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Inside the Court

Its Trade-Offs and Zone of Discretion

In the first part of this chapter, I take a closer look at the Court to shed light on what kind of actor the Court is. What motivates it to oscillate between audacity and forbearance? To answer this question, I rely on the existing accounts of the Court's inner workings and the insights gained from the interviews I carried out in 2014 and 2015. I consider the Court's internal character as a collective actor composed of different groups of agents (i.e., elected judges, permanent staff, and support services). The Court's smooth operation depends on a division of labour and close collaboration among these different groups. Beyond its functional benefits, this collaboration cultivates a coherent legal culture and gives the Court a collective purpose. In the second part of the chapter, I turn to the Court's institutional transformation and how this transformation has influenced the width of its discretionary space. In particular, I describe how the part-time old Court transformed into the full-time new Court with compulsory jurisdiction and how the new Court transitioned into the reformed Court due to a series of reform processes that started in 2010. I will then elaborate on the implications of these shifts on the way the Court operated in different stages of its lifetime.

Who Is the Court?

The European Court of Human Rights (the Court) is "the crown jewel" of the human rights regime embedded in the Council of Europe, located in Strasbourg, France.[1] The Court was created to oversee the application of

[1] Laurence R. Helfer, "Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime," *European Journal of International Law* 19, no. 1 (2008): 125–59. The Council of Europe is different from the European Union. In fact, the former predates the latter. It was specifically created to coordinate European countries' social policies, promote cooperation and prevent another European war. See David P. Forsythe, *Human Rights in International Relations* (New York: Cambridge University Press, 2006), 111.

the European Convention of Human Rights (the Convention).[2] The Registry is its largest organ, with roughly 640 staff members, a considerable number of whom are employed on a permanent basis. The Registry's staff includes lawyers, administrative staff, translators, and the Jurisconsult in charge of ensuring the consistency of jurisprudence.[3]

The Court is organised into five sections, each with its own judicial chamber, President and Vice President (elected from among the judges), Section Registrar, and Deputy Section Registrar. The sections are the Court's administrative units; each unit includes nine or ten judges who are assisted by members of the Registry.[4] Judges assigned to these administrative units may serve in one of the following four formations: (1) *Single-judge formation*, which is mainly responsible for filtering inadmissible cases, (2) *Committee of three judges* that decides on the admissibility and merits of cases where case law is already well-established, (3) *Chamber of seven judges* that reviews admissibility and merits of non-repetitive cases, and (4) *Grand Chamber of seventeen judges* that serves as an appeal mechanism over relinquished or referred cases.[5]

The entire case processing system relies on a synergetic interaction between the Registry's legal team and elected judges. As Nina-Louisa Arold, who conducted a research stay at the Court, rightly points out, "[the permanent staff] remain in Strasbourg so long that their domestic legal

[2] Other bodies of the Council of Europe, such as the Committee of Ministers and the Parliamentary Assembly, support the Court in this regard. The Committee of Ministers, a body composed of foreign ministers and permanent representatives of all forty-six member states, monitors the execution of the Court's judgments. The Parliamentary Assembly consists of parliamentarians of member states and elects the Court's judges. There is also the Secretariat, which consists of the Secretary General, the Deputy Secretary General, and other staff members.

[3] European Court of Human Rights, "ECHR Registry," available at www.echr.coe.int/Documents/Registry_ENG.pdf

[4] For more on the Court's organization and deliberation practices, see Helen Keller and Corina Heri, "Deliberation and Drafting: European Court of Human Rights (ECtHR)," in *Max Planck Encyclopedia of International Procedural Law (EiPro)* (Oxford Public International Law, May 2018).

[5] Appeal to the Grand Chamber is exceptional and takes place through referral or relinquishment; namely, either party can request a referral, or the Chamber relinquishes the case to the Grand Chamber "if the case raises serious questions affecting the interpretation of the Convention." In addition, according to Article 45 of the Convention (on infringement proceedings), the Grand Chamber can also be referred to if a member state refuses to abide by a Court's judgment. Article 45: "if the Committee of Minister (by a two-thirds majority) finds a state is refusing to abide by a Court judgment, it can be referred back to the Grand Chamber for an infringement finding which will then be referred back to the Committee to take action."

cultures become secondary to their experience of the Strasbourg system," and judges serving for a limited term "bring the necessary fresh knowledge of the national law into the system."[6] The existence of the permanent staff, some of whom have worked for the Registry for several decades, contributes to the maintenance of the legal culture and the "stability and continuity of legal reasoning."[7] Similarly, Cosette Creamer and Zuzanna Godzimirska describe the Registry's role as being "largely related to ensuring continuity and coherence in the Court's caselaw and maintaining the institutional memory of the Court."[8] One former judge also highlighted this point in an interview, where he described the Registry's role as "keeping the Court intact and preventing it from going into different schools."[9]

Judges are a much smaller group.[10] There are currently forty-six judges, one from each member state of the Council of Europe, holding nonrenewable nine-year terms.[11] The Parliamentary Assembly elects one judge per member state.[12] The number of judges decreased from forty-seven to forty-six when Russia ceased to be a party to the European Convention on September 16, 2022.[13] Elected judges often have diverse professional

[6] Nina-Louisa Arold, *The Legal Culture of the European Court of Human Rights* (Leiden; Boston: Brill Nijhoff, 2007), 46.

[7] Ibid., 46.

[8] Cosette D. Creamer and Zuzanna Godzimirska, "Trust in the Court: The Role of the Registry of the European Court of Human Rights," *European Journal of International Law* 30, no. 2 (2019): 670.

[9] Interview 17.

[10] The criteria for office, the election process, and the terms of office are regulated in Articles 21–23 of the Convention as amended by Protocol 14, which came into force in 2010. Every Member State proposes three candidates before the Parliamentary Assembly of the Council of Europe, which selects one judge among the candidates. Judges cannot be reelected. Their terms of office expire when they reach seventy.

[11] Council of Europe, "ECHR Registry," www.echr.coe.int/Pages/home.aspx?p=court/howitworks&c= [September 20, 2019]. Additionally, the Member States have begun seconding legal staff in order to contribute to the work of the Court, which was encouraged in the Interlaken, Izmir, and Brighton declarations. The seconded legal officials are only employed at the filtering divisions, where they decide the admissibility of the cases.

[12] Each member state transmits a list of three candidates, and the Assembly elects one judge per member state, in line with the majority rule. Parliamentary Assembly, "Procedure for Electing Judges to the European Court of Human Rights," AS/Cdh/Inf (2015) 02 Rev 1§ (2015).

[13] At the time of writing this book, the number of member states decreased from forty-seven to forty-six with Russia's exit from the Council of Europe. Russia was officially expelled from the Council of Europe on March 22, 2022, due to Russia's refusal to "cease its aggression against Ukraine." Committee of Ministers, on legal and financial consequences of the cessation of membership of the Russian Federation in the Council of Europe, *Resolution CM/Res (2022)3* (March 23, 2022). While the process of Russia's expulsion was underway, Russia announced its withdrawal from the Council of Europe on March 15, 2022.

backgrounds, though typically hold academic, judicial, or public office positions in their home countries before being elected.[14] Although elected judges are a minority of the Court's staff, their work carries major significance since they hold the official responsibility of issuing rulings.[15]

As became clear in the course of the interviews I carried out at the Court, judges have different views concerning the Court's role. Seven out of the fifteen sitting judges I interviewed told me they considered their role to be the simple application of the Convention.[16] These seven were mostly from Western European countries. Four other judges, mostly from Eastern European countries, told me that the Court's role is to protect human rights and enforce the rule of law. The remaining four judges saw their role as setting standards across Europe. Some of the judges elaborated on their vision of the Court. According to one judge: "the Court is there to uphold the values of our civilization."[17] Another judge with an academic background said that the Court's role is "to build a Europe of Rights."[18] Some believe that the Court's role should be more limited. A judge from Western Europe defined the Court's role as ensuring that "the High Contracting parties observe the Convention's provisions."[19] He further added the following: "I have a very traditional sense of what it is to be a judge. I am not a policymaker. I am not a politician. I am here to decide on a case-by-case basis whether the member states have respected human rights as provided by the Convention."[20] Finally, another judge, who previously served on a constitutional court, argued that the primary role of the Court is to decide whether states have complied with their obligations arising from the Convention.[21] He then added:

> The secondary or collateral role of the Court is that of a standard setter. (…) a third, even perhaps more collateral – but at the same time vitally important – the role is that of ensuring that the Convention remains a credible document. This credibility could be undermined if the Court were

[14] For an assessment of the judges' changing backgrounds, Mikael Rask Madsen, "The Legitimization Strategies of International Judges: The Case of the European Court of Human Rights," in *Selecting Europe's Judges: A Critical Review of the Appointment Procedures to the European Courts*, ed. Michal Bobek (Oxford: Oxford University Press, 2015), 259–76.

[15] Arold, *The Legal Culture of the European Court of Human Rights*, 46.

[16] Interview 1; Interview 2; Interview 3; Interview 6; Interview 10; Interview 14; Interview 15.

[17] Interview 8.

[18] Interview 9.

[19] Interview 15.

[20] Ibid.

[21] Interview 10.

> to interpret and apply the Convention in such a way that some member States would consider it as re-writing the Convention. This could happen with unnecessary forays into areas such as ethics and morality.[22]

Eight out of fifteen judges argued that it is within the Court's prerogative to refine the norms in line with societal needs and changing moral values.[23] In contrast, three judges, all from Western European countries, argued that the Court's role does not extend into creating new rights.[24] One judge especially cautioned that the Court must be careful when generating legal change in order to avoid causing backlash from member states.[25]

Scholars have considered how it is that judges coming from different countries, with different prior experiences and understandings, work together as a part of a collective body. In one study, Erik Voeten investigated whether judges exhibited national bias. He concluded that the heterogeneity of judges' national legal cultures does not compromise their impartiality.[26] Nina-Louisa Arold, on the other hand, found that the Court provides a space within which national legal cultures or professional backgrounds are fused into a common legal culture.[27] Judges bring fresh perspectives and experiences that complement the Court's long-term legal tradition, which is well guarded by the Registry's permanent team.

According to my interviews, the synergetic interaction between elected judges and the Registry's permanent staff is what fuels the Court's operations.[28] What became evident in our conversations was that judgments are not just "made" by the judges sitting on the bench. Instead, they are the outcome of a process in which many nameless individuals – such as law clerks, nonjudicial rapporteurs, or editors – are also involved.[29] Judgments are the products of the Court as an institution. "They are public documents," one judge explained.[30] They are decided either

[22] Ibid.
[23] Interview 1; Interview 5; Interview 10; Interview 11, Interview 12; Interview 13; Interview 15.
[24] Interview 2; Interview 8; Interview 14.
[25] Interview 2.
[26] Erik Voeten, "The Impartiality of International Judges: Evidence from the European Court of Human Rights," *American Political Science Review* 102, no. 4 (2008): 417–33; Erik Voeten, "The Politics of International Judicial Appointments: Evidence from the European Court of Human Rights," *International Organization* 61, no. 4 (2007): 669–701. See also Jeffrey L. Dunoff and Mark A. Pollack, "The Judicial Trilemma," *American Journal of International Law* 111, no. 2 (2017): 225–76.
[27] Arold, *The Legal Culture of the European Court of Human Rights*, 80.
[28] Interview 10, Interview 16, Interview 17, Interview 18, Interview 19, Interview 20, and Interview 25.
[29] Interview 19, Interview 17, Interview 20, and Interview 24.
[30] Interview 4.

unanimously or by majority vote and are signed by the entire Chamber, the Committee, or the Grand Chamber. In this regard, they are different from separate opinions authored and owned by an individual judge or a group of judges.

Judgments become institutional documents also because of the way they are produced. The case processing system is complicated and requires the entire staff's collaboration – from judges to the Registry's legal and support services teams. When an application is submitted, it is transferred to one of the Sections and assigned to a reporting judge (judge rapporteur).[31] The judge rapporteur and the Registry's clerks who assist them have an important role in this case throughout the proceedings.[32] Their tasks include submitting a draft report on admissibility, requesting further information from the parties when needed, and proposing a draft judgment to the Chamber to be discussed during deliberations.[33]

Following an initial examination, the judge rapporteur decides whether the case will be reviewed by a single-judge formation, a Committee, or a Chamber.[34] The cases that appear to be inadmissible at first glance (manifestly ill-founded cases) are passed to a single-judge formation or to a Committee.[35] These units are in charge of "disposing of the weakest cases."[36] Assisted by a nonjudicial rapporteur, single judges may declare a case inadmissible or strike it out of the list. Similarly, a Committee of three judges may issue admissibility decisions or strike a case out of the list

[31] Judge rapporteur's identity serving a given case is strictly confidential. For more, see Keller and Heri, "Deliberation and Drafting," § 38.

[32] Arold, *The Legal Culture of the European Court of Human Rights*, 61.

[33] European Court of Human Rights, "Rules of the Court" (2014), www.echr.coe.int/Documents/Rules_Court_ENG.pdf, §Rules 48–50.

[34] Philip Leach, *Taking a Case to the European Court of Human Rights*, 3rd edition (Oxford and New York: Oxford University Press, 2011), 41.

[35] According to the Court's admissibility guide, "[m]anifestly ill-founded complaints can be divided into four categories: 'fourth-instance' complaints [complaints that ask the Court to question the findings of the conclusions of the domestic Courts, putting the Court in a position of a supreme court], complaints where there has clearly or apparently been no violations, unsubstantiated complains and, finally confused or far-fetched complaints." For more, see European Court of Human Rights, "Practical Guide on Admissibility Criteria," January 1, 2014, available at www.echr.coe.int/Documents/Admissibility_guide_ENG.pdf [September 20, 2019], at 83§320.

[36] Leach, *Taking a Case to the European Court of Human Rights*, 41. One disadvantage of being reviewed by a single judge formation or a Committee is that the applicants will not receive an explanation as to why their application was declared inadmissible, and therefore, rejected.

if the decision is unanimous.[37] In the event that the Committee cannot reach a unanimous decision, the case is reviewed by a Chamber.[38]

When there is no apparent reason to declare a case inadmissible, it is communicated to the responding government. The government is then required to submit written observations or reply to specific questions. The applicant is also invited to submit observations in response.[39] Based on the parties' written submissions (or oral hearings, if applicable),[40] the Court assesses both the admissibility and the merits of the case and issues a judgment.[41] If a case raises important questions concerning the Convention's interpretation or the jurisprudence's consistency, then that case is relinquished to the Grand Chamber.[42] Parties may also request a Chamber judgment to be sent to the Grand Chamber for a final review.

This procedure through which a case traverses between different case processing units may seem to be automatic. However, in practice, case processing is realised by means of the tedious work of drafting and redrafting documents and expressing grievances as legal problems.[43] It is the Registry's legal team that administers the case processing steps.[44] They draft the case correspondence, admissibility decisions, and judgments for consideration by single judges or judge rapporteurs.[45] In addition, the facts of the cases are always processed and written by the Registry.[46] The

[37] Ibid.

[38] Additionally, the Committee may issue judgments on the merits of the case, if the case concerns an issue that is well-established in the case law or repetitive violations (manifestly well-founded case). Leach, *Taking a Case to the European Court of Human Rights*, 42.

[39] Ibid., 43–44.

[40] As Philip Leach explains, "the European Convention system is primarily a written rather than an oral procedure. (…) The vast majority of European Court cases will not include an oral hearing. If any Court hearing is held at all, it usually takes less than half a day from start to finish"; Ibid., 44.

[41] The Court may only examine the admissibility of the complaints in some cases. However, the usual practice is to consider both admissibility and merits at the same time, which is considered more efficient. Ibid., 48.

[42] Ibid., 48. The parties can raise objections to the relinquishment decision. However, it is not clear whether their objections amount to a veto, which prevents relinquishment. Protocol 15, which entered into force on August 1, 2021, has a provision that abolishes the parties' right to object.

[43] For an account of the daily tasks of legal practitioners, see Bruno Latour, *The Making of Law: An Ethnography of the Conseil d'Etat* (Cambridge: Polity Press, 2010).

[44] For a good assessment of the authority of international bureaucracies, see Julia Fleischer and Nina Reiners, "Connecting International Relations and Public Administration: Toward a Joint Research Agenda for the Study of International Bureaucracy," *International Studies Review* 23, no. 4 (2021): 1230–47.

[45] Leach, *Taking a Case to the European Court of Human Rights*, 27.

[46] Interview 17.

lawyers may also inform the judge rapporteurs about the relevant national law, or even applicable European jurisprudence if the judge is new or less experienced.[47]

Helen Keller, a former judge at the Court, and Corina Heri explain that the deliberations for Chamber and Grand Chamber judgments differ. Before the deliberations at the Chamber, the judges receive "a thick file from the Registry that already contains a draft judgment or decision."[48] They also receive a document about the Court's caselaw from the Jurisconsult in order to ensure consistency.[49] The judge rapporteur presents the draft opinion to the Chamber at the deliberations.[50] Participating judges express their opinions and take a preliminary vote. The clerks revise the draft judgment based on this feedback. Keller and Cori explain that "there is usually no second deliberation in the Chamber proceedings, as there is often no need for one: generally, the Chamber judges approve the draft judgments or decisions before them."[51]

The discussions at the deliberation are not reflected in the final ruling, which is decided either unanimously or by majority vote.[52] The judgment, which is the text of the majority, does not give a hint about how the Chamber reached a decision. Since deliberations take place in secrecy, one cannot know whether the decision is fully based on the draft proposed by the judge rapporteur and clerks, or a version modified to some degree.[53] It is impossible to discern the judges' individualised input in the final judgment's text. However, judges who do not fully agree with the majority tend to announce their position in separate opinions annexed to the judgment.[54]

Grand Chamber proceedings are like those of the Chamber. However, judges do not receive draft judgments before deliberations at the Grand Chamber. Instead, the judges receive a note from the judge rapporteur (rapporteur's note) and reports from the Registry.[55] While the Chamber usually uses the draft judgment as a template to inform the final decision,

[47] Arold, *The Legal Culture of the European Court of Human Rights*, 62.
[48] Keller and Heri, "Deliberation and Drafting," § 27.
[49] Ibid., §39.
[50] National judge also participates in deliberations and provides further information concerning the national legal system if needed.
[51] Keller and Heri, "Deliberation and Drafting," §43.
[52] Arold, *The Legal Culture of the European Court of Human Rights*, 63.
[53] Ibid., 75.
[54] European Court of Human Rights, Rules of the Court, §Rule 74(2).
[55] Keller and Heri, "Deliberation and Drafting," §27.

the Grand Chamber does not have such a template. Rather it finds a way to resolve the dispute during the course of deliberations, in line with the information provided by the judge rapporteur and the Registry.[56] Grand Chamber proceedings generally start with a public hearing.[57] At the end of the first deliberation session, the Grand Chamber's president selects a drafting committee of up to five judges – including a Judge Rapporteur. The Registry clerks draft a judgment based on the discussions held at the deliberation. The Judge Rapporteur reviews the draft and sends it to the drafting committee. The drafting committee may further revise it, preparing it for a discussion at the second (and final) deliberation meeting.[58]

The entire case processing system, conducted mostly behind the scenes under the cloaks of anonymity, works toward the institutional reproduction of judgments.[59] This largely disguises any given individual's input. Case processing becomes a collective activity. It is the Registry's clerks who process the case files and propel the system.[60] The degree of judges' involvement is a matter of their personality and the importance of the case.[61] For example, Grand Chamber proceedings may require more involvement than those of single-judge formations. However, overall, when it comes to the case-writing process, "it is more the exception than the rule that the judges will intervene," as one former judge explained. This is because "[judges] cannot handle the workload."[62]

Both the judges and the clerks acknowledged the importance of the Registry's role in determining the Court's working methods and the significance of the collaboration between the judges and the clerks.[63] One judge, in particular, laid out the Registry's role as follows: "The judges often depend on the Registrars and their teams. Sometimes the cooperation goes so far that the clerk proposes a draft that will later be used by the judges as the basis for the judgment."[64] Similarly, a senior clerk described

[56] Ibid., §31.
[57] There are exceptions to this rule. The judge rapporteur may request not to hold a hearing.
[58] Keller and Heri, "Deliberation and Drafting," §49–59.
[59] For an interesting overview of how international courts function, see Jeffrey L. Dunoff and Mark A. Pollack, "International Judicial Practices: Opening the Black Box of International Courts," *Michigan Journal of International Law* 40, no. 1 (2018): 47–114.
[60] Arold, *The Legal Culture of the European Court of Human Rights*, 44–46.
[61] Creamer and Godzimirska, "Trust in the Court," 679.
[62] Interview 17.
[63] Interview 18, Interview 19, and Interview 4.
[64] Quoted from an interview in Arold, *The Legal Culture of the European Court of Human Rights*, 46.

his colleagues as "established civil servants" who have been in the system for a long time. He underlined that they are highly skilled in efficiently drafting judgments.[65] What was evident from these discussions was that this working method is the only viable way to process the Court's overwhelming caseload.[66] It requires different groups of agents to cooperate, and it creates a sense of collective ownership over judgments.[67]

This working method and these procedures are the most likely explanation for how the Court can enjoy a coherent common legal culture and formulate a collective purpose. As one Western European judge highlighted, "the system is stronger and larger than the individual. The system is sophisticated and absorptive. The Court remains ideologically homogenous, even with the new and changing personnel."[68] This is why it is plausible to assume that Court's motivations to be audacious and forbearing are not determined by only a few judges, but instead decided collectively. The Court's permanent and temporary agents maintain a coherent narrative about the Court's core concerns and priorities. Together, they may maintain or progress rights in line with their core objective as a human rights court or offer trade-offs in order to secure necessary resources for institutional survival. Regardless, they take this decision as a collective body – albeit the weight of their contributions may vary based on their roles and functions, with judges having the official responsibility of rendering judgments.

European Court at Different Phases of Its Existence

The European human rights system in its early days was different from the one we know today. This difference is primarily related to changes in its institutional design. Design changes are not simply structural reorganization, however. They have an important bearing on the Court's autonomy

[65] Interview 18.

[66] Interview 18 and Interview 10. This does not mean that this relationship is always harmonious. A bone of contention, for example, is the extent of the Registry's functions. Judges held mixed views concerning the role of the Registry. To illustrate, one current judge expressed their concern about the extent of the Registry's power and noted that "the Convention says that the Court shall have a Registry, but it should have been written in the other way around; the Registry shall have a Court." They found judges' limited involvement in writing judgments problematic (Interview 10). Another judge, on the other hand, expressed their satisfaction with the way the Convention system is working and the facilitator role of the Registry (Interview 4).

[67] Arold, *The Legal Culture of the European Court of Human Rights*, 154.

[68] Quoted from an interview in Arold, 83.

and authority and by implication its zone of discretion, as we see in the following section.[69]

The Old Court, 1959–1998: An Institution Built upon a Compromise

The European human rights regime was a product of the political climate in the aftermath of the Second World War.[70] From the devastation that the War brought along still in living memory, European leaders agreed to create a regional human rights regime. Its constitutive treaty, the European Convention, was written in reaction to the atrocities committed during the War.[71] Representing a clear break from the past, this regime was created to embody European values, to prevent democracies from relapsing into dictatorships,[72] and to contain the threat of a communist expansion in Europe.[73]

The Convention took legal effect in 1953, three years after its approval in Rome. The document included a range of civil and political rights, such as the right to life; freedom from slavery; the right to a fair trial; freedom of expression; and freedom of thought, conscience, and religion. The original signatories were the governments of Belgium, Denmark, France, Germany, Iceland, Ireland, Italy, Luxembourg, the Netherlands, Norway, the Saar Protectorate, Turkey, and the United Kingdom. The enactment of the Convention was the first step in launching the European human rights regime. This regime would then go on to shape the political and legal landscape in Europe, becoming an authoritative forum for human rights protection.[74]

[69] Darren Hawkins et al., eds, *Delegation and Agency in International Organizations* (New York: Cambridge University Press, 2006).

[70] Transnational groups took up an important role too. While few human rights organizations strove to contribute to this effort within the UN framework, they assumed an important role in the European case. Samuel Moyn, *The Last Utopia* (Cambridge and Massachusetts: Harvard University Press, 2010).

[71] Luzius Wildhaber, "Rethinking the European Court of Human Rights," in *The European Court of Human Rights between Law and Politics,* ed. Jonas Christoffersen and Mikael Rask Madsen (New York: Oxford University Press, 2011), 206.

[72] Andrew Moravcsik, "The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe," *International Organization* 54, no. 2 (2000): 217–52.

[73] Ed Bates, "The Birth of the European Convention on Human Rights – and the European Court of Human Rights," in *The European Court of Human Rights between Law and Politics*, ed. Jonas Christoffersen and Mikael Rask Madsen (New York: Oxford University Press, 2011), 40.

[74] Helfer, "Redesigning the European Court of Human Rights," 126.

The circumstances surrounding the creation of the European human rights regime were not free from controversy. The most glaring of those was the fact that some of the founding members were colonial powers at the time of the Convention's drafting. The French and the British took the lead in drafting the Convention, even as they were implicated in serious human rights violations within their colonies.[75] Their colonial heritage was reflected in the way the Convention was written, giving the impression that the rights safeguarded were for only "a select group of individuals."[76] Take, for example, Article 56 (territorial application clause). This infamous colonial clause acknowledged the existence of "overseas territories" and specified that it was up to member states to choose whether to extend the Convention to "all or any of the territories for whose international relations it is responsible." This effectively meant that this protection system, created for Europeans, would not automatically be applied to those people living in European colonies.

Although the drafters agreed on this particular matter, they disagreed about others. At the June 1950 Conference in Strasbourg, where the Convention's text was finalised, the drafters argued over whether to create a supranational tribunal and how much power to give it. This matter immediately became a point of contestation because this supranational court would receive complaints brought by member states against other states (interstate complaints) and individuals against states (individual applications). The very idea of a regional court spurred spirited discussions during the drafting sessions.[77] Member states were wary about the sovereignty cost of establishing a supranational review mechanism.[78] To the sceptics, this effectively meant that member states' domestic affairs would be under the scrutiny of a European Court. Allowing individuals to bring cases before the Court appeared equally threatening. Communist sympathisers and other figures aiming to discredit the West could activate

[75] Mikael Rask Madsen, "From Cold War Instrument to Supreme European Court: The European Court of Human Rights at the Crossroads of International and National Law and Politics," *Law and Social Inquiry* 32, no. 1 (2007): 144.

[76] Jonas Christoffersen and Mikael Rask Madsen, "Introduction: The European Court of Human Rights between Law and Politics," in *The European Court of Human Rights between Law and Politics*, ed. Jonas Christoffersen and Mikael Rask Madsen (New York: Oxford University Press, 2011), 1.

[77] Bates, "The Birth of the European Convention on Human Rights – and the European Court of Human Rights," 40.

[78] For more on this, see Karen Alter, "Delegating to International Courts: Self-Binding vs. Other-Binding Delegation," *Law and Contemporary Problems* 71, no. 1 (2008): 37–76.

the Court for disingenuous reasons.[79] On the other hand, supporters of the supranational court believed that the European human rights regime could not be fully realised without it. A clear majority of the countries – such as Denmark, Greece, Netherlands, Norway, Sweden, Turkey, and the United Kingdom – were in the sceptical camp, and only Belgium, France, Ireland, and Italy were in favour.[80]

Belgium, France, Greece, Ireland, Italy, Luxembourg, Sweden, and Turkey proposed a compromise. According to this new scheme, member states could choose whether to accept the Court's jurisdiction or to allow the individuals' right to bring cases before the Court (right to petition). Even though the Netherlands and the United Kingdom – two colonial powers at the time – strongly rejected this proposal initially, these two compromise clauses resolved the differences between member states at the time of the Convention's adoption in 1950.[81] The Convention, therefore, did not automatically require a loss of sovereignty to supranational review, but left the choice to the member states.[82] Accepting the Court's jurisdiction and an individual's right to petition remained optional until the introduction of Protocol 11 in 1998.

In the same spirit, the original design features of the European human rights regime favoured a more limited and state-centric course of action.[83] The regime was created as a two-tier system composed of one quasi-judicial filtering mechanism and one judicial body.[84] In the first tier, the European Commission of Human Rights (established in 1954) would receive individual complaints and decide their admissibility.[85] It would then launch the cases that it deemed admissible before the Court on behalf

[79] Ed Bates, *The Evolution of the European Convention on Human Rights: From Its Inception to the Creation of a Permanent Court of Human Rights* (Oxford and New York: Oxford University Press, 2010), 96.

[80] Bates, "The Birth of the European Convention on Human Rights – and the European Court of Human Rights," 28.

[81] Ibid., 37.

[82] Mikael Rask Madsen, "International Human Rights and the Transformation of European Society: From 'Free Europe' to the Europe of Human Rights," in *Law and the Formation of Modern Europe: Perspectives from the Historical Sociology of Law*, ed. Mikael Rask Madsen and Chris Thornhill (Cambridge University Press, 2014), 256.

[83] Bates, "The Birth of the European Convention on Human Rights – and the European Court of Human Rights," 38.

[84] Solomon T Ebobrah, "International Human Rights Courts," in *The Oxford Handbook of International Adjudication*, ed. Cesare Romano, Yuval Shany, and Karen J. Alter (Oxford and New York: Oxford University Press, 2014), 230.

[85] Ilias Bantekas and Lutz Oette, *International Human Rights Law and Practice* (New York: Cambridge University Press, 2013), 230.

of the individual applicants if the responding state recognised the Court's jurisdiction.[86] This model gave a more prominent role to the Commission which functioned as a quasi-judicial filter and carried out initial screening of individual applications.[87] In the second tier, the European Court of Human Rights (the Court, founded in 1959), would review the cases referred by either the Commission or another member state.

These design features yielded limited authority and autonomy and thereby a narrow zone of discretion.[88] What limited the Court's zone of discretion was the compromise upon which the system was created: *optional* jurisdiction and right of individual petition. These two conditions would severely limit the individuals' access to the Court and the inflow of cases. In the early days, few countries accepted individual petition rights or the Court's jurisdiction. At the time the Convention entered into force in 1953, only Denmark, Ireland, and Sweden agreed to grant the right of individual petition. Denmark and Ireland were the sole members that accepted the Court's jurisdiction.[89] Even when states submitted to the Court's jurisdiction, they did not do so unconditionally but often on two-to-five-year renewable terms. As a result, few cases reached the Commission and the Court, and both operated only on a part-time basis and met when needed.[90]

Member states' initial resistance to being fully on board sent a clear signal to the Court and the Commission that they had to be cautious to offset this resistance. In order to prove that the system was not there to threaten the member states, the Court and the Commission carried out their legal functions with diplomatic sensitivity.[91] This was a specific form of

[86] The Commission was abolished with Protocol 11, which came into force in 1998 and allowed individuals to take cases to the Court directly.

[87] Bantekas and Oette, *International Human Rights Law and Practice*, 224.

[88] These two concepts are also intricately linked to a third concept, legitimacy. For more on the constitutive elements of legitimacy, see Başak Çali, Anne Koch, and Nicola Bruch, "The Legitimacy of Human Rights Courts: A Grounded Interpretivist Analysis of the European Court of Human Rights," *Human Rights Quarterly* 35, no. 4 (2013): 955–84.

[89] Bates, "The Birth of the European Convention on Human Rights – and the European Court of Human Rights," 40.

[90] As for the other design features, both the Commission and the Court would work on the principle of one member and one judge per member state. While the commissioners would be elected by the Committee of Ministers for a period of six years, the judges would be elected by the Consultative Assembly (today's Parliamentary Assembly) for nine years. Commissioners and judges could run for re-election.

[91] Mikael Rask Madsen, "Protracted Institutionalization of the Strasbourg Court: From Legal Diplomacy to Integrationist Jurisprudence," in *The European Court of Human Rights between Law and Politics*, ed. Jonas Christoffersen and Mikael Rask Madsen (New York: Oxford University Press, 2011), 46.

tactical balancing that led the Court and the Commission to adopt more conservative positions in the 1950s and 1960s.[92] They each paid greater attention to member states' national interests and provided both legal and extra-legal solutions to the disputes at hand, as Mikael Rask Madsen finds in his study.[93]

This cautious approach limited the number and nature of decisions in the early period. As Sir Humphrey Waldock – then President of the Commission – explained, they were not there to name and shame member states. Rather, their main function was "to conduct confidential negotiations with the parties and to try and set right unobtrusively any breach of human rights that may have occurred."[94] Underscoring their diplomatic role, he emphasised that the Commission "was not primarily established for the purpose of putting states in the dock and registering convictions against them."[95] He signalled that the European human rights regime would not be the forum to discredit the West at the height of the Cold War rivalry. Following this logic, the Commission adopted a stringent approach when deciding on the admissibility of cases in the early days.[96] The Court contributed to this diplomatic effort by showing deference to domestic authorities with regard to protecting rights and delivering justice.[97] The most effective tools for deference were the margin of appreciation doctrine and Article 15 (derogation clause).[98] The former

[92] Darren Hawkins and Wade Jacoby, "Agent Permeability, Principal Delegation and the European Court of Human Rights," *The Review of International Organizations* 3, no. 1 (2008): 24.

[93] Madsen, "International Human Rights and the Transformation of European Society: From 'Free Europe' to the Europe of Human Rights," 259.

[94] Bates, *The Evolution of the European Convention on Human Rights*, 2010, 223.

[95] Ibid., 223.

[96] In 1966, for example, out of 303 applications, only five were declared admissible; in 1974, out of 445 applications, only six were declared admissible. For more, see Bates, *The Evolution of the European Convention on Human Rights*, 241–45.

[97] The margin of appreciation doctrine results from the fact that the diverse cultural background of the member states made it difficult to establish a uniform European standard for human rights across the board. This principle largely "refers to the room for maneuver the Strasbourg institutions are prepared to accord national authorities in fulfilling their obligations under the European Convention on Human Rights." Steven C. Greer, *The Margin of Appreciation: Interpretation and Discretion under the European Convention on Human Rights* (Strasbourg: Council of Europe, 2000).

[98] Article 15 reads as follows: (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

granted the member states flexibility in fulfilling their Convention obligations, and the latter allowed states to reduce some of their obligations in times of emergency – except for the provisions concerning torture, slavery, servitude, right to life, and punishment without law.[99]

These strategies must have surely worked, because in the early 1970s, there was a sudden increase in the number of ratifications and acceptance of optional clauses – that is, submission to the Court's jurisdiction and the right to individual petition.[100] By 1974, thirteen out of eighteen member states accepted the optional clauses.[101] As confidence in the European human rights regime grew stronger over the decades, more member states accepted the individual petition right. By 1990, all member states (twenty-two at the time) allowed their citizens to bring cases before the European Court.[102] This trend decreased the need for legal diplomacy and increased the flow of cases into the Court's docket. The Court had effectively boosted its autonomy and authority.[103]

The end of the Cold War contributed to this upward trend. When the formerly communist countries joined the ranks of the Council of Europe, the Court's reputation and caseload exponentially grew due to what has become known as the "Eastward expansion." The expansion started in 1990 when Hungary ratified the Convention and became a Council of Europe member. Within a few years, the number of member states grew from twenty-one to forty-one. The European human rights regime significantly broadened its geographical reach when Russia, the largest country in Europe, ratified the Convention in 1998.

The war in the Former Yugoslavia had propelled the expansion of the European human rights regime. Europe was stunned and horrified by another war on the continent in which gross human rights violations were being committed. As a response, the Council of Europe member states

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 of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed.

[99] Madsen, "From Cold War Instrument to Supreme European Court," 151.

[100] Bates, *The Evolution of the European Convention on Human Rights*, 2010, 278.

[101] Madsen, "Protracted Institutionalization of the Strasbourg Court," 53.

[102] European Court of Human Rights, "Annual Report 2011" (Strasbourg: Registry of the European Court, 2012).

[103] Bates, *The Evolution of the European Convention on Human Rights*, 283.

issued the Vienna Declaration of October 9, 1993.[104] Members extended their invitation to the newly independent countries and declared that new members' accession to the Convention System would be "a central factor in the process of European construction." This invitation marked a colossal shift in the European human rights system's objectives, from that of fine-tuning well-functioning democracies to helping countries transition to democracy.

Shortly after ratification, the new members accepted the Court's jurisdiction and individual petition right.[105] In the aftermath, the Court was entrusted not only with a new role but also with an exponentially growing caseload.[106] There already had been steady growth in the number of applications since the 1980s; this further escalated with the Eastward expansion. The number of applications increased from 404 in 1981 to 4,750 in 1997.[107] The Court began having trouble clearing its docket and faced a different challenge: a large backlog of cases.[108]

Protocol 11 was introduced to tackle the caseload problem in 1998. This protocol also reversed the compromise made during the drafting of the Convention and created the European human rights system as we know it now. It abolished the Commission and created the new Court with compulsory jurisdiction. The new Court would work on a full-time basis and receive applications directly from the individual complainants.[109] As one judge explained, the system's structural transformation represented a colossal change in the Court's approach. The Commission's abolition increased "the rhythm and the pace" of legal evolution.[110] The Court began receiving cases that it would not normally have received. This presented the Court with an opportunity to launch the legal change analyzed in Chapters 3 and 4.

The New Court: From Euphoria to Reform

The new institutional setup of the new Court yielded more autonomy and authority, but it did not guarantee smooth sailing. The 1990s brought not

[104] Council of Europe, "Vienna Declaration," October 9, 1993.
[105] Bates, *The Evolution of the European Convention on Human Rights,* 447.
[106] Christoffersen and Madsen, "Introduction," 3.
[107] Karen Schlüter, "The Council of Europe, the Standard Setter," in *Human Rights in Europe: A Fragmented Regime?*, ed. Malte Brosig (Frankfurt am Main: Peter Lang AG, 2006), 40.
[108] Helfer, "Redesigning the European Court of Human Rights," 126. In 2017, this number rose to 63,350, according to the Court's "Analysis of Statistics 2017."
[109] European Court of Human Rights, "Annual Report 2011," 12.
[110] Interview 14.

only major new opportunities for the Court but also major challenges. First came euphoria about the expansion of the European human rights regime with the inclusion of the former socialist countries in the East. Then came waves of reform initiatives attempting to limit the Court's roles and functions.[111]

Once the Eastward expansion was completed in the early 2000s, the Court was charged with reviewing human rights practices of an entire region of nearly 800 million people. In addition to the increase in the volume of applications, the nature of issues brought before the Court changed in this period. Until the 1990s, the Court received cases only from states with long democratic traditions.[112] After the expansion, the cases coming from new members included entrenched problems, such as systemic violations openly targeting ethnic groups or the lack of sufficient domestic remedies.[113] These cases indicated a need to instruct such countries in European human rights standards. Therefore, the Court often took a pedagogical role in cultivating human rights traditions in the newly independent countries.[114]

Although the increased caseload posed an administrative challenge to the Court, it also reinforced its institutional authority. Motivated by a political ambition to consolidate their democracies, the formerly communist states were eager to respect the Court's authority. As Michael O'Boyle, former Deputy Registrar of the Court, explains: "while adding significantly to the Court's docket, [the Eastward expansion] has arguably not weakened or undermined the system but strengthened it. It has created a new and unexpected geopolitical dimension for the institution which *ipso facto* engenders renewed political support."[115]

The Court had been crippled with insurmountable caseloads and delays in the implementation of judgments since the early 2000s. To address these problems, member states initiated a series of reform proposals,

[111] Mikael Rask Madsen, "The Challenging Authority of the European Court of Human Rights: From Cold War Legal Diplomacy to the Brighton Declaration and Backlash," *Law and Contemporary Problems* 79, no. 1 (2016).

[112] Bates, *The Evolution of the European Convention on Human Rights*, 2010, 473.

[113] Aisling Reidy et al., "Gross Violations of Human Rights: Invoking the European Convention on Human Rights in the Case of Turkey," *Netherlands Quarterly of Human Rights* 15, no. 1 (1997): 172.

[114] Robert Harmsen, "The European Convention on Human Rights after Enlargement," *The International Journal of Human Rights* 5, no. 4 (2010): 33. Also, Interview 16.

[115] Michael O'Boyle, "The Imperiled Success of the European Court of Human Rights," in *Trente Ans de Droit Européen Des Droits de l'Homme. Études à La Mémoire de Wolfgang Strasser*, ed. Hanno Hartig (Brussels: Nemesis/Bruylant, 2007), 261.

which spurred structural and behavioural changes – starting the era of the reformed Court. First, member states introduced additional protocols to the Convention and generated significant structural changes. The most important such development came in 2010 with Protocol 14. This protocol modified the Court's internal organization. The original one-judge-per-member-state rule remained the same.[116] Yet, judges' terms of office changed from six years renewable to nine years nonrenewable.[117] The protocol also revamped the admissibility criteria to simplify the application process,[118] and changed the Court's composition to include the following units that are used today: single-judge formations, Committees of three judges, Chambers of seven judges, and Grand Chambers of seventeen judges. These changes – especially the single-judge filtering mechanisms and the three-judge committees – were much needed to tackle the increasing caseload and to streamline the case processing procedures. After this restructuring, the Court announced in October 2013 that its backlog had been reduced from 160,200 in 2011 to 111,350.[119]

Member states have also started a dialogue to address the challenges that the new Court had been facing. They initiated a series of High-Level Conferences on the Future of the Court in Interlaken, Switzerland; İzmir, Turkey; Brighton, the United Kingdom; Brussels, Belgium; and Copenhagen, Denmark, between 2010 and 2018. All of these meetings gathered ministers or high-level officials from each Council of Europe

[116] The selection of the judges takes place in a two-stage process whereby the member states send a shortlist of three candidates to the Parliamentary Assembly, which selects one of these three candidates.

[117] Originally, the Convention stipulated judges' terms of office as nine years renewable. Protocol 11 reduced it to six years renewable.

[118] Admissibility criteria are covered under Article 35 of the Convention: (1) The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of six months from the date on which the final decision was taken. (2) The Court shall not deal with any application submitted under Article 34 that (a) is anonymous; or (b) is substantially the same as a matter that has already been examined by the Court or has already been submitted to another procedure of international investigation or settlement and contains no relevant new information. (3) The Court shall declare inadmissible any individual application submitted under Article 34, which it considers incompatible with the provisions of the Convention or the protocols thereto, manifestly ill-founded, or an abuse of the right of application. (4) The Court shall reject any application, which it considers inadmissible under this Article. It may do so at any stage of the proceedings.

[119] European Court of Human Rights, "Reform of the Court: Filtering of Cases Successful in Reducing Backlog," *Press Release, ECHR 312 (2013)*, October 24, 2013. By 2017 this number dropped even further to 56,250. European Court of Human Rights, "Analysis of Statistics 2017."

member states. Meetings were concluded with declarations that serve as road maps to improving the European human rights regime. What is striking about these declarations is that they gave the member states the opportunity to express their visions for the Court and the extent of its functions while also suggesting practical measures to address the backlog of cases. According to Judge Spano, former President of the European Court, these meetings heralded the dawn of "the age of subsidiarity," re-emphasizing that the supranational review carried out by the Court is subsidiary to the one provided at the national level.[120] Indeed, these meetings represented a turning point in the Court's reform history and influenced the way the Court carries out its judicial functions today.[121] For this reason, I call the post-2010 Court the "reformed" Court and highlight ways in which its practices differed from the new Court. This distinction allows me to assess the influence of the reform process on the Court's interpretive preferences and tendencies for forbearing or audacious interpretations.

The reform Court period is still underway, with the Court facing further structural changes and political challenges.[122] For example, the Committee of Ministers adopted two additional protocols amending and adding to the European Convention. Protocol 15, which entered into force on August 1, 2021, amends the Convention by setting out changes to the case processing mechanism and the Preamble. Notably, it reduces the time limit to bring an application before the European Court from six months to four months, and adds the principle of subsidiarity and margin of appreciation to the Preamble. Protocol 16, on the other hand, adds to the Convention and enables national courts to seek advisory opinions from the Court. Protocol 16 came into force on August 1, 2018, in respect of sixteen member states that ratified it: Albania, Andorra, Armenia, Bosnia and Herzegovina, Estonia, Finland, France, Georgia, Greece, Lithuania, Luxembourg, Netherlands, San Marino, Slovak Republic, Slovenia, and Ukraine.[123]

[120] Robert Spano, "Universality or Diversity of Human Rights? Strasbourg in the Age of Subsidiarity," *Human Rights Law Review* 14, no. 3 (2014): 487–502; Robert Spano, "The Future of the European Court of Human Rights – Subsidiarity, Process-Based Review and the Rule of Law," *Human Rights Law Review* 18, no. 3 (2018): 473–94.

[121] Mikael Rask Madsen, "Rebalancing European Human Rights: Has the Brighton Declaration Engendered a New Deal on Human Rights in Europe?," *Journal of International Dispute Settlement* 9, no. 2 (2018): 199–222.

[122] For a discussion of authoritarian challenges that the Court faces, see Başak Çali, "Autocratic Strategies and the European Court of Human Rights," *European Convention on Human Rights Law Review* 2, no. 1 (March 10, 2021): 11–19.

[123] This information was verified on April 27, 2022, through the Council of Europe webpage, available at www.coe.int/en/web/conventions/full-list?module=signatures-by-treaty&treatynum=214

In addition to these structural changes, the Council of Europe and the reformed Court have been confronted with several political challenges. These range from Turkey's withdrawal from the Istanbul Convention on Violence against Women in March 2021 to the Russian invasion of Ukraine in February 2022. The Council of Europe condemned Russia, and both the Parliamentary Assembly and the Committee of Ministers arrived at the conclusion that Russia "can no longer be a member state."[124] In the meantime, the European Court granted urgent interim measures on 1 March, 2022, underlining that "the current military action which commenced on 24 February 2022 in various parts of Ukraine (…) gives rise to a real and continuing risk of serious violations of the Convention rights of the civilian population."[125] Before the Committee of Ministers took a vote on expelling Russia, Russia announced its withdrawal from the Council of Europe and the European Convention on Human Rights.[126] While Russia's withdrawal, or Rexit, is likely to ease the Court's caseload (since 24.20% of all pending cases concern Russia, according to the Court's 2021 statistics), this will imply a serious gap in the protection of the rights both in Russia and in Ukraine with respect to violations perpetrated by Russia.[127] As Chapter 3 will show, cases brought against Russia constitute a clear majority of the Article 3 jurisprudence.

Conclusion

This chapter is composed of two connected parts. The first part has looked at the European Court of Human Rights' inner workings and the way it functions. Expanding this assessment beyond the elected judges, the chapter has argued that the Court defines its organizational priorities as a collective body. This collective body includes not only the judges elected for limited terms but also law clerks and other legal professionals at the Registry, most of whom are hired on a permanent basis. This essentially

[124] The Council of Europe, "The Russian Federation can no longer be a member State of the Council of Europe, PACE says" (March 16, 2022) available at www.coe.int/en/web/portal/-/the-russian-federation-can-no-longer-be-a-member-state-of-the-council-of-europe-pace-says

[125] European Court of Human Rights, "The European Court grants urgent interim measures in application concerning Russian military operations on Ukrainian territory," Press release, *ECHR 068(2022)* (March 1, 2022).

[126] "'Rexit': Russia withdraws from Council of Europe ahead of expulsion vote," *Euronews* (March 16, 2022), available at www.euronews.com/my-europe/2022/03/16/rexit-russia-withdraws-from-council-of-europe-ahead-of-expulsion-vote.

[127] European Court of Human Rights, *The ECHR in Facts and Figure 2021* (February 2022), available at www.echr.coe.int/Documents/Facts_Figures_2021_ENG.pdf

implies that all members of the judicial elite working at the Court contribute to defining the Court's collective purpose and determining if there is a need for tactical balancing – thus shaping the tendency for forbearance or audacity. The second part has offered a historical overview of the Court's institutional transformation. Created in 1959, the European Court once operated as a part-time institution. The Court then became a full-time institution in 1998; its structure was further refined during the reform processes that officially began with the first High-Level Conference on the Future of the Court in 2010.