The European Court of Human Rights: What It Is, How It Works, and Its Future

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In Lawrence v. Texas¹ the United States Supreme Court cited four cases from the European Court of Human Rights as persuasive authority for the proposition that criminalizing homosexual sex was unconstitutional.² Since that time, the propriety of such reliance has been a matter of debate.³ One result of this attention is that, for the first time, many lawyers became aware of the existence of the European Court of Human Rights. Nevertheless, most know very little

¹ 539 U.S. 558 (2003).
³ European Court of Human Rights cases can be found at the website http://www.echr.coe.int/ECHR (follow the “HUDOC” hyperlink; then follow the “Access Hudoc” hyperlink; then search for the Application Number) [hereinafter “HUDOC Search”].
³ See, e.g., Sarah H. Cleveland, Is There Room for the World in Our Courts?, WASH. POST, Mar. 20, 2005, at B4; The Insidious Wiles of Foreign Influence, ECONOMIST, June 11, 2005, at 25. Members of Congress have criticized the Court for referring to foreign law in interpreting the Constitution and have introduced resolutions to ban reliance on foreign law in constitutional cases. Id. at 26. Some groups have even called for impeachment of Justice Kennedy because of his reliance on foreign law. See, e.g., Dana Milbank, And the Verdict on Justice Kennedy Is: Guilty, WASH. POST, Apr. 9, 2005, at A3. A debate on the topic between Justices Breyer and Scalia was televised nationally on January 13, 2005 on C-SPAN. Discussion Between U.S. Supreme Court Justices Antonin Scalia and Stephen Breyer: Constitutional Relevance of Foreign Court Decisions (C-SPAN television broadcast Jan. 13, 2005), transcript available at http://www.american.edu/media/ (follow “Press Releases” hyperlink; then follow “Transcript of Discussion Between U.S. Supreme Court Justices Antonin Scalia and Stephen Breyer—AU Washington College of Law, Jan. 13” hyperlink). Some of the criticism was the result of the Court’s opinion in Roper v. Simmons, 125 S. Ct. 1183 (2005), banning the death penalty for juveniles which, while referring to foreign law, did not cite any cases from the European Court on Human Rights. Id. See also, Mary Ann Glendon, Judicial Tourism, WALL ST. J., Sept. 16, 2004, at A14.
about it. Indeed, some may confuse it with the similarly named, but completely separate, European Court of Justice.  

There are several pan-European organizations that have transformed the governance of much of the continent. The best known in the United States is the European Union ("EU"), an economic and, to some extent, political union of twenty-five countries. The EU includes all of the Western European countries (except Norway and Switzerland) and, as a result of a recent expansion, a number of former Communist bloc countries. But there are other pan-European organizations as well. One that is less well known in the United States is the Council of Europe to which all European countries except Belarus belong. The Council of Europe is the parent of the European

4. See, for example, Stephen Breyer, Constitutionalism, Privatization, and Globalism: Changing Relationships Among European Constitutional Courts, 21 CARDozo L. REV. 1045, 1049, 1056–57 (2000), for a brief description of this Court and its relationship—or lack thereof—to the Strasbourg Court. The European Court of Justice is located in Luxembourg. Id.


6. See supra note 5.

7. Council of Eur., The Council of Europe’s Member States, http://www.coe.int/T/E/Com/About_Coe/Member_States/default.asp. While Belarus applied for membership in 1993, it has not yet been accepted. Council of Eur., Belarus and the Council of Europe, http://www.coe.int/T/E/Com/About_Coe/Member_states/e_Belarus.asp#TopOfPage. In 1997, it was suspended from having “Special Guest Status” and a request for reinstatement of this status was rejected in 2004. Id. The reason for the suspension—a lack of democratic legitimacy—was set out in a press release. See Press Release, Council of Eur., Belarus Suspended (Jan. 13, 1997), available at http://press.coe.int/cp/97/lla(97).htm. The members include several countries which are only partly in Europe, such as Russia and Turkey, and includes three countries—Armenia, Azerbaijan, and Georgia which are, arguably, wholly in Asia. Geographers differ on the boundary between Europe and Asia, which in any event is more of a cultural artifact since, physically, Europe and Asia are parts of a single landmass. There is general agreement that the Ural Mountains, a long but somewhat low range rarely reaching as much as 5000 feet in elevation and the north shore of the Caspian Sea in central Russia form the eastern boundary of Europe, but the boundary between the Caspian and Black Seas is uncertain. The ENCYCLOPEDIA BRITANNICA places the boundary about 100 miles north of the Caucasus Mountains along the Manych Depression, an ancient watercourse that once connected the Caspian Sea to the Sea of Azov—an arm of the Black Sea. Europe, in 6 ENCYCLOPEDIA BRITANNICA MACROPEDIA 1033 (15th ed. 1984); Manych Depression, in 6 ENCYCLOPEDIA BRITANNICA MICROPEdia 586 (15th ed. 1984) (further defining the Manych Depression). The World Almanac, the National Geographic, and the Cartographic Office of the United Nations place the boundary along the ridge line of the Caucasus Mountains (a much more significant range than the Urals), which, if the border of Europe, contains its highest mountain, Mount Elbrus, over 18,000 feet high. 2005 WORLD ALMANAC AND BOOK OF FACTS 467 (2005) [hereinafter 2005 WORLD ALMANAC]; Nat’l Geographic, MapMachine, Map of Europe, http://mapmachine.nationalgeographic.com/mapmachine/viewandcustomize.html?task=getMap&themelmId=P56 (last visited Sept. 8, 2005); United Nations, Central and Eastern Europe, http://www.un.org/Depts/Cartographic/map/profile/easteuro.pdf (last visited Sept. 8, 2005). Under either of these defi-
Court of Human Rights ("Strasbourg Court" or "Court").

The Council of Europe was founded in 1949 and thus predates the European Union. It has a number of functions, one of the most important of which is to serve as the parent organization for the European Convention on Human Rights and Fundamental Freedoms ("European Convention on Human Rights" or "Convention") and for the European Court of Human Rights created by the Convention.

While a few pan-European decisions affecting human rights come from other sources (including, occasionally, from the European Court of Justice—the highest court of the European Union), most come from the Strasbourg Court created by the Convention.

Definitions Armenia, Azerbaijan, and Georgia are Asian countries. But a third (implicit) definition is simply a political one not following any natural geographical features, but rather following the border of the former Soviet Union with Iran and Turkey, which is presumably the definition used by the Council of Europe since it makes these three countries European. Of course, by including all of present day Russia, the jurisdiction of the Strasbourg Court extends to Vladivostok, which is to the east of China, and to the Bering Strait, within a few miles of Alaska. Since France considers its overseas possessions to be part of France (and gives them full representation in its Parliament and a vote for President), the Strasbourg Court has jurisdiction over, inter alia, Tahiti and New Caledonia, several islands in the Indian Ocean, as well as Guadalupe and Martinique in the Carribean. See Piermont v. France, 20 Eur. H.R. Rep. 301 (1995) (applying the Convention to French actions in Tahiti and New Caledonia); 2005 World Almanac, supra at 776-77 (listing French overseas possessions).

8. The European Court of Human Rights is located in Strasbourg, France and is often referred to in Europe as the "Strasbourg Court" to distinguish it from the somewhat similarly named European Court of Justice (located in Luxembourg and unrelated to the Strasbourg Court) or from other courts dealing with human rights, such as the Latin American Human Rights Court.


11. See A Breath of Fresh Air?, Economist, May 15, 2004, at 50, 50, for a critique of the current Council of Europe made in the context of a discussion of an upcoming contested election for Secretary-General of the Council, its Chief Executive Officer.


Though the European Convention on Human Rights was promulgated over fifty years ago, and the Strasbourg Court is over forty years old and has been issuing significant decisions from its inception, it has received almost no recognition in United States jurisprudence. *Lawrence v. Texas* was the first time a majority of the United States Supreme Court ever referred to decisions of the Strasbourg Court.\(^{14}\)

Lest the ignoring of potentially relevant persuasive authority be viewed as a one-sided snub by United States courts, the Strasbourg Court has been almost as dismissive of American authority. Although in *Soering v. United Kingdom*\(^{15}\) the Court analyzed American law,\(^{16}\) most other references to American law come in concurring or dissenting opinions.\(^{17}\)

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16. *Id.* The issue in *Soering* was whether Britain could extradite the applicant, who allegedly murdered two people in Virginia, to the United States to face a capital charge. *Id.* at 475. The Strasbourg Court held that the extradition would violate the Convention on Human Rights at least in part because the interval between a death penalty conviction and carrying out the sentence—six to eight years—violated Article 3 of the Convention. *Id.* Article 3 states: “No one shall be subjected to torture or to inhuman or degrading treatment or punishment.” Convention, *supra* note 12, art. 3. The interval of time was calculated by reference to pertinent cases from the Virginia Supreme Court and the United States district courts. *Soering*, 11 Eur. H.R. Rep. at 478. The period of time that existed in Virginia between conviction and probable execution was deemed to be in violation of Article 3. *Id.* at 473.

17. It is hard to determine exactly how many American cases may be cited or referred to in decisions of the Strasbourg Court. A search of the Strasbourg Court database using “United States Supreme Court,” “U.S. Supreme Court,” “U.S.,” “L.Ed.,” and “S. Ct.” produces eight cases, with most of the citations in concurring or dissenting opinions. See Council of Eur., European Court of Human Rights, Home Page, http://www.echr.coe.int/echr (last visited Sept. 3, 2005). A search by the names of a number of famous Supreme Court cases (e.g., *Roe v. Wade*, 410 U.S. 113 (1973); *Miranda v. Arizona*, 384 U.S. 496 (1966); *New York Times v. Sullivan*, 376 U.S. 254 (1964)), produced two additional dissents referring to *Miranda* without citation, one recent majority opinion referring to *Roe v. Wade*, and a majority opinion referring merely to the Pentagon Papers case, without citation. Only in five
Superficially, at least, the recognition of decisions of the Strasbourg Court in law reviews in the United States is much better. A Westlaw search for "European Court of Human Rights" in Journals and Law Reviews yields 2818 articles, notes, and comments using the phrase—1160 of which were written after January 1, 2001, when the full effects of a radical reorganization of the Strasbourg Court became clear. The overwhelming majority of these articles cite or discuss only one or a small number of cases decided by the Strasbourg Court without any discussion of the history or structure of the Court or the problems or challenges facing the Court. Only a handful of articles deal with the structure of, or the problems facing, the Strasbourg Court, and none offer a comprehensive analysis of these issues.

of these eleven cases did the majority opinion refer to United States Supreme Court cases, and with one possible exception (Appleby v. United Kingdom, 37 Eur. H.R. Rep. 38 (2003)), the citations were not used as persuasive authority. I have found only two cases citing state court decisions. See Appleby v. United Kingdom, 37 Eur. H.R. Rep. 38 (2003); Soering, 11 Eur. H.R. Rep. 439. Appleby cites seventeen United States state court cases that come to differing conclusions on the issue of whether speakers can be restricted in privately owned shopping centers. Appleby, 37 Eur. H.R. Rep. at 789–90. In Appleby, the right of the privately owned shopping center to exclude speakers was upheld as not being in violation of Article 10 of the Convention. Id. at 795. Doubtless, there are other references to United States cases, but they are few and far between.

18. Westlaw search, JLR database, June 12, 2005. Approximately 250 articles a year appeared with the phrase "European Court of Human Rights" during the years 2000–2002. In the next two years the number increased to approximately 340 articles a year. So far, curiously, in the first six months of 2005 there have been only fifty-four such articles containing the phrase, although that may be a function of delay in uploading articles onto Westlaw. While the reorganization of the Strasbourg Court, see discussion infra Part I, took effect in 1998, because of a lengthy transition, the full effects of the reorganization were not well perceived until about 2001. Thus, even the few articles written prior to 2001 discussing the organization or operation of the Court offer little insight into the current operation of the Court.

19. The statement that an "overwhelming majority of these articles only cite or discuss one or a small number of cases" is based on perusing all articles reported in Westlaw mentioning the Strasbourg Court since January 1, 2001.

Nevertheless, some knowledge of what the European Court of Human Rights is, and what it is authorized to do, is important for American lawyers (and judges) (1) because it is a major court deciding issues of universal interest, and (2) because its decisions may have effects on any American business involved in commerce with Europe. As to the first reason, while neither the Strasbourg Court nor the United States Supreme Court need follow the precedents of the other court, the decisions of one may be useful in informing the other of issues and problems they each face. As to the second reason, decisions of the Strasbourg Court in the area of freedom of expression involving, inter alia, commercial speech, libel, and internet access should be of great interest to any practitioner advising American businesses with international interests. Conversely, any European lawyer advising an international business should be aware of contemporary United States jurisprudence in these areas. Beyond the commercial area, Strasbourg Court decisions concerning family law and inheritance may have an effect on domestic relations in the United States involving a family with European and American members. Even decisions on criminal law procedure (a major concern under Article 6 of the Convention) may have some relevance for businesses involved in international trade or operations.

In view of the useful, if not necessary, nature of this information for a well educated American lawyer, this Article sets out a detailed description of how the European Court of Human Rights operates and discusses problems affecting the operation of the Court. This Article, then, is partly descriptive and partly normative. Part I describes

_Terrorism, 28 FORDHAM INT'L L.J. 392 (2005) (Judge Hedigan is the Irish member of the Strasbourg Court.)._ However, though insightful, none of these articles are sufficiently comprehensive to fully describe the structure or problems of the Court. Thus, I have written this Article to make up for the lack of materials available to American lawyers about the Strasbourg Court.

21. And, obviously, it will be important if the Supreme Court continues to look to it (and other foreign law) as a source of authority in constitutional interpretation, the issue which has focused attention on the Strasbourg Court.

22. Justices Breyer and O'Connor have justified references to foreign law as being useful sources of ideas when confronting intractable problems of interpretation. _See Cleveland, supra_ note 3, at B4. Justice Stevens, in a recent speech justifying relying on foreign law said: "If we expect them to listen to us, we should at least be willing to listen to what they have to say to us." _John Strauss, Justice's Speech, INDIANAPOLIS STAR, May 24, 2005, at 6A._

23. I have spent considerable time reading and analyzing many cases decided by the Court in connection with a course I teach titled "Comparative Civil Liberties" that compares developments in Europe and the United States in this area. I have also discussed the operation of the Court with a number of people in Europe who have practiced before the Court, have been close observers of the Court, or are or have been associated with the Court. Some of the views expressed in this Article are based on discussions with people
the history of the Strasbourg Court, and Part II describes the current structure of the Court. Part III then discusses some jurisprudential principles of the Strasbourg Court. Finally Part IV raises a number of problems that will have major effects on the future operations of the Court. Not everyone who is an observer of, or is associated with, the Court may agree with all of the problems raised by this Article, but these problems are ones with which, sooner or later, the Court (and, in addition, the Council of Europe, its parent organization) must grapple.

I. History of the European Court of Human Rights

Shortly after World War II, at the urging of Winston Churchill, leaders of the victorious Western European countries initiated discussions on creation of a pan-European organization that would protect human rights and make a repeat of the ghastly war less likely.24 In 1948 a conference was organized in The Hague that led to the 1949 establishment of the Council of Europe.25

The Council of Europe’s governance is divided between two bodies.26 The Committee of Ministers, perhaps the most important, is made up of the foreign minister (or the designee thereof) of each member state.27 The other is the Parliamentary Assembly, which is somewhat more proportional in its representation of the various member states.28 The foremost of the Council’s several goals is the protection of human rights.29 Thus, one of its earliest actions was to
facilitate the drafting of the Convention and, once that was in effect, to superintend its operation.  

The draft of the Convention was completed in 1950 and became effective in 1953 after it was ratified by ten governments. The initial provisions were modeled after the Universal Declaration of Human Rights promulgated in 1948. The basic coverage of the Convention can be seen by the titles to the substantive Articles providing for protection rights in two broad categories. The substantive provisions of the Convention as it exists today are set out in the Appendices of this Article. The first category deals with individual human rights—the right to liberty, prevention of torture, and the right to a fair trial—as provided for in Articles 2 through 7. The second category deals with individual liberty—the right of privacy and freedom of religion, expression, and association—provided for in Articles 8 through 12. In subsequent years, additional substantive protections were added by protocols guaranteeing such matters as protection of property, freedom of movement, additional criminal law protections, and the aboli-

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30. Council Summary, supra note 9 (noting that the European Convention on Human Rights was created in 1950).

31. Court History, supra note 25. In opinions by the Strasbourg Court, a country that has ratified the Convention and thus can be a defendant before the Court is usually referred to as the "Contracting State." Id. In this Article, they will be referred to as a member state. Only a member state can be a defendant in a case brought before the Court. Id.

32. Id.

33. Convention, supra note 12, arts. 2-7. The titles of these articles are: Article 2, Right to Life; Article 3, Prohibition of Torture; Article 4, Prohibition of Slavery and Forced Labour; Article 5, Right to Liberty and Security; Article 6, Right to a Fair Trial; Article 7, No Punishment Without Law. Id.

34. Id. arts. 8-12. The titles of these articles are: Article 8, Right to Respect for Private and Family Life; Article 9, Freedom of Thought, Conscience and Religion; Article 10, Freedom of Expression; Article 11, Freedom of Assembly and Association; Article 12, Right to Marry. Id. Two other articles that might be characterized as substantive are: Article 13, Right to an Effective Remedy and Article 14, Prohibition of Discrimination. Id. arts. 13-14. An important aspect of Articles 8 through 11 is that, in addition to guaranteeing a particular freedom, each contains an express limitation on that freedom. Id. arts. 8-11. For example, section 1 of Article 10 provides for freedom of expression, but section 2 limits it: The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.  

Id. art. 10.
tion of the death penalty. Nevertheless, not all protocols have been signed by every member state.

The evolution of the Court has gone through three stages. In the first stage, there was no Court, but only a European Commission on Human Rights. The Commission consisted of one member from each country that had agreed to the Convention. An application to


36. European Court of Human Rights, Dates of Ratification of the European Convention on Human Rights and Additional Protocols, http://www.echr.coe.int (follow "Basic Texts" hyperlink; then follow "Dates of Ratification of the European Convention on Human Rights and Additional Protocols" hyperlink) (last visited Sept. 19, 2005) [hereinafter Ratification Dates]. Russia has not signed the protocol abolishing the death penalty; two members, Andorra and Switzerland, have not signed Protocol 1; seven member states have not signed Protocol 4, including Spain, Switzerland, and the United Kingdom; and eight states, including Belgium, Germany, Netherlands, Spain, and the United Kingdom, have not signed Protocol 7. Id.

37. The third stage (the current stage) will be modified somewhat in the next few years, as is discussed infra Part IV.A.


39. Id.

40. An "application" is the technical term used in the Convention whenever someone claims to be aggrieved by the action of a member state. Thus, it is the equivalent of a complaint or a petition in the United States. A person who would be labeled as a plaintiff or a petitioner in the United States is thus known as an "applicant" under the Convention and this is the term used herein. European Court of Human Rights, Rules of Court, R. 1(n) (Mar. 2005), available at http://www.echr.coe.int/ECHR (follow "Basic Texts" hyperlink; then follow "Rules of Court" hyperlink) [hereinafter ECHR Rules].
the Commission could be filed by any aggrieved individual or by a member state, but only against a member state. 41 If the Commission found no violation of the Convention, it simply rejected the application, and that particular case ended. 42 But if the Commission found a prima facie case that the Convention had been violated, it undertook fact finding and attempted to reach a "friendly settlement." 43 If such a settlement failed, the Commission issued a report as to whether there had been a violation of the Convention and detailed the reasons for its finding. 44 Such a report, by itself, had no binding effect. 45

In the earliest years, the enforcement of the finding of a violation was carried out by the Committee of Ministers (which, as noted above, is made up of the foreign minister—or his or her delegate—of each member state) of the Council of Europe. 46 The Committee of Ministers could attempt to enforce the finding, or could choose to disregard it. 47 Enforcement was left to the Committee of Ministers because, in the earliest years, the member countries were unwilling to take a political element out of the adjudication process. 48 If the Committee of Ministers found that the violation should be enforced, it would attempt to persuade the guilty member state to abide by the Commission's determination. 49 The Committee of Ministers had no direct enforcement powers in the sense that a court in a sovereign country would have. 50 It only had the power of persuasion or, at the last resort, the power to expel the recalcitrant country from the Council of Europe. 51

41. Convention, supra note 12, art. 33. Applications for violations brought by another member state have been very rare, the most notable being Ireland v. United Kingdom, 2 Eur. H.R. Rep. 25 (1978) (complaining about police and judicial procedures used in the effort to quell illegal activities by the Irish Republican Army in Northern Ireland). Initially, an individual could apply for relief only if a member state permitted such applications, but in 1990, the right to apply for relief by an individual had, as a practical matter, become unlimited. Mark Janis et al., European Human Rights Law, Text and Materials 23–26 (2d ed. 2000).

42. Mowbray Text, supra note 38, at 2.
43. Id.
44. Id.
45. Id.
46. Council Summary, supra note 9.
47. Mowbray Text, supra note 38, at 2.
49. Ovey & White, supra note 25, at 435.
50. Id.
51. Id. at 431–35. The Committee of Ministers still has the same limited enforcement powers even today. On one occasion a member state has withdrawn from the Council of Europe. In 1967, a military junta overthrew the government of Greece and installed an
In 1959, a second stage was implemented. Since the Committee of Ministers rarely rejected a Commission finding, the member states amended the Convention to take the Committee of Ministers out of the substantive adjudication process by establishing the European Court of Human Rights. The Court, made up of one part-time judge from each member state, was empowered to hear appeals from Commission decisions. Until 1990, an individual applicant had no independent right to refer a case to the Court (i.e., appeal from a Commission decision) and was, thus, entitled to a hearing only if the Commission itself thought the matter should be further examined by the Court. But, in 1990, the right to appeal to the Court was extended to unsuccessful applicants by the now superceded Protocol 9. If the Court found a violation, its decision was sent to the Committee of Ministers for enforcement. After establishment of the Court, the Committee of Ministers no longer had substantive powers. Rather, the Committee of Ministers merely supervised the implementation of the decisions—one of the roles it played since the inception of the Convention.

The two tier process described above (a Commission proceeding and then a Court proceeding) created many problems. It was extremely expensive for parties to go through what were often, in effect, two de novo hearings. The two hearings were also extremely time consuming, and cases might be in the decision making process for over a decade without a resolution. The biggest problem, however, was the authoritarian regime. Id. Hours before the Committee was to act on expulsion, the junta withdrew from the Committee. Id. After democracy was restored in Greece in 1974, it was re-admitted. Id. at 432–33. See also Janis et al., supra note 41, at 53–63. Recently the United Kingdom considered (but rejected) a withdrawal from the European Court of Human Rights because of decisions by the Strasbourg Court viewed as excessively protective of illegal immigrants. See Philip Johnson, Blair to Take on Judges over Asylum, Daily Telegraph (London), Feb. 20, 2003, at 1, 1.

52. Mowbray Text, supra note 38, at 3–4 (noting that Commission findings were followed “in most cases” and that “in a few cases” the Committee of Ministers was “unable to reach a decision”).
53. Id. at 2–3.
54. Id. at 2, 773 (providing the provisions of Protocol 9, which was repealed by Protocol 11, abolishing the Commission).
55. Id. at 774.
56. Id. at 2.
57. Ovey & White, supra note 25, at 420–36.
vast increase in the caseload of the Commission and the Court resulting from an expanding number of countries joining the Convention—particularly those with a recent history of repression—and from an increasing awareness by member state citizens of the possibility of obtaining substantive relief. In 1990 there were 5279 initial applications filed with the Commission, and the then part-time Court rendered only thirty judgments on appeal from the Commission. The number of cases decided increased slowly over the succeeding years until 1997, the last full year that the Commission was in existence, when there were over 14,000 initial applications filed with the Commission. That year the Court rendered 106 decisions on appeal from the Commission.

In 1998, after many years of negotiations, a third stage in the evolution of the Court became effective when the Convention was amended to provide for a radical restructuring of the Court. The Commission was abolished, and the Court was reconstituted with full-time judges. The new structure allows anyone (an individual or a member state) to make an application directly to the Court itself for any alleged violation of the Convention.

While the new Court began functioning in 1998, there was a considerable transition period, and the now-abolished Commission did not completely disappear until the year 2000. Thus, only since 2001 has the new Court been fully operational in its most recent form. Currently, a somewhat substantial revision of the third stage, known as Protocol 14, has been adopted by the Council of Europe and is being circulated amongst the member states. This revision will take effect when member states ratify it.

almost eight years between a ban imposed on the party and a finding that the ban violated the Convention.)


60. Id.

61. Id.

62. MOWBRAY Text, supra note 38, at 16–17, 778–88 (providing the text of Protocol 11, which accomplished this amendment).

63. Id.

64. Convention, supra note 12, art. 34.

65. MOWBRAY Text, supra note 38, at 17.

II. The Current European Court of Human Rights

A. The Structure of the Court

1. Judges of the Court

The European Court of Human Rights, headquartered in Strasbourg, France, draws judges from the signatories of the Convention—one judge from each member state, regardless of population. Relatively small countries, such as San Marino (population 27,000) and Liechtenstein (population 33,000), each have one judge, while larger countries such as Germany (population 83,000,000) and Russia (population 145,000,000) similarly have only one judge each. Each country nominates three persons to be a judge, but the Parliamentary Assembly of the Council of Europe selects which nominee will serve. Persons nominated must be of good character and have the qualifications that would allow them to hold “high judicial office” in the nation nominating them.

There has been criticism of the current process of choosing judges. Some of this criticism has been directed at the member states where, some suspect the three candidates nominated are not always the best (and willing) candidates available to the member state, but rather are simply politically well-connected. Some direct this criticism toward the Council of Europe for not having sufficient safeguards for screening candidates. Recently, the Assembly of the
Council passed Resolution 1366, placing more emphasis on the legal qualifications of the candidates nominated and making it clear that the Assembly was willing to reject the nominations made by a member state if the nominees did not meet these criteria.

Judges serve on a full time basis for a term of six years and can be renominated at the end of each term. Judges must retire, however, upon reaching the age of seventy. A judge can be dismissed while serving for misconduct by a vote of two-thirds of the judges of the Court. Each judge receives an annual salary of €198,349 free from income tax. The Strasbourg Court conducts its proceedings in English and French (and the Convention and major opinions are pub-


75. Id. The resolution also announced that the Assembly would reject any list of nominations unless it contained at least one candidate of each sex. Id.

76. Convention, supra note 12, art. 23. Protocol 14 provides that judges may serve for a single, nonrenewable, term of nine years. Protocol 14, supra note 66, art. 2. However, it may be several years before this Protocol becomes effective.

77. Convention, supra note 12, art. 23. Protocol 14 retains this provision. Protocol 14, supra note 66, art. 2.

78. ECHR Rules, supra note 40, R. 7.

79. Council of Europe, Comm. of Ministers, Resolution on the Status and Conditions of Service of Judges of the European Court of Human Rights, 909th Meeting, Res. No. 50 (2004), available at https://wcd.coe.int/ViewDoc.jsp?id=803205&BackColorInternet=9999CC&BackColorIntranet=FFBB55&BackColorLogged=FFAC75. The President of the Court receives and additional €12,092 and the Presidents of Sections an additional €6,046. Id. There is, however, no “employer paid” pension or retirement plan for judges. Id. The tax free basis of the salary is provided for by Section 18 of the General Agreement on Privileges and Immunities of the Council of Europe, adopted September 2, 1949 in Paris, available at http://conventions.coe.int/Treaty/EN/cadreprincipal.htm. The value of the euro in the past few years has fluctuated between $0.85 and $1.30, so the dollar equivalent has similarly fluctuated. By comparison, the salary of an Associate Justice of the United States Supreme Court is $194,300, but the tax-free feature makes the European Court judges salaries considerably higher as a practical matter (though this is offset to a degree by the lack of a pension). 2005 World Almanac, supra note 7, at 68.
lished in both languages), and judges must be fluent in one of these languages and should have some facility with the other. 80

Protocol 14, when it is adopted by the member states, will change the term of the judges to a single nine-year nonrenewable term. 81 When this protocol was initially proposed, the Assembly of the Council endorsed the change in the term of the judges in order "to ensure the independence and impartiality of [the] judges." 82 This latter proposal illustrates a concern that a judge might unwarrantedly begin favoring the country that he or she represents in order to obtain renomination.

Some close observers of the Court suggest the nomination and retention concerns reflect unease with the political and economic difficulties existing in many of the more recent member states. 83 In such situations, it may be more likely that improper political considerations may affect the initial choice of nominees. Economic concerns may affect the desire of sitting judges from such countries to get renominated to the Court where the salary and benefits are far higher than for lawyers or judges in his or her member state. 84

2. Organization of the Court

The Court has an extremely complicated organization. It is internally divided into four geographically balanced 85 "Sections," and each judge on the Court is assigned to one of the Sections. 86 The Court as a whole is administered by a President and two Vice Presidents, and the

80. ECHR RULES, supra note 40, R. 34.1. While it is important that a judge be fluent in at least one of the languages, in some cases a judge's facility with the other has been minimal. The Court actually has language classes available for judges. Oral arguments are simultaneously translated into the language not being used by the litigants.

81. Protocol 14, supra note 66, art. 23.


83. Confidential Sources, supra note 23.

84. I have not heard any criticism of any current member of the Court. Those who have spoken to me have been concerned about the process but do not think, so far, unqualified candidates have been seated. In some of the former Iron Curtain countries, the judges appointed—for example Karel Jungwiert of the Czech Republic—were leaders in overthrowing Communist rule. Confidential Sources, supra note 23.

85. ECHR RULES, supra note 40, R. 25. They are also balanced as to gender. Id.

86. Convention, supra note 12, art. 26(b) (providing that the Court shall set up "Chambers"); ECHR RULES, supra note 40, R. 25 (noting that Chambers shall be referred to as "Sections" and that each judge shall be assigned to a Section); Court Composition, supra note 71 (noting that the Court has set up four Sections, and noting the assignment of judges).
judges of the entire Court elect these officers. The Vice Presidents also serve as Presidents of two of the Sections, and the judges elect a President for the other two sections and a Vice President for each of the four Sections. Each case filed in the Court is initially assigned to one of the Sections.

A Section has two functions. First, it decides whether a case assigned to it should be heard on its merits—the term used is whether the case is "admissible." This is an important gatekeeping function, and Sections reject a large majority of the applications for relief at an early stage because the applications do not involve a violation of the Convention, because domestic remedies have not been exhausted, or because the application is not timely. A three-judge "committee" performs almost all of this screening. Second, if the case is deemed admissible, a seven-judge "Chamber" of the Section decides whether there has been a violation of the Convention.

Each Section normally has eleven or twelve assigned judges. A Section is internally divided into three Chambers, each Chamber con-

88. ECHR Rules, supra note 40, R. 8.
89. Id. R. 52.
90. Id. R. 53–56.
91. Id. R. 55–54, 59.
92. Id.
93. Convention, supra note 12, art. 35.
94. ECHR Rules, supra note 40, R. 53. The most significant change contained in Protocol 14 is that most of this initial screening will be done by a single judge (aided by two experienced staffers from the Registrar's office) instead of a three judge Committee. Protocol 14, supra note 66, arts. 24, 26–27. A single judge may declare an application inadmissible. Id. Another change that may also be fairly significant is Article 8 of Protocol 14, providing for an amended Article 28, allowing a three-judge Committee (instead of a seven-judge Chamber) to render a judgment on the merits of a case "if the underlying question in the case, concerning the interpretation or the application of the Convention . . . is already the subject of well-established case-law of the Court." Id. art. 28. Finally, Protocol 14 amends Article 35 to permit the Court to declare an application inadmissible "where the applicant has not suffered a significant disadvantage," unless the issue has not been duly considered by a tribunal of the defendant member state. Id. art. 11. The purpose of these changes is an attempt to keep up with the enormous number of cases which have been filed in the past few years by directing more judge time at deciding cases that have been found to have merit and less judge time to the initial screening process. Council of Eur., Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Amending the Control System of the Convention, Explanatory Report, CETS No. 194, available at http://conventions.coe.int/Treaty/EN/Reports/Html/194.htm [hereinafter Explanatory Report, Protocol 14].
95. Convention, supra note 12, arts. 27, 29.
96. European Court of Human Rights, Composition of the Sections, http://www.echr.coe.int/echr (follow "The Court" hyperlink; then follow "Composition of the Sections" hyperlink).
sisting of seven judges. The President of the Section serves on all three Chambers, and each other judge of the section serves as a member of two Chambers. When a case is heard on the merits, it is usually assigned to a Chamber of the Section containing the judge from the defendant state. Each of the three Chambers sets up a Committee of three judges to carry out the functions assigned to a Committee.

In addition to the four Sections, there is also a “Grand Chamber” of the whole Court whose purpose is to hear further appeals from decisions rendered by a Chamber of a Section. The Grand Chamber consists of seventeen judges including the President of the Court, the President of each Section, and twelve other judges of the Court. For purposes of selecting the twelve additional judges, the judges of the Court are divided into two “groups,” each consisting of half of the judges of the Court (other than the Presidents). Each group “alternates every nine months” in providing the remaining members of a Grand Chamber, and the twelve additional judges for a Grand Chamber case are selected from the group then available by rotation. However, a Grand Chamber cannot include any judge who participated in the Chamber decision except for the President of the Court or Section and the judge of the defendant member state. Any party can request a redetermination by the Grand Chamber, and a Chamber considering a case can recommend that a case be heard in a


98. See Working Methods Report, supra note 97, at 61 (noting that the other Section members sit in on Chamber deliberations in case they are needed as “substitute judges”).

99. Id. at 62. Most cases are assigned to the Section with a judge from the defendant state. But, if it has not been so assigned, if the case is heard on its merits by a Chamber of the Section, the judge from that member state sits as an eighth member of the Chamber. See infra notes 114, 128–29 and accompanying text (assignment of cases procedure).

100. Working Methods Report, supra note 97, at 10. Judges are appointed to a Committee for a one year period. ECHR Rules, supra note 40, R. 27. The President, however, does not serve on a Committee. Id. In a Section with more than ten judges presumably one judge is not burdened with Committee duties for a year.

101. Convention, supra note 12, art. 27(3).

102. Id. art. 27.

103. ECHR Rules, supra note 40, R. 24.

104. Id.

105. Convention, supra note 12, art. 27. See infra notes 128–29 and accompanying text (explaining why the judge for the defendant member state always serves as part of a Chamber or a Grand Chamber).
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Grand Chamber even before it decides a case. Nevertheless, there is no right to have a case heard by the Grand Chamber. Rather it is discretionary, and the Grand Chamber has a five-member screening committee to decide whether a Grand Chamber appeal should be granted—the membership of which is the President of the Court, the Presidents of Sections other than the President of the Section that initially dealt with the case, and one other judge, assigned by rotation. The stated criteria are that the appeal raises “serious questions of interpretation” or “serious issues of general importance.” To date, successful appeals to the Grand Chamber are fairly rare—for example, only sixteen in 2004, which is less than three percent of the cases decided by Chambers.

3. Filing an Application

Anyone who believes that he or she is aggrieved by a decision of a member state can file an application. It need not be filed by counsel, and the initial application can be filed in a language used by any member state. When an application is filed with the Court, the President of the Court assigns the application to one of the four Sections. Within a Section there are four steps for dealing with a case. Initially a case is assigned to one of the Section judges who serves as “Rapporteur” to make a preliminary analysis of the case and recommend whether it should be admissible.

106. Convention, supra note 12, arts. 30, 43.
107. Id. art. 43; ECHR Rules, supra note 40, R. 24(5). The judge chosen by rotation cannot have participated in the chamber decision. Id.
108. Convention, supra note 12, art. 21.
109. See Survey of Activities 2004, supra note 59, at 32 (documenting, in 2004, sixteen cases decided by The Grand Chamber and 800 Chamber decisions—equating to about two percent).
110. Convention, supra note 12, art. 33.
111. ECHR Rules, supra note 40, R. 34. After the case has been communicated to the member state that is the subject of the Application, further submissions must be in either French or English unless leave is granted to continue using the initial application language. Id.
112. Id. R. 51. Given the huge volume of cases, one would imagine that assignments of cases to Sections are not done by the President personally, but merely under his general supervision. The criteria used include balancing the workload of each Section and, to the degree feasible, assigning a case to the Section to which the judge of the member state is assigned. Id. R. 52. For member states from which there are large numbers of cases, this cannot always be done without creating very unbalanced workloads.
113. Id. R. 49.
The Rapporteur is often the judge for the member state against whom the applicant is complaining.\textsuperscript{114} In reality, one or more of the lawyers in the Registrar's Office\textsuperscript{115} performs most of the outset screening and then makes a report to the Rapporteur.\textsuperscript{116} The second step is for the Rapporteur to refer the case with his or her recommendations to a three judge Committee who will decide if it is "admissible."\textsuperscript{117} A Committee, by unanimous vote, can reject the case based simply on the application's pleadings and need not state any reasons.\textsuperscript{118}

Unless a Committee rejects it by unanimous vote, the third step is referral to a seven judge Chamber.\textsuperscript{119} The Chamber determines by a majority vote whether it is inadmissible or admissible.\textsuperscript{120} A Chamber determines whether an application is inadmissible without a hearing.

\begin{enumerate}
\item The reason for this is that decisions and other documents of the member state courts are in that state's language, and review of these documents is often necessary to determine if there is a basis for the claim and, indeed, whether the application is timely. Further, initial applications need not be in French or English, but may be in the language of the applicant. Thus, in most cases, only a judge fluent in the member state language can efficiently evaluate these documents. \textit{Id.}
\item See infra Part II.A.6 (discussing legal staff of the Strasbourg Court).
\item The Working Methods Report outlines the method used for processing initial applications—indicating that the Registrar's office prepares a "draft decision" that is then given to the Rapporteur for review. Working Methods Report, supra note 97, at 76–79. Based on the statistical information contained in Survey of Activities 2004, supra note 59, at 35, most judges would need to be the Rapporteur for over 700 cases each year. \textit{Id.} (estimate attained by dividing the number of cases by the number of judges). In addition, each judge sitting on a Committee will consider the admissibility of more than 1700 cases each year (many of which may be cases for which he or she was Rapporteur, however) and, of course, will be part of a Chamber rendering a judgment on approximately 110 cases a year. Further, there may be a period of service on a Grand Chamber. A judge does all of this without any personal law clerks. There are also various administrative committees of the Court upon which judges serve, which may take varying amounts of time. It is not clear what will happen to the Rapporteur function when Protocol 14 is eventually implemented, which will allow a single judge to perform most initial screening of cases for "admissibility." See Protocol 14, supra note 66. Perhaps the Rapporteur function will be subsumed as part of the single judge position.
\item ECHR Rules, supra note 40, R. 49 (noting that the Rapporteur can bypass a Committee if he or she thinks a case is likely to be "admissible" and refer it directly to a seven judge Chamber). Obviously, when Protocol 14 is adopted, the referral of what appears to be an "admissible" application will be made by the single judge who initially considers the case either to a Committee or to a Chamber.
\item Convention, supra note 12, art. 28; ECHR Rules, supra note 40, R. 53. A Committee will consider approximately seventy recommendations submitted by Rapporteurs at each session—and there are about two sessions per month. See Working Methods Report, supra note 97, at 10 (indicating sessions once each fortnight, and seventy decisions each session for each committee). The Committees of at least one Section do not even meet to consider a Rapporteur recommendation unless one Committee member objects to the recommendation. \textit{Id.} at 79.
\item Convention, supra note 12, art. 29.
\item \textit{Id.} art. 45.
\end{enumerate}
but must give a reason.\textsuperscript{121} If a Committee or Chamber deems an application inadmissible, the case ends.\textsuperscript{122} Historically, Committees and Chambers deemed over eighty percent of the applications assigned to a Section "inadmissible," and this percentage has risen substantially in recent years.\textsuperscript{123}

The fourth step occurs if the Chamber deems the application admissible. Such a finding permits further briefing and factual submissions,\textsuperscript{124} and the Chamber then decides whether there has been a violation of the Convention.\textsuperscript{125} Legal aid is also available from the Court at this stage for applicants unable to retain a lawyer though the amount of compensation allowed is very modest.\textsuperscript{126} While cases are being briefed and considered on their merits, the Office of the Registrar may conduct settlement negotiations.\textsuperscript{127}

4. Hearing a Case

When a case is considered on the merits, the judge from the defendant state always serves as a member of the Chamber or Grand Chamber considering the case (even if the judge is not otherwise a member of the Chamber or the Section).\textsuperscript{128} The reason for this is not to provide favoritism to the state involved—indeed, an express provi-

\textsuperscript{121} Id.; ECHR Rules, supra note 40, R. 56.
\textsuperscript{122} ECHR Rules, supra note 40, R. 53. This rule applies to inadmissibility decisions made by Committees. There is no express rule dealing with the finality of inadmissibility decisions made by a Chamber pursuant to ECHR Rule 54, but the only possibility of further consideration is a "referral" to a Grand Chamber pursuant to Article 43 of the Convention, and a "referral" is only allowed as to judgments. Convention, supra note 12, art. 43. Article 45 of the Convention distinguishes between "judgments" and decisions on admissibility, and a judgment is rendered only after a case has been "admitted" for consideration. Id. art. 45; see also Mowbray Text, supra note 38, at 18 (showing a distinction between admissibility decisions and judgments).
\textsuperscript{123} Survey of Activities 2004, supra note 59, at 35. In 2004, 96% of the applications were not admitted (21,181 applications were considered by the Court, and 830 (4%) were declared "inadmissible"). Id. at 35, 37.
\textsuperscript{124} ECHR Rules, supra note 40, R. 54.
\textsuperscript{125} Convention, supra note 12, art. 45. Judgments are made by written opinion. ECHR Rules, supra note 40, R. 74 (detailing what must be contained in the text of a judgment). A Chamber has the authority to decide both the admissibility of the application and enter a judgment on the merits at the same time. Id. R. 54A.
\textsuperscript{126} ECHR Rules, supra note 40, R. 91–96. The Registrar promulgates the rates. Id. R. 95. The rates in force as of January 2004 were quite modest, for example €337 to prepare an initial case plus €61 for secretarial expenses. Karen Reid, A Practitioner's Guide to the European Convention on Human Rights 621 (2d ed. 2004) [hereinafter Reid, Practitioner's Guide]. If the Court requests additional briefing, some additional modest fees are available. Id.
\textsuperscript{127} ECHR Rules, supra note 40, R. 62.
\textsuperscript{128} Convention, supra note 12, art. 27(2).
sion of the Convention is that judges must be independent and impartial—but a desire to have expertise in the domestic law of the state available to the panel, because it may well play a critical role in the outcome of any case. In the rare circumstance that a judge from the defendant state is disqualified or otherwise unavailable, a temporary judge appointed from the defendant states sits for the matter.

Though the Court is an "appellate" court, it sometimes needs to make factual determinations. It is not well set up for this task when it becomes necessary, however, because it has no "lower" court to remand matters for any necessary fact finding and because the evidentiary rules of the Court are rudimentary. A short set of rules permit a Chamber to "adopt any investigative measure which it considers capable of clarifying the facts of the case." It further permits a Chamber to receive documentary evidence and to "hear . . . a witness or expert" whose evidence "seem[s] likely to assist it in carrying out its tasks." Finally, one or more members of the Court can be deputized to "conduct an inquiry, carry out an investigation on the spot, or take evidence in some other manner." There is no provision in the Court proceedings carried out in Strasbourg for the cross-examination of a witness or other methods of testing the reliability of contested facts. The Court has, on a handful of occasions, deputized members of the Court to conduct an investigation of the facts in the member state, but such investigations are very costly in terms of judicial time and may

129. Ovey & White, supra note 25, at 398.
130. ECHR Rules, supra note 40, R. 29. This happens occasionally in cases involving the United Kingdom since its judge, Sir Nicholas Bratza—President of one of the Sections and certainly one of the most respected members of the court—was, for many years in the past, the attorney for the United Kingdom in numerous cases, a few of which have some relation to current cases. As a result, there was a substitute British judge for him in Hatton. Hatton v. United Kingdom, App. No. 36022/97, 37 Eur. H.R. Rep. 28, 611 (2003) (Grand Chamber decision) (noting Sir Brian Kerr as an "ad hoc judge").
132. Id.
133. Id. R. A1.3.
not be very useful. Critics cite this lack of "independent" fact finding by the Court as allowing member state courts to find facts in a way favorable to the state without fear of independent verification. While there may be some basis for such criticism, it is hard to imagine how the Court could make determinations about hotly contested factual assertions without developing a fact finding mechanism similar to that of a trial court. As will be discussed in more detail later, the forty-six judges of the Court are unable to keep up with the current caseload, and having judges regularly conduct on-site investigations would make the task of managing the caseload far worse. Further, it is unclear exactly how the Court evaluates the affidavits or other evidence presented to it, a topic discussed further in Part II.B.3.

The rules provide for the possibility of oral argument in cases being decided by the Court. Nonetheless, in recent years, very few cases—only about three dozen per year—have been set for oral argument. The Court has never set out any criteria for deciding if an

134. Id. Some of these investigations have been in connection with complaints from Kurdish people against Turkey. A person connected with the Court told me that in one investigation the witnesses spoke in a dialect to a Kurdish interpreter who, in turn, reported what was said to a Turkish interpreter who, in turn, translated into English. Not only was it time consuming, but there was substantial question as to whether the information provided in English was, in fact, a true account of what the witnesses said. Experiences such as this have caused at least some members of the Court to be skeptical of the value of on-site investigations. See Marie-Benedicte Dembour, "Finishing Off" Cases: The Radical Solution to the Problem of the Expanding ECHR Caseload, 2002 EUR. HUM. RTS. L. REV. 604, 618 (2002) (reporting that "the Court restricts its fact finding to exceptional cases").

135. Id. R. A7; Reid, Practitioner's Guide, supra note 126, at 13–14. While the Court has a provision allowing the Registrar to summon witnesses, it has no means to enforce it other than asking the member state in which the investigation is occurring to carry it out. ECHR Rules, supra note 40, R. A5. Presumably an applicant who is being afforded an investigation would have to inform the Court of the witnesses who should be heard.


137. See infra Part IV.A and accompanying text.

138. Convention, supra note 12, art. 40; ECHR Rules, supra note 40, R. 63.

139. See, e.g., European Court of Human Rights, Pending Cases, http://www.echr.coe.int/ (follow "Pending Cases" hyperlink) (last visited Sept. 13, 2005) (indicating that as of September 7, 2005, thirteen hearings are scheduled for September through December 2005, suggesting a rate of about three dozen cases per year since the Court does not hear cases in July and August). A substantial number of these are arguments before the Grand Chamber. A Chamber of a Section may have only a handful of arguments each year out of hundreds of cases decided.
oral argument is required, but one practitioner before the Court has suggested that it is done primarily in cases where the Court is likely to rule against one of the member states.\textsuperscript{140} The arguments tend to be little more than speeches on the part of the opposing counsel with few, if any, questions interposed by judges during the presentations.\textsuperscript{141} After the initial arguments, members of the Court may pose a few questions, but the oral argument process usually bears little comparison with, for example, arguments before the United States Supreme Court. One reason for this somewhat ritualistic approach is that all arguments are simultaneously translated into either English or French, and Court rules urge counsel to submit, in advance, a copy of their presentations to facilitate the translation.\textsuperscript{142} As a practical matter, this rule has the ultimate effect of discouraging material deviation from what has been submitted.\textsuperscript{143}

Opinions are issued simply in the name of the Court—with no indication of the judge who might be the author.\textsuperscript{144} The judges who participated in deciding the case are named, however, and, unlike the practice in the Court of Justice of the European Union, the Rules of the Court permit concurring and dissenting opinions and list the names of the judges who write or join such opinions.\textsuperscript{145} Thus, it is possible to determine which judges joined the opinion of the Court without reservation.

5. Caseload of the Court

Though it is clear that the structural reform adopted in 1998 has increased the efficiency of the Court, the Court has been swamped by thousands of cases in the last few years. This current backlog of pending cases hampers the Court’s ability to reach effective decisions or to maintain the timeliness and quality of its jurisprudence.\textsuperscript{146} This enor-

\textsuperscript{140} Confidential Sources, supra note 23.
\textsuperscript{141} This is based both on personal experience and observations of others close to the Court. Confidential Sources, supra note 23; see also Dembour, supra note 134, at 620 (agreeing that arguments at hearings tend to repeat what has already been submitted in writing, though she regrets that oral arguments have become so rare).
\textsuperscript{142} Reid, Practitioner’s Guide, supra note 126, at 12–13.
\textsuperscript{143} See supra note 141 and accompanying text.
\textsuperscript{144} ECHR Rules, supra note 40, R. 74 (indicating that the names of the judges shall be listed, and allowing for concurring and dissenting opinions, but no lead author is listed).
\textsuperscript{145} Id.
\textsuperscript{146} Survey of Activities 2004, supra note 59, at 35. The problems caused by this huge increase of cases and the response of the Court, and its parent the Council of Europe, will be more thoroughly discussed infra Part IV.A.
mous increase in filings is due, in part, to the greater number of member states. But, more importantly, the greater understanding by the public and lawyers about the remedies available from the Court has resulted in increased applications for relief.

Another likely factor in the increasing number of cases is that the Court has asserted jurisdiction over many matters that might not initially have been thought to be covered by the Convention. For example, in *Hatton v. United Kingdom*, a Chamber of the Court held that England had violated Article 8 of the Convention (the right of privacy) by allowing noisy late night commercial airline flights over residential areas near Heathrow Airport.

Another example of where the Court has exercised jurisdiction over matters is in the application of Article 6 (the right to a fair trial) in many situations concerning the details of the criminal procedure systems of the various member states. In this, the jurisprudence is beginning to resemble the habeas corpus jurisprudence in the United States whereby federal courts review whether state court criminal trials have complied with the United States Constitution. Based on an unscientific survey of recently decided cases (the Court statistics do not report this information directly), many Court decisions deal with alleged violations of Article 6, which provides for fair trials in criminal cases, and a substantial number of these Article 6 cases are decided without published opinions. Many of these Article 6 cases come

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147. App. No. 36022/97, 34 Eur. H.R. Rep. 1 (2001). Subsequently, the Grand Chamber took jurisdiction of the case and although it rejected the Article 8 argument by a narrow margin, it did find a violation of Article 13, the lack of an adequate domestic remedy for those vexed by airplane noise. *See* Hatton v. United Kingdom, App. No. 36022/97, 37 Eur. H.R. Rep. 28 (2003) (Grand Chamber decision). This is a curious result if, as the Court held, there is no Article 8 violation. One completely unstated possibility is that the Court might well find an Article 8 violation if in the future domestic law does not adequately deal with the problem. The Court regards the Convention as an evolving document and has, on several occasions, reversed previous holdings because of changed conditions. *See* discussion *infra* Part III.C.


149. Convention, *supra* note 12, art.6.

150. 28 U.S.C. §§ 2254–2255 (2000). *See* discussion *infra* Part II.C (discussing the many cases decided under Articles 2, 3, 5, and 7, which also involve issues that often resemble habeas corpus cases in the United States).

151. *Survey of Activities 2004*, *supra* note 59, at 13–16. I use the term "published" to mean that the case is made available in print in a reporter such as the ECHR Reports. All decisions of the Court are available on the Court’s website. *See* European Court of Human Rights, European Court of Human Rights Portal, HUDOC, http://cmiskp.echr.coe.int/tkp197/search.asp?skin=HUdoc-en. Many decisions, especially recently, are only in a single language—for example, many cases from Italy dealing with the single issue of trial delay under Article 6 are only in French.
from Turkey and involve Kurdish separatists.\textsuperscript{152} Hundreds of these cases have been from Italy because congestion in the Italian court system can result in such long delays in bringing cases to trial that a violation of Article 6 can be claimed.\textsuperscript{153}

The President of the Court has continually expressed considerable concern that the Court is unable to keep up with the growing backlog of cases.\textsuperscript{154} Protocol 14, which was adopted by the Council of Europe and is now circulating for approval from the member states, is intended to improve the ability of the Court to process its caseload fairly and efficiently.\textsuperscript{155} It is not clear that even these amendments will be more than a palliative.\textsuperscript{156}

6. Legal Staff of the Strasbourg Court

The Court is served by a Registrar and two Deputy Registrars, and, in addition, each Section has its own Registrar.\textsuperscript{157} The Registrars and Deputy Registrars are elected by the judges of the Court.\textsuperscript{158} The Registrar's Office not only serves as the "clerk of the court," but it also has a number of other functions. It serves as liaison between the Court and various member countries,\textsuperscript{159} and it conducts mediation between applicants and defendant states with a goal of reaching a "friendly settlement" without further action from the Court.\textsuperscript{160}

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\textsuperscript{152} Survey of Activities 2004, supra note 59, at 13–16.

\textsuperscript{153} Mowbray Text, supra note 38, at 307 (indicating the state that has been found to be in breach of the reasonable time guarantee most frequently is Italy); Dembou, supra note 134, at 620 (indicating that Italy was the principle state accused in respect of "lengthy procedures").

\textsuperscript{154} See, e.g., Luzius Wildhaber, President of the European Court of Human Rights, Address at the High Level Seminar on the Reform of the European Human Rights System 2 (Oct. 18, 2004), transcript available at http://www.echr.coe.int/ [hereinafter Wildhaber, Oslo Speech] (follow "Press" hyperlink; then follow "Speeches of the President of the Court" hyperlink; then follow "Oslo, 18 October 2004" hyperlink) ("Since 1998 the backlog is growing inexorably.")

\textsuperscript{155} Protocol 14, supra note 66; Wildhaber, Oslo Speech, supra note 154, at 2; Explanatory Report, Protocol 14, supra note 94; see also infra note 346 (setting out the figures showing the enormous scope of the problem).

\textsuperscript{156} Protocol 14, supra note 66; Wildhaber, Oslo Speech, supra note 154, at 1–2; see Alastair Mowbray, European Convention on Human Rights: Report of the Evaluation Group and Recent Cases, 2 Hum. RTS. L. Rev. 127, 129 (2002); see also infra Part IV.

\textsuperscript{157} ECHR Rules, supra note 40, R. 15–18.

\textsuperscript{158} Id. R. 15–16.

\textsuperscript{159} European Court of Human Rights, Role of the Registry, http://www.echr.coe.int/ (follow "The Court" hyperlink; then follow "Role of the Registry" hyperlink) [hereinafter Registry Role] (noting, additionally, that the Registrar's staff also provides training for the courts of new member states on the operation of the Strasbourg Court and the standards enforced by it).

\textsuperscript{160} ECHR Rules, supra note 40, R. 62.
important duty of the Registrar’s Office, however, is to serve as the legal staff for the judges since the judges of the Court have no personal law clerks.161

The Registrar’s legal staff is quite large, with approximately 205 attorneys at the present time.162 Except for the Registrars and Deputy Registrars, the staff, including the legal staff, is appointed by the Secretary General of the Council of Europe in consultation with the President of the Court or his designee.163 The need for a large legal staff is no surprise for anyone familiar with appellate courts in the United States,164 but there are some significant differences.

First, in the United States a judge and the law clerks hired by him or her develop an individual relationship that usually reflects the priorities (and even the biases) of the judge. In the Strasbourg Court, however, the Registrar’s staff is answerable to the Registrar,165 and not

161. Registry Role, supra note 159. When Protocol 14 becomes effective, a staff of “rapporteurs” (presumably senior members of the legal staff) will also be created to assist a judge “sitting in a single-judge formation” in deciding whether a case should be deemed inadmissible. Protocol 14, supra note 66, art. 4. Such rapporteurs would have no say in the final decision on admissibility so, in effect, they would be operating as senior law clerks. Id.

162. See Registry Role, supra note 159. A lawyer in any of the member states is eligible to be employed as a staff attorney and job descriptions describing openings for vacant senior positions will sometimes specify that the applicant must be fluent in a particular language (e.g., Lithuanian) as well as being able to speak and write fluently in either English or French. European Court of Human Rights, The Registry, Employment, http://www.echr.coe.int/ (follow “The Court” hyperlink; then follow “Employment” hyperlink; then follow the “Current Vacancies” hyperlink; then follow the “Vacant Permanent Post”) (last visited Sept. 21, 2005) (listing vacant positions, however, when last visited, no open staff attorney positions were posted). (There are a total of thirty-seven official languages in the various countries which are signatories to the Convention. WORKING METHODS REPORT, supra note 97, at 11.) Whether a disproportionate number of the legal staff are from English or French speaking countries (the two official languages of the Court) is not contained in any information provided by the Court.

163. European Court of Human Rights, The Registry, Employment, http://www.echr.coe.int/ (follow “The Court” hyperlink; then follow “Employment” hyperlink) (noting that the Council of Europe handles all employment for personnel of the Court). In addition to the legal staff of the Registrar’s Office, it provides the necessary clerical staff, translators, and security officers for the Court. See Registry Role, supra note 159.

164. For example, United States Supreme Court Justices have three law clerks apiece, who, generally speaking, serve for one term. Each justice on the California Supreme Court has at least five law clerks (known as “research attorneys” who are usually permanent clerks) as well as a substantial “central staff.” See CALIF. SUPREME COURT, THE SUPREME COURT OF CALIFORNIA 4 (2003), available at http://www.courtinfo.ca.gov/courts/supreme/documents/supreme2003-1.pdf.

165. See Registry Role, supra note 159. Or perhaps, at least as a technical matter, to the Secretary General of the Council of Europe. To what degree the decision making regarding staff is delegated by the Secretary General to the Registrar is unknown to the author.
to individual judges. The Registrar's staff prepares the initial analysis of all cases, is present in Chamber deliberations, and probably prepares most opinions of the Court. What effect this relationship has on the jurisprudence of the Strasbourg Court is impossible for an outsider to know. For some judges the effect may well be minimal or nonexistent. But it is possible that the staff views might have an effect on new judges or judges not entirely comfortable with the English or French language. Extensive use of a central legal staff may also result in greater bureaucratic or institutional decision-making.

Second, in part, the legal staff (serving as the equivalent of an American law clerk) does carry out duties typical of the position, such as an analysis of each application filed with the Court as to whether it should be admissible because the allegations suggest that there has been a violation of the Convention. But the duties go further. Pur-

166. The Registrar, and thus the legal staff indirectly, is answerable to the Court as a whole, but that is a considerably different relationship than between a judge and his or her own law clerk.
167. See Registry Role, supra note 159.
168. It is too soon to know what the average length of service will be of a judge, since the first full term for any of the current judges did not expire until 2004. Some, but not all, were reelected. See European Court of Human Rights, Press Release, Election of Judges to the European Court of Human Rights (Apr. 28, 2004), available at http://www.echr.coe.int/eng/press/2004/April/Electionofjudges-April2004.htm. The term is for six years and is renewable, though it takes renomination by the judge's country and acceptance of the renomination by the Council of Europe, and in any event, judges must retire at age seventy. Certainly some judges will serve for many years, but many others may serve for no more than one or two terms. Novice judges may well be more likely to be influenced in subtle ways by the legal staff. This is merely an inference, but it does seem to be a situation not dissimilar to that often thought to exist in British Civil Service. The cabinet ministers who serve as heads of departments are members of Parliament and are supposed to make all policy. But, they are often in charge for only a short time, with the result that the senior permanent civil service "mandarins" often have great influence. This has been parodied in two popular British television sitcoms, "Yes, Minister" and "Yes, Prime Minister." See The Yes (Prime) Minister Files, Home Page, http://www.yes-minister.com/ (last visited Nov. 1, 2005). I do not mean to suggest that the situation at the Strasbourg Court—or even in Britain—comes even close to the events parodied in these sitcoms.
169. Recently, a judge of the European Court of First Instance of the European Court of Justice made such a complaint in a French legal journal against the legal staff of that Court. John W. Miller & Mary Jacoby, EU Judge Hearing Microsoft's Appeal May Be Dismissed, WALL ST. J., June 21, 2005, at B3. The judge "attacked the legal clerks who assist the judges. He called them 'ayatollahs' and accused them of using their inside knowledge of court procedures and of French, the court language, to manipulate outcomes and inflate their power." Id. The President of the Court has proposed that the judge be "dismissed" from the Court for having attacked the legal staff. Id. I have no reason to think that similar circumstances exist at the Strasbourg Court, but a centralized staff has more potential for such an abuse than a system where law clerks are answerable to each individual judge.
170. Council of Eur., Directorate of Human Resources, http://www.coe.int/t/e/human_resources/jobs/01_General_Information/ (showing some of the range of duties
suant to Rule 22 of the Rules of Court, the Registrar or his designee is present during deliberations of a Committee, Chamber, or Grand Chamber.\textsuperscript{171} The rules provide that "only judges shall take part in the deliberations,"\textsuperscript{172} but it is not hard to imagine that many questions may well be put to the Registrar or other legal staff present, and thus the responses of staff constitute a de facto participation.\textsuperscript{173}

Another aspect to the involvement of the Registrar’s office also deals with drafting opinions. All opinions are either in English or French, and opinions of any consequence have usually been in both languages.\textsuperscript{174} The Court has a staff of professional interpreters so translation of an opinion originally written in English into French (or vice versa) is easily accomplished.\textsuperscript{175} But, of the more than forty-six

of the legal staff of the Registrar’s Office). “Trainee lawyers” are limited to work, including legal research, on correspondence and drafts concerning straightforward cases (such as cases where a lead case has already determined the major legal principles or cases likely to be found inadmissible by a Committee). Council of Europe, Instruction on the Organization of the Work of Assistant and Junior Lawyers at the Registry of the European Court of Human Rights, http://www.coe.int/t/e/Human_Resources/Jobs/08_Current_vacancies/2_Vacant_temporary_posts/AC_JuristInstructionTravail_E.asp. A trainee lawyer may never have “primary responsibility” for a case and may not attend deliberations by a Committee or Chamber without a supervisor in attendance. Id. “Assistant lawyers” are allowed to deal with somewhat more complex cases and may even be given responsibility for simple cases and may attend deliberations of and “present cases” to a Committee or Chamber without direct supervision. Id. There are no job descriptions available for more senior lawyers, referred to as “career lawyers” (that is, lawyers who have been recruited on category-A contracts of indefinite duration) except that they, at minimum handle more complex cases, are assigned cases, and attend deliberations of the Court and “present cases.” They also supervise trainee and assistant lawyers. Id. At one time, if it appeared on the face of the application that there was no basis for jurisdiction in the Court, the Registrar’s Office would contact the applicant and suggest that the application be withdrawn. OVEY \& WHITE, supra note 25, at 400. The suggestion of no merit by the Registrar’s Office had no legal significance but apparently it did result in some cases being withdrawn. Id. This practice, however, is no longer carried out. Id.

\textsuperscript{171} ECHR Rules, supra note 40, R. 22. Rule 22 also provides that “other officials of the Registry and interpreters whose assistance is deemed necessary” may also be present during deliberations. Id. In the United States Supreme Court, law clerks never participate in conferences, and such a practice is extremely rare in the California Supreme Court.

\textsuperscript{172} Id. R. 22(2).

\textsuperscript{173} The job description for attorneys set forth, supra note 170, expressly states that attorneys “present cases” to Committees or Chambers.

\textsuperscript{174} ECHR Rules, supra note 40, R. 76. Since 2002, most of the judgments have been in either French or English, unless the Court decided otherwise. Presumably, many of these are opinions in cases that are repetitive in terms of already clearly established case law, where lack of translation does little harm in terms of making the case law of the Court widely available. But, in some instances, those written only in English at least deal with issues seemingly having some precedential significance because of factual variations. The lack of dual language opinions may be a matter of lack of sufficient budget to translate except in very important cases.

\textsuperscript{175} See Registry Role, supra note 159.
judges on the Court, two have English as a native language,176 and probably not more than five have French as a native language.177 While judges are supposed to be fluent in one of the two languages, spoken fluency in a language and the ability to write with precision in that language are not the same things.178 A few non-native English or French speaking judges may have the requisite skill to write with sufficient accuracy in one of the Court's official languages,179 but probably a substantial number of judges do not. The consequence of this is that opinions of the Court are likely drafted by the legal staff of the Registrar's Office180—to conform to the decisions reached by the judges. Nonetheless, in such cases it would still be the product of the legal staff, not the judges, and it may be that the nuances of such opinions reflect to some degree the unconscious predilections of the staff rather than the precise intention of the Court.181 By necessarily hav-

176. This refers to the judges from Ireland and the United Kingdom. Of course, it is possible that another member state judge is a native English speaker.

177. The judge from France obviously would be a native French speaker as would the judge from Monaco. The judge from Andorra is likely to be fluent in French (though Catalan is the official language). The judges from Belgium and Switzerland might be native French speakers (if from the French speaking parts of those two countries), and, even if not, they are likely to have learned and used French extensively in the course of a domestic legal career. While there may be more native French speakers than English speakers, it is likely that a substantial majority of judges who are not native speakers of either language are substantially more fluent in English than in French.

178. To be "conversant" in a language not one's own does not mean that a person understands all subtleties of the language. See, e.g., Babel's Children, ECONOMIST, Jan. 10, 2004, at 69, 69 (discussing studies on how different structures in language—tenses, gender, lack of clear distinction between nouns and verbs, etc.—have effects not understood by someone not completely fluent in a language, and that this may actually affect the way people think).

179. Some universities in northern continental Europe use English for some classroom instruction. See, e.g., Suzanne Daley, In Europe, Some Fear National Languages Are Endangered, N.Y. TIMES, Apr. 16, 2001, at A1. In the Netherlands there was a proposal a few years ago that all university teaching be in English. Id. A number of continental European companies, including Alcatel (French), id., Siemens (German), and Credit Suisse now use English as the official corporate language at management levels. John Tagliabue, In Europe, Going Global Means, At least English, N.Y. TIMES, May 19, 2002, at 15. A European Union Survey released in 2001 reported that half of the citizens of the Union (including 40% from non-English speaking countries) "believe" that they are conversant in English. Daley, supra, at A1. But as observed, supra note 178, being "conversant" in a language is not the same as being able to write fluently and with precision in that language.

180. See Registry Role, supra note 159 (mentioning "drafting" as a duty of the Registrar's office).

181. This is only speculation on my part, although I have been told by two persons close to the Court that lack of language proficiency is not an unusual problem. Confidential Sources, supra note 23. The same complaint—opinions being drafted by law clerks—can be made about United States courts where judges have several law clerks. Certainly, many United States opinions are, in fact, drafted by staff. But there are two significant
ing judges from many non-English or non-French speaking countries, the involvement of the legal staff in drafting opinions seems to be an inevitable consequence of the structure of the Strasbourg Court.

B. Remedies Available from the Court

1. The Primary Remedy Is Declaratory Relief

In terms of remedies, the Court is essentially restricted, with two limited exceptions, to declaratory judgments. The Court can only declare that a member state either has or has not breached the Convention in carrying out, or failing to carry out, the activity specified by the application. The Court has no jurisdiction to grant equitable decrees such as injunctions or similar remedial devices, and it has no direct power to enforce its judgments—by contempt proceedings or otherwise. Thus, the Court does not possess the many equitable powers available to courts in the United States (or the United Kingdom for that matter) such as those used, for example, in cases involving school desegregation and prison reform.

As noted earlier, it is up to the Committee of Ministers of the Council of Europe to obtain compliance with any judgment of the Court finding a member state has transgressed the Convention. To date, member states have honored the judgments of the Court, although in some instances with considerable delay and sometimes very narrowly. The only truly coercive sanction the Council of Europe has is threat of expulsion of the recalcitrant state. There are only two limited exceptions beyond the declaratory power. First, in some circumstances the Court can request that the status quo be maintained pending the decision by the Court. Second, the Court can grant "just satisfaction"—monetary awards in somewhat limited cir-

differences. First, the law clerk who drafts an opinion works personally for the judge under the judge's personal supervision (and, in terms of longterm staff—common in many courts, though not in the United States Supreme Court—may be almost an alter ego of the judge), and second, the United States judge is equally fluent in English and, thus, is in a better position to spot nuances which might subtly alter or modify the intended meaning.

182. Convention, supra note 12, art. 46 (indicating that the judgment shall be transmitted to the Committee of Ministers, which shall supervise its execution, but failing to indicate in this article or any other article of the Convention what happens to the judgment after this—thus implying declaratory judgment as the Court's primary remedy).

183. Id. art. 46.


185. See supra note 51 and accompanying text.

186. Convention, supra note 12, art. 34; ECHR Rules, supra note 40, R. 39.
cumstances for wrongs suffered by applicants. These are further described in the following two sections.

2. The Court Can “Request” that Status Quo Be Maintained

The first remedy beyond declaratory relief is that the Court may "request . . . interim measure[s] which it considers should be adopted" whenever needed for "the proper conduct of the proceedings before it." In essence, this is akin to a very limited temporary injunction requiring that a member state maintain the status quo in a particular situation pending adjudication by the Court. The website of the Court, in a section providing information to applicants, states: "In exceptional circumstances, the Court may . . . grant interim measures. As a matter of practice it only does so where there is a serious risk of physical harm to the applicant." This limited power is derived from Article 34 of the Convention providing for the right of "any person . . . claiming to be a victim of a violation" of the Convention by a member state to file an application for relief. The final sentence of Article 34 provides that member states shall "undertake not to hinder in any way the effective exercise of this right."

Pursuant to this Article, the Court has adopted Rule 39 providing generally for "interim measures." A Chamber (or President of its Section) may, on request of a party or its own motion, "indicate to the parties any interim measure which it considers should be adopted in the interests of the parties or of the proper conduct of the proceedings before it." This power was exercised in the recent case of Mamatkulov v. Turkey. In Mamatkulov, Uzbekistan (which is not a signatory to the Convention) sought to extradite Mamatkulov who, in turn, filed an application with the Court of Human Rights claiming

187. Convention, supra note 12, art. 34; ECHR Rules, supra note 40, R. 41.
188. ECHR Rules, supra note 40, R. 39.
189. European Court of Human Rights, Frequently Asked Questions, What Is the Court of Human Rights Not Able to Do for Me?, http://www.echr.coe.int (follow the "Applicants" hyperlink; then follow the "What is the Court of Human Rights not able to do for me?" hyperlink).
190. Convention, supra note 12, art. 34.
191. Id.
192. ECHR Rules, supra note 40, R. 39.
193. ECHR Rules, supra note 40, R. 39(1).
that the extradition would be contrary to Article 3.  The Court issued a "request" to Turkey pursuant to Rule 39 to keep Mamatkulov in Turkey until the Court had resolved his application.  Nevertheless, Turkey honored the extradition request without waiting until the Court had adjudicated the matter.  Uzbekistan then tried Mamatkulov for murder and sentenced him to twenty years in prison.

In the Mamatkulov case, the principal remedy was a determination that Mamatkulov had been improperly extradited because the "request" of the Court had not been honored and thus the extradition was in violation of Article 34.  But this determination did not free Mamatkulov from the Uzbekistan prison.  The net result is that the Court may request an interim measure, but it has no direct way of enforcing it either at the time of the request or in the event of a breach. The presumption is that Turkey and other member states will honor the precedent set out in Mamatkulov in future instances where an extradition is challenged as being contrary to the Convention (or any other action where the status quo needs to be maintained pending a determination by the Court). Rule 39 does permit the President of a Section to issue a request alone, but whether this power can be utilized effectively in instances where the member state is about to act is not known.

3. The Court Can Make Monetary "Just Satisfaction" Awards

The only permanent remedy other than declaratory relief available to the Strasbourg Court is the award, under Article 41, of monetary damages.  However, nothing in the Convention or the Rules of the Court spell out what is involved in determining whether to make a "just satisfaction" award, and if so, in what amount.

Perhaps the most common award is for attorney's fees for a successful applicant (though the amount of this award has often been

196.  Id. at 501.
197.  Id.
198.  Id. at 502.
199.  Id. at 530.
200.  Id. at 530-31.  The court awarded Mamatkulov €5,000 in "nonpecuniary" damages.  Id. at 531.
201.  ECHR RULES, supra note 40, R. 39.
202.  Convention, supra note 12, art. 41 ("If the Court finds that there has been a violation of the Convention or the protocols thereto, and if the internal law of the High Contracting Party [i.e., member state] concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.").
relatively small). Further, in some instances, the result of the litigation in a member state has involved the applicant having paid fines to the state or damages to another person, which, subsequently, the Court finds were imposed in contravention of the Convention. An award of “just satisfaction” in the amount the now successful applicant had paid out under the previous judgment is easily measured and certainly justified. Somewhat more amorphous are situations where the applicant has been damaged by the state action or inaction, but to an uncertain degree, such as the loss of probable wages or other monetary benefits. At least on some occasions the judgment of the Court has found that such a loss has occurred and has granted a “just satisfaction” award.

Many of the Convention violations found in cases before the Court do not involve direct monetary loss and sometimes involve no measurable pecuniary loss at all. These often involve matters such as false arrest, torture, prison condition violations, loss of civil or political rights, loss of family rights, governmental invasion of privacy, environmental harm caused or condoned by a government, and many other similar matters. In these situations the Court has reached mixed results. Sometimes the Court will simply state that the award of the declaratory judgment itself constitutes “just satisfaction” and that no


206. See, e.g., Former King of Greece v. Greece, App. No. 25701/94, 33 Eur. H.R. Rep. 21 (2000) (awarding €12,000,000 for violation of Article 1 of Protocol 1 for property that had been expropriated from the King after his abdication); Z v. United Kingdom, App. No. 29392/95, 34 Eur. H.R. Rep. 3, 149 (2001) (awarding four children £820,000 to compensate for severe child abuse that occurred because of the dereliction of a government agency); see also Case of the Former King of Greece v. Greece, App. No. 25701/94 (Eur. Ct. H. R., Sept. 25, 2001), available at HUDOC search, supra note 2 (searching for App. No. 25701/94 and selecting the “Judgment (Just Satisfaction)” document); Smith & Grady v. United Kingdom, App. Nos. 33985/96 and 33986/96, 31 Eur. H.R. Rep. 24, 620 (2000) (finding that the discharge of two members of the United Kingdom armed forces because they were discovered to be homosexual was contrary to Article 8, and awarding one £59,000 and the other £40,000 for lost wages and lost retirement benefits, and awarding each attorney’s fees and approximately £20,000 for non pecuniary losses). But see Ceylan v. Turkey, 30 Eur. H.R. Rep. 73 (1999) (discussing that a pecuniary award is not always made for damages); discussion supra note 203.
additional pecuniary award is required. For example, as to cases of improper detention by police or improper refusal to grant bail (violations of Article 5 of the Treaty) the Court has stated that it "has [in the past] made relatively small awards in respect of non-pecuniary damage. However, in more recent cases, it has declined to make any such award." Sometimes the Court will award a small sum of money on an equitable basis. In Ceylan v. Turkey, the Court gave approximately $8000 to a labor union leader "on an equitable basis" for twenty months of wrongful imprisonment. Ceylan had been imprisoned for publishing a statement about Kurdish rights—a statement the Court had found was protected by Article 10. In Keegan v. Ireland, a child was taken away from her father without a hearing and was given by adoption to another family. The Strasbourg Court decided that the denial of the father's right to be heard was a violation of Article 8 of the Convention, but by the time it decided the matter (six years after the adoption occurred) it was not in the interests of the child to reverse the adoption, and so it awarded the father approx-

207. See, e.g., United Communist Party of Turkey v. Turkey, App. No. 19392/92, 26 Eur. H.R. Rep. 121 (1998) (holding that a ban of a political party and disenfranchisement of its leaders—which lasted seven years before the Strasbourg Court ruled—was in violation of Article 11, but the "judgment [finding the ban contrary to the Convention] constitutes in itself sufficient just satisfaction" for the wrong committed).


209. See Fressoz & Roire v. France, App. No. 29183/95, 31 Eur. H.R. Rep. 2, 62 (1999) (awarding the equivalent of approximately $10,000 (€60,000) on an equitable basis to journalists who were improperly prosecuted for publishing in a newspaper the high salary of a company executive—which was a matter of public record—during a labor dispute involving the executive's employer); see also Reid, PRACTITIONER'S GUIDE, supra note 126, at 548–86 (noting example cases where monetary "just satisfaction" has been awarded, and noting a number of cases holding the judgment itself constituted sufficient "just satisfaction"); see generally David Scorey & Tim Eicke, HUMAN RIGHTS DAMAGES, PRINCIPLES AND PRACTICE (2001) (summarizing all damage cases in the Strasbourg Court).


211. Awards have traditionally been made in the currency of the member state being sued, although recently the Court has used the euro as the relevant currency. I have translated the amounts awarded (other than those awarded in euros or British pounds) into the approximate United States dollar equivalent.

212. Ceylan, 30 Eur. H.R. Rep. at 92. The Grand Chamber awarded Ceylan attorneys fees as well. Id. at 93.

213. Id. at 76, 86–91.


approximately $15,000 for the "trauma, anxiety, and feelings of injustice that the applicant must have experienced" in losing his daughter without a hearing.\textsuperscript{216}

The Court has never identified which factors are or should be considered in making a non-pecuniary equitable award. Judging from the small amounts involved in some cases, it would appear that the awards are merely symbolic. An $8000 award for twenty months of wrongful imprisonment seems pitifully small (at least to someone familiar with civil rights cases in the United States where six-figure damages are not uncommon), and even $15,000 for permanent loss of custody and companionship of one’s own child because of the wrongful act of the Irish government seems to be little more than tokenism (again, at least as judged by United States standards). But, in other cases, the amounts granted for non-pecuniary loss have been somewhat more substantial. In Smith and Grady v. United Kingdom,\textsuperscript{217} the Court awarded the applicants £19,000 each in addition to substantial pecuniary damages.\textsuperscript{218}

The evidentiary rules governing the determination of the appropriate amounts of "just satisfaction" are unclear (or maybe even non-existent). In Ceylan,\textsuperscript{219} the applicant made a claim for wages lost during his twenty month imprisonment and, according to the Court, submitted a “certificate” by his employer as to what his earnings were both before and after the imprisonment.\textsuperscript{220} Turkey argued that Ceylan had “not substantiated his alleged earnings.”\textsuperscript{221} The Court’s resolution was merely: “the loss which the applicant claims to have suffered has not been sufficiently proven” without further explanation.\textsuperscript{222} As discussed earlier, the Court has no rules of evidence similar

\textsuperscript{216} Id. at 366.
\textsuperscript{218} Id. at 635; see supra note 206 (detailing pecuniary damages awarded to Smith and Grady).
\textsuperscript{220} Id. at 92.
\textsuperscript{221} Id.
\textsuperscript{222} Id.; see also Assanidze v. Georgia, App. No. 71503/01, 39 Eur. H.R. Rep. 32, 660–61, 701 (2004) (awarding the applicant, mayor of a city who was incarcerated since 1991 despite having had his conviction reversed and a pardon granted, €150,000 in damages for wrongful imprisonment from January 2001 to April 2004 without specific indication on how the Grand Chamber arrived at the award amount). The Assanidze case is notable because the applicant was imprisoned by a breakaway section of Georgia, and the central government had no physical ability to secure his release. Nevertheless, the Court held that Georgia had to pay damages. Id. at 701. The beginning point for damages of January 2001 was chosen because that was the date Assanidze was acquitted on appeal of the charges that had led to his incarceration. Id. at 698.
to those known in the United States (or in Britain and Ireland, for that matter). There are no standards as to what kinds of evidence—such as some kinds of hearsay—are admissible or inadmissible. There are no provisions for cross-examination or impeachment of witnesses. Given the sparseness of the provisions on evidence in Rule A1, the cryptic holding in *Ceylan* gives precious little guidance as to what would constitute sufficient proof in future cases of this kind, but *Ceylan* does offer that some “examination” may be possible.

Since only a member state can be a defendant in a case before the Court, only damages that can be attributed to the state can be awarded as just satisfaction. Hence, damages occasioned by a private party cannot be recompensed by the Court. Furthermore, the Court merely finds that an award of “just satisfaction” is required, but it has no direct enforcement power. It is up to the member state to comply with the judgment, and the only ultimate sanction for failure to comply is the possibility of expulsion from the Council of Europe.

C. Comparisons and Contrasts with the United States Supreme Court

In some respects the Strasbourg Court occupies a similar role towards its member countries as the Supreme Court does to the state courts of the United States. The Strasbourg Court does not interpret the laws of its member states but only determines whether there are breaches of the Convention. Similarly, the Supreme Court does not interpret state law but only whether a state court decision contravenes

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223. See supra notes 131–37 and accompanying text. The only “evidentiary” rule of the ECHR Rules is Rule A1, permitting a Chamber to “obtain any evidence [that clarifies] the facts of the case.” ECHR Rules, supra note 40, R. A1. The Rule further permits a Chamber to receive documentary evidence and to “hear . . . a witness or expert” whose evidence “seems likely to assist it in carrying out its tasks.” Id. But, other than a requirement that statements can be required to be under oath, id. R. A6, and are subject to examination, id. R. A7, there are no standards set out upon which to judge “evidence” received by it.


225. Convention, supra note 12, arts. 34, 41.

226. Id.

227. See supra note 202; see also OVEY & WHITE, supra note 25, at 423–25 (discussing the enforcement of just satisfaction awards).

228. See supra note 202; see also OVEY & WHITE, supra note 25, at 423–25 (discussing the enforcement of just satisfaction awards).

229. Convention, supra note 12, art. 32.
the Constitution.\textsuperscript{230} Also, much of the litigation in the Strasbourg Court has counterparts in substance to litigation carried out in federal courts in the United States. The most litigated provision of the European Convention is Article 6\textsuperscript{231} with a substantial number of cases arising under Articles 3, 5, and 7.\textsuperscript{232} Decisions on cases arising under these four articles closely resemble the habeas corpus decisions of United States courts. Further, pursuant to Article 41, monetary damages are often sought in cases arising under these articles of the Convention.\textsuperscript{233} The bases for awarding damages are somewhat similar to the bases for awarding damages in civil rights cases in the United States pursuant to 28 U.S.C. § 1983.\textsuperscript{234}

\textsuperscript{230} 28 U.S.C. § 1257 (2000). The Supreme Court, however, has a very substantial caseload interpreting federal law, something which has no equivalent in the Strasbourg Court. In addition, many federal statutes may have an effect of modifying or otherwise affecting state laws, and thus the issues on review of a state court decision may include application or interpretation of federal laws (which control because of the Supremacy Clause of the Constitution) as well as direct application of the Constitution itself. See ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 44-46 (2d ed. 2002).

\textsuperscript{231} See, e.g., European Court of Human Rights, Subject Matter of Judgments Delivered by the Court in 2004, http://www.echr.coe.int/ECHR (follow the “Case-Law” hyperlink, then follow the “Subject matter of judgments” hyperlink, then follow the “Subject matter of judgments before the Court in 2004” hyperlink) [hereinafter Subject Matter, 2004] (The Strasbourg Court has no statistical summary showing the relative frequency of cases invoking the protection of specific articles of the Convention. The list of decided cases refers to the article or articles of the Convention that are the basis for the decisions rendered and only by scanning the list for each year can one determine how often various articles are involved in cases. Even a cursory scan of the list for 2004 shows that the overwhelming number of cases decided involve Article 6.); see also SCOREY & EICKE, supra note 209, at A3-1 (indicating that many cases arise under Article 5 and 6). Of course, the decided cases do not necessarily represent the number of cases filed to enforce various articles and since a vast majority of cases are rejected as “inadmissible” without opinion of any sort, there is no information on the article or articles invoked by the unsuccessful applicants. Even so, it is not hard to imagine that Article 6 is a prominent basis for even unsuccessful applications.


\textsuperscript{233} Convention, supra note 12, art. 41 (allowing a “just satisfaction” award).

\textsuperscript{234} 42 U.S.C. § 1983 (2000) provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section,
The comparison should not be carried too far. The United States Supreme Court has a vast structure of lower federal courts below it that initially review whether state courts have properly applied the Constitution. Most habeas corpus cases arising from state court proceedings are determined at the United States district court level. Some are subject to further review in courts of appeal, but very few are actually decided by the Supreme Court. The same is true for civil rights cases filed under 28 U.S.C. § 1983. When there are disputes about relevant facts, the district courts in the United States have all of the resources of a trial court for factual determination. In contrast, the Strasbourg Court has to decide all such cases itself, since it has no lower courts within its purview. Further, the Court’s ability to decide contested facts is extremely limited at best. This concentration of decision making in the Strasbourg Court takes place in a jurisdiction (i.e., the member states of the Convention) in which the aggregate population is almost three times larger than that of the United States.

any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Id.


236. It may well be that a substantial number of petitions for a writ of certiorari filed with the Supreme Court involve habeas corpus, but few are actually granted and decided by a plenary opinion of the Court.

237. 42 U.S.C. § 1983 (providing that civil rights cases under § 1983 can be filed in state court, but most are filed in federal district court).

238. This includes the availability of pre-trial discovery, subpoena of relevant witnesses, examination and cross-examination of witnesses, a highly developed set of rules of evidence, and, where appropriate, availability of a jury to decide pertinent contested facts.

239. Convention, supra note 12, art. 19. The Strasbourg Court is divided into four Sections and subdivided into three Chambers, and decision making takes place in a Chamber of a Section. Court Composition, supra note 71. However, the President of each Section is a member of each Chamber, and all other members of the Section are members of two Chambers. Id. Finally, whenever a Chamber deliberates, all members of the Section are present, though only those assigned to the Chamber may vote. See Working Methods Report, supra note 97, at 10. So, in effect, assuming the President of a Section is thoroughly involved in each deliberation, there are the equivalent of four “courts” (i.e., decision making bodies) compared to only one United States Supreme Court. In addition, the courts of the country from which the “appeal” arises have presumably reviewed the matter, but that is little different than in the United States, at least as far as habeas corpus is concerned, since, generally, the federal court habeas corpus jurisdiction cannot be invoked until a state court has completed its review. (Of course, there are also habeas corpus petitions filed on behalf of persons being held by federal officials which are reviewed in the first instance by federal district courts.).

240. See supra notes 132–37 and accompanying text.
States and includes some very troubled areas—where Convention violations are more likely to occur.

A further contrast is that the Supreme Court has many procedures available to remedy violations of the Constitution. Damages can be awarded, declaratory relief can be granted, injunctions (preliminary and permanent) may be issued, persons under custody may be ordered released, masters (or other supervisors of decrees) can be appointed, and lower court judgments can be reversed. Anyone violating the orders of a United States court can be arrested and prosecuted for contempt. In contrast, the Strasbourg Court is very limited in its remedies. It can award declaratory relief and monetary damages in some instances and has no direct enforcement mechanisms.

A final contrast is that the Supreme Court, with very minor exceptions, has discretion to deny review of a case tendered it and exercises this discretion to reject almost ninety-eight percent of cases where parties seek review. Decisions to grant review are not based simply on correction of errors made by a lower court, but are primarily made for the purpose of deciding important issues affecting the legal system as a whole, so as to give guidance to lower courts on the administration of justice.

241. 2005 World Almanac, supra note 7, at 623, 808–41 (noting the population of the United States in the 2000 census to be 281 million, and the population of Europe's member states is approximately 803 million).
242. Just to mention a few, the Kurdish areas of Turkey, Chechnya, and Kosovo.
243. The lower courts under the Supreme Court similarly have many procedures available to remedy violations of the Constitution.
244. See generally Fleming James, Jr. et al., Civil Procedure 28–40 (5th ed. 2001).
245. Id.
246. See supra Parts II.B.1, II.B.3. The Court also has the power under Rule 39 to "request" that a member state maintain the status quo. See ECHR Rules, supra note 40, R. 39; supra Part I. However, this is more limited than injunctive power of a court in the United States inasmuch as it is limited to a request directed at a member state (not private parties), and it is only for the purpose of maintaining the status quo and presumably cannot require a member state to do any particular act beyond maintaining the status quo.
248. Charles Alan Wright, Law of Federal Courts 798 (West Publishing Co. 5th ed. 1994) (1963). Obviously, judges of any court want to do "justice" and decide cases presented to them "fairly." But, in the United States system of law, the supervisory role over trial courts is performed mainly by the United States Courts of Appeal in federal cases and by the appellate courts of the various states. But there are simply not enough hours in the year for the United States Supreme Court to consider whether there is error or "injustice" in all of the cases presented to them, and to even attempt to do so would mean virtual
obligated to accept and decide any case presented to it that credibly alleges a violation of the Convention. This has led to an explosion in the number of cases considered by the Court. Further, this explosion in case numbers is exacerbated by the inability of the Court to decide cases on a summary basis and by the lack of a mechanism to remand to a national court for reconsideration based on Strasbourg court prior decisions.

Nevertheless, the use of the word "presumably" in the previous paragraph is done advisedly. Though there is nothing in the Convention or the Rules of the Court granting discretion to ignore what, prima facie, appear to be credible claims, some observers of the Court suspect that a substantial amount of discretion is exercised in rejecting cases. The ratio between the number of applications for relief filed with the Court and the number of cases actually taken gives some credence to this suspicion. For example, in 2004 there were decisions on admissibility on over 21,000 applications, but only 830 cases were deemed worthy of further consideration. While undoubtedly a abandonment of its much more important role of giving guidance to the entire judicial system on important issues.

249. See infra notes 345-50 and accompanying text.

250. For example, the Strasbourg Court has found that the Italian court system is in violation of Article Six because of extensive delays in getting cases to trial and on appeal. See, e.g., Mowbray Text, supra note 38, at 307; Marie-Aude Beernaert, Protocol 14 and New Strasbourg Procedures: Towards Greater Efficiency? And at What Price, 2004 EUR. HUM. RTS. L. REV. 544, 545 (2004) [hereinafter Beernaert, Protocol 14]. The Strasbourg Court now receives hundreds of applications from litigants aggrieved by the delays (not only from Italy, but from several other countries as well). See Mowbray Text, supra note 38, at 307; Beernaert, Protocol 14, supra. The Court has to decide these cases; it cannot simply remand to the Italian Courts for reconsideration based on clear precedent from the Strasbourg Court. Further, each of these hundreds of cases is decided with a full written opinion laying out the facts, the pertinent law and the conclusions of the Court. The opinions are probably similar, with the main changes being the names and basic facts, but it must still be a time consuming process (at least for the Registrar's staff) compared to a summary reversal without opinion.

251. Confidential Sources, supra note 23. The Evaluation Group set up by the Council of Europe to study ways of coping with the caseload of the Court suggested some discretionary authority to reject cases raising issues of "minor or secondary importance." COUNCIL OF EUR., REPORT OF THE EVALUATION GROUP TO THE COMMITTEE OF MINISTERS ON THE EUROPEAN COURT OF HUMAN RIGHTS (EG-Court(2001)1) para. 92 (2001), available at http://www.coe.int/T/CM/home_en.asp (follow the "Advanced Search" hyperlink; then search for "EG-Court(2001)1" in the keyword field; then select "EG-Court(2001)1") [hereinafter EVALUATION GROUP REPORT]. Perhaps the suggestion was made to regularize current practice.

252. See SURVEY OF ACTIVITIES 2004, supra note 59, at 35. This ratio of rejection is getting higher every year. In 2001 only ninety-two percent (8989/9728) of the applications were rejected, and in 1997, the last year of the former Commission and Court, only eighty-one percent (3073/3777) of the applications were rejected. Id.
fair number of applications are unfounded, it seems surprising that close to ninety-seven percent of them are unable to even allege a prima facie credible violation. But without further information, questions about the Court’s exercise of discretion in choosing which cases to hear are merely a matter of conjecture.

III. Some Jurisprudential Principles of the Strasbourg Court

A. The Requirement of a Uniform Application of the Convention

It is a basic principle of the Convention that the standards in the Convention are to be applied with equal force to each member state. The Convention refers to this principle somewhat indirectly in its Preamble, noting that its goals are “best maintained” by a “common understanding and observance of the human rights upon which they depend.” The Court has never referred directly to this principle in any majority opinion. A few dissents, however, have complained that a majority opinion has ignored this principle. In the Report of the

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253. The vast majority of applications filed are rejected as being “manifestly ill-founded” (the term used when a case is rejected by a Committee). Convention, supra note 12, art. 35(3); Wildhaber, Oslo Speech, supra note 154, at 6 (noting that manifestly inadmissible cases constitute ninety percent of applications). It may be that some of the applications are made by lay individuals who have no knowledge of the scope of the Court’s jurisdiction, but it would seem probable that many of the applications are made with the assistance of a lawyer who is acquainted with the relevant provisions of the Convention and would not file an application that had little or no chance of succeeding. So, it is at least surprising that the ratio of summary rejection is so high. Further, I have been told by lawyers familiar with the Court that they have seen applications that did appear to present serious issues but which were, nevertheless, rejected as “manifestly unfounded.” While rejected applications are, in theory, available for public inspection, the procedure to see a file is tedious. A file has to be specifically requested in writing, and a time must be set up to examine it under the supervision of a member of the Registrar’s staff and general requests for multiple files cannot be made. See European Court of Human Rights, Press, http://www.echr.coe.int/ (follow “Press” hyperlink; then follow “Rules on access to case files” hyperlink). Further, applications may be written in any one of the thirty-seven languages used in the member states, and if rejected at an early stage, are not translated. Working Methods Report, supra note 97, at 11. So, as a practical matter it is impossible to determine whether this occurs regularly or are isolated events—or are simply mistakes of the observers as to whether the rejected applications are, in fact, meritorious. Thus, at best it is only a suspicion that there currently exists at least some exercise of discretion in deciding whether the Court will consider a case. See also Ovev & White, supra note 25, at 404 (expressing concern that summary rejection of applications by Committees without explanation will “no longer build up an easily consulted body of decisions clarifying the grounds of inadmissibility”).

254. Convention, supra note 12, pmbl.

Council of Europe's Evaluation Group ("Evaluation Group") on the problem of the growing backlog of cases,\textsuperscript{256} the Preface refers to the Court as "the nerve centre of a system of human rights protection [that] sets common legal standards [for the member] States."\textsuperscript{257} For this reason, the Evaluation Group Report rejected suggestions to create "regional tribunals" for the Court because this would carry "a risk of diverging standards and case-law, whereas the essence of the Convention system is that uniform and coherent standards \ldots should obtain throughout the [member] States."\textsuperscript{258} Despite the paucity of reference in cases to this point, all observers of the Court agree with this basic premise.\textsuperscript{259} This principle, while laudable, has the potential of creating severe logistical problems for the Court in the future. It means, for example, that prison conditions have to meet a certain standard to avoid being in violation of Article 3 in England, Germany, and France and meet the same standard to avoid being a violation in Russia, Armenia, and Albania. Why this is a problem of considerable magnitude will be discussed later in Part IV.B.


The Strasbourg Court does not sit at the apex of an integrated court structure. Rather, it is a court set up by a treaty among participating countries, and it operates independently of the courts of any of the member states.\textsuperscript{260} It exists solely to interpret and apply the provisions of the Convention,\textsuperscript{261} and there is no national body of law upon which it is competent to rule. The participating countries do not share

\begin{itemize}
\item \textsuperscript{256} Evaluation Group Report, supra note 251.
\item \textsuperscript{257} Id. at Preface.
\item \textsuperscript{258} Id. para. 88.
\item \textsuperscript{259} Confidential Sources, supra note 23.
\item \textsuperscript{260} Convention, supra note 12, art. 19; see also Ovey & White, supra note 25, at 440.
\item \textsuperscript{261} Convention, supra note 12, art. 19.
\end{itemize}
a common source of law and have major cultural differences. A substantial number are, at best, emerging democracies. The problems of administering a single system of fundamental rights in such a context can be formidable. Thus, there are legitimate issues as to exactly what the nature of the review of member state decisions should be.

In the United States, the rules are clear on the standards of review applicable in an appeal of a lower court decision. On pure issues of law, United States appellate courts generally review lower court determinations on a de novo basis—that is, they decide the law issues without reference to the lower court determination. However, on factual determinations or on issues where the lower court has discretion, the review is said to be on the basis of whether the lower court had abused its discretion. When issues of whether statutory laws infringe on protected classes of people or protected rights are presented to American courts, the courts will subject such laws to "strict scrutiny" and look for a "compelling state interest" in determining whether such a law is valid. A myriad of appellate court opinions in the United States refer to these terms in describing the nature of the review being undertaken.

In contrast, a search for similar terms in Strasbourg Court decisions yields no comparable use of these terms. The terms "abuse of discretion" or "de novo" have never been used to describe the Court's

262. United Kingdom and Ireland, alone among member states, have a common law tradition. Most of the other member states have a system of law derived from the Napoleonic Codes, though with major differences. The range of cultures include socially liberal Scandinavia; socially conservative Spain; Muslim societies in Albania, Turkey, and Azerbaijan; and fundamentalist Muslim parts of Chechnya (which is part of Russia, and thus within the purview of the Strasbourg Court). Though, in form, any member of the Council of Europe (the prerequisite to being a member state of the Convention) must be a democracy, the reality in some countries (or in some areas of some countries) is tenuous. See infra notes 373–79 and accompanying text.

263. Elder v. Holloway, 510 U.S. 510, 516 (1994) (indicating that an issue that "presents a question of law, not one of 'legal facts' . . . must be resolved de novo on appeal").

264. See CHEMERINSKY, supra note 230, at 529.

265. Id. This paragraph does not purport to describe in detail the standards of review in the United States. There are many "ifs, ands, and buts" on the details of review. The only point to be made by the paragraph is that there is a reasonably clear general structure concerning the standards of review in the United States.

266. A Westlaw search of these terms in the database of appellate decisions yields thousands of cases where one or more of these terms are used. The term "abuse of discretion" appears in over 10,000 federal appellate cases since 2001; note that Westlaw will only display up 10,000 cases with the selected key phrases at a time. Westlaw search, CTA database, Sept. 24, 2005 (searching for phrase "abuse of discretion").
scope of review. The Court has twice used the phrase "strict scrutiny" in its majority opinions to describe its scope of review, but not in connection with the review of a statute or a law of a member state, and only in connection with how a particular article of the Convention is to be interpreted. Thus, in these two instances the term has not been defined or used in a manner similar to, for example, how the phrase is used in United States Supreme Court jurisprudence.

The terminology of strict scrutiny of statutes is not unknown to members of the Court. In a partly dissenting opinion to Chassagnou v. France, in which the validity of a French statute was being challenged, Judge Zupancic observed:

> It should also be understood, however, that the mild rational relationship discrimination test applies to social and economic issues [such as those involved in Chassagnou]. If this was a suspect classification in terms of race, alienage or national origin, etc., the strict scrutiny test would apply, i.e. the Convention would be deemed to be violated unless there were a compelling state interest and the law in question would be suitably tailored to serve it.

This language is, of course, very similar to the test used by the United States Supreme Court for protection of fundamental rights or suspect

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268. Pretty v. United Kingdom, App. No. 2346/02, 35 Eur. H.R. Rep. 1, 28 (2002) (using the term “strict scrutiny” to describe the review undertaken when a violation of Article 2 (Right to Life) was charged in a case involving a denial of the right to assisted suicide by a terminally ill elderly person and citing McCann v. United Kingdom, App. No. 18984/91, 21 Eur. H.R. Rep. 97, 151, 160 (1995), which held that Article 2 should be “strictly construed” and concluded that the state committed no violation of Article 2 in refusing to allow an assisted suicide); Nilsen & Johnson v. Norway, App. No. 23188/93, 30 Eur. H.R. Rep. 878, 879 (1999) (reviewing an Article 10 (Freedom of Expression) case libel award involving allegedly false allegations in connection with police misconduct). The relevant language from Nilsen being: “restrictions placed on the right to impart and receive information on arguable allegations of police misconduct call for a strict scrutiny on the part of the Court.” Id.

269. As noted above, this kind of review is applied in the United States to review of legislative (or administrative) determinations. See supra note 265.

270. App. Nos. 25088/94, 28331/95, and 28443/95, 29 Eur. H.R. Rep. 615 (1999). Chassagnou dealt with whether a statute could compel farm owners to join hunting clubs that would result in hunts being conducted on their lands. Id. at 615–16. The majority held that this was a violation of Article 11 (The Right of Association). Id. at 622.

271. Id. at 699 (Zupancic, J., concurring in part, dissenting in part).
classifications. Judge Zupancic cites no Strasbourg Court cases supporting this approach. Rather, he observes that "[a]dmittedly, these are tests of equal protection typically applicable in constitutional litigation before constitutional courts," and thus he arguably concedes that the Strasbourg Court has not adopted such an approach.

Of course, there is not a priori reason why the Strasbourg Court should adopt either the terminology or the approach of United States Courts on standards for judicial review, and it does have other mechanisms that have some effect on its scope of review. These are discussed in the next two subsections.274

1. The Doctrine of "Proportionality"

"Proportionality" appears to be the main device used by the Court for governing the degree of scrutiny applied. It is often invoked to determine whether the action of a member state in curtailing a right protected by the Convention is reasonable under the circumstances. The Convention, with few exceptions, is designed and interpreted to provide that the rights contained in it are subject to constraints based on the interests of the state. This is most apparent in the structure of Articles 9 through 11, each of which has two clauses. Taking Article 10 as an example, the first clause provides for freedom of expression. The second clause initially further conditions the power of the state to regulate speech by providing that any limits must be "restrictions or penalties as are prescribed by law and are necessary in a democratic society." But it further provides twelve reasons why restrictions on speech can be imposed.278

274. The alternatives to be discussed do not provide much clarity.
275. Convention, supra note 12, art. 10(1).
276. Id. art. 10(2). The text of the second clause of Article 10 is set out supra note 34. Articles 8, 9, 11, and 12 are similar in structure—both having a right and a restriction clause. Even though the structure of the other articles providing for rights (Articles 2 through 7) is different, the Court appears to use a somewhat similar approach in deciding whether specific actions are, in fact, violations of the Convention.
277. Id.
278. Id. The twelve reasons are:

[T]he interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

Id.
The opinions of the Court often parse the text of an article in deciding whether a violation of that article of the Convention has occurred. Using Article 10 again as an example, if a violation of the Article is alleged, the Court first determines whether the action of the member state does, in fact, limit freedom of expression. Then the Court determines whether there is a law that restricts or prohibits the expression. If there is such a law, the Court must evaluate whether such a limitation is "necessary in a democratic society" and in this latter respect, whether one (or more) of the twelve restrictions justify the limitation.

The ultimate test used by the Court in deciding whether the restrictions imposed by the law of the domestic state are "necessary in a democratic society," and whether they are justified by one or more of the twelve specified reasons is dependent upon whether the limitations imposed are proportionate to the harm that is alleged to have occurred. It is fair to say that the "proportionality" test is, at a minimum, somewhat stricter than the "rational relationship" test used by the United States Supreme Court, but it rarely, if ever, reaches the level of "strict scrutiny" as defined in United States jurisprudence. When "proportionality" is analyzed in specific cases, however, in some instances it is near the "rational relationship" test, and in others it is not too far from the United States "strict scrutiny" analysis.

It is hard, perhaps impossible, to find consistency in the decisions that would help define the "true" level of scrutiny used by the Court in reviewing the decisions of member states. The Court did protect the right of a journalist to criticize the Austrian Chancellor for "protecting former members of the Nazi SS" but found that trenchant


280. Id. at 225–26 (discussing next whether the restriction on speech was "prescribed by law").

281. Id. at 226–29 (discussing finally the "legitimacy of the aim pursued" and whether the interference was "necessary in a democratic society"). The Court's opinions are often written in a very mechanistic fashion, devoting a paragraph (or more) to each of the analytical steps outlined above. See, e.g., Muller v. Switzerland, App. No. 10737/84, 13 Eur. H.R. Rep. 212 (1988); Lingens v. Austria, App. No. 9815/82, 8 Eur. H.R. Rep. 407 (1986); ECHR RULES, supra note 40, R. 74 (setting out a detailed list of how an opinion shall be structured).


283. Lingens, 8 Eur. H.R. Rep. at 407. The Lingens judgment is one in which the Court appears to use a fairly high standard of review—nearer a "strict scrutiny" approach. Id. at 418–21.
criticism of a very pro-prosecution Austrian judge could be the basis of a libel action.\textsuperscript{284} The Court found that a painting by a well established artist containing some representations of bestiality and shown in a private exhibition, could be suppressed as obscene.\textsuperscript{285} The Court also found that a film that was distinctly “anti-Christian” shown by a private club could be confiscated because it would offend the sensibilities of the residents of the region in question.\textsuperscript{286} Finally, the Court found that England could suppress a short film, titled “VISIONS OF ECSTASY,” which depicted the visions of St. Teresa of Avila as sexually motivated.\textsuperscript{287}

The Court has often hewed to a stricter standard in dealing with claims of a violation of Article 8, the right to privacy.\textsuperscript{288} On the question of laws criminalizing homosexuality, the Court has rejected any invocation of “margin of appreciation”\textsuperscript{289} and any claim that “national security” or “protection of health and morals” would be the basis for maintaining such laws.\textsuperscript{290}

\textsuperscript{284} Prager & Oberschlick v. Austria, App. No. 15974/90, 21 Eur. H.R. Rep. 1, 21 (1995). The Prager judgment is one where the Court appears to use a fairly low standard of review— nearer to a “rational relationship” approach. \textit{Id.} The judgment drew a strongly worded dissent from four judges that the majority was far too lenient in allowing the Austrian judgment to stand. \textit{Id.} at 22–33 (Pettiti, J., Martens, J., joined by Pekkanen, J., Makarczyk J., dissenting). The dissent argued that “the Court’s supervisions [of freedoms of expression] must be \textit{strict}, which means \textit{inter alia} that the necessity for restricting them must be \textit{convincingly} established.” \textit{Id.} at 23 (Martens, J., dissenting).

\textsuperscript{285} Muller, 13 Eur. H.R. Rep. at 229.

\textsuperscript{286} Otto-Preminger Inst. v. Austria, App. No. 13470/87, 19 Eur. H.R. Rep. 34 (1994). The case describes the film, DAS LIEBESKONZIL (Council in Heaven), depicting Christ, the Virgin Mary, and God as dissolute and corrupt persons. \textit{Id.} at 34. The film was confiscated in Innsbruck, Austria, which the Court described as being predominately Catholic. \textit{Id.} at 59. The advertisements for the film did describe the nature of the film, and the organization stated that it was expected to be shown primarily to “persons with an interest in progressive culture.” \textit{Id.} at 37, 58–59. The film had been made, apparently lawfully, in Italy and was based on a play that had been written almost one hundred years before (though, at that time, had been banned in Munich). \textit{Id.} at 40–41. The play had also been performed in Vienna shortly before the film was made. \textit{Id.} at 47.


\textsuperscript{288} Convention, supra note 12, art. 8. The actual protection provided for in Article 8 is “respect [for] . . . private and family life . . . [and] home.” \textit{Id.} The phrase “right to privacy” is used as an abbreviation corresponding to a similar concept expressed in American law.

\textsuperscript{289} “Margin of Appreciation” as a measure of review is discussed \textit{infra} Part III.B.2.

By the very nature of the wording of the articles of the Convention, the Court must strike a balance between the right protected and the express limitations set out in the Convention. But there is nothing in the Convention itself (except the vague phrase "necessary in a democratic society") that guides the Court as to how to weigh the balance. Further, from a review of the decisions of the Court, it is difficult to determine what standard the Court thinks is appropriate and how it will decide future cases.  

2. The Doctrines of the "Margin of Appreciation" and "Subsidiarity"

Two of the concepts developed by the Strasbourg Court to limit the scope of the Court's review are interrelated. One is referred to as the "margin of appreciation," and the other is known as the principle of "subsidiarity." The "margin of appreciation" is a somewhat nebulous concept borrowed from French law. In essence, the concept is that there is room for countries to differ in what is acceptable under the terms of the Convention based on cultural differences. Thus, using the "margin of appreciation" concept, the Court has discretion under the Convention to find a law or practice violative of the Convention in one member country, but acceptable in another—even though both ratified the Convention.

One of the earliest expressions of the doctrine of "margin of appreciation" was in the case of Handyside v. United Kingdom. In Handyside the issue was whether a book, THE LITTLE RED SCHOOL-BOOK, could be banned as obscene in contravention of Article 10 of the Con-
vention, which protects freedom of expression. In several other European countries—e.g., Denmark and Netherlands—the book circulated freely. When the case was heard in the European Commission (now defunct, but which was in existence when Handyside was decided), there was a division of opinion between those who thought the Convention merely required a determination of whether the English Courts “acted reasonably [and] in good faith” in finding the book obscene or “whether the . . . task [was to] examine the Schoolbook directly in the light of the Convention and of nothing but the Convention.”

The Strasbourg Court, siding with those espousing the former standard noted in the previous paragraph, determined that England was allowed a “margin of appreciation” to find the book obscene in view of English culture:

[I]t is not possible to find in the domestic law of the various Contracting States a uniform European conception of morals. The view taken by their respective laws of the requirements of morals varies from time to time and from place to place, especially in our era which is characterised by a rapid and far-reaching evolution of opinions on the subject. By reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements as well as on the “necessity” of a “restriction” or “penalty” intended to meet them.

The Court did observe that this “margin of appreciation” was not unlimited; it simply was not exceeded on the facts of the case. Further, it has been used primarily in connection with Articles 8 through 11 (dealing with civil liberties rather than more basic human rights). These articles by their very structure allow some national flexibility on what is or is not protected. It has never been applied, however, to allow national variation on fundamental matters such as the right to life (Article 2) and prohibition of torture (Article 3).

The concept of “margin of appreciation” does have its critics who argue that it is often applied in an ad hoc manner, with little guidance

295. Convention, supra note 12, art. 10.
297. Id. at 753.
298. Id.
299. Id. at 753–54.
300. Id. at 754.
301. Convention, supra note 12, arts. 8–11.
302. See discussion supra note 34 (detailing the structure of these articles).
for the future. At least one respected judge on the Court called for its abolition. Despite the fact that it has been applied somewhat more restrictively in recent years, the concept still has its defenders, including Paul Mahoney, Deputy Registrar of the Strasbourg Court, who argues that it is necessary in order to prevent the Court from overstepping its authority.

Another somewhat related concept is the principle of "subsidiarity." The idea of subsidiarity is that the primary enforcers of human rights within each member state are the courts of that state and that the Strasbourg Court only plays a subsidiary role. Implicit in this ordering of who has primary responsibility is the idea that each member state must be granted at least some flexibility in applying the principles enunciated in the Convention. In effect, this is another way of expressing the notion that some variance in applicable norms is permissible under the Convention. Though these two concepts imply some amount of flexibility, they are not intended to suggest that any

305. This is a personal observation based on reading many cases relating to Articles 8 through 11, not the result of any systematic analysis.
306. Mahoney, Universality, supra note 255, at 369-71.
308. Under Article 1 of the Convention, each member state has taken on the obligation to "secure to everyone within their jurisdiction the rights and freedoms" set out in the Convention. Convention, supra note 12, art. 1.
310. See, e.g., Mowbray Text, supra note 38, at 449-53; Paul Mahoney, Marvelous Richness of Diversity or Invidious Cultural Relativism, 1998 Eur. Hum. Rts. L. Rev. 1 (1998) [hereinafter Mahoney, Marvelous]. The doctrine might strike some American viewers as being somewhat analogous to the views expressed by Justice Harlan on the application of the Due Process Clause to state courts. Commentators on the Court have discussed the concept of "subsidiarity" at some length. See, e.g., Mahoney, Universality, supra note 255, at 379. Nevertheless, the term has only been mentioned in a handful of majority opinions of the Court, but without much elaboration on its meaning other than as a synonym for "margin of appreciation." In the recent case of Goodwin v. United Kingdom, App. No. 28957/95, 35 Eur. H.R. Rep. 18 (2002), the Court stated that "[i]n accordance with the principles of subsidiarity, it is . . . primarily for the Contracting States to decide on the measures necessary to secure Convention rights within their jurisdiction." Id. at 475. The Court then observed that this means that "the Contracting States [i.e., signatories to the Convention] must enjoy a wide margin of appreciation." Id. In Goodwin, however, the Strasbourg Court held that the practice complained of—a refusal to alter a post-operative transsexual's birth certificate—was held to be beyond the applicable "margin of appreciation." Id. at 477. The Court has also used the term in connection with the requirement that applicants for relief in the Strasbourg Court must have first exhausted domestic law remedies: "[T]he principle of subsidiarity . . . requires the exercise of the legal channels of domestic law remedies." Karatas & Sari v. France, App. No. 38396/97, 35 Eur. H.R. Rep. 37, 31 (2002).
member state can act in variance to a clearly expressed standard contained in the Convention or in the decisions of the Court that interpret the Convention.\textsuperscript{311}

\section*{C. The Convention Is an Evolving Document}

On many occasions the Strasbourg Court has characterized the Convention as a “living instrument,” meaning that its provisions are subject to changing interpretations under appropriate circumstances.\textsuperscript{312} In an early decision, \textit{Tyrer v. United Kingdom\textsuperscript{313}} in outlawing punishment by “caning” in a secondary school, the Court observed:

\begin{quote}
[T]he Convention is a living instrument which . . . must be interpreted in the light of present-day conditions. In the case now before it the Court cannot but be influenced by the developments and commonly accepted standards in the penal policy of the member States of the Council of Europe in this field.\textsuperscript{314}
\end{quote}

The concept has been repeated in many subsequent cases,\textsuperscript{315} although sometimes in a situation where the Court did not diverge from earlier decisions.\textsuperscript{316} But, on occasion, the Court has found that a re-

\textsuperscript{311} See Mahoney, \textit{Universality}, supra note 255, at 369. Thus, once the Court determined that laws criminalizing homosexuality were contrary to Article 8 (Right to Privacy) in the United Kingdom, see \textit{Dudgeon v. United Kingdom}, 4 Eur. H.R. Rep. 149, 168 (1981), it applied the same determination to all member states— even Cyprus where, apparently, there was great social opposition to the legalization of homosexuality. \textit{Modinos v. Cyprus}, App. No. 15070/89, 16 Eur. H.R. Rep. 485, 488 (1993).

\textsuperscript{312} The position of the Strasbourg Court is, thus, similar to that expressed by Justice Brennan on how the United States Constitution should be interpreted. See, e.g., \textit{Burnham v. Superior Court}, 495 U.S. 604, 630 (1990) (Brennan, J., concurring); \textit{Michael H. v. Gerald D.}, 491 U.S. 110, 137–41 (1989) (Brennan, J., dissenting).


\textsuperscript{314} \textit{Id.} at 9–10.

\textsuperscript{315} See, e.g., \textit{L & V v. Austria}, App. No. 39392/98, 36 Eur. H.R. Rep. 55, 1033 (2003) ("[T]he Court has frequently held that the Convention is a living instrument, which has to be interpreted in the light of present-day conditions.") (emphasis added).

\textsuperscript{316} See, e.g., \textit{V. v. United Kingdom}, App. No. 24888/94, 30 Eur. H.R. Rep. 1, 121, 123 (2000) ("[T]he Convention is a living instrument, [thus] it is legitimate when deciding whether a certain measure is acceptable under one of its provisions to take account of the standards prevailing amongst the Member States of the Council of Europe."). But the Court found that there was no "standards prevailing" on the issue before it—the minimum age at which a juvenile could be tried as an adult. \textit{Id.} at 175. See also \textit{Pretty v. United Kingdom}, App. No. 2346/02, 35 Eur. H.R. Rep. 1, 34 (2002) ("While the Court must take a dynamic and flexible approach to the interpretation of the Convention, which is a living instrument, any interpretation must also accord with the fundamental objectives of the Convention and its coherence as a system of human rights protection."). After this observation, the Court declined to decide that recent medical knowledge would justify allowing someone suffering from a painful terminal illness to participate in the "assisted suicide." \textit{Id.} at 39. Occasionally a dissenting opinion will urge that, since the Convention is a "living instrument," the Court majority ought to find that a particular applicant is entitled to protection. See, e.g., \textit{Botta v. Italy}, App. No. 21439/93, 26 Eur. H.R. Rep. 241, 253–55.
suit it had reached at an earlier time should no longer apply because of changed conditions.317 No cases suggest that the Court would be unwilling to do so in appropriate cases in the future. It may be difficult, however, to predict under which circumstances such a willingness would exist since such a prediction apparently depends on a determination of how "present-day conditions"318 may have changed since the Court last looked at the issue in dispute.319 Ultimately, it at least raises questions about how the Court should determine the true facts about present-day conditions, at least in situations where there is serious conflict over what the true facts might be.320

(1998) (Loucaides, J., dissenting) (urging that Article 8, the Right of Privacy, be interpreted as a positive right, and thus Italy should be required to provide facilities for the disabled at a public beach).

317. See Goodwin v. United Kingdom, App. No. 28957/95, 35 Eur. H.R. Rep. 18, 447 (2002) (finding that a transsexual’s Article 8 right to privacy was violated when the British Government refused to alter her birth certificate from male to female). Twice in the previous fifteen years the Court had ruled to the contrary. Id. at 486 (noting the cases of Rees v. United Kingdom, 9 Eur. H.R. Rep. 56 (1986), and Cossey v. United Kingdom, 13 Eur. H.R. Rep. 622 (1990)).


319. In Goodwin, for example, while the change of policy was justified by changed circumstances, the Court admitted that none of the member states that were signatories to the Convention had changed policies on birth certificate alteration. Id. at 466. Rather, it noted that changes had occurred elsewhere in the world, notably in Australia and New Zealand, and that the British government's report detailing its inquiry into the issue suggested that alteration in such circumstances should be permitted. Id. at 466-67. Parliament, however, had not enacted the proposals into law. Id. at 467.

320. One possible future test of the Court's willingness to change with the times will be the issue of the effect of airline noise on neighborhoods near airports. In Powell & Rayner v. United Kingdom, App. No. 9310/81, 12 Eur. H.R. Rep. 355, 362-63, 366, 369 (1990), the Strasbourg Court rejected a challenge, based on Article 8 (the right of privacy), that excessive noise generated by flights at Heathrow Airport constituted a violation of Article 8. But a decade later, a section of the Court in Hatton v. United Kingdom, App. No. 36022/97, 34 Eur. H.R. Rep. 1 (2001), found that late night flights constituted an invasion of privacy—or, more accurately, a violation of the requirement to "respect . . . private and family life [and] home." Id. at 3-4. In this case, however, the challenge was to "late night" flights, not noisy flights in general. Id. at 25-26. The case was then taken to the Grand Chamber which ruled that there had not been an Article 8 violation, but it also found that it was at least "arguable" that a violation of Article 8 had occurred. Hatton v. United Kingdom, App. No. 36022/97, 37 Eur. H.R. Rep. 28, 645 (2003). Under these circumstances the Grand Chamber held that pursuant to Article 13 Britain must provide an adequate method of domestic challenge to environmental deprivations in such cases. Id. at 646. The Grand Chamber held that Britain did not have adequate provisions for such a challenge, and thus was in violation of Article 13. Id. at 646. Five of the seventeen judges of the Grand Chamber dissented on the Article 8 issue, claiming "that Article 8 embraces the right to a healthy environment, and therefore to protection against pollution and nuisances caused by harmful chemicals, offensive smells, agents which precipitate respiratory ailments, noise and so on." Id. at 648-50. Given that the majority of the Grand Chamber expressed concerns over British procedure, it is not hard to imagine that, if there is little change in substantive relief
To an observer from the United States, it is curious how willingly the Court and its member states have accepted the possibility of altering the coverage of the Convention in light of "changed circumstances." This is, of course, a matter of great controversy in the United States. Proponents of a flexible interpretation of the United States Constitution argue that flexibility within the Supreme Court is necessary because the Constitution is very difficult to amend to take into account unique or novel situations involving constitutional interpretation. In contrast, in its fifty years of existence, the Convention has been amended on a number of occasions utilizing a much simpler process, by adoption of protocols that need not be adopted by all member states at the same time. Further, the judges of the Human Rights Court who determine whether "changed conditions" justify a reinterpretation of the Convention are chosen by a much more decentralized and, in some cases, a more casual method than the choice of Justices on the United States Supreme Court. Thus, to some de-

from the British government or its courts concerning this issue, a future decision from the Court might find an Article 8 violation.

322. Id. at 22–23 (noting that one of the three arguments that "non-originalists" advance for expansive interpretation of the Constitution is that the "cumbersome amendment process" makes it impossible for the Constitution to "meet the needs of a changing society").
323. See sources cited supra note 35. (Some Protocols address the reorganization of the Convention or Court, but other Protocols, namely 1, 4, 6, 7, 12, and 13, deal with substantive rights enforceable by the Court.). Each Protocol specifies how many member states need to ratify it to become effective. See, e.g., sources cited supra note 35; Protocol 7, supra note 35, art. 9(1) (providing that it shall be in force when seven member states ratify it). But the substantive rights in a Protocol cannot be enforced against a member state that has not ratified it. Id. art. 9(2). For a list of the member states that have ratified the various protocols, see European Court of Human Rights, Dates of Ratification of the European Convention on Human Rights and Additional Protocols, http://www.echr.coe.int (follow "Basic Texts" hyperlink; then follow "Dates of Ratification of the European Convention on Human Rights and Additional Protocols" hyperlink) (last visited Sept. 19, 2005) [hereinafter Ratification Dates].
324. See supra notes 67–75 and accompanying text, on the selection of judges for the Human Rights Court, and criticism of the efficacy of the selection system. In the United States, decisions on who should be appointed to the United States Supreme Court are given enormous attention by elected officials (primarily the President who appoints, and Senators who vote to confirm) because of the potential to "reinterpret" the Constitution (and "reconsider" previously decided cases). Some have argued that this attention to who should be appointed to the Supreme Court gives the Court greater legitimacy in flexible interpretations of the Constitution. See, e.g., Christopher Eisgruber, Constitutional Self-Government 4 (2001). In the Strasbourg Court, in some instances the decision to reinterpret the existing case law to find a violation where, before, there was none, is done by a Section Chamber of seven judges. By rule, one judge is from the country affected, but the others are geographically dispersed. ECHR Rules, supra note 40, R. 25(2). In Hatton, 34 Eur. H.R. Rep. 1, 1, the judges of the Section decision finding Britain had violated
gree, this raises questions as to the legitimacy of the mandate of judges of the Strasbourg Court to engage in reinterpretation of the Convention as to matters of policy that might well be viewed differently by democratically elected officials.325

D. The Convention Sometimes Imposes “Positive” Duties

The United States Constitution is almost exclusively a document of authorization and limitation. The Constitution authorizes government to undertake many activities, but it almost never requires action.326 Most of the rest of the Constitution, however, is aimed at prohibiting the government from acting in various ways, such as the numerous prohibitions contained in the Bill of Rights, which protect

Article 8 (privacy) were French, Belgian, Lithuanian, Cypriot, and Czech. Id. See also COUNCIL OF EUR., EUROPEAN COURT OF HUMAN RIGHTS, SURVEY OF ACTIVITIES 2003, at 8 (2003), available at http://www.echr.coe.int (follow “Reports” hyperlink; then follow “Survey of Activities 2003” hyperlink) [hereinafter SURVEY OF ACTIVITIES 2003] (listing the judges at the time the Hatton case was decided, by country). The British judge dissented. Hatton, 34 Eur. H.R. Rep. 1, 35 (Kerr, J., dissenting). Except for France, none of the countries represented by the judges in the majority had a major international airport as significant as Heathrow that might be adversely affected by the scope of the decision. Airports Council Int’l, Passenger Travel 2004 Final, http://www.aci.aero/cda/acis/display/main/aci_content.jsp?zn=aci&cp=1-5_9_2__ (noting the relative importance of airports by volume and listing London’s airport as having the third largest volume and Paris’s airport as having the seventh largest volume in 2004, while failing to list a Belgian, Lithuanian, Cypriot, or Czech airport). Further, France’s main international airport, Charles de Gaulle, is located farther away from populated areas than is Heathrow. Michelin, France, Atlas Routier et Touristique 41-42 (2001); Ordinance Survey, Motoring Atlas, Britain, 22-23 (2003). Thus, Charles de Gaulle airport was less likely to have its air traffic affected by the decision. Indeed, restrictions on Heathrow might arguably work to the advantage of Charles de Gaulle Airport in terms of international competitiveness.

325. There have been occasional suggestions in dissents that the Court should use great care in reinterpreting the provisions of the Convention. See, e.g., Kroon v. Netherlands, App. No. 18535/91, 19 Eur. H.R. Rep. 263, 288 (1994) (Morenilla, J., dissenting) (“This principle of ‘evolutive and creative’ interpretation, which allows the Convention to be adapted to the changing circumstances of our democratic societies, thus making it ‘a living instrument,’ means however that in practice the Court is confronted with a difficult dilemma: that ‘of guarding against the risk of exceeding its given judicial role of interpretation by overruling policy decisions taken by elected, representative bodies who have the main responsibility in democratic societies for enacting important legislative changes, whilst not abdicating its own responsibility of independent review of governmental action.’”) (footnotes omitted).

326. For example, U.S. CONST. art. I, “authorizes” Congress to legislate on many topics, but it only “requires” a very small number of actions by government, and they are mainly organizational in nature, e.g., the taking of a periodic census, U.S. CONST. art. I, § 2, and requiring the President to give a periodic “State of the Union” address to Congress, U.S. CONST. art. II, § 3.
a variety of activities from governmental interference. The Supreme Court has been unwilling to read into the Constitution a judicially enforceable obligation on the part of government to act to enforce the provisions of the Constitution, at least in the absence of legislation. A prime example is DeShaney v. Winnebago County where governmental officials had received complaints that a child was being abused by his father but had not removed him from his father's custody. The Supreme Court held that the state had no constitutional duty to protect the child from his father even after receiving reports of possible abuse.

The Strasbourg Court has interpreted the Convention and the duty of the Court much differently. In a number of instances, it has held that a member state has a positive duty to undertake actions that will enforce the protections to people granted by the Convention. In a situation very similar to the DeShaney case, the Court determined in Z

327. The Bill of Rights, U.S. Const. amends. I–X, prohibits Congress from interfering with a variety of familiar freedoms of speech, religion, and unreasonable searches and seizures, and it imposes restrictions on how government can conduct criminal trials. The Bill of Rights is not the sole repository of prohibitions. The original Constitution contains various prohibitions, such as outlawing Bills of Attainder. U.S. Const. art. I, § 9. Other amendments also restrict governmental power, such as the Fourteenth Amendment's prohibition on states depriving "any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV. The Thirteenth Amendment, providing that "slavery...shall [not] exist within the United States" is the main substantive provision in the Constitution that might be construed as a "positive" right, although Section 2 of the Amendment merely gives Congress "the power to enforce" this Amendment rather than requiring it to do so. U.S. Const. amend. XIII.

328. The biggest exception to the obligation of the government to act to enforce the provisions of the Constitution is Gideon v. Wainwright, 372 U.S. 335 (1963), requiring that counsel be provided to indigent criminal defendants pursuant to the right to counsel provision of the Sixth Amendment.


330. Id. at 192–93. The local social services agency had received complaints on several occasions and had made ineffectual efforts to intervene. Eventually, the child was so severely injured by beating that he became permanently retarded due to brain injuries. Id.

331. Id. at 195–96 ("[N]othing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors. The Clause is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security. It forbids the State itself to deprive individuals of life, liberty, or property without 'due process of law,' but its language cannot fairly be extended to impose an affirmative obligation on the State to ensure that those interests do not come to harm through other means. Nor does history support such an expansive reading of the constitutional text. Like its counterpart in the Fifth Amendment, the Due Process Clause of the Fourteenth Amendment was intended to prevent government 'from abusing [its] power, or employing it as an instrument of oppression,'...Its purpose was to protect the people from the State, not to ensure that the State protected them from each other. The Framers were content to leave the extent of governmental obligation in the latter area to the democratic political processes.").
v. United Kingdom\textsuperscript{332} that a member state had violated the Convention provision prohibiting torture and inhumane and degrading treatment\textsuperscript{333} when it allowed children to live in an abusive situation for over four years before removing them from their home.\textsuperscript{334} The Court reiterated that:

Article 3 enshrines one of the most fundamental values of democratic society. It prohibits in absolute terms torture or inhuman or degrading treatment or punishment. The obligation on High Contracting Parties [member states] under Article 1 of the Convention to secure to everyone within their jurisdiction the rights and freedoms defined in the Convention, taken together with Article 3, requires States to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment, including such ill-treatment administered by private individuals. These measures should provide effective protection, in particular, of children and other vulnerable persons and include reasonable steps to prevent ill-treatment of which the authorities had or ought to have had knowledge.\textsuperscript{335}

\textit{Z v. United Kingdom} is one of a number cases where the Court has found that a member state has positive duties under the Convention. The Court has found that Article 2 (every person’s right to life shall be protected by law) imposes positive duties on the member states to take steps to prevent police or other activities which may endanger life.\textsuperscript{336} The Court has also held that “Article 2 should be interpreted as including a procedural element, namely, the provision of an effective procedure after the event for establishing the facts.”\textsuperscript{337}

The Court has also found that positive duties exist under Article 8 (“[e]veryone has the right to respect for his private and family life

\begin{itemize}
  \item \textsuperscript{333} Convention, supra note 12, art. 3.
  \item \textsuperscript{334} Z v. United Kingdom, 34 Eur. H.R. Rep. at 98.
  \item \textsuperscript{335} Id. The Court also found a violation of Article 13 of the Convention: “Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority” inasmuch as the British law did not provide for a tort action for the failure to prevent the abuse. Id. at 129–30. The Court also determined that the four children were entitled to “just satisfaction” under Article 41 in the aggregate amount of £320,000 for the damages suffered by governmental neglect. Id. at 145. See supra Part II.B.3 (discussing “just satisfaction”).
  \item \textsuperscript{336} See McCann v. United Kingdom, App. No. 18984/91, 21 Eur. H.R. Rep. 97, 138 (1996) (finding that a member state must “adopt clear and detailed rules on the use of lethal force which should strictly control and limit its use in accordance with the Convention provision” and when the “relevant domestic law is vague and general [it is a] violation of Article 2”).
  \item \textsuperscript{337} Id. at 138; accord Kaya v. Turkey, App. No. 22729/93, 28 Eur. H.R. Rep. 1, 46 (1998).
\end{itemize}
[and] his home”). In *Lopez Ostra v. Spain*, the Court found that it was a violation of Article 8 when the government failed to intervene and shut down a private waste water treatment plant that emitted fumes and loud noises near the Lopez Ostra home. While noting that the plant served a public good, the Court stated: “the State did not succeed in striking a fair balance between the interest of the town’s economic well-being—that of having a waste-treatment plant—and the applicant’s effective enjoyment of her right to respect for her home and her private and family life.” It would not be surprising if, in the future, the Court were to find positive duties in other circumstances under these Articles or other Articles.

IV. The Future of the European Court of Human Rights

The Strasbourg Court has become a victim of its own success. It has received an increasing flood of applications seeking relief and is finding it increasingly difficult to keep up with the caseload. Almost from the beginning it has taken a long time between the triggering event and a final decision by the Court. When it was a two-tier process, with proceedings in a Commission before an appeal could be made to the Court, it sometimes took the better part of a decade between the triggering event and the Court’s final decision, and by then, in some cases, no truly effective relief was available. In other words, as the cliché goes, justice delayed is justice denied.

340. *Id.* at 289–90. The waste water plant served several local leather tanneries, and while it was privately owned, it had been built with a municipal subsidy on leased municipal land. *Id.*; see also *Guerra v. Italy*, App. No. 14967/89, 26 Eur. H.R. Rep. 357 (1998) (reaching a similar result). In *Moreno Gomez v. Spain*, App. No. 4143/02, (Eur. Ct. H.R. Nov. 16, 2004), available at HUDOC search, *supra* note 2 (searching for App. No. 4143/02), Spain was found liable for violating Section 8 because it allowed a loud discotheque to operate in an “acoustically saturated zone,” which included the applicant’s residence and the applicant was awarded almost €4,000 for soundproofing and past nuisance. *Id.*
A. Structural Reforms to Ameliorate the Growing Caseload Crunch

The Strasbourg Court and its parent organization, the Council of Europe, have been well aware of the huge problem of increasing numbers of cases with which the Court must deal.\(^\text{345}\) During the Court's early years, it had only a small number of cases to decide, but today it considers many thousands of cases and issues hundreds of judgments.\(^\text{346}\) Part of the increase is due to the expansion in the number of countries that are member states of the Convention, and part of the increase is due to increased awareness of citizens of member states of the opportunity to seek relief from the Court.

In addition, expansive interpretations of the scope of the Convention very likely add to the volume of cases. One such interpretation involves cases brought under Article 8 involving un-remediated environmental problems, such as in *Lopez Ostra v. Spain*.\(^\text{347}\) The Court in *Lopez Ostra* indicated that member states have positive duties to take

\[\text{children to the father in 1986. Id. at 298. In 1994 the Strasbourg Court decided that Austria had improperly used religion as a factor in deciding the custody issue. Id. at 312. By then the children were age twelve and fourteen and had not lived with their mother for eight years. See generally id. In United Communist Party of Turk. v. Turkey, App. No. 19392/92, 26 Eur. H.R. Rep. 121 (1998), the managers and founders of the party were barred in 1991 from serving in leadership posts in any other political party. Id. at 126. It was not until 1998 that the Strasbourg Court ruled this was a violation of the Convention, thus allowing them, once again, to participate in politics. Id. at 137.}\]

\[\text{\textit{See Evaluation Group Report, supra note 251, at Preface; see also Wildhaber, Oslo Speech, supra note 154, at 2.}\]

\[\text{\textit{Survey of Activities 2004, supra note 59, at 35. In 2004 the Court had 40,943 applications lodged, considered 21,181 registered applications alleging violations of the Convention, declared 20,350 applications inadmissible, and issued 718 decisions. Id. In 2004 there were almost 10,000 more applications lodged than in 2001, the first full year of the operation of the reconstituted Court and almost 23,000 more applications lodged than in 1998, the year that the Court was initially reconstituted. Id. As of the end of 2003, 37,281 applications were pending that had not yet been considered by the Court. Id. At the end of 2004, this number had increased by 11,331, over 30%, to 48,612. Id. At the current pace of decision making, it would take over two years to work off the backlog even if no new cases were filed. If the annual increase of unresolved applications were to continue at the same pace for the next three years, the backlog would reach 82,605 unresolved cases by the end of 2007—which would take four years to resolve. Thus most cases filed during 2008 would not even be considered until 2012.}\]

It is probably unrealistic to assume that the annual number of applications will remain at the 2004 level, and while some increase in the number of dispositions may be anticipated once Protocol 14, \textit{supra note 66}, is finally adopted, its effective date may be many months, if not years, from now. \textit{See infra note 370}. But, the reforms envisioned by Protocol 14 may produce only a modest increase in the number of applications resolved each year. \textit{See infra} notes 359–63 and accompanying text. So, the doleful scenario suggested in the previous paragraph may be unduly optimistic.

\[\text{345. See Evaluation Group Report, supra note 251, at Preface; see also Wildhaber, Oslo Speech, supra note 154, at 2.}\]

\[\text{346. Survey of Activities 2004, supra note 59, at 35. In 2004 the Court had 40,943 applications lodged, considered 21,181 registered applications alleging violations of the Convention, declared 20,350 applications inadmissible, and issued 718 decisions. Id. In 2004 there were almost 10,000 more applications lodged than in 2001, the first full year of the operation of the reconstituted Court and almost 23,000 more applications lodged than in 1998, the year that the Court was initially reconstituted. Id. As of the end of 2003, 37,281 applications were pending that had not yet been considered by the Court. Id. At the end of 2004, this number had increased by 11,331, over 30%, to 48,612. Id. At the current pace of decision making, it would take over two years to work off the backlog even if no new cases were filed. If the annual increase of unresolved applications were to continue at the same pace for the next three years, the backlog would reach 82,605 unresolved cases by the end of 2007—which would take four years to resolve. Thus most cases filed during 2008 would not even be considered until 2012.}\]

steps to reduce or eliminate such problems. At present, the scope of this right is not spelled out, but it will likely become a major source of litigation before the Strasbourg Court. This may be particularly so in some of the newer member states where old regimes were careless (or worse) in terms of environmental protection.

While no Court decisions exist (yet) involving workplace protection, one can easily envision that Article 2 (everyone's right to life shall be protected by law) might well be invoked to require governmental intervention to improve workplace safety, at least in dangerous industries such as mining and construction. Again, it is in the newer member states that such problems are likely to be most acute. Given that the Court regards the Convention as an "evolving document," the possibility of expansive interpretations of other Articles of the Convention is reasonable.

In sum, the Court has been and will continue to be confronted with a serious problem because of the growing volume of cases it must decide, and the problem will, almost undoubtedly, get worse. In 2000, a three-person Evaluation Group (including the President of the Court) was set up by the Council of Europe, and it filed a fairly comprehensive report on the problem making a number of suggestions. Many of the suggestions sounded similar to methods used by courts of last resort in the United States. The Evaluation Group suggested at least some discretionary authority on the part of the Court to reject cases (or at least treat them in summary fashion) if they "raise an issue that is, in the view of the Court, of . . . minor or secondary importance." It also suggested creating a mechanism to remit (or re-

348. See supra notes 338-41 and accompanying text.
349. Chernobyl is perhaps the most prominent example. See, e.g., Radiological Devices: Weapons of Mass Dislocation, ECONOMIST, June 15, 2002, at 28, 28 (noting that the Chernobyl nuclear accident in Ukraine in 1986 pumped vastly more radioactive material into the atmosphere than any imaginable "dirty bomb").
350. See supra Part III.C.
351. EVALUATION GROUP REPORT, supra note 251. In its conclusion, the Report of the Evaluation Group characterized the situation faced by the Court as "so serious that, if it is to remain effective . . . action is needed on several fronts." Id. para. 99. Earlier in its report, the Evaluation Group observed that:

the point has been reached at which a difficult choice has to be made: either the Court continues to attempt to deal in the same way with all the applications that arrive (in which event it will slowly sink), or it reserves detailed treatment for those cases which, in the light of its overall object and purpose . . . warrant such attention. . . . [U]nreservedly, the Group opts for the second alternative.

Id. para. 92.
352. Id. In terms of the present caseload, it is possible that the Court is already exercising discretion in deciding whether to take cases which seem to present issues of "minor or
mand) cases back to national authorities for reconsideration; that "senior officials" of the Registrar's office be given power to decide procedural issues or that independent persons be appointed with "judicial status" to carry out many of the duties currently undertaken by a judge-rapporteur or by the three judges who make up the various committees of the Court.353

The Committee of Ministers of the Council of Europe then set up internal review committees to consider the Evaluation Group report and recommendations.354 After two and a half more years of internal review and reports, in 2004, the Committee of Ministers adopted Protocol 14 and circulated it for member state approval.355 Protocol 14 incorporated only some of the Evaluation Group's recommendations.356 It provides that a single judge initially screen cases for admissibility instead of a three-judge committee; it allows a three-judge committee (instead of a seven-judge Chamber) to render a judgment on the merits of a case "if the underlying question in the case, concerning the interpretation or the application of the Convention ... is already the subject of well established case-law of the Court"; and it permits the Court to declare an application inadmissible where "the secondary importance." The vast majority of applications filed are rejected as being "manifestly ill-founded" (the term used when a case is rejected by a Committee). Id. It may be that many of the applications are made by individuals who have no knowledge of the scope of the Court's jurisdiction, but it would seem probable that many of the applications are made with the assistance of a lawyer who is acquainted with the relevant provisions of the Convention and would be unlikely to file an application that had no chance of succeeding. So, it is at least surprising that the ratio of summary rejection is so high. Further, I have been told by lawyers familiar with the Court that they have seen applications that did appear to present serious issues but which were, nevertheless, rejected as "manifestly ill-founded." Since rejected applications are not easily accessible for public inspection, it is impossible to determine whether this is a systematic occurrence or are isolated events—or are simply mistakes of the observers as to whether the rejected applications are, in fact, meritorious. Thus, at best there is only a suspicion that there is at least some exercise of discretion in deciding whether the Court will consider a case.

353. Id. para. 98. The first two suggestions roughly parallel the discretionary power of the Supreme Court to deny certiorari and to remand (with instructions) for reconsideration. The third resembles the power of federal judges to appoint magistrate judges to deal with lesser matters. The Evaluation Group made many other detailed suggestions not recounted here. See generally id.


applicant has not suffered a significant disadvantage," unless the issue has not been duly considered by a tribunal of the defendant member state.357 Protocol 14 also provides that judges will serve a nine year nonrenewable term.358

The provisions authorizing use of a single judge to reject applications lacking merit and three-judge committees to decide repetitive cases will help somewhat in dealing with the burgeoning caseload. Unfortunately, it appears likely to improve things only marginally. Granted, this reduces the collective amount of time judges spend on admission decisions and repetitive case decisions, thereby allowing judges more time to deal with more important matters. But as to admission decisions, it may be little more than regularizing what might go on under the present system. It may well be that the great bulk of the current admissibility decisions are made almost entirely on the basis of the recommendations of the deputy registrar assigned to the case, and by the position taken by the judge "rapporteur"359 who initially handles the case.360 If so, not a great deal of time is saved. Somehow similarly, as to repetitive cases, even if they make up as much as

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357. Protocol 14, supra note 66, arts. 6–8, 12.
358. Id. art. 2 (amending Article 23 of the Convention). The Protocol No. 14 Explanatory Report, supra note 94, has no explanation as to why the single term provision was included in the Protocol, which is the stated purpose of the Protocol. Protocol 14, supra note 66, pmbl. There are rationales that might support this change. It probably takes a new judge a year or two to get up to speed as a member of the Court. It would be inefficient to have a judge serve only six years (the length of a single term). The current terms are renewable so in a second term the judge would be much more efficient, but this may well compromise his or her independence, since the nomination for renewal must come from the member state for whom he or she sits. See supra note 82 and accompanying text. Thus, there may be a tendency to rule for the member state to ensure renomination. An additional factor is that, for judges from Eastern Europe, the pay of a judge on the Court is probably much higher than a judge or lawyer in his or her home country so there might be a pecuniary reason to remain on the Court for additional terms, which also may have the tendency to rule for the member state. (Although judges are well paid, see supra note 79 and accompanying text, a lawyer in Western Europe, who is of the caliber that a Human Rights Court judge should be, can earn much more in practice.) See also supra note 82 and accompanying text (noting that the Assembly of the Council of Europe endorsed this change in order "to ensure the independence and impartiality of [the] judges").

359. See supra note 113–17 and accompanying text (discussing the role of the rapporteur).

360. Though speculation, this seems typical behavior of committees required to make a large number of decisions. Of course, if each judge of the current Committees of the Court spends a great deal of time independently reviewing all of the case files (as opposed to carefully reviewing only those with special situations) rather than accepting recommendations of the rapporteur or staff member, it would suggest that the judges themselves consider such a thorough review as a critical function of the Court and further suggests that the streamlining of the decision process contained in Protocol 14 is ill-advised.
sixty percent of the current caseload,\textsuperscript{361} the amount of time deciding them (if the case law is truly clear and there are no unusual factors) should be a far smaller percentage of judge time.\textsuperscript{362}

In sum, though the proposals appear laudable, they do not seem to provide a real answer to the problem facing the Court.\textsuperscript{363} The original Evaluation Group suggestions\textsuperscript{364} were somewhat more far-reaching. They envisioned that the Court would have the power to simply remand cases to member state courts and to decline to hear cases that raise relatively minor issues—at least until it appeared that some guidance was required from the Court.\textsuperscript{365} The peculiar relation of the Court to the member states may make it impossible to establish an effective method of remand, and there is a real political reluctance to restrict access to the Court.\textsuperscript{366} As such, perhaps the changes incorporated in Protocol 14 are all that are politically possible at this time. More far-reaching reforms, politically impossible at this time, may have to wait until the Court has sunk deeper in the morass of cases pending but unheard.

One additional point needs comment. Not only does the Court often take years to complete a case, but the process of reform has itself occupied several years with no end in sight. In November 2000, a European Ministerial Conference on Human Rights voiced concern about the ever-increasing volume of applications to the Strasbourg Court and its ability to function effectively; and as a consequence an Evaluation Group was formed to study the matter.\textsuperscript{367} After over three

\textsuperscript{361} Explanatory Report, Protocol 14, \textit{supra} note 94, para. 68.
\textsuperscript{362} If a case is truly "repetitive" involving no new issues of law or fact, it would seem that the draft of appropriate opinions could easily be prepared by lawyers in the Registrar's office and simply presented to the judges for adoption. I have no information as to whether this is the way matters are handled, in fact.
\textsuperscript{363} Even the fairly modest reforms proposed were criticized by some observers of the Court. \textit{See}, e.g., Dembour, \textit{supra} note 134, at 622–23; Beernaert, Protocol 14, \textit{supra} note 250, at 555–57 (arguing in each that the changes undermine the fundamental right of individual petition). Technically speaking, these critics may be correct, but it is impossible to imagine how forty-six judges, even if assisted by 205 staff lawyers, \textit{see} Registry Role \textit{supra} note 159, will be able to consider thoroughly, let alone adjudicate fairly, every single case that may arise from a population of 800 million. Something has to give.
\textsuperscript{364} \textit{See supra} note 353 and accompanying text. The President of the Court has stated that the reforms of Protocol 14 do not offer a long term solution. Wildhaber, Oslo Speech, \textit{supra} note 154.
\textsuperscript{365} \textit{Evaluation Group Report}, \textit{supra} note 251, paras. 92–93, 96.
\textsuperscript{367} \textit{Evaluation Group Report}, \textit{supra} note 251, paras. 1–2.
years of internal considerations, the Committee of Ministers adopted Protocol 14 and submitted it to the various member states for ratification. Some states have already ratified it, but the ratification must be unanimous. Failure of even a single member state to ratify it promptly will delay its implementation by many months or even several years. As a consequence, whatever reform does occur may well be close to a decade after the need was perceived.

B. The Caseload Problem May Be Far Worse than Officially Recognized

The work of the Evaluation Group and of the Steering Committee outlined earlier is based on an analysis of caseload trends already experienced by the Court and of existing problems of “repetitive” cases. The number of states that have become members of the Convention, however, has increased substantially in the last few years, and a number have become members since 2001, the date of the Evaluation Group report. One cannot overemphasize the potential of future cases resulting from the admission of the newer member states as a major factor in the continuing increases in the caseload of the Court. At present the number of judgments against the recently admitted states is not great, but this number may escalate.

368. Protocol 14, supra note 66, arts. 18–19.
370. As of September 2005, all but Russia and Bulgaria had signed Protocol 14, but only fifteen member states had actually ratified it to date. Id. For a number of member states, more than a year has elapsed since the signing occurred without having completed the ratification. Id. Nevertheless, some observers hope that the ratification process will be completed within the next year or two. Wildhaber, Oslo Speech, supra note 154, at 2. The more controversial changes that had been suggested by the Evaluation Group Report were not included in Protocol 14, see supra note 356, so there is little likelihood of principled opposition to the changes. Still, it is possible that the delay inherent in the current very slow process of the Strasbourg Court in deciding cases may be to the advantage of some countries with a large number of cases against them, hence there may be little incentive to deal quickly with ratification. Other more pressing domestic matters may put the ratification process on a slow track, especially in countries experiencing internal crises, such as Ukraine and Bosnia. However, the observers of the Court do expect Protocol 14 eventually will be ratified by all member states. Confidential Sources, supra note 23.
371. Ratification Dates, supra note 323. There have been fourteen new members in the last decade, 1995–2005, including four in the last three years, 2003–2005. Id.
372. The number of judgments as of the end of 2004 against the ten most recently admitted member states (Serbia, Armenia, Azerbaijan, Bosnia, Russia, Georgia, Latvia, Moldova, Ukraine, and Croatia, id.) is very small—only eighty-four for the three-year period of 2002–04. Survey of Activities 2004, supra note 59, at 38–39. For comparison, for the same three-year period there were 474 judgments against Italy, 219 against France, and 287 against Turkey. Id. However, during the same three year period, 31,237 applications were filed against the newest ten states. Id. at 36–39. In comparison, 24,102 applications
Most of the member states are, at best, emerging democracies and several have a recent history of violence and repression.\(^3\)\(^7\)\(^3\) Turkey, a long time member, has had an enormous number of cases before the Court because of the conflicts involving Kurdish separatist activities and the efforts of the Turkish government to deal with this situation.\(^3\)\(^7\)\(^4\) There is a distinct possibility of numerous cases arising out of the conflict in Chechnya since Russia is now a member state.\(^3\)\(^7\)\(^5\) There has been turmoil in Georgia and the Ukraine and an intermittent undeclared war between Armenia and Azerbaijan over the Karabakh enclave.\(^3\)\(^7\)\(^6\) There are separatist movements in Moldova and in Macedonia;\(^3\)\(^7\)\(^7\) there have been recent conflicts in Croatia and even more conflicts in one of the newest members, Bosnia-Herzegovina.\(^3\)\(^7\)\(^8\) In all of these situations, the possibility of a large amount of litigation were filed against France, Italy, and Turkey during the same period. \(Id\). Given the serious backlog of cases it is likely that most of the applications from the newest ten states simply have not reached the decision stage—likely the most labor-intensive stage of adjudication. It would not be surprising if the percentage of serious human rights violations in these then newest member states is higher than France, for example.

373. See, e.g., Croatia's Serbs: Stormy Memories, ECONOMIST, July 30, 2005, at 45, 45 (noting repression of Serbs in Croatia); Kosovo's Future: Waiting Game, ECONOMIST, July 9, 2005, at 43, 43 (noting problems in Kosovo); Moldova and Transdniestr: Gangsters Cornered, ECONOMIST, July 2, 2005, at 46, 46 (noting lawlessness and corruption in Moldova); Nagorno-Karabakh: Small War, Big Mess, ECONOMIST, Nov. 20, 2004, at 54, 54 (noting violence and repression in Azerbaijan); Terrorism in Dagestan: The Language of Bombs, ECONOMIST, July 9, 2005, at 44, 44 (noting repression in Chechnya and other parts of the Caucasus region of Russia).


375. The Court recently decided three cases involving six applicants arising out of the Chechnya conflict finding Russia liable for deaths caused in the fighting of rebels. See, e.g., Khashiyev & Akayeva v. Russia, App. Nos. 57942/00 and 57945/00 (Eur. Ct. H. R., June 7, 2005), available at HUDOC search, supra note 2 (searching for App. No. 57942/00 and repeating process for 57945/00); Isayeva, Yusupova and Bazayeva v. Russia, App. Nos 57947/00, 57948/00 and 57949/00 (Eur. Ct. H. R., June 7, 2005), available at HUDOC search, supra note 2 (searching for App. No. 57947/00 and repeating process for 57948/00 and 57949/00); Isayeva v. Russia, App. No. 57950/00 (Eur. Ct. H. R., June 7, 2005), available at HUDOC search, supra note 2 (searching for App. No. 57950/00). The six applicants were awarded a total of €140,000 as damages (€23,000 costs). Khashiyev, at para. 193; Isayeva, Yusupova & Bazayeva, at paras. 246, 252; Isayeva, at paras. 236, 240. The potential for thousands of cases, each one presenting different facts to be determined as to liability and as to "just satisfaction" damages seems very realistic. See, e.g., Chechnya's Disappeared: The War After the War, ECONOMIST, Mar. 26, 2005, at 53, 53; The North Caucasus: An Empire's Fraying Edge, ECONOMIST, Feb. 12, 2005, at 21, 21.

376. See Nagorno-Karabakh: Small War, Big Mess, supra note 373, at 54.


before the Court is plausible. Serbia has just become a member state, and thus Kosovo (as well as Serbia itself) may become the source of numerous cases in the future.

Perhaps the greatest potential for increases in the caseload of the Court is in the area of prison conditions in recently admitted member states. A recent case, Kalashnikov v. Russia, found that conditions in a particular Russian prison were in violation of Article 3 of the Convention. As explained below, there may be many thousands, if not hundreds of thousands, of potential violations of the Convention. A couple of preliminary points need to be noted in order to fully explain why the problem may be so severe.

First, as set out earlier, a basic principle of the Convention is that the standards in the Convention are applied with equal force as to each member state. Prison conditions have to meet a certain standard to avoid being in violation of Article 3 in England, Germany, and France, and meet the same standard to avoid being a violation in Russia, Armenia, and Albania. There are, of course, two ways in which the Court could deal with this. First, it could find that the standards for prison conditions that satisfy Article 3 of the Convention are not nearly as high as those that prevail in Western member states, and

381. See Convention, supra note 12, art. 3 (prohibiting torture). In egregious cases where life may be endangered, even Article 2, providing that the right to life shall be protected by law, might apply. Id. art. 2. The Court previously had found a violation of Article 3 because of prison conditions in a handful of other cases arising in Western Europe, but mainly because the person was being held under conditions that were not appropriate for his or her specific condition, such as someone mentally disturbed being held in solitary confinement. See, e.g., Keenan v. United Kingdom, App. No. 27229/95, 35 Eur. H.R. Rep. 913, 961–65 (failure to properly supervise mentally ill prisoner who then committed suicide); see also Peers v. Greece, App. No. 28254/95, 33 Eur. H.R. Rep. 1192, 1218–19 (2001) (improper housing of convicted foreign national while undergoing drug detoxification treatment); see also Price v. United Kingdom, App. No. 33994/96, 34 Eur. H.R. Rep. 1285, 1293–94 (2001) (degrading treatment of severely handicapped wheelchair bound prisoner in a facility not equipped for disabled). Kalashnikov v. Russia was the first case to find an Article 3 violation in a case involving an ordinary prisoner held in an ordinary prison. Kalashnikov, App. No. 47095/99, 36 Eur. H.R. Rep. at 611 (2002). According to the opinion, the conditions in Kalashnikov were quite brutal. Id. at 609–11.
382. See infra notes 389–95 and accompanying text.
383. See discussion supra Part III.A.
384. If the Strasbourg Court were to take this approach, one of the possible consequences would be for a Western European country to decide to reduce the quality of its prisons to the new level specified as satisfactory by the Court, possibly to save money or possibly to make sure prisons better serve a “retribution” function, which the electorate of the country might think appropriate.
that if conditions are only somewhat better than those found in the Kalashnikov case, they are not in violation of Article 3. If so, while there may still be many cases in Eastern Europe that are not in compliance, it may not take a great deal of effort for the member states to rectify the deficiencies. It would seem more likely, however, that the Court would find that the existing prison conditions in Western Europe are at or close to the minimum level of satisfactory conditions required to avoid a violation of Article 3. If the Court were to find this, then, as described later, the problems with compliance for the more easterly member states are much more severe.\footnote{385}

Second, another basic principle of the operation of the Convention is that the primary enforcement of the requirements of the Convention is supposed to be in the national courts of the member states.\footnote{386} Recourse to the Strasbourg Court is permitted only if the member state courts improperly deny relief or do not provide an effective domestic procedure to protect the rights guaranteed by the Convention.\footnote{387} A corollary principle, in theory at least, is that once a member state has been informed of the violations of the Convention, its domestic courts will ensure that the violations are remedied without the need of further decisions from the Strasbourg Court. This assumes, however, that a national court will be able to handle whatever litigation ensues in a fair manner and issue adequate relief. And if the national courts do not, then the Strasbourg Court has the power and arguably, an obligation to take jurisdiction of such cases.\footnote{388}

Assuming that the Court would require prison conditions to be close to the minimum standards used in Western Europe, and assuming that the more recently admitted member state courts are unable to carry out the necessary reforms, the deluge of cases that would have to be dealt with by the Court would become truly enormous. Russia alone has in excess of 800,000 prisoners, and a recent report funded by the European Commission suggests that many, if not most, Russian prisoners are jailed in conditions resembling those found to be in vio-
lation of the Convention in *Kalashnikov*. Ten percent of the prisoners suffer from virulent forms of tuberculosis and are often untreated and not segregated from other prisoners. HIV is rampant. If only ten percent of the prisoners seek relief from the Court, it would constitute a tripling of the caseload from this one source alone. If half seek relief, the caseload volume would be staggering. Other recently admitted member states have a combined population half of that of Russia, and probably have another 200,000 to 300,000 prisoners. Though there may be no similar detailed reports documenting prison conditions in other newly admitted member states, it is not hard to imagine that an additional substantial volume of prison condition cases may be filed by prisoners in these countries.

Of course it is theoretically possible that the Court will find conditions substantially below Western European standards acceptable, but this seems unlikely. The real problem, however, is that it may be impossible, as a practical matter, for most recently admitted member states to provide for prisons that even come close to meeting Western European standards. Corruption is endemic. The democratic cre-

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389. *Kalashnikov v. Russia*, App. No. 47095/99, 36 Eur. H.R. Rep. 34 (2002); Moscow Helsinki Group, Situation of Prisoners In Contemporary Russia, http://www.mhg.ru/english/1E7AF09 (follow “Personal Hygiene,” “Food,” “Premises,” “Medical Services,” “Discipline and Punishment,” and “Instruments of Restraint” hyperlinks) (last visited Aug. 25, 2005) (financed by the European Commission and containing detailed information about poor Russian prison conditions) [hereinafter Russian Prisoners Report]. The population of Russian prisons is found at the Moscow Center for Prison reform (MCPR) website. Moscow Ctr. for Prison Reform, Reduction of Russia’s Prison Population: Possibilities and Limits, http://www.prison.org/english/rpsys_2.htm (showing 877,000 prisoners in 2003). In the *Kalashnikov* case itself, the Russian government admitted that the conditions under which Kalashnikov was held “did not differ from . . . those of most detainees in Russian prisons.” *Kalashnikov*, 36 Eur. H.R. Rep. at 607. The Government “acknowledged that, for economic reasons, conditions of detention in Russia were very unsatisfactory and fell below the requirements set for penitentiary establishments in other Member States of the Council of Europe. However, the Government was doing its best to improve conditions of detention in Russia.” *Id.*


391. Estimate based on Russian ratio of prisoners to population, translated to a similar proportion using the other recently admitted member state populations.

392. It seems unlikely in that the Court would allow Western European countries to drastically lower standards in prisons in order to save money or for some other reason without violating the Convention.

393. See, e.g., Ukraine’s Presidential Election: An Orange Victory, *Economist*, Jan. 1, 2005, at 35, 35 (reporting on the recent election in Ukraine, noting that corruption has been rampant). Transparency International prepares a periodic “Corruption Perceptions Index.” Transparency Int’l, Knowledge Centre: Corruption Surveys and Indexes, Corruption Per-
dentals of some of the recent member states are questionable at best.\textsuperscript{394} Thus, it seems unlikely that the governments of these newer member countries would invest much energy in prison reform.\textsuperscript{395}

Even if these countries could overcome the political constraints imposed by a lack of a true democracy and the debilitating effects of corruption and became genuinely interested in prison reform, this triumph is probably fiscally impossible in the near future.\textsuperscript{396} Most Western European countries have a gross domestic product of upwards of $20,000 per capita,\textsuperscript{397} an amount that, in several instances, is over ten times the size of more easterly member states.\textsuperscript{398} Each of these eastern member states has the daunting task of bringing its entire economy

\textsuperscript{394} Azerbaijan recently held an "election" and a subsequent crackdown on dissidents struck many western observers as very undemocratic. \textit{See Azerbaijan and Democracy: A Watermelon Revolution?}, \textit{ECONOMIST}, June 4, 2005, at 52, 52. In the recent election in the Ukraine the first result was so flawed that it led to the "orange" revolution—when masses of citizens blockaded the streets, and eventually a new, fairer election was held. \textit{See discussion supra note 393}.

\textsuperscript{395} An exploration of the "political will" within recently admitted member states to pursue genuine prison reform (let alone a demonstration that the political will is lacking) is beyond the scope of this Article. But, the next factor considered—financing improvements—is by itself a complete barrier for the foreseeable future.

\textsuperscript{396} \textit{See Poverty in Eastern Europe}, \textit{ECONOMIST}, Sept. 23, 2000, at 27, 27 (detailing the horrendous economic conditions in more rural parts of Eastern Europe, where living standards have declined since the demise of Communism and noting the daunting task ahead for economic progress and the obstacles presented by disorganized and corrupt government). While this report is several years old, there is little evidence of any marked improvement. For example, hospitals in Russia are in dire straits due to massive under-funding and neglect, so much so it is thought to be a major cause of a declining life span and a declining population. \textit{See Jeanne Whalen, Russia's Health Care Is Crumbling}, \textit{WALL ST. J.}, Feb. 13, 2004, at A9.

\textsuperscript{397} In 2003, for example, the estimated per capita gross domestic product of Germany was $27,600, of France, $27,500, and of Italy, $26,800. 2005 \textit{WORLD ALMANAC}, supra note 7, at 112. Norway had a per capita gross domestic product of $37,700 and Switzerland, $32,800 in the same year. \textit{Id}.

\textsuperscript{398} The 2003 estimated per capita gross domestic product of Moldova was $1800, of Georgia was $2500, and of Serbia was $2300. \textit{Id} at 803, 778, 827. These are all less than 10\% of some of the Western European countries listed, \textit{supra} note 397. It was $5300 in the Ukraine. \textit{Id} at 840. Russia had a somewhat higher per capita gross domestic product at $8900, but even this was less than a third of that of some western European countries. \textit{Id} at 823. A simple comparison of the per capita gross domestic product is not a perfect measure of the economic capacity of any country to provide governmental services. There may be less income but wages (such as for prison guards) are also lower. There are, however,
and social structure up to western standards. It takes money to provide an emerging economy with a modern infrastructure, with modern factories, modern schools, modern hospitals, and with all of the other hallmarks of an advanced western economy. Massive spending projects aimed at modernizing prisons would divert funds from other projects which may well be more important for that state's development as a fully functioning western democratic country.  

In short, whatever the will may be for prison reform, the ability may be lacking. One might ask what, as a policy matter, the Strasbourg Court should do in a situation where there is massive poverty and a decaying infrastructure. Russian prisons are appalling, but so, apparently, are its hospitals. Should the Court, as prison cases are brought before it, attempt to enforce improvement by awarding substantial amounts of monetary damages (or, perhaps, increasing amounts) as "just satisfaction?" If Russia is saddled with many substantial "just satisfaction" judgments with respect to its prisoners, would this have an adverse effect on the ability of Russia to do something to improve its hospitals? In the United States, substandard prison conditions and insufficiently desegregated school districts have many more demands for improvement of almost all aspects of the economies of these countries.

399. See, e.g., Gerald E. Frug, The Judicial Power of the Purse, 126 U. PA. L. REV. 715, 788 (1978) ("limits on government resources are no less applicable in the courtroom than outside of it" and "[a] court cannot weigh the competing demands for government resources to determine how much can be raised for the institutions, nor should it try to force the legislature to raise the necessary money regardless of competing considerations"); Donald L. Horowitz, Decreeing Organizational Change: Judicial Supervision of Public Institutions, 1983 DUKE L.J. 1265, 1305 (1983) (observing that "funds appropriated for, say, improved prison conditions may mean fewer funds for health care or welfare assistance or some other need"). If this is a problem worthy of some concern in the wealthy United States, it would be a much greater problem in a poor country such as Armenia or Moldova. I do not mean to suggest that the status quo of miserable conditions is, or ought to be, considered acceptable. Certainly some steps toward prison reform should be undertaken in even the most economically deprived member states. All I suggest is that it may well be fiscally impossible for a long period of time (even if the will exists) to bring prison conditions up to Western European standards in more easterly member states.

400. See Poverty in Eastern Europe, supra note 396, at 27.

401. See discussion supra Part II.B.3 (discussing awards of "just satisfaction"). The issue raised in this sentence raises the question whether "just satisfaction" awards that were intentionally "substantial" in amount (or increasing in amount over time while noncompliance continued—becoming in essence a form of punitive damages) could be used to goad a member state into faster compliance. It would seem contrary to the language of Article 41, but insofar as I am aware, it has never been discussed by the Court or by commentators.

402. Article 2 of the Convention provides that "[e]veryone's right to life shall be protected by law," Convention, supra note 12, art. 2. Given that the Convention is interpreted to impose "positive duties," the Court may well find that grossly substandard hospital care is a violation of Article 2 at some future point. See discussion supra Part III.D.
been subject of lawsuits, and judges have used all of the equitable powers of a court (including injunctions, appointment of special masters and even day to day supervision of the prisons or school districts) to institute reform.\(^4\) But the Strasbourg Court has neither the structure nor the personnel to carry out a similar task to “reform” Eastern European prisons, health facilities, or other decaying institutions.\(^4\)

\(4\) See, e.g., Malcolm M. Feeley & Edward L. Rubin, Judicial Policy Making and the Modern State: How the Courts Reformed America’s Prisons (1998) (describing in detail litigation to improve prison conditions in the United States and the immense amount of judicial time and resources required); James, Jr., et al., supra note 244, at 38–40. In some cases the courts were aided by attorneys from the United States Department of Justice including conducting investigations of the underlying facts. See, e.g., In re Estelle, 516 F.2d 480, 482, 583–84 (5th Cir. 1975). In terms of remedies, Feeley and Rubin observe: [F]ederal courts ended up promulgating a comprehensive code for prison management, covering such diverse matters as residence facilities, sanitation, food, clothing, medical care, discipline, staff hiring, libraries, work, and education. The decisions themselves, and often the resulting body of law, specify many requirements in what can be described, depending on one’s perspective, as painstaking or excruciating detail; the wattage of the light bulbs in the cells, the frequency of showers, and the caloric content of meals are all part of the code that the federal courts have promulgated. Feeley & Rubin, supra, at 41. All of this requires a great deal of judicial time and a large staff under judicial control to ensure that the court orders are, in fact, carried out. The litigation to reform the Arkansas prison system is recounted in detail emphasizing the amount of time spent by the judge from 1965 to 1982 (including personal inspections of the prisons) as well as the massive amount of other resources required to accomplish the task. Id. at 51–79. The judge, of course, was in Arkansas, not hundreds of miles away, and Arkansas is a relatively small state, not a huge country such as Russia. As to school desegregation, James & Hazard indicate that in some instances, to implement desegregation, the court issued decrees of increasing detail and appointed special officials to monitor and administer the decrees. James Jr., et al., supra note 244, at 38–40. In some cities the federal court became a virtual adjunct to the school board. Id. at 39. In Boston, the district court issued 400 rulings on the administration of the school system. Id. Needless to say, each of these rulings required the judge to hear the request and the evidence upon which the request was made and whatever evidence the opposition offered, in other words, a huge expenditure of judicial time. See also Horowitz, supra note 399, at 1297 (noting the complexity and time consuming character of judicial supervision, that often leads “to the appointment of a special master, a monitor, a review committee, or, in more extreme cases, a receiver to take over administration of an agency”).

\(4\) As discussed, supra Parts II.B.1 and II.B.3, the only remedies available to Strasbourg Court are a form of declaratory relief and limited monetary damages. The Court has no injunctive powers, and, further, has very limited ability to determine relevant facts. See supra notes 132–37 and accompanying text. It only has forty-six judges who, for decision making purposes, sit in groups of seven, meaning at best six decision making bodies. See supra note 97 and accompanying text. It is located in Strasbourg, France, far from the more easternly parts of Europe where institutions that might be substandard are located, and the Court may well have only one judge and a small number of Court personnel who could even speak the local language. The Court has no provisions for appointing or supervising “special masters” or other personnel who could supervise the carrying out of injunctive decrees, even if it had the power to issue them. In short, the Court as it is currently constituted simply has no ability to implement the kinds of “structural litigation” that has oc-
It may well be that the flood of cases posited in the preceding paragraphs will not come to pass. The ability of a prisoner, or someone acting on behalf of a prisoner, to bring the particular conditions of his incarceration to the attention of the national courts, let alone the Strasbourg Court, may be restricted for many reasons, not the least of which is intimidation by the prison authorities. Kalashnikov was a banker before his imprisonment and likely had friends who could facilitate his application to the Court—but this is probably an exceptional circumstance.405 If only prisoners who have well placed domestic connections can appeal successfully, then the flood of cases may never occur.406 But if domestic restrictions on seeking review of prison conditions are overcome, as one hopes they are, it may mean that the Court will be deluged with meritorious applications for relief.407 Further, the Court may not be able to do very much to effectuate a massive change, however desirable it may be.408

Conclusion

Though this Article outlines some serious problems facing the Strasbourg Court, the Convention and the Court that administers it are an immense force for betterment of the human condition, not only in Europe, but, by example, (sooner or later) throughout the world. The Convention was founded by visionaries, and, to date, their vision is being carried out. So, whatever its problems (a charitable

curred in the United States to solve massive problems such as unsatisfactory prisons. See supra note 403. Even if the Court did have such powers, there is at least a serious question of whether the cost “improvements” ordered by the Court for one set of institutions would be achieved at the expense of other important public institutions starved of funds as a result. See supra note 399.

405. Kalashnikov v. Russia, App. No. 47095/99, 36 Eur. H.R. Rep. 34, 593 (2002). If only a small number of prison condition cases are filed, it does not mean that violations of the Convention are not rampant in this respect. It may only mean that a mechanism for effective enforcement of the Convention has not been perfected.

406. Of course if this is what occurs, there will be massive violations of the Convention, but they will never come to the attention of the Strasbourg Court. Even if the Court realizes that this is the case, it still will not be able to do anything since it merely adjudicates individual cases brought before it, and has no capacity or authority to undertake any kind of “structural” litigation such as has happened in the United States. See supra Part II.C.

407. Prison conditions are just one example of a situation that may result in a massive number of cases brought to the Court. In a poor and corrupt society, as exists in most of the newly admitted states, there are probably many other actions (or inactions) by the state that could be the basis of a case in the Court. Already mentioned as another issue are environmental harms, especially if the jurisprudence of the Court “evolves” to recognize state inaction to protect people from environmental harm. See supra notes 347–49 and accompanying text. So might appalling hospital conditions. See discussion supra note 396.

408. See supra notes 393–404 and accompanying text.
characterization might be that they are growing pains), the existence of the Convention and the Strasbourg Court is a major achievement for the entire world. Many of the problems today can be traced to what some might call too hasty expansion of the membership of the Council of Europe and, thus, the coverage of the Convention. It is true that some of the most intractable problems that the Court will face in the future come from more recently admitted member states, and it is unlikely that anything the Court does will dramatically improve the human rights conditions in those countries in the short run. But, the alternative would be to leave the citizens of such countries completely out of any workable human rights system. Thus, some improvement through the decision making process of the Strasbourg Court is better than the alternative of nothing. Any description and analysis of the Convention and the Strasbourg Court must recognize this fundamental point.

That is not to suggest that the problems of the Strasbourg Court can be ignored. The increasing caseload must be dealt with, because not to deal with it is to eventually destroy the Court. It has been suggested that getting the judiciaries of the various member states to deal more forcefully with domestic violations of the Convention is a laudable goal, but one that may be very hard to enforce. So far, only timid recommendations have been made to increase the discretionary powers to choose cases to be decided, and even these have received a mixed reaction. The Court has almost no enforcement powers—making it almost impossible to deal with widespread institutional

409. Evaluation Group Report, supra note 251, paras. 44–47. While I follow the Strasbourg Court more closely than do most legal scholars from the United States, I cannot claim sufficient experience with the internal operations of the Court to allow me to recommend systemic reforms. Even so, I suspect that for cases brought by many applicants, there has been no plenary discussion by a member state court of the facts and the applicability of the Convention to the case before it. If the Court had the power to remand applications to the member states for such a determination, it might (at least some of the time) result in a satisfactory resolution without further recourse to the Strasbourg Court.

410. See, e.g., Council of Eur., Parliamentary Assembly, Opinion No. 251 (2004), Draft Protocol 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms Amending the Control Systems of the Convention para. 11, available at http://assembly.coe.int/default.asp (follow the “documents” hyperlink; then search for and select “Opinion 251 2004”) (objecting to a proposed amendment to Article 35 of the Convention granting the Court any discretion to reject applications if the applicant has not suffered a significant disadvantage). But see supra notes 251–53 and accompanying text (suggesting that it may well be that de facto, such discretion is already being exercised). In the past, four applications out of five have been found “inadmissible” in that there is not even a prima facie case that a violation of the Convention has occurred and in recent years the same fate has occurred in over nineteen out of twenty applications. See Survey of Activities 2004, supra note 59, at 35.
problems, such as prison or hospital conditions.\textsuperscript{411} It will take leadership (and probably considerable financing) from the Council of Europe, or some other body such as the European Union, to address these problems in the poorer member states of the Council.

It is hard to imagine the Court as presently structured being able to have much of a systemic effect. The Court takes pride in the fact that the Convention is interpreted as a living instrument.\textsuperscript{412} Presumably most member states are satisfied with this interpretation. But expansive and evolving interpretations of the Convention put even greater burdens on the Court in terms of caseload and attempts to enforce judgments. Possibly some of the problems dealt with by evolving interpretations (such as increased oversight over environmental conditions by deeming them violations of Article 8) might better be dealt with by bodies that have legislative authority—such as the Council of Europe—or even by further Protocols to the Convention on such topics that have been agreed to by member states.

Whatever the future holds for the Strasbourg Court, knowledge of its current jurisprudence is important for any lawyer with any involvement in the global economy. It is my intention that this Article will advance this understanding.

\textsuperscript{411} It can grant "just satisfaction" but on a case by case basis this is a small penalty for a member state with serious institutional problems such as inhuman prison conditions. A large monetary sanction against a member state struggling to modernize its infrastructure would simply be counterproductive. \textit{See supra} Part II.B.3.

\textsuperscript{412} \textit{See supra} Part III.C (detailing that the Convention is an evolving document).
Appendix I

The substantive provisions of the current Convention are set out below.413

**Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocol No. 11**

The governments signatory hereto, being Members of the Council of Europe,

Considering the Universal Declaration of Human Rights proclaimed by the General Assembly of the United Nations on 10th December 1948;

Considering that this Declaration aims at securing the universal and effective recognition and observance of the Rights therein declared;

Considering that the aim of the Council of Europe is the achievement of greater unity between its members and that one of the methods by which that aim is to be pursued is the maintenance and further realisation of human rights and fundamental freedoms;

Reaffirming their profound belief in those fundamental freedoms which are the foundation of justice and peace in the world and are best maintained on the one hand by an effective political democracy and on the other by a common understanding and observance of the human rights upon which they depend;

Being resolved, as the governments of European countries which are like-minded and have a common heritage of political traditions, ideals, freedom and the rule of law, to take the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration,

Have agreed as follows:

**Article 1 – Obligation to respect human rights**

The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.

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413. All articles and protocols of the Convention (as well as the Rules of Court) are on the Court’s website. For the protocols of the Convention, see European Court of Human Rights, Basic Texts, http://www.echr.coe.int (follow “Basic Texts” hyperlink; then follow “The European Convention on Human Rights and Additional Protocols” hyperlink; select the desired language and follow the appropriate hyperlink). See Convention, supra note 12; ECHR Rules, supra note 40.
SECTION I – Rights and freedoms

Article 2 – Right to life

1 Everyone’s right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

2 Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:
   a in defence of any person from unlawful violence;
   b in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
   c in action lawfully taken for the purpose of quelling a riot or insurrection.

Article 3 – Prohibition of torture

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

Article 4 – Prohibition of slavery and forced labour

1 No one shall be held in slavery or servitude.

2 No one shall be required to perform forced or compulsory labour.

3 For the purpose of this article the term "forced or compulsory labour" shall not include:
   a any work required to be done in the ordinary course of detention imposed according to the provisions of Article 5 of this Convention or during conditional release from such detention;
   b any service of a military character or, in the case of conscientious objectors in countries where they are recognised, service exacted instead of compulsory military service;
   d any service exacted in case of an emergency or calamity threatening the life or well-being of the community;
   e any work or service which forms part of normal civic obligations.

Article 5 – Right to liberty and security

1 Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
a the lawful detention of a person after conviction by a competent court;
b the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfillment of any obligation prescribed by law;
c the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
d the detention of minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
e the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;
f the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

2 Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.

3 Everyone arrested or detained in accordance with the provisions of paragraph 1.c of this article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

4 Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

5 Everyone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation.

Article 6 – Right to a fair trial

1 In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impar-
tial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interest of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

2 Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

3 Everyone charged with a criminal offence has the following minimum rights:
   a to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
   b to have adequate time and facilities for the preparation of his defence;
   c to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
   d to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
   e to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

Article 7 – No punishment without law

1 No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.

2 This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations.

Article 8 – Right to respect for private and family life

1 Everyone has the right to respect for his private and family life, his home and his correspondence.
2 There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Article 9 – Freedom of thought, conscience and religion

1 Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

2 Freedom to manifest one’s religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

Article 10 – Freedom of expression

1 Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2 The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

Article 11 – Freedom of assembly and association

1 Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.
2 No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

**Article 12 – Right to marry**

Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.

**Article 13 – Right to an effective remedy**

Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

**Article 14 – Prohibition of discrimination**

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

**Article 15 – Derogation in time of emergency**

1 In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.

2 No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision.

3 Any High Contracting Party availing itself of this right of derogation shall keep the Secretary General of the Council of Europe fully informed of the measures which it has taken and the reasons
therefor. It shall also inform the Secretary General of the Council Europe fully informed when such measures have ceased to operate and the provisions of the Convention are again being fully executed.

**Article 16 – Restrictions on political activity of aliens**

Nothing in Articles 10, 11, and 14 shall be regarded as preventing the High Contracting Parties from imposing restrictions on the political activity of aliens.

**Article 17 – Prohibition of abuse of rights**

Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.

**Article 18 – Limitation on use of restrictions on rights**

The restrictions permitted under this Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed.

**Article 34 – Individual applications**

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

**Article 41 – Just Satisfaction**

If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.
Appendix II

The provisions of Protocols providing substantive rights which have been adopted since the Convention was established are set out below. Not every member state has ratified every Protocol.\textsuperscript{414}

PROTOCOL 1\textsuperscript{415}

Article 1 – Protection of property

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure payment of taxes or other contributions or penalties.

Article 2 – Right to education

No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.

Article 3 – Right to free elections

The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.

PROTOCOL 4\textsuperscript{416}

Article 2 – Freedom of movement

1 Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.
2 Everyone shall be free to leave any country, including his own.

\textsuperscript{414} See supra note 36.
\textsuperscript{415} Protocol 1, supra note 35.
\textsuperscript{416} Protocol 4, supra note 35.
3 No restrictions shall be placed on the exercise of these rights other than such as are in accordance with law and are necessary in a democratic society in the interests of national security or public safety, for the maintenance of *ordre public*, for the prevention of crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

4 The rights set forth in paragraph 1 may also be subject, in particular areas, to restrictions imposed in accordance with law and justified by the public interest in a democratic society.

**Article 3 – Freedom of expulsion of nationals**

1 No one shall be expelled, by means either of an individual or of a collective measure, from the territory of the State of which he is a national.

2 No one shall be deprived of the right to enter the territory of the State of which he is a national.

**PROTOCOL 6**

**Article 1 – Abolition of the death penalty**

The death penalty shall be abolished. No one shall be condemned to such penalty or executed. (Article 2 of Protocol 6 created an exception for times of war. However, the Thirteenth protocol, signed so far by 22 member states, abolishes this exception.)

**PROTOCOL 7**

**Article 1 – Procedural safeguards relating to expulsion of aliens**

1. An alien lawfully resident in the territory of a State shall not be expelled therefrom except in pursuance of a decision reached in accordance with law and shall be allowed:
   a. to submit reasons against his expulsion,
   b. to have his case reviewed, and
   c. to be represented for these purposes before the competent authority or a person or persons designated by that authority.

2. An alien may be expelled before the exercise of his rights under paragraph 1.a, b and c of this Article, when such expulsion is nec-

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necessary in the interests of public order or is grounded on reasons of national security.

Article 2 – Right of appeal in criminal matters
1. Everyone convicted of a criminal offence by a tribunal shall have the right to have his conviction or sentence reviewed by a higher tribunal. The exercise of this right, including the grounds on which it may be exercised, shall be governed by law.
2. This right may be subject to exceptions in regard to offences of a minor character, as prescribed by law, or in cases in which the person concerned was tried in the first instance by the highest tribunal or was convicted following an appeal against acquittal.

Article 3 – Compensation for wrongful conviction
When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed, or he has been pardoned, on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to the law or the practice of the State concerned, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.

Article 4 – Right not to be tried or punished twice
1. No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State.
2. The provisions of the preceding paragraph shall not prevent the reopening of the case in accordance with the law and penal procedure of the State concerned, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case.
3. No derogation from this Article shall be made under Article 15 of the Convention.

Article 5 – Equality between spouses
Spouses shall enjoy equality of rights and responsibilities of a private law character between them, and in their relations with their children, as to marriage, during marriage and in the event of its dissolution. This Article shall not prevent States from taking such measures as are necessary in the interests of the children.