1 The Court Over Sixty Years

From: The European Court of Human Rights
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1. International treaties and the zeitgeist

International treaties are like monuments. They remind us of unique moments in history. The Treaty of Versailles tells the story of the aftermath of the First World War, a story of winners and losers, of lessons learnt and lessons not learnt. The map of Europe is redesigned; self-determination is understood to be a leading principle in international law; the League of Nations is founded and legal mechanisms are foreseen to adjudicate conflicts between States, to protect national minorities and to avoid a race to the bottom in labour rights. Yet, all these mechanisms, be it the Permanent Court of Justice, the Minority Treaties, or the International Labour Organization, prove to be insufficient to foster peace and well-being in Europe and worldwide in the long run.

There is no such peace treaty after the Second World War. But there is the European Convention on Human Rights (ECHR), a multilateral treaty based on humanism and rule of law ‘according to which right is pre-eminent over might and the purpose of the State ... is not its own greatness, power or riches but the individual self-fulfilment of everybody subject to its rule with due respect for his or her dignity and freedom’ as stated by one of its drafters, the former French Minister of Justice Pierre-Henri Teitgen. Similar to the—albeit non-binding—Universal Declaration of Human Rights (UDHR) the ECHR is a document that marks a change in philosophy and gives a new definition of the responsibility of the State towards the individual. It fixes basic values in times of change and paves the way towards reconciliation in Europe. Unlike in a peace treaty not all wartime enemies participate in its elaboration, but, one by one, all the European States accede to it, signalling their consent to the values fixed by a small community of States in the early 1950s.

Seven decades later forty-seven European States have ratified the Convention; only Belarus and the Holy See—for different reasons—stay outside. Admittedly, the new start based on common values could not prevent the outbreak of violent conflicts between Member States. Mention may be made of the five-days-war between Georgia and the Russian Federation in 2008 and hybrid war-like conflicts between the Russian Federation and Ukraine as well as between Armenia and Azerbaijan. But overall peace was secured in Europe over the years; for human rights violations in military conflicts the Convention system provides judicial remedies. At the same time the resurgence of anti-democratic tendencies could not be successfully banned in all Member States, but such tendencies could be stigmatized as grave human rights violations in binding judgments of the European Court of Human Rights (ECtHR). Thus it is not surprising that the European model of human rights protection has been attractive and inspirational for other parts of the world. Nevertheless, there was and is a debate in some Member States to withdraw from the Convention as the Court’s jurisprudence is seen to be too intrusive on national sovereignty.

The almost seven decades of the life of the Convention are thus a reflection of a new European history that started after the Second World War, even more, a reflection of Europe’s constitutional identity, of Europe’s vision of its better self. It has been a success story. But it is a success story with an open end.

The Convention entered into force after the tenth ratification in 1953. The ECtHR was created in 1959. But if the story is to be told from the beginning, it has to start in 1946 when Winston Churchill held his famous Zurich speech and outlined his plans for recreating the ‘European family in a regional structure called, it may be, a United States of Europe’. Or even before, during the time of war, when, in 1941, the Atlantic Charta’s formula of ‘freedom from fear and want’ conquered the hearts of those whom Churchill would later
call ‘the vast, quivering mass of tormented, hungry, careworn and bewildered human beings’. If international treaties are like monuments, it is not only because they remind us of unique moments in history, but also because they are durable. But even if they seem to be carved in stone they are full of life and aptly adapt to new times and new challenges.

2. The 1940s—Concepts, plans, and fruitful discussions in a newly divided world

a) A new credo

The idea of a European system of human rights protection can be seen as a ‘Great Leap Forward’. It is based on three pillars: first, the idea of human rights as a precondition for peace and prosperity; second, the idea of rebuilding Europe as a self-confident part of the newly created United Nations, based on its distinct values and its century-old heritage; and third, the idea of a fundamental change in international law allowing for ‘restrictions of sovereignty more far-reaching in their implications than any yet propounded in the annals of international utopias’. This last point was most clearly spelled out by Hersch Lauterpacht who can be considered as one of the masterminds of an efficient human rights protection system going beyond mere declarations. Not reform, but revolution was required, a quality change for international law as well as for European politics, replacing mistrust with trust and hatred with cooperation.

b) Universality versus Europeanness

Many saw the 1948 UDHR, even if celebrated as the ‘common standard of achievement for all peoples and all nations’, as a disappointing result of a long and promising process as it had missed the target of creating a binding international treaty with an effective implementation mechanism. Its value lies rather in the comprehensive description of the status quo of human rights and fundamental freedoms worldwide giving a ‘composite synthesis of all existing rights traditions’. At the same time, where it did not go far enough, the European States could move on. And where it was based on compromise in order to integrate non-European values and ideas, a different path was open for the drafters in Europe. This is especially true for the idea that rights have to be ‘deserved’ as argued by many non-European thinkers during the debate. They wanted to grant rights only to those who fulfilled specific obligations, be it towards their family, towards society or towards the State. This idea is, however, at odds with the basic concept of ‘inherent and inalienable rights’, dear to the European Enlightenment. To bridge this ideological cleavage it was necessary to find a compromise. Thus the Preamble to the UDHR refers to ‘inalienable rights’ and Article 1 UDHR stresses that all human beings ‘should act towards one another in a spirit of brotherhood’. Nevertheless, none of the rights granted in the UDHR is made dependent on the prior fulfilment of duties and obligations. No such compromise formula is found in the ECHR; duties and obligations are not mentioned.

c) Beginning of the drafting process

The drafting process of the ECHR began before the adoption of the UDHR and lasted from May 1948 until November 1950, for about two and a half years—a historical breathing space in Europe with the Nazi atrocities having been overcome, but still vividly present, and the Cold War ante portas with communist regimes having already been installed in Poland, Czechoslovakia, Hungary, Romania, and Bulgaria, and with the first violent clashes between the two blocks starting in June 1950 in the Korean War. It was thus a period dominated by double hope and double fear. The Western part of Europe was united in its wish to prevent the rise of another Hitler and its fear of being overrun by the communists. This fuelled the project of a (more) united ‘core’ Europe excluding, at least for the time being, Portugal and Spain, still dominated by fascist regimes, and Eastern European countries, already isolated.
by the iron curtain. This project was eventually put on two different tracks, one based on economic cooperation, and one based on the coordination of ‘soft’ policies and the implementation of human rights instruments. The ECHR forms the essential part of the second approach.

(p. 6) One first important step in the creation of the ECHR was the Hague Congress of non-governmental movements in May 1948 with its ‘Message to Europeans’. It already included a reference to a ‘Charter of Human Rights’ and the ‘establishment of a ‘Court of Justice’ with adequate sanctions for the implementation of this Charter’.

The drafting process involved as main actors the constituent parts of the newly created Council of Europe (CoE), the ‘Committee of Ministers’ as governmental body and the ‘Consultative Assembly’ composed of Parliamentarians. They were supported by expert and specialized bodies. While the ‘Committee on Legal and Administrative Questions’ was part of the Consultative Assembly, the ‘Conference of Senior Officials’ and the ‘Subcommittee on Human Rights’ were instructed by or belonged to the Committee of Ministers. Their different approaches to human rights protection—a more enthusiastic one on the side of the Parliamentarians, a more reluctant and conservative one on the side of the government representatives—marked the up-and-down-movements in the elaboration of the text of the Convention.

Authors of the first draft (the so-called ‘European Movement Convention’) were the former French Minister of Justice, Pierre-Henri Teitgen, the former British Deputy Chief prosecutor at the Nuremberg Trial, Sir David Maxwell-Fyfe, and the Belgian member of the UN Commission of Human Rights, Fernand Dehousse. Initially, it represented a minimalist approach preventing retrogression in national human rights protection and was thus based on the idea of a ‘freezing clause’—human rights guarantees fixed on the national (constitutional) level at the time of signing the new Convention should not be allowed to be withdrawn or diluted. The focus of this first draft was exclusively on political rights seen as a stronghold in preventing the resurgence of totalitarian regimes. The rights to be protected were presented in a summary form only, a ‘Supplementary Agreement’ was left for a later day. While the scope of the rights was thus vague, the control mechanism, composed of a Court and Commission, was stronger than, arguably, it is nowadays. Not only was the right to individual petition foreseen, the Court should even be allowed ‘to prescribe measures of reparation’, a competence never included in the text of the ECHR, but claimed by the Court ‘under very exceptional circumstances’.

The document was reworked in the ‘Committee on Legal and Administrative Questions’ of the Consultative Assembly of the Council of Europe. There was a fierce controversy about the scope of the human rights guarantees to be included—no compromise was found in respect of the right to property and the right to education—as well as about the control mechanism. In the end a list of the rights to be guaranteed and a dualistic control system with Court and Commission was agreed upon. On 8 September 1949 an overwhelming majority adopted the famous Recommendation 38, marking the ‘enthusiastic period’ of the elaboration of the Convention.

The topics discussed in this very early phase of the drafting process are basically the same as those discussed nowadays. Then and now they are prone to controversy—the danger of an (undemocratically) intense encroachment on State sovereignty, the danger of judicial activism, and the danger of overburdening the control institutions with unmeritorious complaints. While some of those participating in the debate wanted to see a European Court as a first step towards a federal European State, a true ‘European Union’, others were interested only in an ‘alarm-bell’ warning against totalitarian tendencies within Member States. Whatever the vision, the debate was based on the assumption that
democratic States did not have to fear to be accused before the new Court as only truly abusive human rights restrictions would be sanctioned.\textsuperscript{30}

The 1940s are the decade of the twentieth century during which crimes ‘for which there is no equal at any time in human history’ (Churchill) have been committed. Nevertheless, it was also during this decade, even if at its very end, that a political initiative started to pave the way for an international control over human rights. The idea of an international Court responsible (p. 8) for human rights protection in Europe was no longer a phantasm, but had taken shape. On the other hand, already in those early days, the problems, dilemmas and questions as to the proper role of such a Court—intriguing both the Member States of the Council of Europe and the Court itself up to the present time—were on the table.

3. The 1950s—Successful negotiations, soft revolution, and a slow start

a) Routes of compromise

A project is not yet a final text. It was still a long way to go from the adoption of Recommendation 38 on 8 September 1949 until the adoption of the final text and the opening of the Treaty for signature on 4 November 1950.

The ball now lay in the field of the Governments. It was the Committee of Ministers who had to advance the project, but was very reluctant to do so. While there was a consensus on a closer value-based unity among Western European States and a bulwark against communism, judicial or quasi-judicial decisions on controversial aspects of internal affairs were not a promising perspective from the point of view of representatives of the Member States’ executive. Therefore, without giving a general ‘okay’ to the human rights protection mechanism as designed by the Assembly, the Committee of Ministers mandated a Committee of Legal Experts to start the discussion about the Convention \textit{ab initio}. Nevertheless, the usefulness of a Convention on Human Rights was not put into question. Two different approaches seemed, however, difficult to reconcile. The supporters for a strong and effective protection system opted for a general list of rights to be guaranteed and for granting far-reaching competences for Commission and Court, including a right of individual petition. The opponents favoured an extensive elaboration on the scope of the respective rights, but were against any effective control mechanism, especially against setting-up a Court. In the end a compromise was found by the Conference of Senior Officials, who were under the instructions from their Governments:\textsuperscript{31} a compromise that was later on refined by the Committee of Ministers’ Subcommittee on Human Rights.\textsuperscript{32} On the one hand, the core human rights guarantees (p. 9) were recorded in detail including potential restrictions. In this process inspiration was drawn from the work being done in parallel on the universal level—but without any short-term success\textsuperscript{33}—in drafting an International Covenant on Civil and Political Rights. On the other hand, not the Court as a true judicial body, but only a ‘Commission’ would be the centrepiece of the new control mechanism. Its task was to prepare reports. Both the right to individual petition (Article 25)\textsuperscript{34} and the jurisdiction of the Court (Article 46)\textsuperscript{35} were considered to be only optional and not mandatory. The Committee of Ministers—a political body—became an integral part of the control system. Unless it brought a case to the Court with a two-thirds majority, the Commission’s report would be final.

In many respects the re-working of the original draft was meant to pull out the teeth of a project that was considered to be a dangerous attack on unfettered State sovereignty. The political-rights-approach, which had been in the forefront of the first draft, was abandoned; the right to free elections and the right to form an opposition were cancelled. Vaguely worded escape clauses based on ‘national security’, ‘public safety’ and the ‘economic well-being of the community’ were added to most of the substantive guarantees. A ‘colonial
clause’ setting out specific regulations for dependent territories was inserted, giving in to specific demands made by the British and the Dutch Governments.\(^{36}\)

After what seemed to be a tour de force by the Committee of Ministers the Consultative Assembly was given an opportunity to take a stand on the end product. The Assembly’s proposals aimed at restoring the main features of its own original draft. It recommended including the rights that had initially been controversial, the right to property and the right to education, and most importantly, the right to free elections, to replace the opt-in (p. 10) mechanism for the individual petition to the Commission by an opt-out mechanism, and to delete the colonial clause. Although the Assembly adopted these modifications unanimously, they were completely ignored by the Committee of Ministers; the conservative approach won over the enthusiastic approach.

Opinions on what was finally achieved may differ. Those active in the preparatory process, above all Pierre-Henri Teitgen and David Maxwell-Fyfe, were disillusioned. But with the benefit of hindsight a more positive evaluation is justified, this all the more so when comparing the result to the standstill of human rights protection on the universal level.\(^{37}\) After all, it was for the first time that an international binding treaty fixed obligations of the contracting parties towards ‘everyone within their jurisdiction’ (Article 1 of the Convention) and set up a control mechanism, be it a weak one, for supervising these obligations.

If it was a revolution in international law, it was softer than many had hoped it would be. However, the evolution of international law always calls for patience. What is important is that doors are not closed forever. This is what happened to the Convention. While important rights such as the right to property, which has been among the first ones to be guaranteed in historical documents such as the Magna Carta Libertatum of 1215, the right to education, and the right to free elections had been left out in the text of 1950, they were included in the First Protocol opened for signature shortly after the Convention itself on 20 March 1952.\(^ {38}\) The Convention remained open for further amendments and improvements on the basis of additional Protocols. Sixteen Protocols have been elaborated in the meantime.

b) Ratification process and entry into force

After the adoption of the Convention it took another two years before it entered into force after the tenth ratification on 3 September 1953. It is (p. 11) interesting to have a closer look on those States who were among the first to ratify the Convention, and also on those who were missing ‘in the club’.

It was the United Kingdom who took the lead on 8 March 1951 by ratifying the Convention, but neither accepting the right to individual petition to the Commission (Article 25) nor the jurisdiction of the Court (Article 46). This illustrates the ambivalent position of the United Kingdom in the whole process.\(^ {39}\) The driving force and political inspiration came from Winston Churchill, the legal inspiration from important British lawyers, Sir Hersch Lauterpacht as the master of doctrine and Sir David Maxwell-Fyfe who was actively promoting the project. At the same time it was a deputy of the British Labour Party who was the only one to vote against the Consultative Assembly’s first draft and claimed that the Convention would ‘do absolutely nothing to protect human rights’, rather it would ‘create [an] expensive and intrusive machinery’.\(^ {40}\) In the Committee of Ministers it was the British Government who was strongly opposed to the creation of an effective control mechanism. It was responsible for the insertion of the colonial clause and the deletion of the right to free elections; it did not agree to an automatic right to individual petition. Nevertheless, the United Kingdom was soon to be exposed to an intense scrutiny of its human rights record in the colonial context. One of the first cases on the dockets of the Commission was the Inter-State complaint Greece lodged against the United Kingdom in 1954 because of the way in which an insurrection of the local population in the then colony Cyprus had been quelled.\(^ {41}\)
It is thus fair to say that the Convention mechanism would have looked differently without the participation of the United Kingdom.

By contrast, France was always a fervent supporter of an effective human rights control mechanism and was even one of the few countries supporting the setting-up of a Court with mandatory jurisdiction. The former French Minister of justice Teitgen was a central figure in the elaboration of the Convention. Nevertheless, France ratified the Convention only more than twenty years after its entry into force, in 1974, when Georges Pompidou had followed Charles de Gaulle as President of France. And even then it did not accept the right to individual petition.

(p. 12) Western Germany was not at all involved in the preparatory process, but was nevertheless among the first States to ratify the Convention (1952) and to accept the right to individual petition and the jurisdiction of the Court (1955). For Western Germany it was essential to show its willingness to protect human rights and to allow international supervision. It was a precondition for re-entering the circle of ‘civilized nations’ from which the country had been excluded in the aftermath of the Second World War. For the other Western European States it was almost a raison d’être of the Convention system to have Western Germany ‘on board’. The experience of what had happened in Germany between 1933 and 1945 had run like a red thread through the discussion about setting up a collective pact against totalitarianism. When Germany ratified the Convention it had already established a strong national system of human rights protection with the German Federal Constitutional Court starting its work in 1951. Nevertheless, international supervision was considered to be indispensable.

The first States immediately accepting the right to individual petition and the jurisdiction of the Court together with the ratification were Ireland and Denmark in April 1953.

It is clear that the ratification of an international treaty, which, as a rule, involves the national Parliament, has to be ‘in the national interest’. And it is not necessarily self-evident why it should be ‘in the national interest’ to ratify an international human rights convention allowing outside control over what is considered to be internal affairs. Relevant counter-arguments are: International supervision as such does not improve a national legal system; it is not necessary to accept commitments others do not accept; national practitioners know better how to safeguard human rights.

The examples of the United Kingdom, France, and Germany as well as the ratification history of the ECHR as a whole show basically three patterns why binding legal obligations in this delicate field were eventually accepted. First, the ECHR was considered as a sort of ‘insurance’ against the danger of an undemocratic take-over of power; this was especially relevant for States liberated from dictatorial regimes. Second, it was interpreted as a signal to the outside world that a State is ‘member of the club’ and upholds the same standards as others; this was important for those whose human rights records was tainted and internationally criticized. Third, and probably most importantly, the motivation was to make sure that others accept and maintain the standards. It was understood that ‘teaching others’ would require credibility; judging and being judged are the two sides of one coin.

(p. 13) c) Beginning of the Commission’s work

Yet, it might still take time to find political support for such an important step on the national level—support that was for example missing in France over many years. Therefore it was no surprise that the process of accepting binding legal obligations under the Convention was comparatively slow even after the consensus on content and form of the new treaty regime had been reached. It was only on 18 May 1954 that the Committee of Ministers could elect the first members of the Commission. And it took five more years, until 1959, until the Court could be set up.42 This delayed start might also be explained by the fact that at that time European States were not used to ‘doing’ human rights, not even
in their domestic courts. The model of the United States greatly influenced the new experiment of constitutional justice in European countries such as Germany. This laid the foundation for a new understanding of human rights adjudication as a legal tool. But it took time; the move was slow. Without such domestification, the regional effort might not have succeeded at all.

In the 1950s it was undoubtedly the Commission, which was the centrepiece of the Strasbourg human rights protection mechanism. Already between 1955 and 1957 over 100 individual applications were filed each year. But it was only in 1958 that the first two cases were declared admissible, *de Becker v Belgium* and *Lawless v Ireland*. In neither of them a violation was found.

Even before, however, the Commission was called upon to give opinions on Inter-State complaints. This competence did not depend on any optional declaration and thus applied immediately after ratification.

The first Inter-State complaints were brought by Greece against the United Kingdom and concerned emergency measures taken to curtail an insurrection in Cyprus, which was still a British colony at that time. It raised legal questions about discretion in derogating from the Convention in case of emergency—questions relevant once again about sixty years later because of the derogations of France after the terrorist attacks in 2015 and of Turkey after the attempted coup-d'état in 2016. The Commission declared the first complaint admissible, analysed the situation comprehensively without, in the end, finding a violation. This was due to the fact that the United Kingdom had revoked the contentious legislation in the meantime. The Commission’s investigation and analysis led to nothing but a ‘Report’; no follow-up was ordered by the Committee of Ministers. Nevertheless, it did have important effects as it showed that outside control could bring to light long-standing, but unacceptable practices—the case was mainly about flogging and collective punishment. Furthermore, the dissenting opinions speaking out against dumping the problem after the change of the legislation provided first evidence of controversies in interpreting the text of the Convention. For sure, the diplomatic findings of the Commission are not compatible with present-day human rights standards. But, compared to the work of the UN Commission on Human Rights which was considered at that time as ‘the most elaborate waste-paper basket ever invented’, on the European level progress was visible. The gravest deficiency of the procedure was the secrecy of the Commission’s Report—nowadays available on the Court’s database—as it could not have an effect of ‘shame and blame’.

Looking back to the 1950s the parallel development of two models of Europe is the salient feature of the time. Two integration processes advance at different speed, involve different Member States and have a different focus although both aim at ‘greater unity’ among (Western) European States. The Strasbourg system is the slower and the lighter one. It focuses only on values and leaves aside economy, money and finances; yet, it is more open and accessible for States wanting to adhere to it. Economic integration within the European Coal and Steel Community, the European Economic Community, and the European Atomic Energy Community is more forceful and effective. Of the value-based framework of a new European constitutional order only a silhouette is visible.

4. The 1960s—Reflection and preparation

a) Halted reform impetus

After the 1950s, which had witnessed a political go-ahead with the setting-up of the Convention mechanism and the quick enlargement of the circle of States, there was not so much momentum anymore. As the then Chairman of the Parliamentary Assembly’s Legal Affairs Committee, Marcel Prélot, put it: ‘after the great initial blaze, the fire ha[d] from then on been smouldering beneath the ashes’. The only two countries which ratified the Convention in the 1960s were Cyprus and Malta, both soon after becoming independent.
and thus probably more interested in marking their new status in international law than feeling the need for European human rights protection.

Nevertheless, the material scope of human rights guarantees was widened with the Forth Protocol adopted in 1963.\(^{53}\) The most important provision was the prohibition of collective expulsion of aliens which was later to become a central piece in the controversy about human rights of migrants.\(^{54}\)

**b) Beginning of the Court’s work**

For the Convention institutions, the Commission and the Court, the 1960s were a period of reflection and preparation and thus important for laying down the fundamentals for future developments. As only about half of the Member States had accepted the right to individual petition to the Commission and compulsory jurisdiction of the Court there was not too much work to do. The most important cases were *Lawless v Ireland* in 1960/1961\(^{55}\) and the *Belgian Linguistic case* in 1968,\(^{56}\) both, even if no violations were found, milestones in the history of international adjudication of human rights.

The *Lawless* case was situated in the context of the conflict over Northern Ireland—the background to many important cases such as the Inter-State case between Ireland and the United Kingdom in 1978 about the definition of torture,\(^{57}\) and the case *McCann v the United Kingdom*\(^{58}\) in 1995 about the right to life. The *Lawless* case concerned the complaint of a member of the Irish Republican Army (IRA), G.R. Lawless, about arbitrary detention. In the Court’s first judgment ever the activist’s preventive detention in a military camp for over five months was found to lack a legal basis under Article 5 ECHR as he was only suspected of committing crimes in the future, but had not yet committed one.\(^{59}\) Nevertheless, no violation was found as the measure was deemed to be strictly necessary ‘in time of war or other public emergency threatening the life of the nation’ (Article 15 ECHR).\(^{60}\)

The case thus set the tone for the human rights protection of terrorists who were—unlike claimed by the Irish Government on the basis of Article 17 ECHR—not seen to be per se stripped of all their Convention rights. (p. 17) Nevertheless, far-reaching human rights restrictions were allowed due to the state of emergency for which the Court assumed the competence to analyse the preconditions.\(^{61}\)

In the *Lawless* case the Court also seized the opportunity to define the respective roles of Court and Commission, to answer questions about the use of the *travaux préparatoires* for the interpretation of the Convention, to discuss differences between the English and the French version of the text, and, most importantly, to define the position of the applicant in the procedure. While it was agreed that he was not a party to the proceedings before the Court and was not allowed to use them ‘as a means of propaganda against his own Government’, he was seen to be ‘directly concerned’ and ‘directly affected’ and should therefore be included in the communication of material. This was the timid beginning of the ascendancy of the individual to become—on an equal footing with States—the subject of international human rights law.

The *Belgian Linguistic case* is linked to an on-going conflict in a Member State as well. The eight-to-seven vote finding the regulation on access to French-speaking schools discriminatory is a harbinger of an often-divided Court in difficult matters. The judgment is noteworthy for heavily relying on the principle of proportionality although it does not figure in the text of the Convention as well as for introducing the idea of subsidiarity. This notion was to travel a long way through the discussions between the Court and the Member States before finally finding its place in the Preamble to the Convention on the basis of Protocol No 15.\(^{62}\) Nevertheless, the Court made it clear that—contrary to what the Belgian Government

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had asserted—there could not be any *domaine reservé* of sensitive political issues which the Court could not touch upon.\textsuperscript{63}

c) Early Inter-State cases

Two further Inter-State complaints, in 1961 between Austria and Italy,\textsuperscript{64} and in 1969 between Denmark, Norway, Sweden, the Netherlands, and (p. 18) Greece\textsuperscript{65} caused diplomatic and political unease. No violation was found in the first case concerning fair trial which Austria had brought to the Commission on behalf of a group of young people from a German-speaking part of Northern Italy. The second complaint concerned wide-spread and grave human rights violations after the military putsch in Greece. It was declared admissible in 1968. Based on the results of fact-finding missions the Commission adopted a detailed report confirming violations of torture in several well-documented cases as well as violations of Articles 5, 6, 8, 9, 10, 11, 13, and 14 of the Convention. But before the Committee of Ministers could give a legal follow-up to the report the new military regime in Greece denounced the Convention.\textsuperscript{66} In both cases the applicant States acted as guardians of what the Commission explicitly called ‘a common public order of the free democracies of Europe’\textsuperscript{67} as they did not intervene on behalf of their own citizens—as the applicant States in later Inter-State complaints such as in *Cyprus v Turkey* (2001) and *Georgia v Russia* (2014)—but on behalf of those in need of help in other Member States.

Not only the Court judgments, but also the Commission’s admissibility decisions in the 1960s contained important elements preparing the ground for the Convention’s role as a ‘constitutionalizing instrument’ for Europe. Thus the Commission’s statement in the case *de Becker v Belgium* (1962), an Article 10 complaint later struck out by the Court because of a change in the relevant legislation, was nothing but revolutionary for the international law of the 1960s:

> in accordance with general principles of international law, borne out by the spirit of the Convention as well as by preliminary work ... [the High Contracting Parties to the Convention had undertaken] to ensure that their domestic legislation is compatible with the Convention and, if need be, to make any necessary adjustments to this end, since the Convention is binding on all the authorities of the Contracting Parties, including the legislative authority.\textsuperscript{68}

(p. 19) This *dictum* was even applied to legislation adopted before the entry into force of the Convention, but having continuing effects.

Furthermore, the system was characterized by inadmissibility decisions on issues many years later moving into the centre of legal debate such as the preconditions for prohibiting political parties\textsuperscript{69} or the rights of conscientious objectors.\textsuperscript{70} But, even if for an in-depth analysis of such important human rights questions the time seemed not yet ripe, already in this early period the Convention institutions made it clear that they would not shy away from dealing with sensitive, conflict-prone issues.

All in all, the Convention system in the 1960s resembled what the Inter-American human rights system seems to be nowadays: proud of a few bold judgments, discontent because of a tense relationship between Commission and Court, and hoping to develop its hidden potential further.

5. The 1970s—Breakthrough and innovation
a) British accession to the Convention system

In many of the ground-breaking cases brought before the ECtHR in the 1970s—Goldner, Tyrer, Handyside, the Sunday Times—the United Kingdom was the respondent State. Thus the new British Labour Government’s ‘yes’ in 1966 to individual complaints and the Court’s jurisdiction—deemed to be a political sign without any real consequences—paved the way for a new era of European human rights jurisprudence, all of a sudden fueled by a forceful British litigation culture. Driving force in the development of the case-law were young lawyers who discovered the Convention as a lever for breaking up unquestioned—but unfair—practices and for modernizing the legal system. At the same time it was the British judge Sir Gerald Fitzmaurice who wrote the most fervent dissenting opinions and thus illustrated how far from conservative the new interpretation of the Convention was. Contrary to its expectations and against its will Britain thus became a catalyst for the Convention system which it has remained ever since.

b) Early seminal cases

The new cases brought to the Court were apt to illustrate the successful fight of David against Goliath. The vulnerable ones, the poor ones, the underprivileged ones were the winners: Johanna Airey, the wife of a drunkard mistreating her obtained the right to legal aid in order to bring to court a claim of formal judicial separation. Alexandra Marcxx, a child born out of wedlock, was successful in her fight against discrimination. Sidney Elmer Golder, a prisoner, enforced his right of access to court after having been falsely accused of prison riot, in respect of Anthony Tyrer, a school boy publicly beaten because of misbehaviour a violation of ‘degrading treatment’ under Article 3 of the Convention was found, and Frits Winterwerp litigated for the rights of those detained as mentally ill persons. In addition to their social dimension all those cases were salient examples of the developments in the Court’s legal doctrine. The most important aspect was the interpretation of the Convention as a ‘living instrument’.

It allowed the Court to interpret the provisions elaborated in the 1950s in the light of the 1970s and thus to take into account changed perceptions in society such as non-violent education or equal treatment of children irrespective of the marital status of their parents. In Airey v Ireland (1979) the Court made clear that there was no ‘watertight separation’ between social rights and civil rights so that even an interpretation obliging the State to pay extra expenditure—such as legal aid—was rendered possible. In this context the Court emphasized the overall aim of effectiveness in human rights protection and explained that the Convention ‘was intended to guarantee not rights that are theoretical and illusory, but rights that are practical and effective’. In the Airey case a violation was found although there was no direct interference of the State with the applicant’s rights; the door was thus opened for recognizing ‘positive obligations’ of the State. In Goldner v the United Kingdom (1975) the Court ‘discovered’ rule of law as a principle underlying the Convention although it was mentioned only in the preamble and not in the main text. On this basis the Court interpreted ‘access to court’ as a precondition for fair trial and thus filled an important lacuna.

The cases Handside v the United Kingdom (1976) and The Sunday Times v the United Kingdom (1979) raised important issues under Article 10 of the Convention. In Handside the famous and often repeated formula describing the value of freedom of expression was coined:

Freedom of expression constitutes one of the essential foundations of such a [democratic] society, one of the basic conditions for its progress and for the development of every man. Subject to paragraph 2 of Article 10 ... it is applicable not only to ‘information’ or ‘ideas’ that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that
pluralism, tolerance and broadmindedness without which there is no ‘democratic society’.

While in *Handyside* the prohibition, seizure, and forfeiture of the ‘Little Red Schoolbook’, which was considered to be obscene and harmful for children, was accepted as compatible with the Convention, in *The Sunday Times* for the first time ever a violation of Article 10 of the Convention was found. The majority of eleven judges (against nine) relied on the principle of (p. 22) proportionality and argued that the injunction prohibiting the publication of an article on the thalidomide tragedy ‘was not proportionate to the legitimate aim pursued’. The Court assumed the competence to scrutinize the choice made by the national authorities and thus boldly defined the scope of European control.

The Inter-State case between *Ireland and the United Kingdom* concerned, as the *Lawless* case, once again the conflict in Northern Ireland. The Court found a violation of Article 3 of the Convention by the United Kingdom because of the use of the so called ‘five techniques’, wall-standing, hooding, subjection to noise, deprivation of sleep, and deprivation of food and drink. The controversy about the qualification of these ‘five techniques’ as ‘inhuman and degrading treatment’ or ‘torture’ did, however, not come to end. While the Court found ‘only’ inhuman and degrading treatment in 1978, the case was taken up again forty years later in 2018 as new documents from the archives were accessible. The majority concluded nevertheless that a reassessment of the case was not necessary.

Two further Inter-State complaints in the 1970s concerned Cyprus and Turkey. The Commission declared the applications admissible in 1975 and 1977 and found in its reports wide-scale serious human rights violations by Turkey. The Committee of Ministers, however, refused to refer the cases to the Court. This was an unfortunate prelude to what turned out later to instigate ground-breaking developments in the Court’s case-law on issues such as ‘jurisdiction’ in military conflicts outside the territory of the respondent State.

It is not exaggerated to say that the Court’s jurisprudence in the 1970s laid down the doctrinal basis for the unfolding of the Convention mechanism in the last decades of the twentieth century. In this context it is also necessary to pay tribute to the lawyers who discovered the potential of the Convention and argued the most famous cases before the Court: Sean MacBride, former Irish Minister of external affairs and involved in the drafting of the Convention, had argued the *Lawless* case, Mary Robinson, the later President of Ireland and United Nations Human Rights Commissioner, the case *Marckx v Belgium*, and Gerhard Schröder, the later German chancellor, the case *Vogt v Germany*.

**c) New Member States**

At the same time the Convention system attracted new Member States. After long hesitations France and Switzerland ratified the Convention in 1974. Portugal followed in 1978 and Spain in 1979 after the reign of Salazar and the Franco regime had come to an end. Greece re-entered the Convention system after the end of the military junta in 1974. By the end of the 1970s most of the States had accepted the optional clause. There were, however, important exceptions such as France and Greece, which had accepted the jurisdiction of the Court, but not the right to individual petition. Turkey, Cyprus and Malta had not yet accepted any of the optional protocols.

**6. The 1980s—Sleeping beauty slowly waking up**

**a) Setting the stage for new developments**

In the 1980s the number of individual applications brought to the Court almost quadrupled, the number of judgments on the merits delivered by the Court jumped from four in 1980 to twenty-four in 1989. Not only important follow-up cases to the jurisprudence developed in the 1970s were decided, but also seminal cases such as *Dudgeon v the United Kingdom* (1981) about the criminalization of homosexual relationships in Northern Ireland.
and Soering v the United Kingdom (1989)\textsuperscript{90} about the prohibition of extradition in case of a risk of a violation of Article 3 of the Convention. The debate about reform started to gain momentum. Thus this decade can be called the ‘years of the sleeping beauty slowly waking up’ \textsuperscript{91}

Unlike its counterpart in the European Economic Community, the European Court of Justice (ECJ) in Luxembourg, which was understood to be the ‘motor of integration’, the Strasbourg Court had, however, not yet become a really visible and important judicial actor in Europe. The two courts (p. 24) operated in different fields, one being focused on economic, the other one on human rights questions.\textsuperscript{92} Nevertheless, parallels were already visible when economic questions touched upon human rights.\textsuperscript{93}

One of the most important challenges during this decade was the military putsch in Turkey which led to an Inter-State complaint along the lines of the Inter-State complaint against Greece in 1967. France, Norway, Denmark, Sweden, and the Netherlands complained against human rights violations in Turkey after the dissolution of Parliament on 12 September 1980. The case was declared admissible\textsuperscript{94} and concluded by a friendly settlement on 7 December 1985 obliging Turkey to bring internal law in line with the guarantees of Article 3 and to gradually reduce the scope of the derogations under Article 15 of the Convention.\textsuperscript{95}

The Cold War dividing line between East and West was still insurmountable in the 1980s. Only two micro States, Liechtenstein (in 1982) and San Marino (in 1989) declared their adherence to the system. France’s new socialist minister of justice Robert Badinter pushed the ratification of the optional protocol allowing individual complaints being brought against France.

b) Protocol on the abolition of death penalty

The most important step taken in the 1980s was the adoption of Protocol No 6 on the abolition of death penalty.\textsuperscript{96} It set a new standard without changing the text of Article 2 of the Convention allowing death penalty under specific conditions. This technique was deemed to be the most efficient one bringing about change in an area where unanimity was still lacking.\textsuperscript{97}

(p. 25) c) Political upheaval and the end of an era

In the late 1980s the turn-around in world politics started to bring the post-World-War-II period to an end. With the ‘velvet revolutions’ in Poland, Hungary, East-Germany, Bulgaria, Czechoslovakia, and Romania the dichotomy between East and West ceased to exist. The fall of the Berlin wall on 9 November 1989 stirred hopes for the beginning of a new era. Human rights started to play an ever greater role.

7. The 1990s—Common values for Europe as a whole

a) Accession of Central and Eastern European States to the Convention

Western Europe was seen as the ‘better world’, not only because of the manifestly higher standard of living, but also because of its value system based on the three pillars of democracy, rule of law, and human rights. For many living in the countries of the ‘Eastern block’, who had come under Soviet rule after the Second World War, accession to the European Union was seen to bring them back to where they belonged to. These aspirations were shared by the Baltic States who had been incorporated into the Soviet Union against their will. Other successor States to the Soviet Union including the Russian Federation under Boris Yeltsin were also open for the reception of what was seen to be ‘Western values’. One by one the former communist States adopted constitutions based on the model
of liberal democracy. They all included comprehensive catalogues of human rights inspired by the Convention.

The European Communities transformed into the European Union on the basis of the Maastricht Treaty were ready to welcome the central European States as new members, but only when fulfilling the so-called ‘Copenhagen criteria’ laid down in June 1993. They required not only the existence of a functioning market economy, but also the ‘stability of institutions guaranteeing democracy, the rule of law, human rights, respect for and protection of minorities’. In this context it was seen as a natural first step to become member of the Council of Europe before applying for membership in the European Union. Thus, there was a ‘run of ratifications’ of the Convention in the early 1990s. It started on 18 March 1992 with the (p. 26) ratification by the Czech and Slovak Federative Republic, which existed, however, only between 23 April 1990 and 31 December 1992; after its peaceful dissolution its successor States, the Czech Republic and the Slovak Republic, became Member States to the Convention. The other future EU Member States Bulgaria, Hungary, Poland, Romania, and Slovenia followed between 1992 and 1994 as well as the Baltic States between 1995 and 1997. By that time both the Soviet Union and Yugoslavia had been dissolved. The military conflicts in Yugoslavia delayed or prevented the accession of some of the successor States. Nevertheless, in addition to Slovenia, Croatia and The Former Yugoslav Republic of Macedonia acceded in 1997 as well as Albania in 1997. With Ukraine, Georgia and Moldova the first States recognized as successor States to the Soviet Union were accepted.

For the Russian Federation the procedure was much more complicated. Its first application for membership in the Council of Europe in 1992 had been suspended in 1995 because of the first Chechnya war, but was later resumed. An expert commission came to the conclusion that the Russian Federation could not yet be regarded as a State based on rule of law. Despite this negative assessment the majority of the members of the Parliamentary Assembly voted in favour of accession. The respective resolution defined, however, manifold conditions to be fulfilled, among others the ratification of the 6th Protocol on the abolition of the death penalty, a condition that up to present time has not yet been fulfilled. At the time of signature of the Convention, Russia ranked third in the number of executions of death penalty. It was only in 1999 that President Yeltsin signed a decree commuting the death sentences of 716 prisoners to life or twenty-five years in prison.

Together with the fifteen Central and Eastern European States Finland and Andorra also ratified the Convention in the 1990s; by then it set binding standards for forty-one European States.

The accession of so many new States within a short period of time brought about a radical change of the Convention system. While up to the end of the 1980s the Member States’ legal culture, traditions and development had—with the exception of Turkey—been rather homogenous, with the accession of fifteen Central and Eastern European States a new era started. The diversity was enormous: The size of the Member States ranged from Andorra to the Russian Federation, it compromised long-standing democracies such as Switzerland and the United Kingdom as well as States in transition, such as Ukraine; rich countries such as Luxembourg and Liechtenstein were together with poor countries such as Moldova. The task of not only setting, but also implementing common human rights standards for all of them seemed to be Herculean, if not utopian, this all the more so as in some parts of the new Member States—such as Transnistria, Nagorny Karabach, and Abhazia—military conflicts were still smouldering.
b) Institutional changes

Together with the enlargement the Convention system underwent a radical transformation on the basis of Protocol No 11.\(^{102}\) After long and intensive reform discussions it was decided to abolish the Commission. While there was thus no more filter for incoming applications, the idea of an institutional dichotomy was upheld with a two-tier-system with chambers deciding as ‘first instance’ and the Grand Chamber eventually called upon to decide as ‘second and final instance’. Individual applicants had direct access to the Court; its jurisdiction had to be accepted by every Member State. This was a very audacious step, revolutionary for international law. It was rendered possible by a zeitgeist not only favourable, but enthusiastic about human rights protection. Especially the new Member States wanted to turn a page in history and were willing to promise a new start, replacing a State centrist worldview by a democratic approach granting priority of the individual. Evidence for the optimism behind the changes is the Vienna Declaration that speaks of a ‘historic opportunity to consolidate peace and (p. 28) stability on the continent’, stressed the ‘indivisibility and universality of human rights’ and called Europe ‘a vast area of democratic security’.\(^{103}\)

The new Court was composed of thirty-nine full-time judges, one per Member State. Not all were newcomers; ten had already been members of the Commission, ten members of the ‘old’ Court, and two members of the Committee of Ministers. When they—thirty-three men and six women—were sworn in on 3 November 1998 the new Court could start its work on a permanent basis.

c) Innovative jurisprudence

While the institutional setting changed completely, the case-law developed at quick pace. One of the most controversial cases was McCann and Others v the United Kingdom.\(^{104}\) Ten out of nineteen judges considered the killing of IRA terrorists in Gibraltar during an arrest operation as a violation of Article 2 of the Convention because of a lack of appropriate care in the control and organization of the actions of the security forces. The Court wrote legal history with this case; the standards were developed further in many follow-up cases.\(^{105}\) Those criticizing the judgment argued that operational actions could not be analysed with the knowledge of hindsight; such jurisprudence risked rendering the fight against terrorists impossible.\(^{106}\) The case Lopez Ostra v Spain (1995)\(^{107}\) opened the door for protecting individuals against environmental pollution; Christine Goodwin v the United Kingdom (1996)\(^{108}\) was the first transgender case where the Court found a violation.\(^{109}\) Last but not least, in Loizidou v Turkey (1996)\(^{110}\) the Court decided that the denial of access to property in northern Cyprus was imputable to Turkey as occupying power. It thus defined the criteria for the extraterritorial application of the Convention. At the same time it did not accept Turkey’s reservations to the Convention and argued that it was fully (p. 29) bound, thus diminishing the role State consent traditionally played in international law based on treaties.\(^{111}\)

In the 1990s the Cold War came to an end and a new era started. The Court proclaimed ‘a new European public order’ and considered the Convention as ‘a constitutional instrument’ for it.\(^{112}\) While the adherence of the large majority of European States to the Convention system justified an optimistic outlook, it was clear that the system was just about to start operating and would have to prove its worth.

8. The 2000s—Exponential growth
a) Military conflicts as a challenge

Turkey refused to execute the judgment in the Loizidou case for principled reasons.\textsuperscript{112} That was a bad harbinger for the Court’s mission to adjudicate human rights in conflict situations. And conflicts there were! The first shock wave was caused still in the 1990s by the atrocities in former Yugoslavia. None of the warring countries was a member to the Convention at that time. Accusations of genocide and crimes against humanity were brought before the ICJ,\textsuperscript{113} the International Criminal Tribunal for the former Yugoslavia was established with the specific mission to bring those who had committed the worst atrocities before a judge. Human rights violations in later conflicts such as the war between Georgia and Russia in 2008 were brought simultaneously before of the ICJ and the ECtHR.\textsuperscript{114} The war in Chechnya was, despite all the preventive measures and promises at the time of Russia’s accession to the Council of Europe resumed and led to wide-spread grave human rights violations; thousands of claimants came before the Court. Military conflicts and occupation regimes in Transnistria and Nagorny Karabach as well as in Southern Turkey, but also outside Europe, especially in Iraq, posed major problems to the Court confronted with the victims’ complaints. The fight against terrorism which started at full scale after the terrorist attacks of 9/11 overshadowed the whole decade. The cases on the Court’s docket reflected world politics.

The Court was called upon to decide intricate legal questions in this context, above all concerning the scope of the Court’s jurisdiction and State responsibility as well as the interaction between international humanitarian law and human rights law. The first seminal case decided was \textit{Banković v Belgium and Others} (2001).\textsuperscript{115} Victims of the NATO attacks in Serbia had brought a complaint against all NATO States for bombings meant to be justified by a humanitarian intervention saving the lives of Albanians in Kosovo. The Court heavily relied on the \textit{traveaux préparatoires}, distinguished the situation in Serbia from the situation in \textit{Cyprus} and the Loizidou case-law, construed the notion of ‘jurisdiction’ narrowly, denied the exercise of effective control of the NATO States on the territory of Serbia, a non-Member State to the Convention at that time, and famously emphasized the ‘essentially regional vocation of the Convention system’.\textsuperscript{116} On this basis it declared the complaint unanimously inadmissible. The decision was taken in the immediate aftermath of 9/11 and published in December 2001.

This jurisprudence was, however, not carved in stone, although the Court had explained in \textit{Banković} that the living-instrument-doctrine did not apply to the interpretation of ‘the scope and reach of the entire Convention system of human rights’ protection’ determined by Article 1 of the Convention.\textsuperscript{117} In later cases concerning the military engagement of the British troops in Iraq, especially in \textit{Al-Skeini v the United Kingdom} (2011)\textsuperscript{118} and \textit{Al Jedda v the United Kingdom} (2011),\textsuperscript{119} the Court interpreted the notion of ‘effective control’ broader and confirmed the Member (p. 31) States’ jurisdiction even in military conflicts outside Europe in so far as the soldiers engaged in the security operations exercised authority and control over individuals. The assumption of jurisdiction in such extraterritorial military interventions led to follow-up questions on the interaction of the Convention with international humanitarian law as shown in the case of \textit{Hassan v the United Kingdom} (2014).\textsuperscript{120} While taking prisoners during an armed conflict was allowed under the Geneva Convention it contradicted a literal reading of Article 5 of the Convention. The Court thus allowed for an exception in order to accommodate the interpretation of Article 5 and to take into account the context and the applicable rules of international humanitarian law even without derogation under Article 15 of the Convention.\textsuperscript{121}

But the notion of jurisdiction was not only decisive for determining the Court’s role in military conflicts outside of Europe, but also in the ‘frozen conflicts’ within Europe where Member States are hindered in exercising jurisdiction in a part of their territory. The scope
of the responsibility of the States involved in such conflicts was defined in the case of Ilaşcu v Russia and Moldova (2004).122

These difficult and controversial case-law developments show that in the new century the Court was not only called upon to live up to its role as guarantor for the European public order, but, having become the most important and influential regional court with a potential of deciding for more than 800 million people, also struggled for defining its role in international law and international relations in general.

b) Rise of the Court’s caseload

By the year 2006 all European States with the exception of Belarus and the Vatican State had become members to the Convention system. The Caucasian States Armenia and Azerbaijan acceded in 2002, the remaining successor States to Yugoslavia, Bosnia and Herzegovina and Serbia, in 2002 and 2004. Montenegro became the forty-seventh—and last—Member States after its dissolution from Serbia in 2006; Monaco had joined the system shortly before in 2005.

As feared by prominent politicians and judges such as the former French Minister of Justice Robert Badinter and the former Court’s President Rolv Ryssdal123 already at the moment of creation of the permanent Court in 1998 the Court’s main challenge was the huge influx of cases from the new Member States confronted with fundamental human rights violations. Transition to democracy and rule of law turned out to be a long and painful endeavour; almost all the legislation had to be rewritten; the judiciary did not work in a way to safeguard fundamental rights. While violations of fair trial because of length of procedure were rampant not only in Eastern European, but also in Western European States, especially in Italy, ‘new’ violations not known up to then were discovered. The most important one was the non-execution of binding judgments which annihilated the very idea of finding justice before courts. The seminal case in this respect was Burdov v Russia (2002).124 The State had been obliged to pay compensation for victims of the Chernobyl catastrophe on the basis of a binding judgment, but had not executed it over decades. The Court considered this to be a violation of fair trial under Article 6 of the Convention.

Another such leading case opening a huge door to the Strasbourg Court was the case of Kalashnikov v Russia (2002)125 about inhuman prison conditions deemed to fall under Article 3 of the Convention. Both cases had countless follow-up cases in almost all the new Member States to the Convention.

Against this background it is of no surprise that the number of cases grew exponentially in the first decade of the new century reaching a peak of 160,000 in 2011. A few countries had a disproportionate share in this rise: Russia, Ukraine, Turkey, and Romania were the most important ‘high-count countries’. Together with Poland, Georgia, Moldova, Serbia, Slovenia, and Italy by 2010 they accounted for more than 77 per cent of the influx of cases.126 Both the amount and the gravity of the alleged human rights violations caused deep concern and made it clear that the new system set up in 1998 had to undergo reforms immediately.

(p. 33) c) Reform initiatives

Three major reform initiatives were taken between 2000 and 2010. The first was the ‘Evaluation Group’ providing a report in 2001.127 It advocated an independent filtering mechanism within the Court as well as a mechanism allowing the Court to decline analysing non-meritorious complaints in detail. The second was the group of wise persons suggesting in 2006 a potpourri of reform measures.128 The third was the ministerial conference of Interlaken in 2010 kicking off a whole series of reform conferences to come. The only tangible outcome of all the reform initiatives was Protocol No 14 allowing a single judge procedure for inadmissible or manifestly ill-founded complaints as well as a rejection of cases ‘where the applicant had not suffered a significant disadvantage’.129 But while the Protocol had been opened for signature in 2004 and ratified by all Member States but one
in 2006, it entered into force only in 2010 after the backlog of cases on the Court’s docket had already become unmanageable. Russia was the Member State playing political games by delaying the ratification of the Protocol; at the same time it was the Member State primarily responsible for the Court’s plight. The enthusiasm of being ‘part of Europe’ had visibly cooled down and given way to an attitude between lukewarm cooperation and obstruction, not least because of the case-law on Chechnya finding grave violations of Articles 2 and 3 of the Convention. The leading case was Isayeva, Yusupova and Bazayeva v Russia130 about the loss of civilian lives during bombings by the Russian military. But there was also open disagreement with the judgment in the Ilaşcu case which was never executed.131

Concerning reforms and improving the output the Court itself was not idle either. The most important step it took was the development of the pilot procedure in the case of Broniowski v Poland (2004).132 This allowed the Court in the event of human rights violations on a massive scale to pick out and decide one or a few cases in an exemplary way and then to call upon the (p. 34) national legislature or courts to find a comprehensive solution on this basis. Thus the Court could—based on the idea of subsidiarity—throw the ball back on the national level, give orientation and lead the way to go, but deal with one case instead of 20,000. In Broniowski v Poland 20,000 applicants were in a similar situation as for historical reasons the wrongful expropriation concerned not only a few individuals, but a whole part of the Polish population.

The case Broniowski v Poland is one of a series of ‘historical cases’ concerning Europe’s past. The applicants’ loss of land was a direct consequence of the change of the Polish borders after the Second World War. Other cases refer back to crimes committed in ‘pre-human-rights times’ and deal with justice being done after the turn-around of regimes.133 At the same time the Court had to deal with philosophical and ethical questions of modern social life. It was transformed into a universal answering machine to all sorts of value-related legal questions and became, as it proudly acknowledges itself, the ‘conscience of Europe’.134

9. The 2010s—New challenges and consolidation

a) Efficiency-enhancing measures

Protocol No 14, when it finally entered into force in 2010, introduced new competences of ‘Committees’ (of three judges) and ‘Single Judges’.135 As explained in its Preamble it responded to the ‘urgent need to amend certain provisions of the Convention in order to maintain and improve the efficiency of the control system for the long term, mainly in the light of the continuing increase in the workload of the European Court of Human Rights and the Committee of Ministers of the Council of Europe’. The Single Judge system started to work as of 2010, first on an experimental basis, then with great efficiency in reducing the backlog of cases. From the peak reached in 2011 with 160, 200 cases the number went down to the lowest level of (p. 35) 56,000 cases in 2017 with ups and downs. Events such as the military conflict in Eastern Ukraine or the attempted coup d’état in Turkey could bring ‘overnight’ thousands of new applications which might disappear after an inadmissibility decision and reappear again after a court judgment on the national level.

Many other measures enhancing the efficiency of the system—such as prioritizing and grouping cases—followed. Reforms were also discussed on the political level; one high level conference followed the other: Interlaken 2010, Izmir 2011, Brighton 2012, Oslo 2014, Brussels 2015, Copenhagen 2018.136 As a follow-up to the Brighton conference two new protocols were opened for signature: Protocol No 15 introducing the idea of subsidiarity in the preamble to the Convention, and Protocol No 16 allowing for advisory opinions on the
request of domestic courts. The latter entered into force on 1 August 2018;\textsuperscript{137} the mechanism is still new and awaits to be developed.\textsuperscript{138}

b) Conflicts and competition with other courts

While the good reputation of the Court as an example of forceful human rights protection rapidly grew outside Europe, conflicts arose with national superior courts bound to implement the Convention. One of the first critical statements came from the German Federal Constitutional Court in its so-called Görgülü-judgment (2004);\textsuperscript{139} other courts such as the Italian and the Russian Constitutional Courts followed. But even in countries where no critical voices about the ‘Court’s activism’ were to be heard, implementation of judgments was sometimes slow and sometimes even inexisten, thus undermining the credibility of the whole system. One unfortunate example is the case of Burmych v Ukraine\textsuperscript{140} a follow-up case to a failed pilot procedure. Ukraine was obliged to build up a mechanism for complaints (p. 36) against non-execution of judgments, but failed to do so over a period of about eight years. Faced with thousands of repetitive cases the Court decided to stop dealing with similar complaints and referred them directly to the Committee of Ministers for execution.

Based on its enlarged competences in the ‘area of freedom, security and justice’ and the Charter of fundamental rights of the European Union\textsuperscript{141} the ECJ in Luxembourg started dealing with similar questions as its Strasbourg counterpart, especially in the area of immigration and asylum, extradition, and judicial transborder cooperation. Against this background it was a logical step for the Lisbon Treaty of 2007 to preview the accession of the European Union to the Convention in order to harmonize human rights protection in Europe and to avoid a competition between the two European courts. But after and despite intensive preparatory work the accession was stopped by an opinion of the ECJ declaring the draft agreement on the accession incompatible with EU law.\textsuperscript{142} The follow-up jurisprudence of the two courts tries to balance dialogue and control and to avoid contradictory results.\textsuperscript{143}

c) Challenges of the twenty-first century

The case-law continues developing at a rapid speed. More and more often it is open for reversals of long-standing jurisprudence such as in the case of Zolotouchin v Russia (2009)\textsuperscript{144} concerning the interpretation of the principle ‘ne bis in idem’ or in the case of Bayatyan v Armenia (2011)\textsuperscript{145} concerning conscientious objection which was first excluded and then included in the scope of the Convention. Stressing rehabilitation rather than punishment the Court elaborates on its jurisprudence in life-sentence cases such as Vinter v the United Kingdom (2013)\textsuperscript{146} and Trabelsi v Belgium (2014),\textsuperscript{147} a field where European standards contrast more and more visibly with standards in other continents.

(p. 37) Unavoidably, the jurisprudence mirrors challenges of the 21st century such as terrorism and mass migration. Faced with many different aspects of the problems involved the Court tries to defend a humanitarian worldview.

A lot of the Court’s energies are absorbed by Inter-State complaints such as the ones pending between Georgia and Russia and between Ukraine and Russia. The follow-up to the declaration of the state of emergency in Turkey after the attempted coup-d’état with tens of thousands of teachers, professors, journalists, and judges being dismissed and arrested brought the Court in a very difficult situation as, according to the principle of subsidiarity, it had to wait for Turkish courts to decide on the relevant issues first.\textsuperscript{148} Generally, the political situation in many European States becomes more tense and more radical. This is
reflected not only in the topics the Court has to deal with, but also in the divided reactions to its judgments in politics and society.

There is virtually no aspect of human life that could not be and is not brought to the Court: custody rights of children, suicide prevention, surrogate motherhood, domestic violence, trafficking in human beings, hunger strikes in detention, discrimination of sexual minorities, sport, access to internet, questions of life and death reaching from car accidents to euthanasia.

Nevertheless, unlike in the 1950s and in the 1990s there is no more real commonly shared enthusiasm for human rights. Too much, not enough—for some the Court’s jurisprudence is ‘activist’ and goes far beyond its competence thus putting into question its legitimacy, for others the Court is too deferential and hides behind the margin of appreciation doctrine.

Still, the Court is a political factor in European politics and beyond. It has created a model of human rights protection unique in the world. And it takes rights seriously.(p. 38)

Footnotes:


2 See Pierre-Henri Teitgen, ‘Introduction to the ECHR’ in Ronald Macdonald, Franz Matscher, and Herbert Petzold (eds), The European System for the Protection of Human Rights (Martinus Nijhoff 1993) 4


4 The integration of Belarus into the Council of Europe and the Convention system has always been a strategic aim, although not achieved due to political reasons (above all the November 1996 constitutional referendum in Belarus introducing death penalty as well as the restrictions of political opposition and freedom of expression). The Holy See has an observer status with the Council of Europe since 7 March 1970, but never applied for full membership in the Council of Europe, a precondition for acceding to the Convention system.

5 The worst military conflicts in Europe after the Second World War in former Yugoslavia did not oppose Member States of the Convention; all the successor States of former Yugoslavia ratified the Convention only after the end of the hostilities.

6 See eg the Inter-State cases Georgia v Russia (no 2) App no 38263/08, Decision on Admissibility, 13 December 2011 (judgment on the merits is pending); see the series of cases between Ukraine and Russia, eg Ukraine v Russia App no 20958/14 (re Crimea), pending; see also the cases which concern the military conflict between Armenia and Azerbaijan (Chiragov and Others v Armenia [GC] App no 13216/05, 16 June 2015, Reports 2015; Sargsyan v Azerbaijan [GC] App no 40167/06, 16 June 2015, Reports 2015); the ongoing conflict between Cyprus and Turkey has also generated a series of judgments, including in Inter-State cases; on an assessment of the effectiveness see Chapter 6 (pp. 198–99).

7 See eg Ilgar Mammadov v Azerbaijan [GC] App no 15172/13, 22 May 2014 where the Court found a violation of Article 18 ECHR (restriction of Convention rights for ‘other purposes’) and argued: ‘The above circumstances indicate that the actual purpose of the impugned measures was to silence or punish the applicant for criticising the Government and attempting to disseminate what he believed was the true information that the
Government were trying to hide’ (para 143); see on the assessment of the Court’s influence on politics Chapter 6 (pp. 200–02).

8 The setting-up of the respective human rights protection systems as well as the development of the case-law of the control bodies in Africa (African Commission on Human and Peoples’ Rights and African Court on Human and Peoples’ Rights; ECOWAS Court of Justice; East African Court of Justice) and South-America (Inter-American Commission on Human Rights and Inter-American Court of Human Rights) has been largely influenced by the model of the ECHR and the ECtHR; see Chapter 3 (pp. 107–08).

9 See eg in Switzerland a referendum on the supremacy of international law (‘Swiss Law Instead of Foreign Judges (Self-Determination Initiative)’) was held in 2018; it was rejected by a vote of 66.2 per cent to 33.8 per cent; in the United Kingdom there is a debate on denouncing the ECHR after the completion of Brexit; see Chapter 6 (pp. 200–02).


12 See n 10 above.


14 Hersch Lauterpacht, International Law and Human Rights (Stevens & Sons 1950) 14.

15 See Preamble to the UDHR, para 8.


17 See the wording of the reference to the UDHR in para 5 of the Preamble to the ECHR: ‘Being resolved ... to take the first steps for the collective enforcement of certain rights stated in the Universal Declaration.’

18 See the opinions of philosophers and Statesmen such as Chung-Suh Lo and Mahatma Ghandi in: United Nations Educational, Scientific and Cultural Organization (ed), Human Rights: Comments and Interpretation, UNESCO/PHS/3 (rev), Paris 25.7.1948, 3 et seq, 185 et seq.

19 This is a major difference to other regional human rights instruments; see Chapter II of both the American Declaration of the Rights and Duties of Man of 2 May 1948 OAS Res XXX (1948), OEA/Ser.L/V/II.23 doc.21 rev.6 at 5 (1979), OEA/Ser.L.V/II.82 doc.6 rev.1 at 17 (1992) and the African Charter on Human and Peoples’ Rights (‘Banjul Charter’) (opened for signature 27 June 1981, entered into force 21 October 1986) CAB/LEG/67/3 rev.5, 21 ILM 58 (1982), which are dedicated to this idea of duties and obligations.


21 See the Schuman Declaration of 9 May 1950 proposing to place French and German production of coal and steel under one common High Authority. This led within one year to the adoption of Treaty Establishing the European Coal and Steel Community (‘Treaty of Paris’) [1951], Europe’s first supranational organization comprising France, Germany, the Netherlands, Belgium, Luxemburg, and Italy.
22 See the foundation of the Council of Europe on 3 August 1949; see below n 24.


24 The Statute of the Council of Europe (opened for signature 5 May 1949, entered into force on 3 August 1949) ETS 1 entered into force on 3 August 1949 after seven ratifications (Denmark, Ireland, Italy, Luxembourg, Norway, Sweden, and United Kingdom). France, the Netherlands, Belgium, and Greece ratified immediately afterwards in August 1949, Turkey and Germany one year later, in 1950.


26 See Article 5 of the ‘European Movement Convention’.

27 See Article 13 (b) of the ‘European Movement Convention’.

28 See for one of the most far-reaching examples *Oleksandr Volkov v Ukraine* App no 21722/11, 9 January 2013, Reports 2013, para 208, where Ukraine as the respondent State was required ‘to secure the applicant’s reinstatement to the post of judge of the Supreme Court at the earliest possible date’; see for more details Chapter 5 (p. 166).

29 Sixty votes in favour, twenty-one abstentions, and one vote against; TP Vol II at 282–84.


31 See TP Vol IV at 100–296.

32 See TP Vol V.

33 Due to ideological controversies the drafting of the respective international treaty lasted until 1966; see below n 37.

34 See the wording of Article 25: ‘The Commission may receive petitions addressed to the Secretary General of the Council of Europe from any person, non-governmental organization or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in this Convention, provided that the High Contracting Party against which the complaint has been lodged has declared that it recognises the competence of the Commission to receive such petitions. ... (1) Such declaration may be made for a specific period.’

35 ‘Any of the High Contracting Parties may at any time declare that it recognises as compulsory *ipso facto* and without special agreement the jurisdiction of the Court in all matters concerning the interpretation and application of the present Convention.’


40 TP Vol II at 256.


42 The following States have ratified the Convention in the 1950s: United Kingdom (8.3.1951), Norway (15.1.1952), Sweden (4.2.1952), Ireland (25.2.1952), Germany (5.12.1952), Saarland (14.1.1953; integral part of Germany as from 1.1.1957), Greece (28.3.1953, denunciation with effect on 13.6.1970), Denmark (13.4.1953), Iceland (29.6.1953), Luxembourg (3.9.1953), Turkey (18.5.1954), Netherlands (31.8.1954), Belgium (14.6.1955), Italy (26.10.1955), Austria (3.9.1958).

43 See Marcel Kau, *United States Supreme Court und Bundesverfassungsgericht. Die Bedeutung des United States Supreme Court für die Errichtung und Fortentwicklung des Bundesverfassungsgerichts* (Springer 2007).


46 *Greece v the United Kingdom (I)* [Commission] (n 41); *Greece v the United Kingdom (II)* [Commission] App no 299/57, 12 October 1957.

47 See for the Court’s interpretation of Article 15 ECHR in the Turkish coup-d’état cases eg *Alparslan Altan v Turkey* App no 12778/17, 16 April 2019, para 67 et seq, para 116 et seq.; *Şahin Alpay v Turkey* App no 16538/17, 20 March 2018, Reports 2018, para 66 et seq, para 119 et seq.

48 The second complaint concerning torture and inhuman treatment was partially declared admissible; the Commission’s Report was adopted in 1958, the Committee of Ministers’ final Resolution in 1959; see the critical analysis in Simpson (above footnote 39, chapters 18 and 19).

49 See Chapter 2 (pp. 66–68).


51 See the respective Resolutions of the Committee of Ministers on publication adopted on 17 September 1997 and 5 October 2006 respectively.


53 Protocol No 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain rights and freedoms other than those already included in the Convention and in the first Protocol thereto (opened for signature 16 September 1963, entered into force 2 May 1968) ETS 46.


Preventive detention has been a major issue for the Court ever since, be it for dangerous sex offenders (see M. v Germany App no 19359/04, 17 December 2009, Reports 2009; Ilnseher v Germany [GC] App nos 10211/12 and 27505/14, 2 February 2017) or football hooligans (S., V. and A. v Denmark [GC] App no 35553/12, 36678/12, 36711/12, 22 October 2018).

At that time Ireland had availed itself of the right of derogation on the basis of Article 15 of the Convention.

See on the Court’s approach to terrorist cases nowadays Chapter 6 (pp. 194–96).


On the methodological questions touched upon by the Belgian Linguistic case (n 56) see Chapter 3 (pp. 74–76).


See the detailed report on the cases in Bates, The Evolution of the European Court on Human Rights (n 20) 264 et seq.

Austria v Italy (n 64), decision at 4 (1961) YB 116, at 138.

De Becker v Belgium (n 44).

In 1957 the Commission had declared inadmissible the case of the German Communist Party which had been dissolved by the German Federal Constitutional Court (BVerfGE 5, 85 —KPD-Verbot). The Commission argued on the basis of Article 17 of the Convention as the party’s objective was to establish a dictatorship and was thus incompatible with the ideals of the Convention (German Communist Party v Germany [Commission] App no 250/57, 20 July 1957, 1 (1957) YB 222.


Bates, The Evolution of the European Convention of Human Rights (n 20) 185 et seq.

See the testimony of one of them: Anthony Lester, Five ideas worth fighting for: How our freedom is under threat and why it matters (Oneworld 2016).

See eg the influence of the British cases such as *Al-Skeini and Others v the United Kingdom* [GC] App no 27021/08, 7 July 2011, Reports 2011; *Al-Jedda v the United Kingdom* [GC] App no 27021/08, 7 July 2011, Reports 2011, *Hassan v the United Kingdom* [GC] App no 29750/09, 16 September 2014, Reports 2014 on the interpretation of the Court’s jurisdiction. This is also true for other areas of the case-law such as life-long sentences (*Vinter and Others v the United Kingdom* [GC] App nos 66069/09, 130/10, and 3896/10, 9 July 2013, Reports 2013, *Hutchinson v The United Kingdom* App no 57592/08, 17 January 2017, Reports 2017) or prisoners’ voting rights (*Hirst v the United Kingdom* (No. 2) [GC] App no 74025/01, 6 October 2005); see on this topic the contributions in Katja S Ziegler, Elizabeth Wicks, and Loveday Hodson (eds), *The UK and European Human Rights. A Strained Relationship?* (Hart Publishing 2015).


*Marckx v Belgium* App no 6833/74, 13 June 1979, A 31.

*Golder v the United Kingdom* App no 4451/70, 21 February 1975, A 18.


*Winterwerp v the The Netherlands* [GC] App no 6301/73, 24 October 1979, A 33.

See Chapter 3 (pp. 76–108).

See Chapter 3 (pp. 76–84).

*Airey v Ireland* [GC] (n 75), para 24.

*Handyside v the United Kingdom* App no 5493/72, 7 December 1976, A 24, para 49.

*The Sunday Times v the United Kingdom* App no 6538/74, 26 April 1979, A 30.

*Ireland v the United Kingdom* (n 57).

*Ireland v the United Kingdom* (n 57).


In 1980 396 applications were registered by the Commission, in 1989 already 1445; see Bates, *The Evolution of the European Court on Human Rights* (n 20) 393.

*Dudgeon v the United Kingdom* App no 7525/76, 22 October 1981, A 45.

*Soering v the United Kingdom* App no 14038/88, 7 July 1989, A 161.


For an explanation of the background see Gráinne de Búrca, ‘The Road not Taken. The EU as a Global Human Rights Actor’ (2011) 105 AJIL 649 et seq.

See on the different developments of the two courts Chapter 4 (pp. 129–36).

*France, Norway, Denmark, Sweden, and the Netherlands v Turkey* [Commission] App nos 9940-9944/82, 7 December 1985, 28 YB 150, 35 DR 143.

*France, Norway, Denmark, Sweden, and Netherlands v Turkey* [Commission] (n 94) 28 YB 150, 35 DR 31–53.

Out of the eighteen Member States of the Council of Europe at the time of the adoption of the Sixth Protocol only thirteen signed it immediately in 1983; the others waited (see the respective dates of signature: Iceland (1985), Malta (1991), Ireland (1994), the United Kingdom (1999), and Turkey (2003); for some, such as Belgium it took a long time before finally ratifying it (Belgium in 1998).

See Aaron Matta and Armen Mazmanyan, ‘Russia: In Quest for a European Identity’ in Patricia Popelier, Sarah Lambrecht, and Koen Lemmens (eds), Criticism of the European Court of Human Rights: Shifting the Convention System (Intersentia 2016) 481.


McCann and Others v the United Kingdom [GC] (n 58).

See Lawrence Early, Anna Austin, Claire Ovey, and Olga Chernishova (eds), The Right to Life under Article 2 of the European Convention on Human Rights (Wolf Legal Publishers 2016).

On the Court’s answer to terrorism see Chapter 6 (pp. 194–99).


The Court had already taken a first step in this direction in the case Belilos v Switzerland App no 10328/83, 29 April 1988, A 132 by arguing that Switzerland was fully bound by the Convention although its reservation had not been accepted; see on this Angelika Nussberger, ‘From high hopes to scepticism? Human rights protection and rule of law in Europe in an ever more hostile environment’ in Heike Krieger, Georg Nolte, and Andreas Zimmermann, The International Rule of Law. Rise or Decline? (Oxford University Press 2019), 150.

Loizidou v Turkey [GC] (n 109), para 75.

It was eventually executed in 2003, five years after its adoption; see on execution Chapter 5 (p. 153).

Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v Russian Federation) (Preliminary Objections) (Judgment of 1 April 2011), ICJ Rep 2011, 70; Georgia v Russia (no 2) (n 6).


See ibid para 80.

See ibid para 65.

Al-Skeini and Others v the United Kingdom [GC] (n 74).

Al-Jedda v the United Kingdom [GC] (n 74).

Hassan v the United Kingdom [GC] (n 74).

See Chapter 4 (pp. 146–49).

Ilaşcu and Others v Moldova and Russia [GC] App no 48787/99, 8 July 2004, Reports 2004-VII.


Burdov v Russia App no 59498/00, 7 May 2002, Reports 2002-III.

Kalashnikov v Russia App no 47095/99, 15 July 2002, Reports 2002-VI.


This was later to become Article 35 para 3 b of the Convention, a provision that was, however, only sparingly used.

Isayeva, Yusupova and Bazayeva v Russia App nos 57947/00, 57948/00, and 57949/00, 24 February 2005 (not yet reported).


See the book edited by the Court: Conscience of Europe. 50 years of the Convention on Human Rights (Council of Europe Publishing 2010).


A first advisory opinion on a request of the French Court of Cassation was given on 10 April 2019 (see n 199), a second one on a request of the Armenian Constitutional Court is pending before the Court.


See Chapter 4 (pp. 129-30).


See Chapter 4 (pp. 132-33, pp. 134-36).


Vinter and Others v the United Kingdom [GC] (n 74).

Trabelsi v Belgium App no 140/10, 4 September 2014, Reports 2014.

See Chapter 2 (pp. 54-55).