Articles

The Future of the European Court of Human Rights

By Michael O'Boyle[*]

A. Introduction

It is a pleasure to be back in Dublin and to have this opportunity to speak to you about the Court and its future. Reading the outpourings of denigration in the newspapers recently you can be forgiven for believing that the Court is about to be towed into the middle of the Rhine and scuppered by a coalition of unhappy State Parties. So where does the future of the Court lie and how should one respond to such media buffetings?

The Court has never, in its 50-year history, been subject to such a barrage of hostile criticism as that which occurred in the United Kingdom in February 2011. In the past it was not infrequent that particular judgments were criticized and called into question. The *McCann v. the United Kingdom* case concerning the Gibraltar killings and the *Lautsi v. Italy* judgment concerning the presence of crucifix in schools are good examples of this.[1] Over the years certain governments have discovered that it is electorally popular to criticize international courts such as the Strasbourg court: they are easy targets, particularly because they tend, like all courts, not to answer back.

On this occasion, the case that became the focus of national opprobrium was a judgment of the Grand Chamber that had been handed down more than five years ago and that had not yet been implemented by the United Kingdom authorities. It had been held in *Hirst (no. 2) v. the United Kingdom* that a blanket ban on the exercise of voting rights by prisoners was incompatible with the right to free elections guaranteed by Article 3 of Protocol No. 1. In essence, the Court was saying that not all prisoners should be put into the same basket and that legislation should be adopted by the United Kingdom that sought to make distinctions between different categories of prisoners.[2] An important feature of

* Deputy Registrar of the European Court of Human Rights. All views are personal. This address was given at University College, Dublin, on 1 April 2011 on the occasion of the launch of the new Masters Degree program in UCD run jointly by the School of Law and the UCD Department of Politics and International Relations. The event was hosted by the UCD Human Rights Network that is composed of academic staff and researchers at UCD who are working in the field of human rights. Email: Michael.Oboyle@echr.coe.int.

[1] McCann v. the United Kingdom, 324 Eur. Ct. H.R. (ser. A, 1995). Lautsi v. Italy, Eur. Ct. H. R., judgment of 18 March 2011, available at: http://www.echr.coe.int/echr/resources/hudoc/lautsi_and_others_v__italy.pdf (last accessed: 27 September 2011).

[2] Hirst v. the United Kingdom (no. 2), 2005-IX Eur. Ct. H.R.

https://doi.org/10.1017/S2071832200017594 Published online by Cambridge University Press

the case was that there had been no substantive parliamentary debate on the issue of prisoners voting since the 19th century. Coincidentally a similar analysis based on the blanket nature of the law had been made in *S and Marper v. the United Kingdom* concerning the retention of the DNA of all persons who had been acquitted of offenses as well as those who had been convicted of offenses. But that judgment was rather popular and received good press.[3]

The issue of prisoners' voting rights was transformed into a national interrogation in the United Kingdom about the legitimacy of the European Court of Human Rights. The Daily Mail led the charge. On 5 February 2011, five days before a free vote on the issue of prisoners' voting rights in the House of Commons, the Daily Mail carried an article with the following heading "*The European Human Rights judges [are] wrecking British law."*

> For the third time in a week, Strasbourg's unelected European Court of Human Rights is under the spotlight. First, Tory MPs made it clear they have no intention of bowing to the court's demand to grant the vote to tens of thousands of prisoners. Next Lord Carlisle, the government's reviewer of anti-terror laws, said its rulings against deportation had turned Britain into a 'safe haven' for those who wish the country harm. Now Damien Green, the immigration minister, has said its rulings have turned human rights into a 'boo phrase'. He said the court's judgments – and our own judiciary's liberal interpretation of them – meant the public immediately expected bad news when the phrase 'human rights' was uttered. 'Clearly something is wrong when you get to that stage,' Mr Green said. His remarks will fuel the anger of MPs towards the European Court. In 2005, 17 judges ruled in favor of John Hirst, who argued prisoners should be able to vote. He had been in jail for killing his 69-year-old landlady with an ax, after which he had calmly made a cup of coffee. Under pressure from the court, the British government announced last year that it would comply with the ruling. Hirst celebrated by drinking champagne and smoking cannabis – and put a video of it all on YouTube.[4]

Warming to its theme, the Daily Mail on 7 February 2011 carried the headline "*European Court of Human Rights Court is out of control – we must pull out."*

[3] S. and Marper v. the United Kingdom, 48 E.H.R.R.50 (2009).

[4] James Slack, *Named and Shamed: The European Human Rights Judges Wrecking British Law*, DAILY MAIL, 5 Feb. 2011, available at: http://www.dailymail.co.uk/news/article-1353860/Named-shamed-The-European-human-rights-judges-wrecking-British-law.html#ixzz1QNTg8Uz2 (last accessed: 27 September 2011).

https://doi.org/10.1017/S2071832200017594 Published online by Cambridge University Press

> One of Britain's most senior judges called last night for Britain to pull out of the European Court of Human Rights following its controversial ruling that prisoners should be given the vote. Lord Hoffman, who served as a Law Lord for 14 years until last year, said the court had gone beyond its remit in a way that would have 'astonished' its founding fathers. The prominent human rights campaigner said that in recent years 'human rights have become, like health and safety, a byword for foolish decisions by courts and administrators.' He said the 60-year-old principles of the European Convention on Human Rights were 'in general terms admirable'. But he said the Strasbourg Court had got out of control, handing itself 'an extraordinary power to micromanage the legal systems (of member states). He said the court was 'in practice answerable to no one.'[5]

It was significant that this recent spate of attacks on the Court involved not only the tabloid press in the United Kingdom but also senior members of parliament known for their attachment to human rights (Jack Straw and David Davis), as well as distinguished judicial figures such as Lord Hoffman.

Lord Hoffman had previously launched a frontal attack on the constitutional legitimacy of the Court in his farewell lecture to the Judicial Studies Board in 2009.[6] For him there was something fundamentally wrong with an international court seeking to impose common solutions on national legal systems. How could it ever have been thought appropriate that an international court of human rights deal with the concrete application of rights in different countries? This was surely a basic flaw in the arrangements. After taking to task various court judgments in cases against the United Kingdom he concluded "unlike the Supreme Court of the United States or the supreme courts of other countries performing a similar role, the European Court of Human Rights lacks constitutional legitimacy."[7] He was clearly irritated by the fact that there was virtually no aspect of "our legal system, from land law to social security, to torts to consumer contracts, which is not touched by some point by human rights. But we have not surrendered our sovereignty over all these matters."[8]

---

[5] Jason Groves, *'Europe's human rights court is out of control... we must pull out': Call by top British judge after ruling that prisoners should get the vote*, DAILY MAIL, 7 Feb. 2011, available at: http://www.dailymail.co.uk/news/article-1354362/Europes-human-rights-court-control--pull-Call-British-judge-ruling-prisoners-vote.html#ixzz1QNV45SLd (last accessed: 27 September 2011).

[6] Lord Leonard Hoffmann, *The Universality of Human Rights,* 125 Law Quarterly Review 416 (2009).

[7] *Id*. at 430.

[8] *Id.* at 431.

https://doi.org/10.1017/S2071832200017594 Published online by Cambridge University Press

If one is allergic to foreign judges meddling in national law, the "constitutional legitimacy" argument is a potent antidote since it contains the implicit suggestion that no right-thinking people or government should give credence to its pronouncements since it enjoys no legitimacy to make them. One immediate reaction to this criticism of the Court is to ask why it has taken 50 years to challenge such a fundamental flaw. It is very strange to wake up to this reality about the Convention so late in its 50-year history. Lord Hoffman provided the answer himself. The Convention has a relevance to every area of law. This means that the Court is being called on to adjudicate many of the most difficult human rights issues of our time and that no area of law escapes its scrutiny. Not only the sheer number, but the sensitivity of cases being brought to Strasbourg against many different countries underlines this fact.

B. The Tasks – and Challenges – of the Court

Look at the Court's recent docket. The jury system in Belgium,[9] the prohibition of abortion in Ireland,[10] the presence of the crucifix in Italian schools,[11] the applicability of the Convention in the war theater of Iraq[12] two inter-state cases brought by *Georgia against Russia*[13] - are a few of the cases pending before or recently decided by the Grand Chamber of the Court. However there is nothing new in this. It is inherent in the right of individual petition that the Court can be seized of such issues when all domestic remedies have been exhausted. The difference is that today there are many more such cases being brought against a greater number of states. In the 1980's and 1990's, the Court examined cases against the United Kingdom concerning telephone-tapping,[14] marital rape,[15] freedom from

[9] Taxquet v. Belgium, Eur. Ct. H. R., judgment of 16 November 2010, available at: http://www.menschenrechte.ac.at/orig/10_6/Taxquet (last accessed: 27 September 2011).

[10] A, B and C v. Ireland, 2032 Eur. Ct. H. R. (2010), available at: http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=A%2C%20|%20B%20|%20C%20|%20v.%20|%20Ireland&sessionid=78694016&skin=hudoc-en (last accessed: 27 September 2011).

[11] *Lautsi*, *supra* note 1.

[12] *See* the cases Al-Skeini and Others v. United Kingdom (GC), Eur. Ct. H. R, judgment of 7 July 2011, available at: http://www.bailii.org/eu/cases/ECHR/2010/2032.html (last accessed: 19 September 2011) and Al-Jedda v. United Kingdom (GC), Eur. Ct. H. R., judgment of 7 July 2011, available at: http://www.bailii.org/eu/cases/ECHR/2011/1092.html (last accessed: 27 September 2011).

[13] Georgia v. Russia – pending before the Grand Chamber, available at: http://cmiskp.echr.coe.int/tkp197/search.asp?sessionid=72691944&skin=hudoc-cc-en (last accessed: 27 September 2011).

[14] Malone v. United Kingdom, 82 Eur. Ct. H.R. (ser. A, 1984).

[15] S.W. v. United Kingdom, 335-B Eur. Ct. H.R. (ser. A, 1995) and C.R. v United Kingdom, 335-C Eur. Ct. H.R. (ser. A, 1995).

https://doi.org/10.1017/S2071832200017594 Published online by Cambridge University Press

self-incrimination,[16] blasphemy[17,] and the closed shop[18] – all highly sensitive issues. But crucially, such human rights issues could not be examined by the national courts since the Convention had not been incorporated into national law and the judges had set their face against giving even limited effect to Strasbourg case law. So one can understand that following the introduction of the Human Rights Act in 2002 when the domestic courts were empowered to apply the Convention directly, questions would inevitably arise as to the necessity or the utility of having a European Human Rights Court. Questions such as – "why do we need these foreign judges telling us how to interpret fundamental rights?"

But what answers can one give to the claim that the Court is constitutionally illegitimate?[19] In my view, this cannot be a debate about the legitimacy of the system in any real sense. One only has to look at the record. The system has been operating for years without being called into question by the High Contracting Parties. They ratified the Convention freely, presumably because they believed in what it stood for, and it is open to them at any stage to denounce it if they so desire. Far from seeking to escape from their Convention obligations, the States are keen to observe and build upon the Convention *acquis* and to reform the system so that it can perform its tasks in a more efficient manner.

The jurisprudence that the Court has established over the last 50 years is generally accepted to constitute the major achievement of the European system of human rights protection. This law is applicable by national superior courts throughout Europe and there is no sign on the horizon that the States desire to dismantle the Court out of a suddenly acquired conviction that its activities are constitutionally questionable or disreputable. Rather the contrary is true. They are seeking to devise a long-term blueprint for the Court that will enable it to come to terms with the large mass of cases before it and confront the challenges of its own success. The impact of the Convention *acquis* to contributing to the reform of the legal systems in Eastern and Central European countries following the fall of the Berlin wall has boosted the political appreciation of the Court as a source of fundamental values that bind European Countries together and give concrete expression to what it is to be European. It is undoubtedly for this reason that the States have laid the basis for a crucial future development of the Convention system by providing in the Lisbon Treaty that the European Union should accede to the Convention.

---

[16] Saunders v. United Kingdom, Eur. Ct. H. R., judgment of 17 December 1996, available at: http://www.unhcr.org/refworld/topic,4565c22520,4565c25f263,3ae6b68010,0.html (last accessed: 27 September 2011).

[17] Wingrove v. United Kingdom, 1996-V Eur. Ct. H. R., judgment of 25 November 1996, available at: http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Wingrove%20|%20v%20|%20United%20|%20Kingdom&sessionid=78694016&skin=hudoc-en (last accessed: 27 September 2011).

[18] Young, James and Webster v. United Kingdom, 44 Eur. Ct. H.R. (ser. A, 1981).

[19] *See also* Michael O'Boyle *The legitimacy of Strasbourg Review: Time for a reality check*, *in* MÉLANGES EN L'HONNEUR DE JEAN-PAUL COSTA, LA CONSCIENCE DES DROITS (2011).

https://doi.org/10.1017/S2071832200017594 Published online by Cambridge University Press

Against this broad background of support and acclaim - the argument of "constitutional legitimacy" lacks substance. In reality the claim that the Court is not constitutionally legitimate has nothing to do with constitutionalism or flawed legal theories. It reposes on a basic dislike, even rejection, of the fact that the Court is called upon to review the decisions of superior national courts in sensitive cases concerning human rights. It is also a critical reaction to what is perceived by national judges as impermissible judicial activism. Some national judges no longer accept that Strasbourg law should take precedence over national law.

However, the strongest rebuttal of this criticism is that many of the Court's critics have lost sight of the origins of the Convention as a system of collective guarantee of human rights. This concept is the cornerstone of the Convention system. Without it the treaty would have little sense. The idea of the collective guarantee of rights is essentially a reciprocal agreement by the Contracting Parties embodied in the Convention and its machinery of supervision, that each of them and their peoples has an enduring interest in how fundamental rights are being protected in other State Parties. In short, it was legitimate for States to be concerned with how human rights were being protected in other European States.[20] However, in return, each Party would itself be exposed to the same possibility of scrutiny through the operation of the right of individual petition or a case brought against it by another State. The close connection between the effective protection of human rights and peace, as highlighted in the Preamble to the Convention, provides the underlying rationale of the concept.

The notion that a community of like-minded States has a treaty right to question the behavior of other States, provided it accepts the *quid pro quo* that I have just outlined, is one of the milestones of civilized legal development of the last century. The entire edifice of the system has been constructed on this simple but powerful premise and it lies at the source of the extraordinary development of the Court over the last 50 years. The legitimacy polemic has failed to take it into account and, for that reason alone, cannot be sustained since what is at stake – regional political stability, prosperity and peace - is simply more vital than purely national concerns.

[20] For an interesting discussion on the duty to have regard to human rights outside national boundaries, *see* Christopher McCrudden's blog, *Duties beyond borders: the external effects of our constitutional debate,* UK CONSTITUTIONAL LAW GROUP, available at: http://ukconstitutionallaw.org/2011/05/30/christopher-mccrudden-duties-beyond-borders-the-external-effects-of-our-constitutional-debates/ (last accessed: 27 September 2011).

https://doi.org/10.1017/S2071832200017594 Published online by Cambridge University Press

C. The Future of the Court

So far I have been addressing the question of whether the Court has any future at all or whether it should be seen as an interesting experiment in international law, which should be brought to an end. My answer is unreservedly positive.

In the first place the achievements of the system speak for themselves. The European Court of Human Rights has developed an unparalleled corpus of law in the area of human rights. It has set common standards which permeate the legal orders of the Contracting States, standards which influence and shape domestic law and practice in areas such as criminal law, the administration of justice in civil and administrative matters, family law, refugee and immigration law, media law and property law. It has also become deeply entrenched in the legal and moral fabrics of the societies of the older Council of Europe states and this same process is well underway in newer state parties. The system has also become a symbol of the protection of human rights through law and a shining example to those parts of the world where human rights protection by any court, national or international, is purely aspirational.

In the second place, notwithstanding the criticisms directed at the Court, the 47 Contracting Parties - to judge by their actions - are concerned to ensure the survival of the Court and to seek to place it on a proper footing. This is the goal of the Interlaken Declaration and the Izmir Conference on 26-27 April 2011. The States are aware of the contribution that a functioning human rights system makes to the maintenance of peace in Europe. As Sir David Maxwell-Fyfe pointed out in August 1949 to those who were concerned at the financial implications of setting up an international court "there will never be a lower insurance rate this side of paradise."[21] Paradoxically, it is a measure of the strength and political appeal of the European system that it will ultimately be defended and enhanced even by its fiercest detractors, partly because of the degree of popular support that it receives but also because of its dispute resolution potential and its attested civilizing influence in Europe. The States also recognize that the ECHR has created a corpus of European values that radiate a powerful effect on the standards underlying their own conceptions of democracy.

Of course, there are many problems to be resolved and these criticisms by national judges cannot be taken lightly and deserve a response. The Court today more than 140,000 cases pending before it, 90-95% of which will eventually be rejected as inadmissible. More than 60% of the cases are brought against 5 States – Russia, Ukraine, Poland, Romania and Italy and 80% against ten. Many of these complaints fall into the category of repetitive or clone applications that considerably clog the Court's docket.

[21] CORDULA DRÖGE, POSITIVE VERPFLICHTUNGEN DER STAATEN IN DER EUROPÄISCHEN MENSCHENRECHTSKONVENTION 238 (2003).

https://doi.org/10.1017/S2071832200017594 Published online by Cambridge University Press

Recently a new and serious problem has emerged in the area of immigration law. For many immigration lawyers the Court has become the forum of last resort in deportation and extradition cases. The number of requests for interim measures has rocketed by more than 4,000% between 2006-2010 with literally thousands of applications being brought relating to deportations to Iraq or Afghanistan (4,786 in 2010 compared with 112 in 2006). The President of the Court has taken the unprecedented step of issuing a formal Statement addressed to both the High Contracting Parties and applicants' lawyers, pointing out that the Court is not an Immigration Appeal Tribunal, that "where immigration and asylum procedures carry out their own proper assessment of risk and are seen to operate fairly and with respect for human rights, the Court should only be required to intervene in truly exceptional cases" and that "the States must ensure that there exist adequate national remedies with suspensive effect which operate effectively and fairly, in accordance with the Court's case law and that provide a proper and timely examination of the issue of risk."[22] Thus we have a triangular confrontation between States seeking to control immigration, immigration lawyers bombarding the Court with cases (many of which are unsubstantiated) and the Court seeking to define and make visible its limited responsibilities in this area.

Important developments have taken place over the last year. Protocol 14 finally came into force in June 2010 after its ratification by the Russian Federation. This Protocol, amongst other important changes, created single judge formations empowered to reject obviously inadmissible cases, 3 judge committees that could adopt judgments in cases where the case law is well established. In addition the States gathered at Interlaken in February 2010 and adopted a Declaration and Action Plan.[23] In particular, the Declaration reaffirmed the States' attachment to the Convention and recognized "the extraordinary contribution of the Court through its protection of human rights in Europe."[24] The Declaration also made important statements concerning the right of individual petition, the implementation of the Convention at national level, the filtering of applications, the handling of repetitive cases, the supervision of the execution of judgments of the Court by the Committee of Ministers and the introduction of a statute facilitating a simplified amendment of the Convention.

It is not my intention to dwell on the details of the Interlaken Declaration except to highlight it as a watershed in the future of the Court's development. It stands both as a

[22] *See* Statement By the President of the European Court of Human Rights, *Requests For Interim Measures (Rule 39 of the Rules of Court)*, (11 Feb. 2011), available at: http://www.echr.coe.int/NR/rdonlyres/B76DC4F5-5A09-472B-802C-07B4150BF36D/0/20110211_ART_39_Statement_EN.pdf (last accessed: 27 September 2011).

[23] *See* the Interlaken Declaration of 19 February 2010, available at: http://www.eda.admin.ch/etc/medialib/downloads/edazen/topics/europa/euroc.Par.0133.File.tmp/final_en.pdf (last accessed: 27 September 2011).

[24] *Id.*

https://doi.org/10.1017/S2071832200017594 Published online by Cambridge University Press

milestone pointing toward the short and long-term development of the Convention system and as an institutional obstacle to those states who are seeking to weaken and diminish the Court for political reasons. I seek rather to focus on what are the key areas that are central to the success and long-term stability of the Court's mission. So, how should the Court go about fulfilling its mission?

The dominant consideration in the reform process must be to place the Court in a position where it can concentrate its resources on what it does best, namely the adjudication of the mainstream human rights problems facing European societies and to do so within a reasonable time frame. It is this role, carried out mainly by the Grand Chamber and in leading Chamber judgments, that has the strongest and most significant impact throughout Europe with many of the Court's leading pronouncement assuming *de facto* the character of judgments *erga omnes* (owed towards all). The Court is hampered today in fulfilling this role satisfactorily because of the crippling docket of individual complaints and repetitive applications, as well as a failure of the States to give proper affect to their Convention obligations. The future of the Court lies in removing these impediments successfully.

The following five areas occupy a central place in the short and long-term development of the Court: the effective filtering of applications by the Court; the national implementation of the Convention; pilot judgments; improving dialogue with national courts and accession of the EU to the Convention. Let me say a word about each.

I. Filtering

The number of cases brought to the Court increases by around 10 to 12% each year. If this trend continues it will not be long before the Court has a backlog of 200,000 complaints. The single judge procedure, although only in force since June 2010, has already demonstrated its potential to dispose of large numbers of obviously inadmissible cases. However, a routine disposal of such cases takes time and resources whereas the Court should be concentrating its resources in cases that do raise serious human rights problems.

There are two possible solutions to this conundrum neither of which is mutually exclusive. The first is to introduce measures that seek to staunch the flow of hopeless cases. The second is to improve the Court's filtering capacity. Both are controversial. One idea, which was discussed at the Izmir conference in April 2011, is that of imposing a modest fee on applicants to require them to think twice before complaining to Strasbourg, bearing in mind that 90% of all applications are rejected as inadmissible. Such a scheme could be introduced in a way that protects the substance of the right of individual petition if appropriate exemptions are made between different categories of applicants (e.g. those in custody, the indigent, mentally ill persons) and the level of fee is pegged to the standard of living of the relevant country and is not excessive.

https://doi.org/10.1017/S2071832200017594 Published online by Cambridge University Press

While the idea of such a deterrent is attractive, it has not been greeted with favor within the Court both for reasons of principle - the risk of those with well-founded applications not being able to pay the fee - and for practical reasons concerning the administrative difficulties of implementing such a fee system in respect of applications from 47 countries and policing the exemptions. The Contracting States are also seriously divided on the matter.[25] Another alternative, more in keeping with the principle of subsidiarity, is that of compulsory legal representation for applicants with national lawyers acting as a form of national filter. However, for such a system to operate some form of legal aid would have to be made available to those without the necessary resources. This is unlikely to be the subject of agreement between the States because of its budgetary implications.

It is clear, however, that the system simply cannot continue to function with a 10% increase in applications every year and that some fairly radical steps will have to be taken to reduce the sheer mass of unfounded cases.

The second possible solution is to substantially improve the Court's filtering capacity, either by empowering members of the Court's registry to act as assistant judges or by creating a judicial filtering body to be set up as an additional section of the Court composed of a core of more "junior" judges assisted by the registry. It would function as an adjunct to the existing Court. They would be selected by the Court itself on the recommendation of the States and would work at the Court for several years only. It seems clear from the sheer number of cases being brought to Strasbourg that it is only through a combination of both of these unpopular ideas or the introduction of even more radical changes that the Court can free itself up to examine more serious applications. [26]

II. National Measures

The Interlaken Declaration has emphasized the importance of the States' responsibility for national implementation of the Convention. As the President of the Court, Jean Paul Costa, has pointed out the founding fathers of the Convention never intended to shift

[25] There was no consensus reached on this issue during the Izmir Conference. *See* the Izmir Declaration of 26-27 April 2011, and the various speeches made by State representatives during the meeting. Available at http://www.coe.int/t/dghl/standardsetting/conferenceizmir/Declaration%20Izmir%20E.pdf (last accessed: 27 September 2011).

[26] As has been recently stated by the UK Bill of Rights Commission in its Interim Advice to the Government, the Court should not be the first port of call for aggrieved applicants, and it should not be examining cases in the tens of thousands but in the hundreds. *See Reform of the European Court of Human Rights – Our Interim Advice to Government*, available at: http://www.justice.gov.uk/downloads/about/cbr/cbr-court-reform-interim-advice.pdf (last accessed: 27 September 2011).

https://doi.org/10.1017/S2071832200017594 Published online by Cambridge University Press

responsibility exclusively or even predominantly to the Court.[27] On the contrary, the Convention emphasizes the obligations of States: for example, an obligation to secure Convention rights to everyone within their jurisdiction; a duty to provide effective remedies before domestic courts and in particular to set up judicial systems that are independent, impartial, transparent, fair and reasonably quick; an undertaking to comply with the Court's judgments at least in those disputes to which the state is a party and increasingly where judgments identify similar shortcomings in other states.[28]

The future of the system is thus bound up with the direct application of the Convention by national courts and other bodies. This presupposes that the Court's essential case-law is translated into the official language of the contracting party and that national judges are provided with training in how this law is applied in practice and that they seek to do so in cases before them. In short, if the Court is to function effectively it is paramount that the 47 states that have ratified the Convention take seriously their obligation to integrate it effectively into national law and practice or as the Council of Europe Commissioner for Human Rights, Thomas Hammarberg, has put it "to adopt a strategic and holistic strategy for giving effect to human rights treaty obligations and, in particular, Convention obligations and case law."[29]

A note of realism is nevertheless necessary in this context. The importance of modernizing and reinforcing the concept of subsidiarity in this way has been repeatedly stressed throughout the life of the Convention - yet the numbers of cases have continued to rise. More recently, similar strongly worded exhortations can be found in the Explanatory Report to Protocol no. 11,[30] in the Evaluation Report,[31] the Woolf Report,[32] and in The Wise

---

[27] Jean-Paul Costa, *Speech at the Solemn Hearing on the Occasion of the Opening of the Judicial Year, in* DIALOGUE BETWEEN JUDGE: THE CONVENTION IS YOURS 30, 35. Available at: http://www.echr.coe.int/NR/rdonlyres/3F410EB0-4980-4562-98F1-B30641C337A5/0/DIALOGUE_2010_EN.pdf (last accessed: 27 September 2011).

[28] *See inter alia*, Council of Europe, *President Costa's speech at the Interlaken Conference* (Febr. 18-19 2010). Available in French at: http://www.eda.admin.ch/etc/medialib/downloads/edazen/topics/europa/euroc/ouvert.Par.0005.File.tmp/cour.pdf (last accessed: 27 September 2011).

[29] *Id.*

[30] Council of Europe, *Explanatory Report to the Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, restructuring the control machinery established thereby* (1994). Available at: http://conventions.coe.int/treaty/en/reports/html/155.htm (last accessed: 27 September 2011).

[31] Council of Europe, Committee of Ministers, *Report of the Evaluation Group to the Committee of Ministers on the European Court of Human Rights* (2001), available at: https://wcd.coe.int/wcd/ViewDoc.jsp?id=226195&Lang=fr#P364_39957 (last accessed: 27 September 2011).

[32] The Right Honorable Lord Woolf *et. al., Review of the Working Methods of the European Court of Human Rights (*2005). Available at: http://www.echr.coe.int/NR/rdonlyres/40C335A9-F951-401F-9FC2-241CDB8A9D9A/0/LORDWOOLFREVIEWONWORKINGMETHODS.pdf (last accessed: 27 September 2011).

https://doi.org/10.1017/S2071832200017594 Published online by Cambridge University Press

Persons' Report.[33] Is there good reason to expect that the message will be acted on more purposefully post-Interlaken? It seems clear that the real benefits to the Court's docket will only be perceptible in the long-term. However, the basic message is crystal clear for the future development of the system. The States must, in accordance with the principle of subsidiarity, make provision for more effective national implementation of Convention principles.

III. Pilot Judgments

The pilot judgment procedure that has been endorsed by the States in the Interlaken Declaration offers substantial promise in dealing with the phenomenon of repetitive complaints that account for up to 70% of the Court's judgments. It cannot be right that the Court is required to act as a Compensation Claims Commission awarding damages in large numbers of judgments applying well-established case law. It seems clear that the Court has taken a wrong turning in pursuing this policy. The focus today is on the identification of the systemic or structural causes that give rise to these problems and to use the pilot procedure as a method of obliging the state to introduce national remedies capable of providing effective redress. This is the only appropriate role for an international court to play. Once it is established that the law or practice in question violates the Convention it must be the duty of the state to provide appropriate redress for all those similarly affected. The pilot procedure offers the best hope of doing this in a manner that will lead to national reform.

The Court was requested in the Interlaken Declaration to "develop, clear and predictable standards for the pilot judgment procedure as regards selection of applications, the procedure to be followed and the treatment of adjourned cases."[34] This has resulted in Rule 61 of the Rules of Court which came into force on 31 March 2011 and which provides (1) that the Court will consult the parties before starting the procedure; (2) that the Court shall identify in the judgment the remedial measures the State is required to take and may impose a time-limit on the adoption of such measures; (3) that any friendly settlement must also cover general measures and redress for other /potential applicants and (4) where a State fails to abide by a pilot judgment, the Court will normally resume examination of the adjourned cases.[35]

[33] Council of Europe, Committee of Ministers, *Report of the Group of Wise Persons to the Committee of Ministers* (2006). Available at: https://wcd.coe.int/wcd/ViewDoc.jsp?id=1063779&Site=CM (last accessed: 27 September 2011).

[34] Interlaken Declaration, *supra* note 23.

[35] *See* Rule 61 of Rules of Court. 1 April 2011. Available at: http://www.echr.coe.int/NR/rdonlyres/6AC1A02E-9A3C-4E06-94EF-E0BD377731DA/0/RulesOfCourt_April2011.pdf (last accessed: 27 September 2011).

https://doi.org/10.1017/S2071832200017594 Published online by Cambridge University Press

IV. Advisory Opinions

Increasing the dialogue with national courts is an obvious way of improving the relationship between national courts and the Court in Strasbourg. But surely the time has come in the development of the Convention system to create a more formal structure for this dialogue to take place. This could take the form of an advisory opinion procedure. It was recently revived by the Wise Persons in their report as a method of fostering dialogue with national courts and of enhancing the Court's constitutional role.[36] The Wise Persons envisaged that States could join the procedure if they so desired as third parties as they do from time to time in contentious cases of great interest, most recently in the *Lautsi v. Italy* case.[37]

Regrettably the proposal was not taken up in the Interlaken Declaration and is not yet part of the Interlaken follow up.[38] Yet there are clear advantages to this idea in terms of strengthening links with the national judiciary and persuading national judges to play their legitimate and designated role in applying the Court's case law. Under the UK Human Rights Act, for example, the courts are bound to have regard to Strasbourg case law but it occurs occasionally that they are not prepared to follow certain judgments either because it is considered that they are not correctly decided or are inconsistent with other judgments. Such a situation is clearly unsatisfactory since the clash of opinion between the two systems is not resolved and another harmful disagreement is recorded - compounded perhaps by a later Strasbourg judgment finding the State to be in violation of the Convention. Had the issue concerned a question of EU law the courts could avail of the preliminary ruling procedure under Article 267 of the TFEU to raise their concerns. By enabling national judges to request an advisory opinion where the case law is controversial or unclear the procedure would no longer be as confrontational as it is today. Moreover experience from EU law has shown that the preliminary ruling system, *mutatis mutandis*, has proved to be a useful instrument for laying down fundamental principles of interpretation.

---

[36] Report of the Group of Wise Persons to the Committee of Ministers, *supra* note 33 at paras. 76-86.

[37] *See Lautsi, supra* note 1.

[38] *See* the Izmir Declaration, *supra* note 25. The Advisory Opinion proposal was eventually endorsed at point D of the Izmir Declaration of 26-27 April 2011 as follows. "The Conference:

1. Bearing in mind the need for adequate national measures to contribute actively to diminishing the number of applications, invites the Committee of Ministers to reflect on the advisability of introducing a procedure allowing the highest national courts to request advisory opinions from the Court concerning the interpretation and application of the Convention that would help clarify the provisions of the Convention and the Court's case-law, thus providing further guidance in order to assist States Parties in avoiding future violations;

2. Invites the Court to assist the Committee of Ministers in its consideration of the issue of advisory opinions."

https://doi.org/10.1017/S2071832200017594 Published online by Cambridge University Press

There are other advantages. Such a procedure has the potential to be even more influential and authoritative than a judgment in a contentious case in that it provides an opportunity to develop the underlying principles of law in a manner that is less confined by the facts of the case and more tilted to the legal systems of a wider number of Contracting Parties. In short it is an idea that has come of age.

Of course there are also disadvantages. Some obvious questions may be asked. Would there not be a tendency for some supreme courts to send too many requests once ECHR issues arose in cases before them leading to an increase of the Court's burden? What model would be best for the Court – the Inter-American Court model or the EU preliminary reference model? Is there a risk that such a system would operate to the detriment of the right of individual petition if the Court's opinion were to prejudge an issue already pending before the Court?

V. Accession of the EU to the ECHR

The future of the Court is also linked to accession of the EU to the Convention. The fact that the EU is not a Party today creates an imbalance and uncertainty as to who can be held legally responsible for breaches of Convention rights when matters of EU law are involved as we saw in *Bosphorus* and (to a lesser extent) *MSS v. Greece and Belgium*.[39] Accession of the EU has now become a reality with the entry into force of the Lisbon Treaty that imposes an obligation on the EU to adhere to the Convention. Accession is much more that the EU demonstrating its commitment to human rights. It will mean that individuals will be able to complain directly to the Court about acts or omissions of the EU in the same way that they can complain today about State action. It will thus result in all European legal systems being subject to the same supervision in relation to the protection of human rights. It will also ensure that the development of human rights law in Europe is harmonious although, as with the superior courts of all Contracting Parties, nothing will prevent the ECJ from interpreting either the Charter of Fundamental Rights and Freedoms or the Convention as imposing higher human rights requirements than the minimum standards contained in the Convention. Negotiations began in July 2010 and a draft agreement ought to be ready by July of this year. The agreement will provide for a co-respondent mechanism, which will enable the EU to join the case as a co-respondent when the complaint involves a substantial link with EU law. Had accession been in force at the time of the *Bosphorus* case where Ireland had no option but to give effect to an EU regulation (requiring the impounding of a Turkish airplane) the EU would have become a co-respondent and afforded the opportunity to argue the compatibility of the provisions of

[39] Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland, 2005-VI Eur. Ct. H. R. (2005) and M.S.S. v Belgium and Greece, 53 E.H.R.R. 2 (2011).

https://doi.org/10.1017/S2071832200017594 Published online by Cambridge University Press

the regulation with principles of Convention law. One of the most difficult questions to be resolved by the negotiators – that relating to the prior involvement of the ECJ in cases where it has not had an opportunity to examine the complaint from the standpoint of EU law – has been tentatively resolved on the lines set out in a joint statement by the respective Presidents of both courts proposing that the proceedings in a case against both a State and the EU be organized in such a way as to provide for the possibility of a speedy internal examination of the complaint by the ECJ prior to its examination in by the Court in Strasbourg.

However, there are many obstacles ahead. The agreement must reflect the unique position of the EU as a High Contracting Party where the implementation of EU law is divided between the EU and its member states. In addition the ratification process foreseen in the Lisbon Treaty is complex and requires the agreement of two-thirds of the European Parliament, a unanimous Council and all of the EU States in accordance with their respective constitutional positions. It will also require agreement by the 20 non-EU States of the Council of Europe who will insist that the EU is placed on an equal footing with all the other High Contracting Parties and not given preferential treatment.

The political and legal importance of the docking of the EU into the Convention on Human Rights should not be underestimated either for its impact on policy making in the EU but also as a stabilizing factor for the Court itself which will of undoubtedly be strengthened by accession. Its implications for the development of the Council of Europe will also be of great significance in the future.

D. Conclusion

I began this lecture by looking at the so-called legitimacy debate and the storm of protest against the Court that was unleashed in February. I have nothing against criticism of international courts and their decisions. In my opinion and, without a doubt, that of the Court itself - it is rather essential. All courts need a certain dose of criticism and international courts are not “cloistered virtues”. But we should be aware that politically motivated campaigns of criticism can be destructive and can threaten a court’s independence. It is worth bearing this in mind.

But two other developments, going in the opposite direction, also occurred at around the same time. They both fell under the radar.

The first was a letter to the Financial Times from a group of senior political figures in the UK headed by Peter Mandelson calling on the MENA countries (Middle East and North African region) to incorporate into their law the principles of the ECHR and for the EU to

https://doi.org/10.1017/S2071832200017594 Published online by Cambridge University Press

support this process.[40] The letter was based on a reflection on the lessons learned from the last mass pro-democracy movement that occurred following the fall of the Berlin Wall and the need to "embed a new judicial and political culture" in MENA countries. The letter hits the nail on the head. But what an extraordinary contrast with the prevailing mood!

The second was a talk given in Strasbourg by Robert Badinter – a very eminent French lawyer. In his first week as French Justice Minister in 1981, after the election of President Francois Mitterand, he abolished the death penalty in France and accepted the right of individual petition to the then European Commission of Human Rights. He has the reputation in France of being a brilliant orator and a *sage.* In his talk, which can be seen on the Court's Internet site, he points to the Convention principles as representing the strongest expression of a community of European values. He makes the point forcefully that Europe should not allow these values to be nationalized by the States since history shows that they will inevitably be weakened and diminished. It is only by being internationalized that the essence of these values can be maintained. He also affirmed that without the European Court of Human Rights - European civilization would not be as it is today and Europe would not be eyed enviously by other continents as a beacon of human rights protection. He thanked the Court for the contribution it has made as Europe's conscience over the last 50 years.[41]

I could not think of a more appropriate testimony on which to bring these reflections to a close.

---

[40] Lord Mandelson, Lord Kinnock, Lord Ashdown and others, *"EU must make a wider offer – with conditions,"* FINANCIAL TIMES (Mar. 12, 2011), available at: http://www.ft.com/cms/s/0/1bd19b2a-4c47-11e0-82df-00144feab49a.html#axzz1QOT9c9dG (last accessed: 27 September 2011). Letter to the Financial Times dated 11 March 2011 from Lord Mandelson, Lord Kinnock, Lord Ashdown and others. The text reads: "As European politicians start to formulate a 'response to the changes' in the Middle East and North Africa region (MENA) they should reflect on the lessons from the last mass pro-democracy movement which occurred as the Berlin Wall fell more than 20 years ago. The support that Western Europe offered the east at that time has strengthened the whole of the region both politically and economically in the subsequent two decades. If the European Union wants to influence its southern neighbors, with whom it shares so much common history, it must make a wider offer in terms of aid, markets and mobility. That means more generous and better-targeted development packages, removing the last barriers to the import of fruit and vegetables from the region, and adopting more flexible visa regimes. The customs union between the EU and Turkey could be extended to North African countries. But the generous offer must be coupled with strict conditionality to raise standards of governance and improve human rights. As a first step towards this, MENA countries should begin the process of incorporating into their law the principles of the European Convention on Human Rights, of which Turkey is a signatory. The EU should give technical and moral support to this process, which would remain a sovereign decision but one that would help to embed a new judicial and political culture in these countries."

[41] Robert Badinter, *France and the European Convention on Human Rights as seen by a privileged witness*, COUNCIL OF EUROPE WEBTV (Mar. 16, 2011). Available at mms://coenews.coe.int/vod/20110316_02_w.wmv (last accessed: 27 September 2011).

https://doi.org/10.1017/S2071832200017594 Published online by Cambridge University Press