THE EUROPEAN SYSTEM FOR THE PROTECTION OF HUMAN RIGHTS: BALANCE AND PERSPECTIVES

O Sistema Europeu para a Proteção dos Direitos Humanos. Balanço e Perspectivas

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SUMMARY 1. Introduction. 2. Overview of the European System for the Protection of Human Rights. 2.1. Democracy and Human Rights in the CoE. 2.2. Instruments. 3. The ECHR & its 14 Protocols. 4. CoE Institutions & Institutional Setting of the ECtHR. 4.1. CoE Institutions. 4.2. Organisation/Institutional Setting of the ECtHR. 4.3. Jurisdiction and Access to the ECtHR. 5.Procedure before the ECtHR. 5.1. Overview of Proceedings . 5.2. Judgment and Just Satisfaction. 5.3. Supervision of Execution by the Committee of Ministers. 6. Jurisprudence of the ECtHR. 6.1. Inter-State Applications. 6.2. Individual Complaints/Applications. 7. Balance and Perspectives. 7.1. The European System for the Protection of Human Rights as Success Story. 7.2. The ECtHR: a Victim of its own Success? 7.3. Appreciation. Bibliograph.

RESUMO O estudo apresenta um balanço do Sistema Europeu de Proteção aos Direitos Humanos através da análise de seus vários instrumentos operacionais, como os Protocolos para a proteção dos direitos civis e políticos e os mecanismos de monitoramento. Aborda de forma crítica a estrutura da organização, a questão do acesso à Corte e às suas decisões. Por fim, avalia a influência da jurisprudência da Corte Europeia de Direitos Humanos (ECtHR) nos ordenamentos jurídicos nacionais dos Estados submetidos à sua jurisdição e os problemas estruturais gerados, justamente, pelo sucesso da Corte, como o grande aumento do número de casos para julgamento (fato que gera o descumprimento da sua própria regra da duração razoável do processo) e o complexo paradoxo gerado pela criação de critérios que podem ferir o direito ao acesso universal à Corte, como o julgamento piloto (suspensão/adiamento de todos os casos semelhantes) e a criação de critérios de admissibilidade substantiva (estabelece um limite mínimo de seriedade nas violações).

ABSTRACT The study gives an overview of the European System of Human Rights Protection by analyzing its various operating instruments such as protocols for the protection of civil and political rights and monitoring system. Discusses critically the structure of the organization, the issue of access to the Court and its decisions . Finally, we assess the influence of the jurisprudence of the European Court of Human Rights (ECtHR) in the national legal systems of the States under their jurisdiction and structural problems generated precisely by the success of the Court, as the large increase in the number of cases for trial (fact that generates the failure of its own rule of reasonable duration of the process) and the complex paradox generated by the establishment of criteria that can hurt the right to universal access to the Court , as the pilot judgment procedure

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(halt/adjournment of all similar cases) and the creation of substantive admissibility criterion (establishing a mininum threshold of seriousness in violations) .

Palavras-chaves: Direitos Humanos. Sistema Europeu. Convenção Europeia dos Direitos Humanos. Tribunal Europeu dos Direitos Humanos. Protocolos. Jurisprudência.

Keywords: Human Rights. European System. European Convention of Human Rights. European Court of Human Rights. Protocols. Jurisprudence.

1. INTRODUCTION[2]

The European system for the protection of human rights is to be appreciated within its historical context. The Council of Europe (CoE) which was founded in 1949 and the 1950 European Convention on Human Rights (ECHR), on the one hand, were a response to the past and the most serious human rights violations which had been committed during the Second World War. Especially the atrocities of Nazi-Germany had shown that it was not sufficient to leave the protection of human rights to national states. Rather, an international system for the protection of human rights was required.[3] On the other hand, the CoE understood itself as bulwark to defend Western values against the rise of Communism which spread from the Soviet Union into European states behind the Iron Curtain.[4] Also, the CoE meant to counter Fascism which was practiced in Spain and Portugal after the Second World War.

More than 60 years later, the European system for the protection of human rights has proven its efficiency and success. The CoE today counts 47 member states, all of which are parties to the ECHR.[5] The European Court of Human Rights (ECtHR) acts as single and permanent Court which may be approached by individuals in case of human rights violations. In this function, the ECtHR exercises jurisdiction over more than 800 million people. In the following, we will provide an overview of the European system for the protection of human rights with special focus on the ECHR and ECtHR.

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[2] This article is the updated version of an article which was published in A. von Bogdandy, F. Piovesan, M. Morales Antoniazzi (eds.), ***Direitos Humanos, Democracia e Integração Jurídica***, Editora Lumen Iuris, Rio de Janeiro, 2011, 371-393.

[3] See in this context also the adoption of the 1948 UN Declaration of Human Rights by the General Assembly.

[4] DJ Harris, M O'Boyle, C Warbrick, ***Law of the European Convention on Human Rights***, 2nd ed, OUP, 2009, 1.

[5] States parties to the ECHR include all European states as well as states such as Armenia, Azerbaijan, Georgia, Russia and Turkey. No states parties to the ECHR are Belarus, the Holy See and Kosovo. See CoE, ECHR, Status of ratifications as of September 2013, http://conventions.coe.int/treaty/Commun/ChercheSig.asp?NT=005&CM=&DF=&CL=ENG.

2. OVERVIEW OF THE EUROPEAN SYSTEM FOR THE PROTECTION OF HUMAN RIGHTS

2.1. *Democracy and human rights in the CoE*

The CoE is the oldest intergovernmental organization which deals with the protection of human rights. The CoE is based on three "pillars": human rights, the rule of law and the promotion of pluralistic democracy.[6] Only those states which adhere to these fundamental values may become members of the CoE.[7] According to Article 8 of the CoE's Statute, states may even be expelled from the Council if they are found to seriously violate them.[8] States interested in joining the CoE must undertake a political commitment to ratify the ECHR.[9]

2.2. *Instruments*

Several instruments for human rights protection have been adopted under the auspices of the CoE. The ECHR and its 14 Protocols provide for an efficient and far-reaching system for the protection of civil and political rights. The ECHR was adopted in 1950 (entry into force in 1953), its 14 Protocols – which broadened the Convention's material scope as well as introduced procedural reforms – successively afterwards. In accordance with Article 1 of the ECHR, all states parties undertake to "secure to everyone within their jurisdiction the rights and freedoms defined in section one of the Convention." States thus commit to an obligation of result which is two-fold: 1. to ensure that their domestic law and practice is compatible with the Convention; and 2. to remedy any breach of the substantive rights and freedoms protected by the Convention.[10]

The protection of economic, social and cultural rights is done in a somehow more fragmented and less effective manner in the (Revised) European Social Charter. The 1961 European Social Charter (ESC) – which entered into force

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[6] See Preamble and Art 3 of the Statute of the CoE.

[7] Art 3 of the Statute of the CoE: "Every member of the Council of Europe must accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms."

[8] Art 8 of the Statute of the CoE: "Any member of the Council of Europe which has seriously violated Article 3 may be suspended from its rights of representation and requested by the Committee of Ministers to withdraw under Article 7. If such member does not comply with its request, the Committee may decide that it has ceased to be a member of the Council as from such date as the Committee may determine."

[9] R Mackenzie, C Romano, P Sands and Y Shany, *The Manual on International Courts and Tribunals*, 2nd ed, OUP, 2010, 335.

[10] See D Gomien, *Short Guide to the European Convention on Human Rights*, 2002, 7.

in 1965 – is alsocalled the "little sister" of the ECHR, since the latter is far better known.[11] Among the rights protected in the ESC are the right to work, to organize and to bargain collectively, the right to social security and to social and medical assistance. The 1996 Revised European Social Charter (RevESC), which entered into force in 1999, broadens the ESC's scope of protection by introducing certain additional rights, such as the right of children and young persons to protection as well as the right of workers to dignity at work.[12] The rights enshrined in the (Rev)ESC are worded more weakly than those in the ECHR. States have to engage in obligations of conduct, rather than result.[13] Also, contrary to the ECHR, states are given the possibility of "à la carte" ratification: with an opting-in system they may selectively ratify which rights they prefer to consider as binding.[14] Likewise, the (Rev)ESC's enforcement mechanism is less effective. Although a collective complaints mechanism was introduced for certain NGOs through the adoption of an Additional Protocol in 1995,[15] state reporting remains the main mechanism to monitor states' compliance.[16]

Other instruments adopted in the framework of the CoE include the 1987 European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (ECPT) which entered in force in 1989.[17] The ECPT protects persons deprived of their liberty from torture and inhuman or degrading treatment or punishment. For this purpose, most importantly, the ECPT establishes a system of preventive visits to places such as prisons where persons are deprived of their liberty by a

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[11] See M Nowak, ***Introduction to the International Human Rights Regime***, Martinus Nijhoff, 2003, 173. As of September 2013, the ESC was ratified by 27 states, the RevESC by 33 states. (See CoE, ESC, Status of ratifications, http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=035&CM=1&DF=&CL=ENG and http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=163&CM=&DF=&CL=ENG);

[12] A 1988 Additional Protocol had added further rights such as the rights to information and participation for workers or the right of elderly persons to social protection.

[13] Art 1 of the ESC: "The right to work: With a view to ensuring the effective exercise of the right to work, the Contracting Parties undertake: 1. to accept as one of their primary aims and responsibilities the achievement and maintenance of as high and stable a level of employment as possible, with a view to the attainment of full employment; …"

[14] Art 20 of the ESC. Still, states have to ratify five out of the seven core articles, including the right to work, the right to organize, the right to bargain collectively, the right to social security, the right to social and medical assistance, the right of the family to social, legal and economic protection, the right of migrant workers and their families to protection and assistance. The RevESC added an 8th core article – the right of children and young persons to protection.

[15] In total there have been 101 collective complaints so far. (As of 30 September 2013; see CoE, ESC, List of complaints and state of procedure, http://www.coe.int/t/dghl/monitoring/socialcharter/Complaints/Complaints_en.asp).

[16] The European Committee of Social Rights with its 12 Members (elected for 6 years each) is the principal body established for assessing the states' compliance with the (Rev)ESC.

[17] The ECPT was amended by two subsequent protocols which entered into force in 2002.

public authority.[18] Likewise under the auspices of the CoE, the 1992 EuropeanCharter for Regional or Minority Languages (entry into force 1998) and the 1995 European Framework Convention for the Protection of National Minorities (FCNM, entry into force in 1998) provide for a minimum of minority rights. In the latter, the monitoring of states' compliance with their obligations is done by means of state reporting.

In the following, emphasis will be laid on the ECHR and its institutions, as the main and most elaborated instrument for human rights protection in the framework of the CoE.

3. THE ECHR & ITS 14 PROTOCOLS

The CoE provides for a very advanced system of human rights protection in the field of civil and political rights: The ECHR and its 14 Protocols[19] enshrine the major civil and political rights and also set up an efficient supervisory/monitoring mechanism.

The ECHR's substantive rights are incorporated in Section I of the ECHR. More particularly, the ECHR contains the right to life (Art 2), the prohibition of torture and inhuman or degrading treatment (Art 3), the prohibition of slavery and forced or compulsory labour (Art 4), the right to liberty and security of person (Art 5), the right to a fair and public trial within a reasonable time (Art 6), the prohibition of retroactive criminal laws (Art 7), the right to respect for private and family life, home and correspondence (Art 8), the freedom of thought, conscience and religion (Art 9), the freedom of expression (Art 10), the freedom of assembly and association (Art 11), the right to marry and found a family (Art 12), the right to an effective remedy (Art 13) and the accessory prohibition of discrimination (Art 14).

Subsequent Protocols (Nos 1, 4, 6, 7, 12 and 13) add further rights to those contained in the ECHR. Protocol No 1 (1952/1954) provides for the right to property (Art 1), the right to education and free choice of education (Art 2) as well as the right to free elections by secret ballot (Art 3). Protocol No 4 (1963/1968) includes the prohibition of detention for debt (Art 1), the freedom of movement (Art 2), the prohibition of expulsion of nationals (Art 3) and the prohibition of collective expulsion of aliens (Art 4). Protocol No 6 (1983/1985) establishes the prohibition of the death penalty in times of peace (Art 1). Protocol No 7 (1984/1988) elaborates on

[18] Art 2 of the ECPT. The visits are carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment.

[19] See Website of the CoE for the full list, text and signatures/ratifications of the ECHR and its Protocols, http://conventions.coe.int/Treaty/Commun/ListeTraites.asp?MA=3&CM=7&CL=ENG.

procedural safeguards relating to the expulsion of aliens (Art 1), the right of appeal in criminal matters (Art 2), compensation for the miscarriage of justice (Art 3), the right not to be tried or punished twice (Art 4) and the equality between spouses (Art 5). Protocol No 12 (2000/2005) establishes the prohibition of discrimination as an independent right and Protocol No 13 (2002/2003) provides for the general abolition of the death penalty in all circumstances.

These Protocols reflect the extension of the ECHR's material scope of protection. As at the time of adoption of the ECHR in 1950 states were only able to agree on a lesser standard of protection than nowadays, later Protocols were needed to gradually broaden the ECHR's scope. The most telling examples are perhaps 1.) the gradual abolition of the death penalty as an exception to the right to life and 2.) the prohibition of discrimination.

1.) The right to life, as provided for in Article 2 of the 1950 ECHR, contained a general exception for death penalty.[20] The conviction of a person to death was thus not unlawful under the condition that it was in the execution of a court sentence for a crime for which the penalty was provided for by law. In the mid-1980s, with the adoption of Protocol No 6, states were able to agree on the abolition of death penalty in times of peace,[21] with Protocol No 6 being ratified by all CoE member states with the exception of Russia. Protocol No 13, in 2002, finally provided for the general abolition of the death penalty in all circumstances, thus also establishing its abolition in time of war. Protocol No 13 has been widely accepted as well: It has been ratified by 43 states.[22]

2.) The prohibition of discrimination was merely framed as an accessory right in Article 14 of the ECHR.[23] Individuals could thus only rely on Article 14 ECHR if they also alleged a violation of other rights contained in the ECHR. Protocol No 12, which was adopted in 2000 and ratified by 18 states as of September 2013, then provided for a comprehensive and non-accessory prohibition of discrimination,

[20] Art 2 ECHR: "Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law. …"

[21] Protocol Nº 6: "Article 1 – Abolition of the death penalty. The death penalty shall be abolished. No-one shall be condemned to such penalty or executed. Article 2 – Death penalty in time of war. A State may make provision in its law for the death penalty in respect of acts committed in time of war or of imminent threat of war; such penalty shall be applied only in the instances laid down in the law and in accordance with its provisions. The State shall communicate to the Secretary General of the Council of Europe the relevant provisions of that law."

[22] Protocol No 13 is not ratified by Armenia and Poland; Azerbaijan and Russia have neither signed nor ratified it.

[23] Art 14 ECHR: "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

thus protecting against discrimination with respect to any right "set forth by law" [24]. Furthermore, Protocol No 12 includes additional discrimination grounds such as physical or mental disability, sexual orientation or age.

The ECHR's substantive scope of protection has continuously been broadened and increased. However, while all CoE member states have ratified the ECHR not all states are parties to all of its Protocols. Moreover, a comparison with other human rights instruments, such as the International Covenant on Civil and Political Rights (CCPR), reveals that the CCPR is more comprehensive in some respects. Not included in the ECHR are the rights of members of minority groups,[25] freedom from racist or other propaganda or the right to recognition as a person before law.[26] The 1969 American Convention on Human Rights (ACHR) goes further than the ECHR with its reference to economic, social and cultural rights in Article 26 ACHR and its far-reaching due process guarantees (Art 8 ACHR). Still, the dynamic and evolutionary interpretation of the ECtHR, which consistently interprets the ECHR as a "living instrument", has compensated for some of these shortcomings.[27]

4. CoE INSTITUTIONS & INSTITUTIONAL SETTING OF THE ECTHR

4.1. CoE Institutions

The history of the CoE's institutions reflects the gradual strengthening of the ECHR's system for the protection of human rights. In 1950, the only mandatory procedure states committed themselves to by ratifying the ECHR was the inter-state complaints procedure before the European Commission of Human Rights (established in 1954) and the Committee of Ministers. The individual complaints procedure and the jurisdiction of the ECtHR (established in 1959) were optional. A two track system of human rights protection was thus applicable to those states which accepted the jurisdiction of the Court. The European Commission of Human Rights acted as "first instance" for victims of human rights violations and the ECtHR as "second instance".

Subsequent reforms strengthened and increased the efficiency of the ECHR's monitoring system. Access to the ECtHR as an individual right of victims of human

[24] Art 1 of Protocol No 12: "1. The enjoyment of any right set forth by law shall be secured without discrimination…"

[25] The FCNM, as stated above, provides however some protection.

[26] See also Harris, O'Boyle & Warbrick, ***supra*** nº 4, 3.

[27] The "living instrument theory" expresses the principle that the ECHR is interpreted in the light of present day conditions, that it evolves through the interpretation of the Court. (See L Wildhaber, "The European Court of Human Rights in Action", 21 ***Ritsumeikan Law Review*** 2004, 83, 84, http://www.ritsumei.ac.jp/acd/cg/law/lex/rlr21/wildhaber.pdf.) See ***infra*** section 7.1, for further reference.

rights violations was successively achieved. Protocol No 11 (entry into force 1998) abolished the European Commission of Human Rights[28] and established one single and permanent Court possessing compulsory jurisdiction over all states parties. Protocol No 14, which entered into force in June 2010, further streamlined the procedures before the ECtHR. Likewise, the role of the Committee of Ministers, a political body, was gradually reduced. The Committee of Ministers is the CoE's decision making body and generally decides the CoE's policy. It is composed of the ministers of foreign affairs of each member state or their permanent diplomatic representatives in Strasbourg. Whereas, in early times, the Committee had a role in the decision--making procedure as regards the establishment of human rights violations, today its role is reduced to supervision of the implementation of the ECtHR's judgments. This, positively, excludes political elements from deliberation and leaves the decision whether a state has violated the ECHR to the Court as the judicial institution.

4.2. *Organisation/Institutional Setting of the* ECtHR

The ECtHR is entrusted with monitoring the compliance of CoE member states with their obligations under the ECHR. The ECHR, as amended by Protocols No 11 and 14, establishes the Court and determines its composition, jurisdiction, and the general contours of its procedure. More specific rules of procedure are contained in the Rules of Court (RoC), which were adopted in November 1998 and amended since, on a number of occasions.[29] Still, the Court may derogate from the RoC where appropriate after consultation with the parties.[30]

a. Composition

The ECtHR is a full time Court, with full time professional judges. It works on a permanent basis. The Court is composed of as many judges as states parties to the Convention[31], *i.e.* 47 as of September 2013. Judges must be persons of high moral character who possess qualifications required for appointment to a high judicial domestic office, or are considered to be jurisconsults of recognized competence.[32] Each state party is entitled to nominate three candidates for service

[28] The European Commission of Human Rights continued to work worked until October 1999.

[29] Rules of Court (RoC), 1 July 2013, available at: http://www.echr.coe.int/Documents/Rules_Court_ENG.pdf.

[30] Rule 31 RoC.

[31] Art 20 ECHR

[32] Art 21(1) ECHR

on the Court. Of these, the Parliamentary Assembly of the CoE[33] elects one after a hearing. Notwithstanding their nomination through states, the judges serve in their individual capacity. Since the entry into force of Protocol No 14, judges cannot be re-elected and their terms of offices were increased from 6 to 9 years. Their retirement age is 70.[34] Positively, these reforms and the prohibition of re-election should further strengthen the judges' independence.

b. Judicial formations

Depending on the circumstances, the Court sits in varying judicial formations. The Plenary of the Court – all 47 judges – only decides organisational matters, including the composition of the Grand Chamber or the Sections.[35] When handling cases – on admissibility and/or merits – , the Court sits in single-judge formations, in Committees of three judges, in Chambers and as Grand Chamber with 17 judges.[36]

Seven-judges Chambers[37] are the "usual"/standard formation to deal with the (admissibility and) merits of a case.[38] As a rule, Chambers include the judge who was elected in respect of the state party defendant in a case.[39] This has the positive effect to further the understanding of local conditions. If the respective judge is not part of the Chamber, ***ad hoc*** judges will be appointed accordingly.

The traditional task of three judge Committees is to – unanimously – reject clearly inadmissible cases.[40] In addition, since the entry into force of Protocol No 14, Committees may also decide the merits in evidently well-founded cases and those with well established case law.[41]

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[33] The Parliamentary Assembly (PACE) is the deliberative body of the CoE and has initiated many international treaties. Its 321 (and 321 replacing) members are appointed by the national parliaments of each member state, with their number differing per state in accordance with a state's size and population.

[34] Art 23 ECHR.

[35] Sections are the organisational entities from where the Chambers are formed for each case. A total of 5 Sections are composed of 9 or 10 judges each. The composition of Sections has to take place with due regard to geographical and gender balance and should be representative of the different legal systems of the states parties.

[36] Art 26 ECHR.

[37] With the entry into force of Protocol No 14, the Plenary may also request the Committee of Ministers to reduce the number of judges in the Chambers from 7 to 5 for a fixed period of time. (Art 26.2 ECHR).

[38] Art 29 ECHR.

[39] Art 26.4 ECHR.

[40] Art 28.1a ECHR.

[41] Art 28.1b ECHR.

Newly introduced by Protocol No 14 was furthermore the single judge formation. A single judge may reject plainly inadmissible applications, i.e. those "where a decision can be taken without further consideration."[42] The decision is final.

Exceptionally, the Court also sits in the comprehensive composition of Grand Chambers. The Grand Chamber is composed of 17 judges, including the President and the Vice President of the ECtHR as well as the Section Presidents. This inclusive composition should result in authoritative, balanced and well reasoned judgments. The Grand Chamber sits in cases which are relinquished by the Chamber before its judgment – if no party objects –, when the case raises serious questions concerning the implementation of the Convention or the Protocols or questions which might result in a judgment which is inconsistent with previous case law. Furthermore, the Grand Chamber can, in principle, also hear cases on referral at the request of any party to cases already decided by a Chamber, thus acting as an "instance of appeal". However, such request of referral is granted only exceptionally.[43] The Grand Chamber furthermore deals with infringement proceedings:[44] The Committee of Ministers may – a competence newly introduced by Protocol No 14 – refer cases where states do not abide by final judgments back to the Court.[45] The Grand Chamber also considers requests for advisory opinions.

The administration of the ECtHR is operated by the Registry, headed by the Registrar.[46] The Registrar is elected by the Plenary Court for a renewable 5-year term. He is responsible for the work of the Registry and for the Court's archives, communications with the Court and dissemination of information concerning the Court.[47]

4.3. *Jurisdiction and Access to the ECtHR*

a. Jurisdiction

The Court has mandatory jurisdiction over individual applications and inter-state cases[48] on "all matters concerning the interpretation and application of the

[42] Art 27 ECHR. When acting as a single judge, a judge shall not examine any applications against the state in respect of which he or she was elected.

[43] *I.e.* when the case raises serious questions concerning the interpretation of the Convention or Protocols or a serious issue of general importance. A panel of five Grand Chamber judges decides on the admissibility of the referral.

[44] Art 31.b ECHR.

[45] Art 46.4 ECHR.

[46] Rules 15-18A RoC. For further reference see Mackenzie, Romano, Sands and Shany, ***supra*** nº 9, 341.

[47] Rule 17 RoC.

[48] Arts 33, 34 ECHR.

Convention and the protocols thereto."[49] Individuals, NGOs, and groups of individuals who claim to have been victims of a human rights violation may bring a case against a state party which has allegedly committed the violation.[50] Likewise, any state party to the Convention may bring a case against any other state party which is alleged to have breached the provisions of the ECHR or its Protocols.[51]

The ECtHR also has (limited) competence to issue advisory opinions at the request of the Committee of Ministers "on legal questions concerning the interpretation of the Convention and the protocols thereto".[52] These opinions must not, however, relate to the substantive content or scope of the rights or freedoms defined in Section I of the Convention. Thus, the ECtHR may only deal with procedural questions and must not address matters concerning the scope of the substantive rights and freedoms enumerated in the Convention or Protocols, or any other matter which may be raised in ordinary proceedings before the Court. Also due to these restrictions, the ECtHR's competence to issue advisory opinions has been very rarely used. So far, the Court has only been requested three times to issue advisory opinions, out of which it rejected one.[53]

b. Access to the Court/admissibility criteria

For (individual and inter-state) cases to be admissible, they have to comply with various conditions which are outlined in Article 35 ECHR. First, all (effective and available) domestic remedies must be exhausted in order to give the concerned state a possibility to remedy the alleged breach at domestic level first and to prevent or rectify the alleged violations before they are brought to the attention of the ECtHR.[54] It also has the effect of not overburdening the ECtHR with too many cases.

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[49] Art 32 ECHR.

[50] Art 34 ECHR: "Individual Applications. 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. …"

[51] Art 33 ECHR: "Inter-State cases. Any High Contracting Party may refer to the Court any alleged breach of the provisions of the Convention and the protocols thereto by another High Contracting party."

[52] Art 47 ECHR.

[53] The ECtHR decides itself "whether a request for an advisory opinion submitted by the Committee of Ministers is within its competence" (Art 48 ECHR). In 2004, the Court refused to issue an advisory opinion on the question whether member states to the Convention could join other regional human rights mechanisms offering less robust human rights protection, arguing that the same question could be raised in the admissibility stage of the Court's ordinary proceedings. (ECtHR, Decision on the Competence to Give an Advisory Opinion, 2 June 2004). The request at issue concerned the compatibility of the participation of Russia and other former Soviet Union republics in both the ECHR and the Convention on Human Rights and Fundamental Freedoms of the CIS. (See Mackenzie, Romano, Sands and Shany, ***supra*** nº 9, 344, for further reference.)

[54] Art 35.1 ECHR. This is premised on the assumption that there are effective domestic remedies (see also Art 13 ECHR). As affirmed by Mackenzie, Romano, Sands and Shany, ***supra*** nº 9, 342: "Remedies need to be exhausted only if they relate to the alleged breach and are, in the context of the case, available accessible, sufficiently certain in theory and practice, offer reasonable prospects of success …".

Likewise, the complaint must be brought before the Court within six months from the date the final decision was taken.[55] This is for the sake of legal certainty and to facilitate the establishment of the facts of the case.

In case of individual complaints, the applicant must allege to be the victim of a human rights violation set forth in the ECHR or its Protocols.[56] Contrary to the Inter-American system for the protection of human rights, the *actio popularis*, i.e. NGOs/civil society groups taking up cases and lodging a complaint on behalf of the victim(s), is thus not possible. Also, anonymous or manifestly ill-founded complaints are inadmissible as well as those which have been already examined by the ECtHR or another international body.[57] Finally, a new and substantive admissibility criterion was introduced by Protocol No 14. Cases, where "the applicant has not suffered a significant disadvantage" may be declared inadmissible under the condition that they have been "duly considered by a domestic tribunal", "unless respect for human rights as defined in the Convention and the Protocols thereto requires an examination of the application on the merits."[58] This gives the ECtHR the competence to, in principle, reject minor cases.

5. PROCEDURE BEFORE THE ECtHR

5.1. Overview of Proceedings

Cases which are submitted to the ECtHR have to be initiated by means of written applications filed with the Registry of the Court. One may generally distinguish between decisions on admissibility and on merits.[59]

Admissibility decisions determine whether an application complies with the criteria and conditions outlined above.[60] A single judge may declare obviously ill-founded individual complaints inadmissible,[61] *i.e.* applications, "where such decision can be taken without further examination"[62]. If the matter is more complex, the judge shall forward the case to a three judge Committee or Chamber for further

[55] Art 35.1 ECHR

[56] Art 34 ECHR.

[57] Art 35.2 ECHR

[58] Art 35.3 ECHR.

[59] This notwithstanding that, in accordance with Protocol No 14, decisions on admissibility and merits may increasingly be taken jointly.

[60] See Art 35 ECHR for the admissibility criteria.

[61] In inter-state cases, Chambers – and not smaller formations – are tasked to decide on admissibility and merits.

[62] Art 27.1 ECHR.

examination. [63] The admissibility of other cases is thus examined by a Committee of three judges or by a Chamber.[64] Moreover, Chambers may in addition to sitting on the merits, come back on a Committee's admissibility decision at all times and declare a case inadmissible.[65]

Once a case is held admissible, parties are invited to submit written statements on the merits as well as additional evidence.[66] An oral hearing only takes place if the Chamber considers it necessary. Oral hearings are public unless the ECtHR – exceptionally – decides otherwise.[67] The Court may also invite NGOs to submit ***amicus curiae***. Likewise states parties or other interested persons may be invited to present written comments to the Court in the interest of the proper administration of justice.

Usually, Chamber judgments are binding and final. As stated, however, in exceptional cases, the Grand Chamber may become a "second instance": Namely when the case raises serious questions affecting the interpretation of the ECHR or the Protocols or a serious matter of general importance.[68] A panel of five Grand Chamber judges decides on the admissibility of the "appeal". If the Grand Chamber accepts the case, it will hear it in accordance with the ordinary procedure of the Court and render a judgment fully replacing the former Chamber judgment. Thus, the Grand Chamber may only set aside the entire judgment; it is impossible to refer merely parts of a case.[69]

5.2. *Judgment and Just Satisfaction*

The judgments of the ECtHR are binding on the parties to the case. The Court's judgments include, generally, an account of the procedure; the facts of the case; a summary of the parties' submissions; reasons for the judgment; operative

[63] Art 27.3 ECHR.

[64] The three judge Committee may, unanimously, either declare the case inadmissible or refer it to the Chamber for deliberation on the merits, or, under condition that the underlying question is already subject to the Court's well established case law, simultaneously render a decision on admissibility and merits. (Art 28 ECHR.)

[65] As stated, in exceptional circumstances they may also refer a case to the Grand Chamber.

[66] The rules for inter-state complaints are slightly different. Because of the greater practical relevance of individual applications, this study will be limited to the latter.

[67] Decisions to hold hearings ***in camera*** must relate to reasons such as moral interest, public order or national security in a democratic society, the interests of juveniles or the protection of private lives.

[68] Art 43 ECHR. Such request that the case be referred to the Grand Chamber must be submitted in writing within three months from the date of delivery of the judgment.

[69] See Mackenzie, Romano, Sands and Shany, ***supra*** nº 9, 340.

provisions; and decisions on costs.[70] The judgment is notified in writing to the parties and made available to the general public online.[71] Judges may also issue separate, concurring or dissenting opinions to a judgment.[72]

When establishing a human rights violation, the ECtHR is given rather limited means to grant relief. In accordance with Article 41 of the ECHR, the Court may award a victim "just satisfaction" – a competence which has been understood as to award monetary compensation for the damages suffered and/or legal/procedural costs.[73] It is not foreseen, for instance, that the ECtHR adopts other measures to award legal redress to the victims of human rights violations, such as by ordering restitution (eg releasing prisoners, returning property), measures of rehabilitation (eg psychological support for victims), or repeals of laws and judgments. Rather, the choice of the appropriate means of redress is left to the state party found in violation of the ECHR.

Also in practice, the ECtHR has traditionally been rather deferent and left a wide margin of appreciation to states on how best to implement its judgments. The ECtHR affirmed that "in principle, it is not for the Court to determine what remedial measures may be appropriate to satisfy the respondent state's obligations"[74]. Still, there is some indication that the ECtHR has somehow started to abandon its attitude of self-restraint concerning reparations.[75] In some cases, the Court has – still on an exceptional basis – started to indicate specific measures of restitution for the victim, including the return of property[76] or the release of prisoners.[77] Likewise, the ECtHR has occasionally given some indication of how states should best bring their law in line with their human rights obligations: this especially in the pilot judgments procedure, which was first used in ***Broniowsky v. Poland*** (2004).[78]

These tentative steps are however not comparable to the far-reaching reparation orders of the Inter-American Court of Human Rights. Based on its – broader

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[70] Rule 74(1) RoC.

[71] Art 44(3) ECHR, Rules 76(2), 77(2,3), 78 RoC.

[72] Art 45(2) ECHR, Rule 74(2) RoC.

[73] Harris, O'Boyle & Warbrick, supra nº 4, 25. Mackenzie, Romano, Sands and Shany, supra nº 9, 354.

[74] ECtHR, ***Broniowski v. Poland (GC)***, Judgment of 22 June 2004, Reports of Judgments and Decisions 2004-V. Rather, it is for that state "to put an end to the breach and make reparation for its consequences in such a way as to restore as far as possible the situation existing before the breach." (ECtHR, ***Brumarescu v. Romania***, Application No 28342/95, 28 October 1999, http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-fr).

[75] Harris, O'Boyle & Warbrick, ***supra*** nº 4, 26.

[76] ECtHR, ***Papamichalopoulos v Greece***, Application No 14556/89, 31 October 1995, http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-fr.

[77] ECtHR, ***Assanidze v Georgia***, Application No 71503/01, 8 April 2001, http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-fr.

[78] ***Broniowsky, supra*** nº 74. For details, see ***infra*** Section 7.3.

– competence in Art 63.1 ACHR[79], the Inter-American Court has told states precisely what means to adopt to redress a situation, including, eg demarcating the territories of indigenous peoples,[80] and even directly establishing the nullity of domestic legislation contravening the ACHR.[81]

5.3. *Supervision of Execution by the Committee of Ministers*

As dealt with above, the judgments of the Court do not annul a domestic law or a decision of an administrative organ of the respective state. Rather, they establish a state obligation in accordance with Art 46(1) ECHR which states: "The state parties undertake to abide by the final judgment of the Court." Accordingly, judgments are not enforceable as such at national level, unless the respective domestic system provides for their direct effects. States are thus free to comply with the ECtHR's judgments in accordance with the rules of their national legal systems.

Art 46(2) ECHR tasks the Committee of Ministers with the supervision of the execution of the judgments. The status of execution is published on the website of the Committee of Ministers.[82] In view of the vital importance of full and rapid execution, Protocol No 14 empowered the Committee of Ministers to refer cases of non-compliance back to the ECtHR.[83] This seems important in particular in case of structural problems, which give raise to repetitive applications brought before the Court. The ECtHR – in the composition of the Grand Chamber – is then competent to issue a second judgment which establishes a state's failure of execution.

States' executions of judgments – outstanding in the past –[84] remain generally good. A certain distinction may be drawn, though, between compliance

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[79] Art 63.1 ACHR: "1. If the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court … shall … rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party."

[80] See eg Inter-Am Court HR, ***The Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua***, Judgment of 31 August 2001.

[81] See Inter-Am Court HR, ***Barrios Altos v. Peru,*** Merits, Judgment of 14 March 2001, Series C, No 75; Inter-Am Court HR, ***La Cantuta v. Peru,*** Merits, Reparations and Costs, Judgment of 29 November 2006, Series C, No 162; Inter-Am Court HR, ***Almonacid Arellano y otros v. Chile,*** Preliminary Objections, Merits, Reparations and Costs, Judgment of 26 September 2006, Series C, No 154.

[82] CoE, Execution of Judgments by the ECtHR, http://www.coe.int/t/dghl/monitoring/execution/Presentation/About_en.asp.

[83] Art 46.4 ECHR: "If the Committee of Ministers considers that a High Contracting Party refuses to abide by a final judgment in a case to which it is a party, it may, after serving formal notice on that Party and by decision adopted by a majority vote of two thirds of the representatives entitled to sit on the Committee, refer to the Court the question whether that Party has failed to fulfil its obligation under paragraph 1."

[84] See Harris, O'Boyle & Warbrick, ***supra*** nº 4, 27. In 1996, the President of the Court stated that they had "not

with pecuniary damages (the monetary compensation of victims) and other, more general measures such as required changes in legislation. As regards pecuniary damages, according to the CoE's statistics, states complied at 81 per cent with their duty to pay just satisfaction.[85] Somehow more critical seems to be compliance with general measures.[86] Still, overall states' compliance remains fine.

6. JURISPRUDENCE OF THE ECtHR

The ECtHR's case law evidences a huge difference in numbers as regards inter-state cases and individual complaints. While merely about a dozen inter-state cases have been brought to the attention of the Strasbourg institutions (European Commission of Human Rights, ECtHR), the number of individual applications has skyrocketed especially since the entry into force of Protocol No 11 establishing one single and permanent Court in 1998.

6.1. Inter-State Applications

Although the inter-state complaints procedure has been mandatory since the beginnings of the Strasbourg system, only a total of 15 inter-state applications have been lodged.[87] What is more, most of these cases involved bilateral conflicts: Inter-state complaints have been brought in relation with the strive for independence in Cyprus (two complaints from Greece against United Kingdom);[88] the South Tyrol conflict (one complaint from Austria against Italy)[89]; the conflict in Northern Ireland (two complaints from Ireland against UK),[90] the Turkish invasion of Cyprus

only generally but always been complied with by the Contracting States concerned. There have been delays, perhaps even examples of minimal compliance, but no instances of non-compliance." (Cited after ***id***.)

[85] CoE/Committee of Ministers, Supervision of the execution of judgments and decisions of the European Court of Human Rights, Annual Report 2012, http://www.coe.int/t/dghl/monitoring/execution/Documents/Publications_en.asp, 12.

[86] ***I.e.*** cases of structural or endemic problems or when violations found require changes in legislation. See Mackenzie, Romano, Sands and Shany, ***supra*** nº 9, 356, for further reference.

[87] As of September 2013. See ECtHR, Inter-State applications, http://www.echr.coe.int/NR/rdonlyres/5D5BA416-1FE0-4414-95A1-AD6C1D77CB90/0/Requ%C3%AAtes_inter%C3%A9tatiques_EN.pdf. See generally Nowak, ***supra*** nº 11, 166.

[88] ***Greece v. United-Kingdom I***, Application Nº 176/56, Report of the Commission, 26 September 1958 (Conf.); ***Greece v. United Kingdom II***, Application No 299/57, Reports of the Commission, 26 September 1959 and 8 July 1959 (Conf.).

[89] ***Austria v. Italy***, Application No 288/60, Report of the Commission, 30 March 1963.

[90] ECtHR, ***Ireland v. United Kingdom I***, Application No 5310/71, 18 January 1978; ***Ireland v. United Kingdom II***, Application No 5451/72, Decision on Admissibility, 1 October 1972, struck off the list.

(four complaints by Cyprus);[91] and the violations of a Danish citizen's human rights in Turkey (one complaint).[92] More recently, two cases were filed by Georgia against Russia in the context of their conflict on the Georgian regions Abkhazia and South Ossetia.[93]

Only three inter-state cases seem to have been filed for genuine human rights concerns; i.e. the original intention of the procedure being "for unconcerned states to commit themselves, without any bilateral interests whatsoever to the human rights of persons in other states, and to intervene in the event of gross and systematic violations by making inter-state complaints in the name of a common European *ordre public*."[94] This was the case with two complaints against Greece during its military dictatorship in the late 1960s[95] and one complaint against the Turkish military regime in the early 1980s.[96] All cases were brought by Scandinavian countries known for their comparatively high level of human rights protection and their pro-active human rights policies in foreign and development affairs.[97]

As regards the outcome of the inter-state complaints, since the majority were older cases where states had not recognized the competence of the Court, most were decided by resolutions of the Committee of Ministers or terminated by friendly settlement.[98] Still, in the *Case of Ireland v. the United Kingdom*, the ECtHR found that the interrogation techniques employed by British security forces constituted a practice of inhuman and degrading treatment and punishment in violation of Article 3 ECHR[99] In the cases brought by Cyprus against Turkey,

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[91] *Cyprus v. Turkey I*, Application No 6780/74, Report of the Commission, 10 July 1976; *Cyprus v. Turkey II*, Application No 6950/75, joined to *Cyprus v. Turkey I*; *Cyprus v Turkey III*, Application No 8007/77, Reports of the Commission, 12 July 1980 (Conf., Interim) and 4 October 1983; ECtHR, *Cyprus v Turkey IV*, Application nº 25781/94, 10 May 2001.

[92] ECtHR, *Denmark v. Turkey*, Application No 34382/97, 5 April 2000.

[93] ECtHR, *Georgia v Russia I*, Application No 13255/07; *Georgia v. Russia II*, Application No 38263/08. In *Georgia v. Russia I*, for instance, Georgia alleges the existence of a Russian administrative practice involving the arrest, detention and collective expulsion of Georgian nationals from the Russian Federation in autumn 2006. (See http://www.humanrightseurope.org/2011/02/georgia-v-russia-judges-take-evidence/).

[94] Nowak, *supra* nº 11, 166.

[95] The Greek Case. Denmark, Norway, Sweden and the Netherlands v. Greece, Application Nos 3321/67; 3322/67; 3323/67; 3344/67, Report of the Commission, 5 November 1969, http://cmiskp.echr.coe.int/tkp197/portal.asp?sessionId=69458958&skin=hudoc-en&action=request; The Second Greek Case. Denmark, Norway and Sweden against Greece, Application No 4448/70, Report of the Commission, 4 October 1976, http://cmiskp.echr.coe.int/tkp197/search.asp.

[96] *France, Norway, Denmark, Sweden, Netherlands v. Turkey*, Application Nos 9940/82, 9941/82, 9942/82/, 9943/82, 9944/82, Report of the Commission, 7 December 1985 (conf., concluded by friendly settlement.)

[97] They were joined by France in the complaint against Turkey.

[98] See Nowak, *supra* nº 11, 166 for details.

[99] ECtHR, *Case of Ireland v. the United Kingdom*, 18 January 1978, http://cmiskp.echr.coe.int/tkp197/search.asp.

the Court ascertained gross and systematic human rights violations committed by the Turkish occupying forces.[100] ***Georgia v. Russia*** I & II remained pending as of September 2013: the cases were relinquished to the Grand Chamber in December 2009 and April 2012 respectively.

The potential of the inter-state complaints procedure is particularly evidenced in the cases brought for genuine human rights concerns. In the cases against the Greek military junta, the European Commission of Human Rights conducted an onsite visit and established gross and systematic human rights violations of almost all rights under the ECHR. In result, the Committee of Ministers was about to exclude Greece from the CoE when the Greek government decided to leave the organization. It was also the pressure of this move which was considered as ultimately instrumental in bringing down the military junta in 1974 and replacing it with a democratic government (with Greece being welcomed back to the CoE).[101] While in the case of the serious human rights violations committed under the Turkish government in the early 1980s a friendly settlement was reached, this also spurred a shift towards democracy and brought Turkey closer to the European human rights system.[102]

In short, inter-state applications, especially when they are brought on genuine human rights grounds, are rather effective to address grave human rights violations. Still, the inter-state complaints procedure remains remarkably little used. States seem highly reluctant to complain about another state's deficient human rights situation before the ECtHR. To exemplify, when the Parliamentary Assembly invited states parties to bring an application against Russia on account of the serious human rights violations in Chechnya, no government followed suit.[103] This, on the one hand, due to the fact that inter-state complaints are diplomatically considered to be highly unfriendly acts and states appear hesitant to bring a complaint "merely" on human rights grounds. Moreover, the inter-state complaints procedure is very formalised, cumbersome and complex. States thus seem to prefer other fora to express concerns about human rights violations, including the UN Human Rights Council, the OSCE, EU foreign relations, bilateral diplomatic channels or development policies.

[100] ECtHR, *Case of Cyprus v. Turkey*, 10 May 2001, http://cmiskp.echr.coe.int/tkp197/search.asp.
[101] Nowak, ***supra*** nº 11, 166.
[102] ***Id.,*** 167.
[103] PACE Recommendation 1456 (2000), 6 April 2000, HRLJ 21 (2000) 286.

6.2. Individual Complaints/Applications

Much more effective than the inter-state was the individual complaints procedure. After a slow start in its first decades, the procedure started to take off since the 1980s and even more so in the 1990s.[104] Especially since the entry into force of Protocol No 11, the number of individual applications before the ECtHR has skyrocketed. To exemplify, alone in 2012 65.150 new applications were brought to the attention of the Court.[105] This is more than in the entire period between 1959 and 1999.[106] However, merely a tiny fraction of these cases – around 8 % – is declared admissible. Reasons for this exponential increase of cases are, first, the growing knowledge about the Court on the part of individual applicants as well as NGOs. This was especially supported by Protocol No 11's establishment of a permanent court with binding jurisdiction on all member states to which individuals have direct access. Another reason is the huge increase in the number of countries which have accepted the ECtHR's jurisdiction since 1989 – from 22 to 47 –, including most significantly post-communist states.[107]

a. Subject matters

As regards the subject matters of individual applications, the ECtHR had to deal with a huge range of issues.[108] A statistical appraisal of violations established between 1959 (the ECtHR's establishment) and 2012[109] showed that most of the violations (43.99 %) concerned the right to fair trial (Art 6 ECHR): the ECtHR established delays in the hearing of cases – such as not to be conducted "within a reasonable time" – in 26.37 % of cases and violations of other aspects of the right to a fair trial[110] in 21.10 % of cases. The second largest share of violations concerned the protection of the right property (Art 1 of Protocol No 1) amounting to 12.96 % of the cases, with an increase of property related cases particularly in recent years. This was followed by violations of the right to personal liberty and security (Art 5 ECHR) which amounted to 11.74 % of all violations, including violations of the maximum length of detention on remand or the preventive detention of terrorists, children or

[104] For details, see eg C Tomuschat, "The European Court of Human Rights Overwhelmed by Applications: Problems and Possible Solutions", in R Wolfrum and U Deutsch (eds), ***The European Court of Human Rights, Overwhelmed by Applications: Problems and Possible Solutions***, Springer, 2009, 1, 6 ***et seq***.

[105] See ECtHR, Analysis of Statistics 2012, http://echr.coe.int/Pages/home.aspx?p=reports, 4.

[106] ***Id.***

[107] Harris, O'Boyle & Warbrick, ***supra*** nº 4, 35.

[108] ***Id.***, 32 ***et seq***.

[109] ECtHR, Overview 1959-2012. ECHR, http://echr.coe.int/Pages/home.aspx?p=reports, 3.

[110] Other aspects of Art 6 include the right of access to a court, with national tribunals not complying with the requirements of an independent and impartial tribunal and the equality of arms.

deportees.[111] Alarmingly, in 8.36 % of cases, the prohibition of torture and inhuman or degrading treatment or punishment (Art 3 ECHR) has been found breached, particularly in cases of ill treatment of persons in detention or extradition in the face of the death row phenomenon.[112]

The approximately 10.62 % of violations of "other rights" [113] include a large variety of further issues: Violations were found of the right to privacy and family life (Art 8 ECHR), which was dynamically interpreted by the ECtHR in a way for instance as to include the necessary respect of the rights of homo- or transsexuals.[114] Again other cases concerned violations of the right to freedom of expression (Art 10 ECHR), especially the freedom of the press.

In result, while the ECtHR has dealt with a wide range of different subject matters, nearly half of all violations found seemed to concern procedural rights and due process guarantees (Art 6 ECHR).

b. Respondent States

More than half of the totality of the judgments which the ECtHR delivered between 1959 and 2012 concerned only five CoE member states: Turkey (2,870 judgments, 18.00 %), Italy (2,229 judgments, 13,98 %), Russia (1,346 judgments, 8,44 %), Poland (1,019 judgments, 6,39%) and Romania (938 judgments, 5,88 %).[115] Although these figures refer to the number of judgments, not violations, they are indicative insofar, as in over 83 % of the total number of judgments, the Court found at least one violation of the ECHR by the respondent states.[116]

Generally, the Court's judgments have highlighted certain problems considered "typical" for the respective states. Put differently, the ECtHR revealed the different states' "blind spots". According to Harris, O'Boyle & Warbrick[117], in the United Kingdom the Court has thrown a spotlight on prisons, resulting in an antiquated system of prison administration being brought up to date. In the Netherlands and Sweden, the Court has highlighted the absence of judicial control over executive action in such areas as the licensing of commercial activities. In Italy, it has repeatedly found delays in the administration of justice, with a notorious length of trial proceedings. In Central and Eastern European states, the ECtHR has revealed problems in the restitution of property and various weaknesses in the administration of justice

[111] ECtHR, Overview 1959-2012, ***supra*** nº 109, 5. See also Harris, O'Boyle & Warbrick, ***supra*** nº 4, 32.
[112] ECtHR, Overview 1959-2012, ***supra*** nº 109, 5.
[113] Id, 5.
[114] Harris, O'Boyle & Warbrick, ***supra*** nº 4, 32-33.
[115] ECtHR, Overview 1959-2012,, ***supra*** nº 109, 3.
[116] ***Id.***, 3.
[117] See Harris, O'Boyle & Warbrick, ***supra*** nº 4, 33.

left over from the former Soviet systems, including the problem of non-enforcement of judicial decisions. In Russia, special attention was given to deficient prison conditions. Consequently, the ECtHR has drawn attention to specific countries and typical problems there, which may be used as starting point for reform. The individual complaints procedure thus also served to highlight endemic and systematic malfunctioning in the respective states.

7. BALANCE AND PERSPECTIVES

7.1. *The European System for the Protection of Human Rights as Success Story*

The European model of human rights protection is a success story in many respects. Already at the time of its establishment in the 1950s, the ECtHR was the first model of a binding court which, at the international level, granted individuals access to and remedy for human rights violations. The Court's effectiveness and institutions were subsequently further strengthened, culminating in the establishment of a permanent and single Court with obligatory jurisdiction on all states parties with the entry into force of Protocol No 11 in 1998. Since its beginnings, an increasing number of countries has ratified the ECHR and thus accepted the jurisdiction of the ECtHR. This resulted in today the Court having jurisdiction over 800 million people.

Likewise the ECtHR's human rights protection has materially broadened and improved. On the one hand, the adoption of several Protocols has extended the substantive scope of the ECHR.[118] First and foremost, the ECtHR's jurisprudence and its dynamic and evolutionary interpretation of the ECHR as a "living instrument" have contributed in keeping the Convention "up-to-date" in the light of societal changes. It is especially with respect to the right to privacy and family life (Art 8 ECHR) that the Court's dynamic interpretation has shown its full potential. The ECtHR interpreted the Convention in the light of present day conditions, in areas such as child care, aircraft noise, transsexual rights, the choice of a child's name, application of immigration rules or disclosure of medical records.[119]

Also, the ECtHR's influence on the national legal orders in states under its jurisdiction is considerable, with the ECtHR having a positive impact and contributing to raising of the level of human rights protection in the respective states. As observed by Nowak, judgments of the ECtHR have often triggered far-reaching changes

[118] See ***supra*** Section 3 for details.

[119] Wildhaber, ***supra*** nº 27, 2. The interpretation of the ECHR as "living instrument" was first used in a corporal punishment case: ECtHR, ***Tyrer v. the United Kingdom***, 25.4.1978, Series A No 26, 31.

in the legal orders of numerous states.[120] The ECtHR has thus contributed to the harmonization of law in the states under its jurisdiction in view of aligning it with the different states' human rights obligations. To exemplify, against the background of violations established by the Court, Austria has lifted the public broadcasting monopoly. Austria likewise amended its code of criminal procedure several times and radically reformed its legal remedy system concerning administrative acts by introducing independent administrative tribunals.

What is more, the European system of human rights protection has served as model for other regional systems.[121] The Inter-American and the African systems for human rights protection draw on the European experiences. The two-track monitoring mechanisms of both, with the Inter-American and African Commissions serving as first instance for victims of human rights violations and the Inter--American and African Courts of Human (and Peoples') Rights acting as second instance in states which have accepted their jurisdiction, are very comparable to the European system before the entry into force of Protocol No 11. In addition, the case law/jurisprudence of the ECtHR is drawn upon and referred to by other international tribunals,[122] most recently even by the International Court of Justice in the *Diallo* case.[123]

Finally, the sheer number of individual complaints, more than 65.000 annually,[124] evidence the ECtHR's success. As some commentators held, they are partly due to the fact that numerous states with comparatively weak standards of human rights protection were integrated into the CoE since the beginning of the 1990s in particular.[125] Still, the huge number of complaints also proves the growing awareness and knowledge concerning the Court and its acceptance by the people

[120] See Nowak, ***supra*** nº 11, 171.

[121] ***Id.***, 159.

[122] For the Inter-American Court of Human Right's references to the ECtHR's jurisprudence, see eg G Neumann, "Import, Export and Regional Consent in the Inter-American Court of Human Rights", in 19 ***European Journal of Human Rights*** 2008, 101.

[123] ICJ, ***Ahmadou Sadio Diallo*** (Republic of Guinea v. Democratic Republic of Congo), Judgment of 30 November 2010, para 68.

[124] See ECtHR, Statistics 2012, ***supra*** nº 105, 4.

[125] Nowak, ***supra*** nº 11, 159: "After the end of the Cold War, the CoE favoured the speedy admission of central and eastern European countries in transition, irrespective of their state of development concerning democracy, the rule of law and human rights. Typical examples of rushed acceptance – measured by the political situation at the time – are Albania, Croatia, the Ukraine and the Russian Federation in 1995 and 1996, and more recently Georgia, Armenia, Azerbaijan, Bosnia and Herzegovina, as well as Serbia and Montenegro. … Because of this enlargement policy, many states with a less than satisfactory perception of the rule of law have ratified the ECHR. As a result the ECtHR is flooded with complaints from states without effective remedies at the national level (as in Russia)."

under its jurisdiction. In total, in its 53 years of existence, the ECtHR has delivered more than 16,000 judgments.[126]

It seems safe to conclude accordingly that the European system of human rights protection with the ECtHR at its centre has proven to be highly successful from various perspectives.

7.2. The ECtHR: *a Victim of its own Success?*

Exactly the system's success appears however also to be its biggest problem. The ECtHR's case load has led to a remarkable increase in the length of proceedings. Given the huge backlog of cases sometimes proceedings take up to 4 years or even longer.[127] Commentators highlighted the irony that the ECtHR might be considered to infringe Article 6 ECHR, the right to be tried within a reasonable time, which it enforces against states. Accordingly, the ECtHR has repeatedly been labelled "victim of its own success".[128]

In fact, it proves more and more difficult for the Court to deal with the sheer number of applications. The actual backlog of cases is of 128.100 cases.[129]

The number of cases submitted to the Court are likely to further increase in the future.[130] In fact, more than half of the 128.100 applications were brought against one offour states: Russia, Turkey, Italy and Ukraine.[131] In view of the growing number of cases, also the length of proceedings is likely to increase. Thus, is the very sign of the Court's success also its undoing?

7.3. *Appreciation*

The adoption of Protocol No 14 (entry into force in June 2010) addressed, to a certain extent, the dilemma of the Court's growing case-load. Protocol No 14,

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[126] See ECtHR, Overview 1959-2012, ***supra*** nº 109, 3.

[127] In 2004, 2000 applications (4 %) had been pending for more than 5 years. See Harris, O'Boyle & Warbrick, ***supra*** nº 4, 35, for further reference. See also M Villiger, "Fair Trial and Excessive Length of Proceedings as Focal Points", in R Wolfrum and U Deutsch (eds), ***The European Court of Human Rights, Overwhelmed by Applications: Problems and Possible Solutions***, Springer, 2009, 93.

[128] See Mackenzie, Romano, Sands and Shany, ***supra*** nº 9, 357.

[129] ECtHR, Statistics 2012, ***supra*** nº 105, 4.

[130] See Harris, O'Boyle & Warbrick, ***supra*** nº 4, 35.

[131] ECtHR, Statistics 2012, ***supra*** nº 105, 5. Harris, O'Boyle & Warbrick opine that while the number of applications against Turkey might fall, those against Central and East European states are likely to continue rising for some time. (***Id.***, 35).

as stated, provides for a streamlining of the court's proceedings,[132] by, at first, reducing the number of judges required for deliberation. Furthermore, it is now under certain conditions within the competence of one single judge – rather than of a three judge Committee – to reject clear-cut cases. Three judge Committees, inversely, may, in principle, also decide the merits of cases with well established case law; and the number of judges in the Chambers can be decreased from 7 to 5. Likewise materially, access to the Court was made more difficult: The ECtHR's competence to reject cases if the applicant has not suffered "a significant disadvantage" raised the substantive threshold of admissibility and should decrease the number of cases accordingly.[133] Still, it seems unlikely that these procedural and institutional reforms are able to resolve the problem of the ECtHR's enormous caseload.[134]

An inevitable additional means seems to increasingly focus on/shift attention to the countries of origin, which are found in violation of their obligations.[135] In fact, it was held that over 60 per cent of the judgments on the merits concern repetitive violations resulting from structural problems in states which have not been rectified or acceptably addressed following judgments against them.[136] Accordingly, the newly introduced competence of the Committee of Ministers to refer cases of non-compliance back to the Court is a step in the right direction.[137] Also, the ECtHR's pilot judgment procedure[138] seems a promising response to repetitive cases.[139] Apart from finding an individual violation of Convention rights, a pilot judgment identifies a systematic malfunctioning at the national level, recognizes that general measures are called for and suggests the form such general measures may take in order to remedy the defect. At the same time, the ECtHR adjourns all

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[132] In accordance with estimates the backlog of cases may be reduced by at least 25% through the introduction of Protocol No 14 (Speech of ECtHR's President Costa, January 2007).

[133] Villiger estimated that the gain might be 5-10%, mostly related to lengthy proceedings (Art 6 ECHR). (Villiger, ***supra*** nº 127, 99).

[134] Other proposals to address the problem of the ECtHR's increasing case load include briefer and more rapid drafting techniques, the encouragement of friendly settlements, a prioritisation of most severe cases with danger for life and limb and the adoption of a new Convention on remedies. (See ***id***, 95 et seq.).

[135] Tomuschat, ***supra*** nº 104, 9 ***et seq***, refers to the positive example of Germany's ***Verfassungsbeschwerde*** as to how the requisite review processes can work at national level.

[136] See also P Leach, "On Reform of the European Court of Human Rights", 6 ***European Human Rights Law Review*** 2009, 725, 727.

[137] See Protocol No 14.

[138] Since ***Broniowski v. Poland*** in 2004 the Court had issued seven judgments that are expressly identified as pilot judgments by the Court itself. See M Fyrnys, "Expanding Competences by Judicial Lawmaking – The Pilot Judgment Procedure of the European Court of Human Rights", 4 ***German Law Journal*** 2011, http://www.germanlawjournal.com/, for further reference.

[139] See L Wildhaber, "Pilot Judgments in Cases of Structural or Systemic Problems on the National Level", in R Wolfrum and U Deutsch (eds), ***The European Court of Human Rights, Overwhelmed by Applications: Problems and Possible Solutions***, Springer, 2009, 69, for further reference.

other pending individual applications which are caused by this defect.[140] Systematic wrongs at the national level may thus be addressed and the Court's case load is eased accordingly given that it is dispensed from hearing certain repetitive cases.[141]

The pilot judgment procedure – with its halt/adjournment of all similar cases – is a step away from the idea of universal access to justice and individual relief in case of human rights violations. Rather, it shifts the focus to measures needed to address systemic problems at domestic level. Likewise, the new substantive admissibility criterion establishing a minimum threshold of seriousness of violations, evidences a move away from the idea of universal relief. Put differently, the ECtHR seems on its way to become a true "European Constitutional Court for Human Rights". In our view, given the ECtHR's case load, the move towards a more constitutional role seems unavoidable.[142] It will also increase the responsibility of individual nation states to live up to their human rights obligations.[143] More than 50 years after the establishment of the ECtHR, it is perhaps time to increasingly "throw the ball back" to the respective states.[144] This seems particularly plausible in the European regional context of, in principle, consolidated democracies.

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[140] *Id.*

[141] Still, as held by Wildhaber, a lot depends on the receptiveness of states to remedy the violation. (*Id.*, 75.)

[142] S. Greer, ***The European Convention on Human Rights: Achievements, Problems and*** Prospects, 2006, 7: "The Court is already 'the Constitutional Court for Europe', in the sense that it is the final authoritative judicial tribunal in the only pan-European system." See also L Wildhaber, "A Constitutional Future for the European Court of Human Rights?", 23 ***Human Rights Law Journal*** 2002, 161, 162. See furthermore Harris, O'Boyle & Warbrick, ***supra*** nº 4, 36, who affirm that rather than focusing on doing individual justice, the ECtHR should focus more on general rulings and key selected cases providing general guidance.

[143] See eg Tomuschat's proposition to make especially the highest national courts guardians of the ECHR. (Tomuschat, ***supra*** nº 104, 16). See also Andenas' and Bjorge's analysis of the considerable role of national judges as regards the ECHR's implementation in domestic jurisdictions. M Andenas and E Bjorge, "National Implementation of ECHR: Kant's Categorical Imperative and the Convention" in A Follesdal, B Schlütter and G Ulfstein (eds), ***The European Court of Human Rights in a National, European and Global Context***, CUP 2011 (forthcoming).

[144] In accordance with Wildhaber: "The principal and overriding aim of the system set up by the European Convention on Human Rights is to bring about a situation in which in each and every Contracting State the rights and freedoms are effectively protected. That means primarily that the relevant structures and procedures are in place to allow individual citizens to vindicate those rights and to assert those freedoms in the national courts." (Wildhaber, ***supra*** nº 27, 1).

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