Plaidoyer for the European Court of Human Rights[1]

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Accountability; Courts' powers and duties; European Court of Human Rights; Human rights; Judicial independence; Jurisprudence; Prisoners' rights; Statutory interpretation; Transparency; Voting rights

Abstract

In this article, the author debates the reasons for the current strained relationship between some Contracting Parties and the European Court of Human Rights. The author argues that much of the criticism addressed to the Court is ultimately aimed at the founding principles of the European human rights protection system, like the principles of evolutive interpretation and European consensus, as well as at the Court's soft law and social rights friendly stance. He briefly analyses the contradictory reaction of the Court to this criticism. In this context, he considers that both the UK rebellion against Hirst and the Court's backtracking from its own principles of interpretation in some major cases have had a negative "snow ball" effect on other Contracting Parties to the European Convention on Human Rights, as the recent confrontational attitude of the Russian legislator towards the Court has shown. The article concludes with a defence of the Court's traditional mode of reasoning and a pledge for reform of some practices of the Court based on three steps: more independence, more transparency and more accountability.

1. Why the strain?

It is stating the obvious that the current relationship between some Contracting Parties and the European Court on Human Rights (the Court) is a strained one.[2] But why the strain?

There are two types of critiques, one of political and the other of legal nature, levelled against the Court. The political criticism is encapsulated in the idea that the Strasbourg judge acts as a subsidiary legislator, an *Ersatzgesetzgeber*. This criticism is directed to the allegedly obscure working methods of the Court, the supposedly deficient status of Strasbourg judges and the apparent lack of consideration for the British exceptional situation.

The argument drawn from the working methods of the Court is the following: judicial activism leads the Court to a mission creep.[3] By means of a not-so-transparent development of the case-law, the Court attempts to aggrandise itself. This is most visible in the invention of new rights and the enlargement of its own supervisory powers. The Court's micro-management of cases threatens democracy and state sovereignty, since Governments lose control of the European Convention on Human Rights (the Convention) and domestic authorities are side-stepped and discredited.

[1] This article merges my speeches delivered at the Bonavero Institute of Human Rights, Mansfield College, Oxford, 28 April 2017 ("Is the European Court of Human Rights facing an existential crisis?"), and at the Middlesex University, London, 15 December 2017 ("How to save the European Court of Human Rights in three steps"). The usual caveat applies: these are my own views and they do not bind the European Court of Human Rights.

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[2] See, among others, Ziegler, Wicks and Hodson (eds), *The UK and European Human Rights—A Strained Relationship?* (Hart Publishing, 2015).

[3] On this line of reasoning see Marc Bossuyt, "Judicial Activism in Strasbourg", in Karel Wellens (ed.), *International Law in Silver Perspective* (2015), pp.31–56; Dragoljub Popović, "Prevailing of Judicial Activism over Self-Restraint in the Jurisprudence of the European Court of Human Rights" (2009) 42 *Creighton Law Review* 361, and Paul Mahoney, "Judicial Activism and Judicial Self-Restraint in the European Court of Human Rights: Two Sides of the Same Coin" (1990) 11 *Human Rights Law Journal* 57.

Lord Hoffmann put it this way:

> "[t]he proposition that the Convention is a 'living instrument' is the banner under which the Strasbourg Court has assumed power to legislate what they consider to be required by 'European public order'. I would entirely accept that the practical expression of concepts employed in a treaty or constitutional document may change. To take a common example, the practical application of the concept of a cruel punishment may not be the same today as it was even 50 years ago. But that does not entitle a judicial body to introduce wholly new concepts, such as the protection of the environment, into an international treaty which makes no mention of them, simply because it would be more in accordance with the spirit of the times."[4]

The argument based on the status of the judges states that the Strasbourg judge lacks political legitimacy to act as a subsidiary legislator, the Court suffering from a democratic deficit.[5] The problem of the unaccountable judge is aggravated by the fact that some judges come from alleged second-class democracies. The undemocratic pedigree of some Contracting Parties taints the judges' independence and the Court's authority.

The British exceptionalism argument goes like this: Parliament is sovereign and domestic courts must defer to it, and the same applies a fortiori to international courts, since that parliamentary sovereignity is protected by a dualist system of relationship between national and international law. As Lord Neuberger put it, "the idea of courts overruling decisions of the UK parliament, as is substantially the effect of what the Strasbourg and the Luxembourg courts can do, is little short of offensive to our notions of constitutional propriety".[6]

The second type of critiques addressed to the Court is more complex, since they pertain to the nature of the subject-matter that the Court deals with, namely the rights and freedoms enshrined in the Convention. They turn around the motto that there is a conflict between "genuine" versus "fake" human rights. Three claims are made:

First, human rights are residual, civil liberties which serve only minorities, not the majority of citizens. The Convention is portrayed as the villains' charter, not as the bill of rights of the common man on the street. Furthermore, social rights are not human rights, not enforceable rights at all. Human rights only imply negative, not positive obligations and certainly not a budgetary cost. The transformation of the Convention into a desguised social charter betrays its nature.

Secondly, human rights result from an originalist, "true" interpretation, not an evolutive, "abusive" interpretation. The true interpretation of the Convention is based on the *travaux preparatoires* and eventually also on the Contracting Parties' law at the time of drafting of the Convention. Soft law is not law, and should not be taken into account, not even as a contextual element of interpretation of the Convention and its protocols.

Thirdly, human rights are truly "homegrown", not "foreign" rights. There are no universal human rights. Universal human rights are indeed foreign human rights, imposed by alien judges who lack sensitivity to domestic traditions. The defence of homegrown rights imposes a sort of scepticism regarding international law and bodies. Cultural relativism and legal diversity are the sole weapons to oppose to the Court's moral tutelage.

[4] Lord Hoffmann, "The Universality of Human Rights" (2009) 125(3) *Law Quarterly Review* 428.

[5] On this line of argumentation see Kanstantsin Dzehtsiarou and Alan Greene, "Legitimacy and the Future of the European Court of Human Rights: Critical Perspectives from Academia and Practitioners" (2011) 12 *German Law Journal* 1707; and Tom Barkhuysen and Michiel L. van Emmerik, "Legitimacy of European Court of Human Rights Judgements: Procedural Aspects", in N. Huls, M. Adams and J. Bomhoff (eds), *The Legitimacy of Highest Courts Ruling* (2009), pp.437–449.

[6] Lord Neuberger, Cambridge Freshfields Annual Law Lecture 2014, "The British and Europe", 12 February 2014.

2. Evolutive interpretation

A response to these claims requires us to go back to basics and recall what the European Court of Human Rights (the Court) was built for.

The Council of Europe is an autonomous legal order, based on agreements and common action in economic, social, cultural, scientific, legal and administrative matters and in the maintenance and further realisation of human rights and fundamental freedoms (art.1, para.b of the 1949 Statute of the Council of Europe). With 217 treaties, the legal order of this international organisation has at its top an international treaty, the European Convention on Human Rights. Being more than just a multilateral agreement on reciprocal obligations of States Parties, the Convention creates obligations of negative and positive nature for States Parties towards all individuals within their jurisdiction, with a view to the practical implementation of the protected rights and freedoms in the domestic legal order of the States Parties. Put it in legal jargon, the Convention is a law-making treaty and not a mere contract treaty.

Very early on, the former Commission, in its decision of 11 January 1961 in the case of *Austria v Italy*, expressed the same principle when it affirmed the "objective character" of the Convention:

> "… the obligations undertaken by the High Contracting Parties in the Convention are essentially of an objective character, being designed rather to protect the fundamental rights of individual human beings from infringement by any of the High Contracting Parties than to create subjective and reciprocal rights for the High Contracting Parties themselves."[7].

Therefore, the States Parties to the Convention are legally obliged not to hinder in any way the effective exercise of the right of individual application and to make such modifications to their domestic legal systems as may be necessary to ensure the full implementation of the obligations incumbent on them.[8] Seen from another perspective, these are the consequences of the principle of good faith in fulfilling treaty obligations, provided for in arts 26 and 31 of the Vienna Convention on the Law of Treaties.

The Convention cannot be interpreted in a vacuum, but must be interpreted in harmony with other international law and soft law. Ever since *Golder*, account shall be taken of any relevant principles and rules of international law applicable in the relations between the parties, as indicated in art.31(3)(c) of the Vienna Convention on the Law of Treaties of 1969.[9] Hence, the Court departs from the contested position that there are "self-contained regimes" within international law.[10] From the Court's perspective, there is no methodological difference between the interpretation of international human rights law and other international law, or between contractual and law-making treaties, and therefore it assumes that the same interpretative methods can be applied in both fields of international law. As Judge Rozakis so elegantly formulated it, the judges of Strasbourg "do not operate in the splendid isolation of an ivory tower built with material originating solely from the ECHR's interpretative inventions or those of the States party to the Convention".[11]

This methodology is warranted by the Court's cardinal principle of interpretation, according to which the Convention must be interpreted in the light of present-day conditions.[12] It was in the seminal case

[7] Commission, *Austria v Italy* (App. No.788/60), decision of 11 January 1961. The Court adhered to this doctrine in *Ireland v United Kingdom* (1978) 2 E.H.R.R. 25.

[8] *Maestri v Italy* (2004) 39 E.H.R.R. 38.

[9] *Golder v United Kingdom* (1975) 1 E.H.R.R. 524.

[10] The point was already made in my opinions in *Al-Dulimi and Montana Management Inc v Switzerland* [GC] (App. No.5809/08), judgment of 21 June 2016 at [71]; *Sargsyan v Azerbaijan* (2017) 64 E.H.R.R. 4, fn.23, and *Centre for Legal Resources on behalf of Valentin Câmpeanu* [GC] (App. No.47848/08), judgment of 17 July 2014, fn.14.

[11] Rozakis, "The European Judge as a Comparativist" (2005) *Tulane Law Review* 278.

[12] *Tyrer v United Kingdom* (1978) 2 E.H.R.R. 1 at [31]. On this method of interpretation, see among many others, Eva Brems and Janneke Gerards (eds), *Shaping Rights in the ECHR: The Role of the European Court of Human Rights in Determining the Scope of Human Rights* (Cambridge University Press, 2013); George Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (Oxford University Press, 2009); and Andreas Fllesdal, Birgit Peters and Geir Ulfstein (eds), *Constituting Europe: The European Court of Human Rights in a National, European and Global Context* (Cambridge University Press, 2013).

Tyrer v United Kingdom that the Court for the very first time used the leitmotiv of "the Convention as a living instrument", whose interpretation has to take account of evolving norms of national and international law.[13] Deeply entrenched into American[14] and Canadian[15] constitutional law since the early twentieth century, this interpretation technique was introduced in European human rights law in 1978.

In *Tyrer*, confronted with the Attorney General of the Isle of Man's arguments advanced under former art.63 of the Convention that, "having due regard to the local circumstances in the Island", the continued use of judicial corporal punishment on a limited scale was justified as a deterrent, the Court replied that:

> "it is noteworthy that, in the great majority of the Member States of the Council of Europe, judicial corporal punishment is not, it appears, used and, indeed, in some of them, has never existed in modern times; … If nothing else, this casts doubt on whether the availability of this penalty is a requirement for the maintenance of law and order in a European country."

By concluding that the Isle of Man must be regarded as sharing fully that "common heritage of political traditions, ideals, freedom and the rule of law" to which the Preamble to the Convention refers, the Court rejected that there were local requirements affecting the application of art.3 in the Isle of Man and, accordingly, found that the applicant's judicial corporal punishment constituted a violation of that article.

Hence, since the very beginning of the Court's existence, the evolutive interpretation of the Convention was intimately linked to the need for a consensual reading of the text, based on the consideration of the domestic legal framework of the "great majority" of the Member States of the Council of Europe and, ultimately, of the common heritage of political traditions, ideals, freedom and the rule of law, to which the preamble makes reference.

The foundational principle of evolutive interpretation has been recently put at stake in *Hassan v United Kingdom*.[16] Contrary to the Government's position, the Grand Chamber affirmed that IHRL applies to international armed conflicts concurrently to IHL, but it went on to admit, as pleaded by the Government, that IHL, namely the Third and Fourth Geneva Conventions relating to internment, may be used to qualify and, in practical terms, to weaken IHRL standards. On the basis of an alleged subsequent practice of the Contracting Parties during international armed conflicts outside Europe, which did not use the derogation clause of art.15 of the Convention in order to detain people indefinitely in such war scenario, the Grand Chamber assumed that all Contracting Parties had proceeded to an implicit review of their own Convention commitments and enlarged the exhaustive list of detention grounds of art.5 of the Convention. The principle of evolutive interpretation of the Convention was turned upside down with a view to include in art.5 a new ground for detention, namely internment under international humanitarian law, the practical consequence being that in cases of international armed conflict, where the taking of prisoners of war and the detention of civilians who pose a threat to security are accepted features of international humanitarian law, art.5 can be interpreted as permitting the exercise of such broad powers and the looser standards of review of detention of the Geneva Conventions will apply. Hence, review of such detention should take place by a "competent body" with "sufficient guarantees of impartiality", and not necessarily by a judicial

[13] *Tyrer* (1978) 2 E.H.R.R. 1 at [31].

[14] *Missouri v Holland* 252 U.S. 416 (1920). Writing the majority's opinion, Justice Holmes made this remark on the nature of the constitution: "With regard to that we may add that when we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they created a nation. The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago." The Supreme Court's reference to "evolving standards of decency" is also understood as a clear mention to the "living constitutionalism" (see *Trop v Dulles* 356 U.S. 86 (1958): "The words of the [Eighth] Amendment are not precise, and that their scope is not static. The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society").

[15] *Henrietta Muir Edwards v The Attorney General of Canada* [1929] UKPC 86, [1930] A.C. 124 (18 October 1929). The case is not only memorable because it established that Canadian women were eligible to be appointed senators, but also because it introduced the "living tree doctrine" in Canadian constitutional law, according to which the constitution is organic and must be read in a broad and liberal manner so as to adapt it to changing times.

[16] *Hassan v United Kingdom* [GC] (App. No.29750/09), judgment of 16 September 2014.

authority. In other words, evolutive interpretation of the Convention may now permit a regression in terms of human rights protection in Europe.

3. European consensus

In Strasbourg, soft law provided, and still provides, the most important source of crystallisation of the European consensus and the common heritage of values. In fact, soon after *Tyrer*, the Court took the fundamental step of enlarging the array of sources of law in the light of which the European consensus may be established. In *Marckx v Belgium*, the Court took into consideration the European shared values based on the domestic law of the "great majority" of Member States of the Council of Europe, as well as the 1962 Convention on the Establishment of Maternal Affiliation of Natural Children, signed but not ratified by the respondent State, and the Council of Europe 1975 Convention on the Legal Status of Children born out of Wedlock, not even signed by the respondent State, and finally the Committee of Ministers Resolution (70) 15 of 15 May 1970 on the social protection of unmarried mothers and their children. To the argument that the 1962 and the 1975 Conventions had a small number of parties, the Court replied that

> "[b]oth the relevant Conventions are in force and there is no reason to attribute the currently small number of Contracting States to a refusal to admit equality between 'illegitimate' and 'legitimate' children on the point under consideration. In fact, the existence of these two treaties denotes that there is a clear measure of common ground in this area amongst modern societies."[17]

Mirroring the interpretative techniques of constitutional courts, the Court went even further and modulated the effects of its judgment, dispensing the respondent State from re-opening legal acts or situations that antedate the delivery of the judgment. For that purpose, it made reference to the fact that "a similar solution is found in certain Contracting States having a constitutional court: their public law limits the retroactive effect of those decisions of that court that annul legislation".[18] As if it were a European Constitutional Court, the Court resorted to the principle of legal certainty to accord itself the implied power of modulation of the temporal effect of its own judgments.[19]

In the landmark case of *Demir v Turkey*, after having recalled that "the Convention is a living instrument which must be interpreted in the light of present-day conditions, and in accordance with developments in international law, so as to reflect the increasingly high standard being required in the area of the protection of human rights, thus necessitating greater firmness in assessing breaches of the fundamental values of democratic societies", and having regard to the developments in labour law, both international and national, and to the pertinent practice of Contracting States, the Court concluded that the right to bargain collectively with the employer had, in principle, become one of the essential elements of the right to form and to join trade unions for the protection of one's interests set forth in art.11 of the Convention. For that purpose, it cited the relevant ILO Conventions, which the respondent State had ratified, the respective ILO Committee of Experts' interpretation, as well as art.28 of the European Union's Charter of Fundamental Rights, art.6(2) of the European Social Charter, which Turkey had not ratified, the European Committee of Social Rights' interpretation of this article, and Principle 8 of Recommendation No.R(2000) 6 of the Committee of Ministers of the Council of Europe on the status of public officials in Europe.[20]

In other words, for the purpose of the interpretation of the Convention, the legal relevance of human rights standards set out in other treaties and conventions depends neither on the number of their respective

[17] *Marckx v Belgium* (1979) 2 E.H.R.R. 330 at [41].
[18] *Marckx* (1979) 2 E.H.R.R. 330 at [58].
[19] On the constitutional nature of the Court see my opinion co-written with Judge Dedov in *Baka v Hungary* [GC] (App. No.20261/12), judgment of 23 June 2016, and the literature cited therein.
[20] *Demir v Turkey* (2009) 48 E.H.R.R. 54 at [146]–[154].

ratifying parties, nor on the number of Council of Europe Member States bound by them and nor even on the fact that the respondent State ratified them. Thus, under European human rights law, hard law is profoundly interwoven with soft law.

The Court's soft law and social rights friendly stance has been questioned in recent times. A remarkable example of this trend is *National Union of Rail, Maritime and Transport Workers v United Kingdom*.[21] The UK banned secondary action more than two decades ago and throughout this time has been subject to critical comments by the ILO Committee of Experts and the ECSR. The applicant union prayed these soft law materials in aid. The Government did not consider the particular criticisms made to be relevant to the factual situation denounced in the present case, or otherwise significant. The Court acknowledged the wealth of international law material relevant for the case and that the analysis of the interpretative opinions emitted by the competent bodies set up under the most relevant international instruments mirrored the conclusion reached on the comparative material before the Court, namely that the UK's outright ban on secondary industrial action finds itself at the most restrictive end of a spectrum of national regulatory approaches on this point and is out of line with a discernible international trend calling for a less restrictive approach. Nonetheless, the Court preferred to underscore the distinct character of its review compared with that of the supervisory procedures of the ILO and the European Social Charter and consequently it concluded that in this legislative policy area of recognised sensitivity the respondent State enjoys a margin of appreciation broad enough to encompass the existing statutory ban on secondary action. No violation of art.11 of the Convention was therefore found.

Evolutive interpretation of the Convention also led the Court to support its reasoning by reference to norms emanating from other Council of Europe organs, even though those organs have no function of representing State Parties to the Convention, whether supervisory mechanisms or expert bodies. In order to interpret the exact scope of the rights and freedoms guaranteed by the Convention, the Court made use, for example, of the work of the European Commission for Democracy through Law (the Venice Commission). The first case where the Court cited the Venice Commission was *Hirst v United Kingdom (No.2)*.[22] The source quoted was the "Code of Good Practice in Electoral Matters", adopted by the Venice Commission at its 51st Plenary Session (5–6 July 2002).

4. International democracy

From the seminal formulation of the European consensus in *Tyrer* emanates a vision of an deliberative, international democracy in which a majority or representative proportion of the Contracting Parties to the Convention is considered to speak in the name of all and thus is entitled to impose its will on other parties. As a matter of constitutional principle formatting the Council of Europe, consensus is decoupled from unanimity. Consensus as a *volonté générale* can still exist even if not all Contracting Parties concur in the same reading of the Convention.

It cannot be argued today that the founding fathers did not want this to happen, and states had been trapped into engagements that they did not agree upon. The now worn-out argument of lack of state consent is sometimes accompanied, as the reverse side of the coin, by the no less *démodé* critique to the Court's lack of political legitimacy to interpret innovatively the Convention, *rectius*, to create law, using soft law to circumvent the competent legislative bodies and to flout the principles of democracy, rule of law and subsidiarity. Underlying this speech is almost invariably the sovereignist leitmotiv *in dubio pro mitius*.

The preamble sets the Convention against the background of the Council of Europe general aims, with a view to creating a "closer union" among Member States, based on "a common understanding and observance of the Human Rights upon which they depend". In the Statute of the Council of Europe, the

[21] *National Union of Rail, Maritime and Transport Workers v United Kingdom* (2015) 60 E.H.R.R 10.
[22] *Hirst v United Kingdom (No.2)* (2006) 42 E.H.R.R. 41.

language used makes reference not only to a "closer unity between all like-minded countries of Europe", but also to an "organisation which will bring European States into closer association". The very first Article of the Statute sets as the aim of the Council "to achieve greater unity between its members for the purpose of safeguarding and realising the ideals and principles which are their common heritage and facilitating their economic and social progress". In the explicit terms of the Statute, the realisation of these ideals and principles warrants "agreements and common action" in all relevant areas of social life (economic, social, cultural, scientific, legal and administrative matters) and "in the maintenance and further realisation of human rights and fundamental freedoms". No better words could proclaim the primacy of human rights obligations in all areas of governance. The principle *in dubio pro persona* could find no better formulation.[23] Hence, social and economic progress is intimately connected to the progress of human rights as two sides of the same coin.

This put, evolutive interpretation, European consensus and hardening of soft law comprise the three pillars of the European normative system within which state consent is relevant. In a nutshell, the Court's golden rule of interpretation rejects a self-contained, literal, originalist, *in dubio mitius* and sovereigntist Convention interpretation.

Based upon these pillars from the very beginning, and animated by the common quest for "economic and social progress", the Council of Europe legal order can no longer be confused with the traditional international accord of juxtaposed national egoisms. Sovereignty is no longer an absolute given, as it was in the Westphalian times, but an integral part of a human rights-serving community.

In this context, the Convention cannot but be interpreted in the light of the formally binding "agreements" (i.e. treaties) and the immense plethora of formally not binding "common actions" performed by the political and technical bodies of the Council of Europe, such as recommendations, guidelines and declarations of its Committee of Ministers. Furthermore, the Convention itself calls for an open-minded approach to international law and soft law, since it is inspired by the Universal Declaration on Human Rights, as the preamble states, and open to other legal instruments, both of domestic or international legal nature, when these offer a better human rights protection (art.53 of the Convention).[24] In sum, the Court's interpretative latitude is dictated by the letter and the very nature and purpose of the Convention.

The Convention "makes no distinction as to the type of rule or measure concerned and does not exclude any part of the Member States' 'jurisdiction' from scrutiny under the Convention".[25] This means that the Convention is not subordinated to domestic rules, since it is the supreme law of the European continent.[26] Neither the supremacy of Parliament nor the independence of the judiciary may be invoked to fail to perform the Convention obligation of implementation of the Court's judgments and decisions.[27] As Lady Hale wrote, "[i]t stands to reason that, once a state has committed itself to certain minimum standards, it cannot contract out of those by defining the terms used in its own way".[28]

As a matter of constitutional law, not even the core of the national constitution, where the political stakes are higher (such as the provisions on the composition of the highest political and judicial bodies of the state), may be determinative in case of conflict with international obligations derived from the

[23] On this principle see my separate opinions in *Khamtokhu v Russia* [GC] (App. Nos 60367/08 and 961/11), judgment of 24 January 2017, and *Garib v Netherlands* [GC] (App. No.43494/09), judgment of 6 November 2017.

[24] On the "floor-ceiling problem" of the wide margin to leap ahead, but no margin to lag behind the Court, see my separate opinion in *Hutchinson v United Kingdom* (App. No.57592/08), judgment of 17 January 2017.

[25] Among many authorities, *United Communist Party of Turkey v Turkey* [1998] 26 E.H.R.R. 121 at [29], and more recently, *Anchugov v Russia* (App. Nos 11157/04 and 15162/05), judgment of 4 July 2013 at [50].

[26] See *Sejdić v Bosnia and Herzegovina* [GC] (App. Nos 27996/06 and 34836/06), judgment of 22 December 2009 at [40]–[41]; *Popescu v Romania (No.2)* (App. No.71525/01), judgment of 27 April 2007 at [103]; and *Anchugov* (App. Nos 11157/04 and 15162/05) at [50]. The practice of the Contracting Parties until at least the mid-1990s consistently confirmed this reading of the Convention. See the reform of the Maltese Constitution following the findings in the *Demicoli v Malta* judgment (Council of Europe Committee of Ministers Resolution DH (95) 211 of 11 September 1995) and the 14th Amendment of the Irish Constitution following the findings in the *Open Door and Dublin Well Woman v Ireland* judgment (Council of Europe Committee of Ministers Resolution DH (96) 368 of 26 June 1996).

[27] Article 27 of the Vienna Convention on the Law of Treaties.

[28] Lady Hale, "Common Law and Interpretation: the limits of interpretation" [2011] E.H.R.L.R. 538.

Convention and its Protocols.[29] Any other approach, which pays lip service to the Court's judgments and decisions but ultimately rejects its legal force as *res judicata* among the parties and *res interpretata* for all Contracting parties, will breach the principle of *pacta sunt servanda* and the instrumental precept of good faith.[30] As put in the Court's "Memorandum to the states with a view to preparing the Interlaken Conference", delivered on 3 July 2009,

> "It is no longer acceptable that States fail to draw the consequences as early as possible of a judgment finding a violation by another State when the same problem exists in their own legal system. The binding effect of interpretation by the Court goes beyond res judicata in the strict sense. Such a development would go hand in hand with the possibility for citizens to invoke the Convention directly in domestic law ('direct effect') and the notion of ownership of the Convention by the States."

The Court's task is to ensure the observance of the engagements undertaken by the Contracting Parties to the Convention.[31] Subsidiarity does not mean that the protection of human rights takes place primarily at the national level in accordance with the Contracting Parties' Constitutions and constitutional traditions, thus implying a limited, if not subservient role for the Court. Instead, subsidiarity means that the responsibility to ensure Convention rights and freedoms falls primarily on the Contracting Parties. Effective national implementation of the Convention remains the sine qua non precondition for subsidiarity. At this juncture, it is not needed to recall the shameful examples in the history of Europe of gravely discriminatory, unjust and inhuman legislation and regulation being passed by democratically elected assemblies, governments and officials. Majorities can get it wrong. As an international court distanced from local politics, the Strasbourg Court is there to provide a legal avenue to the alleged victims of such wrongs.

Against this background, no Contracting Party can legitimately claim special exemption from its Convention obligations and the Court's judgments on the basis of its "exceptional situation", other than in the strict terms of art.15 of the Convention. Even then that exemption is under the Court's oversight. Outside of the very specific context of art.15, any possibility of democratic override of the Convention obligations and the Court's judgments is fundamentally inconsistent with the rule of law inherent in the Convention system and with the concept of the Convention as a charter of fundamental rights and freedoms and a "constitutional instrument of European public order".[32]

5. The Court's existential crisis

The unfortunate *Hirst*[33] saga is a telling example of the current danger facing the European human rights protection system. The British legal framework imposed a blanket restriction on all convicted prisoners in prison. It applied automatically to such prisoners, irrespective of the length of their sentence and irrespective of the nature or gravity of their offence and their individual circumstances. Such a general, automatic and indiscriminate restriction on a vitally important Convention right, as the Court put it, must be seen as falling outside any acceptable margin of appreciation, however wide that margin might be, and as being incompatible with art.3 of Protocol No.1.

Thirteen years have passed without implementation of the *Hirst* judgment delivered in 2004, this omission being aggravated after 2010 by the delivery of a pilot judgment in *Greens v United Kingdom*.[34] In spite of the Court's crystal clear indication that the disenfranchisement system of prisoners in the UK

[29] See *Sejdić* [GC] (App. Nos 27996/06 and 34836/06), judgment of 22 December 2009 for a case of conflict between constitutional provisions on the composition of highest political bodies of the state and the European standards, and more recently *Baka* (App. No.20261/12), judgment of 23 June 2016 on a case of conflict between constitutional provisions on the composition of the Supreme Court of Hungary and the Convention.

[30] Article 26 of the Vienna Convention on the Law of Treaties.

[31] ECHR art.19.

[32] *Loizidou v Turkey (preliminary objections)* (1996) 21 E.H.R.R. 188.

[33] *Hirst v United Kingdom (No.2)* (2006) 42 E.H.R.R. 41.

[34] *Greens v United Kingdom* (App. Nos 60041/08, 60054/08), judgment of 23 November 2010.

constituted a systemic failure which required the adoption of measures of general nature, none were adopted even after the Grand Chamber itself nuanced the Court's position in *Scoppola v Italy* in 2012.[35] In an exact similar case of automatic disenfranchisement as a result of a life sentence, without any assessment of the individual case, the Grand Chamber backtracked from the principled position taken in *Hirst* by accepting the Italian legislation depriving of voting rights automatically all those who are sentenced to three years or more in prison, irrespective of the nature of their offence and their individual circumstances. Despite the compounding circumstance that deprivation of voting rights could entail a life ban in Italy, while the UK deprived all persons sentenced to imprisonment, for the duration of their time in prison, the Court found that the Italian system was indeed acceptable in the light of art.3 of Protocol No.1.

Both the British rebellion against *Hirst*, and the Court's backtracking from its own principles of interpretation, had and still have an enduring, negative effect on the European system of human rights protection.[36] After the shock waves sent by the 2012 *Konstantin Markin* Grand Chamber case on the right of servicemen to parental leave,[37] which was felt as an interference with the organisation of the Russian army, the 2013 *Anchugov* judgment[38] dealt with the exact same issue of *Hirst*, the ban of the voting rights of prisoners, but this time with the particularity that the ban was based on a constitutional provision: art.32(3) of the Russian Constitution. That did not hinder the Court from repeating the finding of a violation of art.3 of Protocol No.1, which would logically entail a constitutional reform in Russia. No such thing happened.

On the contrary, in July 2015 the Russian Constitutional Court judgment on the Federal Law on the Accession of the Russian Federation to the European Court of Human Rights affirmed that a judgment of the Court is not enforceable in Russian territory if the Constitutional Court finds that it contradicts the Russian Constitution. Since there was no legal framework for such finding, the Constitutional Court suggested that the Duma approve legislation to create a special legal mechanism "to ensure the supremacy of the Constitution in the implementation of European Court of Human Rights judgments".[39] Such interpretation of the Russian Constitution was enshrined in December 2015 in a Law on the Constitutional Court powers, which establishes the Constitutional Court power to declare rulings of international judicial bodies non-executable (including on compensation) if they contradict the Russian Constitution.[40] In April 2016, the Russian Constitutional Court applied the new law for the first time and decided that the *Anchugov* judgment is not enforceable in Russia.[41]

The 2016 Constitutional Court judgment only worsened the present existential crisis of the Court.[42] If it is true that the vast majority of the Court's judgments are implemented with more or less delay or precision, the fact remains that in a fast-growing number of cases states are not willing to go along with the Court and oppose directly or indirectly any kind of implementation of its judgments.[43] In the case of Russia, there are now 1,573 non-executed judgments pending,[44] of them 204 in leading cases, among

[35] *Scoppola v Italy* (2013) 56 E.H.R.R. 19.

[36] This is not the first time that this type of reaction occurs. One example suffices. Following the *McCann v United Kingdom* judgment, the media reported: "Ministers said they would ignore it and were not ruling out the ultimate sanction of a withdrawal from the court's jurisdiction. 'Every possible option is being kept open, including walking away,' said one insider." "Downing Street said the ruling in the so-called Death on the Rock case 'defied common sense'. Deputy Prime Minister Michael Heseltine branded it 'ludicrous'" (see *Daily Mail*, 28 September 1995). The novelty with the *Hirst* crisis is the contagious effect that it had.

[37] *Markin v Russia* (2013) 56 E.H.R.R. 8.

[38] *Anchugov v Russia* (App. Nos 11157/04 and 15162/05).

[39] Constitutional Court of the Russian Federation judgment No.21-P/2015 of 14 July 2015.

[40] See the Federal Constitutional Law No.7-FKZ of 14 December 2015, introducing amendments to the Federal Constitutional Law No.1-FKZ of 21 July 1994 on the Constitutional Court of the Russian Federation.

[41] Constitutional Court of the Russian Federation judgment No.12-P of 19 April 2016.

[42] On the impact of this crisis on the European human rights protection system see the European Commission for Democracy through Law (Venice Commission) Opinion No.832/2015 on the amendments to the Federal Constitutional Law on the Constitutional Court, 13 June 2016, CDL-AD(2016)016.

[43] On the problems regarding the effectiveness of the Court raised by non-execution of its judgments, see among others Keller and Marti, "Reconceptualizing Implementation: The Judicialization of the Execution of the European Court of Human Rights' Judgments" (2015) 26 E.J.I.L. 829; and Hillebrecht, "Rethinking Compliance: The Challenges and Prospects of Measuring Compliance with International Human Rights Tribunals" (2009) 1 *Journal of Human Rights Practice* 362.

[44] Data as of December 2017.

which the famous 2014 *Yukos*[45] judgment that set the highest ever compensation amount in the history of the Court, €1.8 billion to be paid to the applicants. Precisely in this case, in January 2017 the Russian Constitutional Court came to the conclusion that the Court's decision on just satisfaction violates the Russian Constitution and cannot be enforced.[46]

In this context, it does not come as a surprise that even the binding force of a unanimous Grand Chamber judgment (*Paposhvili v Belgium*[47]) has recently been rejected by the UK Upper Tribunal, which considered the Grand Chamber judgment as setting an "over-elastic and ill-defined" test which is "as long as the judge's sleeve".[48] The systemic effect of this crisis is evidently aggravated by the possibility of Brexit. If fundamental rights in general and migration law in particular were main points of contention between the United Kingdom and the EU, leaving the EU will not be a solution, in view of the reciprocal influence between the Strasbourg and the Luxembourg jurisprudences on such issues like protection of the right to privacy, mutual recognition of judicial decisions, procedural rights in criminal proceedings, guarantees in asylum procedures or family reunification rights. If Brexit takes place, the dispute will be transposed to the Council of Europe and the Strasbourg Court will be the first to suffer.

6. The institutional response to the crisis

Faced with this adverse context, the Council of Europe should not ignore the critiques addressed to the Court. A proactive stance is needed to reinforce the role of the Court in the European human rights protection system and protect it from undeserved criticism. Having had the benefit of serving the Court for six years now, it seems to me that the following steps should be taken in order to strengthen the independence, the transparency and the accountability of the Court.

The Court is a high-independence judicial body, because the judges are elected by a democratic assembly (the Parliamentary Assembly of the Council of Europe) for a long, non-renewable nine-year mandate[49] and benefit from functional immunity for speech and acts while discharging their duties.[50] In terms of their legitimacy, the judges enjoy a broad European-wide political legitimacy, since the members of the Parliamentary Assembly are representatives of the 47 national Parliaments of the Contracting Parties to the Statute of the Council of Europe. This indirect political legitimacy of the Strasbourg judges is often forgotten.

Yet both the internal and the external independence of the judges can be improved. As in many Constitutional and Supreme Courts, there should be a rotation of the presidency of the sections of the Court, combined with a reduction of the term of section presidents. Article 25(c) of the Convention provides that the plenary Court shall "elect the Presidents of the Chambers of the Court" (who may be re-elected). In fact, the Court's 47 judges are divided into five sections, within each of which three to four chambers are formed. The plenary elects the presidents of the five sections. The present Convention framework does not hinder the election of section presidents in accordance with a seniority-based system of voluntary rotation. Such system would avoid the inconveniences of campaigning and lobbying for electoral posts and therefore better protect the internal independence of the judges.

This new electoral philosophy should be articulated with a new voting philosophy. Pending cases should only be discussed by the judges in the court room, and not externally. Rule 22(1) of the Rules of Court states: "The Court shall deliberate in private. Its deliberations shall remain secret". Rule 28(2)(d) provides that: "A judge may not take part in the consideration of any case if he or she has expressed opinions publicly, through the communications media, in writing, through his or her public actions or

[45] *OAO Neftyanaya Kompaniya Yukos v Russia* (2014) 59 E.H.R.R. SE12.
[46] Constitutional Court of the Russian Federation Judgment No.1-P of 19 January 2017.
[47] *Paposhvili v Belgium* [GC] (App. No.41738/10), judgment of 13 December 2016.
[48] *EA (Article 3 medical cases—Paposhvili not applicable)* [2017] UKUT 00445 (IAC).
[49] ECHR arts 22, 23.
[50] ECHR art.51 and Statute of the Council of Europe art.40.

otherwise, that are objectively capable of adversely affecting his or her impartiality". These rules should be reinforced by the adoption of a strict "rule of silence" outside the courtroom.

The independence of the judges could be further strengthened with some fundamental ineligibility rules. Judges should be ineligible to apply for posts within the Court Registry (which provides legal and administrative support to the Court)[51] for a period of five years after their mandate has ended; an equivalent rule should apply to Registry staff as regards applying for judicial posts at the European Court.

Judges should also be ineligible to apply for certain state positions for a period of five years after their mandate has ended; an equivalent rule should apply to the holders of those state positions as regards applying for judicial posts at the European Court. These "cooling-off period" rules would put an end to any risk of a "revolving door" between the Court and Government-dependent posts.[52]

The Court is a high-transparency judicial body, because the Convention secures the right of judges to join separate opinions to Grand Chamber and Chamber judgments and advisory opinions.[53] Nevertheless, the Court's transparency could be further enhanced.

The transparency of the Court relates essentially to the mode of constitution of the Chamber and the Grand Chamber for each case. With regard to the Grand Chamber, art.26(4) and (5) of the Convention is complemented by r.24 of the Rules of Court. Rule 24(e) provides:

> "(e) The judges and substitute judges who are to complete the Grand Chamber in each case referred to it shall be designated from among the remaining judges by a drawing of lots by the President of the Court in the presence of the Registrar. The modalities for the drawing of lots shall be laid down by the Plenary Court, having due regard to the need for a geographically balanced composition reflecting the different legal systems among the Contracting Parties."

The practice has been that six "regional" groups are organised for the constitution of the Grand Chamber for each case; these "regional" groups are reviewed from time to time and the individual judges are chosen from these "regional" groups by manual drawing of lots.

With regard to the chambers and the sections, r.25(3) of the Convention is complemented by rr.25 and 26 of the Rules of Court. Rule 25 of the Rules of Court on the "Setting-up of Sections" states: "The composition of the Sections shall be geographically and gender balanced and shall reflect the different legal systems among the Contracting Parties [the term 'Section' is used instead of 'Chamber']". Rule 26 of the Rules of Court on the "Constitution of the Chambers" states: "1(b) The other members of the Chamber shall be designated by the president of the section in rotation from among the members of the relevant section". The practice has been that, after consultation with the individual judges, the President of the Court proposes and the plenary ratifies the composition of sections. The constitution of the Chamber for each case depends ultimately on the section president.

These rules should be reviewed with a view to avoid any element of chance or discretion in the composition of judicial formations. Instead, there should be predictability and certainty, eliminating any room for doubt. The constitution of the Chamber and the Grand Chamber for each case should be determined in accordance with strictly objective criteria and a fully automated, publicly available procedure.

In accordance with a long-standing practice, judge rapporteurs are assigned anonymously to preside over the processing of each case. It is an open secret that the practice follows an internal rule according to which the national judge is the judge rapporteur in Chamber cases from his or her own country,[54] save

[51] ECHR art.24.

[52] This would remove the risk to which is made reference in Dunoff and Pollack, "The Judicial Trilemma" (2017) 111(2) *American Journal of International Law* 225, fn.102.

[53] ECHR arts 45(2) and 49(2).

[54] This is why applications are normally allocated to the Section in which the national judge sits. Rule 26(1)(a) of the Rules of Court provides that in constituting Chambers to consider an application, where the national judge is not a member of the Section to which the application has been assigned, he or she shall sit as an ex officio member of the Chamber.

when the section president decides differently. In Grand Chamber cases, the President of the Court has total discretion in appointing the judge rapporteur.[55] This practice should be changed.

First, the Convention does not prevent the judge rapporteur from being identified. Secondly, rr.48–50 of the Rules of Court are manifestly insufficient to ensure the needed institutional transparency, in view of the utmost importance of the judge rapporteur's input into the processing of cases. Thirdly, the applicants, the Governments, the lawyers and the general public have a right to know the identity of the judge rapporteur, in accordance with the overarching principle of transparency of the Council of Europe.[56] Hence, judge rapporteurs should be publicly named and their appointment should be based on strictly objective criteria and a publicly available procedure.

The single judge may declare inadmissible or strike out of the Court's list of cases an application under art.34 of the Convention.[57] The single judge is assisted by a non-judicial rapporteur who shall function under the authority of the President of the Court.[58] In practice, both the single judge and the non-judicial rapporteur are appointed by the President of the Court. Other than the restriction that a single judge shall not examine any application against a country in respect of which he or she has been elected,[59] the President of the Court has full discretion in the appointment of the single judge and the non-judicial rapporteur. This should not be the case. The criteria for designating single judges and non-judicial rapporteurs to particular countries should be objective and public. The mere fact that the single judge decisions are non-appealable, final decisions[60] warrants such objectivity and transparency. The additional fact that they represent the vast majority of the Court's output only shores up the argument for increased objectivity and transparency.

The transparency of the Court's output still leaves much to be desired.[61] Separate opinions are a major, but still underestimated tool to guarantee the Court's transparency and promote the development of its case-law. Article 45 of the Convention does not hinder the identification of the majority and the minority in decisions. Judges who form the majority and minority in decisions should be identified in order to clarify the position of each individual judge.[62]

The practice of the Court has been open to separate opinions (on inadmissibility issues) joined to merits judgments which also incorporate inadmissibility decisions.[63] Indeed, there is no reason why this practice should not extend to decisions as such. The omission in art.45(2) of the Convention of a reference to decisions is a mere historical accident, given the original competence of the Convention organs, where admissibility was essentially a matter for the Commission.[64] Furthermore, r.74(2) of the Rules of Court

[55] Sometimes his or her identity is known (see Dzehtsiarou and Lukashevich, "Informed Decision-Making: The Comparative Endeavours of the Strasbourg Court" in (2012) 30(3) *Netherlands Quarterly of Human Rights* 274, fn.10).

[56] See the "Guidelines for civil participation in political decision making", adopted by the Committee of Ministers on 27 September 2017 at the 1295th meeting of the Ministers' Deputies. These Guidelines recommend increasing transparency of decision-making processes around Europe, and namely that all public bodies responsible for decision making should be subject to access to information laws. See also the Parliamentary Assembly Resolution 2182 (2017) on "Follow-up to Resolution 1903 (2012): promoting and strengthening transparency, accountability and integrity of Parliamentary Assembly members", adopted by the Assembly on 10 October 2017.

[57] ECHR art.27 and Rules of Court r.27A.

[58] ECHR art.24(2).

[59] ECHR art.26(3).

[60] ECHR art.27(2).

[61] Since this article is focused on institutional transparency reform efforts, it will not address substantive transparency issues related to the motivation of judgments, like the unpredictable use of the margin of appreciation and the distortion of the European consensus, regarding which the Court's practice has been the subject of much criticism (see the interesting remarks of Strasbourg Judges on these issues in Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights* (Cambridge University Press 2015, ch.7), as well as Tulkens and Donnay, "L'usage de la marge d'appréciation par la Cour européenne des droits de l'homme. Paravent juridique superflu ou mécanisme indispensable par nature?" (2006) *Revue de Science Criminelle et de Droit Pénal Comparé* 3, and Tulkens, "Conclusions Générales", in Frédéric Sudre (ed.), *Le principe de la subsidiarité au sens du droit de la Convention européenne des droits de l'Homme* (Anthemis, 2014)).

[62] Sometimes it is frustrating that a minority member of the judicial composition does not have the chance to dissociate him or herself from the majority, especially in cases coming from his or her own country of origin.

[63] See, among recent examples, the separate opinions joined by Judges Keller and Dedov in *Navalnyye v Russia* (App. No.101/05), judgment of 17 October 2017, by Judges Karakas, Vucinic and Laffranque in *Tibet Mentes v Turkey* (App. No.57818/10), judgment of 24 October 2017, and my own opinion in *de Tommaso v Italy* [GC] (App. No.43395/09), judgment of 23 February 2017.

[64] As shown by the Court's practice even during the time of the Commission (see *Van Oosterwijck v Belgium* (1981) 3 E.H.R.R. 557 and *Cardot v France* (1991) 13 E.H.R.R. 853).

has already gone *praeter legem*, by including the possibility of a "bare statement of dissent". Most importantly, decisions on inadmissibility occasionally deal with complex, crucial issues which relate to the Court's jurisdiction and the interpretation of the Convention and the Protocols thereto. It is simply nonsensical that judges cannot express their individual views on issues of this magnitude in decisions on applications under arts 33 and 34 of the Convention[65] while decisions rejecting requests for advisory opinions may be accompanied by separate opinions or statements of dissent.[66]

Article 46(3), (4) and (5) of the Convention does not rule out separate opinions in interpretation and infringement judgments. Yet r.93 of the Rules of Court prohibits such opinions in interpretation judgments while r.99 does not prohibit them in infringement judgments. This groundless difference of treatment should be solved by bringing the erroneous r.93 into line with the open rule enshrined in art.46(4) of the Convention, read in conjunction with art.45(2).[67]

Sufficient reasoning (which is not "stereotypical") should be provided for single judge decisions on inadmissibility[68] and for the decisions of the Grand Chamber panels that reject a case to the Grand Chamber[69] and these decisions should be published.[70] These were the crystal-clear demands of the Governments in the 2015 Brussels Declaration,[71] after the criticism expressed by other national and international authorities[72]. Following the same logic, and since it deprives the parties of one degree of jurisdiction, any decision to relinquish in favour of the Grand Chamber should be reasoned.[73]

All the sources of information relied on by the Court for the drafting of a judgment or decision should be made public, including information provided by the Court's Jurisconsult,[74] international and comparative law reports of the Court's Research Division and third-party interventions.[75] One essential element for the motivation of the Court's judgments is its internal guidelines on just satisfaction. There is no reason why these guidelines should remain secret.[76] The parties to the case have a right to know how the awarded just satisfaction was calculated.[77]

Scholarly research shows that normally there is an inverse relation between independence and accountability of judicial bodies: more independence comes at the expense of less accountability.[78] The Court is a low-accountability judicial body. Save for dismissal procedures when the judge no longer fulfils the "required conditions"[79] and the prohibition of engaging in "any activity which is incompatible with their independence, impartiality or with the demands of a full-time office",[80] there is no other accountability

[65] Rules of the Court r.56(1).

[66] Rules of the Court r.88(2).

[67] In fact, the practice of the old Court admitted such separate opinions in interpretation judgments (see the separate opinion of Judges Verdross and Zekia in *Ringeisen v Austria (Interpretation)* (1979) 1 E.H.R.R. 513).

[68] ECHR art.27, in conjunction with art.45(1).

[69] ECHR art.43(2) and (3). Rule 73(2) of the Rules of Court states that "Reasons need not be given for a refusal of the request".

[70] Rule 33(4) of the Rules of Court only provides for publication of "general information" on decisions taken by the single judge.

[71] See the High-level Conference on the "Implementation of the European Convention on Human Rights, our shared responsibility", Brussels Declaration, 27 March 2015: "welcomes the intention expressed by the Court to provide brief reasons for the inadmissibility decisions of a single judge, and invites it to do so as from January 2016; invites the Court to consider providing brief reasons for its decisions indicating provisional measures and decisions by its panel of five judges on refusal of referral requests".

[72] See *Maria Cruz Achabal Puertas v Spain* , United Nations Human Rights Committee, Communication No.1945/2010, 18 June 2013, and my opinion in *Centre for Legal Resources on behalf of Valentin Câmpeanu v Romania* [GC] (App. No.47848/08).

[73] Rule 72(3) of the Rules of Court provide for the opposite.

[74] Rule 18B of the Rules of Court provides as follows: "For the purposes of ensuring the quality and consistency of its case-law, the Court shall be assisted by a Jurisconsult. He or she shall be a member of the Registry. The Jurisconsult shall provide opinions and information, in particular to the judicial formations and the members of the Court".

[75] ECHR art.36 and Rules of Court r.44.

[76] See the CDDH Report on "the longer-term future of the system of the European Convention on Human Rights", CDDH(2015)R84, Addendum I, 11 December 2015, p.83: "Regarding the issue of just satisfaction awarded by the Court, the CDDH considers that the criteria applied by the Court need to be more transparent".

[77] In fact, the Court's own case law imposes a very demanding transparency obligation on national courts (e.g. *Ferreira Alves v Portugal (No.3)* (App. No.25053/05), judgment of 21 June 2007 at [40]–[43]).

[78] Dunoff and Pollack, "The Judicial Trilemma" (2017) 111(2) *American Journal of International Law* 225, 226.

[79] ECHR art.23(4) and Rules of Court r.7.

[80] ECHR art.21(3) and Rules of Court r.4.

mechanism for judges. With regard to the members of the Registry, the general disciplinary rules of the Council of Europe apply.[81] But more could be done to make the Court accountable.

The Court's plenary is responsible for the most important decisions regarding the Court's administrative and managerial policy.[82] The Bureau, which does not have a Convention footing, is an advisory body to the President of the Court and does not have any decision-making power of its own.[83] All judicial matters lay outside the scope of the advisory competence of the Bureau, which can only pronounce itself on administrative and extra-judicial matters which fall within the competence of the Court's President.[84] Hence, the Bureau's task of facilitating coordination between the Court's sections only contemplates matters of administrative and extra-judicial nature.[85] Any pronouncement of the Bureau on judicial matters, including case-law consistency, would be ultra vires.

Prior to the adoption of the Council of Europe's budget each year, a detailed annual report approved by the Court's plenary should be presented to the Committee of Ministers and the Parliamentary Assembly of the Council of Europe, with information on the past results and future, expected results, in accordance with the Court's administrative and managerial policy. Most importantly, the Contracting Parties should be given more input into the adoption of the Rules of Court.[86]

In line with the nature of the Convention as a "constitutional instrument of European public order",[87] the focus of the Court's administrative and managerial policy should be on inter-state cases and pilot-judgment procedures.[88] Special human and financial resources should be allocated to these types of cases. Among other strategic options to be taken, a "situation room" should be established within the Court to provide centralised, internal supervision of the development and follow up to these cases. This should be a high-ranking executive department that enables the Court to assess more efficiently the development of such cases and the impact of the respective judgments in cooperation with the Committee of Ministers' own supervisory mechanism.[89]

More generally, the further judicialisation of the execution of the Court's judgments, namely by means of the increased use of the art.46(4) infringement procedure and the full acknowledgment of the right to reopen the case at domestic level after the Court's finding of a Convention violation, is a crucial strategic step that both the Court and the Committee of Ministers should envisage in order to be fully responsive to recalcitrant states.[90]

[81] See "Staff Regulations of the Council of Europe", arts 54–58.
[82] ECHR art.25.
[83] Rules of Court r.9A(3).
[84] Rules of Court r.9A(3).
[85] Rules of Court Rule r.9A(4) read in conjunction with the previous r.9A(3).
[86] Rule 110 of the Rules of Court is manifestly insufficient in this regard.
[87] *Loizidou v Turkey (preliminary objections)* (1996) 21 E.H.R.R. 188 at [75].
[88] Already the 2005 report Lord Woolf on the *Review of the Working Methods of the European Court of Human Rights* proposed that "Cases that are candidates for a pilot judgment should be given priority, and all similar cases stayed pending outcome of that case". See also the CDDH Report on "the longer-term future of the system of the European Convention on Human Rights", CDDH(2015)R84, Addendum I, 11 December 2015, p.82: "Concerning systemic issues, the CDDH supports wider use by the Court of efficient judicial policy and case-management, allowing effective adjudication of large numbers of applications and inducing the respondent States through pilot judgments or other existing procedures to resolve the underlying systemic problems under the supervision of the Committee of Ministers." The 2015 Brussels Declaration, cited above, supported "further exploration and use of efficient case-management practices by the Court in particular its prioritisation categories for the examination of cases, according to, among other things, their level of importance and urgency, and its pilot-judgment procedure." According to the Court's priority policy, pilot-judgment procedures are Category II cases. But in its recent review of the priority policy, with effect from 22 May 2017, the Court placed inter-state cases, which were hitherto in Category II, outside the priority policy "in view of their special character which in any event attracted special procedural treatment" (see "The Court's Priority Policy", available on the Court's site).
[89] This means that the treatment of repetitive cases once the pilot judgment is delivered should not be entirely de-judicialised. The strike-out judgment delivered in *Burmych v Ukraine* (App. Nos 46852/13 et al.), judgment of 12 October 2017 must be read in the light of the very special circumstances of that case, to which the Grand Chamber repeatedly referred (at [174], [175], [181] and [199]).
[90] See my separate opinion in *Fabris v France* (2013) 57 E.H.R.R. 19 on the legal and political importance of Article 46(4) infringement procedures and see my separate opinion in *Moreira Ferreira v Portugal (No.2)* (App. No.19867/12) judgment of 11 July 2017, on the implementation of Recommendation (2000) 2 on re-examination or reopening of certain cases at domestic level following judgments of the Court.

An accountability-based culture focused on producing a high-quality output, and not just statistical results,[91] should pervade the Court's administration and management. This is evidently only possible with a highly authoritative judicial body and a fully motivated and increasingly specialised Registry. The election of judges should involve an intensive public vetting process. A European-wide uniform vetting process should improve the already existing standards,[92] both at the national and the international stages, including public interviews by the Parliamentary Assembly Committee on the Election of Judges to the European Court of Human Rights. After being elected, judges have an accountability obligation also with regard to their private lives. There should be full publicity about the "off-the-bench" engagements of judges, including details about events sponsored by the Member States.

The Registry is the backbone of the Court's structure and contributes importantly to the quality of its output. Article 25(e) of the Convention provides that the plenary Court shall elect the Registrar and Deputy Registrar. This responsibility of the judges should be expanded to other positions of the Registry. Judges should have decisive input into the recruitment and career progression policy within the Court Registry.

The above-mentioned reform proposals should be perceived as a shared responsibility of the Court and the other bodies of the Council of Europe. Now, more than ever, the Court as the jewel of the crown of the Council of Europe needs the unequivocal and unbaiting support of the other bodies of the Council. The obvious sometimes needs stating. There should be no doubt that, if the Court falls, the Council will also fall.

[91] See Elisabeth Lambert Abdelgawad, "La mesure de la performance judiciaire de la Cour Européenne des Droits de l'Homme: Une logique managériale à tout prix?" (2016) 159 *Revue Française d'Administration Publique* 824.

[92] See the Committee on the Election of Judges to the European Court of Human Rights, Procedure for electing judges to the European Court of Human Rights Information document prepared by the Secretariat, AS/Cdh/Inf (2018) 01, 19 December 2017.