

The European Court of Human Rights after 50 Years

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It is a privilege to speak at the opening session of this distinguished gathering, marking the fiftieth anniversary of the European Court of Human Rights. There is much to celebrate about the Court's work. As its Deputy Registrar, Michael O'Boyle, observes²

“There seems to be unanimous agreement in Europe today that the European Convention on Human Rights ... is one of the major developments in European legal history and the crowning achievement of the Council of Europe. The emergence of the authority of the European Court of Human Rights has been described as one of the most remarkable phenomena in the history of international law, perhaps in the history of all law.”

However, it is important to think imaginatively and boldly about practical ways of alleviating the profound crisis which threatens the Court's achievements during its next half century, ways which go beyond useful but insufficient procedural changes, or increasing funding without tackling fundamental institutional problems. These are hard times as we face a deep economic recession, but hard times might help to concentrate the minds of our European political and judicial leaders to tackle the worsening crisis of the Convention system. As O'Boyle has noted³, there is no or little public or media discussion

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² “On Reforming the Operation of the European Court of Human Rights” [2008] E.H.R.L.R 1.

³ *Ibid.*, at 11.

about the Court's problems, and the dispute about ratification of Protocol 14, for example, is taking place "under the radar", and "confined to the corridors in Strasbourg."

In his speech on the occasion of the opening of the judicial year, on 30th January 2009, Mr Jean-Paul Costa, President of the Strasbourg Court, proposed a major conference in the first half of 2010, to articulate a new commitment, a reaffirmed legitimacy and a clarified mandate for the Court. There is a pressing need for such a conference to be held during the Swiss Presidency. It must be much more than a talking shop. After very careful preparation, it needs to lead swiftly to reforms. Meanwhile, there is much that can be done within the Court itself and its Registry to improve working methods. There is no doubt about the urgency of what is at stake – nothing less than the survival of a viable Convention system in which those it was designed to protect have confidence. And it is essential that the issues are openly discussed by the media and the public across Europe. I hope that this conference will make an important contribution .

I have been asked in my remarks to recall the Court's past life.

"When to the sessions of sweet silent thought
I summon up remembrance of things past,
I sigh the lack of many a thing I sought,
And with old woes new wail my dear time's waste"⁴.

That was Shakespeare's melancholic recollection. But for me, remembrance of things past in using the Convention system as a human rights advocate brings happy memories and not 'old woes'. More recent and new woes are a different matter!

⁴ William Shakespeare, Sonnet 30

The master builders of the Convention were determined, in the aftermath of a second terrible war in half a century, never again to permit state sovereignty to shield from international liability the perpetrators of crimes against humanity; never again to allow governments to shelter behind the argument that what a state does to its own citizens or to the stateless is within its exclusive jurisdiction, and beyond the reach of the international community. So they resolved to create a binding international code of human rights, with safeguards against abuses of power and effective remedies for victims of violations by Contracting States.

The birth pangs of the Convention were not easy. The European Movement approved a 'Declaration of Principles of the European Union'. It stated that "No State should be admitted to the European Union which does not accept the fundamental principles of a Charter of Human Rights and which does not declare itself willing and bound to ensure their application." The Consultative Assembly carried that proposal forward, seeking enforcement via an independent European Commission and Court. The proposal for a Commission, in addition to a Court, was made to protect the Court from being inundated with frivolous litigation and being exploited for political ends. The Commission was envisaged as a filter of admissible applications, as the fact-finding body, and as the body whose authorisation was necessary for an individual to initiate proceedings before the Court.

The Committee of Ministers of the Council of Europe attempted to block the proposal for a Court, but, after a political struggle, the Consultative Assembly overcame opposition from governments, and the Convention and its institutions were born. What is now striking is the speed with which the Convention was drafted and adopted. It was prepared within the Assembly and not by diplomats meeting in secret. And, this above all, there was a political will

to create a new international human rights instrument and a supra-national court without precedent.

It is more than forty years since I argued my first case in Strasbourg. It was in the European Commission of Human Rights. It was also the very first case brought against the United Kingdom, soon after the British Government had accepted the right of individual petition in January 1966.⁵ At that time, when the Court was ten years old, it had dealt with only one case, *Lawless v Ireland*⁶, and acceptance of the right of petition was precarious. Several Governments, including my own, used to accept the right only for limited periods of a few years at a time, playing a game of cat and mouse with the Commission, with the implied threat of non-renewal.

The Commission drew on the considerable diplomatic skills of Anthony McNulty and Hans-Christian Krüger, within the Secretariat, to win the confidence of Governments, whose commitment to the system was precarious because of their concern to preserve national sovereignty and state power. The Commission was brilliantly led by its Presidents, each a fine jurist – including Max Sørensen and Carl Aage Nørgaard from Denmark, and Sir James Fawcett from the UK.

The right of individual petition was especially important to those in the UK because, forty years ago, there was no developed British system of public law and judicial review. We had no framework of positive rights to match the Convention rights and freedoms; and, without a written constitution or human rights legislation, our common law system was in many respects ethically aimless. There was no recognition of fundamental human rights. Habeas corpus

⁵ *Alam and Khan v United Kingdom* (Application 2991/66) (1967) 24 CD 116.

⁶ (1961) 1 EHRR 15.

was easily overridden by positive law. The courts did not even recognise that racial discrimination was contrary to legal public policy.⁷

So British advocates like me began to use the Convention system to challenge administrative action, judicial decisions and the laws made by our sovereign Parliament. We were used to developing legal principles in our common law system, and, in my case, I had the advantage of having studied American constitutional law before being called to the English Bar. It was a great advantage that the Government's advocates, including Lord Slynn and Judge Sir Nicolas Bratza, as they later became as Judges of the two European Courts, shared a common determination to make the system work fairly and effectively.

The idea of fundamental human rights was anathema to Jeremy Bentham and his Utilitarian ideology as it was to the philosophy of Scandinavian legal realism of Alf Ross and Axel Hägerström. British Ministers and civil servants did not welcome the prospect of European judges looking over their shoulders. As Sir James Fawcett, President of the Commission once told me, the British pathology of human rights violations sprang from a tradition of uncontrolled administrative discretion. The benevolent paternalism of administrators was seen as preferable to judicial review. To put it only slightly unfairly, for many Ministers and civil servants power was delightful, and absolute power was absolutely delightful.

I have told elsewhere⁸ the story of the British experience in gradually coming to terms with the Convention system. I shall not repeat that story now. Just as it took the Nordic countries many years to make the Convention rights

⁷ Lester and Bindman, *Race and Law* (1972), Chapter 1.

⁸ See Lester, Pannick and Herberg, *Human Rights Law and Practice*, 3rd ed., 2009, Chapter 1. See also A.W. Brian Simpson, *Human Rights and the End of Empire: Britain and the Genesis of the European Convention*, Oxford, 2001.

part of their legal systems, so it took some thirty years after acceptance of the right of petition for the United Kingdom to give domestic effect to the Convention rights in the Human Rights Act 1998.⁹

During the 1960s and 70s, the main business of the developing Convention system was carried out by the Commission, in fact-finding and giving opinions. Their work was of a very high standard, and the fact-finding, for example, in the interstate case between Ireland and the United Kingdom¹⁰ was impressive by any standard.

The Court gave a handful of important judgments, for example, in *Wemhoff*¹¹, *Neumeister*¹², and the *Belgian Languages Case*¹³, but at that stage the Commission referred cases to the Court infrequently. There was a feeling within the Commission that the Court was too remote and that the Commission was better able to interpret and apply Convention standards. That was gradually replaced by a reluctant recognition that the Court needed to develop the jurisprudence authoritatively. As more cases began to reach the Court, it won public confidence through a series of landmark cases - *Golder*,¹⁴ *Kjeldsen, Busk Masen and Pedersen*¹⁵, *Tyrer*¹⁶, *König*¹⁷, *Klass*¹⁸, *Marckx*¹⁹, *Sunday Times*²⁰,

⁹ The Human Rights Act remains politically controversial, under constant attack from some sections of the British media and the Conservative opposition. The Rt Hon David Cameron MP has repeatedly stated that if he wins the General Election next year his government will replace the Human Rights Act with a British Bill of Rights and Responsibilities.

¹⁰ (1972) 15 YB 76.

¹¹ *Wemhoff v Germany* (1968) 1 EHRR 55..

¹² *Neumeister v Austria* (1968) 1 EHRR 91.

¹³ (1968) 1 EHRR 252.

¹⁴ *Golder v United Kingdom* (1975) 1 EHRR 524.

¹⁵ *Kjeldsen, Busk Masen and Pedersen v Denmark* (1976) 1 ERHRR 711.

¹⁶ *Tyrer v United Kingdom* (1978) 2 EHRR 1.

¹⁷ *König v Germany* (1978) 2 EHRR 179.

¹⁸ *Klass v Germany* (1978) 2 EHRR 214.

¹⁹ *Marckx v Belgium* (1979) 2 EHRR 330.

²⁰ *Sunday Times v United Kingdom* (1979) 2 EHRR 245..

*Winterwerp*²¹, *Dudgeon*²², *Sporrong and Lönnroth*²³ and *Lingens*²⁴, to name just a few of the vintage judgments.

The Court's case law makes²⁵ "a continuing contribution to the evolving public law of Europe as the norms it contains are received into the national law and practice of 47 states", and has developed constitutional principles, including the judicial review of legislation, the principle of proportionality, the importance of freedom of political speech, and the full recognition of the dignity of the human person as a constitutional imperative.

For the first 30 years of the Court's life, Central and Eastern Europe were divided from the West by Winston Churchill's 'Iron Curtain'. The number of States Parties to the Convention was relatively small and most of them were well-established democracies which adhered to the rule of law. The Strasbourg machine coped well enough, with the Commission controlling the admissibility of applications and doing the fact-finding, and the Court deciding important issues of legal principle when cases were referred by the Commission or the respondent Government for final adjudication.

The system was more user-friendly than was the English judicial system at that time. Today I feel nostalgic when I walk along the Allée de la Robertsau, past the unpretentious user-friendly building which housed the Commission and the Court, on my way to the modernist and functionalist palace of justice which now houses the Court and its staff.

²¹ *Winterwerp v Netherlands* (1979) 2 EHRR 387.

²² *Dudgeon v United Kingdom* (1981) 4 EHRR 149.

²³ *Sporrong and Lönnroth v Sweden* (1982) 5 EHRR 35.

²⁴ *Lingens v Austria* (1986) 8 EHRR 407.

²⁵ O'Boyle, note 2 above, at 2.

In the early life of the Convention system, when the case load was small, cases were argued for hours, occasionally even for days, in a friendly atmosphere. During coffee breaks we chatted with the Commissioners and Judges and their staff. Admissibility decisions in important cases were fully reasoned and were usually reasonable too. The Commission acquired great expertise both in fact-finding²⁶ and in achieving friendly settlements compatible with human rights. The Commission was far better than the present Court in identifying urgent and important cases, a skill acquired over many years which appears to have been lost in the transition to the present system.

But for all that the old regime was imperfect. The Judges and Commissioners were part-timers and included former agents of the governments which secured their appointment. The Secretariat and Registry staff had to do their best to uphold the integrity of the system. I remember a senior judge and former government legal adviser telling me that he saw it as his duty to uphold national interests! Of necessity the dedicated Commission staff came to assume a dominant role, seeing themselves as Platonic guardians of the Court's integrity and the European rule of law.

The procedures were cumbersome, repetitive and inefficient. The right to effective national remedies under Article 13 was narrowly interpreted²⁷, and not much attention was paid in individual cases to the need for systemic remedies for systemic violations²⁸. The Committee of Ministers did not perform a useful role in independently supervising the execution of the Court's judgments or giving effect to the Commission's opinions. There was no equality of arms in access to the Court because, unlike governments, the applicants had no right of

²⁶ E.g., in *Ireland v United Kingdom* (1978) 2 EHRR 25..

²⁷ See Lester, Pannick and Herberg, *Human Rights Law and Practice*, (2009), paragraph 4.13.2.

²⁸ See Lord Lester of Herne Hill QC, "The European Convention in the New Architecture of Europe, *Public Law* (1996) 5, at 6.

access and depended on the Commission to make a reference. That flaw was addressed in 1990 when Protocol 9 enabled individual applicants to bring their cases to the Court after lodging their complaints with the Commission.

In March 1985, the Swiss delegation to a European Ministerial Conference on Human Rights in Vienna proposed that the Commission and the Court should be merged into a single Court. The proposal was controversial, but I supported the creation of a single Court in the hope that it would promote speedy justice and enhance the Court's authority. A minority of Governments, led by the UK initially argued for a Court of First Instance to replace the Commission but their view did not prevail.

With hindsight it was a mistake to abolish the Commission. There will be considerable reluctance now, as Professor Caflisch observes,²⁹ to revert, in any form, to the two-tier system of the Commission and Court. Caflisch suggests³⁰, that "in the long run, such a return may prove unavoidable." But as the great economic reformer, John Maynard Keynes reminds us from his grave³¹ "long run is a misleading guide to current affairs. In the long run we are all dead". That is especially true when the patient is at risk of terminal decline and all that is available is palliative care. The need for a new streamlined two-tier system must be recognised as a high priority if we are to preserve both the right of individual petition and a Court able to command public confidence.

It took thirteen years for the single Court system to be created by Protocol 11, which came into force on 1st November 1998³². Europe had changed

²⁹ Lucius Caflisch, *The Reform of the European Court of Human Rights: Protocol No. 14 and Beyond*, *Human Rights Law Review* 6:2 (2006) 403, at 414.

³⁰ *Ibid.*

³¹ *A Tract on Monetary Reform*, Chapter 3 (1923).

³² See *Protocol No.11 to the Convention for the Protection of Human Rights and Fundamental Freedoms*, restructuring the control machinery, established thereby ETS No.155, *Explanatory Report*.

dramatically during those years, but unfortunately it was too late to argue that it would be better to retain the Commission to screen out inadmissible applications and do the fact-finding, working together with the Court to cope with the far-reaching effects of the enlargement of the Council of Europe.

Protocol No.11 dissolved the Commission, made the Court permanent and full-time, and gave it compulsory jurisdiction for all individual applications. But it failed to provide a sufficient length of tenure to guarantee judicial independence, and it created further problems of overload from which the Court cannot recover without urgent and radical reforms.

David Maxwell Fyfe, *rapporteur* of the drafting committee and one of its main architects³³, described the Convention, in a speech made to the Parliamentary Assembly in 1950, as “a beacon to the peoples behind the Iron Curtain and a passport for their return to the midst of the free countries”³⁴ But when the proposal to create a single Court was first put forward, no-one foresaw that the Soviet system was soon to collapse, resulting in a vast enlargement of the Council of Europe to its present membership of forty-seven States.

Everyone knows of the massive burdens the Court carries in attempting to deal with the backlog of applications and new complaints which have increased exponentially during the decade since Protocol No.11 came into force. Like Sisyphus, the Court is cursed to roll a huge boulder up a hill, only to watch it roll down again, and, in the absence of further reform, to repeat this throughout

³³ Maxwell-Fyfe was a British Conservative Party politician who became Solicitor General, Attorney General, Home Secretary, and Lord Chancellor. He was Deputy Chief Prosecutor at the Nuremberg trials, and conducted a brilliant and effective cross-examination of Hermann Göring.

³⁴ *Political Adventure: The Memoirs of the Earl of Kilmuir* (1964), at p.183, quoting from his speech made in August 1950. The Earl of Kilmuir, formerly David Maxwell Fyfe, was a British Conservative MP who became Attorney General and Lord Chancellor, and Britain’s chief prosecutor in the Nuremberg trials.

eternity! In 2007 alone there were 41,000 new applications and the number of pending cases increased by about 15 per cent. Last year, there were 50,000 new applications, 20 per cent more than in 2007. Fifty seven per cent of applications were lodged against just four States, the Russian Federation, Turkey, Romania and Ukraine. They and Poland are the countries giving rise to the greatest number of judgments.

The Russian Federation is the worst offender³⁵. Since it was admitted to the Council of Europe thirteen years ago, it has failed to comply with its obligations under the Convention, including providing effective domestic remedies and abiding by the Court's judgments. Alone among the forty seven Member States, Russia continues to block the coming into force of Protocol 14. They have never explicitly indicated the nature of their objections but they appear to wish to create the pretence that ratification is still possible. Some 3,300 cases with similar factual background have been lodged with the Court since August 2008 against Georgia concerning hostilities in South Ossetia.³⁶ It is reasonable to suppose that this has been done with encouragement from the Russian authorities.³⁷

³⁵ At the end of 2008 there were 27,248 pending cases against the Russian Federation.

³⁶ Press release issued by the Registrar, 14th January 2009.

³⁷ One may speculate that it was the inter-state application brought by Georgia against the Russian Federation in respect of the events in South Ossetia in the summer of 2008 which caused the Russian Federation to retaliate by supporting the bringing of large numbers of individual applications against Georgia. Indeed, the Russian Prosecutor's Office has assisted South Ossetia residents in preparing complaints against Georgia to international and regional courts. On August 12, 2008, the prosecutor general of the Russian Federation, Yury Chaika, announced that he had created "a special brigade of prosecutors that would provide legal assistance in preparing appeals and complaints to the European Court of Human Rights and the Hague International Criminal Court." See Human Rights Watch, *Up in Flames: Humanitarian Law Violations and Civilian Victims in the Conflict over South Ossetia*, 23 January 2009, available at <http://www.hrw.org/en/node/79681/section/31> (accessed 19 March 2009).

Under the present Russian regime, there is no commitment to the European rule of law and no sense of solidarity or collective responsibility with the other States Parties. And across Europe, *realpolitik* abounds. The Parliamentary Assembly and the Committee of Ministers have no appetite to apply dissuasive sanctions, for example by suspending voting rights in the Council of Europe, as was done for nine months in 2000 for alleged gross violations of human rights in Chechnya. And it is improbable that inter-State proceedings will be taken against the Russian Federation (or other States) whose systemic and persistent violations place heavy and unacceptable burdens upon the Court and the Convention system. And I doubt whether the peoples of that long-suffering nation would benefit if the Russian Federation were expelled from the Council of Europe.

Under current circumstances, the Court's case load is likely to increase at an annual rate of about 14 per cent. If Protocol 14 comes into force and if the EU accedes to the Convention, the load will increase, as it will as more States ratify Protocol 12, enabling cases to be brought under a free-standing guarantee of equal treatment without discrimination.³⁸

The Court's expenditure is borne by the Council of Europe.³⁹ Its expenditure accounts for a quarter of the Council's total budget, an increase from 17.4 per cent in 2002, but it needs more money to function properly. It does not have its own ring-fenced budget.⁴⁰ Its budget is part of the general budget of the Council of Europe. The contributions of Member States to the Council of Europe are fixed according to scales taking into account population and gross national

³⁸ Matching Article 26 of the UN International Covenant on Civil and Political Rights.

³⁹ Article 50 of the Convention.

⁴⁰ Unlike the Inter-American Court of Human Rights which, in accordance with Article 72 of the Inter-American Convention on Human Rights, draws up its own budget and submits it for approval to the General Assembly through the General Secretariat which may not introduce any changes to it. In accordance with Article 26 of its Statute, the Court administers its own budget.

product. The Court's budget for 2008 amounted to 56.616.100 Euros. Since 2000, the Council of Europe's budget has been prepared on the basis of zero real growth (that is, the same amount as the previous year to take into account inflation, salary adjustments, etc). Since 2006, the principle of zero growth has been extended to Member States' contributions. In 2009, the Court received an extra 1,542.300 Euros for its enhancement programme (for the creation of 7 additional posts in the Department of Execution of Judgments and 47 additional posts in the Court).

A group of leading human rights NGOs have rightly observed that⁴¹ the Court "has been hampered by a lack of sufficient human and financial resources." The Ministers' Deputies have made it clear to the Secretary General of the Council of Europe⁴² that "they would not accept proposals departing from the principle of zero real growth in member states' contributions." Within the confines of the total Council of Europe budget, it has been treated generously, but the underlying problem is that the Court should not have to compete for resources within the overall budget. It needs its own budget calculated according to its needs in delivering what the Convention requires, without being constrained by the requirement of zero growth for the rest of Council of Europe expenditure.

The resources at the Court's disposal are meagre compared with those of the European Court of Justice. To give one example, the ECJ's library budget for

⁴¹ Amnesty International, the European Human Rights Advocacy Centre, Interights, Justice, Liberty, the International Commission of Jurists, and the AIRE Centre, Comments on Reflection Group Discussions on enhancing the long-term effectiveness of the Convention system, DH-S-GDR (2009) 008, March 2009, paragraph 50. They refer to the Report of the Group of Wise Persons, 15 November 2006, paragraph 37, which noted that "no other international court is confronted with a workload of such magnitude while having at the same time such a demanding responsibility for setting the standard of conduct required to comply with the Convention."

⁴² Budgets of the Council of Europe for the financial year 2009, Report on Economic Affairs and Development (*Rapporteur*, Mr Paul Wille), Doc. 11599, 25 April 2008, Explanatory memorandum, paragraph 14.

acquisitions is about 800, 000 Euros per year, while that of the Strasbourg Court is 70,000 Euros and reducing. Of course the European Courts have different functions, but it is difficult to understand why the European Union should fund the Luxembourg Courts so generously while the Council of Europe deprives the Strasbourg Court of the financial and human resources needed to perform its Herculean labours⁴³.

It is also essential, as the Group of Wise Persons recommended⁴⁴ that, in the interests of enhancing the Court's independence and effectiveness, the Court should be granted "the greatest possible operational autonomy, as regards in particular the presentation and management of its budget and the appointment, deployment and promotion of its staff." It is important too, as the Group of Wise Persons also recommended,⁴⁵ for the judicial system of the Convention to be made more flexible and for there to be a Statute of the Court.

The Court is forced by the present system to spend most of its time striking out inadmissible cases – all but six per cent of applications. Under the current Rules of the Court, cases may be struck out by a committee of three judges, one of whom may be the Judge elected in respect of the State Party concerned. The Rules of Court do not forbid the inclusion of a judge of the State Party. On the contrary, Rule 53 (1) enables such a judge, if not a member of the committee, to be invited to attend the Committee's deliberations. By contrast, Rule 24(5)(c) excludes such a judge from the panel of five judges called on to consider a request for a reference of a case to the Grand Chamber. Given the importance and finality of the Committee's decision to declare inadmissible an application or strike it out of the Court's list, the Rules should be amended to

⁴³ The 2009 budget for the ECJ is EUR 314,954, 443, about 5 ½ times the budget of the European Court of Human Rights.

⁴⁴ Report of the Group of Wise Persons to the Committee of Ministers, CM(2006)203, 15th November 2006, paragraph 124

⁴⁵ *Ibid*, paragraphs 127-128.

exclude the judge elected in respect of the State Party concerned from being a member of the committee or from being invited to attend its deliberations.

Even though the giving of reasons is an important safeguard encouraging a rational and fair process of decision-making, there is no duty for the three-judge committee to give reasons for rejecting an application without communicating it to the government. The applicant is informed of the decision by a peremptory letter reminiscent of the reply to the young narrator in Ring Lardner's novel *The Young Immigrants* who asked her father tenderly whether he was lost on the journey to their new home. "Shut up", he explained."

This peremptory procedure is adopted even in cases raising novel issues of interpretation and application of the Convention which are of general importance, and where lawyers have taken great care on behalf of applicants in cases which deserve to be communicated to the respondent governments. The rejection letters inform them that

"The decision is final and not subject to any appeal You will therefore appreciate that the Registry will be unable to provide any further details about the Committee's deliberations or to conduct further correspondence relating to its decision in this case."

I recognise that the absence of proper reasons does not mean that behind the scenes there has been an absence of detailed reasons to inform the committee in reaching inadmissibility decisions,, but it would enhance public confidence if they or a summary of them could be provided to applicants. There is widespread dissatisfaction among applicants and their advocates about the current practice.

The Court's refusal to provide short but clear reasons for decisions on inadmissibility is unacceptable, given that every proposal to the Committee is accompanied by a report containing the grounds for the proposed rejection of an

application. It would not be a significant burden for this analysis to provide the basis for a short, clear set of reasons, and it is wrong to suppose that only the committee needs to see that analysis. The Court should surely set a good example to national courts and administrators in the way in which it communicates its decisions to applicants.

Several of the senior Registry staff are old personal friends. We grew up together as the system grew and changed. They do a fine job as Platonic guardians of the *acquis*, but I hope they will forgive my observing that they are somewhat in-bred. The Section Registrars and Deputy Section Registrars are grown from within the Registry, and their experience is not enriched by adding those from outside with experience of running and reforming over-burdened national courts. This old friend may be forgiven for saying that younger advocates representing applicants often complain (privately) that they find access to Registry staff difficult and believe that Government agents have much easier access.

Protocol 14 was devised as a means of improving the efficiency of the Convention system and reducing the Court's backlog.⁴⁶ It would:

- (i) permit single judges to declare cases inadmissible where they are clearly without merit;
- (ii) permit committees of three judges (instead of Chambers of seven judges) to give judgments in repetitive cases where the Court's case law is already well established (for example, the many cases on length of proceedings);
- (iii) introduce a new admissibility requirement concerning cases where the applicant has not suffered a significant disadvantage, provided that the case has already been considered by the domestic courts,

⁴⁶ Protocol 14 was adopted by the Committee of Ministers on 13 May 2004.

and provided that there are no general human rights reasons why the application should be examined on its merits;

- (iv) provide for a single term of office of nine years for the judges of the Court;
- (v) give the Committee of Ministers new powers to bring proceedings before the Court against a party that refused to abide by one of the Court's judgments, and to request the Court to give an interpretation of a judgment;
- (vi) allow the Commissioner for Human Rights to submit written observations and take part in proceedings before the Court; and
- (vii) provide that the European Union may accede to the Convention.

Protocol 14 would make important improvements, and give the Court some breathing space before longer-term reforms are made. It needs to be given effect as a high priority. In May, under the Spanish Presidency, when they celebrate the 50th anniversary of the creation of the Court, the Committee of Ministers will consider a report by a Group of Experts on what can be done, despite obstruction by the Russian Federation, to ensure that the Court's work is done effectively. Protocol 14 is not a panacea, but its provisions need where possible to be translated into short-term practical measures while a new Protocol 15 is planned and discussed at the Swiss conference next year.

Six years ago, Interights (the International Centre for the Legal Protection of Human Rights) published a report by a group of eminent jurists⁴⁷ describing

⁴⁷ *Judicial Independence: Law and Practice of Appointments to the European Court of Human Rights*, May 2003. The authors were Professor Dr. Jutta Limbach, former President of the Federal Constitutional Court of Germany (Chair), Professor Dr. Pedro Cruz Villalón, former President of the Constitutional Court of Spain, Mr Roger Errera, former member of the Conseil d'Etat and of the Conseil supérieure de la magistrature in France, Professor Dr. Tamara Morshchakova, former Vice president of the Constitutional High Court of the Russian Federation, the Rt Hon Lord Justice Stephen Sedley, of the English Court of Appeal, Professor Dr Andrzej Zoll, former

the current system of appointments to the Court, in light of the principles of judicial independence. It contained a number of recommendations. In particular, the report proposed that the Council of Europe should devise and distribute minimum standards for national nomination procedures, and should set up an independent group of experts in international human rights law to make recommendations to the Parliamentary Assembly after having interviewed the candidates. In the words of Interights' report, internal processes are "often inadequate, politicised and so opaque that they are barely understood There is no meaningful review of these procedures at the international level, and no effective safeguards against arbitrariness."

The Parliamentary Assembly has recently called for improvements in national and European procedures, building upon the Interights report⁴⁸. They recommend new requirements to make the selection process fair and transparent, and to make it possible for Judges to retain judicial office in their own countries while serving as members of the Court, thereby strengthening judicial independence. Fortunately, the rigid and inflexible requirements imposed by the Assembly to secure gender balance have been interpreted by the Court in an advisory opinion so as to secure appointment on the basis of personal merit rather than gender⁴⁹.

Strasbourg Judges do not manage the cases in any real sense; that key responsibility is left to the Registry staff. It is the staff who manage the cases and make the vital selection as to which cases have priority and which cases are sent

president of the Constitutional High Court of Poland, and myself, as Hon President of Interights.

⁴⁸ Report of the Committee on Legal Affairs and Human Rights, *'Nomination of candidates and election of Judges to the European Court of Human Rights'* Parliamentary Assembly Doc 11767, 1 December 2008, See also Parliamentary Resolution 1646 (2009).

⁴⁹ The Court held that 'in not allowing any exceptions to the rule that the under-represented sex must be represented, the current practice of the Parliamentary Assembly is not compatible with the Convention'. Advisory opinion on certain legal questions concerning the lists of candidates submitted with a view to the election of judges to the European Court of Human Rights, Strasbourg 12 February 2008.

to the Judges in batches for summary disposal. Lord Woolf noted in his Review that ⁵⁰ within the 20 divisions in the Registry, arranged primarily according to language and country, “there is constant pressure to meet targets and increase productivity”. And again according to Lord Woolf⁵¹ the lawyers in the Registry “work to fulfil numerical targets; they have to complete a certain number of cases each year... it is often the more important Chamber cases that get left at the bottom of the pile.” It is a factory system, dominated by the Registry, attempting to achieve high productivity in delivering mass production of mainly negative decisions.

Even cases which have been given priority treatment by the Court – urgent cases involving arbitrary arrest and detention, solitary confinement, inhuman and degrading treatment threatening an applicant’s health and life, the coerced sterilisation of Romani women, and other gross abuses – may be left in abeyance for years. As I know from personal experience, when the lawyers in these cases write to the Registry, they are simply told to wait. The Judges remain in ignorance of the way in which priorities are being determined or operated by the Registry. There is a lack of transparency about the relationship between the Judges and the Registry, and a lack of a proper system of judicial oversight to ensure that urgent cases are given proper priority. I understand that the Court has been examining this problem and look forward to the publication of the new system for ensuring that urgent cases are dealt with expeditiously. It is really important that the criteria are clear and transparent and widely available.

The Convention envisages⁵² that the Court is to be assisted by legal secretaries. It is presumably for the Judges, in partnership with the Registry, to

⁵⁰ *Review of the Working Methods of the European Court of Human Rights*, the Rt Hon Lord Woolf and others, December 2005, at 53.

⁵¹ *Ibid.*, 55.

⁵² Article 25.

decide how that assistance should be provided. Unlike the Judges of the European Court of Justice and the International Court of Justice, Strasbourg Judges are not assisted by their own *référéndaires* in analysing the facts, the law and the case law, and in seeking to improve the reasoning in the decisions and judgments. They depend on lawyers within the Registry who may be assigned to them in particular cases. If Judges wish to do independent research they often have to do it themselves.

It is unlikely that extra funds would be made available to pay for additional support for the Judges, but it is important to ensure that their working conditions are such as to attract able candidates to become and remain members of the Court, and that the Judges are able themselves to decide cases with adequate time for analysis and reflection. It is also essential to involve the Judges themselves in case management. This has been done in the UK with great success, after judges have received the necessary training in case management.

It is also essential in the interests of judicial independence for salaries to be sufficient, and for serving Judges to have both security of tenure and security when they return to their home countries after their term of office. Protocol 14 would give them nine years' tenure, but it would not provide for judicial retirement benefits. In 1997, the Committee of Ministers adopted a resolution on the status and conditions of service of judges of the Court to be set up under Protocol 11.⁵³ It provided that the conditions of service would be governed by provisional regulations which would be reviewed by the Committee of Ministers within twelve months following the entry into force of Protocol 11. That review did not take place.

⁵³ Resolution (97) 9 adopted on 10 September 1997.

The 'provisional' regulations which remain in force require the judges to provide, at their own expense, for their retirement or pension benefits corresponding with the period of their terms of office, as well as arranging, at their own expense, for insurance for temporary or permanent incapacity to work due to illness or accident, costs of health care, and death. Judges of the Court are well paid while they are in office, but it is very important that they should have proper social cover and security for their retirement. Otherwise, they will fear the consequences if they displease the government of their country and are not renewed in office, leaving them with no prospects of earning a living in a worthwhile occupation on their return home or receiving a pension. This has already happened in at least two cases of Judges who were not re-elected, and constitutes a serious threat to judicial independence. There is no justification for treating them less favourably than the judges of the International Court of Justice,⁵⁴ or the European Court of Justice.⁵⁵

Professor Caflisch has asked⁵⁶ whether the increase in the Court's output has been at the expense of quality. As a serving Judge, he cannot answer that important question. I agree with the group of leading human rights NGO's that⁵⁷

⁵⁴ The UN General Assembly fixes the conditions for retirement pensions for those judges of the International Court of Justice who have served a full nine year term at one half the annual salary. There are differing amounts for those serving for shorter or longer periods: Article 32 of the Statute of the Court.

⁵⁵ The terms and conditions for judges and advocates-general of the European Court of Justice (ECJ) are set out in European Communities staff regulations. Members of the ECJ belong to the contributory final salary pension scheme paid for from the general EU budget. A contribution of 10.25 per cent is deducted from their monthly basic salary. After ceasing to hold office, members of the ECJ are entitled to a pension for life payable from the age of 65. The amount of pension is calculated on the basis of 4.275 per cent of their final basic salary per year in office. The maximum pension is 70 per cent of the basic salary last received. Members of the ECJ are entitled to sickness, occupational disease, industrial accident and birth and death benefits under a social security scheme funded by the Communities, to which they contribute 2 per cent of their basic salary. This scheme reimburses 80 per cent of medical costs. See House of Lords Hansard, 18 June 2008, Column WA165-166.

⁵⁶ Note 29 above, at 405.

⁵⁷ Amnesty International, the European Human Rights Advocacy Centre, Interights, Justice, Liberty, the International Commission of Jurists, and the AIRE Centre, Comments on Reflection Group Discussions on enhancing the long-term effectiveness of the Convention system, DH-S-GDR (2009) 008, March 2009, paragraph 2.

“The Court has ensured that applicants have obtained redress for violations of human rights when states have failed to provide an appropriate remedy. In doing so it has played a crucial role in holding states accountable for these violations.... The judgments of the Court have provided essential guidance ... on the steps necessary to respect and secure fundamental human rights.”

Despite the intolerable conditions in which it has to work, the Court has continued to produce landmark judgments of high quality⁵⁸. However, in important areas there is a lack of consistency and coherent principles in Chambers judgments which await clarification by the Grand Chamber.

For example, although the Court’s case law includes landmark judgments explaining and applying the fundamental right to free expression, it has often been closely divided, and its reasoning has always suffered from a use of ad hoc balancing under the margin of appreciation doctrine which lacks legal certainty and adherence to clear principles.⁵⁹ In recent cases, the Court’s case law on free expression has become less consistent and coherent and faithful to legal principle. In the core area of political expression where a speaker seeks to criticise governmental actions, the Court has rightly emphasised that restrictions on speech will be permitted only in the most exceptional circumstances⁶⁰. Because of the role played by politicians in a democratic society, the limits of acceptable criticism of such persons are wider than with respect to private persons.⁶¹

⁵⁸ Recent important Grand Chamber judgments include *Ilascu v Moldova and Russia* (2005) 40 EHRR 46; *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Sirketi v Ireland* (2006) 42 EHRR ; *D.H. and others v Czech Republic* (2007) 47 EHRR 3; *Saadi v Italy* (2008) 24 BHRC 123; *Nachova v Bulgaria* (2006) 42 EHRR 43 ; *Hirst v UK (No. 2)* (2006) 42 EHRR 41; *Sørensen & Rasmussen v Denmark* (2008) 46 EHRR 29; *Jalloh v Germany* (2007) 44 EHRR 32; *Dickson v United Kingdom* (2008) 46 EHRR 4; *S and Marper v United Kingdom*, Applications 30562/04 and 30566/04 (Grand Chamber), 4 December 2008; and *A and Others v United Kingdom* (Application 3455/09) (Grand Chamber), 19 February 2009.

⁵⁹ Anthony Lester, ‘Universality Versus Subsidiarity: A Reply’ [1998] EHRLR 73.

⁶⁰ Eg., *Castells v Spain* (1992) 14 EHRR 445, paragraph 46.

⁶¹ *Lingens v Austria* (1986) 8 EHRR 407; *Worm v Austria* (1997) 25 EHRR 454, paragraph 50; *Colombani v Italy*, Judgment of 25 June 2002.

Unfortunately, in some of its recent decisions concerning situations of conflict between freedom of expression and the right to protection of one's reputation, the Court has not fairly weighed the various interests against each other in order to ascertain whether a fair balance has been struck between the competing rights and interests. Rather, the decisions display a disproportionate weight being given to reputational rights. The most striking example of this is the case *Lindon, Otchakovsky-Laurens and July v France*⁶², as well as the decisions which show the emergence of a dangerous doctrine pursuant to which court-imposed standards or claimed duties of responsible journalism are being invoked to police the way in which the press reports on matters of clear public interest. It is hoped that the Court will curtail the development of this doctrine and return to applying the established jurisprudence which rightly accorded substantial importance to the role and duties of the press in a democratic society, particularly when commenting on the actions of political actors or other public figures.

The problem with the Court's loose invocation of the margin of appreciation is that it removes the need for the Court to discern and explain the criteria appropriate to particular problems. What is needed is a careful, skilful and consistent application of the principle of proportionality. That is lacking in some of the Court's recent case law.

The President of the Court noted at a press conference on 29th January,⁶³ that nearly 100,000 cases are pending and are constantly increasing. He regretted that "various reform proposals have reached an apparent impasse", and called

⁶² (2008) 46 EHRR 761, at paragraph 57. See generally Lester, Pannick and Herberg, *Human Rights Law and Practice*, 3rd ed., 2009, 4.10.10.

⁶³ HRJ (08-09) 8.

for measures to safeguard the long-term effectiveness of the system. President Costa said that

“The main lines of the reform were clear: comprehensive implementation of the Convention standards at domestic level; effective execution of the Court’s judgments by Member States to ensure that the Court was not overloaded with large numbers of similar cases and a re-structured protection mechanism allowing the Court’s efforts to be concentrated as a matter of priority on the important well-founded cases.”

These praiseworthy aspirations are not likely to be achieved in the current political climate. Comprehensive implementation of the Convention standards at domestic level could happen only if there were the necessary collective will within the Council of Europe and among the governing national authorities to achieve this. That will is at present lacking. And the judicial systems in many European states are not yet genuinely independent and impartial in dealing with human rights cases and other politically sensitive cases. In Professor Caflich’s words, “A reason for the high number of applications from Eastern Europe is the distrust of individuals vis-à-vis their national judicial systems.”⁶⁴

Effective execution requires speedy and full compliance by the States with their obligation to abide by the Court’s judgments and effective monitoring of the obligation of States parties to abide by the Court’s judgments. Many Governments are not complying with that obligation, and are not called to account by their Parliaments for failing to do so⁶⁵. At the end of 2008, some 6, 248

⁶⁴ Note 29 above, at 405. That is why the proposal by Professor Laurence R Helfer to embed the Convention regime as a “deep structural principle” in national legal systems lacks practical reality: “Redesigning the ECHR: Embeddedness as a Deep Structural Principle of the European Human Rights Regime”, 19 *European Journal of International Law* 125(2008). Every Contracting State has already purported to do this, but Helfer’s proposals depend on the existence of independent and impartial courts willing to act in partnership with the European Court of Human Rights, for example, by asking the Strasbourg Court to review the Convention-compatibility of existing or proposed legislation. Apart from the matter of the capacity of national courts to carry out this task in many Contracting States, this proposal would further burden the Court with the need to give advisory opinions on proposed or actual legislation. It would interrupt and delay the law-making processes of national legislatures, and would tend to violate the separation of the judicial from the other branches of government.

⁶⁵ Committee of Ministers, “Supervision of the execution of judgments of the European Court of Human

cases were pending before the Committee of Ministers of the Council of Europe in its supervisory capacity. Despite the best efforts of the dedicated staff of the Directorate of Human Rights, the Committee finds it difficult to muster sufficient collective energy to secure speedy and proper execution by recalcitrant governments.

President Costa did not amplify his reference to a “restructured protection mechanism”. This could mean a judicial filtering system as recommended by the Group of Wise Persons, or a new two-tier system of Commission or Court of First Instance and a Final Court, or further limiting or even abolishing the right of individual petition. I would suppose that President Costa agrees with the Group of Wise Persons⁶⁶ that to give the Court a discretionary power (analogous to the *certiorari* procedure of the United States Supreme Court) to decide whether or not to take up cases would be

“alien to the philosophy of the European human rights protection system. The right of individual application is a key component of the control mechanism of the Convention and the introduction of a mechanism based on the *certiorari* procedure would call it into question and thus undermine the philosophy underlying the Convention. Furthermore, a greater margin of appreciation would entail a risk of politicising the system as the Court would have to select cases for examination. The choices might lead to inconsistencies and might even be considered arbitrary.”

In my view, the problems of the present system should not result in yet further procedural obstacles to the right of individual application. As Michael

Rights”, 1st annual report, 2007, Council of Europe, March 2008; Recommendation CM/Rec (2008) 2 of the Committee of Ministers to member states on efficient domestic capacity for rapid execution of judgments of the European Court of Human Rights; Parliamentary Assembly Resolution 1516 (2006) on Implementation of judgments of the European Court of Human Rights”; Committee on Legal Affairs and Human Rights, AS/Jur (2008) 24, 26th May 2008. In the United Kingdom, the Joint Parliamentary Committee on Human Rights monitors the government’s response to the judgments of the European Court of Human Rights as well as of the judgments of domestic courts: “Monitoring the Government’s Response to Human Rights Judgments: Annual Report 2008”, HL Paper 2173; HC 1078, 7 October 2008.

⁶⁶ Report of the Group of Wise Persons to the Committee of Ministers, CM(2006)203, 15th November 2006, paragraph 42.

O'Boyle rightly observes⁶⁷ the success of the Convention system is “undoubtedly linked to the immeasurable value over the years of the right of individual petition” and that right should not be “trammelled or curtailed in any way.” Instead, there is a pressing need to create a new streamlined two tier system which would enable the Grand Chamber of the Court to concentrate its efforts, as a matter of priority, on cases involving serious questions of public importance about the interpretation and application of the Convention. At the same time, there needs to be a body – whether a judicial filtering system within the Court, or a Commission or a Court of First Instance – to deal fairly and speedily with admissibility in all cases. In my view, it would be important for the body to be able to establish the facts, as was done by the European Commission of Human Rights.

A new Protocol 15 will be needed to make these changes, but there are reforms which could now be made without waiting for further amendments to the Convention. The Court is rightly requiring State authorities to provide effective remedies and to eliminate systemic practices which violate Convention rights. The pilot judgment procedure is important in enabling the Court to deal with repetitive complaints that highlight such practices. But the Court needs to develop a fair procedure for dealing with pilot cases so that other parties with a common interest are able to be represented. And the Committee of Ministers must be more vigorous in ensuring that States introduce effective general measures to eliminate systemic and structural problems and provide effective remedies to victims.

In addition, the Court should enable its Judges to decide, in co-operation with the Registry, which cases should be given priority, and what procedure

⁶⁷ Note 2 above, at 3-4.

should be adopted for those cases. The criteria should be developed and made public.

The power conferred on the Secretary General of the Council of Europe to obtain explanations from Contracting States on the manner in which their internal laws ensure the effective implementation of the Convention has fallen into disuse. It should be activated. And the Committee of Ministers should be more rigorous in requiring States to abide by judgments of the Court by which they are directly bound, as well as seeking to ensure that judgments of general importance are given effect across Europe – the so-called *erga omnes* principle.

President Costa rightly calls for a Special Conference next year to consider the future of the Court and Convention system. It should consider what kind of Court do we need, and with what level of political and financial support. There is an urgent need to take stock and strengthen the foundations of what has been built up over the past 50 years. One risk in holding such a Conference is that it could be used to dismantle, to wreck and to weaken. The moment of reform of any type is always a dangerous one. There are certainly States whose governments would dearly love to have the opportunity to hobble the Court. But the risks should be faced and overcome.

To adapt the poet's description of the Mosaic Code⁶⁸, the ethical and legal code protected by the Convention system is "a moon for mutable lampless men". It is often described as a beacon of hope for the 800 million peoples of Europe. But the lamplighters who lit the beacon more than half a century ago are no more, and the light will fail unless our generation rekindles the flame. Let us hope that those who govern us will take heed.

⁶⁸ Isaac Rosenberg, *The Jew*.