Achievements and Options for the Future
The European Court of Human Rights ... is more than just another European institution, it is a symbol. It harmonizes law and justice and tries to secure, as impartially and as objectively as is humanly possible, fundamental rights, democracy and the rule of law so as to guarantee long lasting international stability, peace and prosperity ... The European Convention on Human Rights has brought into being the most effective international system of human rights protection ever developed. As the most successful attempt to implement the United Nations Universal Declaration of Human Rights of 1948 in a legally binding way, it is part of the heritage of international law; it constitutes a shining example in those parts of the world where human rights protection, whether national or international, remains an aspiration rather than a reality; it is both a symbol of, and a catalyst for, the victory of democracy over totalitarian government; it is the ultimate expression of the capacity, indeed the necessity, for democracy and the rule of law to transcend frontiers.¹

¹ Luzius Wildhaber
President of the Court, 1998–2007

At first sight this statement might strike the reader as somewhat audacious. But it is not; it is accurate. The European Court of Human Rights is unique. In terms of numbers, no other international tribunal deals with so many cases. In terms of substance, no other supervisory body has been able to reach such a level of sophistication in shaping and refining human rights standards. In terms of significance, the Court’s judgments have an impact matched by no other human rights body, not only on the parties whose disputes are settled in final and binding rulings, but also on the community of 47 Contracting Parties as a whole. In terms of legal status, few treaties can claim to have developed from common international undertakings to instruments of a constitutional standing, and there is arguably no court in the world that has done so much for the emancipation of the individual as a subject of international law.

In other words, while many would readily agree that the Court has achieved a lot, any attempt to capture in a few words what it has accomplished in half a century of judicial work faces the problem that its achievements stretch in so many different dimensions. And one could add still others. For instance, the Court’s most revealing accomplishment
is arguably something that is not expressly stated in any of its decisions and judgments. On the one hand, European citizens find it self-evident that they can litigate in Strasbourg, as a sort of natural extension of litigation at the national level, and on the other hand, the same States that jealously guarding their sovereignty less than half a century ago are now prepared to change their domestic law and ratified the European Convention.2 Far from wishing to compete with the large handbooks and the specialized monographs, the Strasbourg case-law was, to a considerable extent at the time that the European Convention became better known in the existing States Parties, many countries from central and eastern Europe acceded to the Council of Europe and ratified the Convention. As a result, the number of applications rose from 1,109 in 1988 to 2,037 in 1993 to 5,981 in 1998 to 27,189 in 2003 to well over 50,000 in 2008. Further increases are anticipated. Not only did the number of complaints rise. The ‘output’ went up as well, especially after the reform of the Convention system on 1 November 1998. On 18 September 2008 a milestone was reached when the Court delivered its 10,000th judgment.3 Indeed, the rise in productivity was such that more than 90 per cent of the Court’s judgments since its creation in 1959 have been delivered between 1998 and 2008.

Numbers

There is no need to recount in great detail the history of the Court – the development of the ‘Strasbourg system’ has been described extensively in other contributions to this volume. It will be sufficient to highlight some of the statistics as an obvious way to approach the magnitude of the Court’s achievements. The years 1959 to 2009 have witnessed a chain reaction. After a slow start there was an exponential growth in the number of applications. Individual applications, that is, inter-State complaints have never been popular in the capitals of the Contracting Parties. Few individual complaints were lodged in the early years, which is not surprising given that the Convention was hardly known either by the public at large or by the legal profession. Arguably, the Convention was perceived as a solemn statement of common values, not as a legal tool for actual use in the courtroom. As a result, the Commission received only 138 applications in 1955. Ten years later the number had risen to 310, but it was still modest, which meant that few cases reached the Court in its first decade. The situation was still comparable in 1975 – 466 new complaints were lodged with the Commission, and two judgments were delivered by the Court – and even in 1985 there were 586 new cases and 11 judgments delivered by the Court, of which four were strike-outs. In these years the Strasbourg case-law was, to a considerable extent at least, the Commission’s case-law. Although its reports and lead us into four distinct areas that, taken together, will, it is hoped, give a fair picture of what the Court has done in its first half century. Those areas are: numbers, rights, principles and impact.

Judgments, however, are only the tip of the iceberg. Over 90 per cent of all applications are rejected as inadmissible. Most of these cases are dealt with by Committees of three judges (and, since Protocol No. 14 came into effect, by Single Judges), but the Chambers and the Grand Chamber may declare applications inadmissible as well. Although the overwhelming majority of admissibility decisions are technical in nature, some of them are of great substantive importance. Part of the explanation is that, by virtue of Article 33 of the Convention, a case may be rejected if it is ‘manifestly ill-founded’. Although this expression suggests that the complaint obviously has no merits at all, the Strasbourg institutions have always used a liberal interpretation of this term. Some cases have been rejected as ‘manifestly ill-founded’ only after lengthy deliberations. Again, there is a step rise in productivity here: in the year 2009 alone, the Court delivered more inadmissibility decisions (33,065) than were delivered in the entire period 1955–98 (32,602).

Everything changed in the late 1980s, however. At a time that the European Convention became better known in the existing States Parties, many countries from central and eastern Europe acceded to the Council of Europe and ratified the Convention. As a result, the number of applications rose from 1,109 in 1988 to 2,037 in 1993 to 5,981 in 1998 to 27,189 in 2003 to well over 50,000 in 2008. Further increases are anticipated. Not only did the number of complaints rise. The ‘output’ went up as well, especially after the reform of the Convention system on 1 November 1998. On 18 September 2008 a milestone was reached when the Court delivered its 10,000th judgment. Indeed, the rise in productivity was such that more than 90 per cent of the Court's judgments since its creation in 1959 have been delivered between 1998 and 2008. Indeed, the rise in productivity was such that more than 90 per cent of the Court’s judgments since its creation in 1959 have been delivered between 1998 and 2008.

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Despite all efforts, however, the continuing increase in the volume of new cases means that there is still a large and even a widening gap between the number of cases that the Court decides and the number of incoming applications. By the end of 2009 the Court had a staggering 119,300 applications pending before a judicial formation, an increase of 23 per cent over the previous year. Numbers are numbers, but what do they mean? The statistics do reveal how ‘normal’ it has become to complain in Strasbourg. Indeed, it is safe to say that the right of individual application, the cornerstone of the Convention system, has developed into a basic feature of contemporary European legal culture. In most Council of Europe member States it is quite common for a lawyer in a high-profile (or even a not so high-profile) case to announce ‘that the litigation will continue in Strasbourg’. In all fairness it has to be added, though, that the situation still varies from place to place. In some member States the authorities still react with hostility if an individual dares to go to ‘Europe’, or if they assist others in claiming their rights under the Convention. There have been even appalling cases where human rights defenders had to pay with their lives for their activities, such as the assassination of Natalia Estemirova, the head of the Human Rights Centre ‘Memorial’ in Grozny (Chechnya), on 16 July 2009.

The statistics also show what a huge effort has been made to handle the unprecedented flow of applications. Beyond the formal adoption of Protocols intended to make the work of the Strasbourg institutions more efficient, many practical measures have been adopted. The size of the Registry has expanded, its working methods have been streamlined, and the possibilities of technology have been stretched. There is a danger, however, in focusing only on productivity. Leaving aside the obvious difficulty of ensuring high quality when working under pressure, it may be tempting for the Court to invest in visible increases in the number of cases disposed of. But the likely result is that time is devoted to straightforward cases at the expense of the more complex ones – for instance cases that point to the existence of systemic problems and/or involve the most serious human rights breaches – and cases that raise new questions concerning the interpretation of the Convention.

**Rights**

The last remark brings us to the hallmark of the Court: its interpretation of the rights and freedoms protected by the Convention. It is trite to say that it is the Court’s interpretation of the rights and freedoms protected by the Convention that makes the European Convention on Human Rights an instrument that is active and living, in contrast to other treaties that have become more or less dead once they have entered into force. The Court has found several violations of Article 2 of the Convention in the context of the war in Chechnya. Most of these cases relate to the allegedly disproportionate use of force by law enforcement officials or to the alleged failure by the authorities to carry out a proper investigation into the victim’s death. Other cases have raised sensitive ethical issues, such as abortion and the right to die, and these have generally led to somewhat evasive decisions in which the Court left considerable freedom to national authorities to regulate these areas.

Over the years the Court has often emphasized the need for the authorities to carry out a proper investigation into the use of lethal force. A failure to carry out such an investigation would run the risk of circumventing the legal safeguards protecting the right to life, and it might affect public confidence in the State’s monopoly on the use of force. In this connection the Court has developed elaborate standards, and it is interesting to take a somewhat closer look at these, because this illustrates the ‘added value’ of the Court’s jurisprudence. To start with, a prompt investigation is essential in maintaining public confidence and in preventing any appearance of collusion in or tolerance of unlawful acts. For the same reasons, the investigation and its results must be sufficiently transparent to secure accountability in practice as well as theory. In addition, the...
A *Living Instrument* 

Ever since the case of Tijfer the Court has underlined that the Convention is a *living instrument* which must be interpreted in accordance with present-day conditions. The approach has greatly contributed to the continued relevance of the European Convention to contemporary society. In order to determine what *present-day conditions* are, the Court often follows a comparative approach, seeking to identify common standards and developments in the laws and practices of the States Parties to the Convention. The Court is increasingly prepared to take into account international trends. For example, the Court has underlined that its dynamic interpretation will not lead to a lowering of standards – quite the contrary: *The increasingly high standard being required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably requires greater frugality in assessing breaches of the fundamental values of democratic societies.*

Rights that are *Practical and Effective*  

Another long-standing principle is that the Convention is ‘intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective’. This teleological approach offers a powerful argument for the Court to go beyond appearances and to examine if an individual has really been able to enjoy their rights in practice:

It is also the driving force behind the doctrine of *positive obligations*, requiring the authorities to take reasonable and appropriate measures if they are aware that individuals are at risk. That does not mean, of course, that a positive obligation to prevent every possibility of violence can be derived from the Convention, but in several cases the Court has found that the authorities had failed to protect individuals against private assailants and even against natural hazards. In the context of the right to a fair trial, for instance, the Court observed as early as 1980 that the authorities should intervene if they note that a defence lawyer assigned to the suspect for legal aid purposes fails to conduct an effective defence. The Court stated that *mere nomination does not ensure effective assistance since the lawyer appointed for legal aid purposes may die, fall seriously ill, be prevented for a protracted period from acting or shirk his duties. If they are notified of the situation, the authorities must either replace him or cause him to fulfil his obligations*.

The *State as Ultimate Guarantor of Rights and Freedoms*  

The third general principle to be mentioned here is again closely related to the *effet utile* of the Convention. The State, as a Contracting Party to the Convention, is the ultimate ‘guarantor’ of the rights and freedoms enshrined in it: *The State has a positive obligation to ensure that everyone within its jurisdiction enjoys in full, and without being able to waive them, the rights and freedoms guaranteed by the Convention.* Thus the State cannot absolve itself from its obligations by delegating the task of ensuring the Convention by delegating tasks to private bodies or individuals. Nor can it do so by transferring competences to international organizations. Along similar lines the Court noted in a fairly inauspicious fashion that States may encounter practical difficulties in securing compliance with the rights guaranteed by the Convention in all parts of their territory, but *each State Party to the Convention*

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**Victim’s next-of-kin must be involved in the procedure to whatever extent is necessary to safeguard their legitimate interests.**  

The Court also demands that the authorities take reasonable steps to secure the evidence concerning the incident, including inter alia eye-witness testimony, forensic evidence and, where appropriate, an autopsy report that provides a complete and accurate record of injury and an objective analysis of clinical findings, including the cause of death. As a rule, the people responsible for the investigation and those who carry it out must be independent from those who are implicated in the events. This means not only a lack of hierarchical or institutional connection but also a practical independence. The investigation’s conclusions must be based on a thorough, objective and impartial analysis of all relevant elements and must apply a standard comparable to the ‘no more than absolutely necessary’ standard required by Article 2 § 2 of the Convention. Finally, the investigations must be capable of leading to the identification and punishment of those responsible. If the investigations result in the prosecution and conviction of State officials, the penalty imposed should be sufficiently deterrent. In this connection the Court observed: ‘While there is no absolute obligation for all prosecutions to result in conviction or in a particular sentence, the national courts should not under any circumstances be prepared to allow life-endangering offences and grave attacks on physical and moral integrity to go unpunished.’

Entire monographs have been devoted to the right to a fair trial. Article 6 of the Convention is the provision most often invoked and most often found to be infringed. It provides for a number of general principles, such as the right to be heard by an ‘independent and impartial tribunal’ and the right to a public hearing. In addition, it provides for a number of specific defence rights, such as the right to cross-examine witnesses. The requirement that courts conduct a proper examination of the submissions, arguments and evidence and to give adequate reasons for their decisions.

**Several guarantees are not mentioned expressly in Article 6. They have been developed in the Court’s case-law. In the leading case of Golder, the Court accepted that Article 6 § 1 contains a right of access to court. In the equally well-known Arroy case it held that Article 6 § 5 § 1 may, under certain circumstances, entail a right to a free legal aid. In Hornby, it added that the right to a fair trial implies that judgments must be executed. Fallois is an authority on the privilege against self-incrimination. The Court has also derived from Article 6 § 1 an obligation for the domestic courts to conduct a proper examination of the submissions, arguments and evidence and to give adequate reasons for their decisions.**

**Principles**

While interpreting the individual rights and freedoms enshrined in the Convention, the Court has developed several general principles that return time and again in its case-law. These principles – some inspired by domestic administrative law, others unique to Strasbourg – have become the trademark of the Court. It is not an exaggeration to say that they have had a profound influence on international human rights law.
nonetheless remains responsible for events occurring anywhere within its national territory.46

Against this background it will come as no surprise that the State is responsible for all acts and omissions of its institutions, regardless of whether the act or omission in question was as a consequence of domestic legal obligations. No distinction is made as to the type of rule or measure concerned, and no part of a Contracting Party’s ‘jurisdiction’ is excluded from scrutiny under the Convention.55

Alignment with General International Law and Practice

By 1975 the Court had accepted that it should be guided by the Vienna Convention on the Law of Treaties when ascertaining the meaning of the Convention.56 In recent years great efforts have been made to interpret the Convention in line with generally accepted international concepts of State jurisdiction, State responsibility, State immunity and so on.57 The Court has repeatedly stressed that the Convention ‘cannot be interpreted in a vacuum’.58 The Convention should as far as possible be interpreted in harmony with other rules of international law without losing sight of its nature as a human rights instrument. The Court has also long recognized the growing importance of international cooperation and of the consequent need to secure the proper functioning of international organizations.59 Several judgments reflect a desire not to stand as the way of international cooperation60 and, indeed, to support it.61 This illustrates that there are limits to the Court’s perception of the State as ultimate guarantor of rights and freedoms and the Court’s willingness to hold the State responsible for all acts and omissions of its organs.

The Margin of Appreciation

In the Handside case the Court acknowledged that it is not possible to find a uniform European conception of morals as ‘morals vary from time to time and from place to place’.62 By reason of their direct and continuous contact with the vital forces of their country the Court continued, ‘State authorities are in principle in a better position than the Court continued, “State authorities are in the vital forces of their countries”, the “direct and continuous contact with the concerned, and no part of a Contracting Party’s “jurisdiction” is excluded from scrutiny under the Convention.”

A number of factors must be taken into account when determining the breadth of the margin of appreciation to be enjoyed by the State in any case under Article 8. Where a particularly important facet of an individual’s existence or identity is at stake, the margin allowed to the State will be restricted … Where, however, there is no consensus within the member States of the Council of Europe, either as to the relative importance of the interest at stake or as to the best means of protecting it, particularly where the case raises sensitive moral or ethical issues, the margin will be wider … These will also usually be a wide margin if the State is required to strike a balance between competing private and public interests or Convention rights.”

It should be added that the margin of appreciation is particularly relevant in respect of the rights that can be restricted under the Convention, such as the right to privacy and the freedom of religion. As a rule, it has less, if any, significance for the application of the absolute rights (Articles 2, 3 and 4), but even in that area the Court may exercise restraint when confronted with opposing views. The case of Vo illustrates this:

At European level, the Court observes that there is no consensus on the nature and status of the embryo and/or foetus … At best, it may be regarded as common ground between States that the embryo/ foetus belongs to the human race … Having regard to the foregoing, the Court is convinced that it is neither desirable, nor even possible as matters stand, to answer in the abstract the question whether the unborn child is a ‘person’ for the purposes of Article 2 of the Convention.”

In a way this case-law represents the reverse side of the Tyre coin, as described above. If there appears to be consensus among the Contracting Parties the Court will feel confident to impose ‘European’ standards on a single dissident State.63 On the other hand, the Court will avoid taking a clear position in controversial matters. The use of the margin of appreciation has always remained somewhat controversial. Its supporters regard the doctrine as a wise example of judicial restraint, which is in general appropriate given the sensitivities among European States. Others argue that this deference is difficult to reconcile with the basic presumptions of human rights – that is, that all human beings are born free and equal in dignity and rights. Why should a publication (such as The Little Red Schoolbook, which gave rise to the famous Handside case) be freely available in Denmark but prohibited in the United Kingdom? This debate continues and is likely to continue, both within and outside the Court. Impact

In the end, what counts is impact. To what extent is the Court capable of ending situations that it regards as contrary to the European Convention on Human Rights? There are several ways to answer this question, some more speculative than others.

First, what is the Court’s impact on the fate of the individual applicant? In this connection it is important to realize that the Court’s powers are limited. It cannot order release of a prisoner, re-open proceedings at national level, or grant a resident permit. Pursuant to Article 41 of the Convention, the Court may (or may not) find one or more violations of the Convention, and, if a violation is found, award ‘just satisfaction’ to the victim. This may cover both pecuniary and non-pecuniary damage as well as legal costs. Within the parameters of this system the Court may be said to be highly effective – damages are always paid,

In 2008, 201

which took place in the cases

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In 2008, 201 schoolchildren from four countries presented their acts as human rights representations of the Court and the Council of Europe and planted a tree in front of the Council of Europe Rights Building.

Left: The Little Red Schoolbook was written by two Danish teachers in 1970 and resurrected young people to question societal norms. It immediately caused controversy all over the world, and was banned in some countries. In the United Kingdom, the book was the subject of a successful prosecution under the Obscene Publications Act. In its judgment of 1976 in Handside v. the United Kingdom the Court found that the publisher’s conviction for the sale of the book or for the possession of copies of the book had not violated his freedom of expression. In 2008, 201

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The Court is receiving more cases than it can deal with.

Pretty much every judgment in the national legal order from case-law, publication and/or dissemination of the Court’s amendments, a change in administrative practice or in measures may include constitutional, legislative or regulatory impact for instance, of reopening proceedings at national level, as far as possible, in the same situation as they enjoyed before individual measures are, where necessary, taken in order to judgments. The Committee will ensure in the first place that Committee of Ministers, which, pursuant to Article 46 of the

But the execution of judgments has another dimension but to apply the Convention to the concrete facts and to identify which factors were influential in that respect. to analyse for each of the Court’s judgments what its actual impact of its human rights mechanisms, but it is limited to selected examples, and the document ‘does not claim to be exhaustive’. Instead, it would be physically impossible to analyse for each of the Court’s judgments what its actual impact is in each of the 47 Council of European Member States and to identify which factors were influential in that respect.

without exception – and this is in no small part due to the Commissioner of Ministers, which, pursuant to Article 46 of the Convention, is responsible for supervising the execution of judgments. The Court will ensure in the first place that payment of any just satisfaction decided by the Court is made as ordered. In addition, the Commissioner will see to it that individual measures are, where necessary, taken in order to ensure restitution in integrum – that is, that the victim is put, as far as possible, in the same situation as they enjoyed before the violation of the Convention. These measures may consist, for instance, of re-opening proceedings at national level, granting a resident permit or striking out criminal records. But the execution of judgments has another dimension – that of the impact of the other cases that have been the individual application. When acting under Article 46 of the Convention, the Commissioner of Ministers will also examine general measures are, where necessary, adopted in order to avoid similar violations of the Convention in future. These may include constitutional, legislative or regulatory amendments, a change in administrative practice or in case-law, publication and/or dissemination of the Court’s judgment. It is this process that, crucially, acts as a multiplier of the Court’s judgments in the national legal order from which the first complaint stemmed. This ‘multiplier effect’ was acknowledged by the Court in the Pretty case:

It is true that it is not this Court’s rule under Article 34 of the Convention to issue opinions in the abstract but to apply the Convention to the concrete facts of the individual case. However, judgments issued in individual cases establish precedents albeit to a greater or lesser extent and a decision in this case could not, either in theory or practice, be framed in such a way as to prevent application in later cases.

Against that background it comes as no surprise that the impact of a judgment may extend beyond the borders of the country concerned. Many Contracting Parties now adhere to the theory that it is the Convention as interpreted by the Strasbourg Court that is binding upon them. This means that a judgment in a domestic complaint addressed against another State, may contain highly relevant principles for all Council of European Member States. Indeed, this seems to be the approach taken in the recent case of Opie:

The Court must next determine whether the national authorities have taken all reasonable measures to prevent the recurrence of similar violations. The court will consider whether the national authorities have sufficiently taken into account the principles flowing from its judgments on similar issues, even when they concern other States.

Nevertheless, one has to be careful when it comes to causality. If, in the wake of the Sadik case, the Dutch not considering access to a defender during police detention are amended, it is because of the Sadik judgment, is it because it is the European Committee for the Prevention of Inhuman or Inhumane or Reducing Treatment or Punishment (CPT) had repeatedly called for immediate access to a defender during police detention, it is because for the Commissioner for Human Rights during his visit in September 2008 he had urged the Dutch authorities to grant immediate access to a defender during police detention, or is it because the existing practice was under review anyway? To 2007 the Council of Europe itself published an interesting overview of the impact of its human rights mechanisms, but it is limited to ‘selected examples’, and the document ‘does not claim to be exhaustive’. Instead, it would be physically impossible to analyse for each of the Court’s judgments what its actual impact is in each of the 47 Council of European Member States and to identify which factors were influential in that respect.

Whatever methodological queries one might have, no one could disagree with the words of the Court’s current President, Jean-Paul Costa:

The Convention system and the Court have achieved remarkable success. They exert considerable influence on the rights and freedoms in the 47 States. As a source of innovation their impact extends even further to the frontiers of Europe. They have, through the process of protecting and developing rights, contributed to establishing peace and stability and to strengthening democracy, especially in countries where authoritarian regimes had given way to democracy and during the period of transition which followed the fall of the Berlin Wall.

The Council of Europe: 50 Years of the European Court of Human Rights Chapter 13: The Achievements of the Strasbourg Court
In the old Court the two linguistic groups speaking virtually most on English is practically double the size. This has clearly changed in the new Court in which the predominance of English or French were of almost equal. Sections of 1998 were to a certain extent composed differently in 2001 but—largely because of the resistance of numerous judges. By contrast, the new Court is divided into four Sections (five since 2008). Each case was handled and discussed with great care, or perhaps it would be more correct to say that the low number of cases allowed the old Court to handle each application carefully. Only exceptionally was a case not argued at a public hearing. After the second deliberations the whole draft judgment was read out and scrutinized. Sometime a third deliberation was added. Information concerning comparative law was collected with the help of inquiries among the judges. The figure of the rapporteur who has become so influential in the new Court did not exist in the old Court. Instead, drafting committees were appointed, and national judges were asked to check draft judgments as to facts and the domestic law. The delegate of the Commission appeared at public hearings as a friendly counselor or Advocate General in order to explain the views of the Commission. It is a pity that no such figure was created to help the new Court.

Chambers were constituted by drawing lots. Owing to this system there was a constant mix of judges, a factor that avoided idiosyncrasies. The old Court had the advantage that the judges identified more with the Court than with the Chambers. By contrast, the new Court is divided into four Sections (five since 2006). Judges might therefore be tempted to identify more with the practices and idiosyncrasies of their Sections than with the Court as such. Any such tendency (if any) would, of course, be negligible. The problem is exacerbated by the fact that the Sections of 1998 were to a certain extent composed differently in 2001 but—largely because of the resistance of numerous judges—were hardly reshuffled in 2004 and 2007. In the old Court different, small groups speaking predominantly either English or French were of almost equal size. This has clearly changed in the new Court in which the group that relies mostly on English in practice doubles the size of the group who prefer to speak French.

For me the old Court in the 1990s offered the truly historic adherence, after the fall of the Iron Curtain and the break-up of the Soviet Union and ex-Yugoslavia, of the former communist States to the Council of Europe and the European Convention on Human Rights. This signified at the same time the arrival of new judges from these countries. And this is one of the decisive reasons why I remember these years as an inspiring, exciting and enriching time. At the same time it must be said that the daily life at the old Court was far less influenced and shaped by the cases from the new member States than was the case at the new Court. When I arrived at the old Court in 1991 judges had to spend one week a month in Strasbourg. By the time the Court became full time in 1998 this period had been extended to more or less two weeks a month. Judges had their main bread-winning job in their own countries. As in the new Court, their professional background was a mix. A little bit more than one-third were national judges, a little bit less were professors; the others were former members of government, civil servants, magistrates or attorneys. It was difficult to categorize the judges because a sizeable number of them have a chequered career with various orientations.

From the standpoint of the Court and Europe, the judges were considered more or less like legal experts, getting compensated for expenses and being paid a per diem rate. In the new, full-time Court judges are obviously paid a salary, but they must also be compensated for expenses and being paid a per diem rate. In addition, they are now given the possibility of a longer period of leave without pay. If judges cannot easily be categorized the same, it must be said that the daily life at the old Court was far less influenced and shaped by the cases from the new member States than was the case at the new Court.

5 § 5 of Protocol No. 11 assigned the 89 cases pending before the Council of Europe. A welcome side-effect of this initial focus on the Grand Chamber rather than the Sections was that it facilitated the coming together of the judges of the new Court. In the old Court followed in its activity the existing case-law, except where the doctrine of an evolutive interpretation of Convention guarantees or societal changes or the novelty or new governmental structures in the new member States or a well-balanced mix of a multitude of factors.

In the new Court the number of cases was increased. The number of cases assigned to the new Court in the autumn of 2007 the Court expected more than 15,000 applications for the year. In fact, it had 104,000 applications pending before it, 10,000 of which had been pending for more than three years and therefore constituted a backlog.

In the meantime, after an internal and an external audit report and a management report of 2006–5, it has become reasonably clear that the Court is well organized and managed. Its main problem is that it is simply not possible to handle the avalanche of applications without inordinate delay, on the basis of the existing structures. Additional Protocol No. 14 would have allowed some additional procedural streamlining. Almost all States have ratified it, but the Russian Duma refused to give its approval at the end of 2006, so that further Convention reform looks unlikely in the near future. And the Russian who has, of course, a chilling effect when new ideas such as those of the Wise Persons Report of 2007 are submitted. The old and the new Courts have had quite different identities and peculiarities. From the London club atmosphere to conveyer-belt productivity from a specialized international tribunal to a pan-European quasi-constitutional court, they would appear to be worlds apart. Yet the ideals and the idealism have remained the same. And a healthy dose of idealism will be necessary, now in the future. It is granted that the Court’s future looks solid when we consider its inspirational role and the many needs for which it should cater. However, the future looks somewhat less bright when we consider the fact that present structures and budgetary means do not permit the Court to play its important role fully.
Immediately after the Second World War it was hoped that it might in future be possible permanently to prevent war and the attendant atrocities. This aspiration was reflected in the Charter of the United Nations of 1945, which was intended “to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small’. The Universal Declaration of Human Rights (1948) takes these ambitions further. ‘Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law.’

At the universal level, these aims were elaborated in the Universal Declaration of Human Rights and in the Economic, Social and Cultural Rights (1966). At the European regional level they were first made tangible by the Statute of the Council of Europe (1949) and the European Convention on Human Rights (1950), later joined by the European Social Charter (1961, revised 1996).

Yet Europe has not been spared its share of conflict and oppression since 1945. It is possible to see the presence of the Soviet Union in eastern and central Europe until 1989 in such a light, for during this time Europe witnessed the brutal repression of popular uprisings in East Germany (1953), Hungary (1956) and Czechoslovakia (1968). The Berlin Wall, erected in 1961, became the symbol of an era in history.

Armed conflict between Council of Europe member States was unknown until the occupation in 1975 of northern Cyprus by Turkish troops in response to a coup d’état backed by the Greek colonels’ regime. The Cypriot government lodged three inter-State cases against Turkey with the Commission between 1976 and 1977. Since Turkey had accepted the right of individual compulsory jurisdiction of the Court, the Court has been faced with further cases directed against that Contracting Party: a fourth inter-State case brought by Cyprus and a multitude of individual applications brought by Cypriot citizens, most of whom complain of having been driven from their land in the north of the island. Since the delivery of a pilot judgment in Xenides-Arestis v. Turkey (2004), property claims have been decided by what can best be termed an arbitral body consisting of, among others, a former Secretary to the European Commission of Human Rights (Hans Christian Krüger). The Grand Chamber has made it clear in an admirability decision that affected applicants now have the choice between making use of the remedy thus offered, such as it is, and accepting a political solution to be reached by the governments involved (Demopoulos and Others v. Turkey, 2010). The Court recently had to find violations of Articles 2, 3 and 5 with respect to nine men who had gone missing from Turkish-occupied northern Cyprus in 1974. Varnava and Others v. Turkey, 2009.

The decolonization of the former Soviet Republics located in Europe are members of the Council of Europe and Parties to the Convention itself is a measure of how far they have come. Even so, conflicts arose in the process that were never properly resolved, and serious issues remain. The region of Nagorno-Karabakh remains disputed between Armenia and Azerbaijan. Russia maintains a military presence in parts of Moldova and Georgia, which have declared independence. In the case of prisoners unlawfully held in the Transnistria region of Moldova, the Court has had to hold both Moldova and Russia in violation of the Convention (Ergashev and Others v. Moldova and Russia, 2006). Applications arising from the recent hostilities in Abkhazia and Southern Ossetia are pending against both Russia and Georgia. Two inter-State complaints have been brought by Georgia against Russia. The situation in Nagorno-Karabakh has given rise to large numbers of applications directed against both Armenia and Azerbaijan and brought by individuals forced to abandon their ancestral lands. The dissolution of the former Socialist Federative Republic of Yugoslavia has given rise to many applications lodged against former Yugoslav republics. A large number raise complaints about the failures to allow individuals access to pre-war bank accounts in foreign hard currency (for instance, Kovacević and Others v. Slovenia, 2008). Others have been brought by persons displaced during the hostilities who have sought to return to their homes only to find them occupied by others, similarly displaced and unwilling to move (as for example Blendi v. Croatia, 2004). The dissolution of Yugoslavia was a much more violent affair than the other European conflicts mentioned – so much so that the international community found it necessary to take military action in the region, maintain armed forces in some of its former component parts and set up a dedicated criminal tribunal. The Court has had to decide jurisdiction over the European component States of NATO, which applicants blamed for the death of their relatives in an air attack on Belgrade in 1999 (decision of 2001 in Banković and Others v. Belgium and Others). States contributing troops to KFOR, the international armed force stationed in Kosovo*, blamed for injury and death allegedly resulting from KFOR’s negligence (decisions of 2007 in Behrami v. France and Saracanli v. France, Germany and Norway; and over the Netherlands in its capacity of host nation of the International Criminal Tribunal for the Former Yugoslavia (decisions of 2009 in Galia’s v. the Netherlands and Bajgora’s v. the Netherlands).

The Court has not been spared involvement in the aftermath of the 2003 attack on Iraq. At the time of writing, the Grand Chamber is wound of the question whether the Court has jurisdiction over the United Kingdom, which is claimed to be responsible for unlawful detention and killing in Iraq territory controlled by British forces (Arslan and Others v. the United Kingdom and Al-Jedda v. the United Kingdom).

Cases arising from armed conflict within States Parties to the Convention are far more common. These tend to concern separatist movements – for example, the PKK (Workers’ Party of Kurdistan) in southeastern Turkey and the Provisional IRA (Irish Republican Army) in Northern Ireland – whose violence the Court itself does not hesitate to label ‘terrorist’. Applications in such cases tend to raise classic complaints related to matters such as imprisonment and maltreatment, which it is possible for the Court to consider. The resulting judgments given by the Court number in their hundreds.

In no judgment or decision has the Court taken any position on the substance of any actual international conflict or domestic strife. It cannot. Its jurisdiction as circumscribed by the Convention allows it only to ensure States’ observance of the engagements that they have undertaken in the Convention and Protocols themselves. The Court is well aware of its role in saving Europe from the scourges of war, tyranny and oppression, but that is the line that it may not cross.
Kosovo*

The case study of Kosovo aptly demonstrates how the application of the European Convention on Human Rights with all of its accompanying standards for the protection of individual fundamental rights and freedoms is not limited to countries that directly participate in the Strasbourg mechanism. Increasingly, these standards are gradually and explicitly being adopted as natural points of reference and representation of common values for all people residing on the European continent, irrespective of the territory or state of residence or its status. To a large degree, this trend reflects the deep and systemic processes of political transformation that have taken place in central and eastern Europe since 1989.

Following the creation of open conflict in Kosovo, the UN Security Council passed Resolution 1244 (1999), which placed Kosovo under temporary international civil administration by a UN mission (UNMIK) to ensure ‘the protection and promotion of human rights’ throughout the province. The situation was further complicated because it concerned observance of human rights by international institutions and bodies, not just by local authorities. The situation was further complicated because it concerned observance of human rights by international institutions and bodies, not just by local authorities.

Since 2000 many different Kosovo human rights issues were dealt with by the ombudsperson using the Convention and the Court’s case-law as their standard. A unique body of the Convention case-law was built up, based as far as possible on the interpretation by the Strasbourg Court of the Convention. All Panel members are appointed on the proposal of the President of UNMIK’s mandate lasts. It remains an open question as to what institutional form will be taken by other judicial or quasi-judicial bodies set up to review alleged violations of fundamental rights and freedoms, including those guaranteed by the Convention. It is difficult to predict when Kosovo residents will have access to a robust mechanism based on the Convention that will entitle them to have their complaints dealt with by the Strasbourg Court.

The work of the ombudsperson and their role in Kosovo and, more recently, the Human Rights Advisory Panel have set the applicable standards for, and are indubitable points of reference in, cases involving allegations of human rights violations.

In drawing heavily on the Convention and Strasbourg Court case-law, the ombudsperson and the Human Rights Advisory Panel have created a distinctive body of Convention case-law that is based on the unique Kosovo context and is external to the Strasbourg Court. It is also of interest that in Kosovo, for the first time, an international organization, the UN, has been held accountable to Convention standards and, notably, to an instrument formally within the system of another organization, the Council of Europe.

Marek Antoni Nowicki
Member of the Commission, 1993–9

Bosnia and Herzegovina

Bosnia and Herzegovina declared independence in March 1992, and a war ensued that lasted until the end of 1995. It was generally agreed from the outset that ‘respect for human rights at the highest standards’ would be among Bosnia and Herzegovina’s guiding constitutional principles. A legal structure, including ombudspersons with sweeping powers, a constitutional court and a human rights court, was proposed as early as the Vance–Owen peace plan presented in late 1992, and the entry into effect of the Dayton Peace Agreement on 16 December 1995 made it a reality. A specific Agreement on Human Rights annexed to the main Agreement as Annex 6

Chapter 13: The Achievements of the Strasbourg Court

The Conscience of Europe: 50 Years of the European Court of Human Rights

Kosovo*

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provided for the protection of ‘the highest level of internationally protected human rights and fundamental freedoms’, including in particular all those protected by the European Convention and its Protocols. There were to be an ombudsperson and a jurisdictional body, the Human Rights Chamber.

It was always intended that the international element should predominate. Thus, for the first five years the ombudsperson was not allowed to be a national of Bosnia and Herzegovina or any neighbouring State. Similarly, of the 14 members of the Human Rights Chamber, eight were to be non-nationals appointed by the Committee of Ministers of the Council of Europe, the remaining six, appointed by the entities, were national members (two Bosnians, two ethnic Croats and two ethnic Serbs).

The procedure under the Agreement was in some respects similar to that under the original Convention of 1950. Complaints were, in principle, to be lodged with the ombudsperson for investigation. The ombudsperson, whose position was more or less analogous to that of the Strasbourg Commission of Human Rights, could refer cases to the Human Rights Chamber. It was, however, also possible for applicants to bypass the ombudsperson and approach the Chamber directly. Often the ombudsperson intervened in proceedings before the Chamber as amicus curiae, much as the Strasbourg Commission did before the Court.

Both institutions were supported by a devoted staff composed of a majority of Bosnia and Herzegovina nationals of all ethnicities, plus a minority of foreigners. In later years many of the national staff members, having by then gained valuable knowledge and experience, came to occupy positions of importance in domestic and international institutions. For a long time the Office of the Ombudsperson and the Human Rights Chamber received assistance from the institutions of the Convention. The Commission and the Court both seconded some of their legal staff to serve as deputy ombudsperson or registrar of the Human Rights Chamber for extended periods. The two institutions were intended to be international in nature for only five years. The Office of the Ombudsperson was in fact handed over to the domestic authorities in late 2001. The Human Rights Chamber continued to exist, under a special agreement, until the end of 2003, after which its duties were taken over by the Bosnia and Herzegovina Constitutional Court. The Office of the Ombudsperson and the Human Rights Chamber did much to fill the void left by the lack of functioning domestic courts. Indeed, it is fair to say that for a time the Chamber was the only effective jurisdictional body in the country. Much of this effectiveness came from the Chamber’s power to give binding orders for provisional measures. The most frequent use made of it was to prevent illegal evictions, often at the ombudsperson’s request, which helped to put a stop to the ‘ethnic cleansing’ that had continued after the end of the war.

At a more fundamental level, human rights law itself has penetrated public life to an extent rarely seen elsewhere. It could hardly be otherwise. After all, as long as the Human Rights Chamber was the only functioning court in the country, the European Convention on Human Rights was the ultimate basis of all substantive law.

Peter Kempees
Head of the Just Satisfaction Division in the Registry of the Court

Above: The Human Rights Chamber at a hearing in Sarajevo in 1998. From left to right: Mehmed Dekovic, Viktor Masenko-Mavi, Zelimir Juka, Miodrag Pajic, Rona Aybey, Dietrich Rauschning, Manfred Nowak (President), Hasan Balic, Peter Kempees (Registrar), Michèle Picard (President), Vlatko Markotic, Jacob Möller, Giovanni Grasso, Vitomir Popovic, and Andrew Grotrian. Several senior case-lawyers in the Commission Secretariat and the Court Registry served as Registrars to the Chamber or as Deputies to the Ombudsperson.

Right: A Roma camp in Kosovo*.