TRAINING SEMINAR FOR INTERPRETERS

Sir Nicolas Bratza, Vice-President of the European Court of Human Rights

I am delighted to see you all and extend my own warm welcome to our Court. I am particularly pleased to be asked to talk to a group of interpreters, who play such a vital, but unsung, role not only in our Court but in international and national courts and tribunals throughout the world. It is particularly appropriate that this training seminar should be taking place in the Court responsible for applying and enforcing the European Convention on Human Rights since the essential role played by interpreters in securing fair trials is expressly recognised in Article 6 of the Convention. Paragraph 3 (e) of the Article guarantees the right of a person charged with a criminal offence "to have the free assistance of an interpreter if he cannot understand or speak the language used in court". This is an indispensable safeguard for a foreign defendant before a criminal court. Even when, as is often the case, an accused does not defend himself in person but is represented by a lawyer, our Court has made clear that it is not sufficient that the lawyer alone knows the language used in court. Interpretation of the proceedings is regarded as an essential element of the right to a fair trial, which includes the right of the accused to understand and participate effectively in the proceedings.

But the importance of interpreters is not confined to national courts. Like other international tribunals, our Court, as well as its predecessor and the former Commission of Human Rights owe a very substantial debt to the quality of interpretation with which we have been provided – not only interpretation between the two official languages of French and English, where the understanding of both languages by judges drawn from 47 different countries is inevitably imperfect, but interpretation also from and into other languages of the Member States when oral hearings are held. I have particular reason to be grateful to interpreters who for many years provided outstanding assistance in interpreting the oral evidence of Turkish and Kurdish witnesses in the very many fact-finding missions in which I participated when a member of the former Commission. Without them, we simply could not have functioned. While there has been a regrettable reduction in the number of such missions in our Court, the vital role of interpreting the evidence of witnesses I know continues to be performed on a daily basis in other international tribunals.

My talk is listed in the programme as a presentation of the case-law of the Court with emphasis on its major judgments. I hope I will be forgiven if I somewhat alter the subject matter of the talk and use the time available by looking briefly at the changes which have occurred in the Court's work since the accession to the Convention of States from Central and Eastern Europe, by mentioning what I see as some of the lasting achievements of the Court and by a little crystal-gazing into the future. I will in the course of the talk at least touch on what I regard as some of the landmark judgments.

I first arrived in Strasbourg as a member of the part-time Commission some 16 years ago in 1993. I served 5 years as a member of the Commission and I have been a judge of the permanent Court for the past 12 years. It is no exaggeration to say that the changes in the Convention landscape in those years have been dramatic.

First and foremost, there has been a relentless rise in the case-load. I remember the shock-waves in the Commission when the number of pending cases exceeded 3,000 and the satisfaction felt within the Commission when the number of completed cases topped 2,000 in one year. As you may already have been told, some seventeen years later, the figure of pending cases has reached nearly 140,000. This figure does not include some 21,000 or so further applications which are still at the pre-judicial stage. The Court is currently deciding some 35,000 cases each year. But the number of pending applications is growing by some 1,800 every month. This startling increase is no temporary phenomenon. The potential for growth is virtually unlimited as familiarity with the Strasbourg system in the new democracies generates still further applications. Already we have seen a very sharp geographical shift in the source of the Court's work. In 1998 cases from Central and Eastern Europe made up about 11% of the case-load of the Court; now they represent over 60%. Of the total number of pending applications, nearly 39,000 are against Russia; over 12,000 are against Romania and nearly 11,000 against Ukraine. When added to the 16,000 applications pending against Turkey, complaints against these 4 countries make up well over 55% of the total stock of applications. Nearly 79% of the pending cases are against 10 Member States.

But the change is not only quantitative. There have been significant changes in the nature of the cases before the Court due to the enlarged composition of the Council of Europe. The Court has been confronted with novel and complex problems, some highly politically-charged.

- The restoration of property expropriated under former Communist regimes.

- Property lost or expropriated at the end of the Second World War and in the Balkans conflict in the 1990s.

- Problems deriving from legislative measures in the Baltic States, expelling Russian military families and precluding members or supporters of the former communist regimes from holding public office or standing for Parliament.

- Problems related to the so-called "lustration" laws, penalising those found to have collaborated with the former communist security services.

- Problems of State responsibility for acts taking place outside the legal space of the Council of Europe in former-Yugoslavia and Iraq and occurring in breakaway territories within that space, notably in the Transdniestrian region of Moldova and more recently, Nagorno Karabakh, the disputed territory between Azerbaijan and Armenia.

- Problems related to the non-repayment of foreign currency deposits in the Balkan States.

- Problems arising from complaints of gross violations of human rights in areas of civil conflict, originally South East Turkey, more recently Chechnya and, more recently still, in South Ossetia which has already resulted in a new interstate case and in 3,000 new individual applications being lodged.

Of less complexity but of growing concern has been the huge increase in the number and categories of repetitive cases – complaints of identical or similar character stemming from some systemic fault in the legal framework of a Member State or an

endemic defect in the functioning of the legal system within that State. The oldest and most notorious example is that of the length of civil and criminal proceedings which for many years represented an unacceptably large part of the Court's case-load in claims against Italy, France, Poland, Slovakia and other States. But length cases are far from being the only example. Under Article 3 the Court is confronted with numerous complaints about conditions of detention, particularly those deriving from gross overcrowding in prisons. Under Article 5 we are inundated by complaints of the inordinate length of periods of pre-trial detention and the insufficiency of the reasons given for remanding persons in custody. And under Article 6 complaints about non-enforcement and delayed enforcement of final judgments and about the quashing and reopening of those judgments continue to make up a large part of our case-load.

What changes then in the work of the Court have been brought about by the enlargement of the Council of Europe and the explosion in the Court's case-load? The size of the institution has changed beyond recognition. There are now, as you will have been told, 47 judges working currently in 5 Sections within the Court and we are served by a Registry of over 600 legal and administrative staff. But the working methods continue to bear a close resemblance to those developed by the Commission – the use of 3 judge Committees (and now a single judge with the help of a non-judicial rapporteur) to deal with clearly inadmissible cases which make up well over 80% of the total case-load; the assignment in each case of a Registry lawyer familiar with the language and legal system involved; and the appointment of a Judge Rapporteur to steer each case of substance through its various stages before the judges of the Section.

The changes made within the Court to streamline its procedures and to enable it to cope with the huge influx of cases are too numerous to mention. But I would like to mention briefly one area where important advances have been made by the new Court, that is, the area of remedies and the power of the Court to award just-satisfaction. The old Court used to emphasise that its judgments were essentially declaratory in nature and that it was in principle for the respondent State concerned to choose the means to be used to put an end to the violation found by the Court and to make reparation for its consequences. Such just-satisfaction as was awarded to a successful applicant was exclusively financial in nature, the old Court interpreting its

power to make consequential orders as being very limited. But the past few years have seen a change of heart on the part of the Court which, if not dramatic, will prove to be of lasting importance in my view. There has been a growing recognition in the Court's judgments first, that an award of financial compensation alone will in many cases not suffice to make reparation for a serious violation of an applicant's Convention rights and secondly, that a mere finding of a violation, even if combined with a financial award, will do little itself to bring about a change in structural faults within a national system. This has led the Court to take a number of innovative steps. First, the Court has taken it upon itself to indicate more clearly in its judgments what is required of the State beyond the payment of any financial compensation awarded. Sometimes the indication has been merely recommendatory, the Court indicating in a succession of cases involving the unfair trial and conviction of applicants that the most appropriate form of relief would be to ensure that the applicant was granted a retrial by an independent and impartial tribunal. In some cases, the indication has been more peremptory, the Court going as far in the cases of *Assanidze v. Georgia* and *Ilaşcu and Others v. Moldova and Russia* as to order the respondent States to secure the release of the applicants who had been arbitrarily and unlawfully detained.

But of even greater significance has been the development by the Court of the so-called "pilot judgments" - judgments in which the Court identifies an underlying systemic problem within a State likely to give rise to numerous applications in Strasbourg and spells out the measures necessary to remedy the problem for the past and for the future.

The first and most important of the pilot-judgments so far as the future of the Court is concerned is that of *Broniowski v. Poland* in which the Court directed Poland to adopt appropriate legal and administrative measures to implement its undertaking to compensate the many thousands of Poles who lived in the Eastern provinces of pre-War Poland beyond the Bug River and who had been forced to abandon their properties in the region following the War. In its judgment, which has been followed in subsequent cases, the Court identified what it found to be an underlying systemic problem within the State likely to give rise to numerous applications in Strasbourg and spelled out the measures necessary to remedy the problem for the past and for the future. As a result of the judgment in the *Broniowski* case itself, legislative measures

were introduced to provide compensation for the potentially 80,000 persons in the same position as the applicant, who might otherwise have lodged similar complaints with the Court.

Have the increasing pressures on the Court had an adverse effect on the quality of the Court's judgments and decisions or in its development of the Convention case-law? Perhaps others are better qualified to judge this than I am, but I do not think it has. On the contrary, I believe that the quality of the case-law has been preserved and that important developments have been made in the jurisprudence under the Convention. I would mention only a few of these.

- First, the Court's emphasis on what have come to be known as the procedural aspects of Articles 2 (the right to life) and 3 (the prohibition of torture and inhuman and degrading treatment). In the landmark case of *McCann and Others* concerning the killing of three terrorists on a bombing mission in Gibraltar, the Court stated for the first time that a general legal prohibition of arbitrary killing by agents of the State would be ineffective in practice if there were no procedure for review of the use of lethal force by State agents and that the obligation to protect the right to life required that there should be some form of effective official investigation when individuals had been killed as a result of the use of force by agents of the State. The Court's repeated insistence since the *McCann* case on the carrying out of a prompt, independent, effective and transparent investigation into killings and sudden deaths, whether or not at the hands of State agents, and into allegations of ill-treatment, particularly of those in police custody, are I consider one of the most welcome and enduring achievements of the new Court.

Of the other welcome developments under Article 3, I would pick out three. The first is the Court's reassessment of the relationship between the three forms of ill-treatment defined in Article 3 in its early *Selmouni* judgment against France, in which the Court characterised the severe ill-treatment to which the applicant had been subjected in custody as "torture" rather than "inhuman or degrading" treatment, emphasising that the increasingly high standards required in the area of the protection of human rights inevitably required greater firmness in assessing breaches of the fundamental values of a democratic society. There are similar indications in the Court's more recent case-

law - most notably in the case of *Jalloh v. Germany* concerning the forcible use of emetics by the police to obtain evidence of drug offending - that the very threshold of what constitutes treatment in breach of the Article may require review in what the Court has frequently stressed is a living instrument.

Secondly, I would highlight the strong stance taken by the Court against the use of the death penalty, whether in the Member States or elsewhere. This is reflected in the important judgment in the case of *Öcalan v. Turkey* concerning the sentencing to death of the leader of the PKK terrorist organisation. The Court categorically stated that capital punishment in peacetime was no longer an acceptable form of punishment and was no longer permissible under the Convention; it also held that to sentence a person to death after an unfair trial was to be regarded as inhuman treatment even if the sentence was not carried out.

The death penalty is mercifully a thing of the past in Europe. Unfortunately, it is not in other parts of the world and this leads me to the third aspect of the Court's case-law under Article 3 I would mention, namely the use of the Article in the field of deportation and extradition, where the Court's constant case-law since the landmark *Soering* decision that responsibility under Article 3 can attach to a State which returns an individual to a country where he runs a real risk of being subjected to death or ill-treatment has proved an invaluable and highly effective shield for those facing death or torture on their return. This protection was further reinforced in the cases of *Chahal v. the United Kingdom* and, more recently, *Saadi v. Italy*, confirming that the *Soering* principle was an absolute one, in the sense that a person may not be returned to face the risk of ill-treatment however compelling the public interest reason that the returning State may have to remove the person from its territory.

The potential effectiveness of that protection has also been greatly enhanced by the Grand Chamber's judgment in the case of *Mamatkulov and Askarov v. Turkey* concerning the extradition to Uzbekistan of two persons suspected of terrorist offences in that State. The applicants were returned by Turkey in blatant disregard of the interim measures applied by the Court under Rule 39 of its Rules requesting Turkey not to return the applicants until the Court had examined their complaint. In its important judgment in that case the Court, drawing on the practice in other

international tribunals, reversed a line of case-law dating back to the *Cruz Varas* judgment in 1992 to hold for the first time that its interim measures were to have binding effect on Member States or, more accurately, that the failure of a State to comply with the Court's interim measures under Rule 39 would give rise to a violation of the State's obligation not to hinder the effective exercise of the right of individual petition.

- Under Article 5 (the right to liberty), I would especially mention the Court's continuing emphasis on the fundamental importance of judicial control of all forms of detention and the effective access of anyone who is detained to a prompt review of that detention by a court satisfying the requirements of independence and impartiality. Two United Kingdom cases well illustrate these points – the well-known case of *T. and V.*, concerning the detention of the two young boys who had murdered a two-year old and the length of whose "tariff" period of detention, representing the element of punishment, had originally been set not by a court but by a Government Minister and the lawfulness of whose continued detention was not subject to review by a judicial body; and the case of *A. and Others,* concerning the withholding from a group of suspected terrorists detained in Belmarsh prison of the evidence against them, thereby denying them the effective means of challenging their continued detention.

- Under Article 6 (the right to a fair trial), I would pick out two areas: first, the continued insistence on the independence and impartiality of domestic tribunals and its increasing reliance on the importance of appearances, whether the problem derives from a structural failing, as in the court-martial system in the United Kingdom or in the State Security Court in Turkey, or from a lack of objective impartiality on the part of the members of a tribunal, as in the interesting case of *Kyprianou v. Cyprus* concerning the committal to prison of a barrister for contempt in the face of the court by the very tribunal before which the alleged contempt had occurred. Secondly, the Court's development of the principle of legal certainty to prevent the arbitrary quashing of final and binding judgments of the domestic courts, a practice which was and remains a common feature of the legal systems in a number of former Communist States.

- I do not know where to begin in illustrating the developments under Article 8 (the right to respect for private and family life, home and correspondence). But, if I have to choose, I would highlight five areas: the strong protection given by the Court to private sexual relations, and in particular homosexual relations, whether in ordinary civilian life or in the armed forces; the protection afforded to post-operative transsexuals in requiring the official recognition by the Member States of their new gender; the area of secret surveillance where the Court has insisted that any system of covert surveillance must not only have a firm basis in domestic law but provide effective safeguards against abuse; the growing importance attached to what may be broadly be described as environmental rights; and lastly, and much more controversially, the increasing attention shown to affording protection against media intrusion into the private life of individuals, as demonstrated in the *Von Hannover* case against Germany. In an important judgment, the Court noted that a fundamental distinction needed to be made between reporting facts - even controversial ones - capable of contributing to a debate in a democratic society relating, for example, to politicians in the exercise of their functions and reporting details of the private life of an individual who did not exercise official functions. Its conclusion that the photographing and reporting of incidents from the private life of Princess Caroline of Monaco could not be justified by considerations of public concern and that the conditions under which the applicant could secure protection of her right to privacy in the German courts did not strike a fair balance between the competing interests will have potentially very wide consequences for intrusive journalism and has already provoked a second complaint to the Court by Princess Caroline in which we held a hearing on Wednesday.

- Under Article 10 (the right to freedom of expression), I would highlight the Court's strong defence of the freedom of the press, particularly when fulfilling their watchdog role and its robust approach in a long series of cases involving attempts by politicians to stifle personal criticism on matters of public interest. Two other aspects of the Court's case-law under Article 10 deserve mention: first, the especially strict scrutiny to which all forms of prior restraint on the press are subjected, the Court emphasising in the *Çetin* judgment against Turkey that a ban on publication of a newspaper would be compatible with the Convention only if there existed a strict legal framework regulating the scope of the ban and ensuring the effectiveness of judicial review to

prevent the possibility of abuse; and secondly, the Court's emphasis on the necessity and proportionality of any sanction imposed on a journalist, the Court condemning the use in any circumstances of imprisonment of a journalist for defamation in the context of a debate on a matter of public interest (*Cumpănă and Mazăre v. Romania*).

- Last, under Article 14 of the Convention, the discrimination Article, I am most proud of the increasing importance attached by the Court to the prohibition of discrimination, notably in its landmark judgment in the case of *D.H. v. the Czech Republic* concerning discrimination in the education of Roma children.

But what of the future? What are the main challenges which the Court is likely to face?

In terms of the nature of the cases with which the Court will be confronted, it is easy to predict that there will be no reduction in what may be regarded as our standard diet of complaints about unfair trial, length of proceedings, length of pre-trial detention, restrictions on freedom of expression and so-on. It is less easy to predict what new Convention problems are likely to preoccupy us in the future. Four areas come to mind where one might expect developments in the case-law.

Terrorism and the increasing use of measures taken by States to counter the so-called War against Terror is an obvious candidate. We have, as I have indicated, already decided, or are currently examining, sensitive and difficult cases involving the detention of suspected non-national terrorists without trial or charge and without effective means of challenging their continued detention; cases concerning the application of stringent control orders to those suspected of involvement in acts of terrorism; and cases concerning the return or threatened return of suspected terrorists to countries where they face a real risk of death or subjection to ill-treatment. One can, I think, envisage a growing number of new cases where we are required to examine the compatibility with fundamental rights under the Convention of increasingly draconian measures introduced by States to combat the threat of terrorist attack.

Secondly, the right to respect for private life will I predict generate novel and complex issues under Article 8 of the Convention, with the devising of increasingly sophisticated methods of secret surveillance and with scientific developments in the

detection and prevention of crime. Cases concerning telephone tapping, the use of bugging devices and the use of security cameras already form a part of the Court's jurisprudence, as do cases concerning the collection and storing of confidential personal data. But the use of DNA samples and profiles to detect and investigate crime is still a relatively new area. The recent decision of the Court in *S. and Marper*, concerning the retention of DNA or cellular samples of persons acquitted of crimes, illustrated the legitimate concerns about the potential use of samples, containing as they do a unique genetic code of vital importance to the individual. One can envisage further complex problems relating to the effective control of DNA databanks maintained by the police and other authorities of the State throughout Europe, and the adequacy of the safeguards against abuse of DNA material.

Next, I can foresee an increase in the number of acutely sensitive applications with a strong moral or ethical dimension. We have already been faced with questions of abortion, assisted suicide and the removal of nutrition and hydration from those in a permanent vegetative state. But I predict that we will be presented with novel problems deriving from the dramatic advances in medicine and biology which we have witnessed in recent years – *in vitro* fertilisation, cloning and the use of stem cells for research and therapeutical purposes.

Finally, increasing importance is likely to be attached to what may broadly be called environmental questions. We have already determined cases concerning airport noise and environmental pollution and their effect on the individual's respect for private life and the home, as well as cases reflecting a conflict between individual property rights and the public interest in environmental protection. But, with the growing awareness of the threat to the global environment, it is almost inevitable that such cases will become an increasingly common feature in our case-law.

But it is the size rather than the nature of the case-load of the Court which is likely to present the greatest challenge in the future. Even if the pressures of the Court's case-load have not to date prevented it from fulfilling its constitutional role in developing the Convention rights or from enforcing those rights in individual cases, the problems confronting the Court remain very serious. Quite apart from the risk that the Court will become literally swamped by its case-load, the huge surge of work brings with it

risks to the integrity of the Court – risks of loss of quality in the judgments delivered; risks of loss of consistency of case-law; risks of variable standards being applied, with the resulting loss of confidence in the Court on the part of applicants or Governments or both.

It was in order to ameliorate the problem by speeding up the adjudication of meritorious cases as well as facilitating the rejection of unmeritorious ones that Protocol No. 14 was introduced. Its provisions which allow a single judge instead of a Committee of 3 judges to decide cases which are clearly inadmissible as well as to allow 3 judges, instead of the current 7, to decide cases which are manifestly well-founded are undoubtedly of some assistance in easing the burden on judges. And the adding of a new ground of inadmissibility might be of some benefit in the treatment of applications of a trivial nature. Unfortunately, however, although the Protocol was prepared and signed by the Member States several years ago, it only came into effect in June of this year, Russia alone among the member States having failed to ratify it until February. Quite apart from the fact that the measures are being introduced too late, one must wonder how much the measures will do much to resolve the underlying problem, which arises not at the point of adjudication by the judges but at the much earlier stage of processing applications which arrive in 39 different languages and from 47 different legal systems, with which only a limited number of judges and members of the Court's Registry are familiar.

It was in recognition of the fact that further measures would be necessary if solutions were to be found to secure the long-term future of the Court that a High-Level Conference was held in February in Interlaken. This resulted in the adoption of a Declaration by Member States with proposals covering such matters as filtering, repetitive applications and supervision of execution of judgments and concluding with an Action Plan designed to implement he proposals made. There is no time to go into the details of the Declaration but one point I would highlight, namely the welcome and belated recognition on the part of the States of their primary responsibility for protecting Convention rights and for providing remedies at national level where violations occur. How the Action Plan will be implemented in practice remains to be see. But the Interlaken Conference undoubtedly represents an important milestone in the history of the Court.

Time also prevents me from making more than a passing reference to the other major development in the past year, namely the adoption of the Lisbon Treaty which provides for the accession to the Convention of the European Union. How this is to be achieved and what changes this will bring about to the workload of the Court or the way in which it functions or in the relationship between the Courts in Strasbourg and Luxembourg is too early to say. But the discussions on accession proceed apace.

The ultimate solution to the Court's problem must lie in the hands of the Member States. It is the Member States which must be encouraged to assume their primary responsibility of protecting Convention rights and of providing remedies at national level where violations occur. The key to achieving this is the provision of training and education of those on whom the responsibility lies – principally the judges, prosecutors and members of the legal profession, but also members of the legislature and of the administration in each State. The training programs organised by the Council of Europe, and by various non-governmental organisations, in Turkey and in Central and Eastern Europe in the past few years have already began to produce results. There have been welcome signs of national courts paying a greater attention to Convention rights and to the Court's jurisprudence.

Am I, despite the problems which beset the Court, optimistic about its future?
Yes, I am. It is frequently said that the Court is a victim of its own success. I do not like the term – the word victim strikes a very negative note. I prefer, more positively, to see the fact that so many applicants continue to turn to the Court for help as a tribute to the unique place occupied by the Court in the protection of human rights – a clear sign that the Court continues to represent a beacon of hope for those whose national systems have failed them. The success of the Court over the past 50 years has in no small measure been due to the dedication and professionalism of those who work for the Court – the legal, administrative and secretarial staff of the Court's Registry and, of equal importance, our interpreters. The Court's continued success in the next 50 will depend on the same dedication and professionalism and I am very confident that it will enjoy both.

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