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The Torkel Opsahl Memorial Lecture 2014

The European Court of Human Rights and National Courts: A Constructive Conversation or a Dialogue of Disrespect?

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I. Introductory Remarks

Let me begin by expressing my great pleasure and honour in being asked to deliver this year's *Torkel Opsahl Memorial Lecture.* As a Nordic Judge, I am of course aware of the great contribution that the late Professor Opsahl made to the study and practice of human rights and also to its wider European implementation, having, amongst other prestigious activities, been a member of the European Commission of Human Rights from 1970 to 1984. With a full sense of my inadequacies and with utmost humility, I am also aware of the great figures of international human rights that have given this lecture before. Again, I am deeply honoured by your invitation.

Over the past few years, the European Court of Human Rights has been criticised in many corners of the continent by politicians as well as academics, practising lawyers and judges, with some commentators going so far as to say, at least implicitly, that the Strasbourg Court has not engaged in a constructive conversation with its national counterparts, but rather that this dialogue has become more disrespectful than courteous.[1] Within the context of the wider debate, which is aptly phrased by the Human Rights Institute as the "backlash against human rights", it is therefore important to engage forcefully and reasonably with these claims, as they will without a doubt have an impact on the perceptions of the current and future roles of the Strasbourg Court.

It will hopefully not come as a surprise that I disagree with the claim that the Strasbourg Court has disregarded the national margin of appreciation, usurped its power, or become a venue for "judicial imperialism" as has been alleged.[2] On the contrary, I shall argue that although the criticism directed at the Court is in no shape or form without some foundation, the Court has, when one analyses the case-law closely, attempted to engage in a constructive conversation with national judiciaries, a development that has perhaps become more transparent in the last few years.

In what follows, and in the spirit of reasoned debate, these issues will be discussed by focusing on the institutional dimension and dynamics between the Strasbourg Court and national courts, rather than dealing with individual substantive elements of the Court's case-law, although I shall indeed refer to some cases to clarify my arguments. More concretely, two related claims that have been made about the workings of the Strasbourg Court will be

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[1]For further elaboration, see R Spano, "Universality or Diversity of Human Rights? Strasbourg in the Age of Subsidiarity", (2014) 14(3) *Human Rights Law Rev* 487–502.

[2]*Ibid*, 488.

discussed. The first one, which may be termed the criticism of national sovereignty, is the following: the Strasbourg Court, as an international court, should not second-guess domestic policy choices and judicial rulings in the national application of human rights. This criticism has also been couched in terms of the Court not going far enough in the granting of a margin of appreciation to national authorities, especially national courts. The second one, which is directed at the interpretational strategies of the Court, focusing on the living instrument doctrine and the so-called expansion of Convention guarantees, is formulated in the following way: When interpreting the Convention, the Court has strayed far from giving the text the meaning as it was understood at the time of the Convention's drafting and adoption by the member states. Here, reference has especially been made to the alleged tendency of the Court to formulate obligations of a positive nature, which are not worded in the text of Convention provisions and to expand the scope of certain rights, especially article 8 on the right to respect for private and family life.

Before analysing these claims, let me however first give some preliminary remarks on a general nature.

When one discusses the workings of the European Court of Human Rights, one has to be mindful of the fact that the Court is a very complex institution. It is entrusted with the exceedingly difficult role of resolving cases of alleged human rights violations of the 47 member states of the Council of Europe, brought by individuals from all over the continent, which totals over 800 million people. One should therefore be cautious when expressing a generalised and abstract viewpoint on the Court. Such an approach necessitates at least careful analysis of, and reflection on, the case-law. Also, perspectives on the proper execution of the Court's mandate necessarily vary. Finally, and importantly, the Strasbourg Court, as an international judicial institution, does not operate in a vacuum, a sentiment expressed in very lucid terms by Professors Terris, Romano and Swigart in their book, *The International Judge*, where they state:[3]

> [I]nternational judges are keenly aware that while their rulings can be sweeping and influential, they work in *fragile institutions*. Judges cannot afford to ignore the larger circumstances in which their courts are situated, which subject them to pressures from competing loyalties, inadequate funding, public expectations, and the currents of politics. External circumstances have created subtle but significant threats to the cornerstone of an international judge's work, his independence from outside influences. But judges themselves also play a large part in contributing to both the strength and the fragility of international judicial bodies. With the public credibility of their courts at stake, international judges work, as one observer put it, "under a microscope", so their mistakes are correspondingly magnified.

II. The Criticism from National Sovereignty

Let me now turn to the first part and deal with the claim or criticism from the perspective of national sovereignty.

It has been argued by a former senior judge in the United Kingdom, one of the places where the Court has come under the most intense criticism, that, at the "level of abstraction, human rights may be universal". At the "level of application, however, the messy detail of concrete problems, the human rights which these abstractions have generated are national.

[3]Terris, Romano and Swigart, *The International Judge – An Introduction to the Men and Women Who Decide the World's Cases* (Oxford, Oxford University Press, 2007), xx.

Their application requires trade-offs and compromises, exercises of judgment which can be made only in the context of a given society and its legal system".[4] The Strasbourg Court is therefore, the argument goes, not a suitable body to decide whether the member states have provided, at national level, the human rights protections that the Convention provides.

I agree, in principle, with the conceptual distinction between the abstract interpretation of the scope of Convention rights on the one hand, and their concrete application to facts at domestic level, on the other. Indeed, they are, in my view, inherent in Convention provisions that provide for express, and even implied, limitations of certain rights, namely articles 8 to 11 and article 1 of Protocol 1, as well as, to some extent, the right to a fair trial under article 6, the right to education under article 2 of Protocol 1 and the right to free elections in article 3 of the same Protocol. On a practical level, readers of the Court's judgments can see a recognition of this two-dimensional distinction in the way the judgments are drafted, beginning with a statement of the general principles that the Court has developed and then moving on to their application to the facts of the case.

Having said this, the following question arises: does it follow from the premise that, because the application of human rights guarantees invariably have to take account of domestic circumstances, that the Strasbourg Court is *not a suitable body* to decide whether the member states have, in good faith, applied at the national level the general principles of human rights that flow from the Convention?

I would suggest that it does not for the following reasons. The role of the European Court of Human Rights is to interpret an international treaty providing for the *collective guarantee of human rights*, the treaty is thus based on the primordial and crucial assumption that all the Contracting Parties agree that, in principle, the protection of human rights is not an issue that is purely a matter of domestic concern. In other words, the human rights protections provided by the Convention implicate fundamental values that transgress the geographical boundaries of the member states. Hence, embodied in the Convention is an express acknowledgment of certain common values that all member states share as regards minimum guarantees of human dignity and protection. In this respect it is important to stress that the Convention is not an instrument of *human rights unification*, as can be derived from article 53 of the Convention, but only lays down minimum standards.

To elaborate further and in more detail, the Court's role under article 19 of the Convention is not necessarily always the same; it all depends on the nature and substance of the right implicated, the way in which this right is worded in the Convention and, most importantly, whether the right is considered absolute or open to restrictions. It does not follow from the foundational premise that human rights, as general principles, are universal in the abstract, although their application in individual cases must take due account of domestic circumstances, that an international court is not suitable in principle for deciding whether a violation of human rights has occurred at national level.

The question is rather of degree, to be analysed along a spectrum of possibilities. At one end the total, *de novo*, reassessment by the international court of domestic decision-making, which can apply in principle in cases on the right to life under article 2 of the Convention and on the prohibition against torture under article 3. And, at the other end of the spectrum, the granting of full and unlimited deference, which is seldom the case, but is often an issue that needs reflection in problematic cases under articles 8 to 11. The same is true to some

[4]Lord Hoffmann, 'The Universality of Human Rights', Judicial Studies Board Annual Lecture, 19 March 2009, 8.

extent for article 6 and indeed article 1 of Protocol 1 (the latter provision formed the substance of the complaint in *Lindheim & Others v. Norway*[5]).

Before elaborating further on this issue, let me say this: when analysing the criticism or backlash against human rights that is prevalent at the moment, I have the sense that the critics have perhaps forgotten to some extent where the system of international human rights came from, and especially the regional instrument of the ECHR adopted in the 1950s. More precisely put, why did the member states of the Convention feel it necessary to agree upon a European Convention on Human Rights and subsequently to accept the supervision by an external judicial mechanism? The reasons are to be found in the atrocities of the Second World War and one of its origins, the total lack of safeguards for human rights and human dignity at the domestic level, even before the national judiciaries of the day, which were unable to fulfil their roles as the guarantors of human rights and the rule of law. The European Convention is therefore based on the underlying premise that serious human rights problems and their adequate assessment sometimes necessitate a distant perspective, a viewpoint taken away from the internal domestic bubble, where the individual participants in the legal process – be it parliamentarians, executive officials or members of the judiciary – may have difficulty or, in some states, are unwilling to examine the controversial issues implicating human rights with the necessary objectivity that distance provides.

Let me now limit my discussion to the most pressing issues in this debate, the controversies that often arise between the Strasbourg Court and the national judiciaries on the application of the limitation clauses of articles 8 to 11, and especially the scope and content of the so-called *margin of appreciation* that the Strasbourg Court affords national courts in their assessment at the domestic level.

At the outset, it is imperative to appreciate that the doctrine of the margin of appreciation is a *functional manifestation* of the principle of subsidiarity. They are intimately linked, the former being the operational tool for the realisation of the latter. The recent reinforcement of these principles with the Brighton Declaration in 2012, and with the subsequent introduction of Protocol 15 to the Convention, will have consequences for the work of the Strasbourg Court.

Thus, I venture to suggest that the Brighton Declaration, and the adoption of Protocol 15, adding a direct reference to the concepts of subsidiarity and the margin of appreciation in the preamble to the Convention, have created an important incentive for the Court to develop a more robust and coherent concept of subsidiarity. Thus, in some very important recent judgments, the Court has demonstrated its willingness to defer to the reasoned and thoughtful assessment by national authorities of their Convention obligations. This development constitutes what may be called a *refinement of pre-existing doctrines*, influenced by the necessity to reinforce the subsidiary nature of the Strasbourg Court.

On this basis, I have previously made the claim in published writings that the next phase in the life of the Strasbourg Court might be defined as the *age of subsidiarity*, a phase that will be manifested by the Court's engagement with empowering the member states to truly "bring rights home", all over Europe. Yet, it is clear that this process has consequences for the overall status of human rights protection in Europe. By its very nature, the principle of subsidiarity is an express manifestation of the diversified character of the implementation of

[5]*Lindheim & Others v. Norway*, nos. 13221/08 and 2139/10, 12 June 2012.

human rights guarantees at the national level. The unequivocal call for an increased emphasis by the Strasbourg Court on applying a robust and coherent concept of subsidiarity is thus, by definition, a call for an *increased diversity in the protection of human rights in Europe*.[6]

As previously stated, the margin of appreciation is the functional manifestation of the principle of subsidiarity; the doctrine is in other words the operational tool for the realisation of the subsidiary character of the Convention system. From the perspective of the Strasbourg Court as an international body, this must mean that if national authorities have taken the general principles of our case-law into account in their domestic assessment, the application of these principles to the facts of the case falls, in principle, within the core of their margin of appreciation. This applies in my view in all cases where limitations on rights are possible under the Convention, explicitly or implicitly.

Having said this, let me be clear. My reflections here are of course elaborated in terms of methodology at a rather abstract level. I am fully aware of the fact that it is not always a simple matter, as reflected in some of the criticism directed at the Strasbourg Court, to discern the scope and content of the general principles in the Court's case-law. The case of *Lindheim & Others v. Norway* is in my view an example of this dilemma that national judges can be confronted with. It is not so much that the Norwegian Supreme Court failed to engage with the case-law of the Strasbourg Court under article 1 of Protocol No. 1 of the Convention, but rather that the Supreme Court may have underestimated the subsequent developments in the case-law since the adoption of the judgment in *James & Others v. United Kingdom* in 1986,[7] to which Justice Matningsdal referred to in his opinion for the Supreme Court.[8] In my view, the case is therefore not an example of the Strasbourg Court failing to grant the national court a margin of appreciation. The case rather demonstrates that the general principles of Strasbourg case-law to be applied by national courts may, in some instances, be difficult to elucidate.[9]

Leaving this issue aside, my claim is that this way of viewing the essence of the constructive conversation that the Strasbourg Court is having with the national judiciaries must necessarily mean that the quality of domestic assessment by all branches of the national government is crucial. Some recent Grand Chamber judgments of my Court, for example *S.A.S. v. France*,[10] the French Burqa case that will be discussed in a moment, thus stand for the important proposition that when examining whether and to what extent the Court should grant a member state a margin of appreciation as to the latter's assessment of the necessity and proportionality of a restriction on human rights, the quality of decision-making, both at the legislative stage and before the courts, is crucial and may ultimately be decisive in borderline cases. With this *qualitative, democracy-enhancing approach*, as I have previously termed this phenomenon, the Court's refinement of the principle of subsidiarity, and the margin of appreciation, introduces a clear procedural dimension that can be

[6]R Spano (n 1) 491.

[7]*James & Others v. United Kingdom*, 21 February 1986, Series A no. 98.

[8]HR 2007-1593-P, case no. 2007/237, § 126.

[9]*Lindheim & Others v. Norway* (n 5) at § 16 where reference is made to the judgment of the Norwegian Supreme Court of 21 September 2007, see HR 2007-1593-P, case no. 2007/237, § 126.

[10]*S.A.S. v. France* [GC], no. 43835/11, 1 July 2014.

examined on the basis of objective factors informed by the defendant government in its pleadings.[11]

In sum, it is in my view not the role of the Strasbourg judge to second-guess the reasoned and balanced assessment of the national judge on the eventual outcome of a case, dealing with Convention rights that allow for restrictions based on proportionality, so long as the national judge has faithfully applied the general principles of the case-law of my Court to the facts of the case in accordance with the constitutional traditions in his country. Conversely, in cases where Convention rights are absolute, it is the duty of the Strasbourg judge to robustly re-examine whether the outcome conforms with the minimum standards of the right in question, as espoused by the Court.

To give a more practical sense of the way in which my argument manifests itself in the Court's case-law, dealing with the limitation clauses providing for a proportionality assessment, I again turn to the recent Grand Chamber judgment in *S.A.S. v France*.[12] In § 129, the Court stated:

> It is . . . important to emphasise the fundamentally subsidiary role of the Convention mechanism. The national authorities have direct democratic legitimation and are, as the Court has held on many occasions, in principle better placed than an international court to evaluate local needs and conditions. In matters of general policy, on which opinions within a democratic society may reasonably differ widely, the role of the domestic policy-maker should be given special weight . . .

There are three elements to this reasoning, sustaining a robust concept of subsidiarity, that merit reflection. First, with what may be termed the *democratic element*, the Court acknowledges that national authorities have "direct democratic legitimation". Secondly, the *element of domestic expertise and knowledge* recognises that the national authorities are "better placed than an international court to evaluate local needs and conditions". And thirdly, the *policy element*, manifested in the role of the domestic policy-maker, to which the Strasbourg Court should give special weight.

It seems to me that this formulation by the Grand Chamber, which, in this sense, is not a novelty in the Court's case-law, encapsulates the essence of an attempt to promote a constructive conversation with the national authorities, and does not manifest disrespect or dismissal of the domestic assessment of Convention issues. On the contrary, whilst it may be true that the Strasbourg Court has, up until now, not explicitly provided a detailed explanation of its reasoning in the application of the margin of appreciation, the recent reinforcement of the principle of subsidiarity and its operational tool, the margin of appreciation, has had and will continue to have the effect of refining these principles in the Court's case-law. At the same time, the principle of subsidiarity envisages that national courts have ample latitude in formulating their own concept of the margin of appreciation, which takes account of their respective constitutional traditions. This is the essence of a *constructive conversation* between the Strasbourg Court and national courts.

Let me conclude this first part of my contribution by now reflecting on the same issue but from a different perspective: the *perspective of the national judge*.

[11] For a more extensive discussion on this issue, see R Spano (n 1) 497–99.

[12] *S.A.S. v. France* [GC] (n 10) § 129.

I would suggest that the three dimensional elements of the principle of subsidiarity, as espoused by the Grand Chamber in *S.A.S. v. France*, can also be informative when examining the role of the national judge in reviewing domestic decision-making implicating Convention rights. Whilst the Strasbourg Court, as an international body, grants a margin of appreciation on the basis of the democratic element, the element of domestic expertise and knowledge and the policy element, taking account of nature of the Convention right in question, the same does not necessarily apply, at least not to the same degree, for the national judge. However, these three elements can, in my view, be of guidance when the national judge must make an assessment of whether the interference in question is necessary in a democratic society. This, not just at domestic level, but also whether the same would apply at Strasbourg if the case were to end up there. Let me elaborate by focusing on situations where restrictions on rights are such that the existence of measures of a legislative nature are a necessary, although not sufficient, condition to sustain a claim that an interference is in conformity with the Convention.

First, the national judge would reflect on whether the issue before the Court is one on which the legislator has taken a direct stand in open and reflective debate. In applying the margin of appreciation, there is a material difference between the government making an argument *ex post facto* defending the necessity of an interference with human rights, based on domestic norms that do not reflect any or minimal consideration of Convention obligations, on the one hand, and an argument of the same kind, where it is clear that the government is pleading on the basis of reasoned and thoughtful *pre-interference assessment* by the legislative and executive branches.

To put this in stark terms, one might reasonably pose the following question: why should a judge at national level grant deference in its assessment if the government has not, at the outset, made the necessary assessment of its human rights obligations before interfering with protected rights? At least, in his assessment of proportionality, the national judge might have to take into account that from the perspective of Strasbourg, the lack of such a qualitative assessment of Convention obligations by legislative and executive authorities will have a bearing on the margin of appreciation that will be afforded by the international court.

Secondly, it would be important for a national judge to analyse whether the matter involves problems or issues that are to some extent special for her country, culturally, historically and so forth, and also implicate legitimate values of a democratic society. That is the very essence of the diversified character of European human rights protection inherent in the principle of subsidiarity.

III. The Criticism of the Living Instrument Doctrine and the Expansion of Convention Rights

Let me now turn to the second part of my contribution which deals with the criticism related to the application by the Court of the living instrument doctrine and the purported expansion of Convention rights.

It is important to stress at the outset that in the discharge of its mandate, the Court is usually confronted with interpreting flexibly worded fundamental principles of human rights. The drafters of the Convention consciously decided not to formulate the provisions in a casuistic, detailed manner. For example, the resolution of the question of which aspects of one's "private and family life" fall within the scope of article 8 is not found in "Aladdin's cave", as a famous Scottish Law Lord described the judge's law making power in the 1970s.[13]

[13]Lord Reid, "The Judge as Lawmaker" (1972) 12 JSPTL 22.

The scope of a Convention provision, as far as its flexible wording allows, must thus be determined on the basis of the underlying principles of the provision in question in light of a concrete case. To this effect, the Strasbourg Court has, at least since 1978, used the much discussed, and often criticised, *living instrument doctrine*.

It has been argued quite vigorously, especially recently, that the *living instrument doctrine* contradicts the expected applications of the Convention as envisaged by its founders. I would begin by suggesting that this critique is under some influence from the raging debate in US constitutional law and theory between the divergent methodological camps known, on the one hand, as *originalism*, and the other, as *living constitutionalism*. The adherents of originalism maintain that an obligation to limit the content of the text to the expected applications of the norm at the time of adoption, the so-called *original public meaning* of the provision, limits judicial discretion and enhances democratic accountability.

It is beyond the possible scope of this paper to discuss the arguments for and against an originalist approach to the interpretation of a constitutional text. Suffice it to say that at the level of the European Convention on Human Rights, an international treaty, the argument against the living instrument doctrine and the promotion of an originalist approach are, in my view, misguided for the following reasons.

First, it is important to appreciate that the jurisprudential foundation for the interpretation of the Convention, as an international treaty, is somewhat different from the basis upon which a constitutional text would be interpreted. Under public international law the anchor of the Convention's principles of interpretation is the teleological principle which derives from articles 31–33 of the Vienna Convention on the Law of Treaties.[14] As the primary purpose of the Convention is to provide collective guarantees of human rights, the interpretational method used by the Court must be conducive to achieving this purpose in a way that is practical and effective for the situation in modern day societies in Europe. I submit that this underlying premise conceptually drives the interpretive endeavour towards an appreciation of Convention rights as they are understood by the present day polity, for example as regards the notions of private and family life, the manifestation of religion and the expressive and associational rights under articles 10 and 11. The European Convention on Human Rights would surely die a slow and painful death, were the scope and content of the rights protected limited to a predominantly originalist approach, thus being based on the expected applications of the Convention as envisaged by persons, although perhaps wise and informed, that were born towards the end of the 19th century!

Secondly, and perhaps more importantly, the conceptual premise of the *living instrument doctrine* is based on the understanding that the text actually reflects the original intention of the founders of the Convention that national courts and, if need be, the Strasbourg Court should interpret and apply the Convention in the light of present day conditions. It is therefore also inaccurate to conclude that the *living instrument doctrine* is in itself a methodological principle that flatly contradicts the original intentions of the drafters. On the contrary, the use of such a principle is inherent in the way they decided to formulate the text of the Convention, subsequently accepted and adopted by the member states.

As is well-known, this principle was first espoused by the Old Court in the famous case of *Tyrer v. United Kingdom* of 1978.[15] In this respect, it is interesting to note anecdotally that

[14]See further, the Norwegian Oxford Scholar E Bjørge's excellent book, *The Evolutionary Interpretation of Treaties* (Oxford, Oxford University Press, 2014).

[15]*Tyrer v. United Kingdom*, no. 5856/72, 25 April 1978.

the judgment introducing the living instrument approach was given by a chamber which included one of the pre-eminent drafters of the Convention, Pierre-Henri Teitgen.

But let me stress this: along with the discretionary powers afforded to the Strasbourg judges under the living instrument doctrine, it has long been recognised that the European human rights system must include counterbalancing mechanisms so as to preserve the core of the sovereign prerogatives retained by the domestic authorities. That is the whole point of the margin of appreciation, and the principle of subsidiarity, just discussed. These principles are therefore institutional constraints on the role of the Strasbourg Court and counterbalancing features in view of the open-ended and discretionary nature of the Convention text being developed in the light of present-day conditions and cannot be limited to the expected applications of the drafters in the 1940s and 1950s. In this sense, the living instrument doctrine and the margin of appreciation as an institutional mechanism of power-allocation between the Strasbourg Court and the national courts, are two sides of the same coin.

Again however, let me be clear: although I disagree with the essence of the methodological criticism of the living instrument doctrine, that does not mean that the Strasbourg Court necessarily always gets it right or that the Court's interpretational results in a particular case are not open to valid criticism. However, that debate centres on an assessment of the underlying values and principles of particular Convention guarantees and the way they should be developed by an international court, but does not constitute, in my view, a fatal blow against the overarching theme and relevance of the living instrument doctrine. For example, one may reasonably criticise the Strasbourg Court's expansion of article 8 of the Convention to include the right of the deep sea divers in *Vilnes & Others v. Norway* to have received information on the decompression tables to assess their health risks, but that criticism does not relate to the application of the living instrument doctrine as such, but rather to the way in which the underlying values under article 8 were applied to the facts of the case.[16]

[16] *Vilnes & Others v. Norway*, nos. 52806/09 and 22703/10, 5 December 2013, §§ 235 and 236. At § 235, the Court stated: "In this regard, the Court reiterates that since Guerra and Others, cited above, §§ 57–60; developing López Ostra, cited above, § 55; see moreover McGinley and Egan, cited above, §§ 98–104; and Roche, cited above, §§ 157–69), the Court has affirmed a positive obligation for States, in relation to Article 8, to provide access to essential information enabling individuals to assess risks to their health and lives. In the Court's view, this obligation may in certain circumstances also encompass a duty to provide such information, as can be inferred from the concluding paragraph 60 (concerning Article 8) in Guerra and Others (cited above), and the affirmation of the 'public's right to information' with reference to the latter in the context of Article 2 (see Öneryıldız, cited above, § 90, and Budayeva and Others, cited above, § 132). It does not follow from the foregoing that this right ought to be confined, as suggested by the Government, to information concerning risks that have already materialised . . .". At § 236, the Court thus concluded: "In applying the above principles to the present case, the Court considers that the decompression tables used in diving operations may suitably be viewed as carriers of information which is essential in enabling the divers to assess the health risks involved, in the sense that diving carried out in accordance with the tables would be assumed to be relatively safe, whilst diving which did not respect minimum decompression standards would be deemed unsafe, a perception likely to be reinforced by diving operations being subject to prior administrative authorisation. Thus, the question arises whether, in view of the practices related to the use of rapid decompression tables, the divers received the essential information needed to be able to assess the risk to their health (see Guerra and Others, cited above, §§ 57 to 60, Öneryıldız, cited above, § 90, and Budayeva and Others, cited above, § 132) and whether they had given informed consent to the taking of such risks . . .".

IV. The Importance of an Informed Debate on the Work of the ECtHR

In conclusion, allow me to say a few words on the importance of an informed debate on the work of the Convention system.

Democratic debates on fundamental issues of human rights protection are always necessary. No one can legitimately claim that criticism directed at the Strasbourg Court is in all respects without foundation, of course not. However, recall what I stated at the outset, that the Strasbourg Court is a very complex institution entrusted with an exceedingly difficult role. One should therefore be cautious when expressing a generalised and abstract viewpoint on the Court. It is also important to recognise that democratic debates on these issues must, to be useful and productive, be based on the correct representation of the underlying facts and realities.