Preliminary Rulings in Human Rights Cases

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The purpose of this discussion is to investigate briefly whether a preliminary ruling procedure in human rights cases is a timely or feasible alternative as an addition to the remedies available under the European Human Rights Convention. Other human rights instruments will not be considered.

I. The concept

The term “preliminary ruling” may be defined as a ruling of a particular court relating to a part of an unadjudicated matter in controversy, referred to it by another court, originating in an action (here referred to as the “main action”) which is pending before the latter court. It is assumed that the main action will be suspended while the preliminary ruling procedure takes place. Thus, the definition requires that a preliminary ruling be made with respect to only a part of the matter in controversy before a particular court. The action of referring the entire matter in controversy to a superior court would better be described as an appeal. This would also be the case if only questions of law were referred to a superior court, and questions of fact excluded. The part of an action on which a preliminary ruling is sought must furthermore be unadjudicated. If a matter in controversy is divided into two issues and one of them is resolved first by judgement, e.g. if in an action for damages the question of liability is resolved first and the amount of damages determined later, the procedure does not involve a preliminary ruling but rather an appeal, as the court of lower instance has rendered judgement on a certain part of the main action.

The most practical example of preliminary ruling is when such a ruling is sought in order to have a provision of law interpreted, while the court seeking the ruling decides further, in the given case, how the provision in question is to be applied and decides in other respects what facts are to be viewed as proven in the main action. Preliminary rulings as we now know them are usually binding on the court requesting them. This feature can not be regarded as a part of the definition here.

Preliminary rulings are provided for by the national laws of many member States of the European Community, e.g. in relations between civil or criminal
courts on the one hand and administrative tribunals on the other. The principle furthermore applies, e.g. in Germany and Italy, that the ordinary courts sometimes may and sometimes must apply to the constitutional courts of those countries for preliminary rulings with regard to issues brought up in actions involving constitutional questions.

More examples of this nature may be quoted, but this suffices to demonstrate that preliminary rulings under European Community law are not unique.

II. Preliminary rulings in practice

The most widely known example of preliminary rulings in international law is found in article 177 of the Treaty establishing the European Economic Community (cf. article 150 of the European Atomic Energy Community Treaty and article 41 of the European Coal and Steel Community Treaty.) According to this provision it is a principle of Community law that the highest appellate courts in the member States of the Community are to request preliminary rulings of the Community Court in certain circumstances, but in the lower courts this is an option, but not mandatory. This option or duty, as the case may be, depends on whether the interpretation of primary Community law or interpretation of secondary Community law is at issue in the main action, and whether a decision on that issue is necessary to enable the court or tribunal to give judgment in the main action. The court in question evaluates the necessity for this procedure. The parties may request that an issue be submitted to a preliminary ruling, but such a request can never be binding on the court, and the value of providing for such requests may furthermore be questioned. This provision on preliminary ruling procedure is of great importance for the harmonious application of Community law. The main legal effect of a preliminary ruling is that the court which requested the ruling is bound by the conclusion of the Community Court as regards the substance of the ruling. On the other hand the competent court of the member State concerned will adjudge the matter of the main action in other respects, i.e. on points of fact, and, if applicable, it will decide in further detail whether or to what extent the substance of the rule interpreted by the Community Court pertains to the matter in dispute. In the course of a preliminary ruling procedure the court of the Community is not giving judgement in the main action, but rather it is performing an abstract interpretation of the question referred to it.

III. The purpose of preliminary rulings

The purpose of preliminary rulings in international law is first and foremost to ensure harmonized interpretation and application of certain provisions of law. This is also the purpose of the various traditional judicial remedies, i.e. to