities were facing certain constraints, the Court nevertheless rejected that argument. Those constraints could not release the respondent State from its obligation to guarantee detention conditions that were compatible with respect for human dignity. The Court reiterated in this connection the absolute – even peremptory – nature of Article 3 of the Convention.

In a related context, *M.S.S. v. Belgium and Greece* highlighted the question of the conditions of subsistence of asylum seekers while they waited for the authorities to process their applications. It should be noted that the applicant in that case was free at the material time – he was not detained. The Court nevertheless took the view that the Greek authorities had not had due regard for his vulnerability as an asylum seeker. In view of their inaction, they had to be held to account for the conditions of extreme destitution in which he had been held for months. The applicant had been the victim of humiliating treatment, showing a lack of respect for his dignity.

Moreover, a large number of judgments deal with the lawfulness of the detention of migrants. Such detention will be lawful where a removal procedure is pending. Should removal prove impossible, the detention can no longer be justified. As regards more particularly the detention of asylum seekers, the Court assesses whether or not it would have



been possible to apply a less radical measure as an alternative to deprivation of liberty. In that vein, the *Khlaifia v. Italy* judgment recently noted that the *de facto* detention of the applicants in the Lampedusa reception centres had no legal basis; and that, consequently, it was incompatible with the requirements of Article 5 of the Convention.

Another particularly important matter in the context of the current crisis is that of collective expulsions. From the judgment in *Conka v. Belgium* to that of *Khlaifia*, through other significant stages (*Hirsi Jamaa, Sharifi and Others*, etc.), the Court has pointed out that expulsion procedures must take into consideration the individual situation of the persons concerned. To ascertain whether or not there has been a collective expulsion, the Court takes account of a number of factors: the existence of deportation orders with identical terms; the lack of individual interviews; difficulty for the aliens to contact a lawyer; the fact that a large number of persons of the same origin have received the same treatment at the same time, and so on. Even the identification procedure does not suffice to exclude the existence of a collective expulsion.

Conditions of detention of migrants, conditions of subsistence of asylum seekers, lawfulness of detention, collective expulsions: these are the four main issues directly related to the current migrant and refugee crisis on which the Court has developed clear positions. This case-law will certainly be built upon: suffice it to mention the recent application of provisional measures in the case of migrants returned to Hungary; or other cases concerning the tragic loss of life in the Mediterranean – cases which will be examined sooner or later by the Court. However, it can already be said that the Court's positions significantly circumscribe the policies of States in relation to the migrant and refugee crisis.

### **III. The combat against terrorism: well-developed and innovative case-law**

Another major chapter in this study of the Court's role at a time of crisis relates to the combat against terrorism. This is a recurring issue which the Court has had to deal with since it was first set up – its very first case (*Lawless*) being a terrorism-related case. However, the recent resurgence and extent of terrorist attacks, together with the scale of counter-terrorism measures over the past few years, have generated applications which have considerably added to the “terrorism” case-law. In an attempt to identify the main principles of this well-developed case-law, it can first be said that the Court displays some understanding of the difficulties facing national authorities, but without turning its back on its settled case-law.

*(A) Understanding the position of national authorities*

The well-known case of *Othman (Abu Qatada) v. the United Kingdom*, which proved controversial in the UK, must be mentioned here. The applicant, who had been convicted in Jordan for terrorist acts, argued among other things that he faced a real risk of torture if he was returned to that country. The United Kingdom relied in particular on diplomatic assurances obtained from Jordan. The Court, after summing up its case-law on diplomatic assurances and minutely analysing the assurances in question, which had been approved by the King of Jordan himself, accepted – on that point – the UK Government’s argument. It is extremely rare for the Court to rely mainly on diplomatic assurances. It usually remains cautious.

Again from the perspective of the prohibition of torture, in the case of *Ramirez Sanchez v. France* (concerning Carlos “the Jackal”), the Court’s Grand Chamber took account of the applicant’s personality and “exceptional” dangerousness in acknowledging that his solitary confinement for eight years had not breached Article 3 of the Convention.

Another such example can be found in the case of *Finogenov and Others v. Russia*. It will be recalled that this case concerned a siege in a Moscow theatre by Chechen separatists and the decision to neutralise them and release the hostages by pumping a gas into the building. The Court found that there had been no violation of the right to life in the decision to resolve the hostage crisis by means of gas and the use of force. This case is also interesting from the point of view of general international law, as even though the state of necessity is not expressly mentioned, the Court’s wording strongly reminds one of that concept, as codified by the ILC.

There are many more examples. To sum up, without departing from the main principles of its case-law, the Court often takes account of the considerable difficulties encountered in the combat against terrorism and thus affords greater latitude to the national authorities, bringing their margin of appreciation into play, emphasising the existence of compelling reasons to justify reliance on a state of necessity, etc.

At the same time, the Court is careful to reaffirm the pertinence of its case-law principles even in the extremely sensitive and demanding context of counter-terrorism measures.

*(B) Restating case-law principles*

It should be pointed out that our Court put an end to the debate among legal scholars which arose, in particular in the United States, following 9/11, concerning the scope of the prohibition of torture. Both the Grand Chamber, in the *Saadi v. Italy* case, and the Court's Chambers, have strongly reaffirmed the absolute nature of the prohibition of torture and inhuman or degrading treatment, regardless of the offences committed by the person concerned and even in the most difficult circumstances such as the combat against terrorism. More recently, in *Trabelsi v. Belgium*, the Court reaffirmed, in a terrorism-related case, that an irreducible life sentence – without any possibility of conditional release – was incompatible with Article 3 of the Convention.

The Court has also condemned the detention for an unlimited duration of foreign nationals suspected of involvement in terrorist activities.

In connection with the CIA's extraordinary rendition flights, the Court has described secret detention as “anathema to the rule of law” (in *El-Masri* and other more recent cases).

The Court has also shown its attachment to its case-law principles regarding breaches of traditional civil liberties, as protected by Articles 8-11 of the Convention. To cite just one case, in *Güler and Uğur v. Turkey* it emphasised that “laws against terrorism should not be used as a pretext to limit legitimate religious activity”.

These few examples suffice to show that in relation to a broad range of rights, the Court keeps to the traditional principles of its case-law in spite of the terrorism context.

In other words, the Court avoids the false dilemma of having to choose liberty *or* security, conveying the message that these two important values of our democratic societies must coexist.

Furthermore, terrorism-related cases have led in a number of instances to major jurisprudential developments.

*(C) Jurisprudential developments*

Under this heading also, the examples are legion. It is impossible to give an exhaustive list, but the first development to be mentioned is one of an institutional nature, concerning the binding nature of provisional measures. It is well known that the possibility of adopting such measures is not expressly mentioned in the Convention. It is enshrined in Rule 39 of the Rules of Court. Until 2005 the Court had never stated that such measures were

binding. It was in a terrorism-related case, *Mamatkulov and Askarov v. Turkey*, concerning the applicants' extradition to Uzbekistan, that the Court took a major step forward. Invoking the ICJ's position in the *LaGrand* case, together with the case-law of the Inter-American Court of Human Rights, the Strasbourg Court found that provisional measures had binding effect – a binding effect that guaranteed the effectiveness of the individual application. This was a development which had a significant impact on the Court's case-law.

Among the numerous developments concerning the interpretation of the substantive provisions of Convention, it is appropriate once again to cite the case of *El-Masri*, which established for the first time a “right to the truth” in connection with the procedural obligation to investigate the ill-treatment sustained by the applicant.

In the above-cited case of *Othman (Abu Qatada)*, the Court found for the first time that deportation, in that case to Jordan, would entail a violation of Article 6 of the Convention given that there was a real risk that the applicant might suffer a “flagrant denial of justice” in the destination country.

Again in the area of Article 6, and more specifically that of defence rights, the Court first established in its *Salduz v. Turkey* judgment the suspect's right to have the assistance of a lawyer from the very first stages of police questioning.

Moreover, in the case of *Nada v. Switzerland* the Court made an in-depth examination of the relationship between Security Council sanctions – the addition of the applicant's name to a “black list” – and the Convention system. It did not want to determine the matter from the perspective of a hierarchy – or even a confrontation – between the UN system and the Convention system. On the contrary, the Court stressed the need for a harmonious interpretation of the relevant obligations.

Many more examples could easily be given. Looking at it as a whole, the case-law related to “terrorism cases” is both prudent and balanced: the Court has shown understanding when faced with the sometimes quite extreme difficulties of the combat against terrorism, without abandoning the principles of its case-law, which have, on the contrary, been restated and strengthened. It has even succeeded in adopting a more in-depth and focused approach through its dynamic interpretation of the Convention.

I will now turn to the fourth and last part of my talk: the Court's response to situations of armed conflict.

#### IV. Armed conflict: the system reaches its limits

*(A) The Court has dealt with cases concerning most of the conflicts in Europe (and beyond) since at least 1990*

Let us begin with an observation: all the conflicts which have taken place on our continent, at least since 1990, have been – or are being - addressed by the Court in one way or another. There has thus been a series of cases relating to the conflicts that followed the break-up of the Soviet Union. In the case of *Ilascu and Others v. Moldova and Russia* the Grand Chamber, in order to demonstrate the extraterritorial scope of the Convention, extensively set out the background to the case, namely the factual elements enabling it to show that Russia exercised jurisdiction over Transdniestria – a conclusion confirmed in the *Ivantoc* and *Catan* judgments.

Two other cases before the Grand Chamber concerned the conflict between Armenia and Azerbaijan over Nagorno-Karabakh: *Chiragov and Others v. Armenia* and *Sargsyan v. Azerbaijan*. Although they were brought before the Court by individual application, those cases had an inter-State dimension, given that the Armenian Government intervened in the case against Azerbaijan and vice versa.

In the context of disputes arising in the aftermath of the break-up of the Soviet Union, mention must also be made of the second *Georgia v. Russia* application, currently pending, concerning the events of 2008, and the inter-State applications in *Ukraine v. Russia*, concerning the question of Crimea and the situation in eastern Ukraine, not forgetting the large number of individual applications, which are also pending, relating to the same context.

The conflict in the former Yugoslavia and its effects, the intervention of NATO and the events in Kosovo have also given rise to a number of applications. It is true that in the two best known cases, *Bankovic* and *Behrami and Saramati*, the Court found it had no jurisdiction. However, other highly specific aspects of the situation in the former Yugoslavia have been examined on the merits. Thus in the case of *Margus v. Croatia*, the Grand Chamber had occasion to conclude that amnesties for war crimes and crimes against humanity were incompatible with international law. In the case of *Jorgic v. Germany* the Court addressed the concept of genocide and more specifically the question whether ethnic cleansing was part of that concept. Lastly, among the cases relating to the terrible economic consequences of the break-up of Yugoslavia, that of *Alisic and Others*, before the Grand

Chamber, should be mentioned, as it constitutes a major judicial precedent in matters of State succession with regard to debts.

It should further be noted that the Court has delivered no less than 280 judgments concerning the conflict between the Turkish security forces and the PKK and some 230 judgments concerning the Chechen conflict, largely on matters of forced disappearance.

The main aspects of the Cyprus question have been addressed, particularly in the 2001 judgment concerning the fourth inter-State application in *Cyprus v. Turkey*, supplemented in 2014 by the Court's award of just satisfaction. The latter judgment is a first in the Court's history, in particular because it applies Article 41 of the Convention in the context of an inter-State application, but also because it calls on the applicant Government to distribute the sums awarded to the individual victims. From the perspective of general international law, this judgment reflects the law on State responsibility and the recent evolution of the law on diplomatic protection.

Last but not least, the conflict in Iraq has given rise to some major judgments of the Grand Chamber against the United Kingdom (*Al-Skeini, Al-Jedda, Hassan*) or the Netherlands (*Jaloud*). These all provided the Court with an opportunity to examine questions concerning State jurisdiction, the extra-territorial application of the Convention, issues of attribution, the responsibility of a State acting with the authorisation of the Security Council or the applicability of international humanitarian law.

This rapid overview suffices to show the extent to which the Strasbourg Court has had to concern itself with some of the most painful episodes in the recent history of our continent, and with highly sensitive political matters. It has been called upon to deal with thorny issues of general international law, without forgetting the difficulties relating to the establishment of the facts. Moreover, the pending cases concerning the Ukrainian and Georgian conflicts, but also the judgment of 2014 on the Cyprus question, have led it to look more closely at the revival of the inter-State application.

### *(B) Revival of the inter-State application*

1. It should be pointed out that, among all the human rights conventions providing for inter-State applications, only the ECHR has actually been relied upon to bring such cases. In the other relevant instruments – whether universal or regional – this type of case remains a purely theoretical possibility. In the Convention system, however, the inter-State application has, from the outset, represented an essential component of the “collective guarantee” of the

protected rights: it was enshrined in the initial text of the instrument and has never been subject to any condition of acceptance by the Contracting States.

The existence of this type of application is testament to the *erga omnes partes* nature of all the Convention obligations. Given that the violation of these obligations, both substantive and procedural, may be complained of by any Contracting Party, it is obvious that the obligations in question are assumed in respect of everyone (as emphasised by the Court in *Ireland v. the United Kingdom*). Moreover, a State which brings an inter-State case “is not to be regarded as exercising a right of action for the purpose of enforcing its own rights”, but rather as complaining of “an alleged violation of the public order of Europe” (to use the words of the former Commission in *Austria v. Italy*). As our President has pertinently commented, through the inter-State application the Court can be seen as the “guarantor of a peaceful public order in Europe”.

The inter-State case for breaches of the Convention, which was already enshrined – as has been said – in the 1950 text, was later to be reflected in the concept of obligations *erga omnes* (well before that concept was put forward by the ICJ in 1970). Its introduction prompted a doctrinal process which led to the emergence of the concept of *jus cogens* and, accordingly, to the development of a hierarchy of norms in the international legal order. In short, the inter-State application under our Convention has influenced the very structure of international law.

2. Turning more specifically to the significance of the most recent inter-State cases, it should be noted that the fourth *Cyprus v. Turkey* application led the Court to rule on the main aspects of the Cyprus question – refugees, displaced persons, forced disappearances, property rights – and the question of redress for the victims.

The pending applications of Georgia and Ukraine against Russia will lead the Court to rule on questions concerning the applicability of international humanitarian law, State responsibility and in particular the issues of attribution and control, together with the annexation of territory and its effects on individuals.

Lastly, in the context of these recent inter-State applications, the Court had to indicate provisional measures under Rule 39. This is a significant development, bearing in mind that such measures had previously been decided only in connection with individual applications.

Faced with the high stakes in question, some commentators have wondered whether the examination of such applications is really compatible with the nature, role and mission of the Court as a specialised “human rights” tribunal. I personally do not hesitate to answer this

question in the affirmative. Provided the application is admissible, it is difficult to see how the Court could shy away from its duty of “ensur[ing] the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols thereto” (Article 19).

Admittedly, an inter-State application almost inevitably carries a political dimension. However, this factor certainly did not discourage the Convention’s drafters from making such an application one of the centrepieces of the system of collective guarantee of Convention rights. In addition, as has been pertinently noted by the ICJ, so many questions which arise in international life have, by the nature of things, political aspects. But the mere fact that a question put to it also has political aspects does not suffice to deprive it of its character as a “legal question” or to “deprive the Court of a competence expressly conferred on it by its Statute” (Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*). This point of view applies *mutatis mutandis* to the European Court of Human Rights.

If one were to say, moreover, that a judgment concerning human rights aspects of an armed conflict might not be really effective or might be problematic to execute, that would not be a convincing argument for a number of reasons. First, a similar argument could be advanced in relation to any judgment of an international court. The fact of ruling, for example, on the legality of the use of force would not necessarily change anything on the ground. This does not mean, however, that such a ruling would not be important or that it could not play a significant role at a diplomatic level. The same could be said of a judgment establishing the nature and extent of human rights violations, or the extent of State responsibility in that regard in the context of an armed conflict.

During such a conflict there are almost inevitably acts of violence which may constitute violations – often serious ones – of human rights (and of international humanitarian law). To put aside the human aspect of an armed conflict would be quite inappropriate in the current state of development of international law. It is still necessary, however, to address the question whether and to what extent the Court may apply not only the Convention, but also international humanitarian law, in such circumstances.

### *(C) Application of international humanitarian law: increasing openness*

For several decades, until recently, the Court showed considerable reticence when it came to the application of international humanitarian law (IHL). This is not particularly surprising. It should not be overlooked that Article 19 of the Convention provides in



substance that the Court has jurisdiction to apply the Convention, the whole Convention and nothing but the Convention. The main exception to this is provided by the derogation clause in Article 15 of the Convention, referring to the State's "other obligations under international law".

The Court takes the view, in principle, that the possible application of humanitarian law would bring the derogation clause into play. As can be seen, in particular, from the Chechen cases, if the respondent State has not relied on Article 15 of the Convention, the Court applies the Convention in principle without accepting any derogation that may stem from a parallel application of humanitarian law. It is, moreover, significant, that when the respondent State relies on Article 15 in the context of a state of emergency affecting part of its territory, the Court carefully avoids referring to the law of non-international armed conflicts. This is true in particular of the so-called "Kurdish" cases.

In parallel to that reserved position, it can be observed, however, that the Court has begun to show, rather timidly but nevertheless significantly, some openness towards the application of international humanitarian law in cases concerning international armed conflicts. Thus in the context of the Cyprus conflict, the Court took the view, in the *Varnava* case, that "Article 2 [right to life] must be interpreted in so far as possible in [the] light of the general principles of international law, including the rules of international humanitarian law". In that case international humanitarian law was invoked to corroborate the interpretation of the Convention. The obligations under humanitarian law converge with those of the ECHR.

In other cases the Court has carried out an incidental examination of IHL (in *Kononov* for example), or it takes humanitarian law into account, while observing that the latter does not provide a "conclusive answer" to the key question in the case (*Sargsyan v. Azerbaijan*).

The turning point in the Court's approach to international humanitarian law came with the case of *Hassan v. the United Kingdom*. That case concerned the arrest and detention of the applicant's brother by British forces in Iraq in April 2003. The acts in question had been decided in the context of the United Kingdom's powers under the Third and Fourth Geneva Conventions. However, that basis of detention did not correspond to any of the categories enumerated in sub-paragraphs (a) to (f) of Article 5 § 1 of the Convention. That enumeration is exhaustive: a form of detention which does not correspond to any of those categories will, in principle, be in breach of Article 5 of the Convention. In short, the arrest and detention had been decided on the basis of humanitarian law, which was not a basis under the Convention.

In its judgment in *Hassan*, the Grand Chamber cited the ICJ's position on the relationship between IHL and human rights law. The International Court in The Hague

distinguishes between three situations: “some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law” (Advisory Opinion on *The Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*).

It is precisely in this spirit that the *Hassan* case was decided. Faced with a situation which fell within both IHL and human rights law, the European Court of Human Rights adopted an approach that sought to harmonise the obligations stemming from both branches rather than finding them to be in conflict.

The Court, while admitting that it was mindful of the fact that the impugned form of detention did not fall within the Convention guarantees, was prepared to interpret Article 5 in the light of humanitarian law. To do so, the Court emphasised the quintessence of the right to liberty and security, namely the protection of the individual against arbitrariness. Thus, in so far as the detention was compatible with IHL it was “lawful” within the meaning of Article 5 of the Convention. In other words, the fundamental aim of the provision – the prohibition of arbitrariness – was satisfied. At the same time, the Court has shown pragmatism by agreeing to lower slightly the Convention’s standard of protection to take account of the situation obtaining in the context of an international armed conflict.

The case of *Georgia v. Russia No. 2*, currently pending before the Grand Chamber, may well raise a similar issue.

### *Conclusion*

In conclusion, it is noteworthy that the European Court of Human Rights has had to deal with the main aspects of the crisis that our continent is currently experiencing. Without displaying activism, it has adopted a wise approach to the economic crisis, bringing the principle of subsidiarity into play as regards major economic decisions. At the same time it has been careful to preserve the essence of the Convention, namely the non-derogable rights, the rule of law and the principle of non-discrimination.

As to the refugee crisis, the Court’s case-law has provided guidance for the States and the European Union. It has strengthened the protection provided by the Geneva Convention on the status of refugees. It has highlighted the need to rethink the Dublin system. It has set the red line not to be crossed in crucial areas such as conditions of detention, conditions of subsistence of asylum seekers, lawfulness of detention and collective expulsions.

In its wealth of case-law concerning terrorism, the Court does not ignore the difficulties encountered in combating such acts. It both reiterates the principles of its settled case-law and develops that case-law on a number of points. It refuses to enter into the dilemma of the false choice between liberty and security. It advocates both liberty *and* security at the same time.

In parallel, the Court has been called upon to decide cases relating to practically all the armed conflicts on our continent (and beyond) over the past decades. In its examination of inter-State applications the Court has examined some particularly sensitive cases. It emphasises the *erga omnes* dimension of its case-law and takes forward the interpretation and application of the Convention on points that are of clear importance for the future of the system. The recent display of openness to international humanitarian law may herald a new phase in the Strasbourg jurisprudence.

In general, the European Court is not merely the international tribunal with the highest caseload. It is also the court which has had the necessary courage and wisdom to examine a significant number of cases that have been extremely sensitive, legally, politically and humanly. Before engaging in the – often easy – criticism of secondary aspects of its functioning, one should bear this major contribution in mind. The Court has always striven to rise to the challenge of its mission as custodian of the democratic ideals and principles of our continent.