

**Judicial activism in Europe:
the case of the European Court of Human Rights¹**

by
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Before speaking about the Court of Strasbourg,² I will make some observations about judicial activism in general. Having been a judge at the Belgian Constitutional Court for more than 16 years myself, I came to the conclusion that the most relevant distinction between judges in a superior Court, be it international or national, is the one between judges taking an activist attitude and judges taking an attitude of restraint.

Activist judges have a tendency to adopt a liberal interpretation of the jurisdiction of their court and of the material provisions they have to apply. They believe that they are better qualified to interpret the applicable legal provisions than the original framers of these texts. Not seldom, they show a distrust of political organs such as the governments and parliaments that have approved these texts. Restrained judges, on the contrary, show more respect for the intentions of the authors of the treaties, constitutions and laws they have to apply. They believe that political options should be made by politically responsible organs and that only when the manner by which those organs have translated those options into legal regulations manifestly contradicts superior legal principles, they are entitled to sanction such regulations.

In all courts, both types of judges are present. It is only the degree to which the one or the other category of judges dominates the court, which varies. The International Court of Justice is usually dominated by judges which – in conformity with the tradition of international law - exercise the jurisdiction of their Court with great restraint. The European Court of Human Rights, mostly composed by judges not trained in international law, exercises its jurisdiction in an increasingly activist way.

First, I will give some examples of activist behavior by the Court of Strasbourg. Then, I will indicate some of the techniques used by the Court to engage in an activist behavior and

¹ The opinions expressed are personal to the author and may not be attributed to the Constitutional Court of Belgium of which he is President.

² See also BOSSUYT, Marc, “Is the European Court of Human Rights on a slippery slope?”, in Spyridon FLOGAITIS, Tom ZWART & Julie FRASER, *The European Court of Human Rights and its discontents: Turning criticism into strength*, Cheltenham, E. Elgar, 2013, 217 p., at pp. 27-36.

some of the main arguments invoked to justify it. Finally, I will draw the attention to some of the dangers of this judicial activism.

I. Manifestations of activist behavior

A. The creation of positive obligations

In their classical meaning, civil rights and fundamental freedoms entail only negative obligations for the State. The State is prohibited to torture someone, to hold someone in slavery or to discriminate in the enjoyment of the rights and freedoms set forth in the Convention, to arbitrarily deprive someone from his life and freedom, to interfere in someone's right to respect for privacy, to freedom of thought, of expression, of assembly and association, etc. Only a few provisions explicitly impose positive obligations on the States parties.

Nevertheless, already in its judgment of 23 July 1968 on the merits of the *Belgian Linguistic* case, the Court stated – contrary to the Commission - that, despite the negative formulation of the right to education in Article 2 of the First Additional Protocol (“*No person shall be denied the right to education*”), “it cannot be concluded from this that the State has no positive obligation to ensure the respect for such a right”.³

This was strongly criticized by the Norwegian Judge Terje WOLD, who considered that inserting a positive obligation into that Article 2 was “*not a valid interpretation*”. According to judge WOLD, it would be embarking on “*a very dangerous road*” to admit that the regulation of human rights “*may vary in time and place according to the needs and resources of the community*”. In his view, “*the human rights granted are absolute rights*” which must be the same for everyone, since “*everyone*” is “*every person on the earth*”. Once a freedom is protected by law against interference by the State, it is a “*right*”. That does not imply, as stated by the Court, that it implies positive obligations. As stated by judge WOLD, “*[i]mposing a negative obligation upon the State is important and has a full meaning*”.

³ Case “*relating to certain aspects of the laws on the use of languages in Belgium*” v. *Belgium (merits)*, The Law, I, B, § 3.

Further criticism of the Court's approach was expressed by the British Judge Sir Gerald FITZMAURICE,⁴ particularly in his elaborate separate opinion (34 p.) to the judgment *Golder v. The United Kingdom* of 21 February 1975, in which the Court decided that the right of access to a court is “*inherent in the right stated by Article 6 of the Convention*” (§ 36). In that opinion (§ 32), Sir Gerald FITZMAURICE did stress that: “*There is a considerable difference between the case of ‘law giver’s law edicted in the exercise of sovereign power, and law based on convention, itself the outcome of a process of agreement, and limited to what has been agreed, or can properly be assumed to have been agreed’*”.

In my Ph. D. thesis of 1975, I also did put in doubt that this “positive” interpretation corresponds to the will of the States parties and I warned that, in doing so, the Court took a path with “incalculable” dangers.⁵

Another important judgment in which the Court attributed positive obligations to Article 8 was *Marckx v. Belgium* (13 June 1979). In that judgment, the Court stated that the right to respect for family life “does not merely compel the State to abstain” from arbitrary interference by the public authorities: “in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective ‘respect’ for family life”. In a comment published in 1980 in the *Belgian Review of International Law*, I wrote that the Court had transformed a civil right into a social right requiring an active intervention by the legislator.⁶ I observed that, by neglecting the distinction between classical freedoms and social rights, the Court did risk exceeding its competence, which may not be done by way of interpretation. In my conclusion, I also observed that the method of interpretation of the Court would cause the legal counsels of the applicants quite some pleasant surprises.⁷ Needless to say that for the counsels of the defendant governments those surprises are, on the contrary, particularly unpleasant.

Four months later, in another important judgment (*Airey v. Ireland*, 9 October 1979), the Court declared with respect to Article 6 that “the fulfillment of a duty under the

⁴ MERRILS, John Graham, *Judge Sir Gerald Fitzmaurice and the Discipline of International Law*, The Hague, Kluwer, 1998, 340 p.

⁵ BOSSUYT, Marc, *L’interdiction de la discrimination dans le droit international des droits de l’homme*, Brussels, Bruylant, 1976, 262 p., at p. 217.

⁶ BOSSUYT, Marc, “L’arrêt *Marckx* de la Cour européenne des droits de l’homme”, *Belgian International Law Review*, 1980, pp. 53-81, at p. 68.

⁷ *Ibid.*, p. 79.

Convention on occasion necessitates some positive action on the part of the State”. According to the Court, also in civil litigation, Article 6 of the Convention does “compel the State to provide for the assistance of a lawyer when such assistance proves indispensable for an effective access to court”.

Today, the Court has attributed positive obligations to virtually all Convention rights. At the time of the earlier judgments, the positive obligations were generally confined to the obligation to take legislative measures which did not entail considerable expenses. This did change,⁸ when the Court decided in its judgment *Gaygusuz v. Austria* (16 September 1996) that an emergency assistance in case of unemployment which was linked to the payment of contributions was a pecuniary right for the purposes of Article 1 of Protocol n° 1 (the protection of property). The situation became worse when the Court, in its judgment *Koua Poirrez v. France* (30 September 2003), decided that even a non-contributory social benefit for disabled adults must be considered to be a pecuniary right.

This interpretation of the right to property is designed to enlarge the jurisdiction of the Court to social rights, including social security regulations, in order to overcome the limitation to the rights and freedoms set forth in the Convention contained in the prohibition of discrimination provided for in Article 14 of the Convention. This interpretation was confirmed by the Grand Chamber of the Court in its decision on admissibility in *Stec and Others v. The United Kingdom* of 6 July 2005. In that decision, the Court declared itself competent to examine the applications of Ms Stec and others complaining that the Reduced Earnings Allowance scheme funded by general taxation and the Retired Allowance scheme treat men and women differently up to 2020.

It is true that the Court has recognized that in the field of social and economic rights the States parties enjoy a “wide” or a “broad” margin of appreciation.⁹ As long as the Court sticks to this prudent approach, it may be questioned whether this praetorian extension of the Court’s jurisdiction was worthwhile. But how long will it take before the so-called “dynamic”

⁸ BOSSUYT, Marc, “Should the Strasbourg Court exercise more self-restraint? On the extension of the jurisdiction of the European Court of Human Rights to social security regulations”, *Human Rights Law Journal*, n° 28, 2007, pp. 321-332, at pp. 321-324.

⁹ *Stec and others v. The United Kingdom* (merits), GC, 12 April 2006, § 52, and *Andrejeva v. Latvia*, GC, 18 February 2009, § 89.

interpretation of the Court will lead to a stricter control of the infinite variety of distinctions that States parties have introduced in their economic and social legislation?¹⁰

B. Another worrisome development is the recognition of the indirect responsibility of States parties for the possible violation of some rights by other States, generally States nonparties to the Convention.

This development started with the judgment *Soering v. The United Kingdom* of 7 July 1989. Based on the absolute character of the prohibition of torture, the Court decided that the extradition of Mr Soering for homicide to the United States, where he would run a real risk of spending years on death row, would violate that prohibition. On the basis of that judgment, the Court, starting with its judgment *Cruz Varas and Others v. Sweden* (20 March 1991), engaged in the examination of applications by asylum seekers who complained that, if they would be expelled to their country of origin, they would run a real risk of being subjected to inhuman or degrading treatment.

Between 1989 and 2004, the Court rendered (in 16 years) 16 judgments concerning asylum seekers (one a year). As far as Article 3 is concerned (the prohibition of torture and inhuman or degrading treatment or punishment), the Court found during that period 4 violations in 12 judgments (33%). However, after the Grand Chamber judgment in the case *Mamatkulov and Askarov v. Turkey* (4 February 2005), the Court rendered 45 judgments in 4 years and a half (10 judgments a year) and the Court found 28 violations of Article 3 out of 35 those judgments (80%). Since *Mamatkulov*, there is a finding of a violation of Article 3 in such cases every two months instead of every four years.¹¹

In its Grand Chamber judgment *Mamatkulov and Askarov*,¹² the Court decided – contrary to its previous judgment of 1991 in *Cruz Varas and Others* and to its decision of 13 March 2001 in *Conka and Others v. Belgium* – that its interim measures had become binding. By granting interim measures, the president of a section of the Court indicates that it is

¹⁰ BOSSUYT, Marc, “L’extension de la compétence de la Cour de Strasbourg aux prestations sociales : sur l’interprétation de l’article 14 de la Convention combiné avec l’article 1^{er} du protocole n° 1 dans les affaires *Gaugusuz, Koua Poirrez, Stec et autres, Burden et Andrejeva*”, *Revue de Droit Monégasque*, 2009-2010, pp. 91-130, at p.125.

¹¹ BOSSUYT, Marc, *Strasbourg et les demandeurs d’asile: des juges sur un terrain glissant*, Brussels, Bruylant, 2010, 198 p., at pp. 127-128.

¹² BOSSUYT, Marc, “Judges on thin ice : the European Court on Human Rights and the treatment of asylum seekers”, *Inter-American and European Human Rights Journal*, 2010, pp. 3-48, at pp. 14-21.

desirable not to extradite or to expel the applicants pending the procedure before the Court. In a sharp dissenting opinion, the Judges Lucius CAFLISCH (Liechtenstein), Riza TÜRMEN (Turkey) and Anatoly KOVLER (Russia) stated that the Court had not interpreted but amended the Convention. Indeed, contrary to the Statute of the International Court of Justice and to the Inter-American Convention on Human Rights, the European Convention does not contain any provision concerning interim measures. Moreover, proposals of the Parliamentary Assembly of the Council of Europe to include in an additional protocol a provision making interim measures binding, had been consistently rejected by the States parties.

What could be expected did happen. Year after year, the number of interim measures requested by applicants increased annually: 122 requests were made in 2006, 883 in 2007, 2.871 in 2008 and 4.786 in 2010.¹³ The percentage of the requests granted by the presidents of the different sections of the Court increased even more. In a declaration of 11 February 2011, the President of the Court expressed his concern about the “alarming rise” in the number of requests for interim measures. At the Izmir Conference in April 2011, the Member States of the Council of Europe recalled that “*the Court is not an immigration Appeals Tribunal or a Court of fourth instance*”. With the exception of a decrease in the percentage of interim measures granted (from 1,443 or 38% in 2010 to 103 or 5% in 2012), it does not appear that the Court takes this rebuke very seriously.

Particularly worrisome with respect to asylum is the Grand Chamber judgment *M.S.S. v. Belgium and Greece* of 21 January 2011.¹⁴ Based on the EU Dublin Regulation, Belgium had transferred an Afghan interpreter to Greece, who had paid his smuggler 12.000 \$ for travelling to that country. By stating that asylum seekers that had entered the Schengen area in Greece may not be transferred to that country, the Court undermines the EU Dublin Regulation, a central piece of the Common European Asylum System. In this case, the Court condemned Greece, directly responsible for the violation of Article 3, to pay 1,000 EUR to the applicant, while Belgium, which was only indirectly responsible, had to pay 24.900 EUR.

¹³ According to the annex to the declaration of the President of the Court on 11 February 2011.

¹⁴ BOSSUYT, Marc, “Belgium condemned for inhuman or degrading treatment due to violations by Greece of EU Asylum Law, *M.S.S. v. Belgium and Greece*, Grand Chamber, European Court of Human Rights, January 21, 2011”, *European Human Rights Law Review*, 2011, pp. 581-596.

Other developments in this judgment raising concern are:

1) The continuously lowering of the threshold of Article 3: not every ill-treatment amounts to torture, or even to inhuman or degrading treatment; a particular level of severity (the threshold) has to be attained. In the first judgments, finding that the conditions of retention of an asylum seeker violated Article 3, the conditions considered “unacceptable” lasted for several months (from 17 months in *Dougoz v. Greece*, 6 March 2001, down to 2 or 3 months in several judgments, also mainly against Greece); however, in *M.S.S.* and in other recent judgments, such conditions lasted only 4 days or even less: two days in *Rahimi v. Greece* (5 April 2011) and even maybe only 2 hours in *Tehrani and Others v. Turkey* (13 April 2010). Is that compatible with the absolute character of the prohibition of torture which allows no exception, no restriction and no derogation “not even in time of war or other public emergency threatening the life of the nation”? It is, however, the absolute character of that prohibition that justifies the indirect responsibility for its violation by other States.

2) In 2010, the Court started recognizing “particularly vulnerable groups” such as “mentally disabled” in *Orsus and Others v. Croatia* (16 March 2010) and “Roma” in *Alajos Kiss v. Hungary* (20 May 2010). In *M.S.S.* this list was expanded with a self-elected category: asylum seekers. Indeed, every foreigner who decides to apply for asylum is an asylum seeker, regardless his personal condition or his motives for applying. Other groups deserving special attention are women in Afghanistan (in *N. v. Sweden*, 20 July 2010) and children (in *Nunez v. Norway*, 28 June 2011, and *Kanagaratnam and Others v. Belgium*, 13 December 2011). In doing so, the Court is shifting from protecting civil rights of the universal human being towards protecting social rights of specific categories of persons having particular needs. How many more specific categories will the Court discover in the near future?

3) In *M.S.S.*, the Court has also extended the applicability of Article 3 to the living conditions of asylum seekers. In doing so, the Court is transforming the civil right by excellence (the absolute prohibition of torture is an obligation not to do something, an obligation that has to be and can be respected regardless the available resources) into an obligation to provide social benefits to asylum seekers which requires considerable expenditures. At this very moment of a deep financial crisis, according to the Court, Greece should give priority to asylum seekers rather than to its own citizens.

In its judgment *Sufi and Elmi v. The United Kingdom* (28 June 2011),¹⁵ the defendant government was considered indirectly responsible for a violation of Article 3 of the Convention if the applicants, two Somali sentenced several times in Britain on account of a variety of criminal offences, would end up in a settlement in Somalia or in a refugee camp in Kenya. The Court was of the opinion that the conditions in those camps were “*sufficiently dire to amount to treatment reaching the threshold of Article 3 of the Convention*”. If a foreigner, even when he has committed criminal offences, may not be returned to his country when the conditions of living in that country are not sufficiently decent in the eyes of the Court, it will become very difficult to pursue an effective – and not a merely cosmetic or illusory - migration policy.

Such a policy is neither facilitated by the Grand Chamber judgment in *Hirsi Jamaa v. Italy* (23 February 2012), which awarded 15,000 euros in respect of non-pecuniary damage to 11 Eritreans and 13 Somalis each, who had tried to reach Lampedusa by boat but were sent back to Libya by the Italian navy. It certainly will not discourage migrants to undertake such a perilous journey at the risk of their lives and it raises a number of intriguing questions relevant to the mission of Frontex (the EU agency competent for European border management).

In other recent judgments, the Court has extended the indirect responsibility for acts of foreign States to possible violations of Article 6 of the Convention (the right to a fair trial). In its judgment *Othman (Abu Qatada) v. The United Kingdom* (17 January 2012), the Court decided that the extradition of the applicant to Jordan would not violate Article 3 but Article 6 “*on the account of the real risk of the admission at the applicant’s retrial of evidence obtained by torture of a third person*”. It is this judgment that prompted the British Prime Minister on 20 January 2012 before the Parliamentary Assembly of the Council of Europe to state, referring to persons who intend to harm one’s country, that “*there are circumstances in which you cannot try them, you cannot detain them and you cannot deport them*”. It is quite obvious that this development will, in the future, prohibit extraditions to a great number of countries and hamper international judicial cooperation.

¹⁵ BOSSUYT, Marc, “Strasbourg et les demandeurs d’asile (*M.S.S. c. Belgique et Grèce, et Sufi et Elmi c. le Royaume-Uni*)”, VI *Annuaire international des droits de l’homme 2011*, Athens, Ant. N. Sakkoulas, 2012, pp. 663-676, at pp. 668-676.

In a later judgment (*El Haski v. Belgium*, 25 September 2012), the Court attributed even further extra-territorial effects to Article 6 by judging that that Article was violated since the applicant was condemned in Belgium on the basis of material provided by Morocco while it was not excluded that it could have been obtained in violation of Article 3 of the Convention. In the first case, Jordan could not obtain the extradition of Abu Qatada due to Jordan's own actions; in the second case, Belgium could not condemn El Haski due to actions of another country (Morocco).

C. Some other judgments

Of course, I could also speak about the judgment of the Court in the case of *Lautsi v. Italy*, in which a Chamber of the Court unanimously decided that the presence of crucifixes in schools in Italy violated the freedom of religion of two school boys. This judgment of 3 November 2009 caused uproar from several States parties which intervened in that case: Armenia, Bulgaria, Cyprus, Romania, the Russian Federation, Greece, Lithuania, Malta, Monaco and San Marino. In its judgment of 18 March 2011, the Grand Chamber of the Court reversed its position by deciding that this matter fell within the margin of appreciation of the State party concerned. In his concurring opinion attached to that judgment, Judge Giovanni BONELLO (Malta) referred to “*a court in a glass box a thousand kilometres away*” which had been “*engaged to veto overnight what [had] survived countless generations*”.

Or the judgment of *Hatton and Others v. The United Kingdom* (2 October 2001) concerning complaints of an increase in the level of noise caused at the applicants' homes by aircraft using Heathrow airport. In that judgment, the Court decided that “*a positive duty [rested] on the State to take reasonable and appropriate measures to secure the applicants' rights under Article 8 § 1 of the Convention*” and that, in the particular case at hand, the defendant Government had “*failed to strike a fair balance between the United Kingdom's economic well-being and the applicants' effective enjoyment of their right to respect for their homes and their private and family lives*”. That judgment was overturned on 8 July 2003 by the Grand Chamber of the Court, which decided that the authorities “*had not overstepped their margin of appreciation*”.

As a Belgian, I should also refer to the Grand Chamber judgment *Salduz v. Turkey* (27 November 2008) which provoked, particularly in continental law countries, considerable

legal uncertainty and a high increase in the cost of criminal justice, or I could refer to the judgment in *B. v. Belgium* (10 July 2012) which resulted in rewarding a mother for the legal kidnapping in the United States of her 5 year old child, in disregard of the Hague Convention on the civil aspects of child abduction and of the well-reasoned judgment from the Court of Appeal of Ghent, as recognized in the joint dissenting opinion of Judges Ms Isabelle BERRO-LEFÈVRE (Monaco) and Ms Isil KARACAS (Turkey)

And, if I were British, I should refer to the judgment *Hirst v. The United Kingdom* (6 October 2005), in which the Court decided that the law banning convicted prisoners from voting was in breach of Britain's obligation to hold free elections at reasonable intervals by secret ballot. I would not be surprised if lawyers in most of the States parties can enumerate a number of judgments which shocked the legal conscience of their citizens but, as the Court is rendering about 1,500 judgments a year, many judgments are largely unknown even to most students of the European Convention.

II. What are the techniques used by the Court to engage in an activist behavior and which is the main argument invoked to justify such a behavior?

In important speeches delivered in Strasbourg at the European Court¹⁶ and in London at the Barnard's Inn Reading,¹⁷ both in 2011, Baroness HALE of Richmond, Justice at the Supreme Court of the United Kingdom, identified four different ways in which the Convention jurisprudence has developed beyond the expectations of the original parties:

a) The autonomous concept (a concept used to avoid that European norms would vary according to the different meaning they may have in different States parties):

According to Baroness HALE, there is no problem when the language of the Convention is applied "*to situations which may not have been contemplated by the original framers, but which are entirely capable of being covered by the language used and are consistent with its underlying principles and purpose*". However, the concept "civil right", e.g., has been developed in a way that has, in her view, now reached its natural limits. In her

¹⁶ Baroness HALE of Richmond, in *European Court of Human Rights, Council of Europe, Dialogue between judges 2011*, Strasbourg, pp. 11-19.

¹⁷ www.gresham.ac.uk/lectures-and-events/beanstalk-or-living-instrument-how-tall-can-the-european-convention-on-human-rights-grow, published also under the title "Common Law and Convention Law: The Limits to Interpretation", in *European Human Rights Law Review*, 2011, pp. 534-543.

opinion, “*claims for services, which require a high degree of discretionary judgment on the part of officials, are not readily susceptible to court-like adjudication on the merits*”.

b) The concept of implied rights:

According to Baroness HALE, some decisions of the Court are “*examples of an evolution in the Court’s jurisprudence which, however admirable it may be from some points of view, does risk going further than anything the member States committed themselves to at the time*”. And, while accepting that the Convention may develop beyond its original intentions, she is of the opinion that “*those developments should be foreseeable, for otherwise States might be landed with obligations which they would not have signed up had they known*”.

c) The development of positive obligations:

In the opinion of Baroness HALE, this is “*the more controversial area*” because they oblige the States parties “*to provide some benefit which [they] could not otherwise be obliged or wish to provide*”. She wonders whether we are beginning to see “*the emergence of socio-economic rights*” and whether that is “*a good thing or a bad thing*”.

d) The narrowing of the margin of interpretation:

On this issue, Baroness HALE referred to Lord BINGHAM (Britain’s former senior Law Lord), who believes that respect should be shown to “*the considered judgment of a democratic assembly*” and that “*the democratic process is liable to be subverted if opponents of an Act achieve through the courts what they could not achieve in Parliament*”.

e) Conclusion:

Baroness HALE concluded that “*there must be some limits*”.

I could not agree more. The problem is, as I stated in 2007 in the *Human Rights Law Journal*, that the only limitations to its jurisdiction that Court seems to accept are self-imposed limitations.¹⁸ At the end of the 70’s, the Court relied on the so-called “present-day interpretation” of civil rights in order to condemn judicial corporal punishment of children (in *Tyrer v. The United Kingdom*, 25 April 1978), the distinction between legitimate and illegitimate children (in *Marckx v. Belgium*, 13 June 1979) and the absence of indispensable legal assistance in a civil procedure (in *Airey v. Ireland*, 9 October 1979). All this, however, is very modest compared with the more recent extension of the jurisdiction of the Court to the

¹⁸ BOSSUYT, *supra* footnote 8, p. 328.

field of social security by relying on a property protection provision, as we have seen in *Gaygusuz* (1996), *Koua Poirrez* (2003) and *Stec and Others* (2005).

The Court justifies the extension of its jurisdiction mainly by quoting its *Tyrer* judgment in which it stated that the Convention is “*a living instrument*” which must be interpreted “*in the light of the present day conditions*”. On the *UK Human Rights Blog* of 6 July 2010, Rosalind ENGLISH stated that for some the notion of a “living document” is “*a Trojan horse for judicial activism, giving Strasbourg judges the liberty to find what they want to find in the interstices of Convention rights*”.

Nevertheless, the living instrument doctrine is not without validity for the material provisions of the Convention. Notions as “discrimination”, “torture”, “family life” etc., to mention only a few, should not be interpreted nowadays as they were understood in 1950. There is no major problem when the Court interprets the civil rights and fundamental freedoms guaranteed by the Convention “in the light of present day conditions”, as long as the Court remains within the borders of its jurisdiction. It is my submission, however, that the Court is exceeding its jurisdiction when it transforms - by way of interpretation - a civil right into a social right.

The Court does not take sufficiently into account the fact that its dynamic interpretation of the normative provisions of the Convention is limited by the institutional provisions of the Convention governing its jurisdiction. The jurisdiction of an international court is determined by the States parties in its constitutive treaty. The legal basis for the binding character of the States parties’ obligations lies in the acceptance of that treaty. To disregard, willingly and knowingly, the intentions of the authors of a treaty is incompatible with the principle of good faith, the cardinal principle of any legal interpretation. Moreover, it amounts to a limitation of State sovereignty without democratic legitimation.¹⁹

III. What are the dangers of this judicial activism?

A. As far as the creation of positive obligations is concerned

¹⁹ *Ibid.*, p. 330.

1. A first casualty of the positive obligations doctrine is democracy itself. It is up to the national constitutions to determine which organs are granted which powers. In conformity with the Separation of Powers principle, it is up to political organs to create the rules and to the judiciary to apply them. The Court is entitled to interpret the rules, not to extend its own competences by creating new rules. According to the text of the Convention, the power of the national legislators is limited by negative obligations. Nowhere in the Convention, have the States parties accepted that positive obligations should be imposed upon them without the intervention of parliament.

Moreover, the concept of positive obligations is open-ended. The Court does not set up limitations to those positive obligations. With respect to the negative obligations, several paragraphs of the Convention provide, in the second paragraph of the articles concerned, for the possibility of restricting those negative obligations of the State on the condition that they are “prescribed by law”, “necessary in a democratic society”, taken in the interest of a number of goals specifically mentioned in the relevant paragraph and in a non-discriminatory way. Applying these conditions to positive obligations makes no sense: e.g. a State cannot be required to demonstrate the necessity in a democratic society to restrict a particular rather than another social right to all or to certain categories of persons. In case of scarcity of resources, it is up to the political authorities of the State to set up priorities as far as the rights, their beneficiaries and the timetable of their realization is concerned, without having to justify that a particular restriction is “necessary in a democratic society”. That is why treaties on social rights do not contain clauses similar to the ones on restrictions applicable to civil rights and fundamental freedoms.²⁰

The Court has appropriated itself the power to judge to what extent it may impose positive obligations on the States parties. It is also since the attribution of positive obligations that cases of conflicts between human rights have multiplied, giving the opportunity to the Court to expand its powers by balancing the one right against the other.

2. It is not only problematic that those positive obligations are created by a court, but even more so that they are created by an international court. A national constitutional court functions within the framework of the national constitution and is composed of nationals of

²⁰ *Ibid.*, p. 325, footnote 50.

the State, which are familiar with the economic, social, cultural and political environment of the national community upon which the constitutional court exercises its jurisdiction. An international court is composed in its overwhelming majority by non-nationals which are much less familiar with the national environment in which the decisions it controls are taken.

Moreover, at any time, the competent political authorities can amend the laws and even the constitution when the interpretation of domestic courts goes beyond what is considered appropriate. As an amendment of the European Convention requires 47 ratifications, it is practically impossible for the States parties to counter the Court's judicial activism. The knowledge that the jurisdiction of the Court is based on an agreement given by the States parties in the form of an international treaty, should induce the Court to exercise its jurisdiction with great restraint rather than continuously trying to extend it beyond the limits expressed by the negative formulation of the rights set forth in the Convention.

As long as the Court applies the rights and freedoms of the Convention in conformity with their negative formulation, the lack of familiarity of foreign judges with the national environment of the State parties concerned is generally not problematic. However, when attributing positive obligations to those rights, the Court needs an overall view of the factual and legal situation in the country concerned, taking into account the whole of the national context, including the other interests of the State and of other citizens and groups and not in the least the budgetary implications of its judgments.

3. The extension of the Court's jurisdiction to economic and social rights leads to the development of a purely regional human rights standard, unattainable by many countries, and depriving human rights of their universality, which is one of the strengths of the traditional concept of human rights. Indeed, as the realization of those social rights depends on the availability of resources in the State concerned, there is no universal standard, not even a common regional standard among States parties to the Convention ranging from Albania to Switzerland or from Monaco to Moldova.²¹

4. The extension of the Court's jurisdiction to economic and social rights also enlarges the applicability of the prohibition of discrimination guaranteed in Article 14 of the

²¹ *Ibid.*, p. 329.

Convention. The general prohibition of discrimination provided for in the Twelfth Additional Protocol has only been the subject of ratification by a limited number of Western European Members of the Council of Europe.²² States appear not sufficiently aware of the fact that the application of the prohibition of discrimination to economic and social rights amounts to relinquishing a considerable degree of sovereignty from the national legislators to the international judge, much more than is the case with respect to civil rights and fundamental freedoms.

This is particularly the case since the Court, when examining differences of treatment, attaches great weight to the element of proportionality. In a *Festschrift* published in 2010 – in honour of the former German Judge at the Strasbourg Court, Renate JAEGER -, Paul MAHONEY, former Registrar but at present the British Judge at the Strasbourg Court, expressed his worries over the “*interventionist tendency whereby the principle of proportionality becomes merely the means by which a small group of international judges substitute their own personal view as to the desirability of the regulatory policy chosen for that of the democratic institutions of the country, judicial as well as executive and legislative*”.²³

5. The reliance of the Court on EU regulations and directives, as in its *M.S.S.* judgment, to define the extent of the positive obligations the States are supposed to have assumed by becoming parties to the Convention, is highly questionable. The obligations accepted by the States parties to the Convention are minimum obligations. According to the preamble of the Convention, the governments signatory thereto were resolved to take the “first steps” for the collective enforcement of “certain” of the rights stated in the Universal Declaration.

In any case, the Court cannot rely on those regulations and directives to interpret the Convention with respect to the 19 States parties which are not Members of the European Union. And the Court may neither interpret the extent of the obligations applicable to the 28 Member States of the European Union differently from those applicable to the 19 other States

²² Among the Western European Members of the Council of Europe, only Andorra, Cyprus, Finland, Luxembourg, The Netherlands, San Marino and Spain.

²³ MAHONEY, Paul, “Reconciling Universality of Human Rights and Local democracy – the European Experience” in *Grundrechte un Solidarität. Durchsetzung und Verfahren, Festschrift für Renate Jaeger*, Kehl-am-Rhein, N.P. Engel Verlag, 2010, pp. 147-161, at p. 158.

parties to the Convention. Finally, it is not up to the Court in Strasbourg – but to the Court of Justice in Luxembourg - to interpret the extent of the EU regulations and directives and to sanction their non-respect.

B. As far as the asylum cases are concerned²⁴

Based on the absolute character of the prohibition of torture, the Court moved into the direction of finding indirect and potential violations of the Convention: indirect violations, because the States parties are held responsible for treatment inflicted by other States, generally non States parties, and potential violations, because very often the prohibited treatment has not taken place yet but could take place if a person has to leave the territory of a State party.

As a consequence,

- 1) the Court does not assess facts that did happen but speculates about events that could happen;
- 2) the Court must be familiar not only with situations and regulations of States parties to the Convention but also of non-States parties;
- 3) the Court does not only rely on primary sources but also relies heavily on secondary sources.

It is particularly in the field of asylum and immigration, that the Court quite often indicates interim measures. The Court intervenes in the daily exercise of the migration policy of the States parties, based on a unilateral request, at very short notice and without giving the defendant government the opportunity to state its case. Not only is, as already stated, the legal basis for such an intervention shaky, it is also very likely that, if the State party abides to those interim measures, an irreversible situation is created: chances are indeed very low that in a later stage the applicant will still leave the territory of the State party. By deciding that the interim measures had become binding, the Court has attracted a sharp increase of the applications by asylum seekers contributing to the overall increase of applications submitted and to a backlog which makes it extremely difficult for the Court to discharge its duties “within a reasonable time”.

²⁴ BOSSUYT, Marc, “The Court of Strasbourg Acting as an Asylum Court”, *European Constitutional Law Review*, n° 8, 2012, pp. 203-245, at 241-242.

The backlog of applications pending before the Court did increase from 97,300 on 1 January 2009 up to 160,200 on 1 September 2011. It is true that now, two years later, thanks to the new single-judge procedure instituted by the Fourteenth Additional Protocol, that backlog went down to 119,750 pending applications. However, as observed by Judge MAHONEY, last year at a conference in The Hague on the Court and its discontents: “*It is inconceivable that the Court [...] should have the material capacity to look fully into the merits of all unresolved human rights violations within a Convention community of 47 States and 800 million people*”.²⁵ What could be done and what should be done to meet this challenge is not the subject of the present lecture.

Conclusions

The analysis which I presented may raise concern, particularly with those unfamiliar with the activity of the Court. Some may wonder what might be the appropriate reaction. I consider it as my duty to tell you what I would consider not appropriate. Any suggestion of withdrawing from the Council of Europe or denouncing the European Convention is, in my view, inappropriate. Even suggesting that some of the judgments of the Court should not be implemented is ill advised. We are proud to belong to a region that shares common values. Upholding the Rule of law and respect for human rights are some of the most cherished common values and the Convention and the Court are expressions of those values.

But, this should not prevent us from criticizing judgments which deserve it, particularly when they are typical for a tendency which gives rise to concern. It is my conviction that the long standing reluctance to criticize the Court is one of the main reasons why the Court is continuously advancing on - what I have called - “a slippery slope”. The only hope to stop this unfortunate development is by subjecting the judgments of the Court to strict scrutiny and to assist the judges of the Court to become aware that more restraint is necessary to enhance its credibility.

²⁵ MAHONEY, Paul, “The European Court of Human Rights and its ever-growing caseload: Preserving the mission of the Court while ensuring the viability of the individual petition system”, in FLOGAITIS *et al.*, *supra* footnote 2, pp. 18-26, at p. 22.

Criticizing judgments of the Court of Strasbourg should not be a taboo. It is not blasphemy and it should be possible without running the risk of being labeled a “populist”, if not an “enemy of human rights”. In an “open European society” should it be possible to engage in a free and frank dialogue, not the kind of dialogue in which the Strasbourg Court tells the national courts what they should do, but a genuine dialogue in which the national courts and the governments of the States parties, the Court of Luxembourg and the Court of Strasbourg alike should participate in mutual respect.

I myself fully agree with what has been said by the former President of the Court, Luzius WILDHABER (Switzerland), at the same The Hague conference last year: “*institutions and states will perish, if those who love them do not criticize them and if those who criticize them do not love them*”.²⁶ It is in this spirit²⁷ that I presented you my analysis of the activity of Court of Strasbourg.

Brussels, 16 September 2013

²⁶ WILDHABER, Luzius, “Criticism and case-overload: Comments on the future of the European Court of Human Rights”, in FLOGAITIS *et al.*, *supra* footnote 2, pp. 9-17, at p. 10.

²⁷ See also BOSSUYT, *supra* footnote 11, pp. 103-104.