# Strasbourg’s integrationist role, or the need for self-restraint?

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# Ed Bates.[[1]](#footnote-1)\*

In this piece, I argue that claims that the ECHR is an integrationist instrument must be treated with caution, and that prudent self-restraint is required from the Court. I do so in the spirit indicated by former President Luzius Wildhaber, who once wrote, ‘institutions and states will perish, if those who love them do not criticize them, and if those who criticize them do not love them’.[[2]](#footnote-2) I also have in mind comments recently made by former Registrar (and Judge) Paul Mahoney, lamenting the absence of ‘self-questioning and openness to criticism’ amongst ‘many leading lights of the European human rights movement’.[[3]](#footnote-3) He refers to ‘an all too common intolerance in European human rights circles of anyone who dares’ break ranks by questioning Strasbourg - such individuals are viewed as ‘renegades’ or ‘traitors’, not ‘true human rights “patriots”’![[4]](#footnote-4) I hope the reader will not see me in that light, tolerating this piece, even if my arguments are necessarily brief. They might be provocative; however, noting Mahoney’s observations might this be a good thing? My ambition is not to question the legitimacy of the Court, but to contribute to a debate about its role and how far it can go.

## I

It is abundantly clear that the Convention was *not* born as an integrationist instrument but evolved into a *version* of one. Hence, as President Ryssdal noted in 1995, by then there had been a qualitative evolution in Strasbourg’s role *compared to original expectations*. It was in that sense *only* that he labelled the court, ‘quasi-constitutional’.[[5]](#footnote-5) Michael O’Boyle referred to a ‘success story’ that was ‘probably unexpected and unforeseen’, as the Convention system grew ‘imperceptibly’ into ‘a fledgling constitutional system for the protection of human rights’.[[6]](#footnote-6)

If one considers the limited footing for ‘collective enforcement’ of ‘certain rights’ (ECHR, Preamble) specifically envisaged for the Court by Article 19 ECHR, then the metamorphization just referred to was remarkable. Moreover, it was not expressly endorsed by the States. They acquiesced in it, notably as they accepted the significant reforms instituted by Protocol 11 in the 1990s (which occurred at a time when subsidiarity was a prominent feature of Strasbourg review).[[7]](#footnote-7)

This is a first reason for cautioning against sweeping assumptions about the Court’s remit and authority in relation to the Convention as an integrationist instrument. This remains so, despite its status as a ‘constitutional instrument of European public order’ ((self-) proclaimed by Strasbourg, yet totally opaque as to its meaning), and talk of Strasbourg as ‘the Conscience of Europe’.

However, do such descriptions not risk encouraging a grand vision for *the Court* as an overall voice for human rights, way *beyond* what the States have endorsed via the vehicle of *the Convention*? Wildhaber has expressed concern that some human rights advocates, ‘believe that the Court conceives of its mission as being at the forefront of progressive development, to act as a sort of a indefatigable, widely visible human rights locomotive’.[[8]](#footnote-8) This may result in an unhelpful, binary attitude: the ‘best’ judgments extend human rights, the ‘worst’ fail to do so. ‘Unhelpful’ – why?

## II

Not all the criticism directed at Strasbourg over recent years can just be dismissed as ill-informed, and populist - even if much of it can! As Strasbourg’s jurisprudence extends further and further[[9]](#footnote-9) legitimacy-based questions about *aspects* of its role have formed the backdrop to a debate about it over the 2010s.

The debate has *not* been in relation to obvious breaches of human rights, or the core, protective, democratic security function associated with areas of Strasbourg’s remit in which the States express ‘profound belief’ in paragraph four of the Convention’s Preamble. Rather, of relevance is the Preamble’s (merely passing?) reference to, ‘the… further realization of Human Rights and Fundamental Freedoms’, and the ‘Council of Europe[‘s]’ agenda of achieving ‘greater unity between its Members’.

To the extent that the latter may be perceived as encouraging an integrationist role for the Court, we recall that a new, ‘Protocol 15’ paragraph is due to be added to the Convention’s Preamble, referring to the margin of appreciation and subsidiarity. Some argue this merely reiterates the *status quo*. I suggest it is a call for qualified, judicial self-restraint,[[10]](#footnote-10) endorsing a subsidiarity-orientated vision of Strasbourg standard setting, one that, dependent on context:

‘implies a tolerance of (and even welcome for) the fact that Convention rights can be implemented differently by different Contracting Parties, in keeping with their distinct national conditions, *provided that they are in fact implemented*’ (emphasis added).[[11]](#footnote-11)

Note: this does *not* contest the Convention’s ‘living instrument’ quality, or that it can have a reforming influence; however, it suggests that, if it has an integrationist one, it is limited. As the emphasised words confirm, the above does *not* apply to Strasbourg’s core, protective/ democratic security function.

## III

In my opinion, very few Strasbourg judgments have failed to meet this subsidiarity-orientated approach. So, why communicate the above self-restraint, subsidiarity message to Strasbourg?

One reason may be a concern that the Court has reached a stage in its development when it is appropriate to do this. Related to this one should recall that the Convention is special compared to many other international human rights regimes, for it licenses a Court to deliver rulings that are legally binding (at international law), setting standards which potentially override national law. Strasbourg’s legitimate ability to do this should not eclipse a point once made by Professors Robertson and Merrills regarding what could be at stake: membership of the Convention potentially entails ‘relinquishing an important part of [a State’s] political sovereignty’.[[12]](#footnote-12) ‘Potentially’ – for this would not be so in every case, of course. However, Robertson and Merrills’ point highlights why some States may wish to communicate a ‘Protocol 15’-subsidiarity message to the Court. It is subject to no ‘democratic override’, and might be encouraged to assume a dynamic integrationist role from some stakeholders, as with those Wildhaber suggests eye the Court as a type of human rights locomotive.

It would be understandable if civil society looks to the Court to take the lead on certain human rights issues because, unlike many other relevant regimes of human rights control, the Strasbourg system establishes a Court that may deliver legally binding judgments. However, some States might maintain that their willingness to set up such a system – one that is more advanced than many others, and with the potentially intrusive qualities identified by Robertson and Merrills -, is precisely why Strasbourg should tread carefully

Hence, Robertson and Merrills’ point also relates to how far the States may be prepared to let the special legal regime they have instituted be developed by Strasbourg, and the issues that can arise. If Strasbourg is too bold, State confidence in the legitimacy of its role may become an issue. As a former British Lord Chancellor (Lord Mackay) once put it:

‘when a court moves out of the uncontroversial territory of condemning obvious breaches of the Convention… into areas where opinions may reasonably differ… then questions may arise about the source of the authority of the Court to make these judgments, and the consent of member States on which the system rests may be threatened’.[[13]](#footnote-13)

In short, Strasbourg should be cautious about enlarging its jurisdiction too far, to avoid provoking a ‘damaging reaction’[[14]](#footnote-14) (Mackay) from the States, who might reasonably protest that the Court has (illegitimately) absorbed too much power, in relation to matters not properly within its scope. And could these considerations apply even more in an era when many States have incorporated Convention rights into the fabric of their domestic law?

If so, a gentle, qualified reminder that there should be limits to Strasbourg’s integrationist role may be appropriate. It may encourage the ‘self-questioning’ Mahoney calls for, placing the onus on Strasbourg to ask why the Protocol 15 subsidiarity-orientated vision of human rights protection referred to above is incompatible with the Convention, *if* the States are faithfully implementing Convention rights (and noting Article 53 of the Convention).

Would such a reminder interfere with Strasbourg’s independence? Perhaps that depends on how one perceives the Court in the first place.

Those who advocate a grander role for Strasbourg – perhaps as a type of ‘Conscience of Europe’ - may insist the reminder in issue is an interference with the Court’s independence. If so, I respectfully suggest they should not only properly articulate and justify the basis for that grander role through an analysis of what the Convention is (rather than what they would like it to be),  *but also* how the States have clearly endorsed this vision of the Convention, and so how in that regard Strasbourg’s independence should be protected. I do not doubt that some strong points may be made here. That said, keeping in mind the factors identified in the sections above, advocates of a grander role for Strasbourg should avoid the ‘intolerance’ Mahoney refers to, by attempts to shut down the debate. In my experience, this occurs when Article 46(1) is cited in an almost *caveat emptor* way (the argument being, in effect, that the States handed the Court a blank cheque in terms of its remit in relation to national law, so must put up and shut up – really?).[[15]](#footnote-15) Also familiar are sweeping claims that the Convention’s status as a ‘living instrument’[[16]](#footnote-16) to be interpreted in present day conditions is the entire, invincible explanation for Strasbourg’s expansion in power and influence over the decades (yes, of course, that doctrine is of major significance – but does it not risk becoming a stock or catch-all response, and is more not required by way of justification for claims that the Convention is an integrationist document?). The real questions to ask are, what type of ‘living instrument’ is the Convention, and why were the States prepared to grant the Court Article 46(1) power, and tolerate this to date? Putting it that way encourages consideration of the legitimacy issues that may arise regarding the absorption of power by Strasbourg which a bold understanding of the Convention an integrationist instrument implies, and why the subsidiarity-orientated direction I suggest Protocol 15 endorses may or may not be valid. The point about the need for State endorsement cannot just be ignored. It relates back to the point Robertson and Merrills eluded to, i.e. Strasbourg’s legitimacy to act in certain fields, and the need for it to tread a careful path by not expanding its influence too far, so as to *avoid* a situation whereby, ‘the consent of the Member States [including their democratically legitimate institutions] on which the system rests’ (Mackay) is threatened.

Of course, I am not arguing that Strasbourg’s aim should be to avoid upsetting States! Rather, I am suggesting that a stage needs to be avoided when the argument might arise that the States may reasonably maintain that they are entitled to be less cooperative with a Court that has become too enthusiastic at protecting human rights in domains where they (the States) *may* reasonably have a variation of approaches. ‘Entitled’ - because those States may reasonably argue that they have *not* consented to *the Court’s* absorption of such power through the vehicle of *the Convention* in that it is not an integrationist instrument (or so the argument would run). Here let us note that the Convention is older than the Court:[[17]](#footnote-17) the two are not the same – the Court is not the Convention itself, but serves the Convention system, i.e. the special legal regime the Convention establishes. In the final analysis, the Court owes its jurisdiction to the Convention, which is an international treaty, reliant on the political will of the States.[[18]](#footnote-18)

## IV

Without denying that the Convention is a ‘living instrument’, my aim has been to provoke consideration of whether distinctions can be made between, on the one hand, what role a court of Human Rights should ideally have (and so the form international human rights law should ideally take) and, on the other, what role the Strasbourg Court, *mandated by the Convention (and so the States)*, actually has. I believe this question will be a vital consideration for the future of the Convention, as it passes seventy and looks to its centenary.

I wish to see the Convention and its Court flourish in the years to come, but for the reasons I have set out, believe that this may require the latter to continue to operate *some* prudent self-restraint in *some* fields. I recognise that my position is made from the luxury of academia, and would give rise to dilemmas for the Strasbourg judge reluctant to disappoint applicants in fields where the Court has the potential to make a difference. Indeed, by not finding a violation of the Convention does the Court not risk appearing to condone some situations that should be criticised from a liberal-minded human rights perspective? Hence, the Court’s failure to find violations in some contexts may well incur the disenchantment and criticism of future contributors to this journal, eager to correct it and see Strasbourg catalyse change in their chosen field of law. Yet if so, I encourage those contributors to articulate why the matter is a violation of the European Convention on Human Rights specifically and to at least be alert to the (inconvenient?) wider considerations I have sought to draw attention to, and some of the potential dilemmas occurring there in relation to the Court’s longer-term future. A failure to do so may risk attempts by some States to curtail the Court’s power as the ‘Conscience of Europe’, leading to a situation in which ultimately more is lost than gained. Seen this way, prudent self-restraint may not be so negative, and especially, I suggest, as there may be a further considerations emerging here for the future of the Convention system. If self-restraint means that Strasbourg gains greater State support, setting the foundations for a more durable Convention system, that system may be in a better position to perform the core, protective, democratic security function that the States express ‘profound belief’ in in paragraph four of the Convention’s Preamble. Over the last few years that role has come to the fore, especially in cases raising Article 18 issues. It was in such contexts that the phrase ‘Conscience of Europe’ would appear to originate, back in 1949, when one of the Convention’s founding fathers, Pierre-Henri Teitgen, first advocated a European Court of Human Rights. [[19]](#footnote-19)

END.

1. \* Associate Professor, University of Leicester. This has been written without prior sight of Judge Rozakis’ opinion piece. [↑](#footnote-ref-1)
2. L Wildhaber, ‘Recent criticism of the European Court of Human Rights’ in Gerhard Hafner et al (eds), *Völkerrecht und die Dynamik der Menschenrechte: liber amicorum Wolfram Karl*, (Wien, 2012) 160 at 162. [↑](#footnote-ref-2)
3. P Mahoney, ‘Preface’ in M Bossuyt, *International Protection of Human Rights: Balanced Critical, Realistic* (Intersentia, 2016) xi at xi. [↑](#footnote-ref-3)
4. Ibid. [↑](#footnote-ref-4)
5. R Ryssdal, ‘The coming of age of the European Convention on Human Rights’, (1996) 1, EHRLR, 18 at 22. [↑](#footnote-ref-5)
6. M O’Boyle, ‘Reflections on the Effectiveness of the European System for the Protection of Human Rights’, in A Bayefsky, *The UN Human Rights Treaty System in the 21st Century*, (Brill, 2000) 169 at 169. [↑](#footnote-ref-6)
7. See fn 10 below (Petzold). [↑](#footnote-ref-7)
8. L Wildhaber, ‘No consensus on consensus? The practice of the European Court of Human Rights’, (2013) 33, HRLJ 248 at 256. [↑](#footnote-ref-8)
9. A Hudocs search indicates that since 1998, i.e. Protocol 11, the ‘new’ Court has delivered over 4,500 judgments which it ranks as either category one or two in legal importance. [↑](#footnote-ref-9)
10. For further comment, see E Bates, ‘Activism and self-restraint: the margin of appreciation's Strasbourg career— its coming of age?’ (2016) 36 HRLJ 261. [↑](#footnote-ref-10)
11. Appendix to CDDH contribution to the Ministerial Conference organised by the United Kingdom Chairmanship of the Committee of Ministers Adopted by the CDDH on 10 February 2012 (para 14). What is stated in this passage accords with the classic account of what subsidiarity entails for the Strasbourg Court, at least up to the 1990s, as found in H Petzold ‘The Convention and the principle of subsidiarity’ in R MacDonald, F Matscher, H Petzold (eds), *The European System for the Protection of Human Rights*, (Dordrecht: Martinus Nijhoff , 1993). Heribert Petzold was the Court’s Registrar 1995-1998 (Deputy, 1975-1995). He identified ‘the concept of subsidiarity’ as underlying ‘three crucial features of the [Convention] system’. Firstly, the non-exhaustive nature of the Convention’s protection, it protecting only certain rights, and with the States ‘free to provide better protection under their law or any other agreement’. Second, ‘running throughout the Convention’, as its institutions had continually stressed, was ‘the understanding that the national authorities, in accordance with the traditional role of the State, are generally in a better position than the supervisory European bodies to strike the balance between the interests of the community and the protection of the individual’s fundamental rights the search for which is inherent in the whole of the Convention’. To which end, he went on: ‘[t]hese two characteristics condition the search for common standards of human rights protection in the Convention community: uniformity may result in particular instances from the need to protect effectively the individual’s rights and freedoms, but – and this is the third feature of the system – uniformity is not at all the concern of the Convention’. Strasbourg’s role in interpreting the Convention was not to impose ‘uniform solutions but standards of conduct which will vary in each society of the Convention community; this necessarily entails a choice of the means of implementation for each Contracting State’, Petzold at pp 60-61. [↑](#footnote-ref-11)
12. A H Robertson and J G Merrills, *Human Rights in the world: An Introduction to the Study of the International Protection of Human Rights*, (Manchester University Press: 4th ed. (1996), at 339. [↑](#footnote-ref-12)
13. Lord Mackay of Clashfern, ‘The margin of appreciation and the need for balance’, in Mahoney, Paul et al (ed.), *Protecting human rights: the European perspective, studies in memory of Rolv Ryssdal*, (Köln, Carl Heymanns Verlag, 2000) 837 at 838. [↑](#footnote-ref-13)
14. Ibid at 842. [↑](#footnote-ref-14)
15. If the States had foreseen Strasbourg’s vastly expanded role since 1950, is it credible that they would not have redrafted Article 46(1), eg to provide some sort of check in relation to the Court? Can the new Protocol 15 Preamble paragraph, and the message it communicates, be seen against this backdrop? [↑](#footnote-ref-15)
16. Cf *Tyrer v United Kingdom* hudocs (1978) para 31. [↑](#footnote-ref-16)
17. The Convention was opened for signature on 4 November 1950. The conditions required for the institution of the Court were established in 1959. [↑](#footnote-ref-17)
18. As Professors van Dijk and G van Hoof once put it: ‘The success or failure of international instruments, including those like the European Convention, in the end depend on the political will of the States involved. Legal arguments, however cogent they may be, in the final analysis seldom override political considerations when States feel their vital interests are at stake’. P van Dijk/G van Hoof, *Theory and Practice of the European Convention on Human Rights* (2nd edn 1990), p 618 [↑](#footnote-ref-18)
19. Pierre-Henri Teitgen (‘It is necessary to intervene before it is too late. A conscience must exist somewhere which will sound the alarm to the minds of a nation, menaced by this progressive corruption, to war[n] them of the peril and to show them that they are progressing down a long road which leads far, sometimes

    even to Buchenwald or Dachau’), in A Roberston (ed), Collected Edition of the ‘travaux préparatoires’ of the ECHR, (The Hague: M. Nijhoff , 1975–1985) Vol I at 292. [↑](#footnote-ref-19)