THE SUCCESS OF THE ECHR

The ECHR – A Victim of its Own Success

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> The lamps are going out all over Europe; we shall not see them lit again in our lifetime[1]

A INTRODUCTION

Before the outbreak of World War I, international law generally regarded a state's relations with its citizens as a purely internal matter.[2] States did 'interfere,'[3] to guard their national interests[4] or to protect minorities with which the state felt a particular affinity[5] but such meddling was the exception that proved the rule of state sovereignty.[6] Yet, as Sir Edward Grey's prophetic words (cited above) suggest, World War I was to shatter this old order, as Europe entered a period marked by cataclysmic conflicts in which civilians were often treated with deliberate brutality by their own governments. Such atrocities, exemplified by the horrors which came to light at the end of the Second World War, led to a general acceptance of the need for and value of human rights, an ideology which proclaims that all human beings have an essential worth, simply by virtue of their humanity.[7]

This view was espoused by the United Nations, with the adoption of the Universal Declaration of Human Rights by the UN General Assembly on 10 December 1948. For many, this declaration represented a "... quantum leap in

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[1] Per Sir Edward Grey then British Foreign Secretary, August 2 1914.These famous lines were delivered as it became inevitable that Britain would be forced to enter World War I. See http://wwwa.britannica.com/eb/article-9038083 [last accessed on 1 March 2006].

[2] Kantsin I, "No Rights without Remedy: in Search of an ICHR", Accessed Online at www.eumap.org [last accessed on 20 February 2007]

[3] Usually through military action or heavy diplomatic pressure backed with the threat of armed force.

[4] Thus Britain took control of Egypt and what is now Sudan in the latter part of the 19th century to safeguard the Suez Canal and the route to India.

[5] The prime example being Russia's view of herself as the 'mother of the Slavs' of south eastern Europe then under Turkish rule. In truth no country pursued any such campaign except when it proved expedient, while even the most obvious campaigns of self-aggrandisement were often 'sold' as altruistic wars of liberation. (In the light of Rwanda, Bosnia, Darfur and Iraq a cynic might wonder whether much has changed in a hundred years of international relations.)

[6] For an excellent account of the whole period, see generally Thompson D., Europe since Napoleon, (Harmonsworth: Penguin, 1966).

[7] Some consider that these rights inhere in the individual by virtue of some theistic higher law, while others take a more secular view of the basis of human rights, contrast Kennedy CJ's famous dissent in *State (Ryan) v Lennon* [1935] I.R. 170 with that of Henchy J in *Norris v AG* [1984] IR 36. Most modern positivists would also accept that law ought to embody a concept of fundamental rights, though it need not do so to be valid

international relations,"[8] since States could no longer assert that their domestic policy was entirely "… their own business."[9] Yet the UDHR remained (and indeed remains) an aspirational document. For Europeans, determined not to revisit the tragic mistakes of the past, this was insufficient. Thus, the Council of Europe drew up the European Convention on Human Rights and Fundamental Freedoms[10] to express the signatories' common values and to ensure that the 'High Contracting Parties' accorded an irreducible minimum set of civil and political rights to all who lived within their various jurisdictions. Perhaps most significantly, States that did not meet their obligations could be called to account before an independent international body.[11]

Just over fifty years after it came into force in 1953,[12] the ECHR remains the 'cornerstone' of the European system for the protection of human rights.[13] Given its continuing importance, it seems appropriate to examine the challenges currently facing the ECHR and to question the commonly held view that these have arisen because of the Convention's startling successes.[14] In particular, concern surrounding the court's judicial activism will be considered, as will the reforms contained in Protocols 11 and 14 to the ECHR. Further procedural reforms mooted by a committee of 'wise persons' (experts), established by the Council of Ministers to assure the convention's long term future, also merit brief scrutiny.

B JUDICIALISATION OF THE ECHR: UNCERTAIN BEGINNINGS

At the inception of the ECHR a number of bodies, collectively known as the Strasbourg Organs, were established to ensure the effective protection of the rights guaranteed by the Convention. These included a Parliamentary Assembly, made up of members of the High Contracting Parties Legislatures, a (now defunct) Commission that was to deal with alleged violations of the Convention and a Committee of Ministers consisting of the foreign ministers of the member states. There was also a part time European Court of Human Rights (the ECtHR), composed of judges from the contracting parties. This body was established by virtue of article 19 ECHR to give final interpretations of the Convention, thus ensuring that the contracting parties fulfilled their Convention obligations.

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[8] Per Robinson M, "Human Rights at the Dawn of the 21st Century", 15 Human Rights Quarterly p. 629 at p. 630. (Hereinafter Robinson).
[9] Ibid.
[10] The ECHR.
[11] Initially this could only be done by other states party, see below.
[12] The ECHR was signed on 4 November 1950 and was ratified by the required number of states by 1953.
[13] This role has expanded in recent years as many former communist countries have joined the Council of Europe and ratified the ECHR
[14] Put forward by Heffernan, L, A "Comparative View of Individual Petition Procedures under the European Convention on Human Rights and the International Covenant on Civil and Political Rights", 19 Human Rights Quarterly p. 78 at pp. 79-81. (http://muse.jhu.edu/journals/human_rights_quarterly/v019/19.1heffernan.html) (Hereinafter Heffernan). [Last Accessed on 20 February 2007.]

Yet, in 1953 the potential functions of this body remained strictly limited,[15] particularly since many contracting states had not as yet accepted the right of persons within their jurisdictions to complain directly to Strasbourg (the right of individual petition).[16] Even where an individual was able to petition the Strasbourg Organs, he had no right to go before the ECtHR. Rather he was heard by the Commission, which could appeal the case to the Court, only where the state in question had accepted the ECtHR's compulsory jurisdiction by making another declaration, this time under article 46 of the Convention. If the matter was referred, the parties to the case were the Commission and the state in question, though the plaintiff's submissions were considered as a matter of practice.[17] The state involved could also appeal a decision of the Commission to the Court. If this were not done, or if the Commission chose not to refer the case to the Court, the matter would go before the Committee of Ministers. According to Ovey and White, this body eventually evolved the practice of accepting the Commission's report without further investigation, on the merits.[18]

Yet, under this system there were always cases, which were not referred to the Court.[19] As Bernhardt aptly notes, these arrangements show that in drawing up the ECHR, the High Contracting Parties were "… courageous and timid at the same time".[20] Thus, having negotiated a human rights instrument, which was revolutionary because of its binding character, most states were unwilling to submit to the jurisdiction of an untried and largely unknown court.[21] Many were unwilling to allow persons within their jurisdictions to cause them trouble by taking actions before the Commission.[22]

C GROWING LEGITIMACY OF THE ECTHR

The past half-century has seen a radical change in the attitudes of the High Contracting Parties, as the ECtHR has gradually assumed a pre-eminent role among the Strasbourg Organs[23] which would have been almost

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[15] In fact the Court was not established until 1958 and did not give a judgment until 1960 (*Lawless v Ireland* [1960] ECHR 1).
[16] To grant the right of individual petition, a contracting state had to make a declaration under former Article 25 of the Convention. On the UK government's initial unwillingness to grant this right, which they felt would be abused by communist trouble makers and more general scepticism toward the infant ECHR see Young J, "The Politics of The Human Rights Act, 1999" 26 (1) Journal of Law and Society p. 27. (Hereinafter Young)
[17] Before Protocol 11 entered into force, 24 contracting parties ratified Protocol 9, which conferred on the applicant standing to appeal to the ECtHR.
[18] See Ovey and White, Jacobs and White, The European Convention on Human Rights, 4th edition (Oxford, New York: Oxford University Press, 2006) at pp. 9-10. (Hereinafter Ovey and White).
[19] ibid at 8.
[20] See Bernhardt, "Reform of the control machinery under the European Convention on Human Rights: Protocol No. 11", 89 AJIL, p. 145 (Hereinafter Bernhardt).
[21] 21 See for example the caustic criticisms of Lord Jowitt, (then the UK's Lord Chancellor) who described the putative ECtHR as a kind of 'Star Chamber'(Cited by Clements L. "Reform of the control machinery under the European Convention on Human Rights: Protocol No. 11", 26 Journal of Law and Society, March 1999 p. 72 at p. 73 FN 3. Hereinafter Clements).
[22] Thus, as noted earlier, Lord Jowitt considered that the right of individual petition would allow Communists fresh opportunities to foster discontent.
[23] A point eloquently made in Amnesty International's Intervention to the Symposium on Reform of the European Court of Human Rights, Strasbourg, 17 November 2003 (Accessed

unthinkable in 1950 or 1953. Much of this newfound importance has come at the expense of the Commission and/or the Committee of Ministers and the contracting parties have largely facilitated these developments. The contracting parties have acted to strengthen the ECtHR both implicitly, by accepting the right of individual petition and the Court's compulsory jurisdiction and expressly through the adoption of Protocol 11. This radical reform, established a full time Court, abolished the Commission and in consequence made acceptance of the ECtHR's jurisdiction mandatory for states party to the Convention.[24] Most significantly, Protocol 11 makes the right of individual petition, which allows an individual to call his own state to answer before an impartial international court, obligatory for any country wishing to accede to the ECHR. This represents a crucial development, since individual complaints have been the means by which the great majority of Convention violations have been identified throughout the ECHR's history.[25]

The right of individual petition is clearly one of the ECHR's most efficacious provisions and its acceptance by European states represents a notable success in implementing the Convention and in protecting fundamental rights. It is submitted that these developments speak volumes not merely for the impartiality with which the ECtHR has generally conducted its work[26] but more significantly for the legitimacy which the ECHR has gained since its entry into force.[27] This legitimacy and the respect for Convention rights which is its natural corollary is particularly evident in Protocol 11, an enlightened amendment to the ECHR which implies a recognition that human rights must be vindicated as of right, rather than as a matter of political expediency.

To this end, Protocol 11 removed the Committee of Minister's role in deciding cases which, given that body's inherently political nature, was anomalous. Clearly, this respect for the ECHR, built up through many years in which it has helped to improve the laws and practices of contracting parties represents one of the Convention's greatest assets and most startling successes.

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online at http://web.amnesty.org/library/print/ENGIOR610072003) (Hereinafter Amnesty). [Last accessed on 20 February 2006.]

[24] All existing parties to the Convention had already made the necessary declarations. Protocol 11 came into force on 1 November 1998.

[25] By 1 January 2004 there had only been twenty interstate applications. See Protocol 14: Explanatory Report (http://conventions.coe.int/Treaty/EN/Reports/Html/194.htm) at note 2. (Hereinafter Explanatory Report)

[26] However, the Court's procedure, which mandates a judge from the state whose laws are impugned not only to hear the case but also to vote on its outcome, is highly questionable. (It is doubtful whether a domestic court or tribunal, which engaged in such a practice, could avoid the Strasbourg Court's censure. See *Kingsley v. UK* (Application No. 35605/97). As Ovey and White (p. 474) state, the inclusion of the judge of the respondant state has the advantage of his/her familiarity with the domestic legal system. There is some force to this reasoning and a judge or rapporteur form the respondant state might be a useful resource for the court. Yet, it is difficult to see why he/she should have a vote on the outcome.

[27] Contrast the suspicions and doubts of Lord Jowitt, in the run up to the signing of the ECHR as outlined by Clements with the comments of Lord Ervin, the Lord Chancellor who introduced the UK's Human Rights Act 1998 quoted in the same article.

D JUDICIAL ACTIVISM AND THE HUMAN RIGHTS DEBATE: A LIVING INSTRUMENT?

Given the aspirational and general nature of some of the ECHR's provisions,[28] it was always inevitable that the Court would be required to elucidate and clarify their meaning.[29] It seems appropriate that to avoid manifest injustice and absurdity, the Court should treat the Convention as a living instrument, rather than one set immovably in the political and social climate of the 1950s. This evolving approach to the Convention was adopted by the Court at its inception and was in essence approved by the majority in *Golder v UK*.[30] However, this view did not meet with universal acceptance. Thus, Sir Gerald Fitzmaurice dissented in *Golder*, holding that the Convention should be interpreted restrictively, to ensure that states party thereto would not have obligations foisted upon them, which they had never intended to undertake.[31] With respect, it is submitted that such a view sits uneasily with the philosophy of individual rights, which underlies the ECHR. It seems to accord state sovereignty an undue eminence, more redolent of the nineteenth century than the twenty-first. Moreover, it ignores the reality that the high contracting parties could, if they wished, have circumscribed the Court's 'creativity' by introducing more detailed guidance on construction into the Treaty.[32] This they have not done, (or apparently even seriously considered) despite a decade of sweeping reforms. Finally, such an interpretation flies in the face of the golden rule, which suggests that in interpreting fundamental rights instruments " … the letter killeth but the spirit giveth life".[33]

Thus it is submitted that an evolving interpretation must be adopted, if the ECHR is to keep faith with the ideals from which it sprang and with the people of Europe, whose liberty it guards. While the '*Golder* approach' may not ensure a correct interpretation of the Convention in every case, it at least promises that the ECtHR will not be the victim of the self imposed fetter of textual literalism, which would be a sure guide to failure.

1 The Forbidden Reasoning

Yet, the ECtHR's more valiant efforts at 'improvement' have not been without their critics. It is submitted that in a number of areas, the ECtHR has given an extremely (perhaps overly) broad interpretation to the Convention. Such interpretations are particularly questionable where the Court has concluded that because a majority of the contracting parties have changed their laws, those who fail to follow suit are in breach of their Convention obligations. Of course, a state's recalcitrance may be due to inadvertence or political lethargy in some instances,[34] yet on at least some occasions there

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[28] See for example the proviso to Article 10.
[29] As the Court explained in *Ireland v UK* [1979-80] 2 EHRR 25.
[30] (1979-80) 1 EHRR 524.
[31] This view is clearly influenced by the consent model of international law.
[32] Admittedly this would have to be done unanimously.
[33] Per Henchy J. in *People v O'Shea* [1982] 1 IR 384 at p. 426
[34] Such apathy seems to have led to the successful challenge to Irish legislation criminalising male homosexual acts before the ECtHR in *Norris v. Ireland* (1991) 13 EHRR 186. The impugned section (s. 61) had been introduced before the foundation of the State, as part of The Offences Against The Person Act 1861. No one had been prosecuted (or apparently even

seems to have been a conscious decision not to amend the law. Thus, several states, including Ireland and (particularly) the UK, have consistently refused to allow transsexuals to reregister their gender on their birth certificates,[35] despite much litigation both before domestic courts and the Strasbourg Organs.[36]

In *Goodwin v UK*,[37] the ECtHR held that the UK's refusal to change the applicant's gender on a birth certificate constituted a violation of the applicant's Convention rights. This decision overruled a long line of authority to the contrary culminating in *X. Y. and Z. v UK*.[38] It is significant that the Court did not change its position because its previous case law was wrong in principle but because it felt social attitudes had changed in the meantime. Some might champion this 'realistic' approach but the premise that the ECHR should be read in light of the signatories evolving domestic practice and attitudes remains questionable. This is so because for present purposes, it is irrelevant whether one thinks that transsexuals should have their gender reassigned on a birth certificate or not. Rather the crucial question is whether the ECtHR is the right body to 'reinterpret' the Convention so fundamentally and thereby effectively disregard twenty years of its own jurisprudence on the point at a stroke. It is submitted that this method of interpretation introduces into the Convention an unacceptable element of uncertainty and subjectivity.

What, it may be asked, is a sufficient consensus among the contracting parties to shape the Convention and in what contexts will a consensus among the contracting parties prove persuasive? Too often, such an interpretation leaves the Court open to a charge of 'result orientated jurisprudence' with a 'consensus' among contracting parties being used as a cloak to make a decision which the Court has already reached seem legally decent. More fundamentally, does this not go beyond that of which Fitzmaurice complained and impose on a state novel moral standards (as distinct from obligations which flow from undertakings already agreed to) to which that country has never consented? Is it right that the view of a majority of states should be imposed on a minority, in spite of their democratically expressed preferences? Some might seek to justify such impositions on the basis that they are exceptional and that on the whole the ECtHR's jurisprudence has been

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questioned) under its terms for many years even before s. 61 was challenged. This is not to say that a finding of incompatibility with the ECtHR in such circumstances is of no effect, since it may prove a catalyst for political action, which might otherwise be lacking.

[35] However, there are currently legislative proposals to allow transsexuals to change their name and gender on passports. (See 'State to let transsexuals alter gender in passports', Carl O'Brien, The Irish Times 19 December 2006). Postoperative transsexuals may also change their names by deed poll.

[36] The sole Irish case on the point is *Foy v Registrar of Births*, High Court, Irish Times Law Report, 10 July 2002. Judgment in this case was handed down only two days before the ECtHR's decision in *Goodwin v UK* [2002] 35 EHRR 18. An appeal was subsequently taken to the Supreme Court, which in November 2005 directed that the High Court address issues regarding the compatibility of Irish law with the ECHR, the Convention having been incorporated into Irish law in 2004 after Dr. Foy's proceedings had been initiated. This case is due to come on for hearing in April 2007. (See 'State to let transsexuals alter gender in passports', Carl O'Brien, The Irish Times 19 December 2006).

[37] [2002] 35 EHRR 18. Available at http://www.pfc.org.uk/legal/gdwnvuk.htm.

[38] Available at http://www.pfc.org.uk/legal/xyzjudge.html.

positive. With respect, this is not the point. The question is not whether the law should be changed but whether the Court should change it, perhaps embroiling the Convention in divisive controversy and potentially bringing it into disrepute as a result. Such criticisms of the Court's case law take on an added significance when one recalls that the Convention was designed to stand as a bulwark of civil liberties in countries where governments or strong factions might feel it expedient to whittle these away. Despite all that has happened in half a century, this remains the ECHR's raison d'être. Indeed, this responsibility is perhaps of greater significance than ever in a post 9/11 world, where the siren song of utilitarianism calls ever more insistently for human rights to be sacrificed on the alter of expediency.[39]

In a world where the " ... bitter memories of the past ... "[40] which inspired the Convention itself are too often disregarded, a strong and respected Convention and Court are more necessary than ever to guard against the perils of an uncertain future. For this reason, above all others, the ECtHR must show restraint and must eschew overly 'flexible' interpretations of the Convention, to ensure that it has the moral authority to uphold the ECHR's core standards in time of need. Such restraint is essential because suggestions that human rights are merely one judge's worldview imposed on others sap the legitimacy and the life from such concepts and ultimately threaten the ECHR itself.

2 Legislative Domain

Some would also question the ECtHR's democratic mandate to indulge in such judicial activism and would argue that it is for the Council of Europe's Committee of Ministers to modify the Treaty to take account of a changing society, if modification is required.[41] It might also be argued that by developing the ECHR, the Court has delayed debate regarding the proper scope of human rights protection. As Campbell[42] suggests, such debate is positive and may well lead to human rights protection even more generous than that which the ECtHR may derive from the text of a Convention which, for all its merits, is now showing its age.[43] Almost as importantly, it may well bring home to the ordinary European the significance of human rights in his daily life and may in a real sense contribute to the development of a municipal

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[39] This new approach to human rights is most vividly and disturbingly illustrated by the debate regarding the use of torture in a post 9/11 world, a discussion which would have been almost unthinkable a mere ten years ago. For an overview, see Walsh, K "You're either with us or against us– Viewing Torture in Context", 2006 C.O.L.R. 8. (Accessed online at http://colr.ucc.ie/index.php?option=com_content&task=view&id=88&Itemid=44) [Last accessed on 20 February 2007].

[40] Per Ó Dálaigh CJ in *McMahon v AG* [1972] 1 IR 69 at p. 111. (In the above quoted passage, the Chief Justice is speaking of the Irish Constitution. it is submitted that his comments are equally applicable to the ECHR, given its historical context as outlined above.)

[41] Admittedly, the judges of the ECtHR are elected from a short list of 3 candidates by the Parliamentary Assembly of the Council of Europe. See article 24 of the Convention. This it is submitted is hardly a 'democratic mandate' in the true sense.

[42] Campbell, "Human Rights: A Culture of Controversy", 26 Journal of Law and Society March 1999 p. 6.

[43] Compare the ECHR with the more ample protections offered by the European Charter of Fundamental Rights drawn up as recently as 2001.

law of human rights at the national level. One may well understand and even sympathise with the ECtHR's desire to do justice where possible through a broad interpretation of the ECHR. However, there is a fine line between permissible judicial activism and 'judicial legislation' of doubtful merit. It is worth remembering that the ECHR was designed to be and remains a minimum standard for the protection of human rights, rather than an unbending rule to which states must aspire, regardless of differences in social conditions[44] or the democratic choices of citizens.

Thus far, the ECtHR has generally been successful in moulding the ECHR to take account of a changing social climate. Yet, while the ECtHR must vindicate the Convention's core standards, come what may, it should avoid questionable interpretations which are far removed from the Convention's text and which therefore encroach on the legislative domain.

Admittedly, in the short term, such interpretations are likely to be accepted by contracting parties because of the esteem in which the Convention is currently held. Yet, history shows that in the end, courts which indulge in such 'creativity' inevitably become bogged down in indissoluble controversies from which they emerge diminished, the victims of their own feats of judicial activism.[45] Care is therefore needed, lest controversy surrounding the Court's proper role bring that body's decisions into disrepute, an eventuality which would ultimately threaten the continued efficacy of Convention rights themselves.[46] Were this to happen, the real victims would be the marginalised, the oppressed and the disenfranchised, throughout the continent of Europe.

3 Protocol 11 and The Vicious Circle

Since the early 1980s, the Strasbourg Organs (latterly the ECtHR and the Committee of Ministers) have faced an exponential increase in the number of individual applications to the ECtHR. This trend has emerged as a major cause of concern since Protocol 11 entered into force[47] and it now seriously " … jeopardises the proper functioning of the Convention's control system".[48]

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[44] As recognised by the doctrine of the State's 'margin of appreciation.'

[45] One need look no further than the line of US Supreme Court cases beginning with *Lochner v New York* 198 U.S. 45, as applied in *Adkins v. Children's Hospital of D.C.* 261 U.S. 525, (overruled in *West Coast Hotel Co. v. Parrish* 300 U.S. 379) which led inevitably to the court-packing crisis of the nineteen thirties. For many Lochner is the epitome of a judicial usurpation of legislative functions.

[46] A salutary reminder of the dangers which may attend an over vigorous development of human rights jurisprudence are to be found in the comments of David Cameron, leader of the UK Conservative party. Speaking on 26 June 2006, Mr. Cameron launched a blistering attack on the UK Human Rights Act (which incorporates the ECHR into UK law). In particular, he suggested that the HRA was thwarting effective policing, hindering counter terrorism efforts and fostering a culture of irresponsibility. Mr. Cameron has vowed to repeal the HRA and replace it with a bill of rights and responsibilities if elected. See http://politics.guardian.co.uk/print/0,,329514195-107973,00.html. [Last accessed 20 February 2007] (It must be said that Mr. Cameron's attack on the ECHR's impact on decisions regarding deportment is not a happy one, there being ample support for this in the Convention's text).

[47] See the Interim Report of the Group of Wise Persons to the Committee of Ministers, CM (2006) 88 (10 May 2006), (Accessed online at

Paradoxically, the sheer volume of cases before the Court may prove the ECHR's ruin, as recognised by the Council of Europe and NGOs alike.[49] This matter has become so serious that by the beginning of 2006, 81,000 applications were pending before the ECtHR.[50] Over 25,000 individual applications were awaiting regularisation at that time[51] and approximately 7,000 such applications had been pending for over three years.[52] A mere nine months later, at the end of September 2006, there were a staggering 89,000 applications pending.[53] Over 24,000 individual communications awaited regularisation at the end of September 2006[54] and many of these had been waiting " ... for a very long time".[55] Perhaps even more seriously, there is a chronic backlog of chamber cases. Only 8% of the cases dealt with by the Court in 2003 were chamber cases, while over 20% of the cases allocated in that year were assigned to a chamber.[56] The result is that by the end of September 2006, 21,900 chamber cases are pending.[57] This is a particularly serious matter, since chamber cases require most judicial resources (seven judges per chamber, to say nothing of grand chambers) and because it is from chamber cases that significant interpretations of the Convention's substantive rights are most likely to emerge.

Despite the fact that some of the ever more radical plans for reform (notably Protocol 14) have been submerged in a morass of domestic political bickering,[58] it is well recognised that the current backlog represents a vicious circle[59] which threatens the very future of the Convention.[60] Thus, the ECtHR (and the Convention itself) threatens to become a victim of its popularity, if not entirely its success.

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https://wcd.coe.int/ViewDoc.jsp?id=998185&BackColorInternet=9999CC&BackColorIntranet=FFBB5) [Last accessed on 20 February 2007] at Para 19. (Hereinafter the Interim report.)

[48] ibid at paragraph 19.

[49] This danger has been the theme of successive reports from various committees, most recently the 'Wise Persons'. The point is perhaps most clearly expressed at Para 21 of the Interim report; "if nothing is done, the system is in danger of collapsing". See for the NGO's concurring views: See European Court of Human Rights: NGO Comments on the Group of Wise Persons' Interim Report, at para 2. (accessed online at http://web.amnesty.org/library/Index/ENGIOR610192006?open&of=ENG-312), [last accessed on 21 February 2007].

[50] See the Interim Report at paragraph 20.

[51] ibid.

[52] ibid.

[53] See Report of the Group of Wise Persons to the Committee of Ministers, CM (2006)203 (15 Nov 2006), (Accessed online at https://wcd.coe.int/ViewBlob.jsp?id=1063779&SourceFile=1)

[54] ibid.

[55] ibid. Surprisingly, the final report omits an estimate of the number of cases which have been waiting for over three years.

[56] See the Explanatory Report at paragraph 8.

[57] See the Final Report at paragraph 27.

[58] Protocol 14 has been ratified by all but one of the contracting parties with exemplery speed. However, it was recently rejected by a huge majority in the Russian Duma. See "Duma Gives It to the European Court", Kommersant (Dec. 21, 2006), http://www.kommersant.com/p732043/r_500/State_Duma_European_Court/. (A cynic might note Russia's recent record before the ECtHR.)

[59] At present, the Court can deal with approximately 28,000 applications a year while in 2005 45,500 applications were filed. See Judge Lucius Caflisch, "The Reform of the European Court of Human Rights: Protocol No. 14 and Beyond", 6 Human Rights L. Rev. 403, 404 (2006).

[60] See the Final Report at paragraph 28.

Success there has undoubtedly been. Thus, much of the Court's current caseload comes from the new democracies of central and eastern Europe.[61] Their accession to the ECHR is in itself a telling tribute to the significance and prestige of both the Convention and its Court.[62] The growing awareness of the ECHR system among practitioners in contracting states[63] and their increasingly frequent recourse to Strasbourg are also indications of the ECHR's relevance (and hence success) as a human rights instrument. Yet, systemic problems remain, exemplified by the vast numbers of cases before the ECtHR.

E PROCEDURAL REFORM

Reform of the Convention's procedures was clearly needed to address this problem. A first step toward this came with the adoption of Protocol 11 of the ECHR, which established a truly permanent judicial body for the first time as well as a wholly judicial system for the protection of human rights.[64] More significantly for present purposes, Protocol 11 simplified the procedure for declaring cases inadmissible. Following the registration of an application,[65] it is examined by a three judge panel, by reference to a set of nine questions.[66] Only if the panel unanimously agree that an application is inadmissible is the case dismissed. Such procedures are clearly designed to protect the aggrieved plaintiff and to ensure that the 'wheat' is not discarded with the 'chaff.' Yet in practice, the panels give virtually no reasons for their admissibility decisions.[67] This seems frankly disturbing. It is one of the fundamentals of any judicial system that a court must give reasons for its decisions and that in general these should be publicly available.[68] It is this practice which renders the legal system and the Court's application of the law open to public scrutiny and which contributes to legal certainty. Reform is facilitated and the public is assured that justice is being administered impartially and properly by clearly reasoned (if often brief) decisions. It would be unfortunate if the Court's

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[61] See ibid at paragraph 19 and the Explanatory Report at paragraph 5.
[62] This development bodes well for stability and human rights protection through out the continent of Europe.
[63] See Bernhardt at p 146.
[64] The Commission, which had dealt with cases 'at first instance' (there being a right of appeal to the Court, as explained above) was abolished.
[65] Apparently the secretariat has evolved a practice of explaining in correspondence why certain applications are not registerable (as where the complaint relates to a state which is not party to the Convention) and is therefore outside its jurisdiction. See E. Fribergh, "The Commission Secretariat's Handling of Provisional Files" in F. Matscher and H. Petzold (eds.) Protecting Human Rights: The European Dimension, Essays in Honour of Gerard Wiarda (Koln: Carl Heymans Verlag KG, 1990) p. 181
[66] Set out by Ovey and White at pp 11.
[67] See Helmut Graupner, Sexuality and Human Rights in Europe at 21 (undated), accessed online at http://www.asef.org/go/subsite/ccd/documents/sexualityandhumanrightsineurope-graupner.pdf, [last accessed on 20 February 2007.] who suggests that the Court's caselaw on admissibility is some what inconsistent and suggests that the Court's caselaw is often ignored by admissibility panels.
[68] The final Wise Persons' Report recommended the periodic publication of judgments (including judgments on admissibility) whether in full or in summary form. See The Final report at paragraph 73.

overwhelming caseload were to undermine the rectitude of its procedures at this important stage.[69]

Suggestions that the Court operates a discretionary docket control, winnowing out what its judges regard as unimportant (or perhaps controversial) cases under cover of the admissibility procedures, sap from the ECtHR that moral authority which is the lifeblood of any human rights court. If one considers that a court such as the ECtHR should have discretion, then this should be expressly introduced into the Treaty, not by the backdoor, under cover of 'admissibility requirements.' It is submitted however that such a discretion would be invidious and would leave the ECtHR open to charges of inconsistency if not arbitrariness, as recognised by the Wise Persons.[70]

There can be no doubt that Protocol 11 was a monumental and very welcome reform of the ECHR's judicial system. Yet it failed to alleviate the Strasbourg Organs' backlog of cases. On the contrary, by promoting the visibility and authority of the Court, it may have encouraged applications to the Court. Thus, Protocol 11 may indeed be described as a victim of its considerable successes, as much as what it left undone. Protocol 11's procedural reforms may have had some impact on the Court's efficiency[71] but they served also to highlight the virtual flood of cases coming before the ECtHR. It was widely recognised that further action was necessary and this was undertaken with the signing of the radical Protocol 14.[72]

This seeks to maximise judicial time, through the introduction of extensive supports for the Court's judges, notably through the use of non-judicial Rapporteurs. It is envisaged that these Rapporteurs will do much of the pre-judicial work on the case file and will write a note on the case for the judge(s) involved. It remains to be seen what such a note would contain, if and when Protocol 14 enters into force.[73] One wonders whether Rapporteurs will find contentious facts, for example.[74] More controversially, Protocol 14 envisages allowing a single judge to strike out cases as inadmissible[75] in clear-cut cases.[76] In cases of doubt, the judge may refer the case to a committee or chamber but again an applicant has no right of appeal.[77] It seems likely that such referrals will prove truly exceptional, given the tone of the reforms as a

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[69] There is no right of appeal from a Committee's decision.
[70] See the Final Report at paragraph 42, where the matter is comprehensively addressed.
71 In its first 5 years, the new Court delivered 61,633 judgments, as compared to the forty four years before Protocol 11 entered into force, in which time the Commission and Court together delivered 38,389 decisions and judgments. See the Explanatory Report at paragraph 5.
[71] In its first 5 years, the new Court delivered 61,633 judgments, as compared to the forty four years before Protocol 11 entered into force, in which time the Commission and Court together delivered 38,389 decisions and judgments. See the Explanatory Report at paragraph 5.
[72] As has been noted earlier, Russia has refused to ratify this Protocol, which will therefore gather dust, unused, unless that country changes her mind.
[73] Paragraph 58 of the Explanatory Report appears to envision the Rapporteurs fulfilling the functions now undertaken by the judge Rapporteurs for three judge Committees.
[74] Will any such findings not have a presumptive validity which it will be very hard to dislodge at trial?
[75] A judge may not sit alone where the case concerns the contracting state for which he has been elected.
[76] See The Explanatory Report at paragraph 67 and Article 7 of Protocol 14.
[77] See ibid.

whole.[78] The jurisdiction of committees has also been extended and they may now decide on the admissibility and the merits of a case, where the matter falls within the Court's well-established case law.[79] This, it is hoped will prove an effective means of dealing with repetitive applications.[80] Such a decision may only be made unanimously, a requirement which would seem an effective brake on any undue activism in committees.

Protocol 14 also includes a new admissibility requirement. Complaints are now inadmissible, where the complainant has not suffered significantly, so long as the matter has been considered properly by a domestic body and does not raise serious questions on the interpretation of the Convention.[81] For an introductory two-year period, judgments on the new admissibility requirement will be given by chambers, which will lay down the general principles for its application.[82] Thereafter, it may be operated by a single judge, in clear cut cases. Yet, the application of these requirements in practice may be far from easy. In particular, what constitutes a significant disadvantage? Is the test to be objective, subjective or a mixture? It is submitted that whether the breach is significant will often depend not on general principles but on the individual circumstances of the case at bar.[83]

Some would also question the reliance on domestic courts, a view emphasised by Young,[84] who notes that a domestic tribunal may merely 'human rights proof' a decision,[85] particularly where the matter is politically sensitive. Thus, Young argues, with some force, that the House of Lords would be unlikely to find against the UK in a case such as *McCann v UK*.[86] It must be said, however, that not everyone would subscribe to his more general scepticism of domestic courts.[87] It is to be hoped (and indeed expected) that courts will, in appropriate cases, examine the substance as well as the form of domestic judgments, where there is a suggestion of such 'proofing.'

What will constitute a serious question regarding the Convention's interpretation is also unclear. Here as with the other new admissibility requirements, it will be difficult for the chambers to draw 'bright line' rules. Much, some might say too much, is left to the individual judge's discretion and to his or her notion of what is clear-cut. This prospect is compounded by the absence of any review procedure. A right of appeal might, in current

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[78] In particular the pervasive emphasis on efficiency.
[79] Under the amended article 28, 1 (b)
[80] See the Explanatory Report at paragraoh 69.
[81] Article 35 ECHR as amended by Protocol 14.
[82] See article 20 paragraph 2 of Protocol 14
[83] Thus, for a middle class person, the loss of a few euro might be a minor (if annoying) inconvenience. The same loss for a subsistence farmer on the fringes of Europe may be quite a different matter. Surely such differences must be taken into account. Similarly, would a relatively small loss suffered by many people be regarded as insignificant for Convention purposes?
[84] Writing in the context of the introduction of the British Human Rights Act
[85] So that it has been 'properly considered' domestically, as the Convention's new inadmissibility requirement demands.
[86] (1996) 21 EHRR 97.
[87] Writing on the incorporation of the ECHR into British law, Young appears to regard 'human rights proofing' as a potentially common device of national courts.

circumstances, be too burdensome but even independent examination of a small representative sample of cases dismissed in this way annually might do much to prevent divergent lines of caselaw developing at the ECtHR in the future.

In its favour, it must be said that Protocol 14 retained the decision on admissibility as a judicial one, to be taken by a judge of the Court. Yet, it is marked by a whittling away of those safeguards for the individual litigant, which characterised Protocol 11, a clear indication that the ECtHR's popularity is having a deleterious effect on its ability to function as a human rights court.

In their Report, the Wise Persons suggest the establishment of a judicial filtering body, separate from but attached to the Court.[88] This body would have jurisdiction to declare cases inadmissible and could also decide applications on the merits, where the case came within the Court's well-established caselaw.[89] Again, there would be no right of appeal but the Court could, of its own motion, review any of the judicial committee's decisions.[90] It is recommended that in general this 'judicial committee'[91] should sit in benches of three, though single judges might hear "manifestly inadmissible cases."[92] It seems astonishing that such a far-reaching reform is being undertaken before Protocol 14 has even entered into force. There has been no time for evaluation of that Protocol's effectiveness. Estimates from within the ECtHR suggest that Protocol 14 may improve the Court's efficiency by between 20 and 25%.[93] Clearly, this would be insufficient if current trends in litigation before the Court continue. However, there has been little opportunity for estimating the effect of national reforms, introduced in tandem with Protocol 14, whose primary aim was to vindicate Convention rights at home and avoid recourse to Strasbourg.[94] It also seems strange that the Wise Persons wish to establish a new filtering body and at the same time reduce the size of the Court.[95] One hopes that the proposed judicial committee is not to be a reincarnation of the erstwhile Commission.

The significance of these reforms comes into sharp focus when one recalls that the whole subject of admissibility is highly controversial. The ECtHR's admissibility requirements are already notoriously stringent and are "… strictly enforced."[96] The result is that well over 90% of cases before the

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[88] See The Final Report at paragraph 52.
[89] ibid at paragraph 55.
[90] The Wise Persons' Report envisages this procedure being initiated by the President of the Court or the Chair of the Committee (who would be ex-officio a member of the Court). See paragraph 64. Does this not smack of the certiorari procedure of the U.S Supreme Court, which the Wise Persons' Report rejected, albeit certiorari of applications before the Strasbourg Organs themselves, rather than of the decisions of national courts?
[91] See the Final Report at paragraph 52.
[92] See the Final Report at paragraph 65.
[93] See The Final Report at paragraph 32.
[94] This is not to say that all that could be done by contracting parties has in fact been accomplished. On the need for improved domestic remedies, see The Final Report at section 5. It is submitted that such reforms might prove a more fertile source of efficiencies.
[95] See The Final Report at paragraph 121.
[96] Per Lambert H, "Protection Against Refoulement From Europe: Human Rights Law Comes To The Rescue", 48 ICLQ p. 515 at p. 526.

ECtHR are declared inadmissible,[97] a figure which compares poorly with other bodies dedicated to the protection of human rights.[98] In such circumstances one is forced to question the decision to introduce yet another hurdle over which an aggrieved plaintiff must climb if he is to reach redress in Strasbourg. One wonders whether the current statistics are not symptomatic of admissibility requirements, which are overly strict? Even in the face of the Court's current backlog, can one really put procedural economies before the Convention's ultimate aim, the doing of justice?

In its final report, the Steering Committee, a group of experts who advised on the drafting of protocol 14, suggested that the new admissibility requirement in Protocol 14 (then in an even more severe form), would affect less than 5% of cases currently regarded as admissible. This remains to be seen but it is worth noting that the five per cent in question comes from a very small pool of 'admissible cases'. While it may be too early to form any definite conclusions, given the tenor of current reforms, it may be no surprise if indeed the ECHR proves the victim of its own popularity (if not necessarily its success). Few if any plaintiffs will be able to achieve redress in Strasbourg, if the progressive tightening of Convention admissibility requirements continues in future Protocols.[99] It may be, however, that if and when Protocol 14 comes into force, the ECtHR will interpret the new admissibility criteria generously, a development which may ameliorate the situation somewhat.[100] Yet this prospect serves merely to highlight the difficulties regarding judicial discretion.

F ALTERNATIVE APPROACHES TO REFORM: SUBSIDIARITY

What is most disappointing about Protocol 14 is that it does not treat the process of taking a case to Strasbourg holistically, from the point when the case comes before the national court or tribunal of first instance. In particular, the rejection of a preliminary reference procedure, akin to that adopted by the European Court of Justice (under article 234 EC), with such startling success, seems ill-considered. This proposal was apparently largely rejected because of fears that such references might increase the Court's work in the short term.[101] Several beneficial characteristics of a reference based procedure make this rejection unfortunate.

In the first place, preliminary references would allow cases destined for Strasbourg (as where an authoritative interpretation of the Convention is required) to reach the ECtHR quickly. Thus, the Court would no longer be

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[97] See The Final Report at paragraph 27.
[98] See Heffernan (footnotes 14) and the Explanatory memo.
[99] The prevailing attitude is exemplified in The Final Report at paragraph 60, where the Wise Persons' Report suggests that time limits for supplying all relevant information to the Court to determine admissibility should be strictly enforced save in exceptional circumstances.
[100] It is clear that different members of the Court held different opinions on the new admissibility requirement at the consultation session. It will be interesting to see which view wins out.See the Response of the European Court of Human Rights to the CDDH Interim Activity Report prepared following the 46th Plenary Administrative Session (accessed online at http://www.coe.int/T/F/Droits_de_l'Homme/CDDH-GDR(2004)
[101] See The Explanatory Report at paragraph 34. The report also notes rather cryptically that such references might "… interfere with the court's contentious jurisdiction" (ibid).

delivering justice long after the complained of violations had taken place. Of course, a speedy judgment might not only vindicate the rights of the injured party but might protect many other potential victims. Thus, in the long run, such a procedure could result in the elimination of many of the repetitive cases which currently sap the ECtHR's limited resources. In addition, this procedure would promote compliance with Convention norms at domestic level.

As significantly perhaps, in the absence of such guidance the courts of the contracting parties will be left to interpret the Convention for themselves. The ECHR has now been incorporated into the domestic laws of all states party thereto and it is to be anticipated that domestic courts will regularly be called upon to apply the Convention.[102] While this in itself is a most important milestone for the ECtHR, it is submitted that the lack of guidance from the ECtHR renders this development ripe with potential for confusion and inconsistency. Different courts in different jurisdictions may interpret the Convention in ways which are diametrically opposed. Given the current ever-worsening backlog in Strasbourg, even if a case is taken to the ECtHR, it may be years before it comes on for hearing, by which time the national court may have applied its interpretation on numerous occasions. This is to say nothing of the irrevocable decisions that may be taken on foot of such a mistaken understanding of the law. One thinks of settlements made, or appeals not taken. In effect, many people may have acted to their detriment, on foot of a mistaken interpretation of the Convention. Yet, it would be ridiculous to expect a national government to compensate persons who acted on such an interpretation. It is for the Court, as much as national governments, to ensure that Convention rights are rendered effective. If the Convention is to protect rights of substance, it must not merely be possible to vindicate them but to do so relatively quickly and efficiently.[103]

It is submitted that in a post incorporation world, this can best be done through references. Moreover, it may be difficult to dislodge erroneous interpretations of the Convention, which become established as part of a state's legal system, if individuals or the state itself have acted in reliance on them. Obviously, the longer such an erroneous interpretation stands, the more difficult it may be to dislodge that view of the law. Yet, there is every chance that such interpretations may go unchallenged (by the current method) for a long period, since the vast majority of cases will be dealt with domestically. Indeed, current reforms aim to increase the numbers of cases to be dealt with in this way. It is submitted that a reference procedure would be a practical way

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[102] For an analysis of the Convention's effectiveness in Ireland thus far and predictions for the future, see O'Connell, Donncha, Cummiskey, Siobhan and Meeneghan, Emer with O'Connell, Paul ECHR Act 2003: A Preliminary Assessment of Impact (Dublin: Law Society and Dublin Solicitors Bar Association, 2006) (accessed online at http://www.lawsociety.ie/documents/committees/hr/ECHR/ECHRreport18oct06.pdf) [Last accessed on 21 February 2007] (Hereinafter O'Connell et al). While there may not have been the same explosion of activity following incorporation in this jurisdiction as in other countries, (see O'Connell at chapter 3) such as the UK, (See O'Connell et al at Chapter 2) points do arise and are likely to do so with increasing frequency, as emphasised by O'Connell et al at chapter 5.

[103] This is Protocol 14's raison d'être and the reason for the Wise Persons' Reports.

of ensuring that national judges remain aware of current developments in European human rights law. Such a procedure would also enlist national courts as human rights courts, in much the same way as the European Court of Justice has used a reference procedure to turn national courts into community courts.[104] Restrictive requirements could be built in to ensure that this procedure did not become over burdened. Thus, references might only be sought in cases which the national judge thought merited the Court's attention, leaving him or her with a discretion not to refer, even if asked to do so. This would not damage the right of individual petition, since either party would remain entitled to take a case to Strasbourg when all domestic remedies were exhausted. However, cases of particular importance could be 'fast tracked', with the national judge's co-operation.

In their report, the Wise Persons argued that such a procedure, modelled on the ECJ's practice would create significant (though unspecified) legal and practical problems.[105] They considered that these would derive from the combination of the Court's current system, which requires domestic remedies to be exhausted, and a reference based procedure.[106] However, they did recommend that national constitutional courts, or courts of last instance be free to seek advisory opinions from the Court[107] on questions of principle or of general interest in the Convention's interpretation.[108] This looks suspiciously like a reference system in the making. Yet, as currently envisaged, it is so hedged round with limitations that it threatens to become a non-event. In particular, the Wise Person's recommendation that the ECtHR be able to refuse to give an opinion, without giving reasons,[109] seems at odds with the Report's stated aim of increasing judicial co-operation between national courts and Strasbourg.[110] It seems that this would be a matter of choice for the Court[111] and it seems likely that in practice, the Court would issue reasoned explanations, save in exceptional cases. A failure to do so would expose that body to charges of inconsistency, arbitrariness and might give credence to suggestions that the Court wished to shy away from controversial or difficult cases.

More fundamentally, one must question the Wise Person's recommendation that only courts of last instance should be entitled to seek advice. In doing so, one must acknowledge the group's legitimate concerns with the cost and workload implications of advisory opinions, which would require extensive translation.[112] In the short to medium term, these issues must certainly loom large, in a climate where the Council of Europe's

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[104] On the very successful EC model, see Craig and De Búrca, EU Law: Text Cases and Materials 3rd edition, (London: Oxford University Press 2003) at Ch 11.
[105] The Final Report at paragraph 80.
[106] ibid.
[107] The Final Report at paragraph 86 (a).
[108] See the Final Report at paragraph 86 (b).
[109] See the Final Report at paragraph 86 (c).
[110] See the Final Report at paragraph 78.
[111] See the Final Report at paragraph 86.
[112] See the Final Report at paragraph 85.

budgetary growth has been zero (in real terms) in recent years.[113] Yet we must take the long view in reforming the Convention, as it seems probable that the reforms in Protocol 14, alongside those recommended by the Wise Persons may, in time, (if implemented) alleviate the backlog.[114] Thus, we must strive not just for efficiency but also, perhaps most importantly, for effectiveness. It is worth noting that many of the seminal cases in EC law have arisen from the references of courts of first instance, where the amount at issue was insignificant.[115]

In all likelihood such cases will never go beyond the court of first instance, for reasons of cost and practicality. In the absence of a reference procedure the points of law in question may never come before the ECTHR. Yet, the cases in question may be of the greatest significance to those involved and the point in question may effect thousands, perhaps even tens of thousands of people. (One thinks of cases regarding modest amounts of tax or social welfare.) After all, it is a fundamental principle that human rights must be for all, not only those who can afford them. It seems particularly unfortunate that the ECtHR's current difficulties have forced its policy makers to adopt such a shortsighted approach. Their rejection (for now, one hopes) of this avenue for increasing the Court's accessibility and effectiveness represents a missed opportunity to assure the Convention's success as a legal instrument before the courts of the contracting parties.

Effectiveness is very much at the heart of Protocol 14's emphasis on the enforcement of the ECtHR's judgments. Here, the spotlight falls squarely on the contracting parties, which are exhorted to provide effective remedies for breaches of the ECHR, where necessary.[116] Already, the Committee of Ministers has proved a reasonably effective body, ensuring that the ECtHR's judgments are respected and enforced in most cases.[117] Whether as a result of this external political scrutiny or not, the Court's judgments are usually followed by European governments and officials, without undue urging (if sometimes after undue delay).

Thus, in Ireland, criminal proceedings have been struck out,[118] legislation changed,[119] and large sums expended in non-statutory schemes

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[113] See European Court of Human Rights: NGO Comments on the Group of Wise Persons' Interim Report, at para 8. (accessed online at http://web.amnesty.org/library/Index/ENGIOR610192006?open&of=ENG-312), [last accessed on 21 February 2007].

[114] It seems improbable that a judge at first instance will seek the ECtHR's guidance lightly, even if asked to do so, in view of the costs and delays involved. It may be that the additional workload involved might therefore not be as great as anticipated.

[115] One thinks of Case 26/62 *Van Gend en Loos*, itself.

[116] Such remedies should be given retrospective effect, where possible.

[117] See See Tom Barkhuysen & Michael L. van Emmerik, "A Comparative View on the Execution of Judgments of the European Court of Human Rights" in Christou, Theodora and Raymond, Juan Pablo (editors), European Court of Human Rights: Remedies and Execution of Judgments, (London: British Institute of International and Comparative Law, 2005) pp. 15-17. See also the Explanatory report at 17.

[118] See 'Trial of Cork Dr. Prohibited' RTE news 3 March 2006 http://www.rte.ie/news/2006/0303/barryj.html (last accessed 20 February 2007) Judge Seán Ó Donnabháin expressly held that it would be unacceptable to allow Dr Barry's trial to proceed given that the European Court of Human Rights had ruled last December that the

aimed at fulfilling Convention obligations,[120] on foot of the ECtHR's decisions. In their Report, the Wise Persons advocate a development of this system, with domestic judicial bodies being granted competence to award just satisfaction, after the Court (or the proposed judicial committee) has found a Convention violation.[121] One may tentatively submit however, that this may be a fond hope in certain cases.[122]

Protocol 14 also seeks to build upon the current relatively successful enforcement system, through the introduction of a new procedure, which allows the Committee of Ministers to take a contracting party before the ECtHR where that party refuses to comply with a previous judgment. Proponents of this measure argue that there is a need to enhance the Committee's effectiveness and thus to cut down the number of repetitive judgments which the ECtHR must give.[123] They note that such proceedings are to be taken in rare and exceptional cases and argue that such measures are a less draconian step than suspension or expulsion from the Council. Yet, while sound in principle, the procedure, as currently envisaged, is open to abuse. It might well be used for political ends and is unlikely to be used against powerful members of the Council, in practice. This is to say nothing of the potential difficulties which could arise if the EU were ever to become party to the Convention. In such a situation, the ministers representing the EU member states on the Council would effectively be voting to refer the conduct of a body for which their member states have a large measure of collective responsibility. The procedure outlined in Protocol 14 remains an invaluable first step on the road to mandatory enforcement of ECtHR judgments. Yet, as currently framed, it threatens the spirit of co-operation, which has thus far characterised the Committee of Ministers, a development that may have grave consequences in the future. Thus, the Committee may well prove the victim not of its considerable successes but of its failure to 'grasp the nettle' and delegate the power to take proceedings against a noncompliant state to an independent person or body, such as the Secretary General of the Council, whose conduct will be above suspicion.

This is not to underestimate the political sensitivity of the matter and whoever is nominated must have a wide discretion. It might also be thought advisable to rule out repeat actions (which do not concern articles 2 or 3) where the condemned law is subsequently approved by referendum, unlikely

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delay in prosecuting the case against Dr Barry had been a violation of his human rights. (Dr. Barry had previously failed to have his trial prohibited on grounds of delay before the domestic courts.)

[119] As in *Norris* above (though admittedly this legislation was antiquated and was probably ripe for repeal in any event.)

[120] Most notably in the non statutory civil legal aid scheme, established following the Court's decision in *Airey v. Ireland*, Judgment of 9 October 1979, Series A, No. 32; (1979-80) 2 EHRR 305. (The legal aid scheme is now regulated by the Legal Aid Act 1995)

[121] Some courts have shown a certain 'reluctance' to award damages against the state under EC law. Thus, following the ECJ's judgment in cases C-46 and 48/93, *Brasserie du Pecheur SA v. Germany*, *R. v. Secretary of State for Transport, ex p. Factortame Ltd.* [1996] ECR I-1029, the German court refused to impose liability on Germany.

[122] See The Final Report at paragraph 98.

[123] As noted earlier repetitive judgments make up a very large proportion of the Court's current workload.

as such an eventuality may be. This will give governments an opportunity to keep laws which they regard as absolutely essential, if they can convince their citizens and will moreover effectively insulate the ECtHR from any (spurious) suggestion that it is antidemocratic.[124] Virtually since its inception, many commentators have adopted a view of the ECHR, which is extremely optimistic, if not 'rose tinted'.[125] Yet fifty years after its establishment, masses of complaints still clog the Court's registry. It is clear both that human rights violations continue and that such violations are in no way confined to the emerging nations of Eastern Europe. In such circumstances, one must ask whether the much vaunted ECHR, enriched by the ECtHR's jurisprudence, has in fact brought about a fundamental shift in the administrative and governmental culture in contracting parties or whether it remains a doubtful hope of last resort for the courageous (or desperate) few.

The truth, it is submitted, lies somewhere between these extreme viewpoints. Certainly, much of the ECtHR's caseload[126] is made up of repetitive applications, complaining of activities which the ECtHR has already characterised as Convention violations. Historically, this problem has been exacerbated by the Contracting Parties' failure to honour their obligation to provide effective remedies for Convention violations on occasion,[127] as well as by the ECHR's lack of legal force before the domestic courts of some jurisdictions.[128] As part of the package of measures aimed at improving the effectiveness of the ECHR, this latter problem has been remedied and the ECHR has been incorporated into the domestic legal systems of all the contracting parties. In Ireland, incorporation was accomplished by virtue of the ECHR Act 2003, which came into force on 1 January 2004.[129] This important legislation provides that courts are, where possible, to interpret any rule of law (whether it derives from the common law or statute)[130] in line with our Convention obligations.[131] In construing the Convention, courts are to take

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[124] Such a conflict threatened to arise following the Court's decision in *Open Door Counselling and Dublin Well Woman v. Ireland*, Judgment of 29 October 1992, Series A No 246; (1993) 15 EHRR 244, where Ireland's ban on abortion information was held to violate article 10 of the ECHR. This ban derived from the eighth amendment to the Irish Constitution, which had been enacted by referendum in 1983. (The Constitution was amended by a subsequent referendum that same year. One feels that this had more to do with *AG v X* [1992] 1 IR 1, than with any violation of human rights found in Strasbourg).

[125] See Greenberg and Shalit, "New Horizons for Human Rights: The European Convention, Court andCommission of Human Rights" Columbia Law Review, Vol. 63, No. 8 (Dec., 1963), pp. 1384-1412

[126] The Steering Committee estimated that such cases made up approximately 65% of the ECtHR's cases.

[127] An obligation which would seem to require more than paying 'just satisfaction' if this is awarded by the ECtHR

[128] As in Ireland, See *Re Ó Laighléis*, [1960] IR 93 at p. 103 per Davitt P at p. 103 and per McGuire CJ (speaking for the former Supreme Court) at pp. 124-125. This decision was approved by the present Supreme Court in Application of Woods [1970] IR 154.

[129] Ireland became the last contracting party to incorporate the ECHR into Domestic law, having been among the first to sign the Convention and to grant the right to individual petition.

[130] Though not the Constitution, see *Re Ó Laighléis* [1960] IR 93.

[131] See ECHR Act 2003 No. 20 of 2003 s. 2 (1). This applies both to laws already in force and to laws introduced after the ECHR Act 2003, by virtue of s. 2 (2).

"due account"[132] of the Strasbourg jurisprudence, a phrase which seems to leave open the possibility that an Irish court might refuse to follow the Strasbourg Organ's caselaw. By virtue of s. 5 (1), the High and Supreme Courts are now entitled to issue a certificate of invalidity, stating that an impugned piece of legislation is incompatible with the Convention, where it is impossible to interpret that legislation in line with the Convention.[133] Crucially however it is for the Oireachtas rather than the courts to decide whether the legislation is to be amended and if compensation is to be paid (on an ex gratia basis).[134]

Perhaps the most radical provision of the ECHR Act 2003 is section 3 (1), which provides that organs of the state are to conduct their activities in a Convention-compliant manner. For the purposes of the act an organ of the state is a body established by law or exercising any of the State's functions, whether these be judicial, executive or legislative.[135] Moreover, s. 3 (2) provides that the High (or Circuit) Court may award damages for any violation of Convention rights by any such organ, where no other remedy is available.[136] It is submitted that measures such as these, aimed at establishing a municipal law of human rights hold the best prospect for making the ECHR an unqualified success. If well implemented, such measures could allow the vast bulk of cases which currently come before the ECtHR to be dealt with by national courts, leaving the ECtHR free to deal with cases of exceptional importance or sensitivity,[137] thus fulfilling the role originally envisaged for it in the ECHR.[138]

However, only when the ECHR becomes an integral part of the domestic laws of the contracting parties, in reality as much as in theory, will it be possible to conclude with any degree of certainty that the ECHR's future is assured. In this regard, the Irish Human Rights Commission has worked hard to prepare reports on several important and controversial statutes in an effort to ensure their compliance with the ECHR,[139] work which, if replicated by all

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[132] Section 4 of the ECHR Act 2003.
[133] Such certificates are then laid before the Oireachtas.
[134] The Taoiseach is required to lay any such order before the Oireachtas within 21 Days, by virtue of s. 5 (3) of the ECHR Act 2003.Where the Oireachtas does not alter impugned legislation, following such a declaration, will this not make judicial activism on the part of the ECtHR all the more problematic?
[135] See s. 1 of the ECHR Act 2003. The President, Oireachtas (and committees of the houses of the Oireachtas) and Courts are expressly excluded from this definition. The exclusion of the courts represents a significant departure from s. 6 of the UK's HRA, on which our own legislation is loosely modelled.
[136] The jurisdiction of the Circuit Court is limited by virtue of s. 3 (3).
[137] For a view totally at odds with this see generally Young who argues that these measures are aimed merely at making the judgments of national courts virtually unappealable. With respect these fears seem to have been largely ill-founded, having regard to the major changes which the UK's Human Rights Act 1998 has brought about in that jurisdiction since its introduction. These are perhaps most evident in the field of public law. See Wade and Forsyth, Administrative Law, 9th Edition (London: Oxford University Press 2004) passim and particularly Ch 6.
[138] However, it was probably envisaged that the cases in question would be between states, rather than applications involving individuals.
[139] See for example the Commission's 'Observations on the European Arrest Warrants Bill, 2003', available at http://www.ihrc.ie/documents/article.asp?NID=105&NCID=6&T=N&Print= The

other contracting parties, may help to ensure that the ECHR does not prove the victim of its own success. Indeed, other jurisdictions have arguably gone further. Thus, s. 19 of the UK's Human Rights Act 1998 provides that government ministers must state whether they consider the legislation they introduce is compliant with the convention. They may ask the house to pass legislation which does not comply with the convention however. It may be that such a system could be introduced in this jurisdiction. Arguably however, there is some merit in having an independent body to review legislation for possible incompatibilities.

G CONCLUSION

It is fair to say that reform looms large on the horizon for the ECtHR. However, no matter what procedural difficulties which have arisen, no one would deny that the ECHR stands as a symbol of everything that is positive about a regenerated post war Europe. Problems remain, principally the ever-growing numbers of cases before the ECtHR, the ever-present difficulties regarding enforcement (the Achilles heel of so many international conventions and agreements) and growing concerns regarding the ECtHR's judicial activism. Nevertheless, given the " … power of [its] ideas,"[140] it does not seem probable that the ECHR will fall victim to its own success, in spreading the gospel of human rights throughout Europe, save in the unlikely event that its ideals are stolen by a European Union increasingly desperate to find a raison d'être. Over the past half century, the ECHR has remained a beacon of hope for hundreds of millions of people in Europe and beyond. In that time, it has proved a vibrant force for the protection of fundamental rights and has done much to relight the 'lamps' of hope, freedom, peace and justice which Grey saw extinguished more than eighty years ago.

Commission quite rightly has regard to other human rights conventions to which Ireland is a party.

[140] Robinson at p. 631.