

The European Convention Fifty Years On
Professor Brian Simpson
Thursday 16 October 2003

Conor Gearty (Chair)

Well, you always know it's the start of term because you're all here on time and your relatively quiet, concentrated, all those new resolutions to take detailed notes. In about six months you'll be late, coming in with beer and chatting avidly. But we've got you as a captive audience because you're still slightly intimidated by the wonderful LSE.

So you've got a very special welcome to the first of our evening seminars in the Centre for the Study of Human Rights, evening talks; and a special welcome to those of you who are at the LSE for the first time in this academic year.

It's one of the great traits in running a centre like the Centre for the Study of Human Rights is that you can kind of have some of the people whom you've really admired and who's writings and presence in your subject you've enjoyed over many years. You can actually invite them to come and there's a chance they will. If you write from your own home as yourself, inviting them to come for a drink you invariably won't get any reply. But if you're the Director for the Centre for the Study of Human Rights, for some reason they reply, I of course assume it's my personality.

But, my entire life as a student of law, I've been dogged by the presence of Professor Brian Simpson. I just checked with him because I could barely believe it, but he wrote, I thought an incomprehensible book on the history of land law, which for some equally incomprehensible reason the professor who taught me land law in Dublin, regarded it as the definitive treatise. So from my first year I've been studying Brian's work and then he produced as though remorseful of his first book, he produced a racy book about basically eating people, which was a tremendous success, *Cannibalism and the Common Law*; and then he went on to, I think, studies of law in historical and political context which are absolutely, I think, the way we should approach the study of law. A fantastic book on internment during the Second World War *In the Highest Degree, Odious*, a famous quote from Winston Churchill and more recently and the excuse for the invitation, a remarkable book on the European Convention on Human Rights, called I think at the time somewhat optimistically, it was pre-various actions to secure human rights, *Human Rights and the End of Empire*; and I invited Brian to come to the Centre and to speak to us about the European Convention on Human Rights Fifty Years On. Brian is, apart from a prolific writer, also now primarily based in the United States. Charles F and Edith J Clyne, Professor of Law at the University of Michigan Law School, a Fellow of the American Academy of Arts and Sciences and also I think a Fellow of the British Academy, but possibly not, but he's speaking there next week.

So, could you please give a very warm and enthusiastic welcome for Professor Brian Simpson.

[APPLAUSE]

Brian Simpson

Well, thank you, Conor, and thank you all for coming here. I'm basically a historian who got into law via a historical accident. I've always been fascinated by texts which last from one world into another world; texts like Magna Carta, the Sermon on the Mount - that doesn't haven't any protocols but it's still around. There's something fascinating about that.

Now the European Convention is already a celebrated text and it's going to last as one. It came into force on 3rd September 1953 when there had been ten ratifications. It's quite entertaining to ask people who are studying human rights to name the ten ratifications. They get nine of them right, but they always miss the other because it was the Saar, which no longer exists as an independent entity. It's now part of Germany.

I first want to say a word or two about the world in which this Convention was born, to bring out how different it was from the Europe of today.

Europe was devastated! It had lived through a terrible winter, the 1947 winter, when the sea froze. I remember this, I'm terribly old, I can remember these things, you all can't since you are lucky enough to be young. Many cities in Europe were heaps of rubble; Caen in Normandy for example. Most German cities were just heaps of rubble. Some cities had escaped, like Paris, and Bruges. There were collapsed economies. The UK was virtually bankrupt; for all practical purposes it was bankrupt. There was recent memory of the horrors of defeat and occupation. People in France had only just got through the period of the post-war lynchings of collaborators. Nobody knows how many people were lynched. But the French could all remember not only the horrors of occupation by foreign troops, but also the appalling things which were done to the French by the French, by their own people. They could remember these things; many still can remember them.

The composition of the Western European Democratic club was different. Germany was divided. The western parts were under military rule, as was the eastern part. Spain was outside the club, it was still under General Franco. Portugal also was outside the democratic club.

European countries retained huge empires; some 60 million people lived in the British Empire at that time. France had a huge empire, Denmark a pretty mini one. The Netherlands had lost most of their Empire but some of it was still left. There were huge colonial empires still left.

There was profound fear in western Europe. There were people in France who had been invaded in 1870, in 1914, and again in 1940; they'd been there three times. One monster, Fascism, appeared to be down. But not totally down, there was still Franco in Spain, for example. Another monster, Stalinist Communism, was doing very nicely, thank you very much. There was severe military weakness, and great fear of Russia. I remember in those days when I was a student we had to be in the army. I was in the 15th Regiment of Foot, which was the regiment which was marched up to the top of the hill and marched down

again, and it was still very like that. We were conducting an exercise one night, using live ammunition, in the Fylingdale area in Yorkshire. A young man called Brian Newton put the machine guns, through a map reading error, on the wrong side of a public road. So a young man who was driving back after some illicit gathering up with his girlfriend in the middle of the night was suddenly submerged in a hail of tracer fire. He came running down the road screaming "The Russians have landed! The Russians have landed!" and he really thought they had. We thought "Oh my God, questions in parliaments, courts martial etc.". So we filled him up with whisky, and he eventually enjoyed a nice evening with us, once he realised that the Ruskies had not yet arrived.

In Western Europe Italy might well, by election, soon become a Communist state. West Germany, well we didn't know about that. France could have become communist too. There was deep fear in France of a revived Germany and on top of this the Cold War had broken out. In 1947 the negotiations to settle the future of Germany collapsed; cooperation with the Soviets seemed impossible.

So the idea developed of developing some sort of western club, a western bloc, to provide a counter to Soviet power, and to establish independence from the two major powers at the time, the USA and the Soviet Union. That's the world into which the European Convention was born. It all goes back to a famous speech by the British Foreign Secretary, Ernie Bevin, Uncle Ernie as he was called, delivered in January 1948. He recognising that relations with the Soviet Union had collapsed, and said that what we needed was a "spiritual union" of western Europe. It's not clear what he meant quite, but it was something spiritual, it was some form of union.

There was also at this time a strong European federalist movement. Lots of people, specially from continental Europe, not so many from Britain, believed the solution to the horrors of Europe - and just consider the horrors of Europe, the Holocaust, I mean that's Europe, you know, the home of civilisation, the home of the Holocaust - that the solution to these horrors was federation. They held a big conference in the Hague in 1948 and it called for a Parliamentary Assembly and a Charter of Human Rights; these were first steps towards federation. This ultimately led to the establishment of the Council of Europe in 1949. In the Treaty which established the Council it said that the Council of Europe, which was an expression of the idea of union, was dedicated to the maintenance and further realisation of human rights and fundamental freedoms.

Now, what were they really worried about back in the 1950s? Freedom and democracy had just been re-established in this small western European club. What they wanted was an ideological statement of European values, embodied in a Charter or Convention, and a mechanism which could protect the recently reacquired freedom and liberty from erosion in the future.

There were great clashes about what form this Charter of Rights should take. But the European federalists were very keen on the idea of juridical protection. The rights should be protected by a super national body which was a court, and which gave judgements like a court, legally binding judgements. Other people said, "No, no, the protection of human rights

has to be achieved through political mechanisms, not by a court". Another clash at the time was whether the charter should very clearly specify what the rights were, and the limitations to them, or whether, as people coming from the continental legal tradition said "No, no, what we need is a rather loosely drafted charter and we will then develop through our court and our juridical mechanisms a jurisprudence of human rights. We'll do it case by case, like the common law, we'll develop in the light of experience a jurisprudence of human rights.". That is of course what eventually happened.

So much for the world into which the Convention was born.

Now, how has it all changed since then?

First of all, there's been dramatic economic recovery in western Europe, I mean really dramatic.

Secondly, Europe has become accessible. When I was young you could get hardly any money to travel to Europe. I knew a philosopher in Oxford who annually wrote a pornographic novel which he could then deliver to the back door of the Olympia Press in Paris, where they paid you in used banknotes. He could then take his family on a continental holiday.

At the time the American War Graves Commission was digging up dead Americans to take them back to America and bury them there. Americans follow a practice of taking their dead home; the British leave their dead abroad. It's a curious cultural difference. I'd heard you could get good money in dollars for digging up dead Americans, and we all thought, "Well, you know, it may be a bit rough, but it'll be worth it" and we wrote off and offered our services. The reply was "Sorry, we've dug up plenty and we don't need your services".

Since then Europe has become accessible; every football hooligan can now go to Europe now, there's no problems about travel.

Then there's the end of empire. Well, is there an end to empires? The end of formal empire perhaps, but what about Iraq and Kosovo and so on? One sort of wonders whether empire isn't still going strong under different sorts of names.

Then the membership of the western European club has changed. Spain and Portugal have come in from the cold. Germany eventually ended up reunited. Then there's been the European Union. Now at the time of the Convention was signed in 1950 and came into force, that was all very embryonic. It all started with the Schuman Plan, Robert Schuman made a statement in May 1950, and that led to the beginnings of the European Union of today. The original six countries forming the European Coal and Steel community. Just of think what was that all about? What was the idea of putting super national control over coal and steel production? It was to stop war; coal and steel were essential to waging war.. It was to stop war. People were very frightened of war.

Then there's been the end of the Cold War and the collapse of Communism as a system of government, and also, at the same time, the collapse of powerful Communist parties in western Europe. There never was a strong Communist party in Britain. There was an insignificant Communist party, and entertaining moles and spies and so on, but British communism it never amounted to anything very much. The British are such apethetes they can't get excited about anything at all except perhaps football. But in Europe there were once strong Communist parties, very vigorous Communist parties, but they have largely disappeared.

And there's been the collapse of Fascism, or has there? Fascism I always think is a little bit like shingles. If you get chicken pox, which you always get when you're a kid, you get spots and you scratch and you get better after a bit. But the old chicken pox virus is very clever. It hides in your nervous system and just sits around there for ten, twenty, thirty years, it can wait. One day out it comes and gives you a nasty disease called shingles. You want to worry a little bit about that in relation to Fascism. There are nasty little things under flat wet stones in Europe at the present time, so I wouldn't be too sure that its all gone away for good..

Now, what about the Convention? How is it different? Well, of course it's changed in many respects. It's changed through the various protocols, but it's changed in other ways which are nothing to do with protocols. Protocols are a way of amending the Convention or adding to it. The first protocol by the way was simply part of the original Convention which they had difficulty negotiating. It's really part of the original Convention.

The first thing that's changed is people know about the Convention and use it. Now that wasn't always so. I studied law at Oxford from 1951 to 1954. The Oxford Law faculty then was an extremely dim institution, but it had some quite bright people in it and, you know, there was me for example, so it wasn't too bad. But I never remember hearing the European Convention mentioned when I was a student in Oxford, not once. International law was taught to my group of people by a lovely man called Robert Heuston, who once told me "there are only five discussable issues in international law, so it's only necessary for undergraduates to come for five tutorials". Certainly the European Convention wasn't one of them. This has changed for all sorts of reasons. One is the activities of NGOs. One NGO which I do a tiny-weeny bit of work with, the AIRE Centre, has done a great deal to spread knowledge of the European Convention. This centre does it too; and of course with the incorporation of the Convention into domestic law, lawyers all now have begun to know about it. My youngest daughter is a junior doctor in a London hospital, and when she's working in casualty she has vomit thrown at her, furniture thrown at her by drunks off the street, and also human rights,. People say "You're violating my human rights" and she says "No, no, I'm giving you an injection., but it's not a violation of Article 8. Its good you're your physical integrity".

So it's become known about and used. It's also become universal in Western Europe. France took an awful long time to sign up, not till 1974, and didn't accept individual petition till 1981. Spain and Portugal have come in, so the Western European club has become universally governed by the Convention. The right of individual petition and the acceptance of the jurisdiction of the court were originally optional, because you couldn't get all the countries

who were prepared to sign the thing to agree to them. They said "No, no, no, no. We can't have individual petition and we don't want a court." The British opposition came – guess from where? – from the Colonial Office, because it didn't want people out in the colonies getting sort of uppity ideas about appealing to some super-national body if they had been ill treated or ill used. So it took a long time for the right of individual petition and the court at to become universal. But eventually everybody has signed up, and has to sign up. There's nobody now left out. You cannot imagine the controversy which centred about the right of individual petition in the discussions which led to the European Convention, and earlier to the United Nations Conventions. People viewed it with deep alarm. But of course it doesn't make any sense to have individual human rights if individuals can't do anything about their violation, it's sort of crazy. But you can imagine that people in government realised, and they were dead right, that a right of individual petition was going to be trouble to governments. Its trouble of governments because the whole underlying ethos of the Convention is that you cannot, ultimately, always trust governments, that's what it's all about.

Then there's the extension of the Convention to a huge number of countries which have joined the Council of Europe. I always forget exactly what the figure is and I'll be corrected if I'm wrong, but I think its now 44 or is it 45?. Maybe one of them hasn't ratified, but it's a lot. In terms of people the Convention now in theory at least protects about 770 or 780 million people; that's a huge number. It may even apply to some Iraqis in the area under British control, so that's some millions more. It's even been extended to the Russian Federation, and one wonders whether this wasn't done in a bit of a fit of absence of mind. The Russian Federation does not appear at present to be paying a blind bit of attention to it, but perhaps it will; you know, these things take time.

The Conventions has become linked to the European Union. If you want to get into the European Union - that's where the money is - ff you want to get your snout into the trough then you have first of all t clean up your human rights act and sign up to the European Convention. It's become used as a ticket of entry. Also the European Court now applies human rights law and, as you know, the European Union is getting into this act with its own charter.

None of these changes have happened because of new protocols. Let me mention another. The mode of interpretation was dramatically altered by the famous case of *Tyrer v. United Kingdom* (1978). Tyrer was one of those flagellant cases involving Britain, as the last great home of the western flagellant tradition. I know all about that, I went to an English private school, so I know all about that stuff. A great deal of enjoyment was given to some of our teachers. But Tyrer's case was about judicially imposed flagellation in the Isle of Man.

Anyway a young man was going to be birched – that's a very nasty thing to do to somebody, very humiliating, very painful - for an offence of violence and a case brought under the Convention. The issue really was this. It never occurred to anybody when the Convention was signed and came into force that it had anything to do with the abolition of judicial corporal punishment. It's perfectly true that corporal punishment was already on the way out in Western Europe, Britain, and particularly Scotland, were the last homes of it and the Isle of Man in particular set great store by it. The court decided that it would apply a form of

interpretation which treated the Convention as a living instrument; it didn't say what did the founders mean when it was signed, but how should it be interpreted today in the light of changing and evolving patterns of understanding about human dignity and human and individual rights? That was a critical decision because it turned the Convention from an "intention of the founders" type document into an "evolving instrument for human rights protection" type document. I've been in the Isle of Man teaching Human Rights with Catharina Harby, who's sitting up there, and when we first went there we went about frivolously saying "Don't mention 'Tyrer'", as in the incident involving the German visitors in Fawlty Towers.. But actually it's now okay. Nobody wants to go back to birching in the Isle of Man, as they did when the case came up in the seventies; things have moved on, there's no embarrassment about losing the case any more.

So, that's a change. That means there's been a change in the function of the Convention. The function originally was to protect existing liberty. It was conservative. Now it's become dynamic. It's a Convention to be the basis for the dynamic further realisation of human rights and fundamental freedoms, and that's particularly important with its extension to Central and Eastern Europe, where it's an instrument which can be used to assist those countries, and the people in them who are trying very hard to establish decent democratic systems, systems governed by the rule of law in which individual rights are protected.

Now, originally it was believed that the Convention would hardly ever be needed. So there were the provisions which have now gone through the 11th Protocol for a Commission to investigate and encourage friendly settlements. It was thought that most little bickers about human rights could be settled amicably without litigation, without going to court. There would be a very small caseload indeed for Strasbourg institutions, and, for many years, that was in fact what happened. But that's all changed, partly through evolutive interpretation, through, if you like, moving the goalposts. Partly its through NGOs and lawyers learning about the Convention and using it. There is also another reason I think. Those who originally were involved in the negotiation essentially did not understand, since they all came from upper middle class circles, they didn't understand quite how grotty life was for people at the bottom of the heap even in countries like England, which was supposed to be a place where human rights and fundamental freedoms were really protected.

I wish I could recall the proper reference, I mean to check this up, but in about 1949 – it was a bit before I was a student – there was a case involving an insane police officer in Sheffield. There was a special inquiry into his ill treatment of suspects, and he was sacked and sent off to an asylum with people in white coats looking after him. What's very interesting about the report on the case was that it was, in the late forties, the routine practice of detectives in Sheffield to beat housebreakers with whips. It was what normally went on, it wasn't some aberration, it was the normal thing. They didn't of course do it to people with upper middle class accents, wearing suits. I think there was a lack of awareness when the Convention was entered into about what went on. Officials in, for example, the Home Office, never opposed the Convention. They said, "Well, we don't mind, we haven't got any skeletons in our cupboard". Actually there were some skeletons down there, and they've come out in some of the litigation.

Now a word about present problems and about the future. Well, the colonies have all gone, or virtually have gone. We... Britain stills has one or two places which either nobody else wants, like Tristan da Cunha or places, which for one reason or another it's difficult to get rid of. Take Tristan da Cunha. Its a little island in the middle of the south Atlantic, it blew up some years ago, the inhabitants were evacuated, and accommodated in suitably disagreeable accommodation in England, with government saying "Thank God we've got rid of Tristan Da Cunha" The islanders objected, they said "We can't stand the bright lights, we want to go back home" and the British public rose in revolution and said "Home they're going". Back they went and they live there to this day, hating the anthropologists who regularly visit them. They actually ignore the anthropologists, they walk "through" them. If you're an anthropologist, you will just be trampled in Tristan. The islanders also have the highest per capita consumption of aspirin which has ever been recorded I don't know what the explanation for that is. But, you know, has colonialism actually gone? We have related problems about the territorial reach of the Convention, the famous case over NATO's bombing of Belgrade, Kosovo, Iraq. Does the Convention apply in Iraq to the bit of Iraq which is either under or supposed to be under British control? I say supposed to be because it's not totally clear it really is under British control. There are problems there. As I have said it may well do so.

A second sort of problem lurking out there centres on emergencies. The Convention's provisions on emergencies have never been very satisfactory in the way they've worked, and the Strasburg institutions have, in my view, always rather lent over backwards to support the authorities in dealing with emergencies, insurrections, what people call terrorist movements and that sort of thing. Well, we're now moving into an appalling era of permanent emergency or even war, so we are told. We have now got detention without trial for indefinite periods, executive detention without trial in this country in what I think of as peacetime, but we keep on being told is really war time. Well it isn't war time, it's peacetime. We gave executive detention up last time the very minute the Second World War ended. Of course the security people, whose appetite for repressive laws is insatiable, wanted to continue executive detention in 1945, but the government of the day wouldn't have it. They said "No, no, they all come out". Today however there's a really serious problem lurking out there.

Then there's a acute problem over scale and caseload. The Convention has now been extended to all these millions of people and there is a growing - and it's going to grow further - caseload. So there are great anxieties about what to do about this. Well, obviously some of the anxieties can be solved by spending some more money; you can beef up the secretariat and things like that. But there are other proposals to deal with this problem of the caseload by toughening up the provisions as to when a individual petition case is admissible. Not toughening up very much, but toughening up a little bit. Now that is the beginnings of the erosion of the right of individual petition, and it's a very worrying possibility. I'm not suggesting that the current proposals go dramatically far, but one wonders what's coming next, because this caseload problem is going to get worse. In fact the major work the secretariat currently has to handle is with petitions which are inadmissible. But still there's a real problem for the future and various ideas have been presented as to how to deal with this. For example, one proposal is to set up regional institutions, but the disadvantage about that is you then lose the unity of Europe under the Convention. I don't think the problem of

caseload is going to go away, I mean I think it's going to be an ongoing problem. It reminds me a little bit of when the health service was founded. When the health service was founded it was the belief that if you gave people good medical care the costs of medical care would decrease. But that isn't what happened for various reasons. One is if you give people better medical care they live longer and they get to be like me, and you may guess I never go near a doctor but they'll find out some damn thing wrong with me, and want to give me more tablets and so forth. So there's that sort of problem; and there's also the problem, which is rather like the result of evolutive interpretation of the European Convention. Medical science does not stay still, and many things which, when I was young, you just had to grin and bear and die of can now be treated. Now that's not something bad; it's good. But if you are providing health care it is a matter which requires resources and thought.

One line which I think there's a lot in is that we need more efforts to try to get countries, especially those which are coming in from the cold and so forth, to get their acts together and improve human rights protection so as to reduce the call for interference by Strasbourg. Now, quite a lot of work of that sort has been done. In new member countries there are vettings and checking up on laws and so forth. There are attempts to assist such countries, such as educational programmes. A lot can be done in the way of getting out there and adopting a sort of pro-active attitude towards local protection of human rights, rather than just sitting back waiting for cases to come to Strasbourg.

I sometimes wonder whether the juridical model of the Convention is necessarily always appropriate for dealing with the problems of some new member states. You see under the juridical model most of the cases are initiated by individual petitions; the inter-state cases hardly ever happen. It's like litigation inter partes. Typically you wait until a violation has occurred. You then bring a case against the government and you don't win; you then take it up to Strasbourg and you eventually, if you're lucky, get a judgement in your favour. In the end, ideally, the situation which gave rise to the violation is put right; sometimes this takes years and occasionally it never happens. It maybe that mechanisms for administrative directions and so on from Strasbourg might be a way of developing a more proactive attitude to the problems. This is particularly so when you deal with endemic problems and I just want to say a word about that.

Some people think that protection of human rights is cheap, it doesn't cost any money not to torture people. Well, actually it does cost money not to torture people in two ways. You've got to catch the people who go in for torturing and they can be very ingenious, and that can involve expenditure and checking and so forth. They don't torture people when, you know, the government's anti-torture person, if there is one, is around. So it costs money. But it costs money in another way. If you're not torturing people and you want to run a criminal justice system then you have to do a bit of detection and you have to have forensic laboratories and so on. It's more expensive than as Fitz James Stephens said in the 19th Century, than rubbing> pepper into a suspect's eyes, it's more expensive. It requires training courses and so on, so it costs.

Now there are some areas in which it's perfectly obvious that human rights protection requires economic resources, two are quite simple. Fair trials. How can you have fair trials if

the judiciary are paid so little that they're under persistent pressure just to keep their families going to take bribes and so forth. It's very, very difficult. How can you clean up the prisons - prisons are a bit of a scandal throughout Europe, and don't let's forget our prisons are nothing to write home about. It takes a lot of money to run decent prisons, a lot of money. Prisons are more expensive to run than smart hotels if they're going to be run well; and so there is a real problem there about protection of human rights. There has been enormous economic improvement in Western Europe; Western Europeans are rich beyond the dreams of avarice compared with what they were in 1950. But that is not true yet in, for example, Albania, a country I've visited, where people are very, very poor, and there's not a lot of money. So there's a real problem there and it maybe that you've got to think of human rights protection in conjunction with schemes for educational assistance, economic assistance, trading assistance and so forth. Work of this kind is being done at present, and that's a hopeful thing.

So that's going to be a continuing challenge the future. I wonder if there are other things which could be done within the Convention which might help. Where you get systemic violations of human rights, for example, Italy has been a sort of a scandal for delay in trials and so forth for a long time, it could be that heavier awards by the European Court could be a mechanism which would encourage compliance, because it is for many countries much cheaper to pay up the awards issued by the Strasbourg Court than it is to do anything about the underlying problem. I mean there is a possibility there of using economic sanctions. But if you impose swinging economic sanctions on very poor countries that doesn't obviously improve their ability to provide fair trials or decent prisons, You are going to have to think about issues like this if you're studying human rights.

At the end of the day, to date the European Convention has been a pretty good success story. It's not however a complete success story. It's already got such delays in its own mechanisms for adjudication that it's becoming something of scandal. It's not a total success story when lots of the documents which people need to use to protect human rights are not available in their local language. The languages of the court still remain French and English. Of course the secretariat have people that know other languages but the publication of material needs to be in many more languages. There are problems about the handling of emergency powers I think, it hasn't been entirely successful there. There are a variety of problems and we don't quite know whether the cohesion of the court will be adversely affected by the enormous extension of its jurisdiction. It's always vaguely assumed that if we extend Western European institutions to Central and Eastern Europe the traffic of ideas will entirely be from Western Europe to Central and Eastern Europe. That's a really rather colonialist of attitude, because traffic in ideas may develop, and go both ways, and that may be a good thing in the future and it's something we'll have to watch out for happening.

Now, I've talked enough, so I'm going to stop now and answer any questions I can.

[APPLAUSE]

Conor Gearty

Thank you Brian very much for that overview of the Convention. Now one of the features of our evening talks here at the LSE is our question and answer session and what I'd like to do is to encourage you all to consider making interventions and especially people who are visiting from outside the LSE. So, also that you can contribute to this.

What I'd like you to do please, if you want to make an observation that's fine, if you want to ask a question that's also fine, if you want to do both, fine. But please firstly say who you are or I might interrupt you and if you're from an organisation for example say that, because that's often interesting for people; and if you prefer not to give your name that's fine, but we'd prefer it if you could and keep remarks succinct if you would please and I might take two or three, Brian and then perhaps you can deal with them in a row.

Question 1

<NAME> from Durham University. I was wondering whether you could think of a case under the Convention where you think the individual petitioner shouldn't have won, where the court has won, because there's the sense in which the court is very conservative in its attitudes towards that state, but is there a situation where you think that the court went too far and gave in favour of the individual petitioner where it shouldn't have?

Question 2

Hi, <NAME> I'm doing an LLM here. I wanted to know if you think that there's a danger in bringing the rights home, like there has been the Human Rights Act whereby domestic courts are more likely to look at things like cost than you would at super-national level and whether that would undermine the Convention rather than actually bringing the rights home?

Question 3

Chris Brian, LSE. You mentioned a lot of social changes but one I don't think you did mention was the large number of immigrants who have come into Europe over the last 50 years and who have generated I think quite a lot of caseload on various issues. Could you comment on that?

Brian Simpson

You asked me whether I could think of a case where it's gone too far in the protection of... Now off the top of my head, no I can't think of such a case. One where I think it didn't go far enough was the Gibraltar shooting case. That was the case where the British Special Air Service, using three soldiers, killed people in Gibraltar who were undoubtedly there doing a reconnaissance to plant a bomb which would have, it had worked, you know, would have possibly killed lots of people. The people killed were members of the IRA and their families brought proceedings and the court in Strasbourg was very nervous of this case. I was in the court when it gave its opinion and it found against the United Kingdom by a majority, it found against the British government, but only on the grounds that the planning of the operation had not adequately attended to the positive duty to respect human life. But the Court then said that because these people who had been killed by the Special Air Service were up to no good, which was never doubted, that they thought there was no ground on which any form of compensation should be given to the families. I just find that extremely odd, it seems to me that once you've found there's been a violation of rights and once, you know, in this case it's

quite clear that some people have suffered as a result of it, it seems to me wrong that no award of compensation should be made. It involves some sort of idea of sort of transmitted guilt to the families. Now, I don't know about these families, I don't know whether they were or were not privy to what these people were doing in Gibraltar but there was certainly no evidence before the court that they were privy to it and that struck me as sort of showing a slightly sort of chicken like attitude. The court of course was aware that it was dealing with a very hot political issue and it didn't want to get across too much with the British government. There was indeed outrage in the British press about the finding, though it seems to me that the court lent over backwards in the case to be as sympathetic to the British authorities as they possibly could. So I wasn't very sort of happy about that case.

Now the danger of bringing rights home, of undermining the Convention, I'm not absolutely clear what the drift of this question but it maybe something like this. Now that rights have been brought home and granted the fact you have to exhaust domestic remedies before you can go to Strasbourg, it could arguably make it more difficult to get your rights vindicated because of the cost of domestic litigation. I mean the trouble about litigation in the courts is that if you're, you know, up on a criminal charge or something you get legal aid and you get legal representation and so forth. But civil litigation is extremely expensive and broadly speaking only the very poor and the very rich can engage in it. I personally do not know a single person that was ever engaged in a civil litigation in this country, I don't personally know such a person, but in a sense that they're not amongst my body of friends and so on and friends and acquaintances and so if we're now going to say, "Well, you know, you can't really win in Strasbourg because these points have all been ventilated, or can be ventilated domestically, and you have to exhaust domestic remedies" that could I suppose make it more difficult to get your rights vindicated in Strasbourg than is at present the case.

The other thing about bringing rights home is that one of the government's arguments was that if you brought rights home recourse to Strasbourg would be less necessary, and would be less frequent. That doesn't seem to me to be happening or to be likely to happen, because one of the effects of bringing rights home was that all sorts of lawyers who previously wouldn't have known which way up to hold the Convention now know about it; and so just as people in casualty say "Ouch! You're violating my human rights" there's wide dissemination of knowledge of this and so it maybe that the initial effect of this maybe to put up recourse to Strasbourg. The Convention is possibly being injured or wounded by its own success. Its like the health service. The problems of the health services are often the products of its own success and that's a really difficult issue, Its not an issue to which there's some simple solution. I mean if you let everybody, you know, die as babies, they don't clutter up hospitals when they're 70. The relative success of the health service and of course of all sorts of other things like the internet and widespread knowledge about medical practices and all sorts of other things, in a sense is a threat to a socialised system of medicine and it's a bit like that with human rights. I think this is the sort of problem which if you're studying this subject you need to think about and address, because I don't think any clear answers have yet emerged. The proposals currently going on will paper over the cracks for a few years but they're not radical enough to solve the problem in the long-term, as far as I can see.

Now, the other question of immigrants. Now, two things about that. The first thing, the Convention does not contain a freestanding, anti-discrimination provision. It has a provision which says you mustn't discriminate in relation to the Convention rights and immigrants are not specially provided for in the Convention.

<INAUDIBLE – SHOUT FROM AUDIENCE?>

The other thing is that when the Convention was entered into, you see pre-war, there were systems of minority protection in newly formed states, for example countries like Poland. These systems of minority protection were bitterly resented by these countries and they were not very effective, but they were run under the League of Nations, and some of these minority protection schemes, the one in a place called Upper Silesia was actually relatively effectively pre-war, it was the only relatively effective provision.

Now, an awful lot of human rights problems are about the persecution of minorities. They just are, if you just think about the worst cases you've heard, Rwanda and so on, they're about the persecution of minorities; and you know, in Western Europe there is quite a head of steam, you've only got to read the popular press in Britain, the anti-immigrant, you know, lobby is quite strong and so forth. This is a serious sort of problem and, it can be addressed to some degree under the Convention but not all the problems can be addressed under it.

Furthermore there are parts of Europe where there is absolutely endemic persecution and it's not absolutely clear that this juridical model of individual litigation is adequate to deal with it. I'm thinking of the persecution of the Roma in some parts of Europe. The pre-war minority protection systems were very ineffective, but they were, they caused a lot of political brouhaha and so forth and the people responsible for international affairs after the war, both in the United Nations and in Europe were adamantly hostile to any form of minority protection being built into either the European Convention or the United Nations Conventions. The hostility to it was extreme, Mrs Roosevelt for example, solemnly said in public, in the United Nations, "There are no minorities in America". Now that was the official view. Just as the French official view has always been France just has the French, there's no such thing as minorities in France, they don't exist; and the sort of denial of this problem was a powerful force at the time when the Convention was entered into in governmental circles; and we know that, you know, all the problems in Northern Ireland are about competing groups and minorities and so forth. It's all over the place. Steps are now in hand to address the problem of minority persecution.

Question 4

Hi, Michael Harman with Legal Action Against War. You mentioned whether or not we're responsible for human rights in Iraq and I would be very interested to see if you had a view on whether there's a joint liability and somebody who had been bombed upon could go to the European Court against us, whether it's an American bomb or our bomb?

And then with the figures and the vast caseloads that it seems to be generating if you go into a law library and look at the Act the edges of the page are totally black whereas any other law going back for yonks has hardly been looked at. It's very, very interesting to people. It

seems to take about 30,000 cases a year, you have a one to three percent chance of getting a judgement in favour and about a five percent change of the case even being looked at. So lots and lots of cases are coming and failing and they seem to have developed lots of technical rules that are very difficult to get at and maybe if they could codify what they've done so far it would help people not bring cases that are going to fail before they start.

Question 5

Thank you, hi. My name is Christine Cody, I'm a solicitor and I do immigration, refugee human rights law. I'm just wondering what is your view on the situation with immigrants as the people I represent and Article 6 and the fact that they can't use that. That's the current state of the law at the moment in Strasbourg and I was wondering whether you think there is a way around that, whether that can change?

Question 6

<NAME> University of Sussex. I wanted to follow up the question has there cases where the court had possibly gone too far in a victory for the individual and suggesting that maybe that would have been the case with <??> versus Denmark where a journalist who put a documentary which was relating abusive, racist remarks and was stopped by the then what was fined by the Danish government said his freedom of expression had been infringed and the court agreed with that; and I expect that <??> cannot be the only kind of controversial case where an applicant wins and I suppose if that is that case would you agree that it is possibly too simplistic to look at a case as being an individual versus the state but that we must accept that behind the state there may also be other individuals and that behind the applicant there may also be larger issues so that talking of a victory for the individual when the applicant wins at Strasbourg maybe too simplistic.

Question 7

Jonathon Cooper, Doughty Street Chambers. I would be interested in your view on the demise of the interstate application and in the absence of interstate applications where there is any realistic mechanisms to deal with growth violations of human rights.

Brian Simpson

First of all a word about Iraq.

Under the Convention jurisprudence, as established in cases like *Loizidou v. Turkey* over northern Cyprus. I take it that the European Convention is probably in force in those parts of Iraq which are under British military control. I mean that I think that would be highly arguable anyway, you can never claim absolute certainty on such a tricky issue as that. But it seems to me that's probably right and proper. If you are in the position of running a country, if you are in effective control over it, then why not? And I take it that's very arguable from the *Loizidou* case, that I believe that is the view of British Foreign and Commonwealth Office, but I'm not absolutely sure about that.

The other question on Iraq... sorry could you ask it again.

Michael Harmen

Is there a joint liability...

Brian Simpson

Well, there can't be a joint liability under the European Convention as the U.S.A. is not a signatory to it, and there can't be a liability under the International Covenant on Civil and Political Rights because they haven't accepted the optional protocol. So I don't think so. You see America has always treated human rights as for export. It has always organised its affairs so that no proceedings, international proceedings can be brought against the USA under international human rights conventions. Some of them it just hasn't signed up to at all, like the Rights of the Child. Now, people get cross with America about this but it is simply the realities of politics there. You can't sign up to treaties without a two-thirds vote from the Senate and you cannot get one on these Conventions, and that's been ever since the days of Eleanor Roosevelt when she was a member of the Human Rights Commission. She always knew that it was no good pushing things too far because they'd get screwed by the Senate and nobody who has not met the American extreme right wing can believe how appalling they are, I mean they're just past belief. You know, you sit there thinking "Am I hearing what I've said" and so on. I mean it's just bizarre.

There are lots of Americans who don't think this way at all. I mean Harold Kohn who is in this country at present, former State Department Advisor and so on. I mean such people are horrified by it, but that's the reality. So I don't think there is any joint liability, I don't think there can be; and there's certainly no liability of Americans under the International Criminal Court because they've taken steps not to be subject to it, but of course we would be liable to proceedings for crimes against humanity in Iraq..

There are some odd places where the position of the European Convention is pretty bizarre. One is the British Antarctic Territory. Another is the sovereign basis in Cyprus. Another one is the British Indian Ocean Territory, over which the <Chagos> Islanders have been litigating. There are these places where it's not at all clear whether the thing applies or it doesn't apply. I think it does apply to the <Chagos> islands, I also think it applies in Cyprus. I think it probably doesn't apply in the British Antarctic Territory. I think that so far as the European Convention is concerned you can perhaps torture people you know as much as you like in the British Antarctic Territory, but it would be possible for the Strasbourg Court to extend the existing doctrine to say that it just was covered automatically. It's not possible to be confident one way or the other.

Immigrants. Immigrants can use the Convention because the Convention protects not citizens but anybody within the jurisdiction. So I think the technical position is anybody in this country can use the Convention.

Christine Cody

<INAUDIBLE>

Conor Gearty

Just for those who didn't hear it, it's a point about the availability of Article 6 which, perhaps deal with just briefly.

Brian Simpson

Well, that's wrong. I mean that should be changed but... no it's alright I misunderstood the question, I thought it was a question about a general covering, coverage of the Convention.

The problem that was raised over here of the Danish case, *Jersild v. Denmark*, is the appalling problem of how far you go in protection of speech and the liberty of freedom of expression, and how do you balance that against the harm done by speech. It's the hate speech problem and there is no very, very satisfactory answer to this I think. Under the provisions of the Convention, as you know, there's a balancing act and any law against hate speech must satisfy proportionality and so forth, but there is just an inherent problem about the degree to which you say, okay, we will tolerate the harm done. This came up in the American cases about the marches in Chicago, where people were marching, neo-Nazi groups marching through areas which were inhabited by survivors of the Holocaust. It's a question of how far you go on freedom of speech and I think it's, it's aggravated by another factor. Freedom of speech often comes up in connection with journalists, and journalists have money, and money provides good lawyers and these, you know, that's one of the areas where there's a lot of money in human rights and so these cases are very powerfully argued and well argued I don't think there is a totally satisfactory answer to that.

I think there is another problem about this question which is that the significance, I mean if I say, if I may use an obscene expression, if nobody will be shocked, if I say "Fuck the Pope!" in Sandwich, where I live, nothing happens. If I say "Fuck the Pope!" in some parts of Northern Ireland, it's freedom of speech exercised in a wholly different context. How do you deal with that context problem under a scheme in which you want uniform protection of rights? It's a sort of a conundrum and I don't think there is an obviously right or wrong way to go in this but the tendency of course under the European Convention has been to go a long way in the protection of journalists' rights. I mean that has been the drift of decisions so far.

Interstate applications. They've almost always politically motivated, but not always. You see even from the start it was known that interstate applications would tend to be politically motivated but they haven't always been. The Scandinavian countries at considerable cost, economic cost, took proceedings against Greece under the Colonels.. There was a proposal kicking about when the Convention was signed which got lost and that...

[END OF SIDE OF TAPE]

... of having a sort of Attorney General's department, a Strasbourg institution with a secretariat and lawyers who's job it was to intervene in cases, to take proceedings when nobody else would take them, where individuals weren't able to, which would have considerable resources to bring such cases. Something like a public prosecutor's office. Now, there are great difficulties with that suggestion. How could you make sure that this body was relatively dispassionate, wasn't, you know, under the thumb of particular governments? It would be a tricky thing to set up. But there might be some room for some institution of that sort because relying on interstate cases to deal with major problems hasn't happened much. I mean the number of interstate cases brought in very, very small and the

only sort of really dramatic ones were Greece against the United Kingdom over Cyprus and that was politically motivated, there's no doubt about that at all, but it was, you know, the Greeks had a lot of good points on their side and the other one was proceedings against Greece under the Colonels which lead to Greece actually withdrawing from the Convention. But some sort of centralised body with a general commission, with a general power to intervene or to take cases in the name of the states of the Council of Europe might be a mechanism, might be an administrative mechanism which would be better than the existing, hardly ever used interstate proceedings.

Of course the advantage of states bringing cases is that many states have lots of money and so you'd need to fund such a body so that you could carry out the necessary investigations and so forth.

Question 8

Teresa Steine, I'm a student at LSE and also work as a lawyer for the Norwegian Attorney General; and I was wondering you would comment on if you are worried about the fact that at least in Western Europe in <??> in Norway and I think also in the UK that human rights are being exploited in a way by the rich people, the people with lawyers, big companies, you know, the big cases in Norway, not involving prisoners or immigrants or minorities but more financial aspects of the human rights and that the human rights by that might lose some of its respect being misused.

Question 9

Francesca Klug from the Centre for the Study of Human Rights here at LSE,

Professor Simpson, I really enjoyed your talk but I don't think you've said an awful lot about the Universal Declaration of Human Rights which of course was drafted a couple of years before the Convention is referred to the preamble as an inspiration for it and many of its rights are enumerated in the Convention. Of course, it was drafted by a wider group of people than just Western Europeans and I wonder if you think that European Convention would ever have been drafted without the Universal Declaration and what exactly the inspiration it did draw from it.

Brian Simpson

On the subject of abuse, yes I think there is a problem there. I mean once the human rights were brought home in this country one got the impression the vultures were gathering and that the respectability, as it were, the legitimacy of human rights protection could be damaged. One very odd thing is the possibility of artificial persons, of companies taking proceedings under the Convention. Now I've been asked by a friend of mine to find out and I've yet not done how that got into the system because it is very odd and so I think there is a risk there and of course the human rights, you know, for example, protection of right of property and so on can be used by the well heeled the rich and so on. The flip side of that is if you really believe in human rights well everybody has them, you know, awful people, rich people, fat cats, you know, miserable cats. Most people I think out in the street there worry more about villains having human rights, you know, I've heard people say "Why do these

bastards have human rights?" I say "Because they're bastards and bastards are human beings and that's the rule of the game" and so on.

The Universal Declaration, yes. The Universal Declaration was as it were the first step and then the United Nations started trying to draft covenants and ran into intense difficulties over that and of course what happened to the United Kingdom was that it got sort of fed up with the discussions at the United Nations and thought "Well, perhaps we can join a smaller club, the European club and get somewhere there". I think the Universal Declaration was a sort of foundation charter for the whole movement. It was variously regarded at the time, at present it tends to be viewed as the great step forward. At the time the leading human rights lawyer in this country, Hersch Lauterpacht, viewed it with absolute contempt and he viewed it with contempt because he said "This thing is a lot of pious statements and so on, but there's no enforcement mechanism whatsoever", and it was pathetic, he thought, that the countries of the world, after the horrible things that have recently happened - the best that they could do was to vote for a document which doesn't impose any legal obligations on anybody at all. Now, in retrospect perhaps he was wrong, because it was part of a process, and eventually the UN did get its Conventions and they have had some effect and the European negotiations are a spin off in a sense from the United Nations negotiations.

There's another point about the Universal Declaration which has been argued very much by Mary Ann Glendon in a very highly readable book on the subject. She makes the case for saying that the Universal Declaration was the product of not just Western European and American culture, but was a multicultural document and she goes into some detail into who the people were who were involved in the negotiations. I think she slightly overplays that but it is true that, for example, one of the leading people behind that was a guy called Charles Malik, who was Lebanese, an Arab Lebanese Christian. So he wasn't, you know, from West Europe; on the other hand he taught at Harvard had been a pupil in Germany so I don't know what you say about that. But there was a very distinguished Chinese philosopher involved in the negotiations. So there was a sort of multicultural air about the Universal Declaration. There certainly wasn't a multicultural air about the European Convention. The European Convention is solidly Western European, I know there's no doubt about that at all.

Conor

Well, thank you very much.