1

Introduction

ANDREAS FØLLESDAL, BIRGIT PETERS AND GEIR ULFSTEIN

1. The European Court of Human Rights in a new institutional setting

At 50, the European Court of Human Rights (ECtHR, or the Court) is without doubt one of the most successful international human rights treaty bodies. The Court has been praised as the driving force of fundamental rights jurisprudence in Europe, contributing to a common European standard in a Europe of 47 member states and over 850 million inhabitants, from the Arctic Ocean to the Caspian Sea. With a case law which outnumbers that of any other regional and international human rights instrument, the Court accounts for changes in many national policies, laws and living conditions in the wider Europe.

The Court today reaches out to a far larger group of states, institutions and potential petitioners than envisaged in 1949 by the ten founding states of the Treaty of London. This growth has implications both for the Court's institutional architecture and the relationship of the Court to the Council of Europe, its member states, as well as to other international organisations. The ECtHR needs to adapt to new floods of petitioners, to changing social and living conditions in the member states, to new governments and to forms of governance at the national and international levels. Consider that in 1994 (former) President of the ECtHR Bernhardt noted that the 'character of the Convention as a "Human Rights Constitution" has become more important than the treaty character; … in the great majority of cases decided by the European Court, violations of the most fundamental human rights are no longer at stake…'.[1] Whilst in 2002, Paul Mahoney, then registrar at the Court, remarked that it had acquired a new mission after the fall of the Berlin

[1] R. Bernhardt, 'Human Rights and Judicial Review: The European Court of Human Rights', in D.M. Beatty, *Human Rights and Judicial Review: A Comparative Perspective* (The Hague: Martinus Nijhoff, 1994) 297–319, at 304.

Wall: 'Until 1989, the Convention could be described as an international control mechanism for fine-tuning sophisticated national democratic engines that were, on the whole, working well. Now, and in the foreseeable future, this is not a blanket assumption that can be made for many of the participating States that are starting out on the democratic path.'[2] The year 1989 marked but one of the major turning points in the Court's institutional framework. Mikael Rask Madsen and Jonas Christoffersen recently argued that the ECtHR has undergone at least four major structural changes since its inauguration in 1950. During the first phase, the Court developed institutional autonomy and jurisprudence; the second demarcated the Court's will to develop a progressive jurisprudence, with the doctrines of the margin of appreciation and dynamic interpretation. During the third phase, the ECtHR contributed to the transitions to democracy in Eastern Europe; the last phase consists of the Court's increased focus on the effectiveness of the European Convention on Human Rights (ECHR, or the Convention) in domestic law, which culminated in the recent reform discussions at Interlaken, Izmir and Brighton.[3]

The Court has continuously sought to define and redefine its proper role in the changing institutional landscape of the wider Europe. The recent emphasis on the effectuation of the ECHR at the national levels, and an increased focus on the responsibility of the state members to the ECHR, is not the end. Protocol 14 to the ECHR and the modifications agreed at the Brighton Conference of April 2012 introduced important procedural changes.[4] They emphasised the main responsibility of member states to implement the Court's judgments, as well as the duty of member states to abide with the final decisions of the Court. At the same time, they highlighted the principle of subsidiarity, as well as the margin of appreciation doctrine as main elements of the Court's jurisprudence.[5]

[2] P. Mahoney, 'New Challenges for the European Court of Human, Rights Resulting from the Expanding Case Load and Membership', *Penn State International Law Review* 21:1 (2002) 101–14, at 104.

[3] J. Christoffersen and M.R. Madsen (eds.), *The European Court of Human Rights between Law and Politics* (Oxford University Press, 2011) (hereinafter Christoffersen and Madsen, *The ECtHR between Law and Politics*), at 3.

[4] For example, the recent declaration commended a deletion of the words 'and provided that no case may be rejected on this ground which has not been duly considered by a domestic tribunal' which had been introduced into a modified art. 35(3)(b) with Protocol 14.

[5] See Council of Europe (CoE), *High Level Conference on the Future of the European Court of Human Rights*, Brighton, 20 April 2012, paras. 2 and 3.

But the enlargement of membership to the Council of Europe and ever-more petitioners hoping that the Court may provide effective remedies may require even further adaptations. The number of applications pending before the Court is increasing and has just passed the vertiginous count of 153,850.[6] Just to respond to the pending applications without accepting new cases would keep the Court busy for the next six years, a period of justice delayed which it considers unacceptable at the national level.[7] The final shape and impact of the reform proposals still remain unclear.

The recent Brighton Declaration was preceded by several grand debates in academia, by politicians and other stakeholders. They argued about the comparative benefits and disadvantages of a strong ECtHR with 'constitutional' powers to strike out applications lacking constitutional import, and a precedential effect of its judgments.[8] It could be supported by national states which take ownership over the Convention and strong courts at the member state level,[9] or the ECtHR could be devoted to individual justice, with the right of individual petition and individual remedy.[10] It is not yet clear whether the compromissory lines of the Declaration are able to put an end to those controversies. In one sense, the Court will always be an unpopular institution from the perspective of the member states. After all, it decides on the claims of individual persons against their (democratically elected) governments.[11]

[6] See the statistics for 2011: www.echr.coe.int/NR/rdonlyres/7B68F865-2B15-4DFC-85E5-DEDD8C160AC1/0/Statistics_2011.pdf.

[7] Based on the figures provided in *ibid*., the Court can adjudge around 1,700 cases per year on the merits. In 2010, it decided a total of 29,102 communications, of which a total of 27,345 were inadmissibility decisions, or cases struck out of the list.

[8] M. O'Boyle and A. Lester have argued that judgments of the ECtHR should have an 'erga omnes' effect in cases of 'constitutional import' at the member state level. M. O'Boyle, 'The Future', in E. Myjer *et al.* (eds.), *The Conscience of Europe: 50 Years of the European Court of Human Rights* (London: Council of Europe, Third Millennium Publishing Limited, 2010) 197–201, at 201; European Commission of Human Rights (ECoHR) Council of Europe, *High Level Conference on the Future of the European Court of Human Rights*, Interlaken, 2010, B.4.c; A. Lester, 'The European Court of Human Rights after 50 Years', in Christoffersen and Madsen, *The ECtHR between Law and Politics*, 98–115, at 115.

[9] J. Christoffersen, *'Individual and Constitutional Justice'*, in *ibid*., 181–203 (hereinafter Christoffersen, 'Individual and Constitutional Justice'), at 202–3.

[10] Compare H. Keller, A. Fischer and D. Kühne, 'Debating the Future of the European Court of Human Rights after the Interlaken Conference: Two Innovative Proposals', *European Journal of International Law* 21:4 (2010) 1025–48 (hereinafter Keller, Fischer and Kühne, 'Debating the Future').

[11] S. Greenberg, 'New Horizons for Human Rights: the European Convention, Court and Commission', *Columbia Law Review* 63 (1963) 1384–412, at 1409.

The envisaged ratification of the ECHR by the European Union (EU, or the Union) raises further issues. A draft Agreement on the Accession of the EU to the ECHR has been agreed upon,[12] but the details of the relationship between the ECtHR and the Court of Justice of the European Union (CJEU, formerly the European Court of Justice, ECJ) are yet to be defined. Finally, the ECtHR must increasingly address actions by international organisations such as the United Nations (UN). The *Al-Skeini*[13] and *Al-Jedda*[14] judgments of the Court touch upon its relation to the UN Security Council. They give a hint of questions which need further discussion. To conclude, the Court finds itself in a new institutional setting toward national courts, and toward institutions at the European and global level.

This book examines these new institutional settings of the Court. Few contributions have hitherto concentrated on these multiple relationships of the ECtHR.[15] The most recent contribution to deal explicitly with the Court's institutional role is Christoffersen and Madsen's *The European Court of Human Rights between Law and Politics*.[16] It concentrates on extrapolating the Court's institutional role, largely leaving aside the proper relationship between the member states, the EU or the organs of the Council of Europe. Some articles have assessed the alleged

[12] CoE, Steering Committee for Human Rights, 'Report to the Committee of Ministers on the Elaboration of Legal Instruments for the Accession of the European Union to the European Convention on Human Rights', No. CDDH(2011)009, 14 October 2011.

[13] ECtHR, *Al-Skeini and Others* v. *United Kingdom* (Appl. No. 55721/07), Judgment (Grand Chamber), 7 July 2011, not reported.

[14] ECtHR, *Al-Jedda* v. *United Kingdom* (Appl. No. 27021/08), Judgment (Grand Chamber), 7 July 2011, not reported. See comments by C. Chinkin, 'International Humanitarian Law, Human Rights and the UK Courts', in L. Boisson de Chazournes and M.G. Kohen (eds.), *International Law and the Quest for its Implementation: Liber Amicorum Vera Gowlland-Debbas* (Leiden and Boston: Brill, 2010) 243–64, at 252–64; C. Tomuschat, 'Human Rights in a Multi-Level System of Governance and the Internment of Suspected Terrorists', *Melbourne Journal of International Law* 9 (2008) 391–404 (predicting that the judgment would not stand scrutiny by the ECtHR).

[15] Compare P. Popelier, C. v.d. Heyning and P.V. Nuffel (eds.), *Human Rights Protection in the European Legal Order: The Interaction between the European and the National Courts* (*Law and Cosmopolitan Values*) (Portland, OR: Intersentia, 2011); E. Bates (ed.), *The Evolution of the European Convention on Human Rights: From its Inception to the Creation of a Permanent Court of Human Rights* (Oxford University Press, 2010); H. Keller and A. Stone Sweet, *A Europe of Rights: The Impact of the ECHR on National Legal Systems* (Oxford University Press, 2008); R. Blackburn and J. Polakiewicz, *Fundamental Rights in Europe: The European Convention on Human Rights and its Member States, 1950–2000* (Oxford and New York: Oxford University Press, 2001).

[16] Christoffersen and Madsen, *The ECtHR between Law and Politics*.

constitutional role which the Court assumes within the European context.[17] Although suggestions about the future relationship of the Court and the EU are in circulation,[18] not many have sought to assess this relationship in a more principled manner.

[17] Compare A. Stone Sweet, 'A Cosmopolitan Legal Order: Constitutional Pluralism and Rights Adjudication in Europe', *Journal of Global Constitutionalism* 1:1 (2012) 53–9. S. Greer, 'Constitutionalizing Adjudication under the European Convention on Human Rights', *Oxford Journal of Legal Studies* 23:3 (2003) 405–33; J.R.Z. Pérez, 'The Dynamic Effect of the Case-Law of the European Court of Human Rights and the Role of the Constitutional Courts', in ECtHR, *Dialogue between Judges* (Strasbourg; Council of Europe, 2007) 36–52; E.A. Alkema, 'The European Convention as a Constitution and its Court as a Constitutional Court', in P. Mahoney *et al.* (eds.), *Protecting Human Rights: The European Perspective: Studies in Memory of Rolv Ryssdal* (Cologne, Bonn: Karl Heymanns Verlag, 2000) 41; F. Tulkens, 'The European Convention on Human Rights Between International Law and Constitutional Law', in ECtHR, *Dialogue between Judges*, 8–15; R. Harmsen, 'The European Court of Human Rights as a "Constitutional Court"', *Judges, Transition and Human Rights* (2007) 33–53; X. Groussot, '"European Rights" and Dialogues in the Context of Constitutional Pluralism', *Scandinavian Studies in Law* 55 (2010) 45–75.

[18] T. Lock, 'Accession of the EU to the ECHR: Who Would Be Responsible in Strasbourg?', *SSRN eLibrary* (2010); T. Lock, 'The ECJ and the ECtHR: The Future Relationship between the Two European Courts', *The Law and Practice of International Courts and Tribunals* 8:3 (2009) 375–98; J. Puente Egido, 'Adhesión de la Unión Europea al Convenio Europeo para la Protección de los Derechos Humanos?', *Soberanía del estado y derecho internacional* 2 (2005) 1119–44; T. Jaag, 'Beitritt der EG zur EMRK?: zum Gutachten 2/94 des Europäischen Gerichtshofs', *Aktuelle juristische Praxis* 5:8 (1996) 980–4; J. Boulouis, 'De La Compétence de la Communauté Européenne Pour Adhérer à la Convention de Sauvegarde des Droits de l'Homme et des Libertés Fondamentales: Avis de la Cour de Justice des Communautés', *Libertés* 2 (1994) 315–22; G. Minichmayr, *Der Beitritt der Europäischen Gemeinschaft zur Konvention zum Schutze der Menschenrechte und Grundfreiheiten* (*Euro-Jus, Schriftenreihe der Abteilung für Europäische Integration*) (Krems: Donau Universität, 1999); S. Winkler, *Der Beitritt der Europäischen Gemeinschaften zur Europäischen Menschenrechtskonvention* (*Schriftenreihe Europäisches Recht, Politik und Wirtschaft*) (Baden-Baden: Nomos, 2000); A. Bleckmann, *Die Bindung der Europäischen Gemeinschaft an die Europäische Menschenrechtskonvention* (Cologne: C. Heymann, 1986); M. Ruffert, 'Die künftige Rolle des EuGH im europäischen Grundrechtsschutzsystem: Bemerkungen zum EuGH-Urteil v. 20.5.2003', *Europäische Grundrechte-Zeitschrift* 31:16/18 (2004) 466–71; A. Haratsch, 'Die Solange-Rechtsprechung des Europäischen Gerichtshofs für Menschenrechte: das Kooperationsverhältnis zwischen EGMR und EuGH', *Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht* 66:4 (2006) 927–47; J.M. Bergmann, 'Diener dreier Herren?: Der Instanzrichter zwischen BVerfG, EuGH und EGMR', *Europarecht* 41:1 (2006) 101–17; N. Philippi, 'Divergenzen im Grundrechtsschutz zwischen EuGH und EGMR', *Zeitschrift für europarechtliche Studien* 3:1 (2000) 97–126; M. Hilf, 'Europäische Union und Europäische Menschenrechtskonvention', MPI für ausländisches öffentliches Recht und Völkerrecht (ed.), *Recht zwischen Umbruch und Bewahrung: Festschrift für Rudolf Bernhardt* (Berlin, Heidelberg: Springer, 1995) 1193–210; U. Everling, 'Europäische Union, Europäische Menschenrechtskonvention und Verfassungsstaat: Schlusswort auf dem

The book aims to assess the relationship between the Court and the member states, the EU, the UN and the other organs of the Council of Europe, partly by referring to a specific set of normative criteria, and taking into consideration their respective needs and their own institutional functions. It seeks to provide a coherent overview and some more principled answers to the current reform debate and future design of the Court and of its relationship to the national, European and global level. The book's main areas of consideration and main objectives are outlined in the following sections.

1.1 The Court and the member states

The Court's relationship with the member states is crucial. Its relationship to national courts has long been debated, in particular, whether the Court slowly assumes the role of a constitutional court for Europe. While judgments of the ECtHR have no direct effect at the national level, the increasing *de facto* importance of the Strasbourg case law challenges national legal orders, questions the role of the national constitutional legislature and judiciary, and ultimately, the sovereignty of member states.[19] States, as well as the Court, therefore seek institutional solutions to deal with Strasbourg's case law in the domestic orders whilst preserving national particularities, institutionally as well as legally. The Interlaken process, including the recent Interlaken, Izmir and Brighton Declarations of February 2010, April 2011 and April 2012,[20] respectively, have set a focal point on the principle of subsidiarity for the Court's

Symposion am 11. Juni 2005 in Bonn', *Europarecht* 40:4 (2005) 411–18; L. Wildhaber, 'Europäischer Grundrechtsschutz aus der Sicht des Europäischen Gerichtshofs für Menschenrechte', *Europäische Grundrechtezeitschrift* (2005) 689–92; E. Pache and F. Rösch, 'Europäischer Grundrechtsschutz nach Lissabon: die Rolle der EMRK und der Grundrechtecharta in der EU', *Europäische Zeitschrift für Wirtschaftsrecht* 19:17 (2008) 519–22; T. Ahmed, 'The European Union and Human Rights: An International Law Perspective', *European Journal of International Law* 17:4 (2006) 771–801; G. Quinn, 'The European Union and the Council of Europe on the Issue of Human Rights: Twins Separated at Birth?', *McGill Law Journal* 46:4 (2001) 849–74; J. Polakiewicz, 'The European Union's Charter of Fundamental Rights and the European Convention on Human Rights: Competition or Coherence in Fundamental Rights Protection in Europe', *Revue Européenne de Droit Public* 14:1 (2002) 853–78.

[19] G. Canivet, *Cours Suprêmes Nationales et Convention Européenne des Droits de l'Homme Nouveau Rôle Ou Bouleversement de L'ordre Juridique Interne?* (Paris: Cour de Cassation, 2005) 9, 3–5 (hereinafter Canivet, *Cours suprêmes*).

[20] CoE, *High Level Conference on the Future of the European Court of Human Rights*, Izmir, 2011.

relationship with the member states. Both the Izmir and Interlaken conferences emphasised the 'fundamental role which national authorities, i.e. governments, courts and parliaments, must play in guaranteeing and protecting human rights at the national level'.[21] This led state representatives at Brighton to conclude that 'for reasons of transparency and accessibility' the principle of subsidiarity and the margin of appreciation be included in the Preamble to the Convention.[22] The Declaration further encourages 'open dialogues between the Court and the States Parties as a means of developing an enhanced understanding of their respective roles in carrying out their shared responsibility for applying the Convention'.[23] Yet, whether the codification of subsidiarity will indeed lead to less friction and an increased dialogue between the Court and the member states remains to be seen. States presently eye the ECtHR with mixed feelings. On the one hand, comparative studies of Europe's higher court judges and Members of Parliament suggest that the ECtHR actually enjoys a legitimacy credit rather than a legitimacy deficit.[24] On the other hand, scholars, as well as politicians, question the authority of the Court and criticise the widening grip of Strasbourg.[25] They have questioned the legitimacy of the Court and several particular judgments. Some, such as the *Lautsi* case concerning whether crucifixes may hang in public classrooms in Italy, tackle sensitive and highly political issues.[26] Such judgments are taken to go to the very core of national decision-making. Some judgments have thus provoked strong reactions among the states parties to the ECHR. Ten states intervened as 'third parties' in the *Lautsi* proceedings before the Court's Grand Chamber. Similarly, the proper relationship between the Court and German courts was discussed in Germany in the aftermath of the Federal Constitutional Court's *Görgülü* decision (2004) concerning custody and contact with children born out of wedlock.[27] In Norway, the Court has been

[21] ECoHR Council of Europe, *High Level Conference on the Future of the European Court of Human Rights*, Interlaken, 2010, para. 6.
[22] Brighton Declaration, para. 12(b). [23] *Ibid.*, para. 12(c).
[24] B. Çali, 'The Legitimacy of the European Court of Human Rights: The View from the Ground' (Department of Political Science, University College London, 2011) (hereinafter Çali, 'The Legitimacy of the ECtHR') 35.
[25] Canivet, *Cours suprêmes*.
[26] ECtHR, *Lautsi and Others* v. *Italy* (Appl. No. 30814/06), Judgment (Grand Chamber), 18 March 2011, not reported. Compare B. Schlütter, 'Crucifixes in Italian Classrooms: *Lautsi* v *Italy*', *European Human Rights Law Review* 6 (2011) 86–92 for a discussion.
[27] Bundesverfassungsgericht, *Preventive Detention*, No. 2 BvR 2365/09, Judgment, 4 May 2011.

criticised for its approach to evolutive treaty interpretation, of being too concerned with details, and for extending its scope of jurisdiction with regard to substantive law as well as to subjects.[28] In the United Kingdom (UK) a repeal of the Human Rights Act, which implements the ECHR, has been openly debated since May 2010,[29] though the results of the Brighton Conference may have soothed some of the harshest critics.[30]

1.2 *The Court and the Council of Europe institutions*

The current reform process to overcome the overload of cases culminated in the amendment and introduction of new admissibility procedures as contained in the Brighton Declaration, as well as in the earlier Protocol 14 to the ECHR. So far, this process has mostly dealt with internal reform of the Court and its procedures. The Brighton process also addressed the Court's relationship to other Council of Europe institutions: toward the Committee of Ministers, and its relationship toward the Parliamentary Assembly. In particular, the Brighton meeting discussed the election of judges to the Court.[31] In the longer term, the Court needs to reflect on the implementation of its judgments and the role of the Committee of Ministers in the supervision of this task, as well as its possible budgetary independence from the other Council of Europe institutions.

1.3 *The Court and the EU*

The relationship of the Court with the EU also needs reconsideration. During the past four years, the Court has had to clarify its relationship with the CJEU. A main reason is the 2009 Lisbon Treaty, which stated the

[28] Compare: Norges Offentlige Utredninger, *Makt og demokrati, Sluttrapport fra Makt- og demokratiutredningen* (Oslo: Statens forvaltningstjeneste Informasjonsforvaltning, 2003) 32.

[29] I. Dunt, 'Clarke: "No Question" of Human Rights Withdrawal', available at www.politics.co.uk/news/legal-and-constitutional/clarke-no-question-of-human-rights-withdrawal-$21387359.htm; N. Barber, 'The Commission on the Human Rights Act and the European Court of Human Rights', 10 September 2011, at http://ukconstitutionallaw.org/2011/09/10/nick-barber-the-commission-on-the-human-rights-act-and-the-european-court-of-human-rights/; G. Bindman, 'Britain Should be Proud of the Human Rights Act – And Protect It', *The Guardian*, 29 August 2011, at www.guardian.co.uk/commentisfree/2011/aug/29/human-rights-act-protect.

[30] Compare J. Rozenberg, 'Draft Brighton Declaration is a Breath of Fresh Air', *The Guardian*, 9 April 2012.

[31] Compare Brighton Declaration, paras. 21 and 22.

EU's obligation to ratify the ECHR.[32] The current draft accession agreement brought the formal preparations for the EU's accession a considerable step further.[33] Once ratification takes place by the 47 member states, new questions require attention. According to the draft Agreement, the EU may act as both a respondent and a co-respondent to the ECtHR proceedings. Procedurally, this means that complaints can be aimed directly against the Union, and that it can join the proceedings as a party in cases which involve the compatibility of EU legislation with the ECHR.[34] From a substantive point of view, the *Bosphorus* jurisprudence of the ECtHR may need to be modified. This jurisprudence established the rebuttable presumption that the standard of human rights protection at EU level is equivalent to that provided by the ECHR. Accordingly, the ECtHR will only exceptionally assess the compatibility of EU legislation implemented by member states with the ECHR.[35] The Court may also need to discuss whether the acts complained against can be attributed to the EU, a particular member state, or both. The CJEU, or the ECtHR, or both, must tackle the relationship between the ECHR and the Charter of Fundamental Rights which has become an essential part of the Treaty on European Union (TEU)[36] and stands on the same footing as primary EU law.

1.4 *The Court and other international organisations, in particular, the UN*

The Court must also address its relationship with the Security Council and international territorial administrations established by the UN. The Court is a regional body. Even if a case before it concerns states which are part of the wider Europe, the Court cannot directly control the UN. Nonetheless, issues of attribution may arise for UN-authorised peace

[32] See art. 6(2) of the TEU.
[33] See CoE Steering Committee for Human Rights, *supra* note 12.
[34] *Ibid.*, art. 3.
[35] ECtHR, *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi* v. *Ireland* (Appl. No. 45036/98), Judgment (Grand Chamber), 30 June 2005, Reports 2005-VI. The *Bosphorus* doctrine was later refined, for example, in ECtHR, *Biret* v. *15 EU Member States* (Appl. No. 73250/01), Decision (Fifth Section), 9 September 2008, Reports 2008; ECtHR, *Connolly* v. *15 EU Member States* (Appl. No. 73274/01), Decision (Fifth Section), 9 December 2008, not reported; ECtHR, *Cooperatieve Producentenorganisatie van de Nederlandse Kokkelvisserij U.A.* v. *The Netherlands* (Appl. No. 13645/05), Decision (Third Section), 29 January 2009, Reports 2009.
[36] Article 6(1) of the TEU.

operations. Consider if human rights violations occur that involve member states who have ratified the ECHR. The Court's jurisprudence, such as the *Behrami* and *Saramati* cases, addressed the complex issues of authorship and attribution, as well as further questions involving the supremacy of member states' obligations under the UN Charter. The cases have often been criticised for deviating from the general law of international responsibility. On the other hand, recent cases like *Al-Skeini* and *Al-Jedda* illustrate that member states may not always hide behind international organisations who authorise an operation. Further questions may arise, if UN-mandated action with impact on individual rights is first implemented by a regional organisation like the EU and then executed by the individual member states, a situation which was before the Court in the *Kadi* and *Bosphorus* proceedings. Finally, future cases may not be confined to questions concerning the authorisation of acts by the UN, but may concern regional security organisations like the North Atlantic Treaty Organisation (NATO).

2. Principles and concepts guiding the analyses in this book

The need to rethink the Court's role toward member states and international organisations is imminent. Several maxims and principles may guide such reflections on the future role of the Court.[37] Among the most frequently named are principles of the rule of law,[38] the principle of subsidiarity, the principle of effectiveness,[39] as well as the principles of implied powers and proportionality.[40] These are not novel notions: they stem from discussions

[37] For the character of the principle of proportionality as a maxim, rather than a principle of legal rule, compare F. Wieacker, 'Geschichtliche Wurzeln des Prinzips der verhältnismäßigen Anwendung', M. Lutter, W. Simpel and H. Wiedemann (eds.), *Festschrift für Robert Fischer* (Berlin, New York: Walter de Gruyter, 1997) 867–81 (hereinafter Wieacker, 'Geschichtliche'), at 867.

[38] *Ibid*.; J.A. Brauch, 'The Margin of Appreciation and the Jurisprudence of the European Court of Human Rights: Threat to the Rule of Law', *Columbia Journal of European Law* 11:1 (2004–5) 113–50, at 113.

[39] M.D.S. Lasser, *Judicial Deliberations: A Comparative Analysis of Judicial Transparency and Legitimacy* (Oxford University Press, 2004). For the effectiveness criterion, in particular, compare Y. Shany, 'Assessing the Effectiveness of International Courts: Can the Unquantifiable Be Quantified?', SSRN eLibrary (2010).

[40] Compare J.E. Alvarez, *International Organizations as Law-Makers* (Oxford University Press, 2005) at 123, referring to intent instead of consensus. See also, K.A. Young, *The Law and Process of the U.N. Human Rights Committee* (*The Procedural Aspects of International Law Monograph Series*) (Ardsley, New York: Transnational Publishers, 2002) at 67–9.