THE EVOLUTION AND CURRENT CHALLENGES OF THE EUROPEAN COURT OF HUMAN RIGHTS

PRESIDENT JEAN-PAUL COSTA*

INTRODUCTION

It is with great pleasure that I will deliver a short presentation on the European Court of Human Rights ("the Court"). I will begin by explaining briefly the evolution of the Court. Next, I will discuss the fundamental elements of the Convention mechanism, followed by the structure of the Court, and the activity and influence of the Court. I will conclude by addressing the current problems of the Court and possible reforms aimed at improving the system.

I. THE EVOLUTION OF THE COURT

The Court is located in Strasbourg, France[1] and is often called the Strasbourg Court. Strasbourg should be proud of being the seat of this unique institution. It is unique because, while not the only international court dealing with human rights and liberties, it was the first one of its kind.[2] The Court

* President of the European Court of Human Rights since January 19, 2007. President Costa began his career with the Court as a judge elected to represent France in November of 1998. On May 1, 2000 he became the President of his section and in November of 2001 he became Vice-President of the Court. President Costa has a distinguished legal career. He received a Diploma of the Institute of Political Studies of Paris in 1961; Master of Law, Faculty of Law, Paris in 1962; Diploma of Superior Studies (post-graduate), Public Law in 1964; and he was a pupil of the Ecole Nationale d'Administration from 1964–1966. His professional career includes Auditeur at the Conseil d'Etat in 1966; Rapporteur at the judicial section of the Council of State from 1966-1971, 1977–1980, 1987–1989; Assessor of sub-section (chamber), judicial section of the Council of State from 1989–1993; Directeur du cabinet (political secretary) of the Minister of Education from 1981-1984; and Associate Professor at the Universities of Orléans from 1989–1998 and Panthéon-Sorbonne from 1992–1998.

1. EUR. CT. H.R. R. 19 *in* European Court of Human Rights, Rules of the Court 10 (2007), *available at* http://www.echr.coe.int/NR/rdonlyres/D1EB31A8-4194-436E-987E-65AC8864BE4F/0/RulesOfCourt.pdf.

2. *See* W.J. Ganshof van der Meersch, *European Court of Human Rights*, *in* 2 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 201 (R. Bernhardt ed., 1995).

was created in the 1950s after the signing of the European Convention on Human Rights ("the Convention").[3] The Court's first judgment was *Lawless v. Ireland*, decided on July 1, 1961.[4] This was the start of a long endeavor as the Court is now approaching 10,000 judgments: 800 between 1960 and the entry into force of Protocol 11 to the Convention on November 1, 1998, and more than 9,000 new cases between 1998 and 2008.[5] This number does not take into account the numerous decisions made solely on the question of admissibility. For instance, in 2007 the Court decided that more than 27,000 cases were inadmissible.[6]

A. The Origin and Development of the Court

The origin of the European human rights system is to be found at the end of the Second World War.[7] The horrors visited on the people of Europe by the totalitarian dictatorships are still frightening to contemplate. Yet light and reason

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> The creation of the European Court of Human Rights expresses . . . the common wish of the countries of Western Europe to establish an international legal order which would guard against certain state acts detrimental to the dignity of human beings. The initiative followed a period which had revealed more than ever the value of an effective respect for human rights.

Id.

3. Convention for the Protection of Human Rights and Fundamental Freedoms, art. 19(2), Nov. 4, 1950, 213 U.N.T.S. 222 [hereinafter Convention].

4. "Lawless" Case (Merits), 3 Eur. Ct. H.R. (ser. A) at 27 (1961); *see also* Robert Blackburn, *The Institutions and Processes of the Convention*, *in* FUNDAMENTAL RIGHTS IN EUROPE: THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND ITS MEMBER STATES, 1950–2000 6 (Robert Blackburn & Dr. Jörg Polakiewicz eds., 2001) [hereinafter FUNDAMENTAL RIGHTS IN EUROPE].

5. 2007 EUROPEAN COURT OF HUMAN RIGHTS ANNUAL REPORT 149 [hereinafter 2007 ANN. REP.], *available at* http://www.echr.coe.int/NR/rdonlyres/59F27500-FD1B-4FC5-8F3F-F289B4A03008/0/Annual_Report_2007.pdf. Between 1955 and 2007 the Court delivered 9,031 judgments: 837 judgments between 1955 and 1998, and 8,197 judgments between 1999 and 2007. *Id.* The increase in judgments is a result of the entry into force of Protocol 11, which consolidated the previous judicial system. *See* Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Restructuring the Control Machinery Established Thereby, Nov. 1, 1998, 2061 U.N.T.S. 7 [hereinafter Protocol No. 11]. In 2008, the court delivered an additional 1,881 judgments. European Court of Human Rights Statistics (2008), http://www.echr.coe.int/NR/rdonlyres/A63F2A14-2C68-41F3-BFEF-49D3BF9D8C63/0/Statistics2008.pdf (last visited Jan. 16, 2009).

6. 2007 ANN. REP., *supra* note 5, at 134.

7. PHILLIP LEACH, TAKING A CASE TO THE EUROPEAN COURT OF HUMAN RIGHTS 1 (John Wadham ed., Oxford Univ. Press 2005) (2001).

were not extinguished. The modern age of international relations began in San Francisco with the adoption of the Charter of the United Nations,[8] even while the war was still raging in Asia. Soon after the war the world realized, probably for the first time, the global importance of human rights.[9] Thus, the proclamation of the Universal Declaration of Human Rights ("Declaration") was adopted on December 12, 1948.[10] Although not a binding instrument, the Declaration remains a precious, unique document.

The postwar years were complicated, but the crucial point was the attempt to organize the European continent.[11] The first fruit of this movement was the Treaty of London, which was signed by ten states in London in 1949.[12] The Treaty created the Council of Europe to promote European human rights principles.[13] Meanwhile, for almost half of the continent, victory did not mean liberation, but continued repression. Within a few years the Cold War had divided Europe, which would remain divided for the next 40 years, until the end of the Cold War and the fall of the Berlin Wall.[14] Then, after 1989, the Council of Europe grew as the eastern and central European states that had been behind the Iron Curtain decided to join.[15]

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8. U.N. Charter art. 1, para. 2 (listing purposes that include "develop[ing] friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace").

9. *Cf.* FUNDAMENTAL RIGHTS IN EUROPE, *supra* note 4, at 5 (discussing the emergence and enforcement of the international human rights movement).

10. *See generally* Universal Declaration of Human Rights, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948).

11. *See* IAIN CAMERON, AN INTRODUCTION TO THE EUROPEAN CONVENTION ON HUMAN RIGHTS 26–27 (4th ed. 2002).

12. Statute of the Council of Europe art. 42, May 5, 1949, 87 U.N.T.S. 103. Currently, the Council of Europe includes forty-seven member states. *See* Mark L. Movsesian, *Judging International Judgments*, 48 VA. J. INT'L L. 65, 103 (2007) (citing Council of Europe, About the Council of Europe), *available at* http://www.coe.int/T/E/Com/About_Coe/ (last modified Jan. 3, 2008).

13. *See* DONNA GOMIEN, SHORT GUIDE TO THE EUROPEAN CONVENTION ON HUMAN RIGHTS 11 (3rd ed. 2005).

14. *See* Francis A. Gabor, *Reflections on the Freedom of Movement in Light of the Dismantled "Iron Curtain,"* 65 TUL. L. REV. 849, 854–55 (1991).

15. *See* CAMERON, *supra* note 11, at 27.

B. The Rights Granted by the Convention and Protected by the Court

The European Convention on Human Rights, signed in Rome on November 4, 1950,[16] was one of the first international instruments drafted and adopted by the Council of Europe.[17] The Convention was symbolic because it demonstrated the Council of Europe's realization that the right to freedom, liberty, equality, and human dignity were the indispensable components of a consolidated democracy.[18] The Convention was one of "the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration."[19] Pierre Henri Teitgen, one of the sponsors of the Convention, envisioned that the Convention would embody "seven, eight, or ten fundamental freedoms that are essential for a democratic way of life."[20] While there is no formal hierarchy among the Convention rights, some are more fundamental than others, such as the right to life[21] and the prohibition of torture.[22]

The fundamental rights stated in the Convention were more significant in light of the reign of the dictators and the massacres of the Second World War. Thus, at that time, it was possible to draft the Convention on the seemingly narrow basis of civil and political rights, excluding most economic and social rights. The choice to exclude most of the economic and social rights was not ideological, but pragmatic.[23] It is difficult to argue social rights before a judge, whether national or international. It is easier to argue that the state has violated one's civil and political rights—freedom of expression, freedom of association, or the right to privacy—than for

16. *See* Convention, *supra* note 3, at pmbl.

17. *See* GOMIEN, *supra* note 13.

18. *See* Convention, *supra* note 3, at pmbl.

19. *Id.*

20. EUR. CONSULT. ASS. DEB. 1st Sess. 44 (Aug. 19, 1949), *in* I COLLECTED EDITION OF THE TRAVAUX PREPARATOIRES (Martinus Nijhoff ed., 1975) (statement of Pierre Henri Teitgen).

21. Convention, *supra* note 3, at art. 2.

22. *Id.* at art. 3.

23. *See* FREDE CASTBERG, THE EUROPEAN CONVENTION ON HUMAN RIGHTS 6–7, (Torkel Opsahl & Thomas Ouchterlony eds., 1974).

an unemployed person to argue that the state should give him or her a job.

Recently, however, the Convention has been evolving to include social and economic rights. This phenomenon is occurring for two reasons. First, elements of the Convention and the protocols overlap with certain social rights. Second, the caseload of the Court has been always evolutive and constructive. It was a judgment of the so-called "Old Court,"[24] *Tyrer v. United Kingdom*, that laid down the important principle that the interpretation of the Convention should be evolutive, since the Convention is a living instrument to be construed in light of the present-day conditions.[25]

II. The Fundamental Elements of the Convention Mechanism

The European Court of Human Rights was the first international court in the world dedicated to protecting human rights and freedoms.[26] Of course, there was and still is the International Court of Justice ("ICJ"), which is based in The Hague.[27] Although the ICJ is very important, it normally decides conflicts between states, such as border conflicts, and is not a court for the protection of the individual.[28] Thus, the fundamental element of the Convention mechanism was to protect and guarantee the rights of the individual, normally against the state.[29]

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24. The original bifurcated judicial system created by the Convention was modified with the entry into force of Protocol No. 11 on November 1, 1998. *See* Protocol No. 11, *supra* note 5, at pmbl. The original system, the "old Court" consisted of the European Commission and the Court of Human Rights. *Id.* This was replaced by the European Court of Human Rights, or the "new Court," which created one permanent Court. *Id.* at pmbl., art. 19.

25. Tyrer Case, 26 Eur. Ct. H.R. (ser. A) at 15 (1978).

26. *See* Gomien, *supra* note 13, at 12.

27. *See* International Court of Justice, The Court, http://www.icj-cij.org/court/index.php?p1=1&PHPSESSID=ea4e311675f37dbd47705fd88e7cc113 (last visited Jan. 6, 2009).

28. *See* Lillian M. Pinzon, *Criminalization of the Transboundary Movement of Hazardous Waste and the Effect on Corporations*, 7 DePaul Bus. L.J. 173, 219–20 nn.319–21 (1994) (citing Statute of the International Court of Justice, art. 35(1), 36(1)-(2), June 26, 1945).

29. *See* Gomien, *supra* note 13, at 12.

A. The International Responsibility of the States

In a sense, the Convention mechanism is very simple. The first element is the international responsibility of the contracting states. This is very important in terms of public international law because the states must take the Convention seriously. When states sign and ratify the Convention and its protocols, they commit themselves to guaranteeing to everyone within their jurisdiction the rights and freedoms defined in the Convention. Article 1 of the Convention says, "The High Contracting Parties," namely the states, "shall secure to *everyone within their jurisdiction* the rights and freedoms defined in Section I of this Convention."[30] It also provides a catalog of rights and freedoms guaranteed and protected by the Convention.[31] So, who is *everyone within the state's jurisdiction*? The Court's answer is very broad and is in line with the drafters' intention. "*Everyone within their jurisdiction*" includes citizens of the states and aliens, people residing in the state, and people who are under the jurisdiction of the state.[32] For instance, ambassadors from European states make decisions outside of Europe that have some influence on the rights and freedoms of individuals in Europe. Because their decisions have such effect, these ambassadors represent the continuation of the jurisdiction of their respective states.

In addition, *everyone* includes not only physical persons, but also legal persons. While the Court receives more applications from physical persons than from legal persons, it does receive applications from legal persons involving important issues and substantial sums of money. So, *everyone within their jurisdiction* is defined broadly.

B. The Role of the Court

The second element of the Convention mechanism is the role of the Court. Under the Convention system there are two main organs: the Court and the European Commission on

30. Convention, *supra* note 3, at art. 1.

31. *Id.* at arts. 2–15.

32. *See* Gomien, *supra* note 13, at 13.

Human Rights ("the Commission").[33] The Commission played an important role until the entry into force of Protocol 11 in 1998.[34] Before 1998, the Commission was both a filtering body for applications and a sort of tribunal in its own right, rejecting applications that were inadmissible or manifestly unfounded, and deciding the remaining cases on the merits.[35] During that time, few cases went to the Court, and the majority of cases accepted by the Commission were decided theoretically by the Committee of Ministers of the Council of Europe.[36] In reality, however, the Committee of Ministers followed the Commission's conclusions and recommendations most of the time.[37] Since 1998 and the entry into force of Protocol 11, there is only a judicial body, the Court.[38] Article 19 of the Convention now states, "To ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention and the protocols thereto, there shall be set up a European Court of Human Rights . . . . It shall function on a permanent basis."[39] Before 1998, the Court was a non-permanent judicial body and judges of the Court went to Strasbourg eight or nine days a month, while simultaneously maintaining their own responsibilities in their respective countries.[40] Now, the Court is permanent and the

33. Convention, *supra* note 3, at art. 19; *see also* Ellen G. Schaffer, *Human Rights Protection Under the Council of Europe—The System and its Documentation*, 19 INT'L J. LEGAL INFO. 1, 2 (1991).

34. Protocol No. 11, *supra* note 5, at pmbl.; *see also*, ALASTAIR MOWBRAY, CASES AND MATERIALS ON THE EUROPEAN CONVENTION ON HUMAN RIGHTS 15 (2d ed. 2007).

35. Convention, *supra* note 3, at arts. 27–28; *see also* P. VAN DIJK & G.J.H. VAN HOOF, THEORY AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 61 (2d ed. 1990).

36. *See* 2007 ANN. REP., *supra* note 5 (noting that over the course of the first forty years of the Court, out of 72,167 applications submitted to the Court, 4,161 of those were declared admissible and there were only 732 judgments delivered by the Court); *see also* MOWBRAY, *supra* note 34, at 13.

37. *See* MOWBRAY, *supra* note 34, at 13.

38. *See* Protocol No. 11, *supra* note 5, at pmbl.; *see also* Paul Mahoney, *New Challenges for the European Court of Human Rights Resulting from the Expanding Case Load and Membership*, 21 PENN ST. INT'L L. REV. 101, 101 (2002).

39. Protocol No. 11, *supra* note 5, at art. 19.

40. The Court is comprised of forty-seven judges. The most recent addition was the judge representing Montenegro on April 15, 2008. European Court of Human Rights, Composition of the Court, http://www.echr.coe.int/ECHR/EN/Header/The+Court/The+Court/Judges+of+the+Court/ (last visited Jan. 11, 2009).

judges are all required—though it is not a burden—to live in Strasbourg and to be dedicated full-time to the Court.

The composition of the Court is very simple: there are forty-seven member states and forty-seven judges.[41] The appointment of judges to the Court is not like the appointment of judges at the European Court of Justice in Luxembourg, where each state may select its judge using its own procedure.[42] Instead, the Convention provides that every state must draw up a list of three candidates.[43] After the list is established, the Parliamentary Assembly of the Council of Europe must elect one of the three by secret ballot for a renewable six year term.[44] For instance, I was elected to represent France in 1998 and was reelected in 2004. Unfortunately, unlike the Supreme Court of the United States, the Court has an age limit of seventy,[45] which for me will be in a few years.

C. The Right of Individual Applications to the Court

Thus far, I have explained the international responsibility of the states and the role of the Court. The third element of the Convention mechanism is the right of individual application to the Court, which is absolutely crucial and was unique at the time of the Convention's inception.[46] The creation of this right was very bold because, for the first time in history, there was an international court to which millions of people could submit individual applications. The Convention, not the Court, established the right of individual application. Article 34 reads as follows:

41. *See* Protocol No. 11, *supra* note 5, at art. 20 (stating that "[t]he Court shall consider a number of judges equal to that of the High Contracting Parties"); *see also* European Court of Human Rights, *supra* note 41; Laurence R. Helfer, *Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime*, 19 EUR. J. INT'L L. 125, 126 (2008).

42. *See* Treaty Establishing the European Economic Community art. 167, Mar. 15, 1957.

43. Protocol No. 11, *supra* note 5, at art. 22(1).

44. *Id.* at arts. 22(1)–23(1).

45. *Id.* at art. 23(6).

46. *Compare* Convention, *supra* note 3, at art. 25 (stating the right of individual application to the Commission at the Convention's inception in 1950), *with* Protocol No. 11, *supra* note 5, at art. 34 (stating the right of individual application to the Court after 1998); *see also* GOMIEN, *supra* note 13, at 12.

> The Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right.[47]

The last sentence of Article 34 is not purely theoretical. In some cases, for instance those involving Turkey and the Russian Federation, there have been pressure on individuals to refrain from exercising their right of individual application. Of course, the Court reviews such cases and sometimes finds violations of Article 34 in that respect.

Although the Court primarily hears applications filed by individuals, it also hears interstate applications.[48] Since 1998, the Court has decided only two interstate applications: *Denmark v. Turkey* in 2000, which was finally decided by friendly settlement;[49] and *Cyprus v. Turkey* in 2001, where the Court found violations by Turkey as a result of the situation in Northern Cyprus.[50] In addition, *Georgia v. Russian Federation* is a pending interstate case, which was introduced last year.[51] As you can imagine, it is a tricky political case. The Court is not political, of course, but some of the applications to the Court are political in nature.

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47. Protocol No. 11, *supra* note 5, at art. 34.

48. *Compare* Convention, *supra* note 3, at art. 24 (stating the right of interstate applications to the Commission at the Convention's inception in 1950), *with* Protocol No. 11, *supra* note 5, at art. 33 (stating the right of interstate applications to the Court after 1998); *see also* P. VAN DIJK, *supra* note 35, at 35–36.

49. Denmark v. Turkey, 2000-IV Eur. Ct. H.R. 2, 10–11.

50. Cyprus v. Turkey, 2001-IV Eur. Ct. H.R. at 99–105.

51. Press Release, European Court of Human Rights, European Court of Human Rights Grants Request for Interim Measures (Dec. 8, 2008), *available at* http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=839100&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649 (last visited Jan. 11, 2009); *see also* European Court of Human Rights, Calendar of Scheduled Hearings, Georgia v. Russia (App. No. 13255/07), April 16, 2009, *available at* http://www.echr.coe.int/ECHR/EN/Header/Pending+Cases/Pending+cases/Calendar+of+scheduled+hearings/ (last visited Jan. 11, 2009).

III. The Structure of the Court

A. How the Court Separates Admissible Cases from Inadmissible Cases

To reiterate, the three fundamental elements of the Convention mechanism are: the international responsibility of the states; the role of the Court; and the right of individual applications. These elements function together in various ways.

Applications brought to the Court are not always admissible. In fact, 90 to 95 percent of the Court's most recent decisions were rejections of cases that were inadmissible or manifestly unfounded according to the Convention's conditions on admissibility.[52] The Convention itself contains conditions of admissibility. One such condition is the exhaustion of domestic remedies,[53] which reflects the international law principle of subsidiarity.[54] Thus, before bringing a case to the Court, an applicant must exhaust the remedies in the courts of his or her own country.[55] The Convention also contains formal criteria. For example, an applicant must introduce a case in Strasbourg within six months of the date of the last decision of a national court or body.[56] But the main reason that so many cases are inadmissible is that many people think that the Court is Santa Claus and can solve all the problems of daily life by providing health, riches, happiness, and love. I would like to be able to grant love to everyone, but this is not in the Convention. The Convention is a legal instrument that is also binding on the Court, and legal instruments must be interpreted and applied in a precise

52. European Court of Human Rights Statistics 2008, *supra* note 6 (showing that out of 29,064 applications decided in 2008, 27391 were decided as inadmissible or struck out); *see also* A.H. Robertson & J.G. Merrills, Human Rights in Europe: A Study of the European Convention on Humangoo Rights 264 (3d ed. 1992).

53. Protocol No. 11, *supra* note 5, at art. 35(1).

54. "[T]he [Treaty Establishing the European Community ("E.C")] also expresses a general E.C. law principle of 'subsidiarity,' meaning that the E.C. should not take legislative action within fields of concurrent E.C. and Member State jurisdiction if action at the Member State level could adequately accomplish the E.C.'s objectives." George A. Bermann, *Regulatory Cooperation Between the European Commission and U.S. Administrative Agencies*, 9 Admin. L.J. Am. U. 933, 950 (1996) (citing Treaty Establishing the European Community, art. 3b, para. 3).

55. *See* Convention, *supra* note 3, at art. 35.

56. *Id.*

manner. For example, when I arrived to the Court nearly ten years ago, I was a rapporteur in a simple case against Poland. The applicant was an elderly lady who applied to the Court because her daughter was not happy with her husband. Instead of coming home after work, the husband went out to bars and drank with his friends. This made the daughter cry because she wanted her husband to come home earlier and to stop drinking. The elderly lady, however, was not claiming that her daughter was being beaten or ill treated; she was simply claiming that her daughter was not happy. The Court must reject this type of case.

Cases are rejected by three-judge committees. The only condition the Convention places on the committees is that the decision to reject a case must be unanimous.[57] If one of the judges on the committee disagrees, the case is not decided by the committee, but is sent to a chamber of seven judges.[58] The Court is divided into five sections of nine judges, and within each section—through a process of rotation—there are seven-judge chambers.[59] The chamber is allowed to decide the admissibility and merits of a case simultaneously. Article 29, Paragraph 3 of the Convention permits this process,[60] and the Court has implemented it to increase efficiency and to speed up the proceedings.

If a case is not rejected by the three-judge committee, but is instead sent to the seven-judge chamber, the Court will forward the application to the defending state.[61] Once the defending state is notified, the seven-judge chamber will decide the admissibility of the case. If it is inadmissible, the chamber will reject the case. If it is admissible, the chamber will make a judgment on the merits. In a majority of cases, the result is a judgment that the defending state violated one or more articles of the Convention.

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57. *See id.* at art. 28.

58. *Id.* at art. 29(1).

59. *Id.* at art. 27(1). *See also* EUR. CT. H.R. R. 25 *in* European Court of Human Rights, Rules of the Court 13 (2007), *available at* http://www.echr.coe.int/NR/rdonlyres/D1EB31A8-4194-436E-987E-65AC8864BE4F/0/RulesOfCourt.pdf.

60. *See* Convention, *supra* note 3, at art. 29(1).

61. *See* CAMERON, *supra* note 11, at 46.

B. Cases that are Generally Inadmissible

For legal and practical reasons, applicants may not file initial claims at the Court.[62] It is not as equipped as a municipal domestic court to review the facts of a case or the elements of proof and evidence. Consequently, the Court typically rejects criminal cases. Applicants often contend that, even after being convicted and sentenced in their home state, they are innocent or their penalty is too severe. The Court is unable to review such cases unless the domestic proceedings were arbitrary or unfair. Of course, there is a risk that the domestic court made a mistake. But if the trial was fair, if the rights of the defense were respected, and if the equality of arms between the prosecution and defense were respected, the Court cannot retry the case.[63]

Many articles of the Convention are drafted to include principles. For example, Article 10 protects the principle of freedom of expression and delineates the ways in which a country is authorized to interfere with that right.[64] A state must satisfy three cumulative conditions before it can validly interfere with the principles set forth in the Convention. First, the interference must be provided for in domestic legislation.[65] If there is no legal basis for the interference, the Court will find a violation of the corresponding article of the Convention. Second, the interference must have a legitimate aim.[66] Legitimate aims include, for example, the rights of other persons, the maintenance of public order or public security, and in the case of freedom of speech, the prevention of defamation. Third, the interference must be necessary in a democratic society,[67] which means that even if the aim is legitimate, the interference must be proportional. In a democratic society, it means that the Court and the states must observe democratic standards. Of course, in a dictatorship such as Belarus—which is not a member of the Council of Europe precisely because it is a dictatorship—the rules

62. *See* Convention, *supra* note 3, at art. 35.
63. *See* CASTBERG, *supra* note 23, at 129.
64. *See* Convention, *supra* note 3, at art. 10.
65. *Id.* at art. 10(2).
66. *See id.*
67. *Id.*

and practices are different than they would be in a democratic society. The member states of the Council of Europe, however, accept the rules of democracy, the rule of law, and so on.

IV. The Activity and Influence of the Court

The activity and influence of the Court are important for two reasons. First, the Court enforces the fundamental rights set forth in the Convention. Second, the Court has an oversight function for domestic legislation.

A. The Court Enforces the Fundamental Rights Set Forth in the Convention

The Court is important because it can criticize and even condemn states for serious violations of human rights protected by the Convention. The most serious are violations of Article 2, which protects the right to life; Article 3, which prohibits torture, including inhuman and degrading treatment; Article 4, which prohibits slavery and forced labor; and Article 7, which prohibits punishment in the absence of law, including retroactivity of criminal law.[68]

Often, repeated judgments finding violations of rights guaranteed by the Convention have a very positive effect in the long run. One example of the Court's influence involves Turkey. Fifteen to twenty years ago, Turkey had a poor human rights record. One reason Turkey's human rights record was so bad was that Turkey did not have a long-standing democratic tradition. Another reason was that the army was and possibly still is, although to a lesser degree, a political heavyweight in the country.[69] Lastly, the human rights record was poor because there was essentially a civil war between the Kurdish minority of the population and the central state.[70] This gave rise to unacceptable problems of torture, illegal detention, and arbitrariness in the investiga-

68. *See id.* at art. 2–4, 7.

69. *See generally* Edward McBride,*Why Are We Waiting?*, The Economist, June 8, 2000.

70. *See generally* Paul J. Magnarella, *The Legal, Political, and Cultural Structures of Human Rights Protections and Abuses in Turkey*, 3 D.C.L. J. Int'l L. & Prac. 439, 459–65 (1994).

tions and judgments of the courts.[71] Thus, this Court found that Turkey breached the rights guaranteed by the Convention many times. Eventually, the weight of public opinion and the media in Turkey and around the world was sufficient to persuade Turkey to change its human rights legislation and practices. Turkey was also very interested in joining the European Union, which required that these types of human rights issues be addressed. This concern was amplified by the Court's judgments, which were influential because they gave an unpleasant image to a country condemned by the Court many times.

B. The Court Has an Oversight Function for Domestic Legislation

The Court is also important because the Court's judgments—in some cases—reveal dysfunctional domestic legislation that member states must change in order to align themselves with European standards. Such necessary legislative changes are seen in examples involving Turkey, the United Kingdom, and France.

Turkey's legal system previously included state security courts comprised of three judges: two civilians and one member of the military.[72] The Court decided in 1998, during the last years of the Commission and the "Old Court," that Turkey's system was not in accordance with Article 6—which protects the right to a fair trial—because members of the military on such state security courts were subject to hierarchical discipline by the head of staff.[73] This judgment was very serious for Turkey, not only politically, but also because Turkey had to change its legislation and its constitution in response, since the existence and composition of the state security courts derived directly from the constitution.[74] Turkey complied with the judgment in two steps. First, it decided that the state security courts would no longer

71. *Id.* at 461.

72. Incal v. Turkey, 1998-IV Eur. Ct. H.R 1547, 1558 (quoting Sections 3 and 5 of Law no. 2845 on the National Security Courts).

73. *Id.* at 1573.

74. *See* HEINZ KRAMER, A CHANGING TURKEY: THE CHALLENGE TO EUROPE AND THE UNITED STATES 35 (2000).

allow a member of the military in the tribunal.[75] Second, it abolished the state security courts and made the Assize Courts responsible instead.[76]

Another example of a necessary legislative change dealt with the court-martial system in the United Kingdom. The system, which exists in many countries, was obsolete in the United Kingdom—in its organization, functioning, and composition. In *Findlay v. United Kingdom*, the Court decided that the system was problematic because it was neither impartial nor independent, and did not respect the rights to defense of the people who were appearing before the court.[77] Thus, the United Kingdom had to change its legislation in that respect.

Another change in legislation came in the famous case of *Lustig-Prean and Becket v. United Kingdom*, decided in 1999.[78] The case involved the exclusion of men and women from the British army because of their sexual orientation.[79] The Court decided that these exclusions were contrary to Article 8 of the Convention, which protects the right to respect for private and family life.[80] As an aside, I will share an anecdote. I presided in the chamber that decided this case. At its conclusion, the British tabloid press was furious with the Court and questioned the Court's right to criticize the British government and army.[81] The press focused on the seven judges of the chamber, releasing photographs and short biographies. Mine, for example, said "Judge Costa, born in Tunis." Perhaps they were implying that I was not a true European. And, as though it would be even worse, they noted that I had been the head of the French negotiation team for the treaty to construct the Channel Tunnel. I asked one of my

75. *Id.*

76. Feridun Yenisey, *Some Legal Aspects of Terrorism in Western Europe and in Turkey*, 14 KAN. J.L. & PUB. POL'Y 643, 648 (2005) (citing Terörle Mücadele Kanunu [the Anti-Terror Act] art. 250.).

77. Findlay v. United Kingdom, 1997-I Eur. Ct. H.R. 263, 280–83.

78. Lustig-Prean and Beckett v. United Kingdom, App. Nos. 31417/96 and 32377/96, 29 Eur. Ct. H.R. 548 (1999).

79. *Id.* at 548, 554–57.

80. *Id.* at 573, 587–88.

81. *See, e.g.*, Kevin Cullen, *British Bristling at Reach of European Court of Human Rights Obliging English Law to Fall Into Line*, BOSTON GLOBE, Oct. 13, 1999, at A4.

fellow judges, "Why did they criticize Tunis? I can't understand." He replied, "What is even worse is that what Napoleon failed to do, joining the continent with the United Kingdom, you did."

With regard to France, two examples of necessary changes in legislation can be given. First, France had a system of advocates of the government in the Court of Cassation, and of commissioners of the government in the Conseil d'État. The Court found that the way those high courts functioned was incorrect according to Article 6.[82] This required a change in both of the high courts. There was some reluctance because both courts had been established for over two centuries and because members of the high courts disagreed with this Court's ruling. I remember when the President of the Conseil d'État, a friend and former colleague of mine, said publicly: "We have to burn the European Court of Human Rights," and he added, "Perhaps with the exception of the French judge."

The second necessary change in French legislation involved freedom of expression. France had a decree dating back to just before the Second World War, when there was propaganda from the Nazis and the fascists in Italy. The decree was given in 1939, due to the excess of propaganda, and it said that the Minister of the Interior—a non-judicial member of the government—had the discretionary right to prohibit the diffusion and circulation of foreign newspapers and books.[83] The definition of foreign was very broad, and it did not require the materials to be in a foreign language as long as they were of a foreign origin or influence.[84] At that time, it was said that the decree was a temporary regulation and that it would be quashed as soon as possible. Sixty years later, however, it was still in force. A Spanish Basque association was a victim of such a prohibition in *Association Ekin v. France*, and it made a claim in France and lost.[85] After exhausting domestic remedies, the association filed the claim in this Court and won. The Court decided that this prohibition

82. Reinhardt & Slimane-Kaïd v. France, 1998-II Eur. Ct. H.R. 640, 664–666; Kress v. France, 2001-VI Eur. Ct. H.R. 41, 65–72.

83. *See* Ass'n Ekin v. France, 2001-VIII Eur. Ct. H.R. 323, 334 (quoting Section 14 of the Law of July 29, 1881, as amended by the decree of May 6, 1939).

84. *Id.* at 335.

85. *Id.* at 332.

was contrary to freedom of expression, as it was a kind of censorship by a member of the executive.[86]

V. The Current Problems of the Court

The Court's current problem is very simple to sum up: *we have too many applications*. Some journalists say that the Court is a victim of its own success. While this may be true, it does not solve the problem. The Court receives approximately 40,000 new applications each year, and has a backlog that amounts to nearly 90,000 pending cases.[87] In 2007, the Court delivered 1700 judgments and 27,000 decisions.[88] Thus, the backlog continues to grow.

The Court cannot increase the number of judges, as that is fixed by the Convention.[89] It has, however, succeeded in increasing the financial and human resources of the registry. When I arrived to the Court, there were less than 230 staff members. Now, there are between 600 and 700.[90] However, the Court is still facing problems. For instance, in one year the Court will not have enough room for its staff and will have to ask the Council of Europe to build a new building.[91] A new building would require one to three years for completion. So, the problems are quickly approaching and not easily solved.

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86. *Id.* at 344–47.

87. As of December 1, 2008, there were 96,550 cases pending before the Court. European Court of Human Rights, Eur. Ct. H.R, Dec. 1, 2008, http://www.echr.coe.int/NR/rdonlyres/96960736-30E5-40DE-BC54-28F374A60C0B/0/Pending_applications_chart.pdf.

88. European Court of Human Rights Statistics (2007), http://www.echr.coe.int/NR/rdonlyres/1378B206-4F40-4873-BF32-3BEA8FC4465B/0/Stats2007.pdf (last visited Jan. 16, 2009).

89. "The Court shall consist of a number of judges equal to that of the High Contracting Parties." Convention, *supra* note 3, at art. 20.

90. "There are currently some 600 staff members of the Registry[:] 235 lawyers and 365 other support staff." European Court of Human Rights, Role of the Registry, http://www.echr.coe.int/ECHR/EN/Header/The+Court/The+Registry/Role+of+the+Registry (last visited Jan. 16, 2009) (citation omitted).

91. European Court of Human Rights, The Budget of the Court, http://www.echr.coe.int/ECHR/EN/Header/The+Court/The+Budget/Budget/, (last visited Mar. 31, 2009) (According to Article 50 of the Convention, the Court depends on the Council of Europe for its funding.).

VI. Reforms Aimed at Addressing the Workload of the Court

I would like to conclude by suggesting three possible reforms for reducing the number of applications: domestic, procedural, and selection reforms.

A. Domestic Reforms

The first solution relies on the principle of subsidiarity.[92] While I have esteem for the political leaders of European countries, I ask them to introduce more domestic measures in their respective countries to avoid human rights violations. If violations have occurred, I ask them to provide remedies in order to avoid a tsunami of applications in Strasbourg. This message will most likely succeed in the long run, but it will take time.

B. Procedural Reforms

The second solution is to vary the procedural methods of dealing with cases in the Court. Protocol 14 to the Convention, drafted by the states and approved by the Court, allows this as an option.[93] One method is to replace the seven judge chamber, for the most common, simplistic cases, with a three judge committee, and then replace the three judge committee for the obvious, inadmissible cases with a single judge procedure. Unfortunately, due to the classical international law of treaties, this change would require the unanimous consent of all member states. All 47 member states have signed Protocol 14, but only 46 have ratified it.[94] The member state that has not yet ratified the protocol is the Russian Federation.[95] Cur-

92. "[S]ubsidiarity is the principle that each social and political group should help smaller or more local ones accomplish their respective ends without, however, arrogating those tasks to itself." Paolo G. Carozza, *Subsidiarity as a Structural Principle of International Human Rights Law*, 97 Am. J. Int'l L. 38, 38 n.1 (2003).

93. Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Amending the Control System of the Convention, art. 26 §2, May 13, 2004, http://conventions.coe.int/Treaty/EN/Treaties/Html/194.htm (last visited Mar. 31, 2009).

94. Chart of Signatures and Ratifications of Protocol No. 14 to the Convention, Dec. 3, 2008, http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=194&CM=8&DF=12/3/2008&CL=ENG (last visited Mar. 31, 2009).

95. *Id.*

rently, the Russian Federation is the biggest client of the Court: 25 to 26 percent of all applications brought to Strasbourg are brought against the Russian Federation.[96] There is, of course, a political game going on there. I tried to convince the more positively-oriented people in the Russian Federation to change their minds and ratify Protocol 14. Perhaps President Medvedev will be more influential than President Putin. I am optimistic by character, but I not too optimistic.

C. The Power to Select Cases

The third possible reform for the Court is to have a system that allows the picking and choosing of cases—a system similar to the Supreme Court of the United States and the Canadian Supreme Court. Under this option, the Court would select the most important cases, either those dealing with the most serious human rights violations or those of a quasi-constitutional character, because of the interests of the member states as parties to the Convention. This may be the only effective solution, but it always has been rejected, precisely because the right of individual applications is so important in the European system. It has also been refused because many countries, especially those in Eastern Europe, are not sufficiently protecting human rights.[97] Thus, it would be difficult for individual applicants whose cases may be rejected to be provided the necessary recourse under this last solution.

Thank you very much for your attention.

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96. Pending Cases Allocated to a Judicial Formation, *supra* note 87.

97. *See* 2007 ANN. REP., *supra* note 5, at 142-154.