

2004

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Recommended Citation

Alfred William Brian Simpson, "The European Convention on Human Rights: Taking Stock after Half a Century" (Fulton Lectures 2004).

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The
MAURICE AND MURIEL FULTON
LECTURE SERIES



***THE EUROPEAN CONVENTION ON
HUMAN RIGHTS:
THE FIRST HALF CENTURY***

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The European Convention on Human Rights: The First Half Century

*by A. W. Brian Simpson**

The European Convention on Human Rights and Fundamental Freedoms was signed in the Barberini Palace in Rome on 4 November 1950. It came into force, once there were sufficient ratifications, on 3 September 1953. Its First Protocol, which was really part of the original Convention but contained provisions which gave rise to special difficulties in the negotiations, was signed in Paris on 20 March 1952. It dealt with aspects of the rights of property, to education, and to free elections, and came into force on 18 May 1954. Since then there have been a number of further protocols, some dealing with matters of substance, and others with matters of procedure. Thus the Sixth Protocol dealt with the abolition of the death penalty except in time of war, and the Thirteenth Protocol with its abolition in times of war. The Eleventh Protocol made radical changes to the procedural and institutional mechanisms for handling complaints that the Convention had been violated. The Fourteenth, adopted in 2004 but not yet in force, will make even more radical changes to these mechanisms.

The Convention and its Protocols constitute the most important achievements of the Council of Europe. The Council was established by a treaty of 5 May 1949. Originally there were ten members of the Council: Belgium, Denmark, France, Ireland, Italy, Luxembourg, the Netherlands, Norway, Sweden and the United Kingdom. By the time the Convention was signed, there were four more: Greece, Turkey, the Saar (soon to become part of West Germany), and West Germany itself.

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The treaty provided that every member must:

...accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms...

Members must also collaborate in the aim of the Council, which was to:

...achieve a greater unity between its members for the purpose of safeguarding and realising the ideals and principles which are their common heritage and facilitating their economic and social progress.

The Council is not a federation, and with some exceptions operates by consensus. The basic institutions are the Committee of Ministers, comprising the Foreign Ministers or their deputies of member states, and a Consultative Assembly. The Assembly provides a democratic input, but its members are not directly elected. They are in effect delegates from national Parliaments. It has been given no legislative powers.

You may wonder why the Council (which, incidentally, is not the ancestor of the European Union) was established back in 1949. It all began with a House of Commons speech in January 1948 by Ernest Bevin, the British Foreign Secretary - Uncle Ernie as he was affectionately known to British diplomats. Late in 1947 he came to think that any attempt to provide for the future of Europe through negotiation with the Soviet Union was doomed to failure. In this speech, he called for the establishment of what he called a spiritual union of the Western European democracies. It would offer an ideological alternative to Soviet communism, one different too from American capitalism, and facilitate the development of a coordinated response to European problems, which were acute at the time. So the Council was a product of the Cold War. There were many in Western Europe who sought salvation in

the creation of a federal Europe, but Bevin and his British colleagues were hostile to the federalists, and favoured the establishment of a looser union, which would not involve any sacrifice of sovereignty to a federal European Government. So the Council of Europe was also intended to provide an alternative to a European Federation, an idea which many politicians, particularly in continental Europe, supported at this time, as they still do.

The first task the Council addressed was production of a Charter or Convention of human rights. Why? The state of Western Europe, especially the parts which had been occupied by Germany and others which had been fought over, was grim. German cities were little more than heaps of rubble, and the same was true, for example, for towns and villages in Normandy, and of course elsewhere. Economies had collapsed, and in the terrible winter of 1947 the population of Germany came near to starvation. In the United Kingdom, which had suffered from bombing but had escaped occupation except in the Channel Islands, food rations had to be reduced even below their wartime level. At huge cost fascism had, at least for the time being, been defeated, though both Spain and Portugal remained totalitarian countries under forms of fascism. Soviet communism offered what to many seemed a way forward, and in Western Europe both Italy and France were at risk of becoming communist countries. The future of Western Germany was unpredictable. Beyond the iron curtain, which included of course much of Germany, Soviet communism was triumphant. So there was fear that one monster, fascism, might soon be replaced by another, Soviet communism. One response was for the Western democracies to offer some clear statement of an alternative vision of society, a Charter which would spell out the liberal democratic ideals for whose protection the war, it was thought, had been fought. So the Charter was, if you like, a product of fear that the liberty which had recently been re-established was under grave threat. The threat was exacerbated by the military power of the Soviets; it was seriously thought in 1948 that the Soviets might be at the Pyrenees in six or so weeks.

In Western European countries which had experienced the horrors

of occupation there was another fear, one which I think Americans may not find easy to understand; British negotiators in the 1940s and 1950s too did not entirely grasp its importance. This was the fear of government generated by recent foreign occupation. Experience had shown that the governments of European nation states simply could not be trusted. For example, take the wartime history of France that has only fairly recently come to be written with some objectivity. Very many of the terrible things which were done to the French under the Vichy regime were done by the French to the French. Many years after the war some of those responsible for the notorious massacre of the inhabitants of Oradour, now a memorial to wartime atrocities, were put on trial; most of the defendants were Frenchmen, from Alsace is true, but Frenchmen nevertheless. It was French officials who consigned French Jews to the extermination camps. And I am sorry to say that some nasty things went on in the British Channel Islands too.

A third factor was disillusion with the United Nations, which had not lived up to the high hopes which had accompanied its establishment in 1945. It had become a battleground of the Cold War, where scoring silly points had come to replace any attempt to cooperate to produce a better and a safer world. It had also become a stage whose potential was exploited by the increasingly confident and intransigent anti-colonial movement, supported, with ludicrous insincerity, by the Soviet Union. So far as human rights protection was concerned matters had got off to a reasonable start in 1948 with the Universal Declaration, and the Genocide Convention. In the case of the Declaration, Eleanor Roosevelt was one of the important players. But thereafter, at least in the view of the British negotiators and of many other Europeans, progress had more or less come to an end. There were by the 1950s profound suspicions both of the Soviet Union and the USA, particularly after the establishment of the Eisenhower administration. The attitude of both powers to the international protection of human rights appeared to be deeply hypocritical. The USA seemed to adhere to what I have called the export theory of human rights, under which human rights protection was never to intrude upon the domestic sovereignty of the American federation

and its component States. If Western Europe was to establish international human rights protection, it seemed idle to rely upon the United Nations. Europe must go it alone.

Finally I shall mention another factor. There were many committed federalists in the Consultative Assembly of the Council of Europe, and they had high hopes of using the Council as a vehicle for the establishment of a federal Europe. The British Foreign Office officials favoured diverting their energies to the production of a Charter of Human Rights - it gave them something harmless to do. So long as it was carefully drafted and had weak enforcement mechanisms, what harm could such a Charter do? It might even do some positive good. And if its provisions merely reflected the existing state of affairs in Western Europe, such surrender of sovereignty as might be involved was of little practical significance.

The thinking behind the Convention was that its function was indeed conservative: the protection of the liberty recently recovered but again under threat in Western European countries, countries committed to the rule of law and the protection of dignity, democratic ideals and freedom. One of the chief protagonists in the Consultative Assembly was Pierre Henri Teitgen, a Gaullist minister who had been active in the resistance, and indeed had been lucky to survive the war. He explained:

Democracies do not become Nazi countries in one day. Evil progresses cunningly, with a minority operating, as it were, to remove the levers of control. One by one freedoms are suppressed in one sphere after another. Public opinion and the entire national conscience are asphyxiated. And then, when everything is in order, the Fuhrer is installed.

Or as James Madison put it:

I believe there are more instances of the abridgement of the freedom of the people by gradual and silent

encroachments of those in power than by violent and sudden usurpation.

Both these statements have a chilling resonance today in the world of the war on terrorism.

It was not then believed that the Convention would much affect the existing situation in member states. There were a few known problems; thus the Norwegian Constitution brightly provided that “Jesuits will not be tolerated.” Such problems could be handled by temporary and specific reservations until the Constitution could be amended, as indeed it soon was. The United Kingdom took the line that substantial compliance was all that was required, and entered no reservations at all.

The text of the original Convention is not that of the present day Convention, which has been amended by other Protocols. By way of substance, the original lists a number of rights in the Convention itself and its First Protocol. Most, but not all of them have limitations, which are specified in relation to each right. Under Article 15, States may, in special circumstances, derogate from their obligations, for example, in times of war or of a national emergency threatening the life of the nation. But some rights are non-derogable; for example, torture, including inhuman or degrading treatment or punishment, is ruled out in all circumstances. The right to derogate is severely restricted in the text of the relevant article by the concept of strict necessity. The rights are to be guaranteed to everyone within the jurisdiction of the member state - they are not, for example, confined to citizens. Subsequent jurisprudence has extended the protection, in some instances, to persons outside the territory of the member state, and the extent of this extra-territorial protection is currently a matter of considerable importance. Member states are to provide an effective remedy for their violation. The original Convention contained no free standing provision against discrimination - member states were not, however, to discriminate in the protection of the listed convention rights. There is now a Twelfth Protocol which does provide a free standing prohibition of discrimination, but it still needs more ratifications before it comes into force. The core rights

protected in the original Convention and the First Protocol remain the basis of the system today.

The text is sometimes drafted in very specific terms, and sometimes in more general terms. At the time, there was a dispute as to how it should be drafted. The United Kingdom argued for very specific drafting; negotiators from civil law countries argued for generally expressed provisions, which would be given more precision through the development of a court based jurisprudence of rights. In the end the second view won out, but the text itself reflects a compromise.

The institutions established by the Convention were a Commission and a Court. The Commission was to decide on the admissibility of complaints, acting as a filter to weed out unmeritorious or procedurally improper complaints, for there was fear that the system might be deluged by such complaints. It was to investigate the complaint, and it could express an opinion as to whether there had been a violation of the Convention, but it had no power to issue a binding judgement. It was also to try to arrange a friendly settlement. Its procedures were confidential. The idea was that most complaints would never get beyond the Commission.

The Convention also made provision for the establishment of a Court of Human Rights, with the power to issue binding judgements. The thinking of the civilian negotiators was that in the course of time the Court would evolve a jurisprudence of rights, what we would call a case law of rights. But submission to a Court was more than some of the original member states could accept, and so acceptance of the jurisdiction of the Court was made optional. The Court was not to be a Court of Appeal from national courts; it merely had the power to rule on whether there had been a violation of the Convention or not. It was then for the defaulting state, under the supervision of the Committee of Ministers, to do what was needed to put matters right. The Court could, however, give a ruling as to what monetary compensation ought to be paid.

At the top of the system was this Committee, a political rather than a judicial body. For member states not accepting the jurisdiction of the

Court, it would decide what action was to be taken on the report of the Commission. For states accepting the jurisdiction of the Court, it was to supervise what the respondent country ought to do in response to the Court's decision.

Who could initiate a complaint? Member states of course. But what about individuals? In the original Convention member states had an option as to whether to allow individuals to make complaints and initiate proceedings, and even if they were permitted to do so, they then had no direct access to the Court; only the Commission could in such a case take the matter to the Court. The right of individual petition was first accepted by Denmark and then by the Republic of Ireland. The United Kingdom did not accept it until 1966, by which time the British Empire had largely been dismantled. The British Colonial Office had been firm in opposition. Under the Convention, protection could be extended to colonial territories, and the United Kingdom, the major European colonial power, did indeed extend it to virtually all of its dependent possessions. But the Colonial Office was nervous over giving colonial subjects the right of individual petition, and the right, though accepted for the United Kingdom itself in 1966, was not then extended to the relics of the Empire. Nervousness over the right of individual petition was by no means confined to the British government. France did not accept it until 1981, and it never operated in the vast original French colonial empire. Turkey did not accept the right until 1987.

The first case initiated by an individual petition that actually went to the Court was the entertainingly titled *Lawless v. Republic of Ireland*, litigated between 1957 and 1961. Lawless complained about the use of emergency powers against the Irish Republican Army in the Republic of Ireland; he had been detained for a short while. Ireland had derogated from provisions of the Convention which normally rule out detention without trial, because, it was argued, there had been in the Republic a public emergency threatening the life of the nation. This was so because the IRA had been using the Republic as a base for paramilitary operations in Northern Ireland. The Irish government won the case; the Convention institutions have usually adopted a sympathetic attitude to

governments confronted by insurrectionary movements, particularly in the early years, although this may now be changing.

Let me now very briefly explain what has happened in the half century which has passed since the Convention first came into force. First, as I have already indicated, there have been a number of Protocols. Perhaps the most important substantively is the Sixth Protocol, abolishing the death penalty in time of peace. At the time when the Convention was signed, a number of member states still had the death penalty; these included the United Kingdom. But it was already something of a guttering candle. Nevertheless the Convention quite explicitly recognised its legitimate existence. In the United Kingdom I suspect that a referendum, especially if conducted just after some particularly unpleasant killing, for example, of a child, would produce a majority for its reintroduction, but there is no practical possibility of its being reintroduced. Under the jurisprudence of the Court member States cannot today lawfully extradite a person to a country where they run the risk of suffering capital punishment. This may exclude extradition to the USA. Procedurally the Eleventh Protocol of 1998 ended the two tier system of Commission and Court; there is now just a Court, which sits in panels, and there is provision for a specially authoritative Grand Chamber, which to some degree acts as a sort of appellate body, although it is not technically a Court of Appeal. Whether this change in the mechanics of the system has improved it is dubious at best.

Secondly, and perhaps more importantly, all parties to the Convention now have to accept both the jurisdiction of the Court and the right of individual petition. Interstate cases have always been extremely rare; states are generally extremely reluctant to initiate proceedings against other states except to secure some political end; it was, for example, for political reasons that Greece brought proceedings against the United Kingdom in 1956 over the conduct of the British Government in response to the EOKA insurrectionary movement in Cyprus which sought to unite Cyprus with Greece. A number of Scandinavian countries, Denmark, Sweden, and Norway, joined by the Netherlands, did take proceedings against Greece for the grave miscon-

duct of the government of the colonels; these proceedings led to Greece's withdrawal from the Council of Europe. No obvious political benefit accrued to these states from this action. The rarity of interstate cases brings out the fact that governments are not to be trusted to champion the protection of human rights.

Thirdly, very largely in response to individual petitions, the Strasbourg institutions - the Court, and less importantly the Commission while it existed - have developed a massive jurisprudence or case law of human rights. To a large extent, the Strasbourg judicial opinions are drafted initially by members of the staff of the Registry; there are no law clerks at Strasbourg to produce drafts or engage in research. Opinions are far more systematic and orderly than the rambling and argumentative opinions of the US Supreme Court or of the English House of Lords, and much less personalised. In the course of developing its jurisprudence the Court has evolved various general principles which are not to be found anywhere stated in the text of the Convention; they have been called "the invisible articles." I cannot mention them all, but two are of particular importance.

The first of these was first enunciated in a case in 1978, brought by one Tyrer against the United Kingdom. He was a young man convicted of an assault, and the Court in the Isle of Man ordered that he should be birched, that is beaten on his bare buttocks with a weapon called a birch rod. He was indeed birched. This form of judicial punishment had by then been abolished in mainland Britain, but still existed in the Isle of Man, which is a Crown dependency, has its own legal system, and, for good measure, the oldest Parliament in Europe. Many of the inhabitants of the Isle of Man at this time placed a high value on this punishment, which, they believed, protected them from British hooligans visiting from the mainland. The Court ruled that the Convention must be interpreted as a "living instrument," and that although birching might not have been viewed as a violation of the Convention when it was first brought into force, evolving standards in Europe had come to rule out judicial corporal punishment. It was now to be viewed as a "degrading punishment" and as such a violation of Article 3 of the Convention.

Since this case was decided, there has been no question of applying any notion of original intent as controlling the interpretation of the Convention. In the case the British judge, Sir Gerald Fitzmaurice - he had previously been the Foreign Office Legal Adviser - dissented, but his view did not prevail. He pointed out, correctly, that when the United Kingdom signed up to the Convention it never occurred to anyone that it would have the effect of banning judicial corporal punishment. Back in the 1950s, Britain was a veritable paradise of flagellation. Sir Gerald's capacity to influence his fellow judges may have been reduced by the fact that in judicial conferences he would give his opinion, and then retire behind a copy of the London Times newspaper, ignoring other contributions to the discussion. Fairly recently I took part in providing training in the Isle of Man on human rights law, and I and my colleagues agreed it would be politic not to mention Tyrer; back in 1978 the decision provoked fury on the island, and it was with some difficulty that the central British government persuaded the Manxmen and Manxwomen (for that is what they are called) to abolish the practice. But we soon discovered that opposition to the abolition of birching no longer excited the islanders; things had moved on. Standards of human rights protection had indeed evolved.

The other invisible article or doctrine I shall mention is that of the "margin of appreciation," a concept derived from continental administrative law. According to this doctrine, each state has a certain degree of discretion as to how it implements obligations under the Convention. This is related to the notion that the protection of human rights in member states is primarily the responsibility of each state; the Convention does not require complete uniformity. Ideas of this sort are sometimes related to what is labelled the "principle of subsidiarity." Of course wherever any form of judicial review exists, courts have evolved doctrines which permit the agency being reviewed to exercise some measure of discretion; the language in which these doctrines are expressed will vary from legal system to legal system.

The next important development has been the extension of the membership of the Council of Europe, which now includes forty-five

states. Portugal and Spain came in from the cold and joined the Council in 1976 and 1977 respectively. Switzerland, offered membership many years earlier, joined in 1974. Tiny Liechtenstein joined in 1978, and, being short of human rights lawyers, long used a distinguished Canadian as its judge - judges do not have to be nationals of the country they represent. Andorra, high in the Pyrenees and ruled by the President of France in his personal capacity together with the bishop of Urgel, joined in 1994. Indirectly it was affected by the Convention earlier. Having no prison of its own, it had used space in a French prison, and there the Convention applied. Once the Cold War ended, states under Soviet domination or strong influence began to be admitted: Finland in 1989, Hungary in 1990, and, believe it or not, the Russian Federation in 1996, so that the Convention now even extends to protect individuals in Siberia, which is thus somewhat oddly treated as part of Europe. It also covers Albania, where I have taught human rights law to an impressive group of students, most of them young women, and this in a land where the blood feud, carefully regulated by the *Kanun of Lek*, about which you can read in a notable novel by Ismail Kadare, is not yet extinct. Not long ago there was indeed a killing in Detroit in pursuance of an Albanian blood feud. The process of extension has now ended, except for the possibility that Belarus and Monaco may still join.¹ Somewhere around 800,000,000 people are now, in principle, protected.

With this extension, the function of the Convention has changed; it has become an instrument for assisting the establishment of liberal democratic systems of government in new member states. It has taken on what may be called a missionary function. When a country such as Albania or the Russian Federation joins the club, the Convention and its protocols represent aspirational goals, it is only by degrees that these goals will be achieved. Democracy is of course not just about having elections, and only one article, in the First Protocol, deals with elections. It is also about having a system of government which respects the

¹ Since the lecture was delivered Monaco has joined, bringing the total number to forty-six.

ideal of the rule of law, accepts considerable limits, some of them absolute, upon the employment of force and state power against individuals, tolerates differences, and regards the protection of individual autonomy, political liberty and dignity as principal aims of government, thereby imposing limits to the degree to which other legitimate aims of government may be pursued. With the change in function of the Convention, there has developed the practice of helping new member states to bring their legal and administrative arrangements into conformity, as, for example, by organising training courses for lawyers and judges, and by checking the compatibility of laws; here the first example was Finland.

But the extension of the coverage of the Convention and growing knowledge about it have brought about administrative problems. The trickle of individual petitions has become a flood. Between 1955 and 1983, 76 judgements were delivered by the court. Just under 11,000 applications were registered out of 25,000 files provisionally opened by the officials in the Registry. A mere 326 applications were declared admissible. In the year 2000 alone, 26,000 provisional files were opened, and over 10,000 applications were registered. 1,082 applications were declared admissible, and no fewer than 695 judgements delivered. So there is a serious problem here. But it is worth noting that relatively few applications are declared admissible, and in recent times most findings of violations have been against only three countries - Italy, France and Turkey. To a considerable extent these violations are repetitive; Italy has, for example, been in continuous trouble over the excessive length of legal proceedings. So much thought has been given to addressing the problems of overload. They need to be addressed if the system is not to become a victim of its own success. The Fourteenth Protocol, not yet in force, represents an attempt to deal with the problems of overload.

There are other problems. For example, the official languages of the Convention are French and English. Arrangements for making materials available in the many other languages in use in the Council of Europe are still defective. The NGO in London to which students from

Columbia and Michigan go as interns, called the AIRE Centre, is working to deal with this problem, but it will be some time before it is really solved. The costs involved will be considerable, and governments are not as enthusiastic as they ought to be to spend money on human rights protection.

Nothing like the European Convention had ever been negotiated before in the whole history of the world. Clearly acceptance of the obligations imposed by the Convention involved a loss of state sovereignty. Europe, whether organised into the European Union, or in the much larger Council of Europe, or in the even larger Organisation for Security and Cooperation in Europe, to which incidentally the USA is a party, belongs, it has been argued with some force, to a newly emerging post modern world. In this world, traditional nation states such as France or Italy or Germany do continue to exist, but they no longer seek to retain control of all aspects of what have traditionally been viewed as their domestic affairs. They have come together to agree to establish and maintain systems under which they accept international regulation and control over a growing number of matters, and, through the Strasbourg Court, a degree of control over the way in which they may treat their own citizens. They do so because they have come to think that this limited surrender of sovereignty is in their own long term interests. Yet the European organizations I have mentioned do not constitute federations. The Council of Europe is certainly not a federation of any kind.

Some have seen in the system established by the European Convention the forces of evil at work. For the purpose of illustration, I refer to Robert Bork's, *Coercing Virtue: The Worldwide Rule of Judges* (2003). Mr. Bork tells us that the European Court of Human Rights is one of the institutions whose judges "are continuing to undermine democratic institutions and to enact the agenda of the liberal Left or New Class." He explains elsewhere that this New Class of "faux" intellectuals comprises academics at all levels, denizens of Hollywood; mainline clergy and church bureaucracies; personnel of museums, galleries and philanthropic foundations, radical environmentalists; and activist groups for a multiplicity of causes which Mr. Bork sadly does not list.

Presumably they include the judges of the Strasbourg Court. These supposedly evil people are characterised by smugness and a softness of spirit, a desire to ensure that no one other than their intellectual enemies suffers the least degree of discomfort. They heartily dislike bourgeois culture, so they displace traditional moralities with cultural socialism. To bolster his argument, he selects from the thousands of decisions of the Strasbourg Court and Commission a handful to which he takes exception. It comes as no surprise that they deal with gay rights in Northern Ireland, homosexuals in the armed services, beating children, extradition and death row, and freedom of information in relation to abortion and birth control. Sex, violent punishment, death, and abortion are issues which obsess certain persons in the USA. I cannot take all this very seriously, though it is of course true that some of the decisions of the Court can legitimately be regarded as objectionable. And it must be conceded, although he does not make this point, that from the very beginning there were those who had serious misgivings about the European Convention. Lord Jowitt, who was the Lord Chancellor in England in 1950, was horrified when he saw the draft text, and called the convention “meaningless and dangerous.” Let me also quote a line from a memorandum of 1951 by J. J. Wallace, a Colonial Office civil servant:

If ever there should be a further protocol covering yet more rights (and I suppose we cannot absolutely rule out this frightful possibility)....

When Greece brought the first case against the United Kingdom over Cyprus in 1956 there were suggestions that the United Kingdom might denounce the Convention, but nothing came of this. The case was fought within the terms of the Convention, and the United Kingdom won by the skin of her teeth, and only after abandoning two of the more objectionable mechanisms used for suppressing the insurrection. Greece actually did denounce the Convention in 1969, but not in the name of protecting democracy from the over mighty judiciary. Greece

ratified it again in 1974. There were also long delays both in accepting the Convention at all, and in accepting individual petition and the jurisdiction of the Court. France, though much involved in the negotiations in 1949-50, did not even ratify at all until 1974, Turkey took until 1954. Switzerland only ratified in 1974, with numerous reservations.

A picture of why it has come to be accepted, and how it affects life, may be given by a story of the Court in action. Mrs. Pellegrini married M. Gigliozzi in 1962. In February 1987 she took proceedings for judicial separation. On 20 November 1987, she was summoned to appear before the Lazio Regional Ecclesiastical Court in the Vatican. She attended on 1 December, having had no notice what the case was about. Her long standing marriage to her husband was annulled on grounds of consanguinity - her mother and husband were cousins. She may have had a dispensation; such dispensations are commonplace in Italy. She was informed, wrongly, that it had been declared a nullity on 6 November, that is before the hearing; this was a mistake for 10 December. The proceedings were summary, and she had no legal representation. An appeal upheld the decision. She was still not represented, and there was no proper disclosure of documents. Under the Concordat between the Papacy and the Italian State domestic courts in Italy were bound to accept as binding decisions of this character taken by ecclesiastical courts of the Vatican. Her husband had of course brought the proceedings in the Vatican court in order to forestall any claim for support under the judicial separation which she was seeking. The case was eventually taken to Strasbourg as involving a violation of Article 6 (1); she won, and the eventual outcome was a settlement with her ex husband. The case was of course nothing to do with over mighty judges undermining democracy; it was about the right of individuals to enjoy what in the USA would be called due process of law, which is of course an important aspect of the way democratic states should conduct their affairs. To be sure, one might criticise the decision (though I would not) for imposing too strict a standard. But as a threat to democracy it is a non-starter.

Now let me describe a case which gave rise to outrage in Britain -

its name is *McCann, Farrell and Savage v. United Kingdom*, and it was decided by a divided Court in 1995, though again the outrage had nothing to do with protecting democracy. The facts are complicated and I can only give a brief account. Three members of the Provisional IRA, two men and one woman, had entered Gibraltar from Spain to carry out reconnaissance as part of a plan to drive a car bomb into the city. The idea was to detonate it during a military ceremony, and kill or maim anyone who happened to be around when it went off. This ceremony would have been attended by many civilian members of the public, including children. British intelligence was aware of this plan, and the three persons were kept under surveillance, with the cooperation of the Spanish police, on their journey to Gibraltar; no details of this surveillance in Spain have ever been made public. When they entered Gibraltar at the crossing point with Spain, they were identified and followed by armed plain clothed members of the Special Air Service, a British military formation specialising in counter-terrorist operations. The soldiers who trailed the three bombers were told that the car bomb was thought to be already in Gibraltar, where there was indeed a suspect vehicle. In fact it turned out that this vehicle was wholly unconnected with the plot. They were also told that the car bomb might be detonated at any time by a radio control device. In fact the bomb was not yet anywhere in Gibraltar, but was still in Spain in a car park. It contained 25 kilograms of Semtex explosive, surrounded with ammunition so as to maximise its capacity to kill and injure. Quite how this operation was financed is not publicly known, but lest it be thought that the financing of violent insurrectionary organisations from other countries is a new problem, let me recall that much support for the IRA has come from American organisations.

The soldiers, through the briefing, were given to believe that if any of the suspects made a sudden move - for example, putting a hand in a pocket - the bomb might be detonated. It was their job to prevent this, and the only way they could do this was by shooting the suspect. One of the suspects did make such a move and within a matter of seconds all three were killed. Their families brought a case alleging a violation of

the right to life, as protected by Article 2 of the Convention, which applies in Gibraltar. At the time there was a widespread belief that British security forces were conducting operations against the IRA deliberately intended to lead to the death of suspects, thus, as it were, orchestrating extra-judicial killings - judicial capital punishment for murder was no longer available at this time. The Gibraltar operation had all the appearance of such an operation, being organised in a manner which would almost inevitably lead to the death of the three terrorists. I should perhaps explain that the three soldiers were highly trained and, once fire was opened at the short ranges involved, certain to kill. One of the suspects was hit by no less than seventeen bullets.

The Court, by a majority, held that there had been a violation, but declined to award any compensation to the families. It did not base its decision on the view that there had been a deliberate extra-judicial killing, or on any misconduct by the soldiers. In the jurisprudence of the Court there has developed the doctrine that member states have a positive obligation to take steps to protect the Convention rights; thus, for example, in the case of violent killings, member states have an obligation to conduct a proper enquiry into the death. The majority held that in the planning of the operation the United Kingdom had not discharged this positive obligation; the operation ought to have been and could have been so planned as to respect the right to life of the three individuals killed, as well of course as the right to life to those threatened by the bomb. For example, they might have been arrested at the frontier, and better checks might have been made of the suspect vehicle; there were various possibilities. I happened to be in the Court when the decision was delivered, where it caused much excitement. I was at once approached by journalists who thought I must be a relative; in fact I was there in connection with another case. Back in Britain, where popular opinion largely applauded the killing of the three terrorists, both the press and the government exploded with fury; how dare the Court criticise the actions of the security services. There was even wholly insincere talk by politicians of denouncing the Convention. In reality the majority view of the Strasbourg judges involved much weaker criticism

of the conduct of the operation than could very reasonably have been made on the facts, and the judges further softened their decision by the refusal to assess any compensation, a refusal I personally find politically understandable but legally odd, there being no evidence that the family members were in any way complicit. I have a collection of British newspapers with their angry headlines which I show students when we discuss the case. The Norwegian President of the Court, Judge Rolv Ryssdal, who had in fact dissented, visited London soon after the decision and delivered a lecture designed to cool the heat. And before long the heat died down. There is room for legitimate disagreement, but, to put my own cards on the table, I think the operation was indeed set up to ensure the death of the three suspects, and was certainly not planned so as to respect their right to life. But of course many would not take the view that this mattered.

There was in reality never any possibility of the United Kingdom denouncing the Convention in response to the Gibraltar case, and the decision did not make necessary any change in its law or procedure. Here I should explain that in a case where a violation has occurred, the Court may specify a monetary payment to be made to the injured party by way of just satisfaction, but it does not take any action to check that the money has been paid or take any further action if it has not. Nor does it issue any order to the respondent state, nor provide any guidance, nor make any declaration, stating what needs to be done to put matters to rights in the light of its finding of a violation. It has no power to annul legislation or judicial decisions or administrative actions which have violated the Convention. It is the job of the Committee of Ministers, in consultation with the respondent state, to handle all such matters. Where some action is called for, for example, a change in the law, it is the practice of the Committee to review the situation every six months. If the violation arises from some structural problem or from the state of the law, it may be a complex and long drawn out matter for the offending state to take the necessary action.

The whole procedure is well illustrated by the Kalashnikov case, decided in 1999, which concerned the appalling conditions in Russian

prisons. Briefly stated, Mr. Kalashnikov spent the years from 1995 to 2000 incarcerated, mainly in pre-trial detention. Much of this time he was held in a cell which measured 17 square metres, contained 8 bunk beds, and was occupied by 24 prisoners. Television and a light were permanently on. The toilet was in the cell and it was unscreened. Meals had to be eaten within a metre of it. There was no proper ventilation; the cell was very hot in summer and very cold in winter. There was heavy smoking by prisoners. The cell was infested with cockroaches and ants. He developed skin diseases and fungal infections, losing toenails and some fingernails. Some of his fellow prisoners suffered from syphilis and tuberculosis. He suffered from neurocirculatory dystonia, asthenoneurotic syndrome, chronic gastroduodenitis, fungal infections to feet, hands and groin, and mycosis. God knows what these all are, but they cannot have been a lot of fun. He did receive some medical treatment for scabies. The Court found violations of the right not to be subjected to inhuman or degrading treatment or punishment, and also violations of his right to a fair trial in a reasonable time. Plainly Russian prisons, many of which are in the same sort of condition, cannot be cleaned up overnight. So at present steps are being taken under the supervision of the Committee of Ministers to reform the system. One step is a reduction in the excessive use of pre-trial detention, one of the reasons for gross overcrowding. Another step which would alleviate the situation is a reduction of delay in bringing prisoners to trial. Yet another is the segregation of prisoners suffering from dangerous communicable diseases. The award of reparation in this case gave Mr. Kalashnikov the modest sum of 5,000 Euros. You may speculate as to why the Court fixed on such a low figure.

In general, member states have done what is needed to conform to rulings of the Court, albeit sometimes after delay and with reluctance. Thus money awards have usually been satisfied, often very promptly. The worst instance of delay involved the case of *Loizidou v. Turkey*, decided in 1996. This case was brought by a Greek Cypriot woman who owned property in Northern Cyprus, where there has been established an illegal republic effectively under Turkish control. Mrs. Loizidou had

wholly lost the control and use of this property, and the Court decided that Turkey, being in effective control of the territory, was answerable under the Convention for what went on there. It made an order for reparation. The Turkish government was extremely reluctant to pay the money - there are of course many other persons who have similar complaints, but at the time of this lecture it appears that the money has been paid, and a system established to handle other similar complaints. Where action other than the payment of money is required by the Committee of Ministers, there has again been a general practice of conformity, albeit sometimes with delay, which may be unavoidable, and reluctance. The member states with the worst record here have been Italy, which is forever in trouble over the excessive length of proceedings, France, whose violations have been very varied in nature, and Turkey, the problem there being the treatment of the Kurdish minority and the existence of Northern Cyprus. In the future there are fears, for example, over the Russian Federation. There are bound to be difficulties with countries which have no tradition of respect for the rule of law as this is understood in the West, and no tradition of accepting judicial review of administrative action. Some of the former Iron Curtain countries had, under communism, a somewhat different conception of rights, which placed less emphasis on individualism and on political liberty, and more on economic and social rights and on a reciprocal relationship between rights and duties. There are also institutional difficulties; the role of the Prosecutor in, for example, in the former Soviet Union, with his control over the use of pre-trial detention, cannot really be accommodated with the provisions of the Convention without some radical changes. In the United Kingdom (and in most other member states) there is a settled policy of automatic compliance.

Sometimes the Court indicates action which should be taken before a case comes to be adjudicated - for example, it may wish a member state not to deport a person until the Court can rule on the legality of the deportation under the Convention. In the Strasbourg jurisprudence such "indications" have not, in the past, been thought to impose binding obligations on the respondent state. But they have regularly been respected.

Compliance with them in deportation cases posed some problems in Swedish domestic law, but it has now been changed to permit a stay of execution in such cases when an international body makes such a request. One cannot but contrast this situation with that which obtains in the USA. Germany brought a case in the International Court of Justice against the USA because of a failure to observe the obligation which the USA had undertaken by treaty to ensure consular notification when a German national was charged with a serious offense. The Court requested that the persons involved not be executed, for a capital charge was involved, before it had an opportunity to rule on the case. This request was not acted upon, and the International Court ruled that this had been a breach of international law over and above the primary breach of international law involved in the failure to see that the German consul was notified. The attitude of the US authorities was all the more odd in that very considerable numbers of US citizens work or travel abroad and from time to time end up on criminal charges, and one would have thought that it was in the interests of the USA to support treaty arrangements, which are in force in many of their host countries, requiring consular notification.

Some have wondered why there has been this general conformity within the Council of Europe. The Committee of Ministers could, in theory at least, expel a recalcitrant state from the Council of Europe. But this has never been a serious possibility; Greece, which under the regime of the Colonels, did defy the Convention, precluded any problem by denouncing and itself leaving the Council. I am not sure that any comprehensive explanation is possible, but one reason is that states which hope, in due course, to be admitted to the European Union, with all the economic benefits that follow, have first to sign on to the Convention and exhibit their will and ability to act as good Europeans by conformity. This certainly seems to have acted as a powerful motive, but it does not explain compliance by states which are already in the European Union.

I think, though it is not possible to produce very hard evidence, that conformity is encouraged by the evolution of the new post modern

Europe, in which cooperation between nation states, rather than conflict, is thought to benefit those states. The characteristics of this post modern world have been described by a British diplomat, Robert Cooper, in his *The Breaking of Nations: Order and Chaos in the Twenty-First Century* (2003). One characteristic of the new relationship between nation states is openness, achieved through mutual acceptance - let me emphasise mutual - of intrusive verification procedures. The most obvious example relates not to human rights protection but to military hardware and organisation for war. In Europe this is achieved through the Treaty on Conventional Forces in Europe. As you will know the USA (though a party to this treaty) does not itself belong to any such world - it insists that other countries, with notable exceptions, accept intrusive verification procedures it is reluctant to accept for itself. Through the Convention and the Strasbourg institutions, European states have come to accept a system of intrusive verification in relation to the operation of democratic institutions and the protection of human rights. Let me call attention to the most striking example. Under Article 3 of the ECHR, "No one shall be subjected to torture or inhuman or degrading treatment or punishment." There are no exceptions, and the article is non-derogable. Article 13 of the Convention binds parties to provide an effective remedy before a national authority for violations of this and other articles. But the Council of Europe has gone much further; in 1987 it established the Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment. Members of the Committee can simply turn up at a place of detention at any time to check up on what is going on there. This does not always work perfectly. A recent visit to Britain's Belmarsh prison, where suspected "terrorists" are held, was recently delayed for a short while for a profoundly English reason. The prison officers refused to interrupt their tea break to let the inspecting team in. But generally it works very well.

Let us now speculate on what the consequences would be if the USA somehow became a European country and signed on to the Convention. This is not quite so fantastic as it sounds, since on this side of the Atlantic there is a Convention, the American Convention on

Human Rights, to which the USA could accede if it wished. This Convention is modelled upon and similar to the European Convention as it existed before the institutions were remodelled by the Eleventh Protocol. It is, however, by no means simply a copy, and the USA has never become a party to this Convention. Now as you will know the US government from time to time adopts a position of defiance of international law, as it did in the consular notification case which I have mentioned. When it does so its posture is one of outrage at the cheekiness or uppityness of this or that international body, just as was the British press reaction to the decision in the Gibraltar case. But it is worth remembering that this stance has by no means always been adopted. Americans have in the past played an active part in the protection of human rights, and very many do so today. So I suppose things might someday change, and the USA might sign on to the American Convention, though at the moment any such possibility looks remote. If, as in my game of "Let's pretend," the USA was bound by the European Convention then there is no doubt that there would be problems over various governmental activities in the USA. For example, some prison conditions would present a difficulty, as would long term detention of asylum seekers, the use of corporal punishment, the death penalty, the phenomenon of death row, some trial procedures, the execution of juveniles, the use of stun guns, possible the three strikes out system, the practice of shooting escaping felons, the use of deadly force by the police. One can argue about the details, but the effect would be considerable. But the present situation is that the USA lives by the export theory of human rights, and remains, in practical terms, accountable to no international body for violations of human rights. Americans enjoy of course domestic protection from violation of their rights, a protection which is of course, by no means perfect, but is nevertheless extensive and vastly better than what obtains in many countries around the globe. But an American whose rights are violated cannot take his or her complaint to any effective international tribunal.

Would the USA and its citizens and denizens be better or worse off under the European Convention or some similar instrument? I think it

is plain that many individuals would certainly be better off, just as many Europeans have benefited from the Convention. The cost for this would of course be some degree of restriction on the powers of American states and the federal government, and of the agencies of government generally, including the courts. There are, as the economists remind us, no free lunches.

So far as the conduct of foreign relations is concerned, I incline to think that the USA would derive significant benefits from the enhanced reputation it would enjoy in the world, which would increase its ability to pursue its legitimate interests through cooperation with other countries. In international relations a good reputation is a valuable asset. Let me give you an illustration of something that has done immense harm to the reputation of the USA - Guantánamo. Under the European system a country establishing a Guantánamo would be accountable internationally for what went on there, and the place could be visited, without warning, by the Torture Committee. So if evil things were going on there we should know about it. And there would have to be an effective remedy for victims of any misconduct. But if in fact nothing evil is going on there we should all be reassured about that. I have never been there but to be frank so much information as has emerged seems to me to be pretty shocking and to give rise to the gravest suspicions. In no circumstances whatsoever would the use of torture or inhuman or degrading punishment be permissible there. Currently the perception entertained by many people out there in the world is that Guantánamo is an outrage - this may or may not be correct, but the US Government has only itself to blame for this. I doubt that Guantánamo will ever quite achieve the significance of Guernica, one reason being that Picasso is no longer around to immortalise the institution, as he immortalised the bombing of Guernica, and made of it an enduring memorial to the evils of fascism. But it will be a very long time before it is forgotten. The USA would be in a much more influential and therefore powerful position in the world in terms of its soft power if Guantánamo had never happened, and soft power comes much cheaper than military power, the use of which always generates hatred. People just do not like being

bombed or mutilated or whatever. The price would, under an international system, be some loss of sovereignty. But all co-operative arrangements, whether between individuals or between states, entail some surrender of autonomy as the quid pro quo for the benefits received; if you want to enjoy a game of tennis you have to abide by the rules. Just as in the case of a voluntary sale the parties, as if by magic, both end up better off by paying the price and giving up the ownership of the asset sold.