

The Interlaken process and the Jurisconsult

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Opening remarks

Vincent Berger's connection with the European Court of Human Rights dates back to the "old Court" in whose Registry he held a senior position. When he joined that Court in 1978, the French Judge was Pierre-Henri Teitgen, acknowledged to be one of the fathers of the European Convention on Human Rights. In view of his long association with the Court and the Convention system, it is perhaps not surprising that Vincent Berger became a leading authority on the Court's case-law and was therefore especially well-qualified for the post of Jurisconsult to which he was appointed in 2006. It is worth recalling at the outset that if the Court needs to pursue the goals of efficiency and rationalisation, the only real guarantee of the Court's authority and the long-term effectiveness of the Convention is the quality of its jurisprudence. Over his long career Vincent Berger has contributed to that quality and, particularly as Jurisconsult, to the consistency and coherence of the case-law.

The Convention reform processes

However, since the "old Court" gave way to the "new Court" in 1998 with the entry into force of Protocol No. 11 to the Convention, much of the focus has been on the volume of the Court's caseload and on its steadily growing backlog rather than the quality of its judgments. From 1998 to 2011 the Court's caseload increased by an average of 10% per annum, with the consequent accumulation of pending cases. While predictions that its stock of cases would reach 250,000 by 2010 proved to be overly pessimistic,¹ the figure had

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¹ See Lord Woolf's "Review of the working methods of the European Court of Human Rights", December 2005, available on the Court's Internet site (www.echr.coe.int).

reached 160,000 by September 2011.² Concern about escalating caseload and backlog led to different reform processes, the first of which resulted in the adoption and opening for signature of Protocol No. 14. The second began with the Lord Woolf report³ followed by the Wise Persons Report.⁴ However, little progress was made and the entry into force of Protocol No. 14 was blocked by one State's failure to ratify. In response to the call of the Court's then President, Jean-Paul Costa, Switzerland used its term as Chair of the Council of Europe's Committee of Ministers to organise a high level conference on the future of the Court at Interlaken in February 2010. This conference launched the Interlaken process which was pursued notably by the organisation of two further high level conferences on the same topic in Izmir (April 2011) and Brighton (April 2012).

If the initial impetus for this series of conferences was the case overload, they also provided the occasion for some thinly veiled or implied criticism of the Court. Thus while each conference resulted in a resounding reaffirmation of Council of Europe's member States' commitment to the Court and the Convention system and set out valuable and constructive recommendations aimed notably at improving Convention implementation at national level and securing more effective execution of Strasbourg judgments, there were also recommendations addressed directly to the Court concerning different areas of its judicial practice.

Clarity and consistency

The Interlaken declaration stressed the "importance of ensuring the clarity and consistency of the Court's case-law".⁵ Whether or not this implied criticism of the Court's existing practice and whether or not any such criticism was justified, what is not in doubt is the general agreement on the importance of clarity and consistency as fundamental elements of the rule of law. The Court has repeatedly confirmed this in its case-law. Thus it has held that, while it is not formally bound to follow any of its previous judgments, it is in the interests of

² As a result in particular of the successful exploitation of the Single Judge mechanism introduced by Protocol No. 14, this figure had fallen to 127,000 by January 2013.

³ See note 1 above.

⁴ Report of the Group of Wise Persons to the Committee of Ministers, November 2006.

⁵ Point 4 of the Declaration, to be found on the Court's Internet site.

legal certainty, foreseeability and equality before the law that it should not depart, without good reason, from precedents laid down in previous cases.⁶ What might constitute good reason is expressed as follows: Since the Convention is first and foremost a system for the protection of human rights, the Court must, however, have regard to the changing conditions in Contracting States and respond, for example, to any emerging consensus as to the standards to be achieved.⁷ There may therefore seem to be an inherent tension between, on the one hand, the need for legal certainty and foreseeability which requires consistency and clarity and, on the other, the living instrument doctrine.⁸

The Court has in any event repeatedly stressed in its own case-law that foreseeability is an element of the “quality of law” necessary to satisfy the requirement of “lawfulness” in Article 5 of the Convention and the “in accordance with the law”/“prescribed by law” criterion in the second paragraphs of Articles 8 to 11 of the Convention.

Moreover it has also frequently recalled that its assessment is based on the principle of legal certainty which is implicit in all the Articles of the Convention and constitutes one of the fundamental aspects of the rule of law. The principle of legal certainty, guarantees, *inter alia*, a certain stability in legal situations and contributes to public confidence in the courts. However, the requirements of legal certainty and the protection of the legitimate confidence of the public do not confer an acquired right to consistency of case-law. Case-law development is not, in itself, contrary to the proper administration of justice since a failure to maintain a dynamic and evolutive approach would risk hindering reform or improvement.⁹

Consistency in the sense discussed in this article therefore covers two aspects: firstly, at least from the Governments’ perspective, the sort of judicial self-restraint which serves to ensure that Convention evolution proceeds at a progressive, incremental pace; secondly, and here we are directly concerned with the Jurisconsult’s role, the need to ensure that a Court with five different Sections, with a strong tradition

⁶ See, for example, *Chapman v. the United Kingdom* [GC], no. 27238/95, § 70, ECHR 2001-I.

⁷ *Ibid.*

⁸ *Tyrer v. the United Kingdom*, 25 April 1978, § 31, Series A no. 26: “Human rights treaties are living instruments, whose interpretation must consider the changes over time and, in particular, present-day conditions”.

⁹ See, for example, *Albu and Others v. Romania*, nos. 34796/09 et al., § 34, 10 May 2012.

of independence in terms both of the operation of individual Sections and the positions adopted by individual Judges,¹⁰ maintains a case-law which is internally consistent. In other words, safeguards are necessary to prevent the emergence of divergent lines of case-law. This is not an insignificant risk with some 127,000 applications pending at the time of writing, and Sections each adopting sometimes ten or more judgments a week. Mechanisms and procedures are therefore required to meet this risk.

The Jurisconsult's note in response to Interlaken

In response to Interlaken, at the Court's request, the Jurisconsult, Vincent Berger, drew up a note on the clarity and consistency of the Court's case-law. He firstly fully recognized that it was a constant pressing need for the Court to prevent "the appearance of discrepancies or conflicts between judgments and between decisions". This was, he indicated, a question of equality between the parties, a matter of judicial certainty and one of unity of interpretation. It might be added that these different elements all contribute to the quality and therefore authority of the Court's judgments and decisions, which, as already noted, is ultimately the strongest guarantee of its continuing effectiveness.

In his note the Jurisconsult listed the different means, formal and informal, at the Court's disposal for ensuring consistency.

Convention

The principal formal mechanism is enshrined in the Convention itself and concerns mainly the first aspect of consistency. Thus Article 30 provides, *inter alia*, that "where the resolution of a question before the Chamber might have a result inconsistent with a judgment previously delivered by the Court, the Chamber may, at any time before it has rendered its judgment, relinquish jurisdiction in favour of the Grand Chamber, unless one of the parties objects". This provision is complemented by Article 43 which provided for the possibility of referral of a Chamber judgment where there is "a serious question affecting the interpretation or application of the Convention or the

¹⁰ As evidenced by the separate opinions frequently appended to judgments in accordance with Article 45 § 2 of the Convention.

Protocols thereto". It seems evident that this could include any perceived departure from settled case-law.

Since 1999 there have been a total of 129 relinquishments an average of 9 per year, with a maximum of 16 in 2009 and a minimum of 4 in 2004. It is interesting to note that nearly 60% concerned just five States (United Kingdom (26), France (19), Germany (13), Italy (10) and Turkey (9)). Of course not all of these cases raised issues of consistency; new jurisprudential questions can also justify relinquishment.

An early problem that was identified was a degree of reluctance on the part of Chambers to "let go" of complex and interesting cases. To meet this concern the Rules of Court were amended to the effect that in the event of relinquishment the Grand Chamber would include the members of the Chamber which relinquished jurisdiction.¹¹

At the same time under the terms of Article 30 relinquishment is not mandatory even where there is a clear possibility of a conflict with settled case-law. One response to Interlaken was suggested in the Court's preliminary opinion for the Brighton conference.¹² The Court stated as follows:

"Regarding the relinquishment of jurisdiction by Chambers to the Grand Chamber (Article 30), the Court is considering an amendment to the Rules of Court (Rule 72) making it obligatory for a Chamber to relinquish jurisdiction where it envisages departing from settled case-law. In light of the importance of the objective pursued and the States' express attachment to consistency in the case-law, it is to be hoped that they refrain from opposing such relinquishment."

The Court's position was therefore that it was prepared to envisage compulsory relinquishment in the interests of jurisprudential clarity, consistency and coherence, but in exchange and for the same reasons it expected States to renounce their existing power to oppose such relinquishment (Article 30 *in fine*).

¹¹ Rule 24 § 2(c) of the Rules of Court as amended in December 2000. Compare with Rule 24 § 2(d), which excludes members of the Chamber where a case is accepted for referral (except the President of the Chamber and the national judge).

¹² To be found on the Court's Internet site.

This proposal was taken up in the Brighton Declaration¹³ which contained the following indications:

“23. Judgments of the Court need to be clear and consistent. This promotes legal certainty. It helps national courts apply the Convention more precisely, and helps potential applicants assess whether they have a well-founded application. Clarity and consistency are particularly important when the Court addresses issues of general principle. ... The Court has indicated that it is considering an amendment to the Rules of Court making it obligatory for a Chamber to relinquish jurisdiction where it envisages departing from settled case law.

...

25. ...

d) In light of the central role played by the Grand Chamber in achieving consistency in the Court’s jurisprudence, [the Conference] concludes that Article 30 of the Convention should be amended to remove the words ‘unless one of the parties to the case objects’; [the Conference] encourages the States Parties to refrain from objecting to any proposal for relinquishment by a Chamber pending the entry into force of the amending instrument; ...”

Under the same point, again with a view to encouraging consistency, the Conference invited the Court “to consider whether the composition of the Grand Chamber would be enhanced by the ex officio inclusion of the Vice Presidents of each Section”.¹⁴

As a direct consequence of Brighton two draft Protocols are now in preparation. Draft Protocol No. 15 includes a provision deleting from Article 30 the possibility for parties to object to relinquishment, as agreed in Brighton.¹⁵

With regard to the amendment of the Rules of Court, this was still under discussion in the plenary at the time of writing.¹⁶

¹³ Also to be found on the Court’s Internet site.

¹⁴ *Ibid.*, point 25(e).

¹⁵ Article 3 of the draft Protocol (DH-GDR (2012)R2 Addendum III), to be found on the Court’s Internet site.

¹⁶ It is interesting to note that the Rules of Court in force prior to the entry into effect of Protocol n° 11 made provision for compulsory relinquishment in the event of possible inconsistency with a previous judgment (for example Rule 51 § 1 of Rules A as amended on 27 October 1993. “... Relinquishment of jurisdiction shall be obligatory where the resolution of [a serious question or questions affecting the interpretation of the Convention] might have a result inconsistent with a judgment previously delivered by the Court.” At the time there was

On the other hand, the proposal to alter the composition of the Grand Chamber has not been accepted by the Court. It pointed out that to have eleven *ex officio* members of each Grand Chamber would mean that only six other judges would be involved in each case. It further recalled that it had always attached importance to achieving balance in the composition of every Grand Chamber, especially a geographical balance. Moreover, regular involvement in Grand Chamber cases was an important and valued aspect of the work of all of the judges of the Court.¹⁷

The Grand Chamber will no doubt continue to play a major role in ensuring case-law clarity and consistency, whether through relinquishment or referral.¹⁸

Other means of ensuring clarity and coherence not provided for in the Convention

The other means which the Jurisconsult listed in his response to Interlaken are aimed more at the second aspect of consistency, ensuring a consistent approach across the five Sections. They have in common the fact that they have no express basis in the Convention. In other words, the Court recognised rapidly that additional mechanisms were required if the goals of clarity and consistency were to be achieved and adopted solutions accordingly.

The Bureau

At this stage only one of these solutions is enshrined in the Rules of Court and even then securing consistency of the case-law is not referred to. This is the Bureau of Court, comprising the President of the Court, the five Section Presidents (two of whom are also Vice-Presidents of the Court) and the two elected Registrars (Registrar and

no reference in the Convention itself to the possibility of relinquishment. It is therefore submitted that the fact that relinquishment is not compulsory under the Convention does not preclude the Court from making it so in its Rules of Court.

¹⁷ "The Interlaken Process and the Court", document to be found on the Court's Internet site.

¹⁸ A recent example of a relinquishment which may be presumed to be with a view to clarifying Strasbourg jurisprudence is *Allen v. the United Kingdom*, concerning the role of the presumption of innocence in compensation proceedings following the quashing of a conviction (statement of facts to be found in the HUDOC database: <http://hudoc.echr.coe.int>). For the corrective role of the Grand Chamber, see *Lautsi and Others v. Italy* [GC], no. 30814/06, ECHR 2011.

Deputy Registrar).¹⁹ If the primary role of the Bureau is to assist the President in carrying out his or her function in directing the work and the administration of the Court (Rule 9A § 3), it is also tasked with facilitating coordination between the Court's Sections (Rule 9A § 4). This clearly covers taking steps to avoid where possible inconsistencies between the Sections in the application and development of case-law. Even if it did not, the fact that the six judges in whom the plenary has expressed the most confidence – and five of whom each have a clear overview of what their individual Section is doing – meet on a regular basis (at least monthly) provides an evident opportunity to identify and possibly correct potential conflicts. This points to one of the most important tools for ensuring consistency, namely effective communication. It is plain that regular and open exchanges of information between the Section Presidents makes an important contribution.

The Jurisconsult

At the same time it had been recognised that there was a need for a full-time case-law specialist who could monitor case-law development and draw the attention of Chambers to potential points of conflict. Thus the post of Jurisconsult was created in 2001. The appointment was a senior one because the office holder had to be able to speak with sufficient authority to convince Judges that they might be taking a line which was inconsistent with established case-law. As that role has developed during Vincent Berger's tenure, the Jurisconsult has come to play a key role in preventing case-law conflicts. He receives weekly reports from each of the five Sections and examines all the cases on meeting agendas. Assisted by a team of Registry lawyers, he draws up observations circulated to all Judges identifying issues of inconsistency or overlooked relevant precedents or informing them of pending cases raising similar issues. He also in principle attends all Grand Chamber deliberations. In addition the Jurisconsult compiles a weekly case-law update which helps to alert Judges and Registry lawyers to case-law developments. There has been discussion as whether the Jurisconsult's role could be further strengthened by an express reference to the office and its functions in the Rules of Court, but these discussions have not yet reached a conclusion.

¹⁹ Rule 9A of the Rules of Court, inserted on 7 July 2003.

The Conflict Resolution Board

In the meantime, it was clearly felt that a body with a more specific mission than the Bureau was required for resolving issues of case-law conflict. As a result the Conflicts Resolution Board (CRB) was set up in 2005, with as full members the President of the Court and the five Section Presidents. Unlike the Bureau, however, meetings are attended, in a non-voting capacity, by the Jurisconsult, the elected Registrars and the Section Registrars and Deputy Registrars. Since its creation the CRB has met fourteen times, its discussions covering a wide range of jurisprudential issues. While such meetings gave rise to lengthy and fruitful exchanges of view and thus provided a useful forum for discussion, the lack of a formal basis has meant that its recommendations could not have the character of binding directives and this has led to doubt as to whether it is able to fulfil its purpose.

Section Registrars

Each of the five Sections has a Registrar and a Deputy Registrar whose duties include “ensuring case-law consistency between Sections and facilitating the reporting of case law with the other Registrars”. Weekly meetings are held, attended by the Jurisconsult and other members of the Registry’s senior management team, at which case-law and procedural issues that have arisen in Section meetings are reviewed, notably so as to identify inconsistencies.

Working parties/standing committees

In his Interlaken note the Jurisconsult also referred to the work of the “Article 41 Subgroup”, a subgroup of the Committee on Working Methods whose aim has been to eliminate both inconsistency in the amounts awarded both between Sections and different judicial formations and incoherence or disproportion in awards as between the different types of violation. Both the Standing Committee on the Rules of Court and the Standing Committee on Working Methods have also been involved in reflection on how to enhance clarity and consistency.

Response of the Steering Committee for Human Rights

The Council of Europe's Steering Committee for Human Rights (CDDH) adopted a collective response to the Jurisconsult's note.²⁰ The CDDH stressed the importance of consistency so as to allow applicants and national authorities to understand the precise scope of Convention rights and freedoms and linked this to the effective operation of the principle of subsidiarity. It called for caution in departing from existing case-law and pointed out that the clearer and more consistent the case-law, the easier it was for Contracting Parties to consider the conclusions to be drawn from a judgment, even when it did not involve them directly, and the greater the impact of the Court's case-law would be. The CDDH felt that the Court might consider a more efficient means of internal consultation in order to minimise the risk of inconsistency in its case-law. It also recommended the publication of the Court's "ranged-based guidance" on just satisfaction awards and the adoption of instruments enhancing the clarity and coherence of the application of the Court's procedure.

Brighton Declaration²¹

The Conference welcomed the steps that the Court was taking to maintain and enhance the high quality of its judgments and in particular to ensure that the clarity and consistency of judgments are increased even further. It welcomed the Court's long-standing recognition that it was in the interests of legal certainty, foreseeability and equality before the law that it should not depart without cogent reason from precedents laid down in previous cases. It invited the Court to have regard to the importance of consistency where judgments related to aspects of the same issue, so as to ensure their cumulative effect continued to afford States Parties an appropriate margin of appreciation.²²

²⁰ Adopted at its 74th meeting 7-10 February 2012 (CDDH (2012)R74 Addendum II).

²¹ *Op. cit.* (note 12).

²² *Ibid.*, point 25(c).

Conclusion

There is no disagreement between the Court and the stakeholders in the Convention system that consistency and clarity of case-law are indeed fundamentally important goals. Over the years, as Vincent Berger showed in his Interlaken note, the Court has used both the mechanism supplied by the Convention and non-Convention tools to pursue these goals. It is clear in this respect that the Grand Chamber will continue to play a crucial role at the Convention level. In terms of the practical measures to guarantee internal consistency there is no doubt that the office of Jurisconsult under Vincent Berger's tenure has already made an important contribution and has laid solid foundations which will allow his successors to take this process forward. One unintended consequence of Protocol No. 14 is a more rapid turnover of Judges with a corresponding weakening of the institutional memory. This makes it all the more important to have safeguards in place. The concern expressed by the Governments at Interlaken is a legitimate one and this is fully recognized by the Court and its Registry.