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The European Court of Human Rights: Master of the Law but not of the Facts?

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Ladies and Gentlemen, good evening.

I would like to start with words of thanks to the Institute, to its Director and to Andraž Zidar, for organising this event, and express my appreciation to the sponsors, 9 Bedford Row Chambers. It was with great pleasure that I accepted the Institute's invitation to deliver a lecture, the theme of which was left entirely up to me. My choice of theme was guided by the idea that rather than discussing one or other issue of substantive human rights law, fascinating as that can be, I should instead seek to give an account of the place of the Strasbourg Court in the institutional ecosystem that has developed around the European Convention on Human Rights. That account should cover the powers that the Court enjoys and exercises, and also the limits imposed or self-imposed on those powers. In my speech I will be drawing on my contribution to a collection of essays in honour of Professor Verhoeven of the University of Louvain. The title of that essay is "*Le fait, le juge et la connaissance: aux confins de la compétence interprétative de la Cour européenne des droits de l'homme*". As this lecture is taking place in an institute dedicated to international and comparative law, I think that no translation is necessary.

Master of the Law

I will begin by discussing the first element of the title of my talk this evening – the European Court of Human Rights as "master of the law". It is a rather forceful epithet. More forceful, I think, in the English version, which uses the masculine form, than in the French, which would use the feminine - "*maîtresse du droit*". One might have wished for a more literal translation, but I think that if the Court were regarded as the "*mistress* of the law", it would be hard to take altogether seriously.

In fact, the phrase "master of the law" is not of the Court's coinage – it is not to be found anywhere in the Strasbourg case-law. It is nonetheless a fair and accurate description of the Court's powers. The "law" in question is of course the law of the Convention, referring both to its substantive meaning as well as to its procedural dimension.

The Court's mastery, or exclusive power, is conferred in clear terms by Article 32 by of the Convention, which provides:

> *"1. The jurisdiction of the Court shall extend to all matters concerning the interpretation and application of the Convention and the Protocols thereto which are referred to it as provided in Articles 33, 34, 46 and 47.*
>
> *2. In the event of dispute as to whether the Court has jurisdiction, the Court shall decide."*

This text was given its present form by Protocol No. 11. In the original Convention, essentially the same wording was divided between Articles 45 and 49. Let me recall that, originally, accepting the Court's jurisdiction was at the discretion of the High Contracting Parties. This ended with Protocol No. 11, which made the Court's jurisdiction compulsory.

In the early case of *De Wilde, Ooms and Versyp v. Belgium* (also known as the "*Vagrancy*" case), the Court observed that the language used in the Convention

to establish the scope of its jurisdiction was, and I quote, "*remarkable for its width*"[1]. It continued:

"Once a case is duly referred to it, however, the Court is endowed with full jurisdiction and may thus take cognisance of all questions of fact and of law which may arise in the course of the consideration of the case"[2]. (*emphasis added*)

No less important is the fact that the Court enjoys, again by the express wording of Article 32, *la compétence de la compétence*. It has the *final* say – the *sole* say – over where the limits to its jurisdiction lie.

Although the Court's jurisdiction is both cast and understood in broad terms, this must be set against its institutional purpose, which is set out in Article 19 of the Convention, the Court's founding provision. The mandate that it confers on the Court is that of ensuring "*the observance of the engagements undertaken by the High Contracting Parties to the Convention and the Protocols thereto*". One can see from this that the European Court is not primarily or generally a tribunal of fact. Rather its powers to ascertain and evaluate facts is to be seen as integral to its primary function, which is to say what the law is (*dire le droit*).

In fulfilling the function assigned to it, the Court has taken a strong stance in relation to its judicial powers. Although, as noted earlier, the Court has not referred to itself as "master of the law", it has on many occasions used a similar phrase – "master of the *characterisation*" to be given in law to the facts of a case (in French: "*maîtresse de la qualification juridique des faits de la cause"*). It is a well-established principle in the Strasbourg case-law that "a complaint is characterised by the facts alleged in it and not merely by the legal grounds or arguments relied on". Thus does the Court apply the maxim *jura novit curia*.

[1] See paragraph 48 of the judgment.
[2] See paragraph 49.

No doubt the most prominent manifestation of the Court's mastery of the law is to be seen in its approach to the interpretation of the Convention. For fear of digressing into what is a vast area, and one that is not free of controversy, I will limit myself to referring to the principle of autonomous interpretation. Under this approach, the Court has attributed autonomous meanings to the terms used in the Convention, e.g. in Article 6 the words "civil rights and obligations", "criminal charge" and "tribunal", or the term "private life" in Article 8. The stated rationale for such an approach is the concern to avoid any result that would be inconsistent with the object and purpose of the Convention. It also makes for conceptual coherence in European human rights law, which must have the same meaning wherever the writ of the Convention runs.

The Court's mastery also encompasses the conduct of proceedings, as well as the rules of procedure. Regarding the former, this is both inherent in the overall scheme of Section II of the Convention, and grounded expressly in Article 38 of the Convention, which lays a duty on States to furnish all necessary facilities to make possible a proper and effective examination of applications. That is a provision which the Court interprets strictly. It has often ruled that States have failed to comply with their duty of co-operation, for example by failing to submit to the Court all relevant documents.

Let me mention here that one of the reforms contained in the new Protocol No. 15 concerns the Court's procedural prerogatives, and that is the relinquishment of a case from a Chamber to the Grand Chamber. This is governed by Article 30 of the Convention, which was part of Protocol No. 11. Previously, the Convention only referred to chambers of seven judges. It was the Court itself that came up with the idea of a larger formation (originally the Plenary) and the relinquishment procedure. Later on, as the number of Contracting Parties increased, the larger judicial formation was changed to a Grand Chamber with 21 judges. The decision to relinquish was a purely judicial

one. Protocol No. 11 brought the two-tier model into the Convention, but made relinquishment subject to the parties' agreement. This was so as to preserve the right to request a re-hearing under Article 43 of the Convention. The old Court was not happy with this particular change, seeing it as a restriction of judicial power. What Protocol No. 15 will do is remove the parties' power of veto over relinquishment – a suggestion that the Court itself put forward before the Brighton conference in 2012. The reason for this change, as stated in the explanatory report, is to contribute to consistency in the case-law of the Court. On its side the Court has acted in the same sense by amending Rule 72 of the Rules of Court so that a Chamber must relinquish a case if the result is likely to be inconsistent with previous case-law. That was in fact the rule that applied in the old Court.

As I have already mentioned, the Court enjoys full and exclusive rule-making power by virtue of Article 25(d) of the Convention, which entrusts this function to the Plenary Court. This provision is essentially a re-enactment of Article 55 of the original Convention. Thus, and I consider the point worth stressing, the Court has been twice conferred with sole power over the rules. It regards this power as vital to its functioning, since it gives the Court the flexibility to develop its procedures and methods, which it has done to great effect in the past few years when implementing Protocol No. 14.

The rule-making power is also an important attribute of the Court's independence from States. It is for this reason that the Court has regarded with some anxiety the current inter-governmental discussions exploring the idea of ultimately amending the Convention so as to give States a formal role in amending the Rules. The comparison has been made with the procedure that applies to the EU Court of Justice. As those discussions have yet to conclude, I will say no more about it for now, other than to recall my message to States at the Oslo conference earlier this year: it would be better for the reform process to

focus on what is essential to strengthening the Convention mechanism, rather than pursue an issue that is of no urgency.

I have one more point to make on this first aspect of my talk, and it concerns Protocol No. 16. I consider that the Court's role as "master of the law" stands to be enhanced by this new protocol. As you know, this instrument – which is not yet in force – was created in order to allow the highest courts in the domestic legal systems seek advisory opinions from the European Court "*on questions of principle relating to the interpretation or application of the rights and freedoms defined in the Convention or the protocols thereto*". The emphasis, naturally, is on the interpretation of the Convention. As stated in the explanatory report, the aim of the procedure is not to transfer the dispute from the domestic to the European level, but to obtain from Strasbourg authoritative guidance on the meaning of the relevant provision. Among the many factors that distinguish this procedure from the contentious procedures set down in Articles 33 and 34 of the Convention is the lesser significance of the originating facts. The focus is all on the questions of Convention law – the factual element is envisaged as no more than background, which the referring court will provide. That, I think, is an entirely logical division of labour.

Let me say that Protocol No. 16 has my strong and enthusiastic support. I have favoured the idea since it was first mooted some years ago. Within the Court, I was a willing member of a working group that we created in order to prepare a position paper on the subject to assist States in the drafting of the Protocol. To date, fifteen States have signed it, and we hope to see these acts of signature completed by ratification without too much delay – that at least is the message that we have received at the Court through our different channels of communication. It is a development that I very much look forward to, and I will keep on hoping to see it realized before I complete my term at Strasbourg in a year's time.

And of the facts?

I now come to the second element of my lecture, which can be broadly described as the Court's handling of questions of fact. Let me clarify straightaway that in the Court's practice, the term "facts" is a rather broad one. It is not limited to the purely factual dimension of the individual case. In the Strasbourg practice, every judgment and decision includes the subheading "The Facts". This encompasses not only the facts of the case as such, but also the relevant domestic law and practice, and also – where appropriate – the relevant international and comparative legal materials, along with other types of material that is deemed relevant to the Court's examination of the case. This can be very lengthy and detailed. See for example the Grand Chamber's *El-Masri* judgment, in which 38 pages are given over to the recital of the "facts" in the sense that I have just outlined.

This is why it has been said that the Court treats questions of domestic law, including the domestic court's interpretation and application of same, as issues of "fact".

You are no doubt familiar with the "fourth instance" doctrine. It is a simple enough concept, under which the European Court does not act as though it were an additional layer of the domestic legal system, as if it had broad appellate jurisdiction in the manner of a Supreme Court. Yet is it a common misconception among applicant to think that the European Court can generally review, and ultimately quash, the decisions of national courts. This is above all to do with Article 6 of the Convention and the guarantee of a fair trial, whether criminal or civil. I refer here to the useful explanation that appears in the guide to admissibility drafted by the Registry, which points out that the right to a fair trial is essentially a matter of procedural fairness that is achieved via certain safeguards. As a general rule, therefore, the Court will not review:

- the establishment of the facts of the case;

- the interpretation and application of domestic law;
- the admissibility and assessment of evidence at the trial;
- the substantive fairness of the outcome of a civil dispute;
- the guilt or innocence of the accused in criminal proceedings.

Complaints of this sort are generally rejected as being manifestly ill-founded. I say "generally", since the Court may indeed see the need to act in a particular case. I will give two such examples.

The first is the case of *Ajdarić v. Croatia*, decided in 2011. The applicant complained that he had been convicted of a triple murder and sentenced to 40 years' imprisonment solely on the basis of the rather dubious and contested evidence of one witness, a man known to be psychologically unstable. The conviction was upheld by the court of appeal and then by the Supreme Court. A subsequent complaint to the Constitutional Court, invoking the right to a fair trial, met with failure, with that court finding that the necessary procedural safeguards had been observed. In other words, the constitutional analysis was along the lines of the typical Strasbourg analysis, a review of form rather than substance.

The European Court commenced its analysis by recalling that "*it is not its task to take the place of the domestic courts, which are in the best position to assess the evidence before them, establish facts and interpret domestic law. The Court will not, in principle, intervene, unless the decisions reached by the domestic courts appear arbitrary or manifestly unreasonable and provided that the proceedings as a whole were fair as required by Article 6 § 1*".

It is a dual review: the Court verifies not only the procedural aspect, but also, where necessary, the substantive aspect. But the bar is set high. In this case, the Court's judgment identifies in some detail the fundamental flaws in the

applicant's trial, finding the domestic decisions were not adequately reasoned. It states:

"[O]bvious discrepancies in the statements of witnesses as well as the medical condition of [the key witness] were not at all or not sufficiently addressed. In such circumstances it can be said that the decisions of the national courts did not observe the basic requirement of criminal justice that the prosecution has to prove its case beyond reasonable doubt and were not in accordance with one of the fundamental principles of criminal law, namely, in dubio pro reo."

What we see here is the European Court acting as the ultimate backstop in the field of criminal justice in Europe, departing from its habitual reserve *vis-à-vis* the substantive outcome of the domestic criminal process.

My second example is taken from the other side of Article 6, i.e. its civil head. In *Andelković v. Serbia*, decided in 2013, the case arose out of labour law. The applicant sued his employer for non-payment of his statutory holiday pay and was successful at first instance. This was reversed on appeal, for quite extraneous reasons that were sharply criticized in Strasbourg. In examining the applicant's complaint under Article 6, the Court stated that it would "*not question the interpretation of domestic law by the national courts, save in the event of evident arbitrariness, in other words, when it observes that the domestic courts have applied the law in a particular case manifestly erroneously or so as to reach arbitrary conclusions and/or a denial of justice*".

The judgment goes on to note that the relevant domestic law was neither vague nor ambiguous, and that the applicant's right to payment had been established at first instance. That ruling had been overturned without reference either to the established facts or the law in question. The appellate court had simply held that to allow the applicant's claim would have meant putting him in a more

favourable position than his work colleagues. The European Court took a very clear view of the matter, stating:

"This reasoning had no legal foundation … and was based on what appears to be an abstract assertion quite outside of any reasonable judicial discretion. Furthermore, a connection between the established facts, the applicable law and the outcome of the proceedings is wholly absent from the impugned judgment. The Court therefore finds that such an arbitrary … ruling has amounted to a denial of justice in the applicant's case".

I present these cases as relatively rare exceptions to the general rule that the European Court will not correct alleged errors by domestic courts in the application of domestic law (or of international law) or their assessment of the facts and evidence before them. This rule comes with an important caveat, however: "*unless and in so far as they may have infringed rights and freedoms protected by the Convention*". Or, as it is sometimes put in the case-law, what the Court will do it ascertain whether the effects of such an interpretation are compatible with the Convention.

Here let me give another example, drawn from a somewhat unusual case that arose out of the interpretation of a will. It is the case *Pla and Puncernau v. Andorra*, in which the applicants complained that the will had been given a discriminatory interpretation at second instance, excluding the first applicant from succession because of his adopted status. The European Court observed that where the origin of the case was an eminently private instrument, the domestic courts were "*evidently better placed to evaluate, in the light of local legal traditions, the particular context of the legal dispute submitted to them and the various competing rights and interests*". This justified a wide margin of appreciation. In a later passage the judgment states:

"*Admittedly, the Court is not in theory required to settle disputes of a purely private nature. That being said, in exercising the European supervision*

incumbent on it, it cannot remain passive where a national court's interpretation of a legal act, be it a testamentary disposition, a private contract, a public document, a statutory provision or an administrative practice appears unreasonable, arbitrary or, as in the present case, blatantly inconsistent with the prohibition of discrimination established by Article 14 and more broadly with the principles underlying the Convention".

Thus far I have dwelt mainly on Article 6, and the manner in which the Court treats matters of fact and domestic law. The situation is fundamentally different where, as for example with Article 5 and Article 7, where the very text of the Convention refers back to the state of domestic law, so that compliance with domestic law is a *sine qua non* for observing the Convention guarantee.

Let us look first at Article 5, which protects the individual's physical liberty by prescribing in very exact terms the circumstances in which a person may be detained. The word "lawful" is attached to each of the six grounds stated in the first paragraph of that article, and in each case the deprivation of liberty must be "in accordance with a procedure prescribed by law". In the case of *Benham v. UK*, the Court stated that "*[i]t is in the first place for the national authorities, notably the courts, to interpret and apply domestic law. However, since under Article 5 para. 1 failure to comply with domestic law entails a breach of the Convention, it follows that the Court can and should exercise a certain power to review whether this law has been complied with*". In that case, the Court gave detailed consideration to the course of domestic proceedings, the question it had to answer being whether the Magistrates had, within the meaning of English law, acted in excess of jurisdiction. That would mean, again as a matter of domestic law, that the detention was not lawful, in violation of Article 5. But the Court concluded that "*it cannot be said with any degree of certainty that the judgment of the Divisional Court was to the effect that the magistrates acted in*

excess of jurisdiction within the meaning of English law" and thus rejected the applicant's complaint under this head.

Another case of the old Court, *Lukanov v. Bulgaria*, shows how closely the Court will scrutinize the issue of legality. The applicant, a former Prime Minister of the country, was arrested in 1992 on charges of misappropriation of public funds. This arose out of his part in a governmental decision granting financial aid to some developing countries. Before the Court, the Government accepted the finding of the Commission that the applicant's detention lacked a sound basis in domestic law. Rather unusually, the Bulgarian Prosecutor-General took the opposite view and made submissions to Court in this sense. The Court conducted its own assessment of Bulgarian criminal law and determined that there was no basis for detaining the applicant.

Article 7 is to be set alongside Article 5 for present purposes. In the early stage of the Convention system, it was the European Commission of Human Rights that first drew out the meaning of the principle "no punishment without law". But the Commission's case-law was somewhat lacking both in clarity and in rigour, in my view. While it stated that Article 7 required scrutiny at European level of the legality of a conviction, it understood its role as a supervisory one, to be performed with prudence. In more recent times the Court has developed that approach to one based on more intense scrutiny of the legal grounds for a conviction. In the case of *Kononov v. Latvia*, of 2010, applicant argued that his conviction of war crimes, sixty years after the fact, was in violation of Article 7. Setting out its approach the Court said that "[its] *powers of review must be greater when the Convention right itself, Article 7 in the present case, requires that there was a legal basis for a conviction and sentence. Article 7 § 1 requires the Court to examine whether there was a contemporaneous legal basis for the applicant's conviction and, in particular, it must satisfy itself that the result reached by the relevant domestic courts (...) was compatible with Article 7 of*

the Convention… To accord a lesser power of review to this Court would render Article 7 devoid of purpose". This led into a very lengthy and detailed assessment of the state of international law at the material time, including consideration of scholarly opinion. The Court concluded that the legal basis for holding the applicant individually responsible for the deaths in question sufficiently clear and foreseeable for the purposes of Article 7.

Legal questions aside, it is not infrequent for the Court to be confronted with factual issues that need to be elucidated, this not having been done at the domestic level. In such circumstances, the file is simply incomplete. It is clearly within the Court's mandate to do. As we have seen, the Court's jurisdiction under Article 32 encompasses the application of the Convention as well as its interpretation. Moreover, Article 38 refers to investigations, and lays a duty on States to co-operate in this. More detailed provisions are set out in the Annex to the Rules of Court. There have been investigative, fact-finding measures in almost 100 cases, involving on-the-spot visits and the hearing of witnesses – I give as a recent example the direct testimony taken from 21 witnesses in the inter-State case *Georgia v. Russia (I)*, decided in July of this year. Commentators have noted a fall-off in resorting to such measures, which have proven to be costly, labour-intensive, and not always effective. The Court can rely on other means to establish the facts of a case to the necessary degree. One of these was introduced into the Convention by Protocol No. 14, namely the possibility for the Council of Europe Commissioner for Human Rights to intervene in a case, including taking part in hearings. The Commissioner's role is a valued and respected one, and his knowledge of the situation on the ground in many countries makes his contribution a very useful one. Many other bodies and groups have intervened in cases down the years in order to assist the Court in determining the facts and appreciating the context of the case before it. As examples I would cite the intervention of the UNHCR before the Grand

Chamber in the *MSS* and *Hirsi Jamaa* cases, and the contribution of the Venice Commission in the *Sejdić and Finci* case. The best example of all is the Committee for the Prevention of Torture, whose reports on conditions of detention across Europe are recognized as authoritative by the Court.
The Court has also responded jurisprudentially to the problem of inadequate fact-finding by the domestic authorities, by deriving from the Convention a duty on the authorities to conduct effective investigations into violations, or possible violations, of human rights. This has been done principally in relation to the pre-eminent provisions of the Convention, Articles 2, 3 and 5.

In most cases decided nowadays, though, such matters do not arise. A case that has gone through the available domestic remedies will generally present at Strasbourg with the facts already established, or in any event not in dispute between the parties. This does not mean, however, that there will be no further inquiry into or reconsideration of the circumstances of the case by the Court. In its case-law the Court has stated that it is not bound by the findings of the domestic courts, although it normally would require "cogent elements" for it to depart from them. Nor is the Court constrained by particular rules of evidence. As it said in the *Nachova v. Bulgaria* case, "*there are no procedural barriers to the admissibility of evidence or pre-determined formulae for its assessment. It adopts the conclusions that are, in its view, supported by the free evaluation of all evidence, including such inferences as may flow from the facts and the parties' submissions*". As one commentary puts it (Harris, O'Boyle and Warbrick), the Strasbourg approach to questions of proof is subtle and context dependent.

Another aspect of the Court's handling of facts goes to the margin of appreciation, in circumstances where this arises. This is quintessentially the case under the qualified rights that are set out in Articles 8-11 of the Convention, and I will use the case-law on international child abduction to illustrate the point.

The key ruling in this area is the case *X. v. Latvia*, decided a year ago. The jurisprudential importance of the case lies in the reconciliation by the Grand Chamber of the requirements of Article 8 on the one hand, and, on the other, of those of the Hague Convention on the Civil Aspects of International Child Abduction.

The judgment recalls its established case-law about protecting the best interests of the child, observing:
"*This task falls in the first instance to the national authorities of the requested State, which have,* inter alia*, the benefit of direct contact with the interested parties. In fulfilling their task under Article 8, the domestic courts enjoy a margin of appreciation, which, however, remains subject to a European supervision whereby the Court reviews under the Convention the decisions that those authorities have taken in the exercise of that power"*.

The key notion, for present purposes, is that of supervision, to be contrasted with substitution, which is not the role of the European Court, as the judgment reiterates. What the Court's supervision looks for is stated as follows:
"… Article 8 of the Convention imposes on the domestic authorities a particular procedural obligation in this respect: when assessing an application for a child's return, the courts must not only consider arguable allegations of a "grave risk" for the child in the event of return, but must also make a ruling giving specific reasons in the light of the circumstances of the case. Both a refusal to take account of objections to the return capable of falling within the scope of Articles 12, 13 and 20 of the Hague Convention and insufficient reasoning in the ruling dismissing such objections would be contrary to the requirements of Article 8 of the Convention and also to the aim and purpose of the Hague Convention. Due consideration of such allegations, demonstrated by reasoning of the domestic courts that is not automatic and stereotyped, but sufficiently detailed in the light of the exceptions set out in the Hague

Convention, which must be interpreted strictly (...), is necessary. This will also enable the Court, whose task is not to take the place of the national courts, to carry out the European supervision entrusted to it."

I would comment that the margin of appreciation, which Protocol No. 15 will write into the Preamble of the Convention, is not to be understood as a blank space on the other side of the line. Such an understanding would cast the Court in the role of linesman, rather than umpire, and would not at all capture the reality of the situation. Rather, the Court constructs, for the benefit of the domestic courts, the framework that will assist them to perform their role under the Convention. And their role, I should stress, is the primary role. That is all the truer in when it comes to proceedings involving children.

I will take one last example, from Article 10. The right to freedom of expression is a classic and fundamental civil liberty, vital to democracy, and the Court has shown itself to be very protective of it. Although it allows a margin of appreciation to the national authorities – and indeed the *locus classicus* as regards the margin is the *Handyside* case – the width of the margin varies significantly according to the type of speech involved. Put another way, the intensity of the Court's review will vary according to the case. Here again the Court's role is not to take the place of the national authorities, as it invariably points out – rather it has a reviewing role. It is never a lax or narrow review, but extends to the case as a whole. What the Court has to do is to "*satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in Article 10 and that they based their decisions on an acceptable assessment of the relevant facts*".

This is the supervisory role of the Court at its strongest, the Court having always, since *Handyside*, claimed the power to give the final ruling on respect for Article 10.

Ladies and Gentlemen, since there is a question mark in the title of this lecture, I cannot conclude without an answer. Having surveyed the Court's own powers when it comes to finding and establishing the facts, and reviewed, however briefly, some of the relevant case-law, the answer can only be that there is no watertight division between matters of law and fact at Strasbourg. The boundaries between these two domains are fluid rather than fixed, depending on circumstances, context and the nature of the complaint. The virtue of this is that it allows the European Court to fully discharge its task under the Convention while adapting to the diverse and evolving realities around it.

That the Court is master of the law is not in question. And of the facts?
In light of my remarks tonight, I suggest that we settle on a different term – not master, but commander.
Thank you very much.