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THE EUROPEAN HUMAN RIGHTS CONVENTION: PROTOCOL No. 11 ENTRY INTO FORCE AND FIRST YEAR OF APPLICATION

Strasbourg, 16 November 1999

[Text of paper presented at a seminar organised by the Inter-American Court of Human Rights to commemorate its 20th anniversary and the 30th anniversary of the adoption of the American Convention of Human Rights, entitled "The Inter-American System of Human Rights Protection at the Eve of the 21st Century", held in San José, Costa Rica, on 23rd and 24th November 1999.

The editors of this *Bulletin* and the author of the text wish to thank the President of the Inter-American Court of Human Rights, Professor António Cançado Trindade, who has kindly authorized the publication of this text in the *Bulletin.*]

Outline:

1. Introduction
2. The new control system
3. Key aspects of reformed structure
4. Election, status & conditions of service of new judges
5. Treaties aimed at ensuring independent functioning of New Court
6. Operation of new procedure as of 1st November 1998
7. Transitional arrangements in force up to 31st October 1999
8. The Court's recent case law: a few examples
9. Conclusions

Appendices

1. Introduction

Protocol No. 11 to the European Convention on Human Rights (ECHR), ratified by all Council of Europe member States – in other words, ratified by all the forty-one Contracting States Parties to the ECHR – (Albania, Andorra, Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Georgia, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Moldova, Netherlands, Norway, Poland, Portugal, Romania, Russian Federation, San Marino, Slovakia, Slovenia, Spain, Sweden, Switzerland, 'the former Yugoslav Republic of Macedonia', Turkey, Ukraine and United Kingdom), established a full-time, single Court to replace the Convention's former monitoring machinery. It entered into force on 1st November 1998 [1].

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[1] Of the 17 new member States from Central and Eastern Europe, all have ratified the ECHR (including Protocol No. 11). The last one to do so, Georgia, deposited instruments of ratification on 20th May 1999. For a detailed list, consult vol. 20 *HRLJ* (1999), pp. 112-3.
The full text of the ECHR and its Protocols Nos. 1, 4, 6 & 7 (as amended by Protocol No. 11), the Rules of Court as well as the legal texts referred to in Section 5 of the present paper can all be found in *Human Rights Today. European Legal Texts* (1999, Council of Europe Publishing), in English, and in *Les droits de l'homme: repères juridiques européens* (1999, Editions du Conseil de l'Europe), in French, the other official language of the Organisation. See also texts available on the Court's Internet site: *http://www.echr.coe.int* (in which all the Court's judgments can be consulted).
As concerns Protocol No. 11 and its Explanatory Memorandum, see *Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms and Explanatory Report* (Council of Europe Press, 1994); also to be found in vol. 15 *HRLJ* (1994) at pp. 86-101, in English, and vol. 6 *RUDH* (1994), pp. 86-101 in French.

This text, opened for signature on 11 May 1994, is one of the concrete results of decisions taken by the Council of Europe's Heads of State and Government at their 1st summit meeting in Vienna, Austria, on 8 and 9 October 1993.

2. The new control system

a. The former part-time monitoring institutions, namely the European Commission of Human Rights and the European Court of Human Rights, have ceased to exist. A new European Court of Human Rights, operating full-time, has been set up in Strasbourg.

b. The system has been streamlined and, above all, all applicants now have direct access to the new full-time Court.

Any cases that are clearly unfounded are sifted out of the system at an early stage by a unanimous decision of the Court, sitting as a three-judge committee (they are therefore declared inadmissible). In the large majority of cases, the Court sits as a seven-judge Chamber. There are at present four such Chambers. Only in exceptional cases will the Court, sitting as a Grand Chamber of 17 judges, decide on the most important issues. The President of the Court and the presidents of the four Chambers will always sit in the Grand Chamber so as to ensure consistency and uniformity of the main case law. A judge elected in respect of the State Party involved in a case always sits in the Grand Chamber (as well as the pertinent seven-judge Chamber) in order to ensure a proper understanding of the legal system under consideration.

c. All allegations of violations of individuals' rights are directly referred to the Court; the Committee of Ministers (the Council of Europe's executive organ) no longer has jurisdiction to decide on the merits of cases, though it continues to retain its important role of monitoring the enforcement of the Court's judgments.

d. The right of individual application is now mandatory and the Court has automatic jurisdiction with respect to all inter-State cases brought before it.

3. Key aspects of the reformed structure

Before providing a brief overview of a certain number of (admittedly arbitrarily selected) changes that have been made by Protocol No. 11, three observations of a general nature are probably worth noting.

The first general observation is that the title of Protocol No. 11 referred to the "restructuring of the control machinery" of the Convention. Thus the structural changes made, although profound, did not tamper with any of the rights already guaranteed in the body of the Convention or its protocols. The control machinery has however been changed fundamentally: a completely new institution, namely the permanent Court, has been created.

Secondly, the opportunity was taken to 'tidy up' some of the Convention's provisions in the light of many years' experience. See, for example, new Article 38 concerning friendly settlement proceedings and new Article 41 on just satisfaction. In addition, titles have been given to sections and headings to Articles, including headings to all the other Articles in the Convention and its protocols. These have been included on the understanding that they are not interpretations of the Convention's provisions and that they possess no legal effect. They are added simply in order to make the text of the Convention more easily understandable to the layman, as is the case with respect to the provisions of the American Convention on Human Rights.

Special provision is made for "territories for whose international relations a State is responsible". Article 56 repeats, by and large, what Article 63 of the old text stipulated. States (the United Kingdom and the Netherlands) have been able to make separate declarations in respect of these territories (declarations which must be distinguished from declaration accepting the competence of the former Court's jurisdiction and the acceptance of the right of individual petition before the Commission, both of which were optional under the old *regime*). Thus here, the optional character of the right of individual application before the new Court has, regrettably, been retained.

Three major changes

1. *Individual applications and inter-state cases*

As concerns individual applications, Article 34 is based on the former Article 25 of the Convention. Under the old system, cases originating in applications by private individuals or non-governmental organisations could only be made if the State concerned had declared that it had accepted the Commission's competence in the matter and could only be decided by the Court if the State had, in addition, declared that it recognised the Court's jurisdiction.

Also, until the entry into force of Protocol No. 11, a case which was capable of being the subject of judicial decision (where the Court's optional

jurisdiction was recognised) could not necessarily be so decided *unless* it was referred to the Court either by the Commission or the State concerned (or an applicant by virtue of Protocol No. 9). And when not referred to the Court, the matter was left for determined by the Committee of Ministers, the executive/political organ of the Council of Europe. This situation, which was linked to the fact that the individual applicant had no *locus standi* to refer his own case to the Court, had been changed by Protocol No. 9, which – through it's filtering mechanism – nevertheless maintained a discriminatory procedure *vis-à-vis* the individual. Under the new system applicants are now able to bring their cases directly before the Court without any restrictions whatsoever. Also – and this is an important point – the coming into operation of the new control mechanism has entailed the abandonment of the Committee of Ministers so-called 'quasi-judicial' role, an anomaly which was often criticised and which even sometimes resulted in 'non-decisions' by the Committee of Ministers [2].

Article 33, which concerns inter-State cases, is based on former Article 24 of the Convention. The new text on inter-State cases reflects the old system whereby proceedings could be instituted before the Commission by one or more States against another State, without the necessity for any additional acceptance of competence on the latter's part. No major changes have been made in this connection, with the exception that such applications can now be addressed directly to the Strasbourg Court. That being said, one matter does, perhaps, merit a comment. An important last-minute innovation in the negotiating process (proposed by the U.K. authorities) ensured that – against the 'real' wishes of most negotiators – the re-hearing procedure be, in principle, also applicable to inter-State cases. In other words, an inter-State case must necessarily be brought before a seven-judge Chamber. This is, in my view, a complication which may unnecessarily prolong proceedings before the Court. Provision should have been made for inter-State cases to go directly before the Grand Chamber, as I find it difficult to see how, after a decision of a Chamber of seven judges, the losing State will not in most instances ask for a re-hearing and how, in turn, the panel of five judges of the Grand Chamber would be able to refuse a referral.

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[2] See, among others, my article entitled "Decision on the Merits [Article 32, ECHR]: By the Committee of Ministers" in *The European System for the Protection of Human Rights* (edited by R. St. J. Macdonald, F. Matcher & H. Petzold, 1993), pp. 733-754, esp. at pp. 738-741 (and references therein).

2. *Committee of Ministers role diminished (considerably)*

As already explained above, the Committee of Ministers, the Council of Europe's executive organs, no longer possesses a jurisdictional decision-making role in the new set-up. It does, however, maintain it's important role in supervising the execution of the Court's judgments. This is an important, indeed crucial, function which does not appear to have an equivalent in the context of the Inter-American system.

3. *Articles 43 and 30 of the Convention (the political compromise)*

Articles 43 and 30 which deal respectively with referral and with relinquishment from a Chamber of 7 judges to the Grand Chamber of 17 judges, both with respect to individual application and inter-State cases, are at the heart of the political compromise made in order to ensure that the control machinery be streamlined and replaced by a single Court.

Article 43 reads:

> '1. Within a period of three months from the date of the judgment of the Chamber, any party to the case may, in exceptional cases, request that the case be referred to the Grand Chamber.
>
> 2. A panel of five judges of the Grand Chamber shall accept the request if the case raises a serious question affecting the interpretation or application of the Convention or the protocols thereto, or a serious issue of general importance.
>
> 3. If the panel accepts the request, the Grand Chamber shall decide the case by means of a judgment.'

Article 30 stipulates:

> 'Where a case pending before a Chamber raises a serious question affecting the interpretation of the Convention or the protocols thereto or where the resolution of a question before it might have a result inconsistent with a judgment previously delivered by the Court, the Chamber may, at any time before it has rendered its judgment, relinquish jurisdiction in favour of the Grand Chamber, unless one of the parties to the case objects.'

Although this solution (= formulae utilised to reach a political compromise) does not easily fit into any traditionally accepted legal model, or is not always

easy to understand (see, e.g., Article 30 which provides for the possibility of relinquishment by a Chamber of 7 judges "unless one of the parties to the case objects") and is admittedly rather top-heavy (read Article 43 in conjunction with Articles 27 and 44), the new full-time Court will, it is hoped, possess a sufficient margin of discretion and above all the common sense to overcome any apparent inconsistencies [3].

The referral procedure

The Grand Chamber, composed of seventeen judges, decides on individual as well as inter-state applications referred to it. It will also consider requests for advisory opinions, assuming this happens one day [4]. The President of the Court, the Vice-Presidents (who are also Presidents of Chambers), the Presidents of the other two Chambers and the judge elected in respect of the State against which the application is lodged, are *ex officio* members of the Grand Chamber. The other judges are chosen in accordance with the Rules of the Court (see Article 27, paragraph 3, and Rule 24 of the Rules of Court [5]). To ensure that the Grand Chamber looks into the matter afresh when examining a case referred to it under Article 43, judges from the Chamber which had made the initial judgment are excluded, with the exception of the President of the Chamber and the judge who sat in respect of the State concerned.

This rather peculiar composition of the Grand Chamber in referral cases – although difficult to comprehend at the outset – has a logic of its own. In order to ensure the consistency of the Court's case law, the drafters of the Protocol considered it necessary to ensure that Presidents of all Chambers sit in the Grand Chamber. They also considered that the presence of the judge elected in respect of the State concerned was necessary so as to avoid the participation – to the extent possible – of *ad hoc* 'national judges' sitting in cases brought before the Grand Chamber.

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[3] See, on this point, commentary on the 'principal characteristics' of Protocol No. 11, ECHR, in vol. 15 *HRLJ* (1994), pp. 81-86, footnote 26 at page 85. [In my opinion Articles 43 and 30 should be repealed!].

[4] On this subject see A. Drzemczewski: "A major overhaul of the European Human Rights Convention control mechanism: Protocol No. 11" in vol. VI (1995), Book 2, *Collected Courses of the Academy of European Law* (Florence, 1997), pp. 121-244, esp. footnote 80 on page 174 for further references.

[5] See P. Mahoney "Short commentary on the Rules of Court: some of the main points" as well as the full text of the Rules of Court in vol. 19 *HRLJ* (1998), at pp. 267-269 & 269-282, respectively. The Rules of Court are also available on the Court's Internet site *http://www.echr.coe.int.*

The re-hearing of cases, as envisaged in Article 43, should take place only *exceptionally* when (i) a case raises a serious question affecting the interpretation or (ii) application of the Convention or (iii) a serious issue of general importance. These conditions were taken, in part, from Article 5, paragraph 2, sub-paragraph 2, of Protocol No. 9 to the Convention. (With the entry into force of Protocol No. 11, Protocol No. 9 was repealed: see Article 2 of Protocol No. 11). The Explanatory Report specifies that the intention of the drafters of the text was quite clear: these conditions should be applied strictly. The Explanatory Report also provides an indication of what 'exceptional' cases are: Serious questions affecting the interpretation of the Convention or its protocols are raised "when a question of importance not yet decided by the Court is at stake, or when the decision is of importance for future cases and for the development of the Court's case-law" (paragraph 100). This may be particularly evident when a Chamber judgment is not consistent with a previous judgment of the Court. A serious question concerning the application of the Convention or its protocols may be at stake "when a judgment necessitates a substantial change to national law or administrative practice but does not itself raise a serious question of interpretation of the Convention" (paragraph 101). And finally, a "serious issue" must be one that is considered to be of "general importance" that "could involve a substantial political issue or an important issue of policy" (paragraph 102).

The new procedure is actually more straighforward than the former tripartite mechanism. The parties to the case can request that a case be referred to the Grand Chamber within three months from the date of a judgment of the Chamber of seven judges. If one of the three above-described conditions for a referral is met, a panel of five judges of the Grand Chamber will accept the case and the Grand Chamber will thereupon make a final determination as to whether the Convention has been violated after written and, if the Court so decides, oral proceedings. If these conditions are not met, the panel will reject the request and the Chamber's judgment will become final (Article 44, paragraph 2.c.). The decisions taken by the panel of the Grand Chamber does not need to be reasoned: see paragraph 105 of the Explanatory Report.

It would therefore appear that the success of the new system will be contingent on the way in which the panel of five judges of the Grand Chamber operates in referral case [6]. The ever-increasing workload and complexity

[6] Rule 24, para 6, of the Rules of Court determines the composition of the panel. It consists of the President of the Court, Presidents of Chambers/Sections (other than from the Chamber/Section from which referral was made) & one further judge designated in rotation from judges other than from those who had dealt with the case in the Chamber; the 'national' judge is also automatically excluded).

of cases presently coming before the Court and the substantial increase – real and potential – of States Parties to the Convention will, it is suggested, probably force the panel to interpret the phrase "in exceptional cases" rather restrictively.

One last observation. Although the Grand Chamber has rendered a number of judgments in the context or the transitional arrangements during the first year of its existence (see Section 7 below and statistics provided in Appendix IV), until now *not a single case has come before the Grand Chamber with respect to the referral procedure under Article 43*. That being said, it might be useful, at least for the first couple of cases that come before it, for the panel of the Grand Chamber to actually provide reasons for decisions reached in order to permit potential users of the system (both individual applicants and States concerned) to know exactly what sort of case is considered "exceptional".

Also, it is important to bear in mind that this procedure does *not* give the parties a right of appeal but only a power to seek a "re-hearing" and that the power of referral is certainly *not* unconditional (as can be seen from the added stipulation in Rule 73, paragraph 1, of the Court's Rules, which requires a party seeking post-judgment referral to "specify" why, in it's view, consideration of the case by the Grand Chamber is warranted).

Relinquishment in favour of Grand Chamber

As concerns relinquishment under Article 30, two matters are worth mentioning. Unlike in the case of referrals under Article 43, only two of the above three conditions for referral are expressly mentioned in Article 30. Hence a 'serious issue of general importance' is not a reason for relinquishment in Article 30. Secondly – and on a completely different matter – it may come as no surprise that the phrase 'unless one of the parties to the case objects' has come under severe criticism from a number of quarters [7]. As the text of the Explanatory Report indicates: although derived from Rule 51 of the old Court's Rules, Article 30 does not oblige a Chamber to relinquish jurisdiction, adding that the reason for making relinquishment subject to the approval of the parties 'should be seen in the light of the introduction of the concept of 're-hearing' ...

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[7] See, for example, N. Rowe & V. Schlette "The Protection of Human Rights in Europe and the Eleventh Protocol to the ECHR" in vol. 23 *ELRev. (Human Rights Survey 1998)* pp. HR/3–HR/16 at page 15. See also O. de Schutter "La nouvelle Cour européenne des Droits de l'Homme" in *Cahiers de droit européen* (1998), pp. 319-352 at pp. 342 & 346, as well as other commentaries listed in *Select Bibliography on Protocol No. 11, ECHR,* in vol. 69/70, *Boletim Documentação e Direito Comparado* (1997, Lisbon) at pp. 440-445.

The provision is designed so as to secure the possibility that such a 're-hearing' not be adversely affected' (paragraph 79). This procedure applies not only to individual applications but also inter-State cases.

To date, use of this procedure has been made in only two instances; in both cases objections were not raised by the parties to the litigation.

Here, it is also of interest observe that the Court has introduced into its Rules a stipulation to the effect that a party which objects to relinquishment is required to provide the Chamber in question "a *duly reasoned* objection" (Rule 72, paragraph 2; emphasis added).

Other matters of specific interest

A number of quite significant changes have been introduced by Protocol No. 11. For example, unlike the former text of Article 38 of the Convention, the condition that no two judges may be nationals of the same State has been removed (Article 20). A State Party thus has the possibility to put forward the name of a judge who is a national of another State Party rather than propose a judge from a State which has not ratified the Convention. Also, the Court now consists of the number of judges equal to that of Contracting Parties rather than, as in the past, that of the members of the Council of Europe.

The criteria for office (Article 21) are modelled on the old text. In addition, a new paragraph (paragraph 3) stipulates that judges "shall not engage in any activity which is incompatible with their independence, impartiality or with the demands of a full-time office ...". As is stipulated in the Explanatory Report, this means that judges must be able fully to assume all the duties inherent in membership of the new permanent Court, a condition considered to be an indispensable requirement for the efficient working of the Court.

A completely new provision concerning dismissal of judges was inserted into the text: Article 24. This provision is modelled on Article 18, paragraph 1, of the Statute of the International Court of Justice. However, unlike the latter text, which requires the unanimity of all the other members of the Court for a judge to be dismissed, in this text dismissal from office requires a majority of two-thirds of all the judges of the new Court. This, in my view, was a sensible decision: not only because, as the Explanatory Report specifies, it will ensure the independence of the Court, but more importantly, it will provide a workable system in the unlikely – but possible – situation when a judge may need to be removed discreetly from the Court. It would have been inappropriate to allow for the possibility of one judge (excluding the one against whom action for

dismissal is contemplated) to block such a move. In practice, this new procedure will ensure, if need be, a 'spontaneous' resignation of a judge even before a formal procedure under this provision is undertaken.

Of interest to note is the decision not to create the institution of Advocates-General. This was taken at a rather late stage of negotiations; the vast majority of governmental experts considered this institution to be unnecessary. Were this idea to have been accepted, the new Court would also have probably comprised of six (at least initially) Advocates-General elected by the Committee of Ministers. Their principal functions would have been the preparation of reports containing reasons and opinions on cases brought before the Court – once the admissibility barrier had been breached – and the conduct of friendly settlement negotiations. Both these functions would have corresponded in many ways to that played by the Commission under the old system. As a consequence it would now appear that this rather delicate role of 'negotiating' friendly settlements is placed upon the new Court's registry, principally to be carried out by the Grand Chamber and Chamber/Section Registrars (see Rule 62 of the Rules of Court for details). Indeed, one could argue that it would be improper for the Court itself (a judicial body) to use the device of provisional opinions on the merits in the same (sometimes pro-active) way as the Commission had done in the past.

Of interest, in this connection, is that Rule 44, paragraph 2, of the Court's Rules specifies that the "decision to strike out an application which has been declared admissible [which may include undertaking attached to the discontinuance of a case by means of a friendly settlement] ... shall be given in the form of a *judgment*", whereas Article 39 of the Convention stipulates that friendly settlements take the form of *"decisions"!*

Finally, a few words about financial matters and the status of the Court's registry and its officials [8]. At the very outset, it must be recognised that there exists an organic link between the new Court and its registry, and the Council of Europe. Article 50, which is based on the Convention's former Article 58, stipulates that the expenditure of the Court is to be borne by the Council of Europe. This obviously includes, in addition to items relating to staff and equipment, the salaries of the new Court's judges in lieu of allowances (retainers and *per diem*) as provided to both the former Court and the Commission members. In this context, it will be interesting to see how the 'Provisional

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[8] See P. Mahoney "The Status of the Registry of the European Court of Human Rights: Past, Present and Future" to be published in *Studies in Honour of R. Ryssdal* (editors P. Mahoney, L. Wildhaber, F. Matscher & H. Petzold, 2000).

Regulations' governing the conditions of service of judges will be revised/ /updated (presumably within the next few weeks?): see **Appendix III** which reproduces the full text of the Provisional Regulations.

As concerns the registry officials, the situation is as follows: whereas the former text of the ECHR, in Article 37, specified that the Secretariat of the Commission was provided by the Secretary General of the Organisation, the new text is silent as concerns the present Court's registry officials. The new text, as amended by Protocol No. 11, does not deal specifically with this matter. Instead, reference to the link of the new Court's staff members with the Organisation can be found in the Explanatory Report, in its paragraph 66, where it is stated that the new Court's registry will be provided by the Secretary General of the Council of Europe. This may be important for at least two reasons. The new Court – obviously an independent, autonomous judicial organ – is not considered as a separate legal entity on the international plane; hence, no new seat/headquarters agreement with the French authorities has been necessary for it to operate. Secondly, the fact that registry staff are Council of Europe employees (including those lawyers who may move in-house between the Court's registry and other departments) means that the Organisation's staff regulations apply to them, in addition to any other specific regulations which may be applicable to them as Court registry officials.

Financial responsibility for ensuring the Court's budgetary needs is thus clearly the responsibility of the Council of Europe. Whether the new Court should have a separate budget, presented independently of other Council of Europe departments when budgetary matters are discussed by the Committee of Ministers, is of course a different matter.

4. Election, status and conditions of service of the new judges

Election procedure

Under the terms of Article 22, paragraph 1, of the ECHR: "The judges shall be elected by the Parliamentary Assembly with respect to each High Contracting Party by a majority of votes cast from a list of three candidates nominated by the High Contracting Party". The former requirement that no two judges may have the same nationality was not retained.

Prior to the election of the new judges by the Parliamentary Assembly of the Council of Europe, the latter initiated a system of "interviews" for candidates. The interviews were undertaken by a special sub-committee of the Assembly's Committee on Legal Affairs and Human Rights. This was a complete innovation,

in that *never* before had parliamentarians been given the opportunity of interviewing candidates under the old system! The basic criteria laid down for the election procedure were as follows: States had to provide a list of three candidates, accompanied by a detailed biographical note on each of them, in English or French, structured in accordance with a model *curriculum vitae*, established by the Parliamentary Assembly [9]. In the majority of cases, this procedure was followed.

Of interest to note in this connection was the rather unusual decision taken by the Committee of Ministers, on 28 May 1997, to establish *an additional informal procedure* for the examination of prospective candidatures. This was a well-intentioned initiative taken by the United Kingdom authorities in order to weed out (off-the-record) any unacceptable or totally unmeritorious candidatures. In accordance with this decision, the Committee of Ministers' Deputies undertook an examination of all candidatures before formally submitting lists to the Parliamentary Assembly.

Finally, States were invited to try and achieve a more balanced representation of men and women on the new Court. It would appear that the result product is less than satisfactory: 8 out of the 41 new judges are women [10].

Terms of office

Article 23 specifies that the judges shall be elected for a period of six years. They may be re-elected. However, the terms of office of one-half of the

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[9] For background information see: Parliamentary Assembly Resolution 1082 (1996) on the procedure for examining candidatures for the election of judges to the European Court of Human Rights, adopted on 22nd April 1996 (as well as doc. 7439, Report of the Committee on Legal Affairs and Human Rights, rapporteur Lord Kirkhill, and Parliamentary Assembly debate on 22nd April 1996).
See further, on this subject analysis by J-F. Flauss "Radioscopie de l'élection de la nouvelle Cour européenne des Droits de l'Homme" in vol. 9 *Revue trimestrielle des Droits de l'Homme* (1998), pp. 435-464; H. G. Schermers "Election of judges to the European Court of Human Rights" in vol. 23 *ELRev.* (1998) pp. 568-578 and H-C. Krüger "Selecting judges for the new European Court of Human Rights" in vol. 17 *HRLJ* (1996), pp. 401-404.
It is interesting to note, in this connection, the fact that certain States *openly* invited applications from candidates possessing the necessary qualifications and experience for this position: see *The Times* (of London) of 16 September 1997, *Rzeczpospolita* (Polish daily newspaper) of 6 October 1997 and the *Moniteur Belge* of 10th October 1997.

[10] See Declaration adopted by the Committee of Ministers on 26th May 1997. The origins of this proposal can probably be traced to an initiative taken by Mrs. Err: see Parliamentary Assembly Order No. 519 (1996) on the procedure for examining candidatures for the election of judges to the European Court of Human Rights, adopted on 22nd April 1996. [See also doc. 7530, motion for an order, presented by Mrs. Err and the Parliamentary Assembly debate on this subject on 22nd April 1996 (9th sitting)].

judges elected at the first election expires at the end of three years. The judges whose terms of office are to expire at the end of the initial period of three years were therefore chosen by lot by the Secretary General of the Council of Europe immediately after the first set of elections in April 1998 (see **Appendix II** for complete list of judges elected, including the compositions of the Grand Chamber and four Sections/Chambers of the new Court). The terms of office of judges expire when they reach the age of 70.

Status & conditions of service

The status and conditions of service of the judges of the new permanent Court (as concerns salaries, place of residence, holiday and sick leave and provision of social protection, as well as judges' privileges and immunities – but see Section 5 below, with respect to the last-mentioned –) were specifically enumerated in a Resolution which the Committee of Ministers adopted on 10th September 1997. The full text of this Resolution is attached as **Appendix III**. The "Provisional Regulations" set out in appendices to the Resolution should have been "reviewed" within twelve months of entry into force of Protocol No. 11 (see Article 3 of the Resolution).

5. Treaties aimed at ensuring independent functioning of the New Court

With the adoption, by the Committee of Ministers on 20th April 1994, and subsequent signature by all member States of the Council of Europe of Protocol No. 11 to the ECHR, the Committee of Ministers authorised, in 1995, the amendment and subsequently the consolidation into one text of the Fourth and Fifth Protocols to the 1949 General Agreement on Privileges and Immunities of the Council of Europe and the replacement of the European Agreement relating to persons participating in proceedings of the European Commission and Court of Human Rights of 1969 [11]. Both these treaties came into force on 1st November 1998 and 1st January 1999 respectively.

The Sixth Protocol (which replaces the Fourth and Fifth Protocols to the General Agreement of 1949) defines in detail the privileges and immunities of the judges to the new single Court, especially as concerns the exercise of their

[11] See footnote 1 for reference as to where these texts can be consulted. The complete texts, together with Explanatory reports thereto, can be found in vol. 17 *HRLJ* (1996) pp. 472-476.

functions in Strasbourg and during official journeys. This text is already in force in 22 States Parties (including France, the State Party on whose territory the Council of Europe is situated) and has been signed by 16 States, the most recent signature being that of the United Kingdom on 27th October 1999.

The new European Agreement relating to persons participating in proceedings of the (new) European Court of Human Rights requires States to ensure that persons participating in proceedings instituted under the ECHR, as amended by Protocol No. 11 (agents, advisers, lawyers, applicants, delegates, witnesses and experts) enjoy immunity from legal process in respect of their acts before the Court, as well as freedom to correspond with that organ and freedom to travel for the purpose of attending its proceedings. This instrument has been ratified by 15 States (including France) and signed by 13, the last signature being that of the United Kingdom on 27th October 1999.

6. Operation of the new procedure as of 1st November 1998

General

Any Contracting State (State application) or individual, non-governmental organisation or group of individuals claiming to be a victim of a violation (individual application) can lodge an application with the Court alleging a violation of Convention rights by a Contracting Party. A notice for the guidance of applicants and forms for making applications can be obtained from the registry by post or through the Court's Internet site.

The procedure before the Court is adversarial and public. Hearings are, in principle, public unless the Chamber/Grand Chamber decides otherwise on account of exceptional circumstances. Memorials and other documents filed with the Court's registry by the parties are accessible to the public (Article 40, ECHR & Rule 33 of the Court's Rules).

Individual applicants may submit applications themselves, but legal representation is recommended, and even required for hearings after a decision declaring an application admissible (Rule 36 of the Rules of Court). A legal aid scheme exists for applicants who do not have sufficient means (see Rules 91-96 of the Rules of Court).

The official languages of the Court are English and French, but applications may be drafted in one of the 21 official languages of the Contracting States (Rule 34 of the Rules of Court). In practice, the use of 32 languages – official and non-official – has been granted with respect to the 40,000 or so provisional

files opened by the Court's registry [12]. Once the application has been declared admissible, one of the Court's official languages must be used, unless the President of the Chamber/Grand Chamber authorises the continued use of the language of the applicant.

Admissibility procedure

Each individual application is assigned to a Section (Chamber) [13], whose President designates a judge-rapporteur. After a preliminary examination of the case, the judge-rapporteur has the possibility to refer the application to a three-judge committee, which may – but does not necessarily – include the judge-rapporteur. The committee is able, by a unanimous decision, to declare the application inadmissible; such a decision is final.

When the judge-rapporteur considers that the application raises a question of principle and is not inadmissible or when the committee is not unanimous in rejecting the complaint, the application is examined by a Chamber. (This procedure matches the system formerly in force before the Commission.)

A Chamber, composed of seven judges, decides on the merits of an application and, if necessary, its competence to adjudicate the case. A Chamber determines both admissibility and merits, usually in separate decisions but where appropriate together. The judge-rapporteur prepares the case-file and establishes contact with the parties. The parties then submit their observations in writing. A hearing sometimes take place before the Chamber.

The Chamber may decide *proprio motu* to refer a case to the Grand Chamber when it intends not to follow the Court's previous case law or when a question of principle is involved. This procedure may be adopted on condition that none of the parties objects to such relinquishment within one month of notification of the intention to relinquish (Article 30 of the Convention & Rule 72 of the Rules of Court). To date, this procedure has been used on two occasions.

The first stage of the procedure is generally written, although the Chamber may decide to hold a hearing, in which case issues arising in relation to the

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[12] The Court's registry receives, on average, between 500 and 600 letters per day.

[13] Under the Rules of Court (Rule 25) Chambers provided for under Article 26 (b) of the Convention are referred to as «Sections» (see also **Appendix II**). The Court is divided into four Sections, whose composition, fixed for three years, is geographically and gender balanced and takes into account the different legal systems of Contracting States.

merits will normally also be addressed. An admissibility decision, taken by majority vote, contains reasons and is made public (Rules 54, 56 e 57 of the Court's Rules).

Procedure on the merits

Once the Chamber has decided to admit an application, it may invite the parties to submit further evidence and written observations, including any claims for "just satisfaction" by the applicant, and to attend a public hearing on the merits of the case.

The President of the Chamber may, in the interests of the proper administration of justice, invite or grant leave to any Contracting State which is not party to the proceedings, or any person concerned who is not the applicant, to submit written comments, and, in exceptional cases, to make representations at the hearing. A Contracting State whose national is an applicant in the case is entitled to intervene as of right (Article 36 of the Convention & Rule 61 of the Court's Rules).

During the proceedings on the merits, negotiations aimed at securing a friendly settlement may be conducted through the intermediary of the registrar; such friendly settlement negotiations are confidential (Articles 38 & 39 of the Convention & Rule 62 of the Court's Rules).

Judgments

Chambers decide by a majority vote. Any judge who has taken part in the consideration of the case is entitled to append to the judgment a separate opinion, either concurring or dissenting, or a bare statement of dissent (Article 45 of the Convention & Rule 74 (2) of the Court's Rules).

Within three months of delivery of the Chamber judgment, the parties have three months to request that the case be referred to the Grand Chamber of 17 judges. However, this procedure is restricted to exceptional instances, i.e., when a case raises a serious question concerning the interpretation or application of the Convention and its protocols or a serious issue of general importance. A panel of five judges of the Grand Chamber (composed of the President of the Court, the Section Presidents, with the exception of the Section President who presided over the Section to which the Chamber that gave judgment belongs, and another judge selected by rotation from judges who were not members of the original Chamber) determines whether the request for a re-hearing is admissible (Article 43 of the Convention). No such cases have as yet come before the panel.

The Chamber's judgment becomes final at the expiry of a three month period or earlier if the parties announce that they have no intention of requesting a referral or after a decision of the panel rejecting the request for referral (Article 44 of the Convention).

If the panel accepts the request, the Grand Chamber [14] renders its decision on the case in the form of a judgment. The Grand Chamber decides by majority vote and its judgments are final.

All final judgments of the Court are binding on the respondent States concerned. Responsibility for supervising the execution of judgments lies with the Committee of Ministers of the Council of Europe. It is for the Committee of Ministers to verify whether States in respect of which a violation of the Convention is found have taken adequate remedial measures to comply with the specific or general obligations arising out of the Court's judgments [15].

Although the new system is less complicated than the one it replaces, one cannot say that it is simple to understand by an 'outsider'. For a comparative – schematic – overview of both control mechanisms, please consult **Appendix I.**

7. Transitional arrangements in force up to 31st October 1999

Protocol No. 11, in Articles 4 and 5, regulated the transition from the old to the new system for a two-year period which came to an end on 31st October 1999. As Protocol No. 11 was an amending protocol, it required ratification by all the Contracting States and entered into force one year after the last ratification had been deposited, namely 1st November 1998. This ushered in a preparatory period of one year during which the judges of the new Court were elected and held a number of meetings to take the necessary organisational and procedural measures for the establishment of the Court. In particular, the judges drew up new draft Rules of Court and – soon thereafter, on 4th November 1998 – formally adopted the Rules of Court and elected the new Court's Registrar and Deputy Registrars.

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[14] The Grand Chamber of 17 judges is constituted for three years: see Rule 24 of the Rules of Court. Apart from the *ex officio* members – the President, Vice-Presidents and Section Presidents – the Grand Chamber is formed by rotation within two groups, which alternate every nine months. These groups are composed with a view to geographical balance and are intended to reflect the different legal traditions. (See also **Appendix II**).

[15] For a recent discussion of this and related matters see A. Drzemczewski & P. Tavernier "L'exécution des "décisions" des instances internationales de contrôle dans le domaine des droits de l'homme" in *Colloque de Strasbourg. La protection des droits de l'homme et l'évolution du droit international* (1998, Société française pour le droit international), pp. 197-270, esp. at pp. 215-270.

On the 31st October 1998 the old Court ceased to function. However, paragraph 3 of Article 5 of the Protocol provided that the Commission should continue for an additional year (until 31st October 1999) to deal with cases which had been declared admissible before the date of entry into force of the Protocol.

Paragraphs 2 to 4 of Article 5 of (the now defunct) Protocol No. 11 catered for applications pending before the Commission. Where, at the time of the Protocol's entry into force (1st November 1998), applications had not been declared admissible by the Commission, these were automatically forwarded to the new Court. On the other hand, applications already declared admissible were finalised by the Commission under the old system (paragraph 3). As the drafters of the text considered it inappropriate for the Commission to continue its work many years after this Protocol's entry into force, paragraph 3 provided for a time-limit of one year within which the Commission would be able to complete work on most applications which it has declared admissible. Applications not finalised during this time limit (i.e., before 1st November 1999) have had to be referred to the new Court for determination under the new system. As all these applications have already been declared admissible by the Commission, there will be no need for them to be examined by a committee of the new Court.

Paragraph 4 of Article 5 related to cases in which the Commission has adopted an Article 31 Report (i.e., a legal opinion as to whether the ECHR has been breached) within the period of twelve months following the entry into force of Protocol No. 11. In such instances, the procedure for bringing cases before the Court was the former Article 48 of the Convention (and Protocol No. 9, where applicable). In other words, the Commission or a State Party – as well as the applicant when Protocol No. 9 was applicable – had the right to refer the case to the new Court.

However, in order to avoid cases which had already been examined being dealt with at three levels, the panel of five judges of the new Court was given the power to decide whether the Grand Chamber or a Chamber should decide the case. Cases not referred to the new Court under this Article have been transmitted to the Committee of Ministers in accordance with the former Article 32 of the Convention.

As already explained, the old Court ceased to function on 1st November 1998 and all 87 cases pending before it had to be transmitted to the Grand Chamber of the new Court. The aim of the exercise was to ensure that the (new) Grand Chamber not be inundated with 'less important' cases. However, the old Court did not manage to deal with as many cases as had originally been anticipated, thus leaving a substantial and unforeseen 'burden' of unfinished

business which had to be dealt with by the new Court [16]. As a consequence, judges have been largely tied up, at this early, critical period, in this cumbersome Grand Chamber procedure with less time available for work to begin in earnest on the backlog of nearly 7,000 applications inherited from the Commission.

Lastly, paragraph 6 of Article 5 (of Protocol No. 11) specified that the Committee of Ministers would continue to deal with cases not transmitted to the Court under the former Article 48 of the Convention, even after Protocol No. 11 had entered into effect, until such time as these cases are completed. Although this will, no doubt, prolong consideration of cases before the Committee of Ministers for several years, the drafters considered it inappropriate, by means of such an instrument, to try and tie the hands of an organ whose existence pre-dates the ECHR and, as the Council of Europe's executive, works independently of the Convention mechanism.

8. The Court's recent case law: a few examples

Introductory remarks

Two subject which merit particular attention, but which cannot – in such a short overview – be dealt with adequately, are the subtle change in the nature of a rising number of cases which the Court must now be prepared to deal with and that of the substantial enlargement of the European Human Rights Convention's geographical parameters.

As concerns the nature of cases recently coming before the Court, there is a marked tendency – over the last few years – for primary facts to be disputed, especially where serious human rights violations are alleged, as illustrated by the number of applications brought against Turkey [17]. This will

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[16] Matters were even more complicated than 'outsiders' realise: by virtue of Rule 28, para 2, of the new Rules of Court the ten ex-Commission members of the new Court are excluded from sitting in the Grand Chamber in any case in which they participated previously in the Commission, whether at the admissibility or the merits stage. See, on this subject, P. Mahoney "Speculating on the future of the reformed European Court of Human Rights" in vol. 20 *HRLJ* (1999), pp. 1-4 at page 2.

[17] See P. Mahoney, vol. 20 *HRLJ* at pp. 3-4 (and case law cited therein). This is further complicated by the fact that difficulties may be encountered in exhausting local remedies, compounded by suggestions of intimidation or, at least, of hindrance by State authorities of applicants' ability to bring cases to Strasbourg. See, in this connection, Interim Resolution DH(99)434 of the Committee of Ministers adopted on 9th June 1999 (entitled "Human Rights. Action of the security forces in Turkey: measures of a general character").
See also, in this connection, N. Bratza & M. O'Boyle "The Legacy of the Commission to the New Court under Protocol No.11" in *The Birth of European Human Rights Law.* Studies in honour of

require the new Court to undertake difficult and expensive fact-finding missions. It is likely that this type of issue may well arise in a number of new States Parties to the Convention.

The substantial geographical enlargement of the Council of Europe, tied principally to the upheavals in Central and Eastern Europe that commenced in 1989, is the other subject which merits separate in-depth study. Admission to the Organisation presupposes a commitment, on behalf of candidate States, to join the Convention system. However, standards in a number of new States Parties to the Convention are below those established by the Convention control organs [18]. States "willing and able" (to cite from Article 4 of the Organisation's Statute of 1949) to guarantee rule of law, pluralistic democracy and respect of human rights, have thus made specific undertakings to remedy shortcomings in their constitutional, political and legal orders as part of the membership package.

Another 'complication' – as concerns member States from the ex-Soviet Union – has been the adoption of the Commonwealth of Independent States (CIS) Convention on Human Rights in Minsk in 1995 [19].

In addition to virtually clearing the whole of its backlog of cases which the old Court had left it with, in 1999 the new Court has declared over 2,700

C. A. Norgaard (1998, M. de Salvia & M. E. Villiger, editors), pp. 377-393 and A. Drzemczewski "Fact-finding as part of effective implementation; the Strasbourg experience" to be published in *Enforcing International Human Rights Law: the Treaty System in the 21st Century* (1999, editor A. Bayefsky).

[18] This subject has been discussed extensively. See, *inter alia*, reports undertaken in the context of accession procedures, listed in vol. 20 *HRLJ* (1999) at pp. 112-113, see also vol. 14 *HRLJ* (1993), at p. 248; P. Leuprecht "Innovations in the European System of Human Rights Protection: is enlargement compatible with reinforcement?" in vol. 8, *Transnational Law & Contemporary Problems* (1998, University of Iowa, College of Law journal), pp. 313-336; I. Cameron "Protocol 11 to the European Convention on Human Rights: the European Court of Human Rights as a Constitutional Court?" in vol. 15, *Yearbook of European Law*, 1995 (1996, A. Barav & D. A. Wyatt), pp. 219-260 and F. Sudre "La Communauté européenne et les droits fondamentaux après le traité d'Amsterdam: vers un nouveau système européen de protection des droits de l'homme?" in *La Semaine Juridique, JCP* (1998), I, pp. 9-16.
As P. Mahoney, the Court's Deputy Registrar, has rightly pointed out "While it may be possible at the intergovernmental and parliamentary level of the Council of Europe to make concessions to new members on the grounds that they are in a process of transition and on the road to full democracy, it is of vital importance, for the continuing integrity of the Convention system, that the Convention institutions avoid a concessionary approach when applying the principle of universality to cases before them". This citation is taken from an article Mahoney wrote on the subject of free speech in *EHRLR* (1997), pp. 364-379 at page 371, footnote 19.

[19] English-language text available in vol. 17. *HRLJ* (1996), pp. 159-164. For analyses of the legal implications for States intending to ratify the ECHR and the CIS Convention on Human Rights, see A. A. Cançado Trindade & J. A. Frowein in vol. 17 *HRLJ* (1996), pp. 164-180 & 181-184 respectively.

applications inadmissible, over 630 applications admissible and rendered over 100 judgments (see **Appendix IV** for statistical information). That being said, the *workload of the Court is continuing to rise sharply.* The President of the Court, L. Wildhaber, has noted that despite the major structural changes made by Protocol No. 11

> "to cope with an increasing volume of applications, to speed up the time taken to examine cases and to strengthen the judicial nature of the system [...], the continuing steep increase in the number of applications to the Court is putting even the new system under pressure. Today, we are faced with nearly 10,000 registered applications and more than 47,000 provisional files, as well as around 700 letters and more than 200 overseas telephone calls a day.
>
> The volume of work is already daunting, but it is set to become more challenging still, especially as applications come in from countries which ratified the European Convention on Human Rights in the late 1990s." [20].

Without in any way attempting to provide a survey of the Court's rich and varied case-law (accessible on the Court's Internet site, as indicated in footnote 1), a few examples of judgments rendered this year illustrate the Court's policy to follow the well-established case-law of its predecessor. This approach appears to fully conform with the intentions of the drafters of Protocol No. 11 and is in line with a number of (academic) commentaries made on this subject: the substantial volume of case law established by the Commission (especially on numerous and complex problems of admissibility) as well as "major judgments" of the old Strasbourg Court appear to constitute a firm foundation which the new Court has willingly integrated and is now in the process of developing [21].

Upholding the Rule of Law (Preamble, ECHR)

In finding – unanimously – a violation of Article 6 of the Convention in the case of *Brumarescu v. Romania* on 28th October 1999, the Strasbourg Court

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[20] Text available in vol. 20 *HRLJ* (1999), at page 114 (together with additional statistical data).

[21] See, in this connection, O. Jacot-Guillarmod "Comments on some recent criticism on Protocol No. 11 to the European Convention of Human Rights" in vol. 38A, *Yearbook of the European Convention on Human Rights* (1997, proceedings of 8th international colloquy on the ECHR, held in Budapest, 1995), pp. 173-188, esp. at pp. 185-186. See also N. Rowe & V. Schlette "The Protection of Human Rights in Europe after the Eleventh Protocol to the ECHR", *supra* note 7, p. 10 and K. Reid, *A Practitioner's Guide to the European Convention on Human Rights* (1998), at p. 8.

stressed that the right to a fair hearing before a tribunal "must be interpreted in the light of the Preamble to the Convention, which declares, among other things, the rule of law to be part of the common heritage of the Contracting States. One of the fundamental aspects of the rule of law is the principle of legal certainty, which requires *inter alia* that where the courts have finally determined an issue, their ruling should not be called into question" (paragraph 61 of the judgment).

In this case the Procurator-General of Romania – who was not a party to the proceedings – had a power under Article 330 of the Code of Civil Procedure to apply for a final judgment to be quashed, the exercise of which was not subject to any time-limit, so that judgments were liable to challenge indefinitely. Hence, by allowing the application lodged under that power, the Supreme Court of Justice set at naught an entire judicial process which had ended in a judicial decision that was "irreversible" and thus *res judicata*.

Prohibition of torture (Article 3, ECHR)

In the case of *Selmouni v. France* (judgment of 28 July 1999), the European Court of Human Rights held unanimously that there had been a violation of Article 3 (prohibition of torture) and Article 6, paragraph 1, (right to a hearing within a reasonable time) of the European Convention on Human Rights. In so finding the Court reiterated that Article 3 enshrined "one of the most fundamental values of democratic societies. Even in the most difficult circumstances, such as the fight against terrorism and organised crime, the Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment" (paragraph 95 of the judgment), citing the well-established Strasbourg case-law on this subject as well as Articles 1 and 16 of the UN Convention against Torture.

The Court went onto hold that the "repeated and sustained assaults over a number of days of questioning" of Mr Selmouni by police officers in Paris – subsequent to his arrest concerning alleged involvement in drug trafficking – which caused severe pain and suffering, amounted to torture. The Court then added that it "considers that certain acts which were classified in the past as "inhuman and degrading treatment" as opposed to "torture" could be classified differently in future. It takes the view that the increasingly high standard being required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably requires greater firmness in assessing breaches

of the fundamental values of democratic societies." (paragraph 101 of the jugdment) [22] .

Right to participate in elections (Article 3 of Protocol No. 1, ECHR)

In the case of *Matthews v. United Kingdom* (judgment of 18th February 1999) the Court held that legislation which emanated from the European Community formed part of the legislation in Gibraltar and that the United Kingdom was responsible for securing the right to free elections thereto, regardless of whether the elections were domestic or to the European Parliament.

In so determining, the European Court of Human Rights held, by 15 votes to two, that there had been a violation of the applicant's right to participate in elections to the European Parliament. In so doing, it rejected to respondent States' argument that the legislation in question (which precluded the possibility of Ms Matthews registering as a voter for elections to the European Parliament) was outside member States' effective control. It also rejected the 'historical approach' of the majority view of the (former) members of the Commission who had argued that the drafters of the Additional (First) Protocol did not have the legislative bodies of international organisations in mind when writing the Protocol [23]. In finding a violation of the Convention, the Court referred to the Convention as a "living instrument", and reiterated that the object and purpose of Article 3 is to ensure an "effective political democracy" (paragraphs 39 and 42 of the judgment).

9. Conclusions

The implementation of the machinery laid out in Protocol No. 11 has inevitably involved some uncertainties and has witnessed a difficult transitional period. States have had to face additional costs during the transitional period; the setting-up and consolidation of the new system has also necessitated the need for supplementary budgetary resources. But more important issues will need to be faced. As the late M-A. Eissen, former Registrar of the European Court of Human Rights, had rightly pointed out, *the real problem for the*

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[22] See also comments on this case in *Le Monde* (Paris) of 29 July 1999, at pp. 1, 8 and 15 and article by D. Pannick "The case that strikes a blow against the nature of torture" in *The Times* (of London), of 24th August 1999.

[23] See comments by B. Rudolf in vol. 93 *AJIL* (1999), pp. 682-685 at page 683.

credibility of the reformed system is likely to reside in identifying the best ways in dealing with the 6 to 8% of complaints declared admissible.

The first, decisive factor, is the political context. As P. Van Dijk and G. J. H. Van Hoof have rightly observed in the second edition of their book *Theory and Practice of the ECHR* (1990), at p. 618:

> "the success or failure of international instruments, including those like the European Convention, in the end depends on the political will of the States involved. Legal arguments, however cogent they may be, in the final analysis seldom override political considerations when States feel that their vital interests are at stake".

How the new single, full-time European Court of Human Rights will function in a few years time and indeed, how it will manage to cope with the 'onslaught' of applications is at present both hazardous and impossible to foretell. That the continued 'success story' of the ECHR will be put under substantial pressure in the future (is this not so already now?) is a certainty: hence the need to bear in mind at least *three* important matters.

Firstly, the difficult and immediate question of *costs* in operating the new system has to be broached by member States. If States do not provide appropriate funding and logistic back-up for the new Court, it will simply not work well.

Secondly, although – when looking from Strasbourg – we can consider the present Convention mechanism a victim of its own success, I'm not sure that the same can be said when assessing the Strasbourg case-law from the other side, namely the domestic forum. The rights and freedoms found in the ECHR and its protocols should first and foremost be firmly anchored in domestic law; *Strasbourg should play merely a subsidiary role*. The fact that in the foreseeable future *all* State Parties will have incorporated the ECHR into their domestic law, is a matter worth stressing [24]. Any amelioration of the Strasbourg control mechanism – and irrespective of how efficiently it operates – will not in itself ensure real and effective protection of human rights within States Parties to the ECHR. Therefore, the success of the Strasbourg system is contingent on adequate human rights protection in member States (thereby short-circuiting or

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[24] This subject is discussed in detail in a book to be published in early 2000, entitled *The European Convention on Human Rights:* 1950-2000, by R. Blackburn and J. Polakiewicz (eds), to be published by Cassell Academic (London). See also E. Lambert, *Les effets des arrêts de la Cour européenne des droits de l'homme* (1999) and *The Execution of Strasbourg and Geneva Human Rights Decisions in the National Legal Order* (editors T. Barkhuysen, M. van Emmerik & P H van Kempen, 1999), *passim.*

even totally eradicating the need to go to Strasbourg), appropriate interplay between Strasbourg and the highest domestic judicial instances when necessary, and last but not least, the effective implementation (= supervision of the execution of the Court's findings by the Committee of Ministers) of the Strasbourg findings when breaches occur.

Thirdly, enlargement of the Council of Europe (presently 41 States of which all have ratified the ECHR) poses a potentially serious threat to the Convention *aquis,* especially if one has the intellectual honesty to admit that legal standards in a number of new member States from Central and Eastern Europe fall below those required by the Convention control organs. High standards will need to be maintained, avoiding, as Lord Lester of Herne Hill has put it, "the insidious temptation to resort to a 'variable geometry' of human rights which pays undue deference to national or regional 'sensitivities'" [25].

One of the most important guarantees to ensure the maintenance of this *aquis* will reside in the status and *quality of judges* who now serve upon the new Court. They must confirm the fact that they are jurists of the highest calibre. In returning to 'home base' these judges will, in turn, enrich the legal profession's knowledge of Strasbourg case-law with their uniquely acquired European experience. Here, a provisional 'stock-taking' of the Court's case-law (see Section 8, above) suggests that things seem to be moving in the right direction ...

After the initial euphoria of 1989 and 1990, the European continent is now again faced with difficult, serious challenges, new fears and anxieties. Major human rights violations have occurred principally, though not exclusively, outside the parameters of the Council of Europe, the 'conscience of Europe'. Hence the urgent need to ensure that Europe's most cherished achievement in the field of human rights protection works as well as possible. In this way, those in much less privileged parts of Europe – including certain member States of the Organisation – should have more than just a glimmer of hope that they too may have recourse against (potential) barbarities which we Europeans mistakenly considered to be confined to the annals of history of our civilised continent. Both the legal and political credibility of the Council of Europe, and in particular the ECHR, is at stake. The question must therefore be put: will there exist sufficient moral and political courage, both in member States of the Council of Europe and in Strasbourg , to ensure that the ECHR, as amended by Protocol No. 11, lives up to this challenge?

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[25] Lord Lester of Herne Hill: "The European Convention on Human Rights in the New Architecture of Europe" in vol. 38A, *Yearbook, supra,* note 21, pp. 223-236 at pages 226-227.