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The Role and Authority of the European Court of Human Rights

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The European Court of Human Rights, created back in 1959, will be celebrating the 20th anniversary of its existence as a full-time court, in Strasbourg, on 1 November 2018.

Rather than provide an analysis of the Court's considerable case-law (the 4th edition of an outstanding book on this subject has just been published by the Oxford University Press[1]), I intend to present a wider picture of this Court's role and authority, as the institution which possesses the final say in interpreting and applying the substantive provisions of the European Convention on Human Rights, by which all 47 member States of the Council of Europe are bound.[2]

My presentation will consist of three parts:

- **First,** I will provide an overview of the Court's role in Europe's changing legal architecture.
- The **second** part will deal with the *gravitas* the Convention and the Court's case-law has acquired, as well as the considerable challenges facing this regional mechanism of human rights protection.
- The **third** part will focus on an assessment of the manner in which the system operates, with emphasis placed on the responsibility of States to consolidate and reinforce the Convention's effectiveness and the Strasbourg Court's authority.

I will finish my presentation with a few concluding remarks.

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***Additional note** (9 August 2018):* Due to self-evident time constraints imposed upon speakers by the Conference organisers, the oral presentation will consist of a shorter version of this presentation, on the understanding that conference participants will be provided with this written contribution, in both English & Chinese, once the oral presentation has been made.

[1] Law of the European Convention on Human Rights, 2018, OUP, D. J. Harris, M O'Boyle, E. Bates & C. Buckley.

[2] See www.coe.int and The Council of Europe. Its Law and Policies, 2017, OUP, edited by S. Schmahl & M. Breuer, *passim.*

Outline

A. The Court's role in Europe's legal architecture

- The European Convention on Human Right (ECHR): historical base
- Challenges facing the full-time Court with 'compulsory' jurisdiction (Articles 33 & 34 ECHR) - weight of case-law, especially from new democracies

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- Guarantor of common European standards (c.f. Article 53 ECHR)

B. The authority of the European Convention and the Court's case-law

- Significant impact upon States Parties: challenges & threats
- The Court's interpretative authority (*res interpretata*) –Articles 1, 32 & 46, ECHR; Protocol No.16
- Accession of the European Union to the ECHR

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- Challenges: large-scale violations, Article 18 ECHR, Rule-of Law precepts

C. The need to (further) consolidate the system's effectiveness

- Compliance & effective implementation (Article 46 ECHR)
- State responsibility: key role (also) of States' Parties legislative organs
- Major stumbling block: the budgetary situation

D. Concluding remarks

A The Court's role in Europe's legal architecture

Drawn up within the Council of Europe, the European Convention on Human Rights (the Convention), was signed on 4 November 1950 and came into force on 3 September 1953, when ten of the fifteen - at the time principally western European member States - ratified it. This international instrument represents a collective guarantee at the European level of, principally, a list of civil and political rights set out in the 1948 U.N. Universal Declaration of Human Rights. This list of rights and freedoms has been extended by a number of Protocols.

At the time of its adoption, the Convention was considered primarily as a collective pact against totalitarianism in Europe. After the rise of Nazism and fascism, and in particular the atrocities of the Second World War, like-minded European States came to the conclusion that,

in order for history not to repeat itself, a mechanism to protect individual rights on the international plane would need to be established.

This instrument was not intended to create new substantive rights. It was designed to place under international supervision basic or common rights and freedoms already well-entrenched in the domestic law of States Parties, be they 'minimum' rights, such as that to a fair trial, 'qualified' rights such as that of the freedom of expression which can be restricted for legitimate reasons, or 'absolute' rights, such as not to be tortured, from which derogation is not possible even in time of war (Article 15, ECHR).

The newly established mechanism made a departure from reliance upon traditional international law concepts of 'nationality' (see Article 1, ECHR: "*everyone within ... jurisdiction*") and 'reciprocity' (*erga omnes* effect of the Convention: a law-making treaty), in order to protect individuals. But THE 'revolutionary' innovation at the time was the possibility of individuals to bring complaints against States on the international plane and the 'compulsory jurisdiction' of the Court – at the time based on a tripartite system of control by a Human Rights Commission, a Court and the Committee of Ministers (the executive organ of the Council of Europe). In other words, individuals from states having accepted this optional procedure were, after making use of all available domestic remedies, able to seize the (now defunct part-time) European Commission, but not directly the (then also part-time) Court.[3]

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What led to the creation of a full-time Court in Strasbourg, and what are the main challenges facing the Court? [4]

The enormous increase in the workload of the bodies responsible for enforcing the rights guaranteed by the Convention and its protocols, plus the unforeseen increase, both potential and real, in membership of the Council of Europe since the rise of the *Solidarność* movement in the 1980s in Poland and the fall of the Berlin Wall in November 1989, led to the setting-up of a full-time Court in Strasbourg as of 1998. The part-time Commission and Court were abolished. The system was streamlined: all individual applicants (Article 34 ECHR) now have direct access to the Court and the right of individual application is mandatory. The Court also has jurisdiction with respect to inter-state cases (Article 33 ECHR) and the Committee of Ministers, a political organ, can no longer decide the merits of cases.

The Convention and the Court's case-law have, in effect, become by far the most important legal manifestation and guarantors of the Council of Europe's values elaborated in over nearly 70 years with regard to pluralistic democracy, human rights and the rule of law.

[3] Additional Protocol No.9 ECHR (of 6 November 1990, in force since 1 November 1994) permitted individual applicants from 17 States Parties to refer cases before the old part-time Court after the Commission had drawn-up its report (subject to a screening panel decision). This Protocol was repealed as part of the major changes effectuated by Protocol No.11, ECHR.

[4] See E.Bates The Evolution of the European Convention on Human Rights. From its Inception to the Creation of a Permanent Court of Human Rights (2010, Oxford U.P). See also A. Drzemczewski "A major overhaul of the European Human Rights Convention control mechanism: Protocol No.11" in Collected Courses of the Academy of European Law vol. IV, book 2 (Martinus Nijhoff, 1997), pp. 121-244.

Permit me to recall, in this connection, that in 1949 the Organisation had 10 member states, in 1990 23 member States, all of which had ratified the Convention - fully accepting its control mechanism. Since then all States, prior to joining the Organisation, had to undertake the commitment to ratify the European Convention within a short time after accession to the Council of Europe. Today's membership of Organisation is 47, with all member States being Parties to the Convention.[5]

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The challenges facing the Court - in Europe's new legal architecture - are considerable. One can identify at least two inter-related reasons for this: the Court's enormous workload (as of 30 June 2018 54,350 applications pending, with a registry of 24 persons back in 1991, now in the region of 650 staff), and the weight, complexity and, above all, the types of (major) human rights problems the Court is confronted with principally, but not exclusively, from the so-called 'new democracies' (especially those of Eastern Europe and the former Soviet Union).[6]

There has been an unprecedented, indeed astronomical, rise in the Court's caseload. Between 1958 and 1972 the Court delivered on average one judgments *per* year; the yearly average between 1981 and 1985 was eleven. In 2004 the figure was 718, and in 2017 the Court rendered well over a thousand (1,068) judgments!

We must also be honest and accept the fact that the Council of Europe of 47 member States is no longer the privileged club of relatively sophisticated and economically - more or less – comfortable states which reflect liberal-democratic (Western) European standards. The rapid enlargement of the Organisation poses today - even after 20 or 30 years since the momentous upheavals in Europe - a potentially serious threat to the Convention's *acquis.* Legal standards in several 'new democracies' in actual practice fall (far) below those required by the Convention and the Court's case-law. The Court continues to be confronted with an extremely difficult balancing act: high human rights standards need to be maintained in the 'old' democracies (in certain of which major problems persist) and at the same time substantially improved in a number of 'newer' States Parties whose democratic credentials are suspect, not to say defective.[7]

And this brings me to the end of the first part of my intervention: **what exactly is the Court's role in Europe's evolving legal architecture?**

The Court has a dual role: the right of individual application (after the exhaustion of all possible domestic remedies) remains 'the linchpin,' an indispensable tool, in the Convention enforcement mechanism, without which the system would almost certainly fall apart. The Convention is also, as the Court itself has underlined, a 'living instrument' whose primary

[5] Belarus, Kosovo & the Holy See are not members of the Council of Europe.
[6] See, in particular, L.Hammer & F.Emmert (eds): The European Convention on Human Rights and Fundamental Freedoms in Central and Eastern Europe (2012, Eleven International Publishing, Utrecht, 2012) and I. Motoc & I.Ziemele (eds) The Impact of the ECHR on Democratic Change in Central and Eastern Europe (2016, Cambridge University Press).
[7] See, e.g., the views of Dahrendorf, Leuprecht and Sudre found in "The prevention of human rights violations: monitoring mechanisms of the Council of Europe" in The Prevention of Human Rights Violations 2001, Martinus Nijhoff, edited by A. Sicilianos, at pp. 140-145 & 174-177.

purpose is to ensure *l'ordre public de l'Europe.*[8] In a way, the Court possesses a 'quasi-constitutional' role in upholding common basic human rights norms which need to be interpreted in the light of new and constantly evolving societal norms and expectations.

In short, States must respect these 'common European human rights standards,' as interpreted by the Strasbourg Court on the clear understanding that when so doing, they continue to ensure higher standards of human rights protection (Article 53 ECHR). The Strasbourg control system is subsidiary: a 'safety net', in that States themselves have primary responsibility for protecting human rights.

B The authority of the European Convention and the Court's case-law

The Convention and the Strasbourg Court's case-law has brought about major modifications in the laws and practices in all 47 Council of Europe member States, without exception.[9]

Several States made changes to their legal systems prior to or shortly after their accession to the Council of Europe in order to bring them into conformity with Convention requirements. For example, Switzerland granted women the right to vote at federal level before ratifying the Convention. Also, in the course of the political changes in the late 1980s/early 1990s, several post-Soviet States abolished the death penalty and substantially restricted the overbearing role of the *prokuratura*. A number of countries from Central and Eastern Europe undertook 'ECHR compatibility' analyses and adapted their respective legal systems and practices accordingly.[10]

Areas in which the Convention and the Court's case law have brought about significant change include: individuals' access to justice and the right to a fair trial, the prohibition of discrimination, property rights, family law issues such as custody rights, the prevention and punishment of torture, the protection of the victims of domestic violence, the privacy of individuals in their correspondence and the protection of religious freedoms, the freedoms of expression and association. The Convention and the Court's case-law has profoundly affected all areas of human life, benefiting hundreds of thousands of individuals, associations, political parties, companies, and persons belonging to vulnerable groups such as minors, victims of

[8] See, e.g., *Tyrer v UK*, judgment of 25 April 1978, § 31 and *Airey v: Ireland*, judgment of 9 October 1979, § 26 respectively. As to the Convention's specific characteristics – a constitutional instrument of European public order - see e.g., judgment (preliminary objections) of the Strasbourg Court, *Loizidou v Turkey* of 23 March 1995 and comments by A. Drzemczewski The European Human Rights Convention in Domestic Law. A Comparative Study (1983, OUP), pp.22- 34, and F. Sudre "Existe-t-il un ordre public européen ? in, Quelle Europe pour les droits de l'Homme ? La Cour de Strasbourg et la réalisation d'une 'Union plus étroite' " (1996, Bruylant, Brussels, edited by P. Tavernier) at p.39-80.
The present contribution does not adequately deal with a number of essential aspects of the Court's case-law, such as 'subsidiarity,' 'the margin of appreciation' and 'positive rights,' concepts essential to the proper understanding of how the Court functions. See, in this connection, in particular, the book cited in footnote 1, by Harris, O'Boyle, Bates & Buckley, and P. Leach, Taking a Case to the European Court of Human Rights (2017, OUP), *passim.*

[9] See e.g., Council of Europe publication Impact of the European Convention on Human Rights in States Parties. Selected Examples (2016), which I helped prepare prior to leaving the Council of Europe. Also available at: http://website-pace.net/documents/19838/419003/AS-JUR-INF-2016-04-EN.pdf/12d802b0-5f09-463f-8145-b084a095e895

[10] See "Ensuring compatibility of domestic law with the ECHR prior to ratification" in vol.16 Human Rights Law Journal (1995), pp.241-260. See also Council of Europe document H (96)12.

violence, elderly persons, refugees and asylum seekers, defendants in judicial proceedings, persons with (mental) health problems, and those belonging to national, ethnic, religious, sexual or other minorities.

In order to implement Strasbourg Court judgments, corrective measures have often necessitated constitutional and major legislative changes, organisational and administrative reforms, as well as adjustments reflected in the case-law of States highest courts. Of relevance, in this connection, is the status of the Convention in the domestic law of States Parties, all of which, without exception, have incorporated the Convention into their domestic law.

However, **despite the undoubted success of this regional human rights mechanism, the Court's authority is confronted with challenges and threats**. In addition to its (considerable docket of complex inter-state) case-law relating to, for example, major human rights abuses committed in the conflict concerning Ukraine and Russia, or in Nagorno-Karabakh, not to mention massive human rights violations recorded in the North Caucasus, the Court must deal with major structural problems in several countries, such as excessive length of judicial proceedings (Italy, Romania, Hungary, Bulgaria), unacceptable conditions in detention facilities and the lack of domestic remedies in this regard (principally but not only in states from the former Soviet Union), as well as non-enforcement of domestic judicial decisions (Russia, Ukraine) and excessive length of remand detention in, in particular, Russia and Turkey.[11] The massive (and constant) arrival of migrants, refugees and asylum-seekers in Europe and the flood of applications linked to the failed *coup d'état* in Turkey pose a significant challenge for the Court. The picture is grim. In 2017 more than 20% of violations found by the Court concerned particularly serious breaches such as the right to life and the prohibition of torture and inhuman or degrading treatment (Articles 2 and 3, ECHR).

After the fall of the Berlin Wall, the somewhat precipitated, yet politically inevitable, decision was taken to 'force' states to ratify the Convention within a relatively short time-span after joining the Organisation, thereby extending the Court's jurisdiction to a number of states lacking adequate democratic credentials and a solid rule-of-law base, on the understanding that Convention standards would not be diluted. Views differ as to the correctness of this political decision. That said, one cannot deny that it has been an uphill struggle and that the result, in certain instances, is far, far from satisfactory. This difficult situation has in recent years been compounded by gratuitous 'Strasbourg Court-bashing' in certain older democracies, and the attempt to undermine the Court's authority by a destructive legislative initiative taken by Russia in 2015, empowering the Russian Constitutional Court to determine, *inter alia,* whether the findings of the Strasbourg Court are compatible with Russian constitutional norms – and to refuse implementation of Strasbourg Court judgments if they were not.[12]

But these negative comments must not detract from the staggering achievements accomplished by the Convention control mechanism.

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[11] For specific details, including the most recent statistical data, consult Appendices 1 & 2 to this paper and hyperlinks to documents cited therein.
[12] See, in this connection, the Council of Europe's Venice Commission Opinion No.832/2005, of 13 June 2016, available at www.venice.coe.int

There are many aspects with respect to which the Court's authority merits in-depth analysis. But, principally due to time constraints, I've somewhat arbitrarily decided to concentrate on two distinct, but not necessarily directly related matters, namely the Strasbourg Court's interpretative authority and the European Union's (non-) accession to the ECHR.

The Court's interpretative authority. We can all agree that it is totally unacceptable for the Strasbourg Court to continue to deal with – again and again – similar violations that occur in different countries, even though the meaning of Convention standards is crystal clear on the basis of the Court's (Grand Chamber) well-established case-law. And yet, to my regret, this still often occurs! Permit me to cite in this respect the case of *Marckx v Belgium*, of 1979, in which the Strasbourg Court held that children born out of wedlock must not be discriminated against. French law had similar discriminatory provisions - and yet changes in the French legal system were only effectuated 20 years later after France had been found in violation by the Court in 2000 in *Mazurek v France*! The point I'm making here is quite simple. Although Strasbourg Court judgements are binding on those States found in violation of the Convention in specific cases (*inter partes*; Article 46, § 2, ECHR), **State authorities**, be they executive, legislative or judicial, **are duty-bound** – when having cognizance of such cases as that of *Marckx v Belgium,* **to take into account the Court's interpretative authority (*res interpretata*) in respect of judgments concerning other States.**[13]

This *res interpretata* authority of the Court's case-law has been recognized by the highest judicial organs of certain number of States, such as those of the Netherland and Russia, as well as in specific legislative provisions in a few countries. For example, the United Kingdom's 1998 Human Rights Act, Section 2 § 1, specifies that national courts "*must take into account*" Strasbourg Court judgments, and Article 17 of Ukrainian Law No.3477–IV of 2006, reads: "*Courts shall apply the Convention [ECHR] and the case law of the [Strasbourg] Court as a source of law.*"[14] But much, much more needs to be done in this respect.

In this connection, the entry into force of Protocol No.16, ECHR, on 1 August 2018, which provides for the possibility of the highest domestic courts to seek advisory opinions on '*questions of principle relating to the interpretation or application of the rights and freedoms defined in the Convention or protocols thereto*' (Article 1) in cases pending before them is likely to contribute significantly in asserting the Court's unique role as the final authoritative interpreter of the meaning of the Convention's substantive provisions.

Accession of the European Union (EU) to the ECHR. Article 6, § 2, of the Treaty on European Union stipulates that the EU "*shall'* accede to the Convention. On the basis of this provision (see also Article 59, § 2, ECHR, which envisages this eventuality; inserted into the

[13] See A.Drzemczewski "Quelques reflections sur l'autorité de la chose interprétée par la Cour de Strasbourg" in La conscience des droits. Mélanges en l'honneur de Jean-Paul Costa, 2011, Daloz, edited by P.Titiun, pp.243-247.

[14] A subject analysed in depth by O.M. Arnardóttir "*Res Interpretata, Erga Omnes* effect and the role of the margin of appreciation in giving domestic effect to the judgments of the European Court of Human Rights" in vol.28 EJIL (2017), pp.819-843. See also "The interpretative authority (*res interpretata*) of the Strasbourg Court's judgments: compilation of background material" Parliamentary Assembly document AS/Jur/Inf (2010)04 of 25 November 2010, pp.5-44 available at http://www.assembly.coe.int/CommitteeDocs/2010/20101125_skopje.pdf. The Court's *res interpretata* authority is based on Articles 1, 19 & 32 of the Convention, not Article 46, ECHR.

ECHR by Protocol No.14 thereto), a draft Accession Agreement was agreed in 2013 between the European Commission and Council of Europe member States.

However, as many of you are aware, negotiations with respect to EU accession will now need to be re-opened after the Luxembourg Court's negative Opinion, in December 2014, on the agreed text. [15] Without re-opening discussion on this important subject today[16] what is important to bear in mind is the intrinsic logic of such accession, especially as all (presently) 28 member States of the EU are already bound by Strasbourg Court judgments. Also, although the EU has its own 'Bill of Rights' (Charter on Fundamental Rights, of 2000[17], which now has the status of primary EU law), accession would submit the Union's legal system to independent external review permitting individuals to bring complaints of alleged infringement of the ECHR by the EU itself, for acts or omissions for which the latter now has (often exclusive) responsibility. Moreover, accession would achieve a coherent system of human rights protection, excluding the possibility of forum shopping, by consolidating the harmonious development of 'European Human Rights Law' by the Court in Strasbourg which already possesses ultimate responsibility in this respect.

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A few remarks to conclude the second part of my intervention (with respect to the Strasbourg Court's authority). The Court is the final authority for the application and interpretation of the Convention (Articles 32 and 44, ECHR) and a constitutional instrument of European public order. That said, the challenges facing it are substantial, principally but not exclusively relating to large-scale abuses of human rights and the existence of persistent systemic unresolved human rights violations which, when not dealt with by States at the domestic level, clog-up the Court's work in Strasbourg. To these difficulties can be added other worrying aspects of the Court's case-law with respect to illegitimate restrictions, not to say abusive use of, Convention provisions by certain State authorities for purposes at variance with rights and freedoms guaranteed by the Convention and its Protocols (Article 18, ECHR).[18]

At the start of 2017 the Court had 80,000 applications pending before it. The number stood at 56,000 at the beginning of this year. Although this is a major drop in numbers, the situation remains unacceptable. In addition to (major) human rights violations in its docket, one cannot but be deeply saddened, and indeed frightened, by the rise of illiberal democracies and the erosion of Rule-of-Law standards in States like Romania, Hungary and Poland. These must now be dealt with by EU institutions and other Council of Europe's (political) bodies. To my regret, the Strasbourg Court will almost certainly not be in a position to deal with these issues

[15] CJEU Opinion 2/13 of 18 December 2014.
[16] See, in this connection, e.g., The EU Accession to the ECHR 2014, Oxford University Press, V.Kosta, N.Skoutaris and V.P. Tzevelekos, editors, and J. Polakiewicz "Accession to the European Convention on Human Rights – an insider's views addressing one by one the CJEU's objections in Opinion 2/13" in vol.36 Human Rights Law Journal (2016), pp.10-22.
[17] See, in particular, Articles 52 & 53 thereof, including 'comments' attached thereto, at http://www.europarl.europa.eu/charter/pdf/text_en.pdf & Charter 4473/00 http://www.europarl.europa.eu/charter/pdf/04473_en.pdf
[18] See, e.g., Guide on Article 18, ECHR, issued in 2018 by the Court, available at https://www.echr.coe.int/Documents/Guide_Art_18_ENG.pdf. See also the Grand Chamber judgment of *Merabishvili v Georgia* of 28 November 2017.

in the coming years.[19] This is also true for the repression of freedom of speech, mass arrests and oppression of civil society in Turkey, in the context of the state of emergency and beyond.[20] This is a major drawback of the system. '*Justice delayed is justice denied*', as the late 20th century maxim goes… (attributed to British statesman and Prime Minister William E. Gladstone in a speech he made in 1868).

The above developments pose new and grave challenges to the Court's authority. Hence the need to (further) consolidate and reinforce the system's effectiveness, which I will now deal with in the third and last part of my intervention.

C The need to (further) consolidate the system's effectiveness

States Parties to the Convention have undertaken to abide by judgments of the Strasbourg Court and it is the Committee of Ministers (the executive organ of the Council of Europe) which supervises the implementation of the Court's judgments (Article 46, §§ 1 & 2, ECHR). States are duty-bound to ensure full, effective and prompt compliance with all judgments, including those which raise (substantial) structural problems, often necessitating – as already explained – legislative amendments and administrative reforms. In the majority of cases this is done within a reasonable time after the Court has found a violation of the Convention. Indeed, one can even consider it a major achievement, not to say a 'small miracle,' to note that in 2017 nearly 3,700 cases had been satisfactorily resolved before the Committee of Ministers. The figure was 2,066 in 2016 (see Appendix 2 for details).

Nevertheless, even though the overwhelming majority of Court judgments are implemented without difficulty under the Committee of Ministers' supervision, it is still highly disturbing to observe that there were nearly 7,600 unresolved cases pending at the end of 2017.[21] Difficulties in implementing certain judgments reveal 'pockets of resistance,' often rooted in complex political scenarios. Of considerable concern is also the fact that serious structural problems remain on the Committee of Ministers docket for over ten years (yes, 10 years!) in 10 States Parties, namely in Italy, Russia, Turkey, Ukraine, Romania, Hungary, Greece, Bulgaria, Moldova and Poland.[22] Can one honestly deduct from this that these States, together with several other of the Court's 'main clients' (especially those with long-standing unresolved systemic and a high number of repetitive applications: see Appendix 1) have made serious efforts to comply with the Court's judgments? But how best to deal with this

[19] See Parliamentary Assembly Resolution 2188 (2017) "New threats to the Rule of Law in Council of Europe member states: selected examples", of 11 October 2017, and document 14405, of 25 September 2017 upon which the Resolution is based, available at http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=24214&lang=en. See also Will of the People? The Erosion of Democracy under the Rule of Law in Europe (2017, Advisory Council on International Affairs, The Hague, The Netherlands), *passim,* available at www.aiv-advice.nl

[20] See, in this connection comments in the 'Preface' of the 2017 Annual Report of the European Court of Human Rights, at p.8, explaining why more than 27,000 applications lodged against Turkey had been declared inadmissible by the Strasbourg Court at https://www.echr.coe.int/Documents/Annual_report_2017_ENG.pdf

[21] See Appendix 2 (information extracted from the 11th Annual Report of the Committee of Ministers, April 2018, and hyperlink to the Report). Note also, in this connection, the unprecedented development in the case of *Burmych & others v Ukraine*, Grand Chamber judgment of 12 October 2017, in which the Court struck out about 12,000 applications and then forwarded them to the Committee of Ministers indicating that Ukraine had failed to give effect to a pilot judgment (*Ivanov* of 2009) concerning the non-enforcement of domestic court judgments.

[22] See "The implementation of judgments of the European Court of Human Rights," document 14340 of the Parliamentary Assembly of the Council of Europe, of 12 June 2017, *passim* available at http://assembly.coe.int/nw/xml/XRef/Xref-DocDetails-EN.asp?fileid=23772&lang=EN&search=MTQzNDA=

problematic situation? Ought not the principle of 'State responsibility' be invoked more stringently before/by the Committee of Ministers?[23] Perhaps time for the Committee of Ministers, if not the Court, to consider the institution of a more radical, punitive form of infringement proceedings against States considered 'big sinners' (not merely restricted to what is foreseen in Article 46, § 4, to which recourse has recently made in the case of *Mammadov v Azerbaijan*)?[24] Food for thought.

And when touching upon the notion of '**State responsibility**,' it must be emphasized that all branches of the State are responsible for implementing ECHR standards and Strasbourg Court judgments – and not only governments. The rapid and full implementation of 'Strasbourg standards' rests on the shoulders of the executive, legislative and judicial organs of the State. [25] In this connection, I wish highlight one, until recently relatively neglected aspect, namely **the need for a more structured and systematic involvement of State legislative organs**, a subject which has not been given the attention it deserves.[26]

Permit me to highlight a few, self-evident points in this respect: as democratically elected representatives, members of parliament hold governments to account when implementing legislation, approve/ratify treaties. They are also intricately involved, on a yearly basis, in the determination of State budgets. Hence, in so far as the ECHR is concerned, Parliaments can influence the direction and priority of legislative initiatives and, where appropriate, channel the funds needed to ensure prompt implementation of Strasbourg Court judgments. Parliaments must be cognizant of their responsibility to reinforce the effectiveness of the Convention system at national level and by so doing help stem the flood of applications to the Court and ensure full, rapid and effective execution of Court judgments.[27]

In this context, the Parliamentary Assembly (in its Resolution 1823 of 2011) urged all parliaments to set-up appropriate structures and mechanisms. Unfortunately, only a small number of legislative bodies have followed-up this proposal. Parliaments should ensure systematic verification of the compatibility of draft legislation with ECHR standards and require governments to submit to them regular reports on relevant Strasbourg Court

[23] Needless to add, this is a well-established notion in international law. See e.g., https://en.wikipedia.org/wiki/State_responsibility

[24] See CDDH document GT-GDR-E (2013)002 "Memorandum on the Parliamentary Assembly's proposal to introduce a system of financial sanctions or *astreints* on states who fail to implement judgments of the Strasbourg Court," 3 May 2013. See also the views expressed on this subject by H.Däubler-Gmelin in the Parliamentary Assembly's 'preparatory contribution' to a High-Level Conference on the Future of the European Court of Human Rights held in Interlaken, Switzerland, on 18-19 February 2010, pp.49- 55, *passim.*

[25] This subject is more thoroughly dealt with in, for example, Implementation of the European Convention on Human Rights and of the Judgments of the ECtHR in National Case-Law: A Comparative Analysis, 2014, Intersentia, Antwerp, edited by J.Gerards & J.Fleuren, and in The Council of Europe: Its Law and Policies, 2017, cited in footnote 2 above, esp. in chapters 9 (by E Lambert Abdelgawad), 36 (by M.Breuer) & 7 (by P.Leach). Note also the important 'Superior Courts Network,' more information about which can be found at https://www.echr.coe.int/Pages/home.aspx?p=court/network&c=

[26] See, in particular, in this respect, A.Donald & P.Leach Parliaments and the European Court of Human Rights (2016, Oxford University Press), and Parliaments and Human Rights. Redressing the Democratic Deficit (2015, Hart Publishing, Oxford, edited by M.Hunt, H.J.Hooper & P.Yowell).

[27] See, *inter alia,* Parliamentary Assembly Resolution 1823 (2011), of 23 June 2011, "National parliaments: guarantors of human rights in Europe," and Resolution 1856 (2012) of 24 January 2012, "Guaranteeing the authority and effectiveness of the European Convention on Human Rights," available, respectively, at http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=18011&lang=en and http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=18060&lang=en

judgments and on their state of (non-)implementation. Hence the utility of a designated parliamentary body or bodies with a remit to initiate legislative proposals and amendments to law, as well as to initiate inquiries, to hold oral hearings and, if necessary, compel witnesses to attend such hearings. Adequate logistical and financial resources for this work must to ensured, as well as access to independent human rights expertise, including that of ombudsmen/parliamentary commissioners and representatives of the civil society. And last but not least, parliaments must be assisted by a specialist, full-time staff and not persons on secondment from governments or NGOs.

….

A few words about **the budgetary situation**. At the beginning of this presentation, I referred to a recently published book, Law of the European Convention on Human Rights, which provides an in-depth analysis of the Strasbourg Court's case-law.[28] In the book's preface, mention is made of recently imposed cuts in the Court's budget following political decisions by Russia not to pay its budgetary contribution to the Council of Europe and by Turkey to reduce its contribution considerably. This information can be supplemented by another worrying and indeed potentially an even more disturbing aspect of States' (persistent, over the years) decisions not to appropriately finance the budgets of the Organisation and the Court.

Permit me to be somewhat blunt and undiplomatic: Despite repeated praise of the Court's '*extraordinary contribution'* at high-level conferences of Foreign Ministers (in Interlaken in 2010, in Izmir in 2011, in Brighton in 2012, in Brussels in 2015 and more recently in Copenhagen, in April 2018)[29] and the highlighting of its "*essential"* status in guaranteeing the protection of human rights in Europe (underlined at summits of Heads of State and Government),[30] how many persons (in today's audience) are aware of the fact that the contribution of 15 States, almost a third of the Organisation's membership, pay into the Council of Europe's annual ordinary budget contributions which do not even cover the cost of their own judge in Strasbourg? [31]

D Concluding remarks

Already back in the early 1990s it was evident that the ECHR – undoubtedly the world's most successful human rights instrument – needed a major overhaul so as not to collapse under its

[28] See footnote 1, above.
[29] Texts available on the Committee of Ministers portal: https://www.coe.int/en/web/cm
[30] See solemn declarations adopted at the three summits of Heads of State & Government of the Council of Europe: in Vienna in 1993 when they "*resolve*[ed]… *to improve the effectiveness*" of the ECHR by establishing a single Court, the "*purpose* [of which was] *to enhance the efficiency of the means of protection, to shorten procedures and to maintain the present high quality of human rights protection*"; in Strasbourg in 1997, by deciding to "*reinforce*" the protection of human rights so that the Organisation's institutions can effectively defend rights of individuals in Europe, & in Warsaw in 2005, emphasizing the Court's "*essential*" status in guaranteeing the effectiveness of human rights in Europe, all available at https://www.coe.int/en/web/cm/summits . Such summits are not, strictly speaking, summits of the Organisation: see The Council of Europe. Its Law and Policies, footnote 2 above, especially chapter 6, by S.Palmer, at pp. 141-143.
[31] See M-L. Bemelmans-Videc, "Guaranteeing the authority and effectiveness of the European Convention on Human Rights," document 12811, of 3 January 2012, especially Section 2.4, entitled 'Major stumbling block: the Council of Europe's budgetary predicament,' §§ 19 to 22, available at http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=12914&lang=en . See also footnote 27, above.

own weight, be this as a result of the enormous increase of individual applications (now coupled by with a doubling in the number of States Parties since 1989) or the interrelated problem of the clogging-up of the system with unacceptable delays. This resulted in the creation of a full-time single European Court of Human Rights (Protocol No.11, ECHR, 1994, in force since 1 November 1998). The system is again under considerable strain. At present, there appears to exist consensus that if appropriate and concerted efforts are made, the right of individual application can be preserved, in essence, and the Court will still be able to deliver authoritative and high-quality judgments within a reasonable time.[32] But this is contingent on States' providing sufficient logistical back-up – including money!) to permit a dozen or so States with (major) structural problems to settle these, once and for all, tied to the need to strengthen the 'ownership' of the Convention and the Court's case-law at the national level. Hence the importance of also stressing the Court's interpretative authority (*res interpretata).*

Questions as to the Court's 'legitimacy' have also surfaced in recent years.[33] One way to partly abate this criticism would be, I suggest, to permit the highest court in the State concerned to designate a senior judge to replace the 'national judge' in cases to be determined by the Strasbourg Court's Grand Chamber.[34] This would enhance the interaction between domestic courts and the Court in Strasbourg, and create amongst domestic judges a feeling of ownership – and more sensitivity to Strasbourg case-law.[35]

So, how best to commemorate the 20th anniversary of the full-time European Court of Human Rights, in less than a month's time, on 1 November 2018? By firmly reaffirming the uniqueness of the Strasbourg Court's dual task: the Court's key '***role***' in adjudicating individual cases providing justice of last resort to applicants, and confirming its Grand Chamber's '***authority***' in upholding the Convention's specific characteristics as a constitutional instrument of European public order.

I thank you for your attention.

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[32] See The longer-term future of the system of the European Convention on Human Rights (2015, report of Council of Europe's Steering Committee for Human Rights (CDDH)), available at https://www.coe.int/en/web/human-rights-intergovernmental-cooperation/work-completed/future-of-convention-system . See also P. Leach "The European Court of Human Rights: Achievements and Prospects" in International Human Rights Institutions, Tribunals, and Courts, 2018, Springer, Heidelberg, edited by G. Oberleitner.

[33] See Criticism of the European Court of Human Rights. 2016, Intersentia, Antwerp, edited by P. Popelier, K .Lemmens & S. Lambrecht. See also https://en.wikipedia.org/wiki/European_Court_of_Human_Rights (Point 6: *Criticism*).

[34] As concerns present requirements see Article 26, §§ 4 & 5, ECHR, and A.Drzemczewski & E.Fribergh "Grand Chamber (European Court of Human Rights)" in on-line Max Planck Encyclopedia of International Procedural Law, 2018- OUP (forthcoming), editor-in-chief H. Ruiz Fabri.
In 2017 **19** Grand Chamber judgments were rendered on a wide range of issues including surrogacy arrangements, the monitoring of electronic communications in the workplace and the extent of States' obligations in medical negligence cases.

[35] See also the rather more radical proposal I made a the 10th anniversary of the entry into force of Protocol N.11, in late 2008: Ten years of the 'new' European Court of Human Rights 1998-2008 (European Court of Human Rights, 2008), testimony on pp. 63-64 available at https://www.echr.coe.int/Documents/10years_NC_1998_2008_ENG.pdf which was not retained for consideration by the CDDH (see footnote 32, above, §§ 126-127).

Appendix 1: Pending applications allocated to a judicial formation of the European Court of Human Rights: 30 June 2018[36]:

https://www.echr.coe.int/Documents/Stats_pending_month_2018_BIL.pdf

Total number of pending applications before the Court: 54,350

Specific States:

Romania: 9,350 = 17,2%

Russia: 9,200 = 16,9%

Ukraine: 6,950 = 12,8%

Turkey: 6,400 = 11,8%

Italy: 4,650 = 8,6%

Azerbaijan: 2,050 = 3,8%

Hungary : 1,900 = 3,5%

Georgia : 1,900 = 3,5%

Armenia: 1,900 = 3,5%

Poland: 1,500 = 2,8%

Remaining 37 States: = 8,550 15,7%

[36] For additional background information/statistics consult, *inter alia,* 'The ECHR in facts & figures 2017' at https://www.echr.coe.int/Documents/Facts_Figures_2017_ENG.pdf ,and the Court's portal: https://www.echr.coe.int/Pages/home.aspx?p=reports&c & https://www.echr.coe.int/Documents/Stats_month_2018_ENG.pdf

Appendix 2: Supervision of the execution of judgments & decisions of the European Court of Human Rights by the Committee of Ministers, 2017

Information extracted from the 11th Annual Report of the Committee of Ministers[37]:

Cases closed by the Committee of Ministers:

1998: 116

2008 : 400

2015 : 1,537

2016 : 2,066

2017 : 3,691

Cases pending before the Committee of Ministers:

1998 : 1,435

2008 : 7,328

2015: 10,652

2016 : 9,941

2017 : 7,584

[Pending cases are those in which the execution process is on-going. As a consequence, pending cases are at various stages of execution and must not be understood as unexecuted cases. In the overwhelming majority of these cases, individual redress has been provided, and cases remain pending mainly awaiting implementation of general measures, some of which are very complex, requiring considerable time].

[37] Information taken from pages 67 & 62 respectively, of the report issued in April 2018. The full 273-page report is available at : https://rm.coe.int/annual-report-2017/16807af92b