

CONTENTS

Acknowledgements v

List of Abbreviations xix

Chapter I

Introduction

1	An Example of Dialogue: The Hearsay Saga	1
2	Dialogue	3
3	This Research	4
	3.1 Relevance	5
	3.2 Research Questions	7
	3.3 Method	8
	3.4 Delineation – A Working Definition of ‘Convention Dialogue’	9
4	Outline	10

Part 1

Chapter II

A Characterisation of the Convention System

1	The Establishment of the Convention System	15
	1.1 Unity and Human Rights	15
	1.2 Drafting the Convention	17
2	The Functioning of the Convention System	18
	2.1 The Object and Purpose	18
	2.2 Interlocutors	20
	2.2.1 States Parties	20
	2.2.2 The Court	20
	2.2.3 The Committee	21
	2.2.4 The Assembly	22
	2.2.5 The Commissioner	23
2.3	The Principle of Subsidiarity	24
	2.3.1 Background	24
	2.3.2 Role of the Court and the States Parties	25
	2.3.3 Manifestations	27

2.4	The Principle of Effectiveness	28
2.4.1	Background	29
2.4.2	Role of the Court and the States Parties	30
2.4.3	Manifestations	30
3	The Convention System in Development	33
3.1	The Achievements of the Convention System	34
3.2	An Expanded Catalogue of Rights and an Increased Scope of Protection	35
3.3	The Confirmation of the Right to Individual Petition	36
3.4	Enlargement: From 13 to 47 States Parties	37
3.5	The Increased Workload	38
3.6	The Changed Subject Matter of the Court's Judgments	40
3.6.1	Grave and Widespread Violations	41
3.6.2	Transitional Violations	43
3.6.3	Repetitive Violations	44
3.7	Implementation and Execution Problems	45
3.8	Legitimacy Questions	48
3.9	The Essence of the Developments	52
4	The Convention System under Reform	52
4.1	Protocol 11	53
4.2	Protocol 14	54
4.3	Questioning the Object and Purpose of the Convention System	55
4.4	Protocols 15 and 16 and Beyond	58
4.5	The Essence of the Reform	61
5	A Characterisation of the Convention System	61
5.1	The Functioning of the Interlocutors	61
5.1.1	States Parties	61
5.1.2	The Court	62
5.1.3	The Committee	65
5.2	The Characteristics of the Convention System	65
5.2.1	Internal and External Tension	65
5.2.2	Sharing Responsibilities	66
5.2.3	Interconnectedness between National and European level	66
5.2.4	Diversity	66
5.2.5	Lack of Final Power	67

Chapter III

A Characterisation of Dialogue

1	Dialogue as a Descriptive and Normative Tool	70
1.1	In National Constitutional Settings	70
1.1.1	Background	70
1.1.2	Dialogue as a Descriptive Tool	71
1.1.3	Dialogue as a Normative Tool	72

1.1.4	Implications of Dialogue	75
1.1.5	Dialogue and Deference	76
1.1.6	Dialogue in a Broader Perspective	77
1.2	In the EU	78
1.2.1	Background	79
1.2.2	Dialogue as a Descriptive Tool	79
1.2.3	Dialogue as a Normative Tool	80
1.3	In Transjudicial Communication	81
1.3.1	Background	81
1.3.2	Dialogue as a Descriptive Tool	82
1.3.3	Dialogue as a Normative Tool	84
1.3.4	Dialogue and Dialectical Review	85
1.4	Comments	86
2	Dialogue Prerequisites, Facilitators and Instruments	89
2.1	Prerequisites	89
2.1.1	Willingness	89
2.1.2	Different Viewpoints	90
2.1.3	Common Ground of Understanding	91
2.1.4	Time	92
2.2	Facilitators	92
2.2.1	Dynamic Distribution of Power	92
2.2.2	Deference	93
2.2.3	Comparative Methods of Interpretation	94
2.2.4	Procedural Approach	94
2.2.5	Remedial Discretion	95
2.3	Instruments	99
2.3.1	Pro-dialogic Rules	99
2.3.2	Requests for a Ruling	101
2.4	Comments	103

Chapter IV

The Convention System and Dialogue

1	The Necessity of Cooperation	107
1.1	Lack of Coercive Means to Compel Convention Implementation	108
1.2	Sharing Responsibilities	108
2	Internal Tension	109
2.1	Sources	109
2.1.1	Countermajoritarian Difficulty	110
2.1.2	Knowledge Gap Difficulty	110
2.1.3	Unifying Diversity Difficulty	111
2.2	The Risk of Conflict and Decreased Effectiveness	111
2.3	The Preventability of Conflict	113
2.4	Internal Tension as a Positive Good	114

2.5	The Potential of the Convention System to Channel Internal Tension away from Conflict	115
2.6	The Ever-present Possibility of Conflict	117
2.7	The Characteristics of Internal Tension	121
3	External Tension	122
3.1	Sources	122
3.1.1	Need for Long-term Change	122
3.1.2	Limited Usefulness of Increasing Coercion and Power	123
3.2	Decreased Effectiveness	124
3.3	The Eliminability of External Tension	125
3.4	External Tension Reinforcing Internal Tension	125
3.5	The Characteristics of External Tension	126
4	The Added Value of Dialogue in the Convention System	127
4.1	The Notion of Dialogue	128
4.1.1	As Used for Other Systems	128
4.1.2	As Used for the Convention System	129
4.1.3	Appropriateness of the Notion	133
4.2	The Added Value	134
4.2.1	Preliminary Observations	134
4.2.2	Observations on the Added Value	137
4.3	The Possible Functioning of Dialogue	139
4.3.1	Cooperation	140
4.3.2	Internal Tension	140
4.3.3	External Tension	141
4.4	Prerequisites for Convention Dialogue	142
4.4.1	Ability and Willingness	143
4.4.2	Different Viewpoints and a Common Ground of Understanding	145
4.4.3	Time and Clarity	147
5	Researching Dialogue in the Convention System	147
5.1	Hypotheses	148
5.2	The Research Questions of Part 2 and Part 3	149
5.3	Procedures of Interest	149
5.3.1	Why Procedures?	149
5.3.2	What are Procedures?	150
5.3.3	Which Procedures?	151
5.4	A Definition of Dialogue	153
5.5	Indicators of Dialogue	154
5.5.1	Indicator 1: Procedural Opportunities for Involvement of All Relevant Interlocutors	155
5.5.2	Indicator 2: Sharing Responsibilities	157
5.5.3	Indicator 3: Mutual Understanding	159
5.5.4	Indicator 4: Balanced Decision-making	160
5.5.5	Indicator 5: Reason-giving	161

5.5.6	Indicator 6: Room for a Response	164
5.5.7	Indicator 7: Preventing, Mitigating and Ending Conflict	166
5.6	Applying the Indicators of Dialogue	167
5.6.1	Paper: The Dialogic Potential	167
5.6.2	Practice: The Dialogicness	169

Part 2

Chapter V

The Dialogic Potential of Procedures in the (Pre-)Merits Phase

1	Introduction to the (Pre-)Merits Phase and its Procedures	173
1.1	Communication	175
1.2	Interim Measures	175
1.3	Article 37 Strike-out Procedures Generally	177
1.3.1	Friendly Settlements	178
1.3.2	Article 37(1)(b) Strike-out Decisions	178
1.3.3	Unilateral Declarations	179
1.3.4	Article 37(1)(c) Strike-out Decisions	180
1.4	Hearings	180
1.5	Relinquishment	180
1.6	Third-party Interventions	181
1.7	Investigations	181
1.8	Judgments	182
1.9	Referral	182
2	Applying the Indicators of Dialogue	183
2.1	Indicator 1: Procedural Opportunities for Involvement of All Relevant Interlocutors	183
2.2	Indicator 2: Sharing Responsibilities	188
2.3	Indicator 3: Mutual Understanding	191
2.4	Indicator 4: Balanced Decision-making	193
2.5	Indicator 5: Reason-giving	195
2.6	Indicator 6: Room for a Response	198
2.7	Indicator 7: Preventing, Mitigating and Ending Conflict	200
3	Conclusion: The Dialogic Potential of Procedures in the (Pre-)Merits Phase	202

Chapter VI

The Dialogic Potential of Procedures in the Execution Phase

1	Introduction to the Execution Phase and Its Procedures	207
1.1	Article 41-awards	211
1.2	Action Plans/Reports	212
1.3	DH Meetings	213
1.4	Bi- and Multilateral Meetings	213
1.5	Requests for Interpretation	214

1.6	Infringement Proceedings	215
1.7	Assembly Questions and Recommendations	216
1.8	Commissioner Country Visits and Reports	218
1.9	Decisions and Interim Resolutions	218
1.10	Final Resolutions	219
1.11	Individual Follow-up Cases	219
1.12	General Follow-up Cases	220
2	Applying the Indicators of Dialogue	220
2.1	Indicator 1: Procedural Opportunities for Involvement of All Relevant Interlocutors	220
2.2	Indicator 2: Sharing Responsibilities	224
2.3	Indicator 3: Mutual Understanding	227
2.4	Indicator 4: Balanced Decision-making	229
2.5	Indicator 5: Reason-giving	231
2.6	Indicator 6: Room for a Response	234
2.7	Indicator 7: Preventing, Mitigating and Ending Conflict	236
3	Conclusion: The Dialogic Potential of Procedures in the Execution Phase	239

Chapter VII

The Dialogic Potential of the Pilot-judgment Procedure

1	Introduction to the Pilot-judgment Procedure	243
1.1	Run-up to the Pilot Judgment	244
1.2	Content of the Pilot Judgment	245
1.3	After the Pilot Judgment	245
2	Applying the Indicators of Dialogue	246
2.1	Indicator 1: Procedural Opportunities for Involvement of All Relevant Interlocutors	246
2.1.1	The Court	246
2.1.2	The Respondent State	247
2.1.3	The Committee	248
2.2	Indicator 2: Sharing Responsibilities	248
2.2.1	Court – Respondent State	248
2.2.2	Court – Committee	250
2.3	Indicator 3: Mutual Understanding	250
2.4	Indicator 4: Balanced Decision-making	251
2.5	Indicator 5: Reason-giving	252
2.6	Indicator 6: Room for a Response	252
2.7	Indicator 7: Preventing, Mitigating and Ending Conflict	253
3	Conclusion: The Dialogic Potential of the Pilot-judgment Procedure	254

Chapter VIII

Conclusions: The Dialogic Potential of Convention-related Procedures

1	Indicator 1: Procedural Opportunities for Involvement of All Interlocutors	255
2	Indicator 2: Sharing Responsibilities	257

3	Indicator 3: Mutual Understanding	257
4	Indicator 4: Balanced Decision-making	258
5	Indicator 5: Reason-giving	259
6	Indicator 6: Room for a Response	260
7	Indicator 7: Preventing, Mitigating and Ending Conflict	261
8	Overview of the Findings per Procedure	261

Part 3

Chapter IX

The Dialogicness of Procedures in the (Pre-)Merits Phase

1	The Functioning of the Procedures in Practice	265
1.1	Communication	265
1.1.1	Methodology	265
1.1.2	Contacts Prior to and After Communication	266
1.1.3	The Court's Questions	267
1.1.4	The Respondent State's Observations	271
1.2	Friendly Settlements	275
1.2.1	Frequency and Areas of Use	275
1.2.2	Reasons (not) to Settle	276
1.2.3	The Court Placing Itself at the Disposal of the Parties	278
1.2.4	Terms of Friendly Settlements	281
1.2.5	The Human Rights Condition	281
1.2.6	Restoral of Application	282
1.3	Article 37(1)(b) Strike-out Decisions	283
1.3.1	Frequency and Areas of Use	283
1.3.2	Initiative	284
1.3.3	The Human Rights Condition and other Criteria	284
1.3.4	Decision or Judgment; Award of Costs; Restoral of Application	286
1.4	Unilateral Declarations	287
1.4.1	Frequency and Areas of Use	287
1.4.2	Reasons to (not) Issue a Unilateral Declaration	288
1.4.3	The Human Rights Condition and other Criteria	289
1.4.4	Extra Message from the Court	295
1.4.5	Decision or Judgment; Award of Costs; Restoral of Application	296
1.5	Article 37(1)(c) Strike-out Decisions	297
1.5.1	Frequency and Areas of Use	297
1.5.2	The Human Rights Condition	299
1.5.3	Decision or Judgment; Award of Costs; Restoral of an Application	300
1.6	Hearings	300

Contents

1.6.1	Methodology	301
1.6.2	Frequency and Areas of Use	301
1.6.3	Initiative	304
1.6.4	Reasons for Holding a Hearing	304
1.6.5	The Court's Questions	306
1.6.6	The Respondent State's Observations	307
1.6.7	Third-parties' Observations	309
1.7	Third-party Interventions	311
1.7.1	Methodology	311
1.7.2	State Article 36(1) Interventions	311
1.7.3	State Article 36(2) Interventions	313
1.7.4	The Commissioner's Interventions	318
1.7.5	The Assembly's Interventions	319
1.8	Judgments	320
1.8.1	Reliance on Others for the Facts	320
1.8.2	Reliance on Others for the Merits	322
1.8.3	Reasoning	330
1.8.4	Scope	336
1.8.5	Separate Opinions	339
1.9	Referral	344
1.9.1	Frequency and Areas of Use	344
1.9.2	Reasons for Submitting a Request	345
1.9.3	Reasons for (not) Accepting a Request	346
1.9.4	Scope of a Case before the Grand Chamber	349
1.9.5	Chamber and Grand Chamber Judgments Compared	350
2	Applying the Indicators of Dialogue	354
2.1	Indicator 1: Procedural Opportunities for Involvement of All Relevant Interlocutors	355
2.2	Indicator 2: Sharing Responsibilities	359
2.3	Indicator 3: Mutual Understanding	361
2.4	Indicator 4: Balanced Decision-making	363
2.5	Indicator 5: Reason-giving	365
2.6	Indicator 6: Room for a Response	367
2.7	Indicator 7: Preventing, Mitigating and Ending Conflict	369
3	Conclusion: The Dialogicness of Procedures in the (Pre-)Merits Phase	370

Chapter X

The Dialogicness of Procedures in the Execution Phase

1	Introduction to the Practice of the Execution	375
1.1	The Secretariat	375
1.2	The Execution Department	376
1.3	Outline of Certain Aspects of the Supervisory Process	378
1.3.1	Procedure	378
1.3.2	Grouping Cases Together	379

1.3.3	Standards for Evaluation	380
1.3.4	Sources for Evaluation	380
2	The Functioning of the Procedures in Practice	383
2.1	Article 46-indications	383
2.1.1	Frequency and Areas of Use	385
2.1.2	Reasons to Make an Article 46-indication	387
2.1.3	Content	389
2.1.4	Place of the Indication	391
2.1.5	Effects of the Indication	392
2.2	Action Plans/Reports	393
2.2.1	Methodology	393
2.2.2	Submissions	394
2.2.3	Content	395
2.2.4	Quality	398
2.3	DH Meetings	399
2.3.1	Frequency	399
2.3.2	Preparation	399
2.3.3	Selection	400
2.3.4	Attendees	402
2.3.5	The Meeting	403
2.4	Bi- and Multilateral Meetings	410
2.4.1	Frequency	410
2.4.2	Preparation	411
2.4.3	Attendees	411
2.4.4	Bilateral Meetings	412
2.4.5	Multilateral Meetings	413
2.5	Requests for Interpretation	413
2.6	Infringement Proceedings	414
2.7	Assembly Questions and Recommendations	416
2.7.1	Methodology	419
2.7.2	Frequency	419
2.7.3	Content of the Questions	420
2.7.4	The Committee's Reply to Questions	421
2.7.5	Influence of the Questions	422
2.7.6	Content of the Recommendations	423
2.7.7	Content of the Reports	425
2.7.8	The Committee's Reply to Recommendations	427
2.7.9	Influence of the Recommendations	428
2.8	Commissioner Country Visits and Reports	429
2.8.1	Frequency and Areas of use	429
2.8.2	Content	431
2.9	Decisions and Interim Resolutions	435
2.9.1	Methodology	435
2.9.2	Frequency	435

Contents

2.9.3	Preparation	436
2.9.4	Content	437
2.10	Individual Follow-up Cases	441
2.10.1	Frequency and Areas of Use	441
2.10.2	Conditions	442
2.10.3	Content	443
2.10.4	Role of the Interlocutors	446
2.10.5	The Committee's Reliance on Individual Follow-up Judgments	448
2.11	General Follow-up Cases	449
2.11.1	Frequency and Areas of Use	452
2.11.2	Content	452
2.11.3	The Committee's Reliance on General Follow-up Judgments	454
3	Applying the Indicators of Dialogue	455
3.1	Indicator 1: Procedural Opportunities for Involvement of All Relevant Interlocutors	456
3.2	Indicator 2: Sharing Responsibilities	458
3.3	Indicator 3: Mutual Understanding	462
3.4	Indicator 4: Balanced Decision-making	465
3.5	Indicator 5: Reason-giving	466
3.6	Indicator 6: Room for a Response	468
3.7	Indicator 7: Preventing, Mitigating and Ending Conflict	470
4	Conclusion: The Dialogicness of Procedures in the Execution Phase	472

Chapter XI

The Dialogicness of the Pilot-judgment Procedure

1	The Functioning of the Pilot-judgment Procedure in Practice	475
1.1	Methodology	475
1.2	Frequency and Areas of Use	476
1.3	Run-up to the Pilot Judgment	476
1.3.1	Initiative	476
1.3.2	Views of the Parties	477
1.3.3	Conditions for Applying the Pilot-judgment Procedure	479
1.4	Content of the Pilot Judgment	482
1.4.1	The Nature of the Problem	483
1.4.2	Remedial Measures	484
1.4.3	Ongoing Reform	489
1.4.4	Time Limit	490
1.4.5	Just Satisfaction	490
1.4.6	Similar Applications	491
1.5	After the Pilot Judgment	493
1.5.1	The Court's Involvement	493
1.5.2	The Committee's Involvement	502
2	Applying the Indicators of Dialogue	507

2.1	Indicator 1: Procedural Opportunities for Involvement of All Relevant Interlocutors	507
2.1.1	The Court	507
2.1.2	The Respondent State	508
2.1.3	The Committee	509
2.2	Indicator 2: Sharing Responsibilities	510
2.2.1	Court – Respondent State	510
2.2.2	Court – Committee	511
2.3	Indicator 3: Mutual Understanding	513
2.4	Indicator 4: Balanced Decision-making	515
2.5	Indicator 5: Reason-giving	516
2.6	Indicator 6: Room for a Response	517
2.6.1	The Court	517
2.6.2	The Respondent State	518
2.7	Indicator 7: Preventing, Mitigating and Ending Conflict	519
3	Conclusion: The Dialogicness of the Pilot-judgment Procedure	520

Chapter XII

Conclusions: The Dialogicness of Convention-related Procedures

1	Indicator 1: Procedural Opportunities for Involvement of All Interlocutors	521
2	Indicator 2: Sharing Responsibilities	523
3	Indicator 3: Mutual Understanding	524
4	Indicator 4: Balanced Decision-making	525
5	Indicator 5: Reason-giving	525
6	Indicator 6: Room for a Response	526
7	Indicator 7: Preventing, Mitigating and Ending Conflict	527
8	Overview of the Findings per Procedure	527

Chapter XIII

Conclusions and Recommendations

1	Main Findings	529
1.1	Part 1	529
1.1.1	A Characterisation of the Convention System	529
1.1.2	A Characterisation of Dialogue	534
1.1.3	The Added Value of the Notion of Dialogue to the Convention System	537
1.2	Part 2 and Part 3	539
2	Comparison between Dialogic Potential and Dialogicness in Practice	541
2.1	Findings per Procedure Compared	541
2.1.1	Procedures in the (Pre-)Merits Phase	542
2.1.2	Procedures in the Execution Phase	544
2.1.3	The Pilot-judgment Procedure	546
2.2	Findings per Indicator Compared	547

Contents

2.2.1	Indicator 1: Procedural Opportunities for Involvement of All Relevant Interlocutors	547
2.2.2	Indicator 2: Sharing Responsibilities	549
2.2.3	Indicator 3: Mutual Understanding	550
2.2.4	Indicator 4: Balanced Decision-making	551
2.2.5	Indicator 5: Reason-giving	552
2.2.6	Indicator 6: Room for a Response	552
2.2.7	Indicator 7: Preventing, Mitigating and Ending Conflict	553
2.3	General Observations about the Comparison	553
3	Recommendations	555
3.1	How to Give the Convention-related Procedures more Dialogic Potential on Paper	556
3.1.1	Procedures in the (Pre-)Merits Phase	556
3.1.2	Procedures in the Execution Phase	560
3.2	How to Make the Convention-related Procedures more Dialogic in Practice	561
3.2.1	Procedures in the (Pre-)Merits Phase	561
3.2.2	Procedures in the Execution Phase	566
3.2.3	The Pilot-judgment Procedure	571
	<i>Appendix I Interviewees Research Interviews</i>	575
	<i>Appendix II Sample of Questionnaire</i>	577
	<i>Appendix III Full Pilot Judgments</i>	583
	<i>Summary in English</i>	585
	<i>Summary in Dutch</i>	587
	<i>Bibliography</i>	605
	<i>Index</i>	625
	<i>Curriculum Vitae</i>	637