CONFLICT PREVENTION OR CONFLICT RESOLUTION: WHAT ROLE FOR THE EUROPEAN COURT OF HUMAN RIGHTS?

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Introduction

On 7 October we learnt that the 2022 Nobel Peace Prize was awarded to human rights advocate Ales Bialiatski from Belarus, the Russian human rights organisation Memorial and the Ukrainian human rights organisation Centre for Civil Liberties. Why this choice? Because the three laureates represented civil society in their home countries. They had for many years promoted the right to criticise power and protect the fundamental rights of citizens. They had made an outstanding effort to document war crimes, human rights abuses and the abuse of power. Together they demonstrated the significance of civil society for peace and democracy. One could not hope for a clearer example of the link between human rights, the rule of law and democracy on the one hand and peace on the other. At a time when Europe is once again witnessing armed conflict and devastation on its soil it is only right that we ask ourselves: what role does the European Convention on Human Rights play in a conflict prevention and resolution?

The preamble to the European Convention on Human Rights stresses that human rights and fundamental freedoms 'are the foundation of justice and peace in the world'. As has been accepted by the UN Security Council, gross, massive or systemic violations of human rights constitute a threat to international peace and security. Therefore, ensuring the observance of human rights by way of a strong mechanism of judicial control is a factor in ensuring stability, security and peace. I would like to echo here the words of a former President of the European Court of Human Rights, Judge Alexandre-Linos Sicilianos, when he asserted on its 70th anniversary, that the European Convention on Human Rights was one of the greatest peace projects in history.[1]

For the purposes of this article, a rather black and white dichotomy between conflict prevention on the one hand and conflict resolution on the other is illustrated. In real life, the distinction is not so clear cut, just like our case-law. Nevertheless, each will be addressed separately. In the first place, the article examines conflict prevention in terms of the work the European Court does 'upstream' in maintaining political pluralism and a healthy civil society. Second, in respect of conflict resolution, the article concentrates on the work that the Court does 'downstream' in relation to inter-State applications. How effective are they and what difference can they make? Of course, one may think of other ways in which the Court assists in conflict resolution, in particular by looking at the implementation of the Court's judgments and the ensuing impact of the Convention in Member States of the Council of Europe.

[1] Linos-Alexandre Sicilianos, 'The European Convention on Human Rights at 70: the dynamic of a unique international instrument' (European Court of Human Rights, 5 May 2020) <https://echr.coe.int/Documents/Speech_20200505_Sicilianos_70th_anniversary_Convention_ENG.pdf> Accessed 26 June 2023.

Conflict prevention – the Court's work in respect of maintaining political pluralism and civil society

According to the Preamble to the Convention, fundamental human rights and freedoms are best maintained by 'an effective political democracy'. Democracy is essential if people are to live in freedom, dignity and security. Democracy is also required as a backstop for maintaining human rights and the rule of law. As the Secretary General to the Council of Europe noted in her annual report in 2021, the three pillars of the work of the Council of Europe are inseparable. If one pillar weakens, so too do the others.[2] A healthy democratic environment is achieved through the protection of a number of key rights provided for in the European Convention, such as, freedom of expression (Article 10); freedom of assembly/association (Article 11) and electoral rights (Article 1 of Protocol No. 1) as well as an efficient, impartial and independent justice system whose decisions are enforced (Article 6). The latter is key to the rule of law and a precondition for the enjoyment of all fundamental rights and freedoms. I will look at each very briefly.

Freedom of expression (Article 10)

In its interpretation of Article 10 of the Convention, the Court has held that 'freedom of expression constitutes one of the essential foundations of [democratic] society, one of the basic conditions for its progress and for the development of every man'.[3] The importance the Court attaches to freedom of expression, and in particular its role in a democracy, is reflected in the heighted protection it affords to those tasked with upholding democratic values such as journalists, academics and opposition politicians. Indeed, the positive obligations under the Convention imply, among other things, that States are required to establish an effective mechanism for the protection of authors and journalists in order to create a favourable environment for participation in public debate of all those concerned, enabling them to express their opinions and ideas without fear, even if they run counter to those defended by the official authorities or by a significant part of public opinion, or even if they are irritating or shocking to the latter. In this connection, the Court has consistently held there is little scope under Article 10 § 2 of the Convention for restrictions on political speech or debates on questions of public interest.

Freedom of association and assembly (Article 11)

Political parties play an essential role in ensuring pluralism and therefore come within the scope of Article 11. Any measure taken against them affects both freedom of association and, consequently, democracy in the State concerned. The exceptions set out in Article 11 should, therefore, be construed strictly. Associations formed for other purposes, including those protecting cultural or spiritual heritage, pursuing various socio-economic aims, proclaiming or teaching religion, seeking an ethnic identity or asserting a minority consciousness, are also important to the proper functioning of democracy.

In the recent and very important case of *Ecodefence and Others v. Russia*, the applicants were 73 Russian non-Governmental organisations who were involved in areas of civil-society issues, human rights, protection of the environment and cultural heritage, education, social security, and migration.[4] They included some of the oldest and most established Russian organisations

[2] Secretary General of the Council of Europe, *State of Democracy, Human Rights and the Rule of Law: A democratic renewal for Europe* (2021) <https://rm.coe.int/annual-report-sg-2021/1680a264a2> Accessed 26 June 2023.
[3] *Handyside v The United Kingdom,* App No 5493/72 (ECHR, 7 December 1976) para 49.
[4] App Nos 9988/13 and 60 others (ECHR, 14 June 2022).

such as the Memorial Human Rights Centre. The case concerned the measures imposed by virtue of the Foreign Agents Act 2021 on these organisations. These measures included registration of the organisations as 'foreign agents', which entailed extraordinary auditing, reporting and labelling requirements, and heavy fines. Many of the organisation had been either forced to dissolve or had been wound up as a result. The Court found a violation of Article 11 interpreted in the light of Article 10. The link between the two is obvious.

Moreover, the Court looks closely at the chilling effect of certain State actions in relation to the freedom of assembly such as banning gay pride marches or the excessive use of police force. For example, in *Navalnyy and Gunko v. Russia*, the Court noted that the first applicant's brutal arrest, as well as his subsequent administrative conviction, had a chilling effect, discouraging him and others from attending protest rallies or indeed from engaging actively in opposition politics.[5]

The right to free elections under Article 3 of Protocol No. 1

The Court has consistently emphasised the importance of Article 3 of Protocol No. 1 in an effective democracy and, as a consequence, its prime importance in the Convention system. It has reiterated that the rights guaranteed under Article 3 of Protocol No. 1 are crucial to establishing and maintaining the foundations of an effective and meaningful democracy governed by the rule of law. Indeed, free elections and freedom of expression, and particularly freedom of political debate, form the foundation of any democracy.[6] These principles have been recently confirmed in a judgment against Russia in October 2022, *Kara-Murza v Russia*.[7] The applicant is a well-known opposition politician and journalist. He complained before the Court of the annulment of his registration as a candidate for election to the Yaroslavl Regional Duma. The reason he was given was on the grounds of his having two nationalities. The Court found a breach of that Article, referring to the lack of proportionality.

Conflict resolution and the role of the inter-State application

At the heart of the Court's role in respect of both conflict prevention or conflict resolution lies in the inter-State application. The inter-State application is provided for in Article 33 of the Convention. But what is its object and purpose? Is it a mechanism intended to settle international disputes between States or rather to ensure the collective enforcement of human rights, or both? Beyond these questions, there seems to be an interest within the Council of Europe in recalibrating how it functions, at least to ensure that it works as efficiently as possible.

There are currently 16 inter-State applications pending before the Court, with the majority relating to conflict situations. In addition, there are around 11,000 pending individual applications which the Court considers as connected to inter-State applications or to an inter-State dispute. These amount to around 15% of the total number of pending individual applications which today stand at around 75,000. There have been over 20 inter-State cases since the Convention entered into force in 1953 and compared to the number of individual applications one can say that it is rather rarely used. The first one was *Greece v United Kingdom* lodged in 1957 concerning alleged violations in Cyprus.

[5] App No 75186/12 (ECHR, 10 November 2020) para 88.
[6] *Tănase v. Moldova* App No 7/08 (ECHR, 27 April 2010).
[7] App No 2513/14 (ECHR, 4 October 2022).

Why do States bring these applications against each other? Most inter-State applications concern situations of crisis or conflict, such as the UK authorities' interrogation techniques from 1971 – 1975 in Northern Ireland, Turkey's military operations in Northern Cyprus in 1974, the armed conflict between Georgia and Russia in 2008 and the events in Crimea and Eastern Ukraine in 2014. However, the last decade has seen a marked increase in the number of inter-State applications being brought to the Court. As mentioned, there are currently sixteen pending applications. On one hand, this may unfortunately be a result of increased recent conflict in the European legal space. However on the other, it also shows a certain confidence in the role that can be played by the Court in resolving disputes that arise at the inter-State level within the Council of Europe. Since 2020, the Court has seen eleven new inter-State applications being lodged. I will not go through each one but give you some examples.

Three relate to the conflict in Nagorno-Karabakh.[8] One, *Ukraine and the Netherlands v Russia,*[9] concerns the shooting down of Malaysia Airlines Flight MH17 over Eastern Ukraine in 2014. Another, *Liechtenstein v the Czech Republic,*[10] relates to alleged breaches of property rights of Liechtenstein citizens following the Second World War. *Ukraine v the Russian Federation (IX)* concerns allegations of a State-authorised targeted assassination operations against perceived opponents outside a situation of armed conflict.[11] *Ukraine v Russia (X)* concerns the Ukrainian government's allegations of mass and gross human rights violations committed by the Russian Federation in its military operations on the territory of Ukraine since 24 February 2022. Twenty-three Council of Europe governments and one NGO have requested leave to intervene as third parties in the proceedings.

Some of these cases arise from political conflict or dispute; some are the result of steps taken by States to represent the interests of individual nationals; others demonstrate the possibility for States to operate a more general 'policing' role.[12] All inter-State applications are factually complex and invariably raise difficult legal questions. These judgments have important political ramifications and may affect a large number of individuals, given the number of individual applications associated with inter-State cases or more generally with conflict situations. Currently there are 9,600 associated individual applications. Essentially, they relate to conflicts in the following three regions: Abkhazia and South Ossetia (with applications pending against Georgia and before Russia); Nagorno-Karabakh (with individual applications pending against Armenia and Azerbaijan); and Eastern Ukraine and Crimea (with individual applications pending against Ukraine and Russia).

There have been some recent developments in inter-State cases. These are the admissibility decisions in *Ukraine v Russia (re Crimea),*[13] and *Slovenia v Croatia,*[14] and a judgment in respect of *Georgia v Russia (II)*[15] adopted on 21 January 2021. The admissibility decision in *Ukraine v*

[8] *Armenia v Azerbaijan* App No 42521/20; *Armenia v Turkey* App No 4351/20; *Azerbaijan v Armenia* App No 47319/20.
[9] App Nos 8019/16, 43800/14 and 28525/20 (ECHR, 30 November 2022).
[10] App No 35738/20 (ECHR, 29 November 2018).
[11] App No 10691/21 (ECHR, 19 February 2021).
[12] Philip Leech, 'On Inter-State Litigation and Armed Conflict Cases in Strasbourg' (2021) 2(1) European Convention on Human Rights Law Review 1-48.
[13] App No 20958/14 (ECHR, 14 January 2021).
[14] App No 54155/16 (ECHR, 18 November 2020).
[15] App No 38263/08 (ECHR, 13 December 2011).

Russia (re Crimea)[16] contains some interesting developments *inter alia* as regards the assessment of evidence and the burden of proof (non-exhaustion/administrative practice). In *Slovenia v Croatia,* the Court found that the Convention did not allow Governments to use the inter-State application mechanism to defend the rights of a legal entity that was not a 'non-governmental organisation'.[17] Accordingly, the Court lacked jurisdiction to hear the complaint. In *Georgia v Russia (II),* the Court decided on important questions of jurisdiction; further defined the criteria of the concept of an administrative practice; and examined the interrelation between the provisions of the Convention and the rules of international humanitarian law.

What are the consequences of rulings of the Court in inter-State cases? In 2000, there was a friendly settlement in the case of *Denmark v Turkey* concerning the alleged ill-treatment of a Danish national detained in Turkey. The settlement provided for *ex gratia* payment and expression of regret by the Turkish government for the ill-treatment inflicted, provision of assistance in police training by the applicant Government and establishment of a continuous dialogue. *Cyprus v Turkey* concerned the situation in Northern Cyprus since Turkey carried out military operations there in July and August 1974, and the division of the territory of Cyprus since that time. Turkey was ordered to pay Cyprus €30,000,000 in respect of the non-pecuniary damage suffered by relatives of 1,456 missing persons and €60,000,000 in respect of the non-pecuniary damage suffered by the enclaved Greek-Cypriot residents of the Karpas peninsula.

Conclusion

Can human rights prevent serious conflicts including armed conflicts? Has the European Convention on Human Rights stopped wars? Just like Professor Angelika Nussberger, former Vice-President of the Court, when she asked this question at the 70th anniversary celebrations of the Convention, I would like to reply 'yes', but the reality is more complicated.[18] One could ask if Russia's invasion of Ukraine on 24 February and the continuing war in Europe is proof that the Convention is somehow powerless in the face of determined military action. However, I hope that this article has demonstrated two points. The first is that the European Convention, through its protection of key civil and political rights, plays an important role in ensuring that the elements for a peaceful society – democracy, tolerance and pluralism – are in place and not dismantled by an authoritarian government. The European Convention does create a climate in which the escalation of conflict becomes less likely. Second, States and individuals, victims of conflicts can turn to the Court for reparation and a public statement of a violation of the Convention.

[16] App No 20958/14 (ECHR, 14 January 2021).
[17] App No 54155/16 (ECHR, 18 November 2020).
[18] Angelika Nußberger, 'Promoting Peace and Integration among States' (70th anniversary of the European Convention on Human Rights Conference, Strasbourg, 18 September 2020) <https://echr.coe.int/Documents/Speech_20200918_Nussberger_Conference_70_years_Convention_ENG.pdf> Accessed 26 June 2023.