



The Future of the European Convention on Human Rights after the Brighton Conference

Antonio Bultrini

Abstract

It is widely recognized that the European Convention on Human Rights has led to the most advanced human rights protection system to date - and represents an important benchmark for several other international bodies. The individual right of application to the European Court, which unlike other human rights treaties is compulsory for State parties, is a unique feature and pillar of the system. However, the European Court is presently overwhelmed by an abnormal caseload: about 150,000 applications are currently pending in Strasbourg. Recent reforms have increased the Court's efficiency. Yet the British Government has just tried to promote a new reform of the system. This attempt was not entirely disinterested and has led to an unprecedented mobilization by international civil society. The British move has nonetheless triggered a debate on the real challenges facing the European system.

Keywords: *European Court of Human Rights / ECHR Court reform / United Kingdom / Civil society / Brighton conference*

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by Antonio Bultrini*

Introduction

From April 18 to 20, 2012 the High-Level Intergovernmental Conference on the European Convention on Human Rights (ECHR) system took place in Brighton, England, at the end of the British Chairmanship of the Committee of Ministers of the Council of Europe (November 2011-May 2012). The reform of the European Court of Human Rights (the Court) was the first goal in the list of priorities set by the United Kingdom.¹ To quote Shakespeare, the conference was apparently “much ado about nothing”, since the boldest and most controversial British proposals failed to find a consensus. However, the final Declaration² suggests that the most important challenges facing the ECHR system still remain on the negotiating table.

1. A critical situation in Strasbourg

There is little doubt that the ECHR system is under strain. The Court’s caseload (about 150,000 pending applications) is inordinately large, considering that the Court is meant to have a subsidiary role. For years, the mantra has been that the system is a victim of its own success, but in fact that is not entirely true.

In the first place, the increase in the number of admissible applications is a symptom of something going wrong internally, and in some countries worse than in others.³ One of the pivotal elements of the system is the principle of subsidiarity. The duty to protect human rights falls primarily on the national States, for no better reason than the fact that State authorities are present on the ground and in most cases are able to prevent violations or to promptly remedy them. The Court “wraps up” the system and exercises a supervisory function (aside from the exceptional, but compulsory, requests for precautionary measures) where the national authorities are not in a position to provide an adequate response. Consequently, the large number of admissible applications for

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¹ Council of Europe (CoE) Committee of Ministers, *Priorities of the United Kingdom Chairmanship ...* (CM/Inf(2011)41), 27 October 2011, <https://wcd.coe.int/ViewDoc.jsp?id=1859397>.

² See High Level Conference on the Future of the European Court of Human Rights, *Brighton Declaration*, 19 April 2012, <https://wcd.coe.int/ViewDoc.jsp?id=1934031>.

³ In 2011, Italy was third for the number of pending cases, after Russia and Turkey; it was followed by Romania and Ukraine. See European Court of Human Rights, *Analysis of statistics 2011*, January 2012, p. 12, http://www.echr.coe.int/NR/rdonlyres/11CE0BB3-9386-48DC-B012-AB2C046FEC7C/0/STATS_EN_2011.PDF.

a wide range of violations is a clue that the internal machinery of rights protection is, at the very least, unsatisfactory.

Second, many verdicts of the Court are not properly executed. If the violation is due to a structural problem, the failed execution of a judgment generates so-called “repetitive” applications. Suffice it to mention here that many of the cases that are pending in front of the Committee of Ministers, which is the organ charged by the ECHR⁴ to supervise the execution of judgments, concern convictions for the failed execution of a previous judgment! Correspondingly, about 60 percent of the Court’s judgments relate to “repetitive” applications. As the current Registrar put it: “the very existence of all these repetitive applications is clear evidence that the States and the Committee of Ministers have not adequately fulfilled their obligations when it comes to executing previous judgments (...). With certain countries, the supply of new cases appears to be practically inexhaustible.”⁵

Finally, with the gradual extension of the Council of Europe towards the East, the Court’s remit now encompasses 800 million people (not counting potential applicants from third-party States, who in one way or another might find themselves under the jurisdiction of one of the contracting States).⁶

2. The British initiative

This state of affairs has already brought about two conferences⁷ as well as the entry into force, on June 1, 2010, of the reform set forth in Protocol No. 14. The British government has nevertheless launched a political-diplomatic offensive to promote a further reform.⁸ Doubtless, some of the British proposals, which in due course found their way into the Final Declaration, are the subject of broad agreement.⁹ To begin with, these include the recommendation for the national systems to improve their internal instruments of protection. This objective, which is of the utmost importance in the

⁴ See *European Convention on Human Rights*, Article 46, paragraph 2, <http://conventions.coe.int/treaty/en/Treaties/Html/005.htm>.

⁵ Erick Fribergh, *Bringing Rights Home, or How to deal with repetitive applications in the future*, speech made at a roundtable held in Bled (Slovenia) on 21-22 September 2009, <http://www.echr.coe.int/NR/rdonlyres/F4E1DAB4-9382-4CF1-8407-EE82A92A275A/0/ErikFriberghBledspeech.pdf>.

⁶ Of late, see for example the judgment of the Grand Chamber on the case of *Hirsi Jamaa and Others v. Italy* (Application No. 27765/09), 23 February 2011, concerning the Italian authorities’ push-back policy of sea migrants from Libya in 2009 (<http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-109231>), and the two judgments of 7 July 2011 in the cases of *Al-Skeini and Others v. The United Kingdom* (Application No. 55721/07) and *Al-Jedda v. The United Kingdom* (Application No. 27021/08), relating to events that occurred in the context of the British military occupation of Southern Iraq from the 2003 invasion until 2005 (<http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-105606>; <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-105612>).

⁷ Final declarations of two High Level Conferences on the Future of the European Court of Human Rights, held in Interlaken (Switzerland) on 18-19 February 2010, and Izmir (Turkey) on 26-27 April 2011, both available on <http://www.echr.coe.int/ECHR/EN/Header/The+Court/Reform+of+the+Court/Conferences>.

⁸ British Secretary of State for Justice has expressed his views in the Italian press as well: Kenneth Clarke, “Diritti umani, la riforma Ue è fondamentale” (Human Rights, the EU reform is vital), in *La Stampa*, 18 April 2012, http://rassegna.camera.it/chiosco_new/pagweb/getPDFarticolo.asp?currentArticle=1DRBS3.

⁹ *Brighton Declaration*, paragraphs 7-9.

perspective of the principle of subsidiarity, requires wide-ranging action and the Final Declaration rightly stresses the need, among others, to develop an appropriate training of professionals (magistrates, attorneys, civil servants)¹⁰ and to improve the mechanisms that are meant to systematically verify the compatibility of the internal States' legislation with the minimum standards established by the ECHR.

The issue of an independent national authority on human rights is also raised (some countries, such as Italy, are still not equipped with one). In principle this authority is meant to play an important "auxiliary" role in terms of educating, informing and raising awareness of public opinion and the authorities, monitoring the execution of the Court's judgments, and promoting initiatives, including legislative ones, aimed at improving the implementation of the States' international commitments.

Furthermore, the Declaration supports tweaking the selection procedure of the judges of the Court with the declared aim of sending people to Strasbourg who have a strong level of professional competence so as to promote, indirectly, a "clear and consistent" jurisprudence.¹¹

Finally, the Declaration calls for a rapid accession of the European Union to the ECHR to "enhance the coherent application of human rights in Europe".¹²

The British authorities had also pursued other, questionable goals, among which the introduction of a new ground for the inadmissibility of an application in the event that the national authorities had already "duly examined" the case. Right away, this proposal appeared to be problematic for two reasons. First, it would have placed in serious jeopardy the exercise of the right of individual petition to the Court as envisioned in Article 34 of the ECHR (a pillar of the European system and a unique international feature). This is because many serious applicants would have most likely faced the difficult task of arguing why a case, having led to several domestic reasoned verdicts, had still not been "duly examined". Second, the said proposal appeared of doubtful benefit anyway. At this time, if a case has been resolved in a satisfactory manner by the national authorities, the Court already has the means to reject it. According to many observers, this kind of proposal, which tends to increase the leeway of national authorities (under the guise of subsidiarity), betrays the background of the British offensive: a strong irritation for certain judgments that have vexed London.¹³ Not surprisingly, the British authorities have also openly tried to enlarge the scope of the margin of appreciation for national authorities, an aspect which will be commented upon further on.

¹⁰ See in particular paragraph 9.

¹¹ *Brighton Declaration*, paragraphs 21-25.

¹² *Brighton Declaration*, paragraph 36. The related negotiations are currently at a stalemate: see the page on the "EU accession to the European Convention on Human Rights" in the Council of Europe website: <http://hub.coe.int/en/web/coe-portal/what-we-do/human-rights/eu-accession-to-the-convention>.

¹³ In this regard see the article by the Court's president: "Nicolas Bratza: Britain should be defending European justice, not attacking it", in *The Independent*, 24 January 2012, <http://www.independent.co.uk/opinion/commentators/nicolas-bratza-britain-should-be-defending-european-justice-not-attacking-it-6293689.html>; cf. also Nicolas Bratza, "The Relationship Between the UK Courts and Strasbourg", in *European Human Rights Law Review*, No. 5 (2011), p. 505-512. See also Sophie Briant, "Dialogue, Diplomacy and Defiance: Prisoners' Voting Rights at Home and in Strasbourg", in *European Human Rights Law Review*, No. 3 (2011), p. 243-252.

3. The role of international civil society

If the dangers inherent in some of the British proposals have been warded off, at least for now, we owe it to a large degree to the mobilization without precedent of international civil society (NGOs, attorneys, experts and politicians too).¹⁴ Besides countering the above-mentioned problematic British proposals, international civil society has also insisted on taking the time to evaluate the effects of the measures adopted in the last two years. It would indeed be a mistake to underestimate the Court's substantive efforts to dispose of its pending caseload.¹⁵ It expects to complete this work by 2015 within the current procedural framework. The Court has also introduced a stringent priority policy for the most serious cases, while the reforms recently introduced by Protocol No. 14, in force for barely two years, have given it the possibility to reject the least relevant applications.¹⁶ Furthermore, it is important to stress that the Court's budget is at present still smaller than that of several other international courts which have a significantly lighter caseload.¹⁷ Therefore, the resources allocated to the Court for hiring competent and independent staff should be reinforced in the present, critical transition.

The mobilization of international civil society has not been in vain. Little remains of the arguably most awkward proposals. In summary, the above-mentioned emphasis on the importance of the national authorities' margin of appreciation¹⁸ has led to the idea of inserting this principle in the Preamble of the ECHR.¹⁹ The doctrine of the "margin of appreciation" aims at granting national authorities a certain leeway when it comes to cases raising much-discussed (and often sensitive) social and ethical issues.²⁰ It has been developed through the Court's case-law and it is actually complex and not easily defined, as the Court itself has not always applied it in a straightforward manner.²¹

¹⁴ Among the first to react, see Emma Bonino and James A. Goldston, "Overworked but vitally important", in *European Voice*, 8 December 2011, p. 12, <http://www.europeanvoice.com/article/imported/overworked-but-vitally-important/72881.aspx>; see also Filippo di Robilant, "L'Italia difenda la Corte europea dei diritti dell'uomo" (Italy should defend the European Court of Human Rights), in *Affari Internazionali*, 29 March 2012, <http://www.affarinternazionali.it/articolo.asp?ID=2003>.

¹⁵ In 2011 the Court issued over 47,000 decisions.

¹⁶ Article 35, paragraph 3.b of the Convention as amended by Protocol No. 14.

¹⁷ Emma Bonino and James A. Goldston, "Overworked but vitally important", *cit.*

¹⁸ See paragraphs 11 and 12a of the *Brighton Declaration*.

¹⁹ *Ibid.*, paragraph 12.b.

²⁰ See for example the judgments of the Grand Chamber on the case of *Lautsi and Others v. Italy* (Application No. 30814/06), 18 March 2011, concerning the presence of crucifixes in Italian State-school classrooms, or on the case *A., B. and C. v. Ireland* (Application No. 25579/05), 16 December 2010, concerning abortion (<http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-104040>; <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-102332>). For a comment on the case *Lautsi and Others v. Italy* see Benedetto Conforti, "Crocifisso nelle scuole, una sentenza che lascia perplessi" (Crucifix in schools, an unconvincing judgment), in *Affari Internazionali*, 24 March 2011, <http://www.affarinternazionali.it/articolo.asp?ID=1705>.

²¹ Regarding the national margin of appreciation doctrine see, among many others, Dean Spielman, "Allowing the Right Margin the European Court of Human Rights and the National Margin of Appreciation Doctrine: Waiver or Subsidiarity of European Review?", in *CELS Working Paper Series*, February 2012, http://www.cels.law.cam.ac.uk/cels_lunchtime_seminars/Spielmann%20-%20margin%20of%20appreciation%20cover.pdf; see also Christos L. Rozakis, "Through the Looking Glass: an 'Insider's View of the Margin of Appreciation", in *La conscience des droits. Mélanges en l'honneur de Jean-Paul Costa*, Paris, Dalloz, 2011, p. 527-537; or Jan Kratochvil, "The Inflation of the

Clearly it will not be easy to turn the doctrine in question into a passage of the Preamble. Additionally, the proposal to shorten the deadline for appealing to the Court from six to four months raises concerns among attorneys and non-governmental organizations.²² Compared to certain particularly complex situations and/or particularly difficult circumstances for providing assistance to the victims, four months might be an inadequate time for a complete file to be ready for the Court.

4. The real challenges following the Brighton conference

In addition to the positive elements, put forward by the British Chairmanship, already mentioned above, two important novelties among the British proposals remain. First, a mechanism is contemplated that would allow State authorities, particularly the judiciary, to request advisory opinions without prejudice from the Court.²³ The advantages and shortcomings of such an approach in the field of the ECHR have already been elucidated by the Council of Europe's Steering Committee for Human Rights.²⁴ In our view, the benefits are greater than the drawbacks. The need for a preliminary mechanism is felt by many professional insiders as it would establish a direct link between the European Court and the State courts to the likely benefit of all. The national courts would strengthen their primary role while at the same time a direct dialogue would be instituted between the national and supranational levels, a facet that was particularly dear to the British.²⁵

Second novelty: an invitation to rethink the procedure for the supervision of the execution of judgments of the Court as well as the Court's powers to indemnify (currently: affording "just satisfaction to the injured party").²⁶ These are actually the two weakest elements of the Strasbourg mechanism, yet both crucially important. The ECHR's effectiveness and credibility are, in fact, contingent on the actual impact of its judgments.

Regarding the tools currently available to the Committee of Ministers, the most significant progress has been achieved thanks to Protocol No. 14 that has introduced the possibility, for the Committee of Ministers, to start a sort of "infringement proceedings" if it believes that a State refuses to abide by a final judgment in a case to which it is a party.²⁷ If the Court finds this refusal to be established, it shall refer the case back to the Committee of Ministers "for consideration of the measures to be taken".²⁸ Other elements, however, call into question the real scope of such a procedure. Article 11, paragraph 2 of the Rules of Procedure of the Committee of Ministers on the supervision of the execution of judgments of the Court states that such

Margin of Appreciation by the European Court of Human Rights", in *Netherlands Quarterly of Human Rights*, Vol 29, No. 3 (2011), p. 324-357, <http://www.corteidh.or.cr/tablas/r26992.pdf>.

²² *Brighton Declaration*, paragraph 15.a.

²³ *Brighton Declaration*, paragraph 12.d.

²⁴ CoE Steering Committee for Human Rights (CDDH), *Final Report on measures requiring amendment of the European Convention on Human Rights* (CDDH/2012/R74 Addendum I), 15 February 2012, http://www.coe.int/t/dgi/brighton-conference/Documents/CDDH-amendment-measures-report_en.pdf.

²⁵ Besides, see the *Brighton Declaration*, paragraph 12.c.

²⁶ *Brighton Declaration*, paragraph 35.f.

²⁷ *European Convention on Human Rights*, Article 46, paragraph 4.

²⁸ See *European Convention on Human Rights*, Article 46, paragraph 5.

“infringement proceedings” should be brought only in “exceptional circumstances”. Moreover, according to the Explanatory Report of Protocol No. 14,²⁹ the procedure in question does not provide for payment of a financial penalty against the State in breach of its obligations, inasmuch as it is felt that the political pressure exerted by proceedings for non-compliance should suffice to secure execution of the Court’s judgment by the State concerned. Granted that the Committee of Ministers has constantly updated its working methods,³⁰ but taking into account that it is a political-intergovernmental body, it would be unwise to expect a significant evolution in this area (in particular, the resort to financial sanctions).

It is fair to note that much has been done to develop specific domestic procedures aimed at efficiently and rapidly executing the Court’s judgments.³¹

However, it seems to us that the strengthening of the judgments’ impact must be pursued in the first place within the crucial environment of the Court itself. Its powers in the field of reparation should be strengthened in three directions: a) the obsolete concept of “just satisfaction” (Article 41 of the ECHR) should be replaced with the power attributed to the Court to grant a compensation for damages; b) the Court should be unequivocally endowed with the power to recommend specific measures to execute its own judgment on the merits of a case;³² and c) the Court should also be given a discretionary power to inflict so-called punitive damages in the event of the ascertainment of a second violation as a consequence of a failure to execute the preceding judgment.³³ As to the latter, it can be observed that in specific cases the infliction of punitive damages might be inappropriate, but in many others it would probably be a decisive impetus for the State concerned to press for the execution of the sentence. The Court’s leeway in prudently assessing, case by case, the grounds for inflicting punitive damages would allow it to distinguish the ones from the others. Moreover, we are certain that the Court would resort to such action with great caution.

²⁹ CoE, *Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms ... Explanatory Report*, paragraph 99, <http://conventions.coe.int/Treaty/EN/Reports/Html/194.htm>.

³⁰ See for example CoE, *Supervision of the execution of the judgments and decisions of the European Court of Human Rights: implementation of the Interlaken Action Plan (CM/Inf/DH/2010/45 final)*, 7 December 2010, <https://wcd.coe.int/ViewDoc.jsp?id=1700777>.

³¹ For this same purpose the Committee of Ministers had adopted recommendations (2008)2, 6 February 2008 and (2000)2, 19 January 2000 (<https://wcd.coe.int/ViewDoc.jsp?id=1246081>; <https://wcd.coe.int/ViewDoc.jsp?id=334147>). On the judgment of the Italian Constitutional Court No. 113 of 4 April 2011 (<http://www.cortecostituzionale.it/actionSchedaPronuncia.do?anno=2011&numero=113>) see Michele Caianello, “La riapertura del processo per dare attuazione alle sentenze della Corte europea dei diritti: verso l’affermarsi di un nuovo modello” (The reopening of the proceedings with a view to implementing the European Court of Rights’ judgments: towards a new model), in *Quaderni costituzionali*, n. 3 (settembre 2011), p. 668-670; on the same subject cf. Maria Suchkova, “An Analysis of the Institutional Arrangements within the Council of Europe and within Certain Member States for Securing the Enforcement of Judgments”, in *European Human Rights Law Review*, No. 4 (2011), p. 448-463.

³² The Court often has a clear idea of what is needed to remedy a violation that it has ascertained; in this sense see also Stuart Wallace, “Much Ado about Nothing? The Pilot Judgment Procedure at the European Court of Human Rights”, in *European Human Rights Law Review*, No. 1 (2011), p. 76.

³³ In substance, this result has already been obtained regardless of a request by the Committee of Ministers in accordance with Article 46, paragraph 4 of the *European Convention on Human Rights*. See for example the judgment on the case of *Burdov v. Russia (no. 2)* (Application No. 33509/04), 15 January 2009, <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-90671>.

In our view, strengthening the Court's powers in the said directions would lead to a more clear distribution of tasks between the Court, as the judiciary element of the system, and the Committee of Ministers. The latter, as the political-intergovernmental element of the system, could thus more usefully focus on enhancing the political-institutional tools aimed at exerting a more effective pressure on States to fully comply with the judgments, rather than meddling, as it is bound to do now, with the legal-technical implications of their execution. It should ultimately be for the Court - for any court - to decide what a judgment requires in terms of execution.³⁴

Conclusions

Nobody wants to belittle the difficulties that stem from the unusually excessive caseload that already weighs upon the Court, but it is obvious that intervention is needed on the causes, not just the symptoms. And the causes are upstream (inadequate or outright lack of protection at the State level) and downstream (unsatisfactory, delayed or failed execution of the judgments of the Court). It has been said: "(t)he States have a huge capacity to undermine the court's authority, they may refuse or delay enforcing judgments, which is occurring with increasing frequency (...)"³⁵ The weaknesses of the system in matters of execution of the judgments should be of concern at least as much as the unsustainable caseload in front of the Court. Quickly and fully executed judgments serve not only to acknowledge the wrong done to the victim, but also to compel the domestic systems to adopt the appropriate instruments to prevent new violations. A result that would be conducive to fulfilling the principle of subsidiarity upon which, quite rightly, there is much ado.

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³⁴ It is worth noting that the difficulties that the Committee of Ministers has been encountering in identifying the measures that a State should adopt to fully comply with a judgment, a task which we consider as hardly compatible with its political-intergovernmental nature, are partly reflected in Resolution (2004)3, 12 May 2004 (<https://wcd.coe.int/ViewDoc.jsp?id=743257>). The latter is devoted to judgments revealing an underlying systemic problem but interestingly, the Committee of Ministers invites the Court "to identify, in its judgments finding a violation of the Convention, what it considers to be an underlying systemic problem and the source of this problem, in particular when it is likely to give rise to numerous applications, so as to assist states in finding the appropriate solution and the Committee of Ministers in supervising the execution of judgments". It is important to mention, in this context, that Article 63 paragraph 1 of the American Convention on Human Rights grants the Inter-American Court of Human Rights similar powers to those that we advocate with regard to the ECHR Court. The text of the Convention is available on the Organization of American States website: http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights.htm

³⁵ Stuart Wallace, "Much Ado about Nothing? ...", *cit.*, p. 80.

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