

Max-Planck-Institut für
ausländisches öffentliches Recht und Völkerrecht

Beiträge zum ausländischen öffentlichen Recht und Völkerrecht 205

Rüdiger Wolfrum · Ulrike Deutsch (eds.)

The European Court of Human Rights Overwhelmed by Applications: Problems and Possible Solutions

Max-Planck-Institut für ausländisches
öffentliches Recht und Völkerrecht



Beiträge zum ausländischen
öffentlichen Recht und Völkerrecht

Begründet von Viktor Bruns

Herausgegeben von
Armin von Bogdandy · Rüdiger Wolfrum

Band 205

Rüdiger Wolfrum · Ulrike Deutsch (eds.)

**The European Court
of Human Rights Overwhelmed
by Applications: Problems and
Possible Solutions**

International Workshop

Heidelberg, December 17–18, 2007



Springer

the language of science

ISBN 978-3-540-93959-7

Springer Berlin · Heidelberg · New York

e-ISBN 978-3-540-93960-3

DOI 10.1007/978-3-540-93960-3

Beiträge zum ausländischen öffentlichen Recht und Völkerrecht ISSN 0172-4770

Bibliografische Information der Deutschen Nationalbibliothek

Die Deutsche Nationalbibliothek verzeichnet diese Publikation in der Deutschen Nationalbibliografie; detaillierte bibliografische Daten sind im Internet über <http://dnb.d-nb.de> abrufbar.

© by Max-Planck-Gesellschaft zur Förderung der Wissenschaften e.V., to be exercised by Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht, Heidelberg 2009

Dieses Werk ist urheberrechtlich geschützt. Die dadurch begründeten Rechte, insbesondere die der Übersetzung, des Nachdrucks, des Vortrags, der Entnahme von Abbildungen und Tabellen, der Funksendung, der Mikroverfilmung oder der Vervielfältigung auf anderen Wegen und der Speicherung in Datenverarbeitungsanlagen, bleiben, auch bei nur auszugsweiser Verwertung, vorbehalten. Eine Vervielfältigung dieses Werkes oder von Teilen dieses Werkes ist auch im Einzelfall nur in den Grenzen der gesetzlichen Bestimmungen des Urheberrechtsgesetzes der Bundesrepublik Deutschland vom 9. September 1965 in der jeweils geltenden Fassung zulässig. Sie ist grundsätzlich vergütungspflichtig. Zuwiderhandlungen unterliegen den Strafbestimmungen des Urheberrechtsgesetzes.

Die Wiedergabe von Gebrauchsnamen, Handelsnamen, Warenbezeichnungen usw. in diesem Werk berechtigt auch ohne besondere Kennzeichnung nicht zu der Annahme, dass solche Namen im Sinne der Warenzeichen- und Markenschutz-Gesetzgebung als frei zu betrachten wären und daher von jedermann benutzt werden dürften.

Einbandgestaltung: WMXDesign GmbH, Heidelberg

Gedruckt auf säurefreiem Papier

springer.de

Foreword

The European Court of Human Rights is faced with a huge and ever-growing workload. Up until 1998, the Court pronounced only 837 judgments, while it rendered 4.000 judgments in the last three years alone. On 18 September 2008, the European Court of Human Rights delivered its 10.000th judgment; currently, there are some 100.000 cases pending before the Court. This enormous caseload is both a testimony to the Court's success and of the considerable threat posed to the effectiveness of the protection of the rights and freedoms guaranteed by the European Convention on Human Rights and its Protocols. Moreover, Protocol No. 14, which was intended to alleviate the problem by increasing the efficiency of the Court, is still not in force.

This publication is intended to contribute to the ongoing discussion about the reforms that are necessary to prevent a failure of the European system of human rights protection. It compiles the contributions of a workshop which took place on 17-18 December 2007 at the Max Planck Institute for Comparative Public Law and International Law in Heidelberg and the discussions following the presentations. The convening of this workshop was recommended by Christian Tomuschat.

The conference brought together academics and practitioners and thus offered an excellent opportunity for the discussion of possible approaches to the dilemma. Christian Tomuschat's presentation outlined the success story of the European Court of Human Rights and the resulting danger of failure of the system and gave an overview of possible solutions. Rudolf Bernhardt concentrated on the merits of introducing a discretionary admission procedure and argued for a radical reform of the present system. Jochen Abr. Frowein focused on the need to introduce a filtering mechanism as part of the exhaustion of domestic remedies, which would consist of special chambers on the Supreme Court level of Member States for dealing with Convention cases. Luzius Wildhaber analysed the approach of the Court to issuing pilot judgments in cases concerning structural problems affecting a large number of persons. Finally, Mark Villiger took a close look at a particular group of cases responsible for the huge back-log, i.e., cases concerning the length of proceedings.

Our personal thanks go to Yvonne Klein and Falilou Saw in whose hands rested the entire organization of the workshop. We would also

like to thank Dr. Christiane Philipp who was heavily involved in editing the manuscript. Furthermore, thanks are due to Verena Schaller-Soltau for her technical assistance.

Heidelberg, November 2008

Rüdiger Wolfrum

Table of Contents

The European Court of Human Rights Overwhelmed by Applications: Problems and Possible Solutions	1
<i>Christian Tomuschat</i>	
Discussion Following the Presentation by Christian Tomuschat	19
The Admissibility Stage: The Pros and Cons of a <i>Certiorari</i> Procedure for Individual Applications	29
<i>Rudolf Bernhardt</i>	
Discussion Following the Presentation by Rudolf Bernhardt	37
The Interaction Between National Protection of Human Rights and the ECtHR	51
<i>Jochen Abr. Frowein</i>	
Discussion Following the Presentation by Jochen Abr. Frowein	55
Pilot Judgments in Cases of Structural or Systemic Problems on the National Level	69
<i>Luzius Wildhaber</i>	
Discussion Following the Presentation by Luzius Wildhaber	77
Fair Trial and Excessive Length of Proceedings as Focal Points of the ECtHR's Increasing Caseload	93
<i>Mark Villiger</i>	

Discussion Following the Presentation by Mark Villiger	103
Concluding Remarks	121
<i>Rüdiger Wolfrum</i>	
List of Participants.....	123

The European Court of Human Rights Overwhelmed by Applications: Problems and Possible Solutions

Christian Tomuschat

I. Introduction

Is it not an almost unbelievable success story? Currently, the jurisdiction of the European Court of Human Rights (ECtHR) extends to 47 States with more than 800 million inhabitants. Accordingly, international judges review the activities of 47 governments as to their compatibility with the European Convention on Human Rights (ECHR). No injusticiable areas or groups of acts exist. The ECtHR has abstained from evolving a doctrine of act of State or *acte de gouvernement*.¹ Everyone who feels aggrieved by a decision or some factual conduct of public authorities can bring the relevant dispute before the Strasbourg judges after having exhausted domestic remedies. Invariably, the case will be heard.² The Strasbourg Court has no discretion to accept or reject a case *a limine*. In 2006, it handed down no less than 1.560 full judgments. Thus, paradise in full blossom seems to have been ushered

¹ But see the Grand Chamber decision in *Markovic v. Italy*, application 1398/03, 14 December 2006, where the ECtHR had to assess a doctrine of *acte de gouvernement* evolved in Italy.

² This is the excruciating strength and weakness of the system of the ECHR, see Paul Mahoney, "Thinking a Small Unthinkable: Repatriating Reparation from the European Court of Human Rights to the National Legal Order", in Lucius Caflisch *et al.* (eds.), *Liber Amicorum Luzius Wildhaber: Human Rights – Strasbourg Views*, Kehl 2007, p. 263, at 267.

in. Can we therefore assume that the rule of law, as encapsulated in human rights, has found its definitive consecration in Europe?

II. The Growth of the Strasbourg System

Indeed, who would have thought, when the journey to the peak we have reached by now began in the late forties of the last century, that human rights in Europe would ever be based on such strong foundations? There is no need to dwell at length on the political and historical origins of the ECHR. I shall confine myself to mentioning some basic facts. After the horrors of the Nazi regime in Germany, the world community was generally agreed that any recurrence of a murderous dictatorship should be forestalled by all conceivable means. For that reason, the UN Charter defined the promotion and the encouragement of respect for human rights and fundamental freedoms as one of the primary purposes of the World Organization (Article 1 (3)). A few years later, on 10 December 1948, with a view to particularizing this general formula, the Universal Declaration of Human Rights was proclaimed. This Declaration served as a source of inspiration for the newly founded Council of Europe (the Statute of the Council of Europe entered into force on 3 August 1949). Taking the work which had already been performed by the UN Commission on Human Rights for a world covenant on human rights as the basis for its own drafting efforts, the Council of Europe succeeded in finalizing the draft text of the ECHR in the autumn of the next year. On 4 November 1950 the ECHR could be signed during a solemn ceremony in Rome. After having received the first ten ratifications, it entered into force on 3 September 1953. The UK had been the first State to accept the new instrument, but Germany was also among the pilot group of ten States who had the courage to bind themselves under the terms of an international regime the effects of which were unforeseeable at that time.

The first years saw a slow, but progressive enlargement of the circle of States parties. Especially the bigger States hesitated initially to follow the adventurers who had paved the way. While Turkey joined the group in May 1954, Italy took the decision not earlier than in October 1955. But it was France which adjourned its ratification for more than two decades. Although the ECtHR took its seat in Strasbourg, and although *René Cassin* was one of the first Presidents of the ECtHR (1965–1968), the French government waited until May 1974 before finally joining the

States that had manifested their confidence in the operation of the new regime by submitting to it. Apparently, France felt that as the country where the *Déclaration des droits de l'homme et du citoyen* had been proclaimed in 1789, in other words, as “la patrie des droits de l'homme”, it had no ground to submit to international control its governmental conduct. In a country which had “invented” human rights, everything was fine by definition.

Until the great change in Europe, the number of parties to the ECHR remained at the level of 22 States. The demise of socialism as a political doctrine brought about by the political occurrences in 1989/90 entailed dramatic results and led eventually to a tremendous increase in membership to more than the double of the figures reached until then. The first State to become a member of the Council of Europe and thereafter to ratify the ECHR was Finland (10 May 1990), which during the reign of socialism in Eastern Europe had not dared to embark on the way to Strasbourg, out of fear to antagonize its great neighbour to the east, the Soviet Union. With some slight delay, taking a lot of precautions, the former satellites of the Soviet Union followed suit: the Czech Republic on 3 March 1992, Hungary on 5 November 1992, and Poland on 19 December 1993. Currently, all the Eastern European States have joined the family of nations grouped around the ECHR, with the sole exception of Belarus which, because of open disregard for the rule of law, being under the tight grip of a dictatorship, is currently still unfit for membership in the Council of Europe. It was a dramatic event when the former superpower itself, now under the name of Russia, was admitted to membership in the Council of Europe in February 1996 and thereafter ratified the ECHR in May 1998. It is not absolutely clear what objectives were pursued by Russia when it made that move to the west of the continent. One may presume that in 1996/98 Russia felt that in order to demonstrate its definitive rupture with its Stalinist past it should accept international obligations to respect and observe human rights. It must have felt politically weak, seeking to rehabilitate itself morally by cooperating with the other States of the continent on a level of parity, without enjoying any prerogatives. Indeed, within the Council of Europe, contrary to the configuration obtaining at the United Nations, the larger States have not been granted any special status, which, in principle, is acceptable even for more powerful countries since the Council of Europe has no true decision-making power.

However, such powers do exist under the regime of the ECHR. From the very outset, it was the particularity of the ECHR that it established not only a certain number of substantive guarantees but that it sought

at the same time to make those guarantees truly effective by providing for enforcement machinery. It was an exceptionally bold decision to introduce an inter-State application by virtue of which every State party is entitled – and politically even called upon – to act as guardian of legality in instances where another State party is seen as breaching the provisions of the ECHR (formerly Article 24, now Article 33). This was a principled departure from the rule of consent which normally governs international dispute settlement: under general international law, reflected in Article 33 (1) of the UN Charter, States have the right of free choice regarding the way in which they wish to lay to rest any international disputes that they may have with another State. Here, by contrast, they accepted to be made accountable before the European Commission for any violation of the obligations incumbent upon them under the ECHR. The relevant provision can be seen as the precursor of what the ICJ, many years later, in its famous *Barcelona Traction* judgment, called ‘obligations *erga omnes*’. The provision giving leave to challenge another State must be viewed as the expression of the idea that the ECHR as a whole protects common goods, the preservation of which lies in the public interest of the community of States assembled under the roof of the ECHR.

As everyone here knows, little use was made of the inter-State application. A couple of years ago, the Parliamentary Assembly invited the States parties to bring an application against Russia on account of the tragic occurrences in Chechnya,³ but no government took up that challenge. Notwithstanding that reluctance to put into motion a procedure specifically designed for such occurrences,⁴ one should not lose sight of the fundamental importance which the inter-State application holds as a matter of principle. The existence of this remedy underlines the position of the community of States parties as guarantors of the rights set forth by the ECHR. In practice, though, it has been more or less supplanted by the individual application which permits the victim of a violation directly to bring his/her case to the Strasbourg system, without having to prevail upon his/her home state to initiate a process of diplomatic protection.

Originally the individual application depended on a special declaration which every State party was free to make or not to make (Article 25). A

³ Recommendation 1456 (2000), 6 April 2000, *HRLJ* 21 (2000) 286.

⁴ On 27 March 2007, an application was filed by Georgia against Russia. It is still pending.