

---

## STRAATSBURGSE MYJ/MERINGEN: Jack and the solemn promise – a cautionary tale

**Egbert Myjer \***

In dit bijzondere nummer van het NTM/NJCM-Bulletin ook een bijzondere Myj/mering: in het Engels. Een sprookje opgeschreven ter gelegenheid van het afscheid van collega EHRM-rechter Renate Jaeger (uit Duitsland).

### Introductory remark

*This is a story Renate Jaeger knows very well. She and I have told it to each other many times over the years.*

*We completely agree on how it should end.*

*Renate's departure from the Court has prompted me to commit it to paper.*

*A story like this needs no footnotes. It can stand on its own.*

*Every word counts, and so I wrote the original version in my own language.*

*Peter Kempees, Legal Secretary, learned in the law, translated it into English. Together he and I turned it into this fairy tale.*

*Now read on.*

Once upon a time, not so very long ago (although it may seem ages ago to young people, who have grown up with mobile telephones, pizza delivery services, music downloads and social networking web sites), there was an inhuman war. Of course, all wars are inhuman, but this one was really horrible, worse than anything anyone could remember.

When it was all over, the Kings and Queens and their Ministers all said, as they had said many times before, that there would be no more wars ever. And it seemed as though they really meant it this time. They all got together to make a solemn pledge that everyone in their kingdoms would be equally entitled to a number of minimum rights. This, they hoped, would prevent a new horrible and inhuman war.

And so they did. They called their pledge the Universal Declaration of Human Rights, and they put it in very solemn terms:

*'Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,*

*Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people,*

- Prof. mr. B.E.P. Myjer is rechter in het Europees Hof voor de Rechten van de Mens en bijzonder hoogleraar mensenrechten aan de Vrije Universiteit Amsterdam.

Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law,  
Whereas it is essential to promote the development of friendly relations between nations,  
Whereas the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women and have determined to promote social progress and better standards of life in larger freedom,  
Whereas Member States have pledged themselves to achieve, in co-operation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms,  
Whereas a common understanding of these rights and freedoms is of the greatest importance for the full realization of this pledge, ...'

And so it went on, making solemn promises in very beautiful language.

Almost as if fundamental human rights and dignity and worth were something completely new. In fact, the whole solemn pledge was just a restatement of truths and values all based on an ancient Golden Rule: Do unto others as you would have them do unto you. And almost as if all the best kingdoms did not already have constitutions in which promises like those were made. Still, for the first time ever there was a statement of the minimum rights of all the people in the world.

Of course, it was not that simple. Things never are. Good intentions are one thing. But if they were ever to move beyond fine promises, the Kings and Queens and their Ministers had to make a further pledge solemnly consenting to be bound by their promises.

\*

Some of the Kings and Queens in the North, the South and the West, and their Ministers, dared promise to be held to their pledges. But the Kings and Queens of the East and the Centre, and some of the South, did not want to join in. Some had other things on their minds. Others thought the rights promised too old-fashioned. Others still, many of them, wanted to pursue social justice in their own way and promises of individual human rights did not fit their plans.

The Kings and Queens who joined in, and their Ministers, again used very solemn words:

'Reaffirming their profound belief in those fundamental freedoms which are the foundation of justice and peace in the world and are best maintained on the one hand by an effective political democracy and on the other by a common understanding and observance of the human rights upon which they depend; ...'

Still, at least they solemnly promised to take the first steps for the actual enforcement of some of the rights set out in the Universal Declaration of Human Rights. They wrote Rights with a capital R. And they wrote all those Rights in a beautiful document in letters of purest gold. They decided to call the document the Convention.

All the Kings and Queens who took part solemnly attached their Royal Seal to the Convention.

That was not all. They also appointed International Judges to whom every King or Queen could complain if they felt that other Kings and Queens, or their Ministers, were not living up to their

## Myjer

promises. They even agreed that the ordinary people in their own kingdoms could come and complain to the International Judges that the Kings and Queens and their Ministers themselves were not living up to their promises. That was the most important promise of all: to allow ordinary men and women to complain to International Judges about the Kings and Queens and Ministers who governed them. But the ordinary people would have to show that they had first complained to the Kings and Queens and Ministers themselves, and to all the Judges in the Kingdom if need be.

The International Judges were called simply 'the Court'.

The Kings and Queens, and their Ministers, solemnly promised that they would obey the judgments of the Court. If the Court found that a King, or a Queen, or a Minister, had broken one of their promises, the Kings and Queens and Ministers themselves would promise never to do so again. If need be, they would make new laws. If the Court told them to make it up to the victim, they would do that too.

That was another big promise which the Kings and Queens made: to give up some of their sovereign power over their own people. So, just to be on the safe side, the Kings and Queens agreed to keep it to themselves to decide whether they had done enough to comply with a judgment of the Court; this was a job which they entrusted to their Ministers. They officially wrote that into the Convention.

\*

You can be sure that when the Kings and Queens and their Ministers promised that ordinary people could hold them to the Convention, they all thought that it would be easy. After all, each of them thought their kingdom and their laws and their Judges to be the best ever. They all had their constitutions, many of them rooted in centuries-old traditions. And as the Convention solemnly stated, they were 'like-minded', and they had 'a common heritage of political traditions, ideals, freedom and the rule of law'. Were not all the Rights set out in the Convention more or less self-evident? Were they not guaranteed in their laws? Of course, neighbouring kingdoms, and especially kingdoms further away, had some catching up to do. Remember, Kings and Queens, and especially their Ministers, are human: being accustomed to their own traditions and ways of doing things, sometimes they behold the mote that is in someone else's eye but they do not see the beam that is in their own eye.

\*

In the first few years of the Convention's existence, nothing much happened. Everyone needed to get used to the new situation. Kings and Queens were advised by their Ministers not to summon other Kings and Queens before the Court; for if they did, they could themselves expect to be summoned in retaliation at the earliest possible opportunity. Most ordinary men and women did not even know that the Court existed; and if they did, they hardly knew how to complain to it. At all events, no one bothered to advertise its existence. If Learned Professors and Scholars even bothered to mention the Convention, it was to describe it as a curiosity

intended mainly for the benefit of other kingdoms, less civilised than the one they were fortunate enough to live in. Any lawyer who dared to argue the Convention in court would be treated with condescension by the Judge, who – even if aware of the Convention – would come to the conclusion that the lawyer had run out of proper legal arguments.

For the first few years, very few complaints were brought before the Court. Often the complaints that were made had to be declared inadmissible on some ground or other, perhaps because they had not first been made to the Judges of the kingdoms themselves or because the complaint was altogether too silly. The International Judges had an easy time of it. They only needed to meet when something interesting seemed likely to happen. A Registrar and some Legal Secretaries, learned in the law, were appointed to open the incoming letters and see if they contained anything remotely interesting, which they rarely did. The International Judges mostly stayed in their own kingdoms, where they had interesting jobs as High Judges or Learned Professors and Scholars themselves.

Slowly but surely, the number of complaints grew and life for the International Judges making up the Court became more interesting. They even started delivering judgments finding that kingdoms had violated the Convention. That was when the Kings and Queens, and their Ministers, finally sat up and took notice.

In the first cases in which the Court found violations of the Convention, the Ministers of the kingdom concerned usually failed entirely to understand what all the fuss was about; the Kings and Queens, for their part, generally kept a dignified silence. The other Kings and Queens and their Ministers, however, understood perfectly well. Worse, it often happened that the International Judge sent by the kingdom found to have violated the Convention was the only one in the Court to vote against that finding; although an International Judge, they declared themselves quite unable to see what was wrong with the way things were done in their homeland. After all, everything had always gone all right until then, had it not – well, mostly? So you see, even International Judges sometimes have sharp eyesight when it comes to spotting motes in the eyes of others while utterly failing to see the beams in their own.

It would hardly have been fair to say that the Court was unduly adventurous in those early days. The International Judges proceeded with great caution; they thought long and hard on each case. They provided extensive and intricate explanations in their judgments, as indeed all the best International Judges do to this very day. So it was that the Court's judgments were generally welcomed by the various Kings and Queens and their Ministers. Except of course for those found in violation of the Convention, who could usually be heard gnashing their teeth as they read the judgment; but by this time no one expected anything else from them.

Gradually it became clear how the Court viewed its responsibility. Its purpose was to apply the Rights to best effect, provided of course that the men and women submitting their complaints – who were now called Applicants – had met the admissibility criteria. In many cases they had not. In many other cases, there was simply nothing that could possibly be found to violate any Right set out in the Convention. Even so, the Court and its Registrar and Legal Secretaries, learned in the law, had to spend time on all these cases.

## Myjer

A wide margin of appreciation was left to the Judges of the various kingdoms. The Court did not wish to be an International Court of Appeal and do the work of the domestic Judges all over again. Only if the domestic Judges had clearly got the facts wrong did the Court sometimes step in, and even then only if one of the actual Rights set out in the Convention had been violated.

However, if the Ministers – to whom the Kings and Queens had entrusted the task of defending them before the Court – tried to hide behind a surfeit of legal intricacy, the Court saw through them; the Rights were, after all, intended to be practical and effective, and so was the protection which the Court was set up to offer. In the same way the Court developed autonomous concepts of the Rights: it identified their real scope and meaning by going to the very heart of the promise which each Right contained, rather than follow the understanding of a Right prevailing in the legal systems of each of the kingdoms. The Court even accepted that new developments which had not been foreseen when the Convention was written also came within the scope of Rights: for example, everybody knew that ‘correspondence’ protected by a Right covered a letter delivered by a carrier pigeon, or indeed an owl, but it now also covered an e-mail delivered by a flightless device.

In addition, the Court made it clear from the beginning that solemn pledges did not come cheap. Ministers might admit that they had made all sorts of promises but argue that they did not have the money to deliver on them. The Court disregarded such arguments. Whoever made a promise had to stick to it no matter what the cost.

As the Court’s letter-box filled ever more quickly and the nature of the complaints became ever more varied, the Court increased its efforts to be consistent and coherent in its judgments. It was thoroughly aware of the nature of legal precedent. The meaning of a Right, as stated in a case against one kingdom, had of course to be the same in a case against another kingdom. In this way a body of case-law emerged, which was studied by the Learned Professors and Scholars in the various kingdoms; they expounded it in great detail, sometimes correctly, in ever-expanding Scholarly Books. The authority of the Court increased steadily, not only in the kingdoms bound by the promises which they had made in the Convention but even in the wild lands beyond. The Court’s case-law was cited more and more the world over. In the end the Learned Professors and Scholars made the Convention and its application and interpretation by the Court a subject to be studied by everyone who hoped to become a lawyer or even, one day, a Judge.

\*

All of this had not transformed the various kingdoms into an earthly paradise. Old people continued to lament that things had been better in the old days, as old people have always done – though they usually admitted that things had actually been worse during the horrible war. And in each kingdom, in addition to the usual deaths and accidents, unfortunate things happened which simply ought not to. These included mistakes on the part of the Kings and Queens (who let their Ministers take the blame, that was what Ministers were for) and shortcomings in the laws; even things which, according to the Convention, were not supposed to be possible. In

short, 'freedom from fear and want' had not quite yet been achieved. Clearly much remained to be done. Sometimes the Kings and Queens sent their Ministers to confer with other Ministers and say so, in new official Declarations, Recommendations and Resolutions.

Even so, it was clear for all who wished to see that much had changed for the better thanks to the Convention. Even better, many of the kingdoms who had rejected the Convention in the beginning now asked to be allowed to join. Sometimes this happened only after their Wicked Dictators had been deposed or retired. The ordinary people in those kingdoms saw the Convention as a beacon of hope, a sign of new times and a better future for themselves and their children. The truth was that any King or Queen who wanted to count in the world as a ruler who respected civilised principles of government (things like democracy, human rights and the rule of law), which by this time they all did, had no choice but to promise to recognise the Rights.

It came to pass that the Kings and Queens of the few countries in the South who had kept aloof in the early stages, and even the Kings and Queens of the Centre and the East who had wished to follow their own path of social justice, attached their Royal Seal to the Convention.

Almost all of the kingdoms of the North, the South, the East, the West and the Centre were thus parties to the Convention. This meant that all the ordinary people living in these kingdoms could now complain to the Court. All eight hundred million of them. A small army of postmen now worked day and night to deliver complaints to the Court. It became obvious that being an International Judge in the Court could no longer be a sideline for High Judges or Learned Professors and Scholars from the various kingdoms. The Kings and Queens and their Ministers therefore had little choice but to set up the Court anew, this time as a Permanent Court. Moreover, the Permanent Court would need the assistance of a far greater number of Registrars and Legal Secretaries, learned in the law. It was also understood, by astute observers, that additional Legal Secretaries were needed to help the Ministers supervise the execution of the Court's judgments effectively; but the Ministers were in no hurry to appoint any. After all, if you are being supervised then ineffective supervision is the next best thing to no supervision at all.

\*

The Permanent Court turned to its duties with zeal and relish. It continued along the lines set out by what had now come to be called the Old Court. It was however worrying to see that some of the Kings and Queens, or perhaps their Ministers, had abandoned the strict discipline of the early years and become somewhat slack. More and more Clone Cases were presented to the Permanent Court. Those were new cases raising complaints which the Court – Old or Permanent, usually the Old Court – had found years ago to constitute a violation of one of the Rights. Instead of taking immediate and effective measures to prevent the same violation from happening again, the Kings and Queens, or more likely the Ministers, had let matters get out of hand. The Ministers of the other kingdoms had allowed them to get away with it rather than call them to account.

## Myjer

Large numbers of cases were brought against kingdoms which had recently joined. Often these kingdoms had much to catch up in order to meet the high standards set by the Convention as interpreted by the Court.

Altogether the sheer number of cases became such that even the Permanent Court was unable to decide them within a reasonable time. Complaints kept coming in faster than they could be read, let alone considered. The cellars of the beautiful new Palace which had been built to house the Permanent Court began to fill with case-files no one had the time to open.

Another thing happened at this time. People started to complain not only about violations of the Rights set out in the Convention, but also about the failure to meet standards described as desirable in the various Declarations, Recommendations and Resolutions. Others complained about things that upset them very much, and sometimes understandably so. Some International Judges of the Permanent Court felt sorry for these people and devised ways to succour them in their misery. They took an activist approach, applying the Right in the Convention that says that no one shall be subjected to inhuman treatment so as to find a violation of the Convention.

It did not take long for people to notice this. Soon there was, in addition to the old-fashioned complaints, an increasing flow of incoming complaints from people wishing to turn desirable standards into law and from the miserable. The Permanent Court came to be seen as a legal remedy of last resort, the straw clutched by a drowning man. After all, if in the end it did no good, it did no harm either, and it cost nothing.

All of a sudden, there was the flywheel effect. More and more people lodged complaints and the Permanent Court could not possibly deal with them all. Not even with more Legal Secretaries, learned in the law, more Administrative Assistants, and even Rapporteurs. Whatever the Permanent Court did to increase its output, the input continued to grow at a faster rate. Incoming mail was now delivered by lorry every day. Internal work statistics had to be printed in a smaller typeface in order not to run off the page. The cellars of the Palace that housed the Permanent Court were by now long filled. Files were stacked in the corridors and even the offices on the ground floor, then on the first floor, the second floor, and so on. There was a suggestion to rent some shipping containers to store them. The International Judges of the Permanent Court and the Legal Secretaries, learned in the law, the Rapporteurs, the Administrative Assistants and Ushers, and even the cleaning staff – all had to climb over large piles of files just to do their daily work.

‘This cannot go on any longer’, said the Permanent Court. ‘We are succumbing under the weight of our own success.’

‘This cannot go on any longer’, said the Learned Professors and Scholars.

‘This cannot go on any longer’, said ordinary men and women everywhere.

‘This cannot go on any longer’, said the Kings and Queens and their Ministers in public, although one suspects that one or two of them in their heart of hearts were not really concerned to do much about the Court’s predicament. ‘We must find a way out of this mess. How do we stop the flywheel? As long as it does not cost us any money ... ’

There followed a succession of Wise Plans, published by the Ministers, discussed and commented on by Learned Professors and Scholars, studied by Financial Experts, and ultimately rejected by the Kings and Queens and their Ministers as too costly.

All the time the flywheel kept gathering momentum.

\*

The media took notice too.

Then along came Jack.

Jack had not asked to say anything, but a television journalist shoved a microphone into his face and asked him for his opinion.

Jack said: 'Well, I don't know much about it. I am a humble carpenter's son and I don't have book-learning like all these people.

But if I understand rightly ... er ... wouldn't it help if everyone simply kept their promises? You know, a promise is a promise, that kind of thing.

What if the Permanent Court did only what it was set up to do?

Surely that way you don't need any Wise Plans?'

The television journalist looked around him for someone else to accost, but he waited, and said: 'What do you mean?'

'Well, it's like this. What if the Kings and Queens, and the Ministers, simply gave people their Rights. You know, like they solemnly pledged and all that.

I may not be saying this right. But ... er ... suppose the Kings and Queens and Ministers made sure that there were enough decent Judges in the kingdom to see to it that it was all properly done. And ... er ... suppose those Judges did their job properly, and saw to it that what happened in the kingdom was what it says, you know, in the Convention and in the judgments of the Permanent Court.

And ... er ... suppose that the Kings and Queens and Ministers abide by the judgments of the Court, and adapt their laws if the Permanent Court says that they're wrong.

And ... er ... suppose that the Ministers keep an eye on each other, as I reckon the Convention says. There may have to be some more Legal Secretaries to help them, but what do you expect? There's no free ride, after all.

And ... er ... well, suppose that the Permanent Court does what it's there for: you know, rule on everything that has to do with the application and interpretation of the Convention, that kind of thing. You know, practical and effective and all that, but remembering that the Judges in the kingdom have had a look at the case already. And remembering that what is desirable is not necessary fundamental.

Wouldn't that make a difference already?

And ... er ... if I may add something: suppose everyone who wants to complain to the Permanent Court stops to think for a moment and ask themselves: What if I were to read in the newspaper, or see in the television news, that my next-door neighbour was about to send in a complaint

## Myjer

like mine. Wouldn't I think him a right twit, or would I still think it normal to burden the Permanent Court with a complaint like mine?'

The interview got much media attention.

'We need to consider that carefully', said the Ministers in a first reaction.

'Simply do as we have promised? Is not that rather too much to ask of us? And how much will it cost, and what will the gains be?'

'Do what we are set up to do?' said the Permanent Court in a Presidential Statement. 'If we do not, then who will? If Jack's suggestion is considered desirable, then who are we not to attain this desirable standard?'

It was obvious that the Permanent Court was not lost for words.

'Think twice before sending in complaints?' said some Applicants. 'But we'll be stuck with a Permanent Court that has nothing to do. It's our tax money after all.'

'Well, I don't know', said Jack, when asked again. 'But it seems to me that there is still more than enough to do for the Permanent Court.

But ... er ... if the Permanent Court goes bust, what will we have left?

And anyway, you expect me to keep my promises, don't you? So what is the difference?

I just thought that the Kings and Queens and their Ministers had put it all very well in their Universal Declaration of Human Rights. You know, no more war, tyranny, oppression, and all that. We have to take care of that.'

The Kings and Queens kept a dignified silence, as always. The Ministers, the Permanent Court, the Applicants, they all looked glum. But they all had to admit that Jack was right. It offered the best prospects of living happily ever after.

And even as they said so, the flywheel started to slow down.

Only the postmen complained. But not for long.