2015 Sean Lester Memorial Lecture

Irish Society of International Law

St Michan's Church, Dublin

1 December 2015

The Future of the European Court of Human Rights

Professor Fiona de Londras

Chair of Global Legal Studies, University of Birmingham

E: f.delondras@bham.ac.uk | T: @fdelond

The Future of the European Court of Human Rights

Ms. Justice O'Malley, members of the judiciary, members of the executive committee of the Irish Society of International Law, ladies and gentlemen.

I am very pleased to be here this evening to deliver this lecture, dedicated to the memory of a fine statesman and a man who, in the words of Felician Prill, "possessed a practical political intellect which enabled him to deal with policy as the art of doing the possible".[1] If ever there was a time when that quality was needed in and beyond Europe this, surely, is it. That sentiment applies not only to the current political and policy turmoil surrounding possible military intervention in Syria, but also to securing the future of the European Court of Human Rights: the topic on which I want to concentrate tonight.

1. Seán Lester: Principle, Politics, and Idealism

Before I move on to consider the Court itself, let me dwell for a moment or two on the man whom we are gathered here to honour—Seán Lester—and on how his approach to Danzig as the world stood on the brink of war in the 1930s displays the importance of principled, practical politics.

As the League of Nations' High Commissioner of Danzig, Seán Lester's insistence on protecting the democratic constitution of Danzig (now Gdansk) could well have led to a rerun election early in the 1930s. Had that happened, the available evidence suggests that this would have been the first election in which ethnic Germans would overturn a Nazi 'government'. However, in spite of Lester reporting in no uncertain terms to the League that the preceding election had been unfair and characterized largely by irregularities, the less principled politics of the League of Nations and the misguided approach of the Polish government towards appeasing Germany meant that the election was allowed to stand. In spite

[1] Prill, "Sean Lester: High Commissioner in Danzig, 1933-1937" (1960) 49 *Studies* 261-267, 264.

of this (or perhaps because of it) Lester was considered a threat by the Nazis, who in Paul McNamara's words, "engineered a diplomatic crisis" to force Lester's removal or resignation: the so-called *Leipzig Incident*. So potentially powerful was the bravery of Lester's conviction against totalitarianism that Hitler himself considered him a major irritant. He opined

> "the presence of Lester in Danzig is, from the point of view of the doctrine of the regime governing Germany, unacceptable…there [must be] a change of personnel in the post of high commissioner".[2]

Lester's resignation from the post of High Commissioner ushered in Danzig's slide, in September 1939, into a totalitarian mini-state run by the Nazis and the removal of an effective League buffer between Berlin and Warsaw. Danzig, thus, became a vital step in realizing Hitler's ambition for the so-called Polish corridor.

As is well known, Lester went on to act as Deputy Secretary General and then Secretary General of the League of Nations during the Second World War. In taking over as Secretary General, Lester helped to restore some integrity to that organization after the difficult period of leadership by General Joseph Avenol, who had proposed its alignment with Hitler. Lester, of course, ultimately oversaw the League of Nation's closure and the transition to the United Nations.

I rehearse this short narrative—no doubt well known to many people here—because of the comment Paul McNamara makes at the end of his short article on Lester in *History IRELAND* from 2009. He writes:

> "Sean Lester's importance in the events leading to the Second World War has been seriously underestimated. One of the first non-Germans to witness what Nazi totalitarianism meant in practice, it was not Lester's fault that he was ignored by those who had the power to do something

[2] Quoted in McNamara, "Could this Irishman have stopped Hitler?" (2009) 17(3) *History IRELAND* 34, p.p. 36-37.

about it. It is also regrettable that this unassuming and courageous Irishman should remain so long forgotten and unrecognised in his own land".[3]

Indeed, Lester's lack of recognition in this country is a recurring theme in those pieces of writing dedicated to his legacy. It is, thus, a great honour to be here to deliver this 9th annual lecture named after him and through which the Irish Society of International Law does its part in ensuring that the great contribution of this man to world affairs is appropriately recognized.

Of course, as Deputy Secretary General and then Secretary General of the League of Nations, Lester was participating in the first great project of Wilsonian idealism; the first, but not the last. Woodrow Wilson outlined his vision for world peace in his famous 'Fourteen Points' speech, delivered to Congress on 8 January 1918. For Wilson, the idealist vision of international peace and security (which, for him, were clearly codependent phenomena) was deeply reliant on two things: "the removal…of all economic barriers and the establishment of an equality of trade conditions among all the nations consenting to peace" (Point III) and the creation of free (by which he meant democratic) nations (Points V-XIII).

These basic aspirations are shared by the major regional organizations operating in Europe—the European Union and the Council of Europe—and the protection of human rights is a fundamental foundation for their achievement. Let us not forget that what became the European Convention on Human Rights was originally proposed by the 'European Movement' to be "a system of collective security against tyranny and oppression" or, as David Maxwell-Fyfe put it, to be a "beacon to those at the moment in totalitarian darkness…[to] give them a hope of return to freedom".[4]

[3] Ibid, p. 37.

[4] Speech of Sir David Maxwell-Fyfe on the occasion of signing the European Convention on Human Rights, 4 November 1950.

As we stand here, well advanced into the 21st century, we see daily the fragility of Europe's commitment to rights and, resultantly, of the idealist underpinnings of the great modern European project(s). This is discernible in Europe's slide into self-protection and away from humanitarianism, most manifestly illustrated by the suspicious and often inhumane treatment of asylum seekers arriving at Europe's external borders. However, this is also discernible, I argue, in the persistent frailty of the European Court of Human Rights, to which I now turn.

2. The Triumph (?) of the ECtHR's Establishment

It is no surprise the European Convention on Human Rights did not originally establish a permanent court to adjudicate on alleged violations. In truth, the conclusion of the Convention at all was quite the achievement. As Ed Bates has written "a number of States…were opposed to a human rights Convention, or at least one that actually threatened their sovereignty via the creation of a Court or other bodies to which individuals would have access".[5] Notwithstanding this, agreement on the Convention text was reached, and its original purpose was anything but modest.

As already mentioned, the Convention was to be an alarm—a beacon, a light—to protect 'free Europe' from a return to totalitarianism. It would achieve this by acting as something akin to a conscience—or what we would perhaps now call a set of constitutionalist values—by which we could clearly identify indicators of a slow slide into totalitarianism, which we would then, ideally, arrest. Breaches of the Convention would constitute behaviour contrary to what Churchill called the "judgment of the civilized world". When politicians today criticize the Court's "expansion" from its original intention, it is worth remembering that this original intention was hardly modest, even if it was perhaps idealist.

[5] Bates, *The Evolution of the European Convention on Human Rights*, 6.

The Convention that was signed in 1950 saw rights as being primarily enforceable between states. Contracting Parties were required to accept that any other Contracting Party could bring a claim of violation before the then-Commission of Human Rights. The Convention, then, was classically horizontal at least in the conception of many: it was primarily enforced between states, and there was no permanent Court. Instead there was a Commission of Human Rights, the recommendations of which would provide a basis for a political body—the Committee of Ministers—to make a determination.

While Contracting Parties were obliged to accept this form of inter-state complaint, they could opt to also accede to the jurisdiction of a Court to be established once eight states so acceded. Even then, the right to individual petition—nowadays considered such a cornerstone of the European human rights machinery—was also optional. Individual petition would begin to operate once five states agreed to it. Although (or perhaps because) Sean McBride reportedly opined that the individual petition was "not worth the paper it is written on", Ireland accepted both the jurisdiction of the Court and the right to individual petition when it signed the Convention. Ireland, of course, became party to the first inter-state case before the Court (*Ireland v United Kingdom*[6]) *and* the first case arising from individual petition (*Lawless v Ireland*[7]).

The then-part-time Court itself came into being in 1959 with something of a whisper. It is not clear that much if anything was really expected of it, and one doubts that anyone could have imagined the enormous influence the Court would eventually have on European public law, national human rights law, and comparative law more broadly. Indeed, so quiet were its beginnings that six years after its establishment, then Vice-President of the Court Judge Rolin asked "Has the European Court of Human Rights a Future?".[8]

[6] [1978] ECHR 1.
[7] (1961) I EHRR 15.
[8] Published as Rolin, "Has the European Court of Human Rights a Future?" (1965) 11 *Howard Law Journal* 442.

However, as time passed larger countries began to join the Court—the United Kingdom in 1966, France in 1974, Italy in 1973—and slowly but surely a group of lawyers and a body of legal scholarship on the Convention was developed. Lawyers began to see that failure in domestic courts did not necessarily constitute the end of a legal story. Individual petition was soon recognized as a key weapon in a human rights advocate's arsenal.

In the meantime, the Commission and the Court began to be more active—perhaps also more confident—and major judgments were handed down. The Convention began to expand from a 'mere' political bulwark against totalitarianism into a working and workable human rights instrument. By the time the 1980s dawned, the part-time Court in Strasbourg had handed down major decisions in which they developed key principles such as dynamic interpretation, the margin of appreciation, and proportionality. The cases from these years slide easily off of the tongue; they are familiar to lawyers everywhere and recognized as canonical. *Golder v United Kingdom*,[9] *Marckx v Belgium*,[10] *Guzzardi v Italy*,[11] *Handyside*,[12] and, of course, *Airey v Ireland*[13] are among them. These cases and others from that golden period of the late 1970s and early 1980s continue to provide the very core of our understanding of the Convention.

In these cases the Court was not providing a bulwark against totalitarianism, or at least not in the way that its founders might have anticipated. It was developing a set of constitutionalist principles to be enjoyed *as a minimum* across what was still 'free Europe'; principles that recognized the role of a rich and full conception of liberty and of the right to be oneself in the fostering and development of broader freedom, of democracy, of a rights-respecting polity. It did this only when the domestic courts did not: the Strasbourg system respected the principle of subsidiarity. It was thus always acting in a sense in cooperation with the national

[9] [1975] 1 EHRR 524.
[10] [1979] ECHR 2.
[11] [1980] ECHR 5
[12] [1976] ECHR 5.
[13] [1979] ECHR 3.

courts and governments of the Contracting Parties (i.e. in an earlier version of what some scholars now describe as 'dialogue'). But it was resolutely doing something unanticipated by most in 1950. And states were responding, not with petulance or resistance, but (by and large) with change. Domestic legal systems were evolving into more rights-based constitutionalist systems, and the Convention's constitutionalist character was well on the way to being established. The Court too was becoming more active: it delivered fifty judgments on the merits between 1983 and 1987, whereas the first fifty had taken 1959 to 1983. This increase in workload led to the Court becoming permanent by virtue of Protocol 11.

It is tempting to see the evolution of the Court from its tentative beginnings in the 1950s to its permanent establishment in the 1990s as a story of success: states recognized the court, individual petition was extended, the Court developed a judicial voice and a jurisprudential corpus, judgments were executed, the Court became seen as *quasi*-constitutional by at least some, and the Court's future was guaranteed by Protocol 11. While there is some truth in that Whiggish narrative, there is also an underlying reality that must be recognized: the Court became permanent because its workload could not be borne in its part-time state, which reflects the fact that violations of the Convention were widespread across the Contracting Parties and were not being adequately addressed in domestic courts, all of which points to the fact that the Convention was not being appropriately domesticated across the continent.

I make this point to note that long before the Russian Federation—often pin-pointed (with much justification) as a prime offender in Convention terms—became a member of the Convention in 1998, or before Turkey (an original signatory) accepted individual petition in 1987, human rights abuses remained widespread, were often systemic, and were frequently grave across the member states of the Council of Europe. Europeans take great pride in talking about how the Strasbourg system is the "most successful" regional human rights system in the world. However, behind such assertions lie deeply unsettling conditions of

living—what Arendt might deem the banal—that call such grand claims into question.

Workload concerns have arisen over and over again in the almost two decades since Protocol 11 made the Court permanent. There has been an admirable amount of organizational and institutional innovation in the attempt to manage workload and it is worth noting, with some admiration, that the Court dealt with something in the region of 86,000 cases in 2014 alone.[14] As any judge here will know, that is no mean feat. While workload-oriented reform of the Court remains a matter of high priority, I will not address it any further in this lecture. For the reality is—and I think this is widely recognized by the Court—that in the case of the European Convention on Human Rights political reform of the workings of the *Court* recognize political deficiencies *in the protection of rights*: it does not resolve them.[15]

I want to move to three deficiencies in respect of the Court now, which I consider pose the most significant challenges and thus must be addressed as a matter of priority. These I term crises of legitimacy, enforcement, and dilution.

3. The Legitimacy Crisis

Legitimacy is and should be an anxious concern for courts. For good reasons, judges cannot usually be easily removed. Nor are they normally elected by universal suffrage. Their salaries are often constitutionally protected from variation. Their appointment is not normally manifestly political. They do not usually stand for elected office while working as judges. They do not usually intervene in political matters, especially if these are likely to arise before them in their role as judges. They do not usually donate to political parties. They usually declare all interests. They frequently take a hyper-cautious approach to their extra-

[14] *Annual Report of the European Court of Human Rights 2014,* 11.

[15] I borrow this phrase from a discussion on reform of the League of Nations in Peter Beck in "The League of Nations and the Great Powers, 1936-1940" (1995) 157(4) *World Affairs* 175, 177.

curial utterances. These are, of course, generalizations. But they all point to behaviours that have become normalized among judges, especially in higher courts, to ensure that, as much as possible, they do not do anything that might bring their impartiality into question and, through that, impact negatively on the authority and weight of their judicial decisions.

Quite beyond that, judges pay close attention to the process of judging: to marshaling materials, forming arguments, justifying outcomes, and being open to coming to a conclusion determined by the evidence and legal materials even if that decision contrasts with their personal views, morality, or preferences. This is also, of course, a generalization, but it is the bedrock (or perhaps what Fuller would call the fiction) upon which is built the expectation that parties to a dispute, including the state, will comply with the decision of the court. Ultimately, all of these things—and more—go to the processes of legitimation and the development of legitimacy on the part of a court.

However, a court's legitimacy is only ever partially in its own gift. It depends very heavily on recognition by other powerful actors. A national court's perceived legitimacy will be impacted by the political branches' and interest groups' claims as to its legitimacy. Consider the claims of illegitimacy by some federal states in respect of the US Supreme Court's decisions in *Roe v Wade*[16] and *Obergefell v Hodges*,[17] or the persistent claims here that the Supreme Court's decision in *Attorney General v X*[18] was poorly reasoned, in defiance of popular understandings of the 8th Amendment, and consequently illegitimate. An international court's legitimacy will also be impacted by states' and other stakeholders' perceptions and utterances; consider the claim from many African states and the African Union

[16] 410 U.S. 113 (1973)
[17] 576 U.S. ___ (2015)
[18] [1992] 1 I.R. 1.

that the International Criminal Court's apparent focus on the African continent undermines its claim to legitimacy.[19]

There is an important difference between disputing the legitimacy of a decision, and disputing the legitimacy of the Court. What is significant about much of the current discourse surrounding the European Court of Human Rights is the claim that the *Court itself* is losing its legitimacy, rather than it being limited to contestation on the outcome of particular cases.

A great deal of the "noise" in this respect emanates from the United Kingdom: a founding Contracting Party and still a very powerful voice within European institutions and politics. Its position vis-à-vis the Court is a matter of general interest and concern. The UK is an important norm entrepreneur in respect of the European Court of Human Rights: it is a high compliance state, a state from which judges of the Court tend to say some of the most imaginative and compelling advocacy before it emanates, and relatedly a state from which some of the key cases for Convention evolution have come. It is also, of course, a state whose relationship to the Convention and the Court is of fundamental concern to us in Ireland, not least because of the terms of the Belfast/Good Friday Agreement. As I have written elsewhere, "the Court has rather a lot to lose if states (and particularly high-compliance states) begin to withdraw support and/or seriously question its legitimacy….a discourse of illegitimacy might emerge that has the potential to destabilise the Court and set the conditions for selective non-compliance even by high compliance states".[20]

Of course, in the context of legitimacy crisis, the UK and the Court, one's mind turns immediately to the prisoner voting cases against the United Kingdom and

[19] The African Union went so far as to disregard the Court's arrest warrant for Muammar Gaddafi in 2011, with the AU spokesperson Jean Ping claiming the ICC was "discriminatory". "African Union disregards Gaddafi arrest warrant", *Herald Sun*, 3 July 2011.

[20] de Londras & Dzehtsiarou, "Managing Judicial Innovation in the European Court of Human Rights" (2015) 15(3) *Human Rights Law Review* 523.

the resultant fallout.[21] It is clear that the United Kingdom government vehemently disagrees with the idea that imprisonment should not result in an automatic and blanket ban on voting. Even the relatively moderate tone of the Court's finding (that *not all* prisoners must be banned from voting regardless of crime or duration of imprisonment without there being a violation of their Convention rights) has not been enough to placate the UK. The thought of prisoners voting makes David Cameron, in his words, "physically ill".[22] Democratic participation for imprisoned criminals (although not, apparently, convicted but not imprisoned criminals) "damn well shouldn't" be allowed to happen, the Prime Minister says.[23] If the Court thinks otherwise, it seems, "we need to clip its wings".[24]

The strength with which this position is held by the Prime Minister may well be as baffling to you as it is to me, but in some ways it is irrelevant to the current legitimacy crisis experienced by the Court. That crisis is *not* about prisoner voting. It is about fundamental disagreements between the United Kingdom and the Court about the role and nature of human rights and about the judicial function, and it is that deeper intellectual disagreement that has motivated the UK's claims that the Court *per se* is acting illegitimately, not only in respect of prisoner voting but in a broader sense. And so, we see statements from David Cameron that the Court is going beyond the states' original consent in its development of the Convention and, thus, acting illegitimately.[25]

Lest we consider this is "only" a Conservative phenomenon, it is important to note that the roots of this current legitimacy crisis go back at least as far as the Blair government's frustration with the Court's insistence that some parts of its

[21] *Hirst v United Kingdom (No 2)* [2005] ECHR 681. See also *Scoppola v Italy (No.3)* Application No 126/05, Merits and Just Satisfaction, 22 May 2012, *Anchugov and Gladkov v Russia* Application No 11157/04 and 15162/05, Merits and Just Satisfaction, 4 July 2013; *Firth and Others v United Kingdom* Application No 47784/09, Merits and Just Satisfaction, 12 August 2014.

[22] Prime Minister's Questions, 3 November 2010.

[23] "Prisoners 'damn well shouldn't' be given right to vote, says David Cameron", *The Guardian*, 13 December 2013.

[24] Ibid.

[25] See, *eg*, David Cameron's speech to the Parliamentary Assembly of the Council of Europe, 25 January 2012, available at: www.gov.uk/government/speeches/speech-on-the-european-court-of-human-rights [last accessed 29 December 2014].

counter-terrorism agenda are in violation of the Convention, and the use by British Courts of Strasbourg jurisprudence in finding incompatibilities with the Human Rights Act 1998. Remember that in the British constitutional tradition it is politics that determines the constitution, not courts, and that deep-seated constitutional tradition inevitably struggles with a muscular judiciary.[26] While a muscular European judiciary might have caused discontent in the past, the Human Rights Act 1998 has brought that muscularity "home"[27] together with the rights protected by the Convention; it has caused a constitutional disruption of substantial proportions. The European Court of Human Rights has been dynamic, sometimes provocative, and often expansionist for quite some time, but under the Human Rights Act that can no longer be ignored or left to the international sphere within a classically dualist construction. Rather, it flows into every Magistrates' Court and public authority.

The legitimacy crisis currently besetting the Court is, thus, a polycentric one, with roots in British constitutional culture, governmental frustration, the cut and thrust of constitutional change in the United Kingdom, and institutional jealousy all of which are mapped onto frustrations with the European Court of Human Rights and come together to form a rhetorically powerful claim of illegitimacy in Strasbourg.

The real difficulty for the Court, when we frame this legitimacy crisis thus, is that there is really very little that it can do about it. It can, and does, engage in formal and informal "dialogue" with the domestic courts, but ultimately it is not the courts of the United Kingdom that levy the charge of illegitimacy at the Court: it is the political branches. This is not to suggest that individual judges have not taken public positions on the Court—indeed, some of them have[28]—but they

[26] Classically, see Griffin "The Political Constitution" (1979) 42(1) *Modern Law Review* 1.

[27] This refers, of course, to *Bringing Rights Home* (Labour Party, 1996) in which the Labour Party outlined its vision of the Human Rights Act 1998 itself.

[28] In many cases this takes place in the context of what Conor Gearty has convincingly characterized as a "revival of fantasy" about the judicial role in the United Kingdom: Gearty, "On Fantasy Island: British politics, English judges and the European Convention on Human Rights" UK Const. L. Blog (13th November 2014). It is not only judges who suffer from this fantasy; some (eminent) scholars too valorise

continue to apply the Human Rights Act 1998 and that, as well as the Convention, leaves the questions of implementation and execution to the political branches of government (largely Parliament).

The Court could also work harder on the judicial craft. It has long been said—I think with some justification—that judgments are not always as well or as carefully reasoned in the Court as they might be, and while it is certainly true that domestic courts often engage in intellectual gymnastics, cognitive shortcuts, and dubious reasoning, this does not release the European Court from the need for rigour and precision in its reasoning. However, one wonders whether even that would put an end to illegitimacy claims, especially if my diagnosis of the real roots of those claims is correct.

The Court, however, valiantly tries to answer the charge through a mixture of what Dzehtsiarou and I have described as a nascent model of self-restraint (in respect of docket management, cognizance of non-legal factors, the use of European consensus reasoning),[29] what certainly appears to be appeasement,[30] and concessions to political demands for "enhanced subsidiarity".[31]

---

the political constitution and criticize the judicial role in a manner that indicates the extent to which rights based constitutionalism of a kind that might be familiar (although not always endorsed) to Irish constitutionalists remains far from accepted within the British academy and the particularly British conception of the separation of powers. See, for example, John Finnis, "Judicial Power: Past, Present and Future", a lecture delivered at Policy Exchange, 20 October 2015. Available at http://judicialpowerproject.org.uk/wp-content/uploads/2015/10/John-Finnis-lecture-20102015.pdf

[29] de Londras & Dzehtsiarou, "Managing Judicial Innovation in the European Court of Human Rights" (2015) 15(3) *Human Rights Law Review* 523.

[30] Fenwick, 'An Appeasement Approach in the European Court of Human Rights?', *UK Constitutional Law Blog*, 5 April 2012, available at: ukconstitutionallaw.org/2012/04/05/helen-fenwick-an-appeasement-approach-in-the-european-court-of-human-rights [last accessed 29 December 2014]. See also, enwick, 'Post 9/11 UK Counter-Terrorism Cases in the European Court of Human Rights: A 'Dialogic' Approach to Rights' Protection or Appeasement of National Authorities?' in Davis and de Londras (eds) *Critical Debates on Counter-Terrorist Judicial Review* (2014) 302. See for example *Babar Ahmad and Others v United Kingdom* Application No 24027/07, 11949/08, 36742/08, 66911/09 and 67354/09, Merits and Just Satisfaction, 10 April 2012; *Austin and Others v United Kingdom* Application No 39692/09, 40713/09 and 41008/09, Merits and Just Satisfaction, 15 March 2012; *Animal Defenders International v United Kingdom* Application No 48876/08, Merits and Just Satisfaction, 22 April 2013.

[31] See Protocols 15 and 16 to the Convention.

The difficulty with these efforts to assert and reestablish legitimacy in the eyes of the United Kingdom (and other states) is that they may involve serious legitimacy costs of other kinds, particularly in the eyes of human rights advocates and potential complainants, without really making any substantial inroads into the perception of the Court as illegitimate. The states hold almost all the cards; the Court holds few, and seems a poor poker player.

At present, a substantial number of domestic political actors in the UK appear strongly drawn to the idea that the decisions of the Court should be merely advisory, not just under the replacement to the Human Rights Act, but as a matter of international law between the UK and the Court itself. If this suggestion makes its way into any serious discussions of Convention revision the Court and, one imagines, the majority of Contracting Parties will surely resist it, as indeed they should. But even if such resistance proves not to be futile, one wonders how much the Court might find itself to have given away in trying to establish its legitimacy in the eyes of the UK.

4. The Enforcement Crisis

What I have identified as especially challenging about the Court's legitimacy crisis vis-à-vis the United Kingdom is also what distinguishes the UK's position in an important way from the posture of persistently non-enforcing states. There is a tendency, now, to include the UK in considerations of non-enforcement, but I am not inclined to do that here because non-execution by the UK is (a) rare, and (b) rooted in disagreements as to the allocation of power within a constitutionalist system. This is clearly different to other states, frequently found in violation of the Convention, and generally unwilling to execute the judgments of the Court against them. It is to these states—the repeat non-enforcers—that I now turn in the context of considering the Court's enforcement crisis.

The possibility of non-execution has always been recognized. As early as 1949, the International Council of the European Movement recommended that the Council

of Europe "shall decide on such measures as are appropriate" to address any "case of persistent failure to execute" recommendations of the then-Commission or judgments of the Court.[32] Indeed, as William Schabas shows,[33] it was not intended that the Court would have enforcement powers per se; rather, as Churchill said in debates on the draft Convention, the Court would "depend …on the individual decisions of the States"[34] for enforcement. Notwithstanding this, it seems to have been contemplated that states who signed up to the Convention *would* abide by their obligations as "States existing by right of law",[35] with substantial debate as to the appropriateness of involving the Committee of Ministers in a substantial way in supervising the execution of judgments.[36]

The original position conveys a sense of optimism that states will abide by and execute judgments to which they have volunteered to be bound and that supervision by the Committee of Ministers would likely be somewhat light touch. In reality, however, a real challenge with execution emerged. This suggested that the drafters' faith in "States…by right of law" may have been misplaced, or perhaps that the Court, the Convention and the membership of the Council of Europe changed so fundamentally over time that an enforcement infrastructure became necessary.

Protocol 14 was drafted in partial recognition of the view that "The Court's authority and the system's credibility both depend to a large extent on the effectiveness"[37] of execution. In particular, there was concern that cases pointing to structural problems in the Contracting Parties were not being executed, which in turn fed into the problem of repetitive applications before the Court.[38]

---

[32] Recommendation adopted at the meeting of the International Council for the European Movement held at Brussels in February 1949, INF/2/F, p. 3 quoted in William Schabas, *The European Convention on Human Rights: A Commentary* (2015; OUP), p. 862.

[33] Schabas, ibid.

[34] Report of the Sitting of the Consultative Assembly of 17 August 1949, 1 *Traveau Preparatoires* 32, 35.

[35] Comments of Henri Fayat, Report of the Eighth sitting of the Consultative Assembly held 19 August 1949, 1 *Traveau Preparatoires* 36, 154.

[36] See the account given in Schabas, above n 32, p.p. 863-864.

[37] Explanatory Report on Protocol 14.

[38] Ibid.

Motivated by a desire to address this phenomenon, Protocol 14 introduced two new procedures. The first, now in Article 46(3), allows the Committee of Ministers to ask the Court to interpret a judgment in order to better enable its supervision. This was intended to address situations where execution is hampered by "disagreement as to the interpretation of judgments".[39] The second, now Article 46(4), allows the Committee of Minsters to bring infringement proceedings against a Contracting Party that has failed to execute the judgment, even after being served with a Notice to Comply. This power was intended to give the Committee of Ministers an alternative, but still strong, instrument to use against recalcitrant states, so that suspension from the Council of Europe (the strongest sanction available and contained in Article 8 of the Statute of the Council of Europe) would not be necessary. Suspension, it was thought, "would prove counter-productive in most cases", whereas an Article 46(4) proceeding would "add further possibilities of bringing pressure to bear" and "should act as an effective incentive to execute the Court's judgments".[40]

Execution itself is complex. It can take any of up to three forms: just satisfaction covering pecuniary and non-pecuniary damage, individual measures to ensure the successful complainant can restore the violated rights to the extent possible, and general measures to be adopted by the respondent state in order to address the broader rights violation that has been identified. The non-execution crisis currently experienced by the Court relates primarily to general measures, which tend to require substantial resources and/or political will in order for them to be executed. Seen in this way, we can identify some repeat non-executioners.

In the 8th report on the implementation of judgments, presented by Mr Klaas de Vries in September of this year,[41] the nine states in relation to which the non-execution problem is most acute are named as Italy, Turkey, the Russian

[39] Ibid.

[40] Ibid, para 100.

[41] de Vries, "Implementation of Judgments of the European Court of Human Rights", PACE, September 2015, Doc 13864.

Federation, Ukraine, Romania, Greece, Poland, Hungary and Bulgaria. The major problems identified are strikingly common across many of the states.

These are problems—in all nine states—with the duration, re-opening and enforcement of judicial decisions and lack of effective remedy; unfair trials in Ukraine; the expulsion of foreign nationals in violation of the Convention in Italy and Bulgaria, and their detention in Greece; conditions of detention in Italy, Russia, Ukraine, Romania, Greece, and Hungary (where the concerns reach ill-treatment levels); violations of freedom of expression, assembly and association in Turkey, Russia, Ukraine, and Greece; excessive detention in Turkey and Russia; the behavior of security forces in Turkey, Romania, Russia (where concerns as to torture and ill-treatment arise), Greece and Bulgaria (where the use of lethal force and deaths in custody arise); the treatment of Cypriots (in Turkey), Chechens (in Russia), and Roma (in Hungary); discrimination on the grounds of sexual orientation in Russia; and failure to compensate for nationalization in Romania.

These are not problems that display any deep-seated politico-philosophical disagreements with the Court's interpretation of a particular provision, or with the concept of international supervision *per se*. Rather, I would argue, in some cases they reveal far more problematic attitudinal and organizational resistance to the idea of rights protection, to liberal democracy founded on rights and constitutionalism, and to judicial authority *per se*; in others a long-standing failure to organize the organs of the state and administration of state power in an effective, accountable, and rights-respecting way. There are problems here of corruption, autocracy, geopolitics, formal legality without commitment to the liberal construction of the Rule of Law, and systematic disregard for judicial authority. These are not problems of the European Court of Human Rights itself, but they fundamentally undermine its capacity for the effective protection of rights in these countries. The question is whether there is anything the Court can do to address them.

The de Vries report, to which I have already referred, proposes the use of Article 46(4). I mentioned this earlier: it is the infringement procedure that the Committee of Ministers can use to ask the Grand Chamber to decide whether a judgment has been executed. I understand entirely the rationale for making this suggestion. Article 46(4) has never been used, and is a serious step requiring a super-majority of the Committee of Ministers to be triggered. However, what would an Article 46(4) proceeding achieve that could possibly address the fundamental problem of political will that motivates such entrenched non-execution? I am not convinced that anything would be gained by the use of Article 46(4).[42] Let me outline this position briefly.

First, the Article 46(4) procedure effectively tells us what we already know: that a state has failed to respect a judgment of the Court. If there were uncertainty about it, Article 46(3)—asking the Court to give a clearer interpretation of its judgment—would be used. Infringement proceedings will not be used unless the Committee of Ministers already knows that the state is non-executing, and so what does it add for the Court to reiterate that? Secondly, the formal finding of non-execution does nothing to address the root causes of non-execution. As I have already argued, those root causes relate to resource allocation and to political will, which in effect are one and the same thing, as resource allocation decisions themselves reflect political will. The scolded state will not suddenly see the error of its ways if the Court scolds it again, especially after the state's fellow Contracting Parties have already unsuccessfully attempted to ensure execution. To think otherwise is, I think, to misunderstand what motivates these states and how reputational credit works in international affairs.

These states' international reputations have already been damaged by the non-execution, which is hardly likely to be a secret, and so what further *material* or *motivating* reputational damage could a finding of the Court achieve? All that will be achieved by the use of Article 46(4) in relation to these states, I propose, is the

[42] In this analysis I draw on current writing being undertaken with Dzehtsiarou and, as yet, untitled on the de Vries proposal.

further depletion of the Court's resources (which must hear them in Grand Chamber), and a redoubling of the enforcement crisis by the production of *even more* un-executed judgments.

5. The Dilution Crisis

The suggestion that infringement proceedings might be the answer to non-execution brings me to the third crisis I want to address: what I term the dilution crisis.

I have already noted that the European Court of Human Rights was established to deal with complaints of non-compliance, and to make remedial orders related thereto. Over time that has expanded to move into recommending general measures, as well as just satisfaction and individual measures. But so too has the Court progressively been asked, or volunteered, to take on more and more activities that are related to the *general* enforcement of the Convention beyond the adjudication of individual and inter-state complaints that come before it. The Court may now hand down pilot and advisory judgments, it engages in substantial judicial dialogue on formal and informal levels, as well as with NGOs and scholars in its annual and *ad hoc* conferences and seminars on the Convention, and runs major enterprises such as its new and large-scale system of case law exchange between Council of Europe states. It does all of this while dealing with tens of thousand of cases every year. And it does it with 47 judges and a budget of just under €68 million. To put that figure into perspective, we might note that the European Union spends around €114 million every year to move the European Parliament between Strasbourg and Brussels, or that running the Irish Courts Service in 2014 cost €56.6 million.[43]

Although it is a tight budget, running the Court on under €70 million per annum is achievable. So too is operating the Court with the current number of judges,

[43] Courts Service, Annual Report 2014, p. 73.

although it should be noted that their workloads are exceptionally heavy. What is less achievable, in my view, is doing so while the Court's core function continues to be diluted by fragmentation.

The Court's self-imposed work in judicial dialogue and networking, conferencing and so on are all, in my view, reflections of the fact that judgments of the Court alone cannot ensure the effective enjoyment of Convention rights across the Council of Europe. That in itself is not problematic. Nor is it a crisis *per se*. But the Court can only ever provide part of the answer to non-compliance with the Convention. The real key to the Convention's success lies, it has long been recognized, in the effective domestication of the Convention not only by domestic courts but also—and perhaps fundamentally—by the political and bureaucratic machineries of the Contracting Parties.

The European Court of Human Rights is subsidiary. As well as developing the Convention jurisprudence and ensuring it remains "fit for purpose" in changing dynamics of government and governance, it should operate as a stopgap where domestic systems are not "working" to implement the Convention. Those domestic systems go well beyond the judicial function. While the Court can, and should, engage with the judiciary in member states, judicial dialogue will only ever take the Convention so far. The crises of legitimacy and enforcement that I have outlined above are *not* crises of judicial recognition and esteem: they are crises of politics. The imposition of more and more functions on the Court, and the Court's own development of further 'outreach' functions, cannot address those political crises, but they *can* dilute the Court's function and drain its resources. That should be a cause of real concern.

6. So what is the future of the European Court of Human Rights?

This has, I concede, been a less than uplifting lecture so far, and as I draw close to my conclusion I cannot say that this will change (although I can perhaps comfort

you with the reassurance that the wine reception is drawing ever closer). I can offer some more comfort too, perhaps, in the form of two further thoughts.

The first is that, in spite of the crises it is undergoing, the European Court of Human Rights remains a stalwart on the European scene. Nobody suggests shutting it down. Nobody suggests robbing it of resources. Almost all states continue to engage with it. Almost all states remain at least rhetorically committed to the Convention. A large body of advocates, state actors, and scholars are committed to its survival and its flourishing. The Court and the Convention will remain with us, and they will continue to be fundamental in the protection of rights for over 820 million people from the west coast of Ireland to the east cost of Russia every day.

The second is that there *are* ways to address the crises that are undermining the Court. These are political. At the risk of channeling the great scholar and international realist Hans Morgenthau, the success of this great, idealist, international project fundamentally rests on the internal political will of the member states who are party to it; on political reform, on attitudinal change, on meaningful commitment to the Rule of Law, on the development and sustenance of the legitimate exercise of state power.

What the crises that currently beset the Court show us, in my view, is that it is not the Court, or even the Convention, that can and will achieve this. Rather, to return once more to Seán Lester, it requires a practical, principled politics that calls to mind the virtue that was always the antecedent condition for Wilsonian idealism. This is, I think, widely acknowledged among those who care about the Court and the Convention, but in this respect we continually witness what Gillespie calls "optimism of the intellect [and] pessimism of the will".[44]

[44] Paul Gillespie, (2000) 11 *Irish Studies in International Affairs* 163

Some of you may be familiar with Shel Silverstein's *The Giving Tree*; a children's book to which my mind often turns when I think about the Court. This is a deeply divisive book. Some read it as a relentlessly pessimistic and abusive tale; others as a positive story of selfless love. The book revolves around a boy and a (female) apple tree. The boy enjoys playing in and around the tree, but as he gets older he begins to make demands of her. He picks her apples and sells them when he wants money, he cuts her branches to help build a house, he cuts her trunk to a stump when he wants a boat. Every stage of the story ends with the words: "and the tree was happy". At the end, when the boy is an old man, he comes to the tree once more, and the book closes with a suitably ambiguous passage, with which I too will end:

> "I am sorry, Boy", said the tree, "but I have nothing left to give you—my apples are gone".
> "My teeth are too weak for apples", said the boy.
> "My branches are gone", said the tree, "You cannot swing on them—"
> "I am too old to swing on branches", said the boy.
> "My trunk is gone", said the tree, "you cannot climb—"
> "I am too tired to climb", said the boy.
> "I am sorry", sighed the tree.
> "I wish that I could give you something…but I have nothing left. I am just an old stump. I am sorry…"
> "I don't need very much now", said the boy, "just a quiet place to sit and rest. I am very tired".
> "Well", said the tree, straightening herself up as much as she could, "well, an old stump *is* good for sitting and resting. Come, Boy, sit down. Sit down and rest".
> And the Boy did.
> And the tree was happy.

END.