The Future

‘For I dipped into the future, far as human eye could see, / Saw the vision of the world, and all the wonder that would be.’
Lord Alfred Tennyson

‘The future is what we make of it.’
Anon

The Present

It is a daring question and it is not the first time it has been addressed in an essay: What will the Court look like in 50 years’ time? Will it exist? Does the Court actually have a future? Can it survive the exponential growth in individual cases over the long term and a growing disenchantment with its case-law in certain quarters? The alarm bells have been ringing ceaselessly since 2000 when it was realized that a further reform of the reform was necessary to enable the Court to survive. In 2009 the Court indicated to the States Parties that urgent action must be taken if the integrity of the institution was to be preserved.

Civil society in general and European human rights lawyers realize that the Court, one of the most important democratic institutions in Europe, may be headed towards a tipping point beyond which its dwindling reputation may not recover as criticism grows and remains unanswered about the number of cases awaiting consideration, about inconsistency in case-law among the sections, about excessive interference with national court decisions, about the lack of guiding principles in the awarding of compensation and about the continued politicization of judicial appointments. Some people even say that certain governments will be quite content to allow the tipping point to be reached. Faced with runaway statistics and limited budgetary growth, the Court has been forced to rely on its own ingenuity and inventiveness to cope with a waiting list of unmanageable proportions. But it is obviously not enough to turn off the alarm bells.

The way in which the Court functions today is nothing short of miraculous when one considers the progress that has been made in a relatively short time and its many accomplishments. That the Court can receive complaints from more than 800 million individuals is, in itself, an extraordinary development in European law. Its impact on legal developments throughout Europe and beyond is also...
unparalleled for an international court. But we are all aware that an attachment to human rights has undergone a subtle global transformation in recent years as the struggle against terrorism after the destruction of the World Trade Center in New York, followed by a severe economic crisis, has steadily propelled the human rights idea towards the bottom end of the democratic agenda. We cannot close our eyes to the perceptible gap between rhetoric and practice, even in Europe. So, it must be asked, has it all been a fantastic experiment that has reached the end of its natural cycle as the institution is being challenged on so many fronts? Is not ‘beleaguered’ an accurate word to describe the Court’s predicament?

The enquiry, of course, reveals the precariousness of an international court. We are, after all, unlikely to ask the same question about the International Court of Justice, the European Court of Justice or superior domestic courts, or the United States Supreme Court. These judicial institutions are all solidly rooted in the legal landscape, and their future is simply not questioned in the same way. Their demise is unthinkable barring the overthrow of democracy or a coup d’état. We assume that these institutions will continue to flourish. The Court, on the other hand, is constructed on the shifting sands of State acquiescence and consent irrigated by the ebb and flow of politics.

So why is it any different with the Court? Why does the word ‘future’ in the context of the Court posit the possibility of decline or the withdrawal of political support? After all, the Court has become the world’s largest international court as well as its foremost human rights court. Its reputation is solidly established. Can we not assume that it will continue to flourish?

The Past

Against this rather gloomy background it is almost reassuring to observe that the future of the Court has always had a question mark over its head, even from the beginning of the Convention’s existence. In 1950 the British Lord Chancellor, Lord Jowett, advised the Cabinet against ratifying the European Convention on Human Rights, which he considered to be ‘some half-baked scheme to be administered by some unknown court’. Indeed, throughout the 1960s the Court had little work to do. It was the Commission, against all expectations, that was making the running, and during that period it was not inclined to refer cases to the Court. There was thus a shortage of cases for the Court to examine.

The Belgian judge Henri Rolin was so dispirited by the lack of work that he confessed to an American audience in a famous lecture, ‘Has the Court got a Future?’, that he hesitated about whether he deserved the title of ‘judge’ at all. He said that the Court had to fall back to working hard on its rules of procedure, which were full of interesting principles, ‘their only weakness [being] that we have no opportunity to use them’. One case had been brought to the Court in 1960 and another in 1961, but none had been brought in 1963, 1964 or 1965. While this was a cause for genuine disappointment for Judge Rolin, it must have been especially troubling for Lord McNair, who was the Court’s first President. Neither had the good fortune to have been drawn by lot for the Court’s first and second cases – Lawless v. Ireland (1960 and 1961) and De Becker v. Belgium (1962) – and so had to follow these cases from the touchline. Indeed, Lord McNair did not have
the opportunity to sit in any case during his tenure. The judgment reveals that he drew lots in Laussel. The rule that the President of the Court sat ex officio in all cases had not been developed at that time, although its provenance must owe much to this occurrence. René Cassin, however, was lucky enough to be drawn by lot, and, even though France had not even ratified the Convention at that time, he had the honour to preside in both cases. His reputation as a jurist of great merit was significantly enhanced as a result. Thus when the train of judicial business in the Court commenced its lengthy journey in those early days it left the bemused and faintly irritated – but resigned – Henri Rolin, as well as the distinguished first President of the Court, Lord McNair, standing at the station. One can imagine their exasperation. Judges Rolin and McNair would be astonished by the developments that have taken place since they lamented the lack of work they had to do as well as by the current density of the work that is facing the Court with the ‘unexpected’ has always been a feature of the Court and one that is known to those who have had the privilege to have been associated with its development. Seen from today’s perspective that feature is encouraging, if not altogether according to plan.

The history of the development of the Convention amply demonstrates that all attempts to divine the future of the institution are condemned in advance. We should bear this fact in mind when we consider plans for future development. Let us think about the past for a moment.

The right of individual petition has become the dynamic mechanism of the Convention. The founding fathers of the system imagined that most of the litigation in Strasbourg would be by way of the inter-State jurisdiction in keeping with contemporary ideas about international courts. This was understandable at a time when international lawyers were still debating whether an individual could be a subject of international law. It was envisaged that the Strasbourg system, if it ever developed at all, would be dealing with issues of international law in the area of human rights and democracy. The system was perceived as a means of shoring up effective political democracy because States that protected human rights tended not to go to war with each other. However, these suppositions were defeated by the developments by which the agreements of individual being in a position to resist the might of the State by having recourse to a legal system beyond national boundaries. For the community of the non-governmental organizations (NGOs) it is sacrosanct. And, of course, as time progressed, it became clear that the bulk of the work transacted in Strasbourg concerned, in the main, public law or constitutional issues, ventilated by way of the right of petition, rather than issues of public international law.

The Commission was designed as a filtering body – an adjunct to the prestigious Court with which it shared the same premises and that nearly did not see the light of day because of political opposition to the notion of a Court being able to give binding judgments in the area of human rights. The Commission turned out to play the leading role in the system in the 1980s, its members and lawyers being kept fully busy with a steadily mounting number of cases, while throughout the 1960s and early 1970s the Court sought to assert itself. Is it any wonder that those early seminal cases decided by the Court – De Wilde, Ooms and Versyp v. Belgium (1971), Handyside v. the United Kingdom (1976), and finally职业生涯 v. the United Kingdom (1976) – gave rise to such solidly reasoned judgments? The judges must have been bursting with enthusiasm to leave their mark and were politely critical of the Commission for not sending it more cases. It is undoubtedly the quality of these early judgments that inspired early confidence in the Court and established its reputation. However, it cannot be denied that the legacy of the Commission with its experience of dealing with large numbers of individual cases has also been fundamental to the success of the new Court during its formative years.

Who could have anticipated that the system would be unified into a single Court? Or that the number of Contracting States that could be the subject of a complaint by an individual would grow from 14 in 1980 to 47 today, largely as a result of the fall of the Berlin Wall? Or that in 2010 more than 27 per cent of the 127,000 cases pending before the Court would have been brought against Russia?

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The Treaty of Lisbon entered into force on 1 December 2009. Amongst other things, it provides the impetus for the European Union to act in accordance with the Convention, which will make the Strasbourg Court compete to review acts of the EU institutions, bodies and agencies, including rulings of the Court of Justice.

Or that the Court would be dealing with large numbers of cases against Hungary, Ukraine, Romania, Poland, Moldova, Bulgaria, Albania, Latvia, Estonia, Lithuania? Who could have imagined that Russia would have blocked the entry into force of Protocol No. 14, which was opened for signature in 2004 but came into effect only on 1 June 2010 following Russia’s decision to ratify it before the Intertaken Conference? That this has happened without any specific reasons being given during this lengthy period, or that the States have been obliged, after deploying considerable diplomatic resources to convince Russia to ratify the Protocol, to circumvent the obstruction by inventing Protocol No. 14 in 2004 and arranging for a meeting of the States Parties to agree on the provisional application of certain provisions of the Protocol are surely extraordinary and unpredictable events in the life of the Convention. Have we any doubt that these adjectives will continue to characterize the life of the Convention system in future?

The Imagined Future

Predicting the future for the Court is a risky enterprise. It is probably easier to predict the stock market. There are no comforting certainties any longer, and the only available compass is the confusing past, which suggests three different potential scenarios for the Court’s development – one benign, one malignant and one stagnant.

According to the ‘benign’ scenario the States will match their political rhetoric with action and support. They will endorse the Court with a much enhanced separate budget and, while stressing the importance of the Court’s link with the rest of the Council of Europe, will give it the necessary autonomy over the recruitment and promotion of staff and disciplinary matters that are enjoyed by all other regional and universal intergovernmental organizations and will be amended by a structural Protocol speedily ratified by all States to give effect to many of the main proposals made in the Wise Persons Report. They will also make available, perhaps in conjunction with the European Union, funding for an ambitious project to translate into the languages of the Contracting Parties the Court’s jurisprudence so that the States Parties will be provided with an effective remedy for alleged violations, thereby reducing the endless flow of cases to Strasbourg. Despite the severe difficulties facing the Court, brought to the fore and paraded by both the European Parliament and the European Court of Justice, the European Union will finally adhere to the Convention, within a reasonable time-frame, to reaffirm its solid commitment to human rights.

In the ‘malignant’ scenario the process of reform will provide an occasion for certain States to seek to reduce the Court’s powers under the guise of architectural improvement. As De Tocqueville remarked, ‘the time of reform is the most dangerous of moments for government’. Supported by critiques made by national judges that the Court has overstretched itself and expanded its jurisdiction impermissibly at their expense, the States will seek to limit the Court’s powers to award damages, to grant interim measures. The right of individual petition will be tampered with and subjected to a variety of conditions, such as obligatory legal representation or the presentation of a case in one of the official languages. There will be allegations of the most serious nature and will be effectively replaced by a system of non-binding preliminary rulings at the request of superior national courts. New admissibility criteria will be introduced into the statute book as well as obligatory legal representation or the presentation of a case in one of the official languages. There will be allegations of the most serious nature and will be effectively replaced by a system of non-binding preliminary rulings at the request of superior national courts. New admissibility criteria will be introduced into the statute book as well as obligatory legal representation or the presentation of a case in one of the official languages, which will limit to the Court’s jurisdiction to examine complaints that have already been examined by national courts in the light of the Court’s case-law. The Court’s...
budget will be capped and set for cycles of five years in order to ensure budgetary stability and certainty. According to the ‘stagnant’ scenario, the States gathered at Interlaken in 2010 to express their continued political support for the Court. However, in the Committee of Ministers and the Steering Committee for Human Rights they will be unable to agree on the best way to achieve this during the post-Interlaken process. Serious differences will emerge on the proper role of an international court of human rights. Some will favour radical proposals of restructuring. Others will argue for restricting the right of individual petition in order to staunch the flow of cases and for the setting up of regional human rights tribunals. Agreeing to differ, the States will urge the Court to continue to review its working methods to give priority to the most serious allegations, to ‘pick and choose’ the cases it considers admissible and to respect scrupulously the principle of subsidiarity. Budgetary support will be linked to the Court’s capacity to reform itself. Following the entry into force of the Lisbon Treaty on 1 December 2009 the European Union is obliged to accede to the Convention. However, the tough negotiating mandate agreed by the Council delays the drafting of an accession agreement as the parties disagree about the possibility of the Court being able to examine a complaint against the Union that has not first been examined by the European Court of Justice and are unable to reach agreement on a mechanism to prevent the problem from arising. The requirement in the Lisbon Treaty to secure the consent of the European Parliament and all the EU’s member States leads to such considerable delay in European Union accession that non-European Union Council of Europe States refuse to give priority to ratifying the agreement.

The above scenarios are, of course, exaggerated, yet all three contain ideas that have been voiced and examined by, among others, the Wise Persons, NGOs and different official and academic commentators. Looking at the question of the Court’s future in this way may not reveal what is going to occur in the next five years, but it certainly demonstrates that the Convention system has reached a crossroads as the Court celebrates its 50th anniversary and that its future success in overcoming its current difficulties depends on which path the Contracting Parties can agree to follow. Indeed, one of the main difficulties lies in the difficult and time-consuming process of securing agreement among the States to take the necessary steps collectively.

The Real Future

We must abandon our crystal ball and set a prescribed course for the future. The main consideration must surely be to place the Court in a position where it can concentrate on what it does best – that is, the adjudication of the mainstream problems facing European societies. To that end we need to add ‘within a reasonable time’, because that requirement has been a notable casualty of the Court’s success. It is this role carried out mainly by the Grand Chamber and in leading Chamber judgments that has the strongest and most significant impact throughout Europe as many of the Court’s leading pronouncements assume de facto the character of judgments erga omnes. The Court is being impeded in fulfilling this role by an asphyxiating number of individual complaints and repetitive applications as well as the failure of the States to give proper effect to their obligations under the Convention. The future of the Court lies in removing these impediments successfully.

Individual Petition

To impose greater restrictions on the right of individual petition would appear inevitable given the relentless onslaught of cases. Yet such a step would be a mistake because this has come to represent what the Court stands for. In reality, the debate about possible restrictions on the right of individual petition is a false one, in which the passionate confront the pragmatic in a never-ending discussion. Neither the Woolf Report nor the Wise Persons nor the 2001 Evaluation Group has proposed such a step, perhaps because it was realized that the Court’s differentiated system for dealing with large numbers of complaints, in particular the Committee system, is, in itself, tantamount to a trammelling of the right of individual petition. In other words, the system itself has found the right balance between maintaining the right of petition and weeding out unfounded applications. Nevertheless, in view of the unending increase in the flow of cases each year it must be asked whether the time has not come to impose a modest court fee in certain cases, as is done in many national court systems, to require applicants to think twice before complaining to Strasbourg and to seek to impose some form of prior quantity control, bearing in mind that 90–95 per cent of applications are eventually rejected. This can be introduced in a way that fully protects the substance of the right of individual petition if the President has discretion to waive the requirement in certain cases and the level of fee is pegged to the standard of living of the relevant country and is not excessive. It is hard to characterize such a scheme, assuming that the logistical problems of organizing the collection of fees can be overcome, as an unreasonable restriction on the right of individuals to petition the Court. While predictably unpopular with NGOs, the purpose of introducing fees is to preserve the real value of the right of individual petition since the Court’s future is inevitably compromised if the large number of clearly inadmissible cases clogging it up is not considerably reduced.

In addition, as the Interlaken Declaration recognizes, a more efficient filtering system to eliminate the underscoring cases with an economy of procedure needs to be developed. The Single Judge formation, in force since 1 June 2010 and involving the innovative tandem of judge and non-judicial rapporteur drawn from experienced Registry officials, offers such a procedure: by making experienced Registry lawyers and ultimately seconded national judges part of the decision-making process and by empowering most judges with the capacity to dismiss at an early stage undervesting cases in a simple procedure carries with it an important multiplier effect. In the longer term the introduction of a distinct and more effective filtering system – or a chambre des requêtes that would have such a function – properly resourced and ideally separate from the main constitutional business of the Court is of the essence. The mere admissibility criterion set out in Protocol No. 14 enabling the dismissal of ‘trivial’ cases has an important part to play, notwithstanding its awkward formulation.
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The pilot judgment procedure that has already been endorsed by the States in the Interlaken Declaration offers substantial promise in dealing with the phenomenon of repetitive case-law. It seems clear that the Court has taken a wrong promise in dealing with the phenomenon of repetitive case-law. It cannot be right that the Court is required to act as a compensation claims commission, awarding damages in large numbers of judgments by applying well-established case-law. The focus should instead be on the identification of the systemic or structural causes that give rise to these problems and to use the pilot procedure as a method to introduce national remedies that are capable of providing effective redress. This is the only appropriate role for an international court to play. Once it is established that the law or practice in question violates the Convention it must be the duty of the State to provide appropriate redress for all those similarly affected. The pilot procedure offers the best hope of doing this in a manner that will lead to national reform.

It must, however, be recognized that the enforcement of these judgments often creates special difficulties for the States concerned and that success is unlikely unless States are assisted by the Council of Europe to identify and take national steps also encompass the screening of legislation for compatibility with Convention principles, the willingness of the authorities to respond effectively to pilot judgments requiring the introduction of often far-reaching corrective measures to staunch the flow of repetitive complaints and the creation of effective remedies to provide national redress as regards alleged violations of all Convention rights. The future of the system is also bound up with the direct application of the Convention by national courts and other bodies. This presupposes that the Court’s essential case-law is translated into the official languages of the Contracting Parties, that national judges are provided with training in how this law is applied in practice and that they seek to do so in cases before them. It also presupposes that the law of the Convention is taught in law schools and that appropriate teaching manuals are made widely available. Effective national steps also encompass the establishment of a binding procedure for compatibility with Convention principles, the willingness of the authorities to respond effectively to pilot judgments requiring the introduction of often far-reaching corrective measures to staunch the flow of repetitive complaints and the creation of effective remedies to provide national redress as regards alleged violations of all Convention rights.

If the Court is to function effectively, it is paramount that the 47 States that have ratified the Convention take seriously their obligation to integrate it effectively into national law and practice. Indeed, if a system of advisory opinions is to be successful it presupposes that the superior courts are able to read and follow Strasbourg case-law. National human rights institutions, such as ombudsmen and national commissions, have a valuable role to play not only in encouraging the States in these endeavours but also in supervising their effectiveness in practice. The States have, however, been emphasizing the

Advocacy Opinion Jurisdiction

The notion of the Convention as providing a ‘long-stop’ protection’ is now out-dated and needs revision. The future of the Court is closely linked to the future of the Convention. The Convention machinery is now widely recognized as being the centrepiece of the human rights system for the 21st century.

The introduction of an advisory opinion procedure has two particular advantages. First, it emphasizes the important role of national judges in applying Convention principles and takes into account the well-known susceptibilities of the national authorities confronted with what is perceived as an invasion – perhaps damaging – contrary view from Strasbourg. Domestic judges and their authorities are likely to feel less ‘wounded’ by judgments of the Strasbourg Court if their participation is integrated in the decision-making process. Second, and more subtly, a system of advisory opinions, operating side by side with a petition system, ought to make it easier for the States to agree to putting in place and funding a more efficient filtering system because the Convention system will be perceived as an adjunct of the national system rather than as a meddling, external jurisdiction.

A system of advisory opinions may not be in keeping with the traditional model of supervision by the Court with its emphasis on binding judgments – though these would co-exist with the advisory jurisdiction – but it can only enhance the legitimacy of the Court in the long term by institutionalizing the concept of subsidiarity. It would be a missed opportunity to wait for ten years to put in place such a procedure.

Pilot Judgments and Repetitive Complaints

States to seek to identify the root causes and the steps needed to deal with them. The pilot judgment is one of the important potential tools of the future success of the Court, but it will need constant refinement by the Court as well as a revamped, more ‘hands-on’ technique of enforcement by the Committee of Ministers. Since it has such far-reaching implications for the States by requiring the introduction of reform measures to deal with difficult structural problems, their continued support is vital to its future development and success.

Advisory Opinions

The States have missed the opportunity in Interlaken to endorse the introduction of an advisory opinion procedure whereby the Court’s opinion can be requested by national superior courts. The omission was unfortunate. The Wise Persons have proposed advisory opinions as a method of enhancing the constitutional role of the Court. Requests for such opinions would come from national courts, and the Court would enjoy a discretion to accept or reject the request – a vital condition given the need for the Court to balance the number of requests against its workload of individual cases. The contribution of the
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The first 50 years of the operation of the Court have taught us three essential lessons. First, the future of this remarkable system of human rights protection, which is the envy of the world, must make more room for the principle of subsidiarity. But subsidiarity means more than the Court respecting the decisions of domestic courts and correctly applying its admissibility case-law. It also commotes the duty on the States to give practical effect to the Convention in national law. The co-responsibility of national judges in interpreting and applying the Convention needs to be made a reality. Translation, training and education are vital objectives in this respect. They have not yet been taken seriously by a large number of Contracting States.

Second, the Court’s major contribution to the protection of human rights lies not only in the examination of serious allegations of human rights violations in different settings but also in the adjudication of cases of constitutional import that establish standards erga omnes to be taken into account in the national law and practice of all European States. It is a hopeful development that the Contracting Parties are now encouraged by the Interlaken Declaration to have regard to judgments against other States. It is depressing that it has taken 50 years to do so.

Finally, the process of amendment of the Convention has become too cumbersome and is fraught with political uncertainty. There is an urgent need for the States to agree on a Statute that enables the Court’s procedures to be amended speedily when the need arises without it being necessary to await the lengthy process of national ratification, with its attendant complexity and uncertainty of outcome.

The Court is founded on the concept of the collective guarantee of human rights. This principal feature is often overlooked. It provides the juridical legitimacy for all the Court does since it gives States the right to be concerned with how rights are being protected in other countries as a trade-off for the right of individual petition in their regard. This inspired concept is arguably more important today than it was after the Second World War when the Convention was originally conceived and when the community of States shared a common heritage and was considerably smaller. However, it must be brought up to date with current political and legal realities. It needs to be supplemented by permitting requests for advisory opinions from national courts and a more substantive understanding of the notion of subsidiarity that gives due place to the responsibilities of the States themselves to be the front-line protectors of Convention rights. It is this realignment that is necessary to ensure the Court’s future.

Michael O’Boyle
Deputy Registrar of the Court

The vision of the Convention as an international treaty to which States must adhere to ensure a collective enforcement of human rights in Europe must, in accordance with the principle of subsidiarity, prioritize more effective national implementation of Convention principles as an inherent part of such collective action.

crucial role of national measures since the Rome Conference in 2000. Is there good reason to expect that the message will be acted on more purposively post-Interlaken? It seems clear that the real benefits to the Court’s workload will be perceptible only in the long-term. However, the basic message is clear for the future development of the system.
The application concerned the possible expulsion of a Tunisian national resident in Italy to Tunisia, where he asserted that in 2005 he had been sentenced in his absence to 20 years’ imprisonment for membership of a terrorist organization operating abroad in time of peace and for incitement to terrorism.

Nassim Saadi was arrested and placed in pre-trial detention in Italy on suspicion of international terrorism, among other offences. He was accused of conspiring with others to commit acts of violence, including attacks with explosive devices, in States other than Italy, with the aim of spreading terror. He was also accused of falsifying documents and receiving stolen goods.

Taştan v. Turkey, 4 March 2008 (63748/00)

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Isabelle Berro-Lefèvre Judge at the Court

Tajçi v. Turkey, 26 March 2008 (42048/04)

I remember one Turkish case not for its legal complexity, but because of its rather peculiar facts. To tell the story, one might use the language of a fairytale.

Once upon a time in the mountains of southeast Turkey there lived a shepherd. He was poor, and he looked after the sheep belonging to the inhabitants of a nearby village. They paid him for his services by supplying him with some clothes, and that was the only payment he received. The poor man was illiterate. He could speak his Kurdish mother tongue and had some poor knowledge of Turkish. He was 66 years old when he was married according to Islamic rites. He was born in 1940, but because of its rather peculiar facts. To tell the story, one might use the language of a fairytale.

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Religious Pluralism

The applicants are the religious community of Jehovah’s Witnesses and four of its individual members. Jehovah’s Witnesses are the fifth largest religious community in Austria, and the applicants complained about the Austrian authorities’ refusal to recognize Jehovah’s Witnesses as a religious society.

The proceedings started in 1978 when the individual applicants made a request under the Legal Recognition of Religious Societies Act to have Jehovah’s Witnesses recognized as a religious society. Following complex proceedings, the Federal Minister for Education and Cultural Affairs dismissed the applicants’ requests in 1997. The Constitutional Court quashed this decision as being arbitrary and violating the principle of equality. Meanwhile, in 1998, an Act on the Legal Status of Registered Religious Communities came into force and Jehovah’s Witnesses obtained legal personality as a religious community in July 1998. From that point, the community of Jehovah’s Witnesses had legal standing before the Austrian courts, was able to acquire and manage assets, establish places of worship and disseminate its beliefs. The applicants continued to seek recognition as a religious society, a status that confers a wider range of rights, in particular in the field of taxation and schooling. The request was dismissed by the Federal Minister for Education and Cultural Affairs in December 1998 on the grounds that a religious community could be registered as being autonomous only if it had already existed for ten years. This decision was confirmed in 2004.

The Court found a violation of Article 9 of the Convention. It underlined that the right of a religious community to an autonomous existence was indispensable for pluralism in a democratic society. The authorities’ prolonged failure to grant Jehovah’s Witnesses legal personality for which no relevant and sufficient reasons had been given had violated the applicants’ right to freedom of religion.

The Court also found a violation of Article 14 taken in conjunction with Article 9 of the Convention. The applicants had been discriminated against in that the ten-year qualifying period had not been applied to any other religious community.

Recently, following the adoption of the judgment, Jehovah’s Witnesses have obtained recognition as a religious society in Austria by a decision of the Ministry for Education and Cultural Affairs. 

Elisabeth Steiner
Judge at the Court

Montenegro’s Human Rights Inheritance

The Court’s judgment in the Bijelić case related to several unsuccessful attempts to enforce a final eviction order issued in 1994. The eviction order at issue relates to a flat in Podgorica, owned by the applicants. The first applicant (a mother), her husband and the other two applicants (their children) were holders of a specially protected tenancy concerning the flat in Podgorica where they lived. In 1989 the first applicant and her husband divorced and the former was granted custody of the other two applicants. In January 1994 the first applicant obtained a decision from the Court of First Instance declaring her sole holder of the specially protected tenancy, and her former husband was ordered to vacate the flat. In May 1994 an enforcement order was issued. In July 1994 the bailiffs attempted to evict the ex-husband with his new wife and their children, but the eviction was adjourned because he threatened to use force, namely to blow up the flat and the whole building. From then on all attempts to enforce the judgment failed because of the ex-husband’s constant threat to use force. On 15 July 1994 the first applicant bought the flat and became its owner. She gave it as a gift to the second and third applicants in October 1995.

The Court ruled that the Convention had been binding without any reservations for Montenegro continuously from 3 March 2004, when the State Union of Serbia and Montenegro joined the Council of Europe, until May 2007, when Montenegro itself became a full member of the Council of Europe and a Party to the Convention. By this reasoning, the Court confirmed a customary-law rule that human rights treaties that have entered into force in one territory or federal unit continue to be binding for the territory, regardless of political changes such as later independence. This line of reasoning is based on the proposition that human rights treaties are a specific type of international treaty, with the primary purpose of protecting individual human beings from possible government abuses and intrusions. In adopting this attitude, the Court was undoubtedly influenced by a third-party intervention, submitted by the European Commission for Democracy through Law (the Venice Commission) and Human Rights Action, a non-governmental organization from Podgorica. They argued that Montenegro should be deemed responsible for any and all violations of the Convention and/or its Protocols committed by its authorities as of 3 March 2004, which is when these instruments had entered into force in respect of the State Union of Serbia and Montenegro. In support of that argument they referred to practical considerations, the domestic and international context surrounding the Montenegrin declaration of independence, the Court’s own precedent regarding the separation of the Czech and Slovak republics and the opinion of the Human Rights Committee of the United Nations on the issue of State succession and the continuation of human rights treaties.

Second, by this judgment the Court removed all uncertainties concerning the temporal application of the Convention in respect of Montenegro, caused by Montenegrin independence proclaimed on 6 June 2006. The Court ruled that the Convention had been binding for Montenegro continuously from 3 March 2004, when the State Union of Serbia and Montenegro joined the Council of Europe, until May 2007, when Montenegro itself became a full member of the Council of Europe and a Party to the Convention. By this reasoning, the Court confirmed a customary-law rule that human rights treaties that have entered into force in one territory or federal unit continue to be binding for the territory, regardless of political changes such as later independence. This line of reasoning is based on the proposition that human rights treaties are a specific type of international treaty, with the primary purpose of protecting individual human beings from possible government abuses and intrusions. In adopting this attitude, the Court was undoubtedly influenced by a third-party intervention, submitted by the European Commission for Democracy through Law (the Venice Commission) and Human Rights Action, a non-governmental organization from Podgorica. They argued that Montenegro should be deemed responsible for any and all violations of the Convention and/or its Protocols committed by its authorities as of 3 March 2004, which is when these instruments had entered into force in respect of the State Union of Serbia and Montenegro. In support of that argument they referred to practical considerations, the domestic and international context surrounding the Montenegrin declaration of independence, the Court’s own precedent regarding the separation of the Czech and Slovak republics and the opinion of the Human Rights Committee of the United Nations on the issue of State succession and the continuation of human rights treaties.

The proceedings started in 1978 when the individual applicants made a request under the Legal Recognition of Religious Societies Act to have Jehovah’s Witnesses recognized as a religious society. Following complex proceedings, the Federal Minister for Education and Cultural Affairs dismissed the applicants’ requests in 1997. The Constitutional Court quashed this decision as being arbitrary and violating the principle of equality. Meanwhile, in 1998, an Act on the Legal Status of Registered Religious Communities came into force and Jehovah’s Witnesses obtained legal personality as a religious society in July 1998. From that point, the community of Jehovah’s Witnesses had legal standing before the Austrian courts, was able to acquire and manage assets, establish places of worship and disseminate its beliefs. The applicants continued to seek recognition as a religious society, a status that confers a wider range of rights, in particular in the field of taxation and schooling. The request was dismissed by the Federal Minister for Education and Cultural Affairs in December 1998 on the grounds that a religious community could be registered as being autonomous only if it had already existed for ten years. This decision was confirmed in 2004.

The Court found a violation of Article 9 of the Convention. It underlined that the right of a religious community to an autonomous existence was indispensable for pluralism in a democratic society. The authorities’ prolonged failure to grant Jehovah’s Witnesses legal personality for which no relevant and sufficient reasons had been given had violated the applicants’ right to freedom of religion.

The Court also found a violation of Article 14 taken in conjunction with Article 9 of the Convention. The applicants had been discriminated against in that the ten-year qualifying period had not been applied to any other religious community.

Recently, following the adoption of the judgment, Jehovah’s Witnesses have obtained recognition as a religious society in Austria by a decision of the Ministry for Education and Cultural Affairs. 

Elisabeth Steiner
Judge at the Court

Montenegro’s Human Rights Inheritance

The Court’s judgment in the Bijelić case related to several unsuccessful attempts to enforce a final eviction order issued in 1994. The eviction order at issue relates to a flat in Podgorica, owned by the applicants. The first applicant (a mother), her husband and the other two applicants (their children) were holders of a specially protected tenancy concerning the flat in Podgorica where they lived. In 1989 the first applicant and her husband divorced and the former was granted custody of the other two applicants. In January 1994 the first applicant obtained a decision from the Court of First Instance declaring her sole holder of the specially protected tenancy, and her former husband was ordered to vacate the flat. In May 1994 an enforcement order was issued. In July 1994 the bailiffs attempted to evict the ex-husband with his new wife and their children, but the eviction was adjourned because he threatened to use force, namely to blow up the flat and the whole building. From then on all attempts to enforce the judgment failed because of the ex-husband’s constant threat to use force. On 15 July 1994 the first applicant bought the flat and became its owner. She gave it as a gift to the second and third applicants in October 1995.

The Court ruled that the Convention had been binding without any reservations for Montenegro continuously from 3 March 2004, when the State Union of Serbia and Montenegro joined the Council of Europe, until May 2007, when Montenegro itself became a full member of the Council of Europe and a Party to the Convention. By this reasoning, the Court confirmed a customary-law rule that human rights treaties that have entered into force in one territory or federal unit continue to be binding for the territory, regardless of political changes such as later independence. This line of reasoning is based on the proposition that human rights treaties are a specific type of international treaty, with the primary purpose of protecting individual human beings from possible government abuses and intrusions. In adopting this attitude, the Court was undoubtedly influenced by a third-party intervention, submitted by the European Commission for Democracy through Law (the Venice Commission) and Human Rights Action, a non-governmental organization from Podgorica. They argued that Montenegro should be deemed responsible for any and all violations of the Convention and/or its Protocols committed by its authorities as of 3 March 2004, which is when these instruments had entered into force in respect of the State Union of Serbia and Montenegro. In support of that argument they referred to practical considerations, the domestic and international context surrounding the Montenegrin declaration of independence, the Court’s own precedent regarding the separation of the Czech and Slovak republics and the opinion of the Human Rights Committee of the United Nations on the issue of State succession and the continuation of human rights treaties.

Third, the Court chose a somewhat unusual type of relief. In the first place the Court directed Montenegro to enforce the order of January 1994 of the Court of First Instance by appropriate means and to pay the applicants, jointly, 4,500 euros for the non-pecuniary damage suffered plus 700 euros for costs and expenses. Alternatively, if Montenegro failed to enforce the said order, the government of Montenegro was to pay the applicants jointly a total sum of 92,000 euros, which it considered to be the appropriate market price for the flat in question. In so doing, the Court had regard to the specific circumstances of the case: the fact that the order had not been enforced for 15 years after ten unsuccessful attempts, genuine concern about the future enforcement of the judgment and the fact that the government of Montenegro had not contested the applicants’ claim of 97,200 euros in respect of pecuniary and non-pecuniary damage.

Nebojša Vučinić
Judge at the Court