

## PDF hosted at the Radboud Repository of the Radboud University Nijmegen

The following full text is a publisher's version.

For additional information about this publication click this link.

<http://hdl.handle.net/2066/151439>

Please be advised that this information was generated on 2021-05-19 and may be subject to change.

## Dialogue in the European Convention on Human Rights System: inspiration, added-value and means

### Dialogue dans le système de la Convention européenne des droits de l'homme : origines, valeur ajoutée et moyens

Lize R. Glas

#### Abstract

*The concept of 'dialogue' is often used in relation to the European Convention on Human Rights system, but its added-value or how it can be achieved are rarely made explicit. This article aims to provide clarification about the concept by answering two questions. The first question is why the concept of dialogue, when employed as a normative objective for judicial interaction between the European Court of Human Rights and the courts in the states parties, can be of added-value to the Convention system. It is proposed that the added-value lies in the contribution of the concept to the smooth cooperation between the Court and the domestic courts and the channelling of tension between them away from conflict, towards increasingly balanced decision-making. The second question is by which means the concept can be operationalised. In answer to this question, the article gives different prerequisites, facilitators and instruments for Convention dialogue. The answers to both questions are inspired by how the concept of dialogue has been applied to other legal systems and are grounded in the Convention system's defining features.*

#### Résumé

*Le concept de dialogue est fréquemment invoqué dans le système de la Convention européenne des droits de l'homme. Cependant, la valeur ajoutée de ce concept ainsi que ses modalités de mise en œuvre sont rarement explicitées. Cet article tend à opérer cette clarification en répondant à deux questions. La première question traite des raisons pour lesquelles le concept de dialogue peut être utile au système de la Convention en tant qu'objectif normatif dans le cadre des interactions juridictionnelles entre la Cour européenne des droits de l'homme et les juridictions nationales. L'auteur considère que cette valeur ajoutée réside dans la contribution du concept de dialogue à, d'un côté, la bonne coopération entre la Cour et les cours et tribunaux internes et, de l'autre, dans la canalisation des tensions, les éloignant du conflit et favorisant ainsi un mode de prise de décision de plus en plus équilibré. La deuxième question porte sur les moyens par lesquels le concept peut être opérationnalisé. En vue de répondre à cette question, l'article identifie différents prérequis, facilitateurs et instruments pour qu'un dialogue existe au sein de la Convention. Les réponses à ces deux questions sont inspirées par comment le concept de dialogue a été appliqué à d'autres systèmes juridiques et trouve son origine dans les caractéristiques essentielles de la Convention.*

## I. Introduction

‘Dialogue’ is the new buzzword for the European Convention on Human Rights (Convention; ECHR) system. ‘Dialogue’ has been welcomed and encouraged,<sup>1</sup> as well as commended as ‘valuable’<sup>2</sup> and ‘more necessary than ever’.<sup>3</sup> With the completion of Protocol 16, coined the ‘Protocol of dialogue’ by the current President of the European Court of Human Rights (Court; ECtHR),<sup>4</sup> the notion seems to be referred to even more frequently.<sup>5</sup> Yet although the buzzing has intensified, exactly why dialogue can be of added-value to the Convention system and, more precisely, to the relation between the Court and the authorities in the states parties, is not often shed light on.<sup>6</sup> Nor do the users of the word ‘dialogue’ usually explain how exactly this apparently useful concept can be operationalised in a practical sense.<sup>7</sup>

This article argues that the concept of dialogue can be usefully employed in the Convention system if it is understood as norm for interaction between the European Court and the courts in the states parties. It can thus offer an answer to challenges posed by *inter alia* the pluralist nature of the Convention system. In developing this normative account for Convention dialogue, inspiration will be drawn from how the concept has been applied in the EU and to transjudicial communication, that is ‘communication among courts – whether national or supranational – across borders’.<sup>8</sup> Additionally, prior to explaining why dialogue can be of added-value to the Convention system, two defining features of that system are identified and cast light on, as these features should be taken into consideration in construing the normative account.

The second aim of this article is to explore how in a more practical sense dialogue can develop in the Convention system. Again, to find inspiration for this it is first explained how dialogue has been made operational with reference to other legal systems. Based on that explanation, the article summarises some possible means for Convention dialogue. With reference to the normative account for Convention

<sup>1</sup> High Level Conference on the Future of the ECtHR, “Brighton Declaration”, 19 and 20 April 2012, § 12(c).

<sup>2</sup> UK Supreme Court, *R. v. Horncastle and Others* [2009] UKSC 14, per Lord Phillips, § 11; See also N. BRATZA, “Future of the ECtHR – Role of National Parliaments (Speech at ‘European Conference of Presidents of Parliament’)”, 20 September 2012.

<sup>3</sup> F. TULKENS, “Introduction (Speech at ‘Dialogue between Judges’ seminar)”, 27 January 2012; See also Consultative Council of European Judges, “Opinion No. 9 on the Role of National Judges in Ensuring an Effective Application of International and European Law”, 10 November 2006, § 27.

<sup>4</sup> D. SPIELMANN, “Solemn Hearing of the ECtHR on the Occasion of the Opening of the Judicial Year”, 31 January 2014.

<sup>5</sup> See e.g. P. GRAGL, “(Judicial) Love is Not a One-Way Street: The EU Preliminary Reference Procedure as a Model for ECtHR Advisory Opinions Under Draft Protocol No. 16”, *E.L.R.*, vol. 2, n° 38, 2013, p. 229, at p. 237; D. SPIELMANN, “The Best Practices of Individual Complaint to the Constitutional Courts in Europe (Speech at ‘Conference on best practices of individual complaint to the Constitutional Courts in Europe’)”, 7 July 2014.

<sup>6</sup> See for an exception J.H. GERARDS and J.W.A. FLEUREN (eds.), *Implementation of the European Convention on Human Rights and of the Judgments of the ECtHR in National Case-Law. A Comparative Analysis*, Antwerp, Intersentia, 2014; See also M. AMOS, “The Dialogue between the United Kingdom Courts and the European Court of Human Rights”, *I.C.L.Q.*, vol. 61, n° 3, 2012, p. 557.

<sup>7</sup> See for an exception J.H. GERARDS, “The Pilot Judgment Procedure before the European Court of Human Rights as an Instrument for Dialogue”, in M. CLAES and P. POPELIER (eds.), *Constitutional Conversations*, Antwerp, Intersentia, 2012.

<sup>8</sup> A.-M. SLAUGHTER devised the term ‘transjudicial communication’ and definition thereof, see “A Typology of Transjudicial Communication”, *Richmond L.R.*, vol. 29, n° 1, 1994, p. 99, at p. 99.

dialogue established in the article, it is explained why these means can potentially bring about dialogue in a way that is of use to the system.

The focus is solely on dialogue between the European Court and domestic courts, because ‘the senior courts of the European states’ are the ‘main interlocutors’ of the Court.<sup>9</sup> Moreover, experience has proven that domestic courts are both ‘the most important’<sup>10</sup> domestic institutions for and have ‘taken the lead’<sup>11</sup> in implementing the Convention. Importantly, this article’s perspective is that of the Convention system, meaning that the perspectives of the states and their courts are not specifically considered. Further, the article concentrates on ‘internal’ dialogue between the Court and the courts in the states parties, to the exclusion of any ‘external’ dialogue that may take place between the Court and other international courts.

The article proceeds in four sections. The first outlines the manner in which the notion of dialogue has been developed and applied in other systems. The second works towards creating a normative account for Convention dialogue. These sections therefore concern the question ‘Why dialogue?’ The third analyses means for dialogue as they have been proposed for other systems. Building on in particular the second and third section, the last examines practical means for dialogue in the Convention system. Working from the assumption that the first question can be answered satisfactorily, the last two sections formulate an answer to the question: ‘How can dialogue take place?’

## II. Dialogue: inspiration from other systems

The origins of academic legal writing about dialogue can be traced back to publications about dialogue between the (supreme) courts and the legislature in national constitutional systems. Although therefore originally devised for the national legal system, different authors have demonstrated convincingly that the notion can also be usefully applied to judicial dialogue in the EU and to transjudicial communication. Their contributions can form a valuable source of inspiration for explaining why dialogue can be of added-value to the Convention system. This section gives insight into why the notion of dialogue came to be used by authors writing about national constitutional systems in order to sketch the background to this notion. Additionally, the section explains how various authors have applied the same notion to the EU and other forms of transjudicial communication. The account is by no means exhaustive, but serves to contextualise the dialogue discourse and to give some insights into the possible uses of the concept.

<sup>9</sup> N. BRATZA, “Speech”, *op. cit.*, note 2.

<sup>10</sup> C. HILLEBRECHT, “Implementing International Human Rights Law at Home: Domestic Politics and the European Court of Human Rights”, *H.R.R.*, vol. 13, n° 3, 2012, p. 279, at p. 284.

<sup>11</sup> H. KELLER and A. STONE SWEET, “Assessing the Impact of the ECHR on National Legal Systems”, in H. KELLER and A. STONE SWEET (eds.), *A Europe of Rights: The Impact of the ECHR on National Legal Systems*, New York, OUP, 2008, at p. 687.

## A. THE ORIGINS OF THE DIALOGUE DISCOURSE

The emergence of 'dialogue' as 'one of the principal contenders for a satisfactory theory of judicial authority in constitutional decision-making'<sup>12</sup> can be placed against the background of the 'countermajoritarian difficulty', or, the perceived undemocratic nature of judicial review.<sup>13</sup> Solving that difficulty requires reconciling two notions. The first is that of representative democracy, which is founded on majority rule and decision-making based on the representative will of the people, and the second that of judicial review, which allows electorally unaccountable judges to overrule the majority's will. The difficulty is particularly intricate in the context of human rights adjudication, because human rights are usually broadly defined and multi-interpretable, which unavoidably leads to the question why a judge, and not a democratically elected parliament, should interpret them in last instance.<sup>14</sup>

The perceived undemocratic nature of judicial review is arguably attenuated when judges and the legislature engage in a dialogue. Hogg and Bushell use the notion of dialogue to describe the practice of adjudication by the Canadian Supreme Court under the Canadian Charter of Rights and Freedoms (Canadian Charter).<sup>15</sup> They call the relationship between the Supreme Court and the legislature 'dialogical' when the latter can reverse, modify or avoid a decision of the former, and the other way round. Dialogue thus takes place when a judgment that strikes down legislation for incompatibility with the Charter is followed by legislative action.<sup>16</sup> The authors' empirical research shows that 80 percent of the 65 surveyed cases were followed by legislative action.<sup>17</sup> On that ground, they conclude that judicial review is 'the beginning of a dialogue' and that the critique of the Charter based on democratic legitimacy concerns cannot be sustained.<sup>18</sup> The empirical account demonstrates in their view that the countermajoritarian difficulty is largely solved when the legislature can influence the judiciary's decisions.

Other authors have formed a normative concept of dialogue on the basis of Hogg and Bushell's description.<sup>19</sup> In particular in relation to the Canadian system they use the notion of dialogue to justify the role of the judiciary in the dialogue about fundamental rights. To take one example, Dixon justifies the judiciary's role with

<sup>12</sup> C. BATEUP, "The Dialogic Promise; Assessing the Normative Potential of Theories of Constitutional Dialogue", *Brooklyn L.R.*, vol. 71, n° 3, 2006, p. 1109, at p. 1118.

<sup>13</sup> J.B. THAYER, "The Origin and Scope of the American Doctrine of Constitutional Law", *H.L.R.*, vol. 7, n° 129, 1893, p. 129; A.M. BICKEL, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics*, Indianapolis, Bobbs-Merill, 1962; B. FRIEDMAN, "The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy", *N.Y.U.L.R.*, vol. 73, n° 2, 1998, p. 333.

<sup>14</sup> C. BATEUP, *op. cit.*, note 12, at p. 1114-1115.

<sup>15</sup> See also B. FRIEDMAN, "Dialogue and Judicial Review", *Michigan L.R.*, vol. 91, n° 4, 1993, p. 577.

<sup>16</sup> P.W. HOGG and A.A. BUSHELL, "The Charter Dialogue between Courts and Legislatures (Or Perhaps the Charter of Rights Isn't Such a Bad Thing after All)", *Osgoode Hall L.J.*, vol. 35, n° 1, 1997, p. 75, at p. 79-82.

<sup>17</sup> *Ibidem*, at p. 97.

<sup>18</sup> *Ibidem*, at p. 105; See also P.W. HOGG, A.A. BUSHELL-THORNTON and W.K. WRIGHT, "Charter Dialogue Revisited – Or 'Much Ado about Metaphors'", *Osgoode Hall L.J.*, vol. 45, n° 1, 2007, p. 1.

<sup>19</sup> See e.g. K. ROACH, "Dialogic Judicial Review and its Critics", *Supreme Court Law Review (2<sup>nd</sup>)*, vol. 23, n° 1, 2004, p. 49, at p. 67-68.

reference to its capacity to undo ‘blockages’ in the legislative process,<sup>20</sup> which are caused by gaps in the legislative process, called ‘blind spots’ and ‘burdens of inertia’. Blind spots occur, for example, when the legislature, due to a lack of time or expertise, does not realise that the application of a law potentially limits a right. Burdens of inertia make that blind spots remain unremedied and are caused by, for example, bureaucracy or prioritisation policies. As a consequence of these gaps, even those rights that the majority wishes to protect and that do not necessarily have significant budgetary implications risk remaining unprotected. This is where, in Dixon’s view, the judiciary comes in and plays a justifiable role: it can point out and counter legislative blockages, in order to ensure that they do not impede the enjoyment of rights.<sup>21</sup> The notion of dialogue is thus used as a norm for judicial interventions in the legislative process.

## B. THE EU SYSTEM

The EU system is often described as ‘pluralist’, due to the existence of EU and national constitutional claims and the arguably non-hierarchical nature of the relation between EU and domestic law.<sup>22</sup> The system is composed of interdependent legal systems, rather than of independent states or a single authority.<sup>23</sup> This means, for example, that the rules created by the EU are not completely supreme over national law.<sup>24</sup> In this context, there is no apparent means to determine who has the ultimate authority to pronounce which norms prevail and how EU norms should be interpreted.<sup>25</sup> In particular in the area of fundamental rights, which are valued differently among states, it is problematic to simply appoint the Court of Justice of the EU (CJEU) as the final arbiter. This would not only lead to democracy concerns, but would also disregard the pluralist nature of the system.<sup>26</sup>

In this system, various authors have welcomed and adapted the notion of dialogue as originally devised for the national legal system because it can, for example, help counter the risk that diversity is disregarded by the CJEU or because it legitimises the Court’s claim over fundamental rights’ cases. Cartabia, for example, takes as a starting point the risk that the CJEU uses the EU Charter of Fundamental Rights too actively to standardise and centralise the protection of fundamental rights. When this risk materialises, Luxembourg would undermine the plurality of European constitutional traditions, an ‘original feature’ of the EU.<sup>27</sup>

<sup>20</sup> R. DIXON, “The Supreme Court of Canada, *Charter* Dialogue and Deference”, *Osgoode Hall L.J.*, vol. 47, n° 2, 2009, p. 235, at p. 235.

<sup>21</sup> *Ibidem*, at p. 257-261.

<sup>22</sup> N. WALKER describes the relationship EU-domestic law as non-hierarchical, because both systems make constitutional claims, see “The Idea of Constitutional Pluralism”, *The Modern Law Review*, vol. 65, n° 3, 2002, p. 317, at p. 337; See also A. TORRES PÉREZ, *Conflicts of Rights in the European Union: A Theory of Supranational Adjudication*, Oxford, OUP, 2009, at p. 124.

<sup>23</sup> N. WALKER, *op. cit.*, note 22, at p. 337; A. TORRES PÉREZ, *op. cit.*, note 22, at p. 66-67, 106.

<sup>24</sup> J.H. GERARDS, “Pluralism, Deference and the Margin of Appreciation Doctrine”, *E.L.J.*, vol. 17, n° 1, 2011, p. 80, at p. 80.

<sup>25</sup> *Ibidem*, at p. 81.

<sup>26</sup> A. TORRES PÉREZ, *op. cit.*, note 22, at p. 101.

<sup>27</sup> M. CARTABIA, “‘Taking Dialogue Seriously’ The Renewed Need for a Judicial Dialogue at the Time of Constitutional Activism in the European Union”, *Jean Monnet Working Paper*, 12/07, 2007, at p. 23.

In her view, the risk can be countered by enhancing dialogue between courts, because dialogue allows the CJEU to consider the different constitutional traditions, thus protecting the diversity that unites the EU.<sup>28</sup> More precisely, a ‘multi-logue’ is required, because the CJEU can only decide on common European values when multiple constitutional traditions are considered. Otherwise, it may impose the values of a minority of active courts on a majority of comparably inactive courts.<sup>29</sup>

The account of Torres Pérez commences with the observation that the CJEU cannot coerce states to comply with its fundamental rights’ judgments. Instead, it must rely on the legitimacy, defined as ‘the justification of authority’,<sup>30</sup> of its judgments and on domestic courts.<sup>31</sup> Dialogue functions as an ideal that justifies the CJEU’s claim to authority over fundamental rights cases,<sup>32</sup> in the context of a pluralist system where, in spite of the multiple sources of national and international authority, agreement should be reached on fundamental rights’ norms.<sup>33</sup> In this dialogue, the CJEU should not search for universal truths, but should integrate the meaning given to rights by different courts.<sup>34</sup> The ideal of dialogue then is a source of legitimacy, because it leads to better-reasoned interpretative outcomes that respect national constitutional values, thus leaving room for diversity. Moreover, it improves participation and thereby reaching a shared outcome and helps building a common European identity based on fundamental rights.<sup>35</sup>

### C. TRANSJUDICIAL COMMUNICATION

The notion of dialogue has also been applied to horizontal relations between international courts. These relations are characterised by a high degree of informality, a lack of hierarchy and multiple sources of law.<sup>36</sup> In this context, jurisdictional and interpretative issues may arise that, due to the characteristics of vertical relations, cannot be solved by a hierarchically superior court or with reference to a single document. Further, the notion has been applied to vertical relations between an international court and domestic courts.

Within this context, Romano has observed that dialogue between international courts in fact takes place.<sup>37</sup> In the description that follows, he endeavours to decipher the dialogue, using different hypotheses. He hypothesizes for example that the dialogue can be best explained in terms of acculturation, because the oppo-

<sup>28</sup> *Ibidem*, at p. 23.

<sup>29</sup> *Ibidem*, at p. 39.

<sup>30</sup> A. TORRES PÉREZ, *op. cit.*, note 22, at p. 97-98.

<sup>31</sup> *Ibidem*, at p. 101; See also L.R. HELPER and A.-M. SLAUGHTER, “Toward a Theory of Effective Supranational Adjudication”, *The Yale L.J.*, vol. 107, n° 2, 1997, p. 273, at p. 285.

<sup>32</sup> A. TORRES PÉREZ, *op. cit.*, note 22, at p. 101-102.

<sup>33</sup> *Ibidem*, at p. 110.

<sup>34</sup> *Ibidem*, at p. 112.

<sup>35</sup> *Ibidem*, at p. 112-117.

<sup>36</sup> J.S. MARTINEZ, “Towards an International Judicial System”, *Stanford L.R.*, vol. 56, n° 2, 2003, p. 429, at p. 431.

<sup>37</sup> C.P.R. ROMANO, “Deciphering the Grammar of the International Jurisprudential Dialogue”, *International Law and Politics*, vol. 41, n° 4, 2009, p. 755, at p. 756-757.

site, namely formality and persuasion, would require courts to openly admit that they were persuaded by and follow another court. Admitting this would devalue their autonomy and create a sense of hierarchy.<sup>38</sup> Dialogue occurs because it helps prevent interpretative and jurisdictional conflict, which would negatively impact on the legitimacy of international law generally.<sup>39</sup> Further, the courts engage in dialogue, because ‘reinventing the wheel’ would be inefficient and because it may increase their power and authority.<sup>40</sup> After clarifying why dialogue takes place, Romano questions the dialogue’s legitimacy, by reason that it occurs without the sanctioning of the states that established the courts.<sup>41</sup> Due to the informality of dialogue and the importance of acculturation, states can hardly do anything about it,<sup>42</sup> but may guide the dialogue by, for example, giving courts the resources to publish their decisions widely.<sup>43</sup>

Others authors, such as Ahdieh, have argued, however, that dialogue is a less appropriate term for domestic and international courts in a vertical relation, bound together by a treaty like the Convention, than for courts in a horizontal relation, such as the European Court and its Inter-American counterpart. This derives from the power that international courts exercise over domestic courts when reviewing them.<sup>44</sup> Neither is the term hierarchy apt,<sup>45</sup> because an international court cannot enforce its will on domestic courts in practice, although it is hierarchically superior on paper.<sup>46</sup> International review is therefore a hybrid form of interaction, positioned between horizontal dialogue and hierarchical review,<sup>47</sup> which can be best described as dialectical review. This term combines a hierarchical and dialogic dimension and denotes a ‘dynamic distribution of power’, meaning that the courts can force each other to listen, but not to act.<sup>48</sup> Dialectical interaction, when characterised by a mix of diverse and common perspectives,<sup>49</sup> as well as by the presence of the same players,<sup>50</sup> leads to legal learning and innovation.<sup>51</sup> Further, it advances judicial coordination, jurisprudential harmonisation and norm internalisation.<sup>52</sup> Ahdieh sees dialectical review as a preferred mode of interaction to achieve the ‘ultimate goal’ of legal innovation.<sup>53</sup>

<sup>38</sup> *Ibidem*, at p. 771-772.

<sup>39</sup> *Ibidem*, at p. 779-780.

<sup>40</sup> *Ibidem*, at p. 780.

<sup>41</sup> *Ibidem*, at p. 782.

<sup>42</sup> *Ibidem*, at p. 783-784.

<sup>43</sup> *Ibidem*, at p. 785.

<sup>44</sup> R.B. AHDIEH, “Between Dialogue and Decree: International Review of National Courts”, *N.Y.U.L.R.*, vol. 79, n° 6, 2004, p. 2029, at p. 2030.

<sup>45</sup> *Ibidem*, at p. 2047.

<sup>46</sup> *Ibidem*, at p. 2035-2036.

<sup>47</sup> *Ibidem*, at p. 2034.

<sup>48</sup> *Ibidem*, at p. 2034-2035, 2189.

<sup>49</sup> *Ibidem*, at p. 2095.

<sup>50</sup> *Ibidem*, at p. 2099.

<sup>51</sup> *Ibidem*, at p. 2035.

<sup>52</sup> *Ibidem*, at p. 2162.

<sup>53</sup> *Ibidem*, at p. 2029, 2034-2035, 2100.

#### D. COMMENTS

The notion of dialogue originates from the national constitutional system where viewing the relation between the judiciary and legislature through the lens of dialogue exposes that judicial review is oftentimes followed by legislative action. A judgement is therefore not a final verdict, but offers room for a legislative response, which attenuates the problematic nature of judicial review in the light of the countermajoritarian difficulty. Dialogue can therefore in a more abstract sense be conducive to solving a difficulty that is seemingly inherent to a legal system. As regards transjudicial communication, dialogue suitably describes and serves to decipher exchanges between international courts in a horizontal relationship. Interaction between an international and a national court in a vertical relationship may, however, be more accurately understood with the term 'dialectical review'.

In both the EU and for other forms of transjudicial communication, the notion of dialogue has also been promoted as a normative ideal for judicial interaction because it can have different positive effects. As a norm, dialogue can, for example, help justify the role of a court in the adjudication of rights' questions. Dialogue was also presented as a norm because it can be a vehicle for an international court to pay respect to diverse practices as regard the protection of human rights in the states parties to the treaty of which it is the guardian. Furthermore, a normative account of dialogue can exist in that it can help prevent conflict between courts functioning in a pluralist system, to increase their power and to work efficiently by citing each other. In the next section, it is examined which positive effects dialogue may have on the Convention system.

### III. Dialogue and the Convention system

The previous section illustrated where the idea of dialogue hails from and how various authors have applied the idea as a normative ideal or descriptive tool. Drawing on these illustrations and on two defining features of the Convention system, this section explores what the added-value of dialogue can be for the Convention system. It is proposed that this value can be found in the following features: the necessity of cooperation between the Strasbourg court and the domestic courts for the effective functioning of the system and the need to manage tension inherent to the system. In order to explain this, these two features are further elaborated first. Subsequently, a normative account for Convention dialogue is presented that explains why dialogue can be of added-value. As can be noted already, the word dialogue is used here in spite of Ahdieh's suggestion that dialectical review may be a more appropriate term for interaction between an international and a national court. This choice was made, because others have already used the word in connection with the Convention system, making it a term that is more easily recognisable and that requires less introduction.

## A. TWO DEFINING FEATURES

1. *The necessity of cooperation*

Cooperation between the Strasbourg Court and the domestic courts is indispensable to the effective functioning of the Convention system for at least two reasons.<sup>54</sup>

First of all, even though the Convention obliges the states parties, including their courts,<sup>55</sup> to implement the Convention (Article 1 ECHR) and to execute the Strasbourg judgments by ending, remedying and preventing (future) violations (Article 46(1) ECHR), the Court cannot coerce them to do so.<sup>56</sup> In the words of Ahdieh, it cannot force them to act, but it can force them to listen by way of its judgments. Nor can the Court instruct the states, or domestic courts for that matter, *how* they fulfil their Convention obligations. The obligation to implement is one of result and the Court's judgments are 'essentially declaratory',<sup>57</sup> thus leaving the domestic authorities discretion in choosing the appropriate means of compliance.<sup>58</sup> The Court must therefore rely on cooperation commanded by, for example, the persuasive force of its judgments, its institutional authority or the good relationship with the court that is to be persuaded and must give the states room to cooperate rather than rely on coercion.<sup>59</sup> The foregoing points to the pluralist nature of the system, because although the Court may seem hierarchically superior on paper, it cannot in fact impose its will.

Secondly, the founding Convention principle of subsidiarity makes that the Court and the states parties, including domestic courts, share responsibilities.<sup>60</sup> The states parties bear primary responsibility for securing the Convention rights.<sup>61</sup> This logically gives the Court a subsidiary role,<sup>62</sup> namely 'to ensure the observance of the engagements undertaken by' the states.<sup>63</sup> Sharing responsibilities is essential, not only for reasons of principle, but also because '[t]he Court self-evidently

<sup>54</sup> T.B. BARKHUYSEN and M.L. VAN EMMERIK, "Legal Protection against Violations of the European Convention on Human Rights: Improving (Co-)operation of Strasbourg and Domestic Institutions", *Leiden J.I.L.*, vol. 12, n° 4, 1999, p. 833, at p. 833-834; C. PARASKEVA, "Returning the Protection of Human Rights to Where They Belong, At Home", *I.J.H.R.*, vol. 12, n° 3, 2008, p. 415, at p. 412, this author refers to observations of Professor Evrigenis, an ECtHR-President (Ryssdal) and Drzemczewski; L. GARLICKI, "Cooperation of Courts: The Role of Supranational Jurisdictions in Europe", *I.J.C.L.*, vol. 6, n° 3, 2008, p. 509 at p. 511, 516, 521; L.R. HELFER, "Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Right Regime", *E.J.I.L.*, vol. 19, n° 1, 2008, p. 125, at p. 158.

<sup>55</sup> Eur. Ct. H.R. (1<sup>st</sup> sect.), *Aslakhanova and Others v. Russia*, 18 December 2012, Appl. No. 18 December 2012 (final since 29 April 2013), § 210.

<sup>56</sup> See also E. LAMBERT ABDELGAWAD, *The Execution of Judgments of the European Court of Human Rights*, Strasbourg, CoE Publishing, 2008, 2<sup>nd</sup> ed., at p. 10-12.

<sup>57</sup> *Ibidem*, at p. 7; See e.g. Eur. Ct. H.R. (GC), *Assanidze v. Georgia*, 8 April 2004, Appl. No. 71503/01, § 202.

<sup>58</sup> C. PARASKEVA, *op. cit.*, note 54, at p. 415; See e.g. Eur. Ct. H.R. (GC), *Kurić and Others v. Slovenia*, 26 June 2012, Appl. No. 26828/06, § 406.

<sup>59</sup> See also L. GARLICKI, *op. cit.*, note 54, at p. 522; GERARDS and FLEUREN, *op. cit.*, note 6, at p. 33-34.

<sup>60</sup> High Level Conference on the Future of the ECtHR, "Izmir Declaration", 26-27 April 2011, § 6; See for a discussion of 'shared responsibility': GERARDS and FLEUREN, *op. cit.*, note 6, p. 21-34.

<sup>61</sup> Article 1 ECHR; Eur. Ct. H.R. (GC), *M.S.S. v. Belgium and Greece*, 21 January 2011, Appl. No. 303696/09, § 287.

<sup>62</sup> Eur. Ct. H.R. (Plenary), *Handyside v. UK*, 7 December 1976, Appl. No. 5493/72, § 48; *Ibidem*, § 287.

<sup>63</sup> Article 19 ECHR.

cannot shoulder the whole burden of [Convention] implementation'.<sup>64</sup> This is now more evident than ever, considering the enormous workload on the Court, which can only be addressed adequately when domestic authorities fulfil their responsibilities.<sup>65</sup> In the light of the great significance of sharing responsibilities, the importance of cooperation comes as no surprise. The Convention system requires a 'collective effort'<sup>66</sup> and it is unlikely that this effort can be fulfilled without cooperation. The system is therefore also pluralist from another perspective: not one court is responsible, but the domestic and European judges are jointly responsible.

## 2. Tension

Regardless of the need for cooperation, the relationship between the Court and its domestic counterparts is inherently tense. The tension derives in a general sense from the Court's power of review and from the legally binding nature of its judgments,<sup>67</sup> which gives it some power over the domestic courts, albeit no coercive power. More specifically, two sources of tension exist.

Tension is, first, caused by the review carried out by international judges of domestic judgments, even though domestic judges and other state authorities are '[b]y reason of their direct and continuous contact with the vital forces of their countries, [...] in principle in a better position than the international judge to give an opinion on the exact content' of the Convention requirements.<sup>68</sup> Domestic judges are in that position because they are most knowledgeable of the particularities of the national system in which the Convention right is at stake. This source of tension is referred to here as the 'knowledge-gap-difficulty'.<sup>69</sup>

The second source of tension lays in the diversity of laws, practices and constitutional cultures in the forty-seven Convention states, combined with the potential of a Strasbourg judgment to impose uniform standards. This may cause the domestic judges to wonder whether Strasbourg 'sufficiently appreciates or accommodates specific aspects of our domestic process'.<sup>70</sup> These two competing forces, national diversity and uniform standards, lead to tension that is here termed the 'unifying-diversity-difficulty'. The use of this term expresses the pluralist nature of the Convention system, because it accentuates the Convention system is composed of 47 different legal orders.

<sup>64</sup> N. BRATZA, "Solemn Hearing of the ECtHR on the Occasion of the Opening of the Judicial Year", 27 January 2012; See also Brighton Declaration, *op. cit.*, note 1, § 4.

<sup>65</sup> TULKENS, *op. cit.*, note 3.

<sup>66</sup> N. BRATZA, "Solemn Hearing", *op. cit.*, note 64.

<sup>67</sup> Articles 19 and 46(1) ECHR.

<sup>68</sup> *Handyside v. UK*, *op. cit.*, note 62, § 48.

<sup>69</sup> See e.g. *Eur. Ct. H.R. (GC), Z. and Others v. UK*, 10 May 2001, Appl. No. 29392/95, § 100.

<sup>70</sup> *R v. Horncastle and Others*, *op. cit.*, note 2, per Lord Phillips, § 11.

When the Court reviews domestic judicial decision-making, it risks causing the escalation of either source of tension into conflict. This can be the consequence of issuing a judgment that, according to a domestic court is unbalanced, either because it takes insufficiently into account its knowledge or because it disrespects the particular features of its legal system. Such conflict is problematic in a system characterised by the sharing of responsibilities, since it would obviously complicate the functioning of the system. As the legitimacy of some of the Court's judgments has been received critically by domestic courts and other domestic authorities,<sup>71</sup> the possibility of an escalation of tension into conflict is real and never far away. Such conflict likely causes the domestic courts to feel less inclined to implement the Convention and to execute the Courts' judgments, while the Court does not possess the means to coerce them to do so. On the contrary, the persuasiveness of the Court's judgments likely plays an important role in the full implementation of the Convention and the persuasiveness almost inevitably diminishes when, for a reason related to one of the difficulties, tension escalates.<sup>72</sup> More generally, conflict would hamper the required cooperation. When domestic courts are not inclined to implement the Convention at times, the effective functioning of the entire Convention system is at risk, as they bear primary responsibility for the Convention's implementation. In turn, this would jeopardise the achievement of the Convention's object and purpose, which is 'that the rights and freedoms [in the Convention are] secured by the Contracting State within its jurisdiction'.<sup>73</sup> It is therefore of great importance that the sources of tension do not lead to a conflict that causes the domestic courts to neglect or abandon their crucial role in the system.

Neither source of the tension can be completely eliminated,<sup>74</sup> but it is also important to realise that tension does not necessarily lead to conflict. The knowledge-gap-difficulty, for example, does not need to cause conflict if it stimulates the Court to listen to the knowledgeable domestic courts and to sometimes leave issues undecided with reference to the superior knowledge of these courts. Further, the unifying-diversity-difficulty is the unavoidable consequence of the establishment of a court that must 'ensure the observance of the engagements undertaken by' a diverse group of 47 states, while adjudicating on 'all matters' concerning the Convention's interpretation and application.<sup>75</sup> Although domestic courts must therefore accept a certain level of uniformity, the crux of the matter is when their acceptance turns into reluctance, that is, when they feel they are left insufficient room to make their own decisions within the parameters set by the Convention, as interpreted by the Court. This point does not need to be reached if the Court strives to respect this need for leeway. Therefore, as long as it is willing

<sup>71</sup> See J.H. GERARDS, "The Prism of Fundamental Rights", *E.C.L.R.*, vol. 8, n° 2, 2012, p. 173, at p. 173-175.

<sup>72</sup> J.L. JACKSON, "Note; *Broniowski v. Poland*: A Recipe for Increased Legitimacy of the European Court of Human Rights as a Supranational Constitutional Court", *Connecticut L.R.*, vol. 39, n° 2, 2006, p. 759, at p. 792.

<sup>73</sup> *Z. and Others v. UK*, *op. cit.*, note 69, § 103.

<sup>74</sup> See also A. STONE SWEET, "From the Point of View of National Judiciaries: The Role of National Courts in the Implementation of the Court's Judgments (Speech at 'Dialogue between Judges' seminar)", 31 January 2014.

<sup>75</sup> Articles 19 and 31(1) ECHR.

to do so, the difficulty does not inevitably cause conflict. Not only does tension not necessarily lead to conflict, tension can also be regarded as a positive good, for it can enhance balanced decision-making by the Court if channelled in the right direction. This outcome is achieved if the tension stimulates the Court to take into account the knowledge of domestic courts and to respect diversity in the states parties.<sup>76</sup> This then results in balanced judgments, which expressly take into consideration different sources of information and pay respect to different constitutional perspectives and which, in turn, may help increase their persuasiveness. Eventually, this may facilitate cooperation, as domestic authorities are likely to be more willing to follow balanced, persuasive and informed judgments.

## B. THE ADDED-VALUE OF DIALOGUE FOR THE CONVENTION SYSTEM

When the notion of dialogue is employed as a normative objective for judicial interaction, it is proposed that its added-value for the Convention system lies in the contribution which it can make to the smooth cooperation between the European Court and the domestic courts and the channelling of tension away from conflict, towards increasingly balanced decision-making. In this way, dialogue can further the effective functioning of the Convention system and, eventually, the protection of the Convention rights. Dialogue therefore is an answer to the challenges posed by the pluralist nature of the system, the answer consisting of means to deal with pluralism and to allow it to bloom, rather than to deny it. This proposal is inspired by the comments made with respect to the other systems, namely that dialogue can help solve difficulties that are inherent to a system, that it has legitimising potential, that it is conducive to preventing conflict and that it can also be a way to respect diversity. If dialogue would contribute to achieving such outcomes in the Convention system as well, the just-made proposal would work. The proposal is also inspired by the observation that certain characteristics of the Convention system, such as a lack of final power over domestic courts and the need to respect diversity, correspond with characteristics of other pluralist systems to which the notion of dialogue has already been applied usefully. Given these similarities, it can be expected that the notion as it has been developed in relation to the EU and transjudicial communication, can be usefully transposed also to the Convention context. The remainder of this subsection is dedicated to examining how dialogue can have the added-value just proposed.

### 1. *Dialogue and the necessity of cooperation*

Interaction based on dialogue can enhance cooperation because dialogue is a means to compel Convention implementation based on persuasiveness rather than coercion. A dialogue, when seen as an exchange of arguments, is a vehicle

---

<sup>76</sup> See also A. TORRES PÉREZ, *op. cit.*, note 22, at p. 112-117.

that can be used to try to persuade, in particular when the Court bases itself on the knowledge of the domestic courts and responds to their concerns. Further, when the dialogue demonstrates that the Strasbourg Court respects its counterparts, this likely also increases the persuasive force of its arguments. Dialogue potentially also helps improve domestic courts' understanding of their role in the Convention system and thereby it may facilitate the effective sharing of responsibilities. Domestic courts can, for example, ask Strasbourg to give them room to fulfil their primary role and Strasbourg may allow them to actually fulfil that role. Indeed, the Brighton Declaration encouraged dialogue 'between the Court and States Parties as a means of developing an enhanced understanding of their respective roles in carrying out their shared responsibility for applying the Convention'.<sup>77</sup> Likewise, the Court's current President has called dialogue 'the natural consequence of the shared responsibility'.<sup>78</sup> Further, a German judge is convinced that 'the long-term viability and strength of the Convention system depend on a division of labour based on dialogue [...] and draws attention 'to the way dialogue between the courts in the exercise of their respective jurisdictions and the principle of subsidiarity are connected'.<sup>79</sup> In sum, one reason why dialogue can be of added-value is that understanding procedures and interaction between the Court and national courts in these terms can facilitate cooperation in different ways.

## 2. Dialogue and tension

In the words of a Strasbourg judge, regarding the relationship between national courts and the Court in terms of dialogue can help 'ensure greater harmony between the decision-making of the Strasbourg Court and that of national courts and to avoid what appears to have been from time to time a feeling of mistrust by one court of the other'.<sup>80</sup> This can be achieved in particular if the notion is used as a vehicle to create a process of interaction between the Court and domestic courts that advances respect for national knowledge and diversity. Thus, it is facilitated that tension is channelled away from conflict, towards balanced decision-making. Dialogic relations can achieve this, because they enable domestic courts to communicate to the Court their knowledge and concerns as to diversity. This may already decrease the chance that tension causes conflict and it likely enables the Court to make its decisions more balanced. Also the mere possibility that the Court actually listens to them, can make domestic courts feel more respected, which again decreases the chance that tension grows into conflict. Further, should the Court have failed to respect diversity in the eyes of domestic courts or should it have taken a decision based on a misunderstanding of domestic law, domestic

<sup>77</sup> Brighton Declaration, *op. cit.*, note 1, § 12(c); See also BRATZA, "Solemn Hearing", *op. cit.*, note 64.

<sup>78</sup> D. SPIELMANN, "Speech at the 78th meeting of the CDDH", 27 June 2013.

<sup>79</sup> G. LÜBBE-WOLFF, "How Can the European Court of Human Rights Reinforce the Role of National Courts in the Convention System? (Speech at 'Dialogue between Judges' seminar)", 27 January 2012.

<sup>80</sup> N. BRATZA, "The Relationship between the UK Courts and Strasbourg", *E.H.R.L.R.*, vol. 5, 2011, p. 505, at p. 510.

courts can point this out to the Court in a dialogue.<sup>81</sup> As the same Strasbourg judge noted, it is ‘right and healthy that national courts should [...] feel free to criticise Strasbourg judgments [...] where they have misunderstood national law or practices’.<sup>82</sup> In these ways, dialogue can function to find a middle road between conflict and deference.<sup>83</sup>

### C. CONCLUSION

The added-value of dialogue can be found in its potential contribution to the smooth cooperation between the European Court and the domestic courts and to the channelling of tension that inevitably arises between them away from conflict towards more balanced decision-making. Dialogue may, however, also have less positive consequences. If it, for example, leads to irreparable diverging opinions, it risks decreasing the legitimacy of the Court and, thereby, probably the effectiveness of the Convention system.<sup>84</sup> This should be prevented by only engaging in dialogue for the purpose of enhancing cooperation or channelling tension in the right direction and by fulfilling the dialogue prerequisites discussed in the next two sections.

## IV. Means for dialogue: inspiration from other systems

Now that it has been established why dialogue can be of added-value to the Convention system, the question arises how such a dialogue can be attained. This section gives some inspiration for the answer, which is formulated in section V. In addition to from publications about the EU and transjudicial communication, inspiration is drawn from national constitutional systems, because – although the literature on these systems does not involve judicial dialogue – they can nevertheless be a source of inspiration, as section V demonstrates. The inspiration is presented from the angle of prerequisites, facilitators and instruments for dialogue. These means are distinguishable, although the difference between them is not wholly clear-cut. Prerequisites function as a basis for dialogue and relate to institutional structures and features and the way in which institutions perceive each other. Dialogue facilitators are, unlike prerequisites, not a *sine qua non* of dialogue, but rather enhance the likelihood and quality of its occurrence. Facilitators are less tangible than dialogue instruments. The latter contribute in a comparably direct sense to dialogue and may have been specifically created for dialogue. Instruments

<sup>81</sup> LORD KERR, “The Conversation between Strasbourg and National Courts – Dialogue or Dictation?”, *Irish Jurist*, vol. 44, n° 1, 2009, p. 1, at p. 12; *R. v. Horncastle and Others*, *op. cit.*, note 2, per Lord Phillips, § 11; Eur. Ct. H.R. (GC), *Al-Khawaja and Tahery v. UK*, 15 December 2012, Appl. No. 26766/05 and 22228/06, Concurring Opinion of Judge Bratza, § 2-3; N. BRATZA, “The Relationship”, *op. cit.*, note 80, at p. 511-512; B. HALE, “*Argentorum Locutum*: Is Strasbourg or the Supreme Court Supreme?”, *H.R.L.R.*, vol. 12, n° 1, 2012, p. 65, at p. 78; AMOS, *op. cit.*, note 6, at p. 572.

<sup>82</sup> N. BRATZA, “The Relationship”, *op. cit.*, note 80, at p. 512; See also: AMOS, *op. cit.*, note 6, at p. 566.

<sup>83</sup> KELLER and STONE SWEET, *op. cit.*, note 11, at p. 705.

<sup>84</sup> C.J. VAN DE HEYNING, “The Natural ‘Home’ of Fundamental Rights Adjudication: Constitutional Challenges to the European Court of Human Rights”, *Y.E.L.*, vol. 31, n° 1, 2012, p. 128, at p. 158; AMOS, *op. cit.*, note 6, at p. 574.

are therefore the most practical means. Again, the narrative is not meant to be exhaustive, but to create some comprehension of how dialogue can develop. The discussion focuses on concepts which may be relevant to the Convention system.

## A. PREREQUISITES

### 1. *Willingness*

For a dialogue to develop, the interlocutors should not only be willing to engage in dialogue as such but also to embrace certain other notions. It has been argued that a prerequisite for a dialogue about national constitutional values is that the interlocutors are willing to subscribe to a political and constitutional culture that functions in accordance with the rule of law.<sup>85</sup> If the legislator would, for example, not accept the power of judicial review, it can simply and squarely refuse to abide by a judgment, without entering into a dialogue to explain why it disagrees. Comparably, when the dialogue is one between courts, be they in a horizontal or a vertical relation, they should be prepared to see each other as autonomous judicial actors, free from the control of others and empowered to independently establish which interests they wish to protect.<sup>86</sup> Also, they should recognise each other as similar institutions, all 'engaged in the application and interpretation of the law'.<sup>87</sup> If they would not accept each other as such, their willingness to engage in dialogue would inevitably diminish.

### 2. *Different viewpoints*

Further, for a dialogue to develop, different viewpoints must exist. When total agreement would exist on legal questions, dialogue may be precluded, in particular when a hierarchically superior interlocutor formulates the answer.<sup>88</sup> In the national legal system, different viewpoints between the courts and parliament are forged by the different nature of these branches. Further, international and national courts usually have different viewpoints, because they have a different hierarchical position, institutional purpose and may rely on different sources of law.<sup>89</sup>

### 3. *Common ground of understanding*

The different viewpoints should be accompanied by a common ground of understanding.<sup>90</sup> On the national level, this common ground can exist in, for example,

<sup>85</sup> G. DOR, "Constitutional Dialogues in Action: Canadian and Israeli Experiences in Comparative Perspective", *Indiana International & Comparative L.R.*, vol. 11, n° 1, 2000, p. 1, at p. 32-33.

<sup>86</sup> SLAUGHTER, "A Typology", *op. cit.*, note 8, at p. 122-124.

<sup>87</sup> *Ibidem*, at p. 125.

<sup>88</sup> R.M. COVER and A. ALEINIKOFF, "Dialectical Federalism: Habeas Corpus and the Court", *The Yale L.J.*, vol. 86, n° 6, 1977, p. 1035, at p. 1048-1049; AHDIEH, *op. cit.*, note 44, at p. 2088, 2095-2096; TORRES PÉREZ, *op. cit.*, note 22, at p. 118.

<sup>89</sup> AHDIEH, *op. cit.*, note 44, at p. 2093-2094.

<sup>90</sup> COVER and ALEINIKOFF, *op. cit.*, note 88, at p. 1048-1049; SLAUGHTER, "A Typology", *op. cit.*, note 8, at p. 125; TORRES PÉREZ, *op. cit.*, note 22, at p. 121.

the adoption by each branch of a rights culture that nourishes their interest in and expertise of rights' questions.<sup>91</sup> In the EU and in the case of transjudicial communication, this ground can be that the courts use comparable methods of legal reasoning<sup>92</sup> or that they are all pursuing a 'common legal enterprise' that confronts them with common legal problems and demands mutual respect.<sup>93</sup> When such commonalities exist, a basis for transcending differences and for developing a dialogue based on persuasive authority materialises.

#### 4. Time

The availability of sufficient time to engage in dialogue at various occasions is another prerequisite. This is necessary because the interlocutors can normally not all speak at the same time, or else their voice will be lost, and because the positive outcomes of dialogue, such as the prevention of conflict, cannot be achieved overnight.<sup>94</sup> Dialogue develops over time, for example, when courts are involved in the same case, when there is a continuous pattern of cases and when there are 'repeat players'.<sup>95</sup>

### B. FACILITATORS

#### 1. Dynamic distribution of power

In a vertical relation between an international and a domestic court, linked up by a treaty, a dynamic distribution of power can be a facilitator of dialogue.<sup>96</sup> Such a distribution of power exists when both courts can exercise some power over each other but are also constrained by one another. This means that neither court can impose its will on its counterpart, as is common in pluralist legal systems.<sup>97</sup> Because neither court has complete supremacy over the other, they depend on each other. International courts rely in particular on national courts for the execution of their judgments. This opens room for dialogue, because it presses international courts to acknowledge that domestic courts must have some room for their own interpretation and because it stimulates the international court to listen to the viewpoints of domestic courts, or else, risk non-execution.<sup>98</sup>

<sup>91</sup> LORD FALCONER of THOROTON, "Human Rights and Constitutional Reform (Speech at Law Society and Human Rights Lawyers' Association)", 17 February 2004.

<sup>92</sup> SLAUGHTER, "A Typology", *op. cit.*, note 8, at p. 125-126.

<sup>93</sup> SLAUGHTER, "A Typology", *op. cit.*, note 8, at p. 127; A.-M. SLAUGHTER, "A Global Community of Courts", *H.I.L.J.*, vol. 44, n° 1, 2003, p. 191, at p. 194; W. BURKE-WHITE, "International Legal Pluralism", *Michigan Journal of I.L.*, vol. 25, n° 5, 2004, p. 963, at p. 973; TORRES PÉREZ, *op. cit.*, note 22, at p. 125.

<sup>94</sup> TORRES PÉREZ, *op. cit.*, note 22, at p. 129.

<sup>95</sup> AHDIEH, *op. cit.*, note 44, at p. 2088-2089.

<sup>96</sup> COVER and ALEINIKOFF, *op. cit.*, note 88, at p. 1048; *Ibidem*, at p. 2090; TORRES PÉREZ, *op. cit.*, note 22, at p. 123-124; T. DE LA MARE and C. DONNELLY, "Preliminary Rulings and EU Legal Integration: Evolution and Stasis", in P. CRAIG and G. DE BURCA (eds.), *The Evolution of EU Law*, Oxford, OUP, 2011, p. 378-379.

<sup>97</sup> AHDIEH, *op. cit.*, note 44, at p. 2090.

<sup>98</sup> *Ibidem*, at p. 2093; TORRES PÉREZ, *op. cit.*, note 22, at p. 124-125.

## 2. Deference

Deference has been mentioned as a facilitator for dialogue in both the national and the EU systems. As regards the Canadian Charter, Dixon has noted that the Canadian system of judicial review distinguishes itself insufficiently from systems where the judiciary has the final say about the interpretation of the constitution.<sup>99</sup> To restrain the voice of the Supreme Court more, it should defer to the legislature in cases bringing an issue before it that it had previously already decided on and that subsequently have been dealt with for a second time by the legislature.<sup>100</sup> Dialogue takes place when the Supreme Court defers 'to legislative sequels that evidence interpretive disagreement' in such cases.<sup>101</sup> The doctrine of deference as used by the CJEU also has been argued to facilitate dialogue.<sup>102</sup> By exercising deference, the EU court invites national courts to make their own decision, as it guarantees to only intervene when their decision is 'manifestly unreasonable or inappropriate'<sup>103</sup> and to return an issue undecided if it falls within the national discretion.<sup>104</sup>

## 3. Comparative methods of interpretation

Further, the CJEU's use of comparative methods of interpretation can be mentioned as a facilitator. This approach stimulates it to base the content and development of its jurisprudence on domestic constitutional traditions. It thus shows that these traditions are taken into account and respected. This stimulates domestic courts to enter into a dialogue to explain the CJEU the peculiarities of their national traditions.<sup>105</sup>

## 4. Procedural approach

When the domestic courts adopt a procedural approach to rights' adjudication, dialogue can be facilitated. Following this approach, the courts do not adjudicate the content of rights, but inquire into the decision-making process which led to the establishment of that content. The other branches can therefore make their own decisions, provided they decide in conformity with certain standards, and they can respond to an adverse judgment by making procedural improvements that leave the impugned decision untouched.<sup>106</sup> Additionally, because the procedural approach is comparatively objective and therefore less politically sensitive than the alternative approach, it may lower the threshold for the other branches to accept courts as an interlocutor and in this way contribute to dialogue.

<sup>99</sup> DIXON, *op. cit.*, note 20, at p. 239-240.

<sup>100</sup> *Ibidem*, at p. 240.

<sup>101</sup> *Ibidem*, at p. 242.

<sup>102</sup> GERARDS, "Pluralism", *op. cit.*, note 24, at p. 84-85.

<sup>103</sup> *Ibidem*, at p. 85.

<sup>104</sup> *Ibidem*, at p. 88.

<sup>105</sup> *Ibidem*, at p. 84-85.

<sup>106</sup> D.T. COENEN, "A Constitution of Collaboration: Protecting Fundamental Values with Second-Look Rules of Inter-branch Dialogue", *William and Mary L.R.*, vol. 2, n° 5, 2001, p. 1575, at p. 1583, 1586.

## 5. Remedial discretion

Dialogue can also be facilitated by how the judiciary in a constitutional setting, depending on its competences and creativity, can establish which remedial action should be pursued. Generally, the more the course of remedial action is left open, the better a judgment facilitates dialogue, because remedial discretion gives the other branches the opportunity to formulate their own response to a judgment.<sup>107</sup>

### C. INSTRUMENTS

#### 1. *Pro-dialogic rules*

Martinez has described several instruments for dialogue for courts in a transjudicial vertical relation, which he calls 'pro-dialogic rules'. The rules are alternatives to centralising power as a way of solving tension.<sup>108</sup> Domestic courts can, for example, adhere to the rule that, when considering a judgment of an international court, they take into account the context in which the judgment was pronounced and do not depart from the judgment without good reasons. On the national level, the US Supreme Court uses procedural rules to operationalise the procedural approach. These rules help establish whether decisions incompatible with the constitution were taken with due regard to procedural prescriptions.<sup>109</sup> The 'clarity rule', for example, requires Congress to formulate its intention clearly when limiting a constitutional right. The Supreme Court thus leaves the content of the limitation to Congress and instead scrutinises how carefully Congress has considered its intention.<sup>110</sup>

#### 2. *The preliminary reference procedure*

An EU dialogic instrument is the preliminary reference procedure which enables, and sometimes obliges, domestic courts to pose questions to the Luxembourg Court about *inter alia* Treaty interpretation.<sup>111</sup> The instrument is a means to inform the EU Court of domestic concerns.<sup>112</sup> The flexibility with which the Court can answer a question also encourages dialogue. When not answering a question, it, for example, clarifies that a question is one of national, not EU, law.<sup>113</sup> Domestic courts can refer follow-up questions to inform the Luxembourg Court

<sup>107</sup> ROACH, *op. cit.*, note 19, at p. 64-65.

<sup>108</sup> MARTINEZ, *op. cit.*, note 36, at p. 434-435.

<sup>109</sup> COENEN, *op. cit.*, note 106, at p. 1655.

<sup>110</sup> *Ibidem*, at p. 1584-1585.

<sup>111</sup> Article 267 TFEU.

<sup>112</sup> K. ALTER, "Explaining National Court Acceptance of the ECJ", in A.-M. SLAUGHTER, A. STONE SWEET and J.H.H. WEILER (eds.), *The European Court and National Courts – Doctrine and Jurisprudence*, Oxford, Hart Publishing, 2000, at p. 232-233, 249; CARTABIA, *op. cit.*, note 27, at p. 21; TORRES PÉREZ, *op. cit.*, note 22, at p. 136; GERARDS, "Pluralism", *op. cit.*, note 24, at p. 84; MARE and DONNELLY, *op. cit.*, note 96, at p. 363.

<sup>113</sup> T. TRIDIMAS, "Constitutional Review of Member State Action: The Virtues and Vices of an Incomplete Jurisdiction", *I.J.C.L.*, vol. 9, n° 3-4, 2011, p. 737, at p. 739-740; GERARDS, "Pluralism", *op. cit.*, note 24, at p. 84.

why they disagree with a ruling. In this way, dialogue develops over time,<sup>114</sup> sometimes with the result of inducing ‘a more favourable reply from Luxembourg’.<sup>115</sup>

## V. Means for dialogue in the Convention system

The previous section presented prerequisites, facilitators and instruments for dialogue. Based on this presentation, other scholarly work and the author’s own ideas, this section studies how dialogue can be made operational in the Convention system. The means for dialogue are discussed in the light of what has been remarked above about the features of this system and the potential added-value of Convention dialogue. The facilitators and instruments presented here are not new: rather than introducing novelties, the article aims to explain that and how already known concepts can be used in a dialogic manner. The discussion is one of possibilities – it is not established whether and to what extent the facilitators and instruments are already applied dialogically.

### A. PREREQUISITES

Because prerequisites are rather abstract and form rather general requirements, this subsection can lean on each prerequisite described above, even though they were developed in relation to other systems. Additionally, two prerequisites which were not found in the author’s literature review were added, namely those of ability and clarity, because they are also considered to be important to Convention dialogue.

#### 1. *Ability and willingness*

The prerequisite of willingness cannot do without that of ability. Ability calls for awareness and knowledge of domestic courts of the Convention system, but also denotes the importance that both the European court and the domestic courts have sufficient time and other resources to engage in dialogue. In a very practical sense, this means that domestic courts should be able to read the Court’s judgments, which are the ‘food for dialogue’, either in the original language or in translation.

Willingness concerns both readiness to engage in dialogue and to accept connected notions. Willingness is particularly important when time and resources for dialogue are limited, as they inevitably are, because these limitations mean dialogue comes at a cost. The interlocutors must be willing to accept the ‘authority and legitimacy’ of its counterpart and that ‘every other court may have good

<sup>114</sup> TORRES PÉREZ, *op. cit.*, note 22, at p. 127, 136, 139.

<sup>115</sup> T. TRIDIMAS, “Knocking on Heaven’s Door: Fragmentation, Efficiency and Defiance in the Preliminary Reference Procedure”, *C.M.L.R.*, vol. 40, n° 1, 2003, p. 9, at p. 39.

reasons to differ on how rights are to be interpreted and applied in the context of any specific dispute'.<sup>116</sup> Further, they should accept a legal culture functioning in accordance with the rule of law and see each other as autonomous judicial actors, all engaged in the application and interpretation of the Convention. Willingness must be born of an institution's own conviction that dialogue is worthwhile; it cannot be imposed hierarchically. The willingness of domestic courts may be stimulated by clarifying that dialogue offers the possibility to communicate national knowledge and concerns to the Court.

## 2. *Different viewpoints combined with a common ground of understanding*

Different viewpoints are the engine for and the subject of dialogue. Different viewpoints can develop from, for example, the reliance of the European Court on concepts not usually relied upon by domestic courts, such as the margin of appreciation doctrine, or the reliance of the domestic courts on domestic legal sources in addition to or even with the exclusion of the Convention.

For a dialogue to develop, the existence of different viewpoints should go paired with a common ground of understanding. Such a ground can exist in the realisation that all courts are engaged in the 'common legal enterprise' of securing and further realising the Convention rights.<sup>117</sup> However, and this shows the interconnectedness of the prerequisites, if domestic courts are insufficiently able to understand what this enterprise entails or are unwilling to engage in it, this may also mean that they do not realise that they should be engaged in it or simply refuse to do so.

## 3. *Time and clarity*

One further prerequisite is that dialogue should be given time to develop.<sup>118</sup> It may take a series of exchanges for the Court to develop a good understanding of sensitivities and national knowledge and it may equally take time to be respectful and to be perceived as such. It is furthermore likely that dialogue can lead to improved cooperation, provided that time passes, considering that cooperation is important because the Court must rely on persuasion and the sharing of responsibilities; both persuading domestic courts and sharing responsibilities are likely not achieved swiftly. Cooperation anyhow requires more than one step because it involves at least two interlocutors and it can be assumed that the more frequently the interlocutors take steps to cooperate in a dialogic manner, the smoother the process becomes.

<sup>116</sup> STONE SWEET, *op. cit.*, note 74.

<sup>117</sup> Preamble ECHR.

<sup>118</sup> AHDIEH, *op. cit.*, note 44, at p. 2098; TORRES PÉREZ, *op. cit.*, note 22, at p. 129.

Dialogue should further be based on sufficient and sufficiently clear information and reasoning, communicated in an understandable language.<sup>119</sup> If the Court's judgments are for example not sufficiently clear, this hampers the ability of the domestic courts to engage in a well-reasoned dialogue about the outcome of the judgment or to cooperate with the Court in a dialogic manner. Again, this shows how the prerequisites are interconnected. Further, if domestic courts think Strasbourg has misunderstood a domestic legal concept or disrespected a constitutional tradition, but do not state this clearly in their judgments or do not give persuasive and clear reasons for this, it is hard and unappealing for Strasbourg to make its judgments more balanced in response to their criticism.

## B. FACILITATORS

Once the prerequisites are in place, facilitators can enhance the likelihood and quality of dialogue's occurrence. With regard to the other systems, five facilitators for dialogue were described. These facilitators can also be applied to the Convention system, albeit sometimes in a slightly different manner, adapted to the specific added-value of dialogue for the Convention system or with a different label that fits the Convention system's vocabulary.

### 1. *Subsidiarity principle*

As was noted above, a dynamic distribution of power can help facilitate dialogue between an international and a national court. The subsidiarity principle, one of the founding principles of the Convention system,<sup>120</sup> can be a facilitator in a corresponding manner as it denotes a distribution of power – or of at least responsibilities – between the European Court and the domestic courts. When the principle functions in that manner, it can have the outcome of addressing the knowledge-gap and the unifying-diversity-difficulty. It gives domestic courts, before an application reaches Strasbourg, the power 'to determine questions of the compatibility of domestic law with the Convention', based on their knowledge and with due regard to the characteristics of their legal order.<sup>121</sup> This gives Strasbourg 'the benefit of the views of national courts',<sup>122</sup> which decreases the likeliness that tension over the difficulties causes conflict and increases the likeliness that its judgments are well-balanced, in particular by taking the domestic views expressly into account. When the subsidiarity principle is employed to facilitate dialogue, it can also promote cooperation by contributing to the sharing of responsibilities. Since the principle dictates that domestic courts must pronounce themselves first about a Convention matter, they can fulfil their part of the shared responsibility, namely the primary responsibility for ensuring the Convention rights. At the basis of the attainment of channelling tension and facilitating coop-

<sup>119</sup> GERARDS and FLEUREN, *op. cit.*, note 6, at p. 81.

<sup>120</sup> See also subsection II.A.

<sup>121</sup> Eur. Ct. H.R. (GC), *Burden v. UK*, 29 April 2008, Appl. No. 13378/05, § 42; See Article 35(1) ECHR.

<sup>122</sup> *Ibidem*.

eration in the manner just outlined, can be seen a dialogue: the domestic courts have the opportunity to speak first and the Court has the opportunity to rely on their insights, to approve or disapprove of them and, eventually, to formulate an answer in its judgment.

## 2. Margin of appreciation doctrine

As was explained in subsection III.A, the obligation to implement the Convention under Article 1 ECHR is one of result. The states therefore have discretion when choosing the means of compliance. The margin of appreciation doctrine, which was devised by the Court in *Handyside v. UK*,<sup>123</sup> is a tool for the Court to indeed leave discretion to the states when adjudicating a case. The margin of appreciation afforded to domestic authorities, or, for that matter, courts,<sup>124</sup> delineates the ‘measure of discretions allowed [...] in the manner in which they implement the Convention’s standards’.<sup>125</sup> If the discretion is wide, the Court leaves it largely to the domestic courts to decide on a Convention issue, as it only examines ‘superficially and rather generally’ their decision.<sup>126</sup> This doctrine can be used as a facilitator in a way comparable to the notion of deference used in the other systems. After all, a wide margin applies *inter alia* if the states follow a ‘diversity of [...] practices’,<sup>127</sup> in particular if a case ‘raises sensitive moral or ethical issues’,<sup>128</sup> issues which may stir conflict. The application of a wide margin therefore can be used by the Court to express respect of the knowledge of domestic courts and of, in particular, diversity. Consequently, the tension that may otherwise cause conflict by the difficulties can be usefully directed towards balanced decision-making. The respect shown by the Court may also increase the persuasiveness of its judgments, which can help nourish cooperation by domestic courts.<sup>129</sup> Furthermore, the doctrine already implies that ‘a measure of responsibility for ensuring observance of human rights’ is devolved to domestic courts, meaning that the sharing of responsibilities is also facilitated by the doctrine, which in turn can enhance cooperation.<sup>130</sup> It is clear, therefore, that the margin of appreciation can easily be regarded as an important dialogue facilitator. If a wide margin applies, the Court gives the domestic courts a voice to which it attaches great importance and to which it formulates a deferential response. Indeed, some Strasbourg judges have underlined the dialogic potential of this doctrine by calling it a ‘valuable tool for the interaction’ between national authorities and the Court.<sup>131</sup>

<sup>123</sup> *Op. cit.*, note 62, § 48–49.

<sup>124</sup> Eur. Ct. H.R. (GC), *A. and Others v. UK*, 19 February 2009, Appl. No. 3455/05, § 174.

<sup>125</sup> Y. ARAI-TAKAHASHI, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR*, Antwerp, Intersentia, 2002, at p. 2.

<sup>126</sup> GERARDS and FLEUREN, *op. cit.*, note 6, at p. 29.

<sup>127</sup> Eur. Ct. H.R. (GC), *Lautsi v. Italy*, 18 March 2011, Appl. No. 30814/06, § 61.

<sup>128</sup> Eur. Ct. H.R. (GC), *Hämäläinen v. Finland*, 16 July 2014, Appl. No. 37359/09, § 67.

<sup>129</sup> A.A. OSTROVSKY, “What’s so funny about Peace, Love, and Understanding? How the Margin of Appreciation Doctrine Preserves Core Human Rights within Cultural Diversity and Legitimises International Human Rights Tribunals”, *Hanse L.R.*, vol. 1, n° 1, 2005, p. 47, at p. 59; ARAI-TAKAHASHI, *op. cit.*, note 125, at p. 249.

<sup>130</sup> D. SPIELMANN, “Whither the Margin of Appreciation? (UCL – Current Legal Problems lecture)”, 20 March 2014.

<sup>131</sup> Eur. Ct. H.R. (GC), *Mouvement Raëlien Suisse v. Switzerland*, 13 July 2012, Appl. No. 16354/06, Joint Dissenting Opinion of Judges Sajó, Lazarova Trajkovska and Vučinić.

### 3. *Consensus interpretation*

The facilitator introduced here is reminiscent of the comparative methods of interpretation used by the CJEU. The Court developed the consensus method of interpretation in its case-law as a tool to interpret the Convention. If there is 'general agreement among the majority of [the] Member States [...] about certain rules and principles', a 'rebuttable presumption' ensues 'in favor of the solution adopted by the majority'.<sup>132</sup> This can help the Court show respect for diversity in its judgments, because a lack of consensus usually means that it upholds the lowest common denominator or affords the states a wide margin of appreciation.<sup>133</sup> The tension caused by the unifying-diversity-difficulty is thus channelled towards what domestic courts regard as more balanced-decision making. Regardless of the outcome, establishing (a lack of) consensus can be the result of dialogue because it requires the Court to listen to what, amongst other authorities, various domestic judges have said. These judges can assist 'in demolishing or building a European consensus', by, for example, affording a higher standard of protection than was afforded in a case where the Court found no consensus.<sup>134</sup> Thus, 'the law today is developed through [a] dialogue between judges'.<sup>135</sup> Moreover, if the outcome of the dialogue is that no consensus exists, the Court does not substitute its own interpretation for that of national authorities, giving the latter a decisive voice in the debate about the interpretation of the Convention rights.<sup>136</sup>

Consensus interpretation and the margin of appreciation are connected in the sense that consensus is one, but only one,<sup>137</sup> parameter to determine the appropriate scope of discretion: in the absence of consensus, the margin must be a wide one, and domestic courts are thus given a voice as was outlined above.<sup>138</sup> Nevertheless, these two facilitators are not wholly comparable in the light of dialogue. Consensus interpretation contributes, regardless of the outcome, to dialogue because establishing whether consensus exists requires listening to amongst others domestic courts, whilst the margin of appreciation doctrine in itself only contributes to dialogue when a wide margin applies.

### 4. *Procedural approach*

The Court can also adopt a procedural approach, as it increasingly does in its case-law,<sup>139</sup> in a comparable manner as domestic courts can do in the national consti-

<sup>132</sup> K. DZEHTSIAROU, "European Consensus and the Evolutive Interpretation of the European Convention on Human Rights", *German L.J.*, vol. 12, n° 10, 2011, p. 1730, at p. 1733.

<sup>133</sup> D.J. HARRIS *et al.*, *Law of the European Convention on Human Rights*, 3<sup>rd</sup> edn., Oxford, OUP, 2009, at p. 11.

<sup>134</sup> P. MARTENS, "Perplexity of the National Judge Faced with the Vagaries of European Consensus (Speech at 'Dialogue between Judges' seminar)", 25 January 2008.

<sup>135</sup> *Ibidem*.

<sup>136</sup> GERARDS and FLEUREN, *op. cit.*, note 6, at p. 51.

<sup>137</sup> See for other parameters: M.R. HUTCHINSON, "The Margin of Appreciation Doctrine in the European Court of Human Rights", *I.C.L.Q.*, vol. 48, n° 3, 1999, at p. 640-641.

<sup>138</sup> Eur. Ct. H.R. (GC), *Hämäläinen v. Finland*, 16 July 2014, Appl. No. 37359/09, § 75.

<sup>139</sup> See *e.g.* Eur. Ct. H.R. (GC), *Maurice v. France*, 6 October 2005, Appl. No. 11810/03; Eur. Ct. H.R. (GC), *Hirst v. UK (No. 2)*, 6 October 2005, Appl. No. 74025/01.

tutional system. This approach leads the Court to relocate its focus from ‘the substantive reasons provided by the states in justification of an interference’ to ‘the quality and transparency of the national procedure and judicial remedies’.<sup>140</sup> Because the focus is not on the material right, the interpretation of which may be controversial, but on procedures, which are comparably neutral, the chance that conflict erupts over the tension is attenuated. The approach is also a means to share responsibilities in a way that promotes cooperation, because it is a clear signal to domestic courts that, if they follow certain procedures, the Court does not overturn their decisions lightly. This probably stimulates them to indeed fulfil their primary responsibility and also helps ensure that the Court sticks to its subsidiary role. These fruits of the procedural approach can be enjoyed as the result of what can be characterised as a dialogue. The Court not only takes into consideration, but also relies on domestic judgments and therefore listens to domestic judges, but also scrutinises the procedural standards applied by them, which opens room for a dialogue about these standards.

### 5. Remedial discretion

As explained in relation to the national constitutional setting, the more the course of remedial action is left open, the better a judgment facilitates dialogue. In this light, it is important to recall, as was noted in subsection III.A, that the Court’s judgments are essentially declaratory and impose an obligation of result only.<sup>141</sup> The remedial discretion can be used to stimulate sharing responsibilities, because it makes domestic courts, when relevant, responsible for the execution of a judgment. These courts are thus given the chance to fill in the ‘freedom of choice attached to the primary obligation of the Contracting States under the Convention to secure the rights and freedoms guaranteed’.<sup>142</sup> Since the discretion makes domestic courts responsible for formulating a practical response to the findings made in Strasbourg, it is an incentive for dialogue. This also holds, because, as was noted above, if an international court must rely on domestic courts for execution, it must give them room for their own interpretation and take into consideration their views, or else risk refusals to execute. This may, for example, give domestic courts the leeway to decide whether or not they reopen a case in the face of a violation of Article 6 ECHR or whether they adapt their case-law in the face of a violation that is caused by a line in their case-law that departs from the Court’s case-law.

### C. INSTRUMENTS

After the consideration of both prerequisites and facilitators for Convention dialogue, it is time to explore the final and most tangible building block for

<sup>140</sup> GERARDS and FLEUREN, *op. cit.*, note 6, at p. 52.

<sup>141</sup> See II.A.1.

<sup>142</sup> Eur. Ct. H.R. (GC), *Assanidze v. Georgia*, 8 April 2004, Appl. No. 71503/01, § 202.

Convention dialogue: instruments. Drawing on the pro-dialogic rules introduced above, it is first discussed whether such rules can also be employed in the Convention system. Thereafter, a Convention instrument which can be compared to the EU preliminary reference procedure is introduced. Lastly, the instrument of follow-up cases is put forward. This instrument has not yet been discussed as such, although it was mentioned that domestic courts can ask follow-up questions in the context of the EU preliminary reference procedure.

### 1. *Pro-dialogic rules*

The exhaustion of domestic remedies rule, laid down in Article 35(1) ECHR, can be seen as an instrument for dialogue because it requires the applicant to bring a case to the highest domestic court before he can bring his case to Strasbourg, or else risk an inadmissibility decision. The functioning of the rule therefore ensures that domestic courts have, in line with their primary responsibility, the possibility to remedy a Convention violation prior to Strasbourg's assessment of the complaint. Moreover, when the applicant brings his complaint to Strasbourg, the rule ensures that the highest domestic court has had the opportunity voice its view on the case. The European Court can therefore rely on this view when dealing with the case. Considering the foregoing, the rule is an 'important aspect' of the subsidiarity principle.<sup>143</sup>

Another ground (Article 35(3)(a) ECHR) for inadmissibility is that an application is manifestly ill-founded. The Court can use and has already used this inadmissibility ground as a pro-dialogic rule by declaring an application inadmissible on this ground because 'there is nothing to suggest that the decision-making process leading to the impugned measures by the domestic court was unfair or failed to involve the applicant to a degree sufficient to protect his interests'.<sup>144</sup> It has also declared an application inadmissible on that ground because the conclusions drawn by the domestic courts did not 'disclose any apparent arbitrariness, capable of raising [Convention] issues'.<sup>145</sup> Indeed, the Brighton Declaration affirmed that 'an application should be regarded as manifestly ill-founded [...] to the extent [...] that the application raises a complaint that has been duly considered by a domestic court applying the rights guaranteed by the Convention in light of well-established case law of the Court'.<sup>146</sup> The proposed dialogic rule prevents the Court from intervening in the decision-making by domestic courts too easily and therefore from potentially overturning their views, something which may cause tension.

<sup>143</sup> Eur. Ct. H.R. (GC), *Selmouni v. France*, 28 July 1999, Appl. No. 25803/94, § 74.

<sup>144</sup> Eur. Ct. H.R. (4<sup>th</sup> section), *Tiemann v. France and Germany*, 27 April 2000, Appl. No. 47457/99 and 47458/99 (decision).

<sup>145</sup> Eur. Ct. H.R. (4<sup>th</sup> section), *Fryckman and Fryckman-Yhtiö Oy v. Finland*, 15 November 2005, Appl. No. 36288/97 (decision); See also Eur. Ct. H.R. (1<sup>st</sup> section), *Carriero v. Italy*, 10 April 2003, Appl. No. 39767/98 (decision).

<sup>146</sup> Brighton Declaration, *op. cit.*, note 1, § 15(d); The Declaration encourages in the same paragraph 'the Court to have regard to the need to take a strict and consistent approach in declaring such applications inadmissible, clarifying its case law to this effect as necessary'.

Another pro-dialogic rule to which the Court can adhere is a manifestation of two facilitators: the procedural approach and the margin of appreciation doctrine. The rule brings to mind the procedural rules of the US Supreme Court. It is the rule, which the Court sometimes already formulates, that it requires 'strong reasons to substitute its own view' for that of domestic courts, provided these courts have undertaken a sufficient and precise balancing exercise in conformity with the criteria in its case-law.<sup>147</sup> The right to freedom of expression and the right to respect for private life can, for example, be the subject of such a balancing exercise. This rule restrains the Court from finding a violation when the reasoning of a domestic court is of sufficient quality, even if it could have reached a different conclusion would it have undertaken the balancing exercise itself.

The last pro-dialogic rule outlined here concerns the scope of the case before the Court. The Court has adopted the rule in some judgments that the arguments put to it by the respondent government must be 'on the same lines' as those which were put before domestic courts. This rule estops the government from putting 'to the Court arguments which are inconsistent with the position they adopted before the national courts'.<sup>148</sup> This rule can be seen as an instrument for dialogue, because in the absence of the rule's existence, it would be rather difficult for the Court to rely on the views of domestic courts, because the latter would not be given the opportunity to respond to the arguments of the government.

The first and the last pro-dialogic rule have in common that they ensure that domestic courts can voice their opinion on a case, which also means that the Court can listen to that opinion. This gives domestic courts the opportunity to fulfil their part of the shared responsibility, something which contributes to cooperation, and to express any concerns in connection with the difficulties, which can help channel tension towards improved decision-making by the Court. The other two rules share the characteristic that they can prevent the Court from substituting its own view for that of domestic courts. This is dialogic because the voice of domestic courts is given great importance and because there is still room for a response by the European Court, as it only respects their voice after it has checked that the domestic court has fulfilled certain criteria. A cooperative process can be seen and tension is prevented from developing.

## 2. *Advisory opinions*

Optional Protocol 16 will empower, upon its entry into force,<sup>149</sup> the highest domestic courts to seek an advisory opinion of the Court on 'questions of principle relating to the interpretation or application' of the Convention rights in

<sup>147</sup> See e.g. Eur. Ct. H.R. (4<sup>th</sup> section), *MGN Limited v. UK*, 18 January 2011, Appl. No. 39401/04 (final since 18 April 2011), § 150; Eur. Ct. H.R. (GC), *Von Hannover v. Germany (no. 2)*, 7 February 2012, Appl. No. 40660/08 and 60641/08, § 107.

<sup>148</sup> *A. and Others v. UK*, *op. cit.*, note 124, § 154.

<sup>149</sup> Protocol 16 enters after ten ratifications (Article 8(1) Protocol 16).

the context of a domestic case.<sup>150</sup> This mechanism has been compared with the preliminary reference procedure before the CJEU.<sup>151</sup> Various features of the instrument, as well as the instrument as such, intend to ‘further enhance the interaction between the Court and national authorities’.<sup>152</sup> To illustrate, the Panel deciding on the request for an opinion must reason a refusal<sup>153</sup> in order to ‘reinforce dialogue’.<sup>154</sup>

The procedure potentially stimulates cooperation through the sharing of responsibilities as it emphasises ‘the national court’s role in supervising compliance with the Convention’<sup>155</sup> and aims to ‘reinforce implementation of the Convention, in accordance with the principle of subsidiarity’.<sup>156</sup> Cooperation is furthermore stimulated by the non-coercive nature of the procedure. As their name indicates, the opinions are advisory, not binding;<sup>157</sup> they give guidance, no dictates.<sup>158</sup> The requesting court therefore ‘decides on the effects of the [opinion] in the domestic proceedings’.<sup>159</sup> In addition to cooperation, this opens the possibility for the domestic court to not follow the opinion entirely for reasons connected to the unifying-diversity and the knowledge-gap-difficulty. If it clearly explains its reasons for not doing so and if the applicant subsequently brings the case to Strasbourg, the European Court can respond to the reasons of the domestic court for declining to follow its guidance. If this means it departs in the judgment from the view expressed in the opinion, the tension is clearly channelled towards more balanced decision-making and directed away from conflict. The opinions can also help prevent tension and therefore conflict altogether if the domestic court follows the guidance given in the advisory opinion. If the applicant nevertheless brings a case, the Court declares his case inadmissible in a decision and does therefore not issue a potentially conflict causing judgment.<sup>160</sup> Another way to address tension by way of an opinion is for the domestic courts to ‘express its specific concerns’ in a request for an advisory opinion.<sup>161</sup> Indeed, it must state in the request ‘its own views on the question, including any analysis it may itself have made of the question’.<sup>162</sup> If the Court takes these concerns into consideration, tension leads to balanced decision-making rather than conflict.<sup>163</sup>

<sup>150</sup> Article 1(1-2) Protocol 16.

<sup>151</sup> See GRAGL, *op. cit.*, note 5.

<sup>152</sup> Preamble Protocol 16.

<sup>153</sup> Article 2(1) Protocol 16.

<sup>154</sup> Explanatory Report to Protocol 16, § 15.

<sup>155</sup> J.-P. JACQUÉ, “Preliminary References to the European Court of Human Rights (Speech at ‘Dialogue between Judges’ seminar)”, 27 January 2012.

<sup>156</sup> Preamble Protocol 16; See also Eur. Ct. H.R., “Reflection Paper on the Proposal to Extend the Court’s Advisory Jurisdiction”, 2013, § 2.

<sup>157</sup> Article 5 Protocol 16 ECHR.

<sup>158</sup> Explanatory Report to Protocol 16, § 11.

<sup>159</sup> *Ibidem*, § 25.

<sup>160</sup> *Ibidem*, § 26.

<sup>161</sup> JACQUÉ, *op. cit.*, note 155.

<sup>162</sup> Explanatory Report to Protocol 16, § 12.

<sup>163</sup> See criticism of the procedure K. DZEHTSIAROU and N. O’MEARA, “Advisory Jurisdiction and the European Court of Human Rights: a Magic Bullet for Dialogue and Docket-control?”, *Legal Studies*, vol. 34, n° 3, 2014, p. 444.

### 3. Follow-up judgments

Follow-up cases are the last possible instrument for Convention dialogue discussed here. This instrument was not discussed with regard to the other systems, simply because it was not encountered in the author's literature review as such. Applicants currently sometimes bring a follow-up case to complain about the measures taken to execute another Strasbourg judgment or lack thereof.<sup>164</sup> These execution measures can be individual, only changing the applicant's situation, or general, taking the form of a change in practice, case-law or legislation. Domestic courts can, for example, take the individual measure of reopening a domestic case in the face of a violation of Article 6 ECHR or they can take the general measure of changing their own case-law, because domestic case-law caused the violation established by the Court. If the execution measure complained of is of a general nature, the pool of potential applicants who can bring the follow-up case is clearly larger than in case of an individual measure. In the follow-up case, the Court can assess the execution measures adopted by domestic courts or their refusal to do so.

A follow-up case can also materialise in the course of the referral procedure. Both parties can request that a case, decided by a chamber, be referred to the Grand Chamber. A five-judge Panel decides on the request and accepts it if the case raises a serious question affecting the interpretation or application of the Convention or a serious issue of general importance.<sup>165</sup> In between the issuing of a chamber and the Grand Chamber judgment, the possibility arises for a domestic court to react to the chamber judgment, provided a suitable case is brought before it. To this, the Grand Chamber can react in its judgment, which can be called a follow-up judgment, as it follows up to the reaction of the domestic court. The Panel deciding on the request can make room for this by postponing its decision until an upcoming relevant domestic judgment is issued.

Follow-up judgments provide room for dialogue when domestic courts decide to not execute the Strasbourg judgment or execute it in a minimalist manner or criticise a chamber judgment. Provided they give persuasive reasons for this relating to the unifying-diversity or knowledge-gap-difficulty, the Strasbourg Court may in the light of the fresh domestic judgment reassess the approach which it adopted previously in the follow-up judgment. If this reassessment means it changes its approach, the difficulties stimulate balanced decision-making and the tension is attenuated. Even if Strasbourg does not change its approach, the reaffirmation of its approach in the light of a new domestic judgement can make its follow-up judgment more balanced because it can take into consideration and respond to the reluctance and criticism of domestic courts.

<sup>164</sup> E.g. Eur. Ct. H.R. (GC), *Demopoulos and Others v. Turkey*, 1 March 2010, Appl. No. 46113/99 and others; *Von Hannover v. Germany* (no. 2), *op. cit.*, note 147; Eur. Ct. H.R. (GC), *Chabauty v. France*, 4 October 2012, Appl. No. 57412/08.

<sup>165</sup> Article 43 ECHR; Rules of Court, Rule 73.

## VI. Conclusion

The above discussion has given some insight into how dialogue in the Convention system can be achieved by various means, divided into prerequisites, facilitators and instruments. The discussion benefited from the outline given of means for dialogue in systems other than the Convention system; all these means could be applied to the Convention system, albeit sometimes in a modified manner.

The discussion of prerequisites demonstrates that dialogue in the Convention system cannot be taken as a given. When the six prerequisites introduced here are not fulfilled, it is unlikely that dialogue develops and that, even if it develops, it will have the added-value which this article proposed it potentially has. Therefore, those using the buzzword 'dialogue' should wonder whether the prerequisites are fulfilled, as well as think of how the facilitators and instruments can make a valuable contribution to the Convention system by way of dialogue. Those who speak of Convention dialogue enthusiastically may sometimes overlook this important matter. It can be rather useless to employ dialogic instruments, for example, even though only different viewpoints exist, but not a common ground of understanding. In this situation, there is no basis for transcending the differences and for developing a dialogue based on persuasive authority. Rather, dialogue then may result in a deadlock. As another example, if domestic courts would not engage in a clear manner in dialogue in the process of a follow-up case and if the European Court, due to the lack of clarity, does not respond to their concerns, domestic courts may feel unheard, which can cause tension. As these examples illustrate, it is important to give thought to the prerequisites, because this can help prevent dialogue from having unwanted and perhaps even harmful consequences for the Convention system.

The facilitators outlined above show that that some characteristic principles, doctrines and methods which are already relied upon by the Court can function to stimulate cooperation and channel tension in a dialogic manner. The same holds for the pro-dialogic rules. Engaging in dialogue is therefore something that should come natural to the Court. Nevertheless, the facilitators mainly can stimulate the Court to listen to the voice of domestic courts and to attach a certain importance to their views, but they do not give the courts a direct means to address the Court.

Two instruments, namely advisory opinions and follow-up judgments, do give more direct means for domestic courts to engage in dialogue. They create the possibility for them to respond to a judgment or opinion of the Court and, in turn, the for Court to formulate an answer to their response. Although follow-up cases can be beneficial to dialogue directly and meaningfully, whether domestic courts can employ these instruments for this purpose largely depends on circumstances beyond their control. For a follow-up case to appear before the Court, the domestic court depends on an applicant willing to complain about measure (not) taken to execute a European judgment, not only up to the highest domestic court, but also in Strasbourg. Further, in case of referral, which can lead to a

Grand Chamber follow-up judgment, it is for the government to make a request. Additionally, the circumstances should be so fortunate that someone brings a case before a domestic court which allows it to comment on a chamber judgment before that judgment is supplanted by a Grand Chamber judgment. Furthermore, the pro-dialogic rules can only be applied by the European Court, not by domestic courts directly. These observations underline the great relevance of Protocol 16 for dialogue, as the advisory opinions give domestic judges the possibility to directly enter into a dialogue with the European Court without having to rely on others. However, one limitation still applies as Protocol 16 is optional and because the government determines which courts can submit a request for an opinion.<sup>166</sup> Since Protocol 16 was opened for signature on 2 October 2013, sixteen states have signed the document.<sup>167</sup> Their number is sufficient for the Protocol's entry-into-force once they have also ratified it,<sup>168</sup> but still limited compared to the total number of 47 states parties. This can be problematic in the light of the prerequisite of ability. When only a minority of domestic courts is able to engage in dialogue by way of this instrument, the possibility materialises that the minority imposes its views on a majority of inactive courts,<sup>169</sup> something which may cause tension over the unifying diversity difficulty rather than address it.

The discussion of means for Convention dialogue has been a discussion of possibilities. Although these possibilities have their roots in the Convention and the Court's case-law, it was not verified whether the prerequisites are fulfilled in practice and whether the proposed facilitators and instruments are already applied in the dialogic manner proposed. Indeed, this approach is in line with the aim of the article, which was not to describe how dialogue takes place *in practice*, but to give insight into how it *can* take place. The description of whether and how dialogue takes place in practice can be the subject of future research.

More generally, this article has resulted in the conclusion that dialogue can be of added-value to the Convention system due to its potential to stimulate cooperation and channel the tension that is inherent to the system. This conclusion was built on *inter alia* how others have developed and applied the concept of dialogue in relation to the national and the EU system and to transjudicial communication and on the particular features of the Convention system. Cooperation is stimulated because dialogue relies on persuasiveness rather than on coercion and because it can help share responsibilities. The tension that is caused by the unifying-diversity and the knowledge-gap difficulties is moved away by means of dialogue from potential conflict towards increasingly balanced decision-making. In order for these advantages of dialogue to materialise, different means can be employed. It has been explained in this article that certain prerequisites must be met and that dialogue can be attained by various facilitators and instruments.

<sup>166</sup> Article 10 Protocol 16.

<sup>167</sup> Numbers based on the information available on the website of the CoE Treaty Office on 11 May 2015; Two states have also already ratified the document.

<sup>168</sup> Article 8(1) Protocol 16.

<sup>169</sup> CARTABIA, *op. cit.*, note 27, at p. 39.

Now that it has been clarified why dialogue can be of added-value, it is hoped that the prerequisites will be fulfilled and that the facilitators and instruments discussed here will be employed to generate Convention dialogue.

**Lize R. Glas**

is a PhD candidate, Department of International and European Law, Raboud University. The author writes a PhD thesis on the dialogic potential and function of Convention-related procedures, such as, the pilot judgment procedure and various procedures relating to the execution of the Court's judgments. The author can be reached at: [l.glas@jur.ru.nl](mailto:l.glas@jur.ru.nl).