CHANGE IN THE EUROPEAN COURT OF HUMAN RIGHTS: ACCESSION OF EASTERN AND CENTRAL EUROPEAN MEMBER STATES

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INTRODUCTION

After the destruction and brutality of World War II, Western European states established the Council of Europe (COE) in 1949 as the first international organization designed to promote European integration. The following year, COE members adopted the European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention) which became the world's first human rights treaty. Contemporaneously, COE members established a European Court of Human Rights (ECHR or "the Court") to monitor the performance of treaty obligations, which celebrated its 50th judicial year this January. Due in part to the similar political and legal traditions of the COE's early members, the ECHR quickly became one of the world's most effective international courts. Despite a modest number of claims during the Court's early years, the ECHR's caseload quickly reached substantial numbers; allocating 404 applications to a decision body in 1980 alone.[1] After only twenty years, the Court had rendered judgments on 37 cases concerning both interstate and individual disputes.[2] However, the ECHR adequately coped with that caseload due in part to the fact that most cases raised issues of secondary importance (such as the right of liberty and security in regards to lawful arrest or the right to a fair and timely trail) and only required the application of the European Convention to agreed facts.

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1 When applications are made on the application form provided by the Registry and are accompanied by copies of all relevant documents, they are "allocated to a decision body" which opens the way to judicial examination. (This is the equivalent to what was previously referred to as "registering an application".); Statistics found in: Turpin, Colin, and Adam Tomkins. *British Government and the Constitution : Text and Materials*. New York: Cambridge UP, (2007): 265-6

2 "Chronological List of Judgments and Published Decisions of the European Court of Human Rights." Council of Europe. Nov. 2008. Can be found at: <http://www.echr.coe.int/nr/rdonlyres/15e0e23d-8d4a-4b53-b483-9b443ab99aa3/0/listechrono.pdf>.

The fall of the Soviet bloc in 1989, however, prompted the COE's extension of membership to emerging democracies in Eastern Europe which consequently produced three problematic consequences for the ECHR: an overwhelming caseload, transformation in the nature of cases, and recurring patterns of human rights violations in certain member states which collectively began to undermine the court's effectiveness. As cases accumulate before the ECHR, application processing becomes increasingly difficult. In contrast to the figure of 1980, the number of applications registered in 1998 had risen more than ten-fold to 5,981.[3] By December of 2008, the total number of applications pending before the Court reached the staggering figure of 97,300.[4] While the ECHR considers that, ideally, a case should be finally disposed of within two years, the present caseload exceeds the Court's capacity, with the result that progression through the system often requires four or five years.[5] Those cases which finally do see a judgment, of course, represent a small fraction (typically less than five per cent) of those initially registered with the Court.[6] Additionally, the increased frequency of cases involving violations of non-derogable rights involving physical security (for example the right to life and freedom from torture) require more complex proceedings and force the Court to reorient its jurisprudence. Also, the development of reoccurring patterns of violations by particular states suggests a reduction in the court's

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3 Robert Harmsen , "The Eruopean Convention on Human Rights after Enlargement." The International Journal of Human Rights Winter 5 (2001): 26

4 "Annual Report 2008 of the European Court of Human Rights (provisional edition)" Jan. 2007. Council of Europe. p. 125 <http://www.echr.coe.int/NR/rdonlyres/69564084-9825-430B-9150-A9137DD22737/0/SurveyofActivities2006.pdf>.

5 Paraskeva, Costas. "Reforming the European Court of Human Rights: An Ongoing Change." Nordic Journal of International Law 76 (2007): 185-216.

6 "The European Court of Human Rights: Some Facts and Figures 1998-2008" *ECHR*, p.4-5.

effectiveness as measured by the implementation of its decisions.

Under the circumstances just described, the COE's experience with new members may provide a cautionary tale about the expansion of international organizations. As demonstrated by the ECHR, rapid expansion can alter an organization's character and tax its resources beyond capacity. In fact, the problems of assimilating emerging democracies may serve as an illustration of the consequences likely to flow from premature expansion of NATO and the EU to Eastern and Central European states.

Seeking to develop the points just made, Part I of this paper provides a brief narrative of the ECHR's history, importance, and successes before the fall of the Berlin Wall. Part II introduces the most obvious problems facing the ECHR after 1989: an overwhelming caseload. Among other things, this section addresses the contribution of new members to a growing judicial backlog while also developing the theme that justice delayed is justice denied. Part III examines the ECHR's jurisprudential reorientation towards cases involving physical security in emerging democracies. Additionally, a study of major organizational and operational reforms of the past two decades will illustrate the ECHR's attempts to address the problems of jurisprudential reorientation. Part IV, in turn, will describe the problem of recurring patterns of violations in Eastern European members (such as repeated applications concerning Russia's inability to uphold the right to life). Together, Parts I through IV will establish how the introduction of new members could so noticeably alter the character of the COE and the effectiveness of the ECHR. Part V will use these findings to draw broader lessons regarding proposals to expand membership of organizations like the European Union

and NATO.

PART I

THE EUROPEAN COURT OF HUMAN RIGHTS BEFORE 1989

After five devastating years of World War II, European states resolved to prevent such a tragedy from happening again. The horrors of the war stimulated for the first time internationally a tremendous concern for human rights protection. The way forward for many Western states seemed to lie with the protection of constitutional democracy and human rights in much more effective international institutions. In 1945 leaders of the world formed the United Nations, a global association of governments facilitating international cooperation. Although the UN's Charter and its Universal Declaration of Human Rights addressed human rights and fundamental freedoms, progress in the realm of human rights continued to move slowly and the process of developing a treaty stalled at the global level. Concern from European states, which suffered the war's greatest casualties, gave way to the view that their recovery, prosperity, and security required tailor-made arrangements, including a regional human rights regime.[7]

Efforts to find common solutions to the challenges afflicting post-war society culminated with the creation of the first European organization after WWII, the Council

[7] Greer, Steven, Laurence Gormley, and Jo Shaw. The European Convention on Human Rights: Achievements, Problems and Prospects. New York: Cambridge UP, 2006: 12

of Europe.[8] Its goals focused on building a new, united Europe on a solid foundation of shared values and principles, those of pluralist democracy, the rule of law, and human rights. The COE was to be the guardian of these fundamental and interconnected values and principles.[9] As a means of developing its goals, the COE created the Convention for the Protection of Human Rights and Fundamental Freedoms in 1950. This was Europe's first expression of commitment to the international protection of human rights and it was the first international treaty to legally bind members to the principles set forth in the Universal Declaration.[10]

In order to monitor the performance of treaty obligations, the European Convention established three institutions based in Strasbourg, France: the European Commission of Human Rights (Commission), the European Court of Human Rights, and the Committee of Ministers of the Council of Europe (Committee of Ministers), which is composed of the Ministers of Foreign Affairs of the Members States or their representatives. The Convention allowed for complaints to be brought against contracting states either by another state or by individual applicants who have exhausted all legal remedies at the national level. However, under the original European Convention, states had the option of granting the right of individual application, therefore this right was only applicable to those states which had accepted it. Recognition of the Court's jurisdiction was also optional, although all member states

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[8] The founding members of the COE were: Belgium, Denmark, France, Ireland, Italy, Luxembourg, Netherlands, Norway, Sweden, and The United Kingdom.

[9] Shelton, Dinah. Regional Protection of Human Rights. New York, NY: Oxford UP, 2008: 18

[10] "Survey of Activities 1950-1998 of the European Court of Human Rights." Council of Europe. Sept. 1998. p.1 <http://www.echr.coe.int/NR/rdonlyres/66F2CD35-047E-44F4-A95D-890966820E81/0/Surveyapercus_19591998.pdf>.

had accepted it in practice.[11]

Article 19 of the European Convention originally arranged for two judicial bodies: the Court and the Commission to work alongside each other. The Commission played an intermediary role, protecting the ECHR from unfounded suits. All complaints brought by individuals or contracting states first appeared before the Commission which determined their admissibility. After first attempting to mediate a settlement between involved parties, the Commission could then present cases on behalf of the claimant to the ECHR for binding adjudication. The Commission also had the ability to refer its reports to the Committee of Ministers, a political body to decide the European Convention's violation. Although individuals could only be heard through the Commission, never before had they possessed so much power in the international arena. Prior to the creation of the European Convention and its various mechanisms for enforcement, individuals were unable to bring complaints of human rights abuses concerning their own governments before an international court. This was the same for one government's ability to bring a case concerning another government's treatment of its own people. From the beginning of the Court's operation, the vast majority of cases submitted have come from individual members of the general public.[12]

The first judgment delivered by the court in 1960 for the case, *Lawless v. Ireland*,[13] also concerned the first application by an individual against that person's state of

[11] "Survey of Activities 1950-1998 of the European Court of Human Rights." Council of Europe. Sept. 1998. p.1

[12] Survey of Activities 1950-1998,p. 27-38; The Conscience of Europe. Prod. Council of Europe. 2007.

[13] *Lawless v. UK*, No. 332/57, 14 November 1960

nationality. Lawless lost the case due to an interpretation of Article 15 (derogation of obligations in time of war or public emergency) that found the Irish government to be acting in the interest of the nation. Ireland's use of diplomacy and guile to handle the case was characteristic of the Court and Commission's first years of operation, in that international politics often resolved matters before they reached the ECHR.[14] In fact, the Court had produced judgments on a mere seven cases before 1970.[15] Increased awareness of the European Convention and its monitoring machinery, however, encouraged greater activity in the next decade of the Court's existence. Before 1980 the ECHR had more than doubled its performance by delivering judgments on an additional 20 cases. The Court's caseload only continued to rise and by the end of 1989, the Court had received a total of 161 judgments. The great majority of violations found in these three decades concerned obligations not deemed fundamental to the rights of man; mainly the right of liberty and security in regards to lawful arrest (Article 5), the right to a fair and timely trial (Article 6), and the right to respect for privacy (Article 7).[16] Furthermore, those cases only required the application of the European Convention to agreed facts, which fostered the expeditious disposal of cases, usually within one to two years.[17]

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[14] "Survey of Activities 1950-1998 of the European Court of Human Rights." Council of Europe. Sept. 1998. p.1

[15] Survey of Activities 1950-1998, p. 27

[16] Survey of Activities 1950-1998, pp. 27-38

[17] Survey of Activities 1950-1998, pp. 27-38

The ECHR's first judgment concerning an inter-State case arrived in January of 1978 for the case *Ireland v. United Kingdom*[18] in which the Government of Ireland lodged a case against the Government of the United Kingdom. Due to a series of extrajudicial powers of arrest, detention, and internment committed in Northern Ireland by British authorities, the Court ruled that Article 3 of the European Convention (prohibition of torture and inhuman or degrading treatment or punishment) had been violated. As a result of the case, the British Prime Minister gave a solemn undertaking in March 1972 that the five interrogation techniques, which were later found to be in breach of Article 3, would no longer be employed. In addition, measures were taken to ensure that prisoners would be properly treated (medical examinations, rigorous procedures for investigating complaints, strict instructions to the security forces).

Despite the availability of inter-State proceedings and the fact that Article 33 has permitted inter-State cases since the Convention's entry into force, the ECHR has seen relatively few of these cases. Most inter-State cases concern widespread violation of human rights, although this is not a requirement for admissibility or jurisdiction. The goal of such cases is to provide an effective means for securing a minimum standard of human rights protection in all Convention States, for example *Denmark, Norway, Sweden and the Netherlands v. Greece* of 1967 concerned serious violations of the prohibition against torture following a military coup d'etat in the latter country.[19] However, the ability of Contracting Members to invoke inter-State cases for collective protection is

[18] *Ireland v. UK*, No. 5310/71, 18 January 1978 para. 11
[19] Shelton, Dinah. Regional Protection of Human Rights. New York, NY: Oxford UP, 2008. p.890

rarely called upon because States are typically unwilling to lodge complaints outside of their special interest. In fact, such measures generally run counter to their interest in that complaints against another State can be considered unfriendly acts.[20]

The ECHR's first 30 years of judgments were met with a generally high level of compliance.[21] Article 46 of the European Convention requires that States "undertake to abide by the final judgment of the Court in any case to which they are parties." Court judgments are of a declaratory nature character in that they simply establish whether the Convention has been violated, and may be accompanied by a decision under Article 50 about financial compensation.[22] Full compliance with judgments depends upon States to actively seek general measures towards the prevention of violations in question. While a state's fulfillment of payment obligations may be easily concluded,[23] its ability to take measures to prevent the recurrence of certain violations requires much more detailed investigation. Under Article 46(2), "the final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution." Reports compiled by the Committee show a great deal of success in judgment compliance through the alteration of domestic legislation and case law between 1959 and 1989. Reports on the measures taken for 79 different cases during this time (out of 161 total judgments) reveal the willingness of member states to follow to the Court's

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[20] Van Dijk, Pieter, G. J. Van Hoof, and A. W. Heringa. Theory and Practice of the European Convention on Human Rights. 3rd ed. New York: Kluwer Law International, 1998. p.43

[21] "Survey of Activities 1950-1998 of the European Court of Human Rights." Council of Europe. Sept. 1998. p.87

[22] Van Dijk, Pieter, G. J. Van Hoof, and A. W. Heringa. Theory and Practice of the European Convention on Human Rights. 3rd ed. New York: Kluwer Law International, 1998. p.21

[23] Survey of Activities 1950-1998, p.87.

decisions. For example, following the judgment in the case of *Golder v. the United Kingdom*[24] concerning violation of the right to fair trial, England and Wales altered their domestic law to accommodate the ruling.[25] Within a year of the judgment, the Prison Rules of 1964 were amended so that leave for a prisoner to institute civil proceedings would always be granted. Although the long term effects of such revisions are difficult to determine, the Court's influence on any state's decision which seeks to fulfill the spirit of the European Convention constitutes a success.

As the credibility of the human rights protection system depends to a great extent on the execution of the Court's judgments,[26] member states' high compliance with judgments illustrates the ECHR's effectiveness during its first thirty years of performance. The Court's success even earned it the title of "The Conscience of Europe."[27] As was celebrated at the Court's fiftieth anniversary this January, many international courts such as the International Criminal Tribunal for the Former Yugoslavia and the International Court of Justice[28] regularly refer to and cite the case law of the ECHR in their own judgments. Drezemczewski, Head of the Monitoring Department of the Directorate of Strategic Planning of the Council of Europe, states that "it would be difficult to deny that the European Convention and its case law have had a

[24] *Golder v. UK*, No. 4451/70, 21 February 1975
[25] Survey of Activities 1950-1998
[26] Report of the Group of Wise Persons to the Committee of Ministers. The Group of Wise Persons, Council of Europe. 2006.
[27] The Conscience of Europe. Prod. Council of Europe. 2007.
[28] Higgins, R. "The International Court of Justice and the European Court of Human Rights : Partners for the Protection of Human Rights". At the Ceremony marking the 50th Anniversary of the European Court of Human Rights 30 January 2009

profound effect in preventing many human rights violations."[29]

PART II

MEMBERSHIP EXPANSION AND CASELOAD GROWTH

In contrast to other trans-national courts which only handle a few cases per year, such as the WTO Appellate Body, Inter-American Court of Human Rights, International Court of Justice, or the International Criminal Court, the ECHR processes many thousands of cases annually. However, the most obvious and threatening problem facing the ECHR today involves the backlog created by a precipitous rise in individual applications, especially from Eastern and Central Europe. As explained below, the COE's ambition to consolidate Europe through eastern expansion greatly increased the ECHR's annual caseload, ultimately jeopardizing the Court's own ability to uphold an individual's right to a fair and expeditious trial. In other words, the consequences of increased membership and a growing caseload seriously threaten the Court's continued effectiveness.

With figures growing exponentially each year, the ECHR now toils in the shadow of an insurmountable caseload. Between 1998 and 2008, the figure for applications lodged[30] annually rose by nearly 600 per cent – that is, from 5,109 applications in 1998 to 42,376 new applications lodged in 2008.[31] Because the Court is

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[29] Drezemczewski, A. "The Prevention of Human Rights Violations: Monitoring Mechanisms of the Council of Europe", *International Studies in Human Rights* 67 (2001), 155.

[30] An application is lodged (previously referred to as "opened applications") after the Court first receives a complaint, assigns it an application number and then records it in the Court's database.

[31] See Tables 1 and 2; The European Court of Human Rights. *Some Facts and Figures 1998-2008.* (2008):14-

unable to dispose of the same number of applications as are being received each year, a rising backlog now threatens the ECHR. [32] Although only 14 per cent of applications are eventually declared admissible, the Court must still expend a great deal of energy and resources sorting through the new cases being lodged. The increasing number of applications received each year poses a threat to the effectiveness of the system and the ECHR itself admitted that it has difficulty processing applications in a reasonable time.[33] The Court set a "one-year target" as the maximum acceptable duration of the proceedings from allocation of the first examination of admissibility, from communication to a decision on admissibility, and from admissibility to the delivery of judgment. It currently takes about five years, however, between the lodging of a complaint with the Registry and the delivery of judgment on the merits by the Court,[34] delaying the ECHR's ability to guide member states in the implementation of the European Convention.

Interestingly enough, around 35 per cent of total violations found by the Court between 1998 and 2008 concerned Article 6 of the Convention under which states must guarantee a fair trial and judgment within a reasonable time.[35] For example, in *EO and VP v. Slovakia*[36] family proceedings lasting four years and 13 days (EO) and three years, nine months, and six days (VP) violated the applicants' rights to an expeditious trial.

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[32] Applications are disposed of either by a judgment being delivered or by a decision of inadmissibility

[33] *Position Paper of the ECHR on Proposals for Reform of the ECHR and Other measures as Set Out in the Report of the CDDH of 4 April 2003,* CDDH-GDR (2003) 024, para. 4.

[34] Greer, Steven, Laurence Gormley, and Jo Shaw. The European Convention on Human Rights : Achievements, Problems and Prospects. New York: Cambridge UP, 2006, p.38.

[35] "The European Court of Human Rights: Some Facts and Figures 1998-2008" *ECHR*, p.13.

[36] *EO and VP v. Slovakia,* No. 56193/00 and 57581/00, 27 April 2004

Similarly, in the case of *Kudla v. Poland*[37] the Court found that criminal proceedings (concerning fraud and forgery) lasting more than nine years constituted a violation of Article 6(1). Applicants from *Steel and Morris v. UK* were involved in the longest trial in English legal history (lasting from September 1990 to March 2000) which the Court found to be a substantial Article 6 violation.[38]

As Court procedures lag under the caseload burden, applicants who have exhausted all domestic legal remedies before taking their case to the Court[39] must wait longer for justice. As Lord Woolf said, "If 'justice delayed is justice denied', then a large proportion of the Court's applicants – even those who are the victims of serious violations – are effectively denied the justice they seek."[40] Furthermore, as a result of the Grand Chamber judgment in the previously mentioned *Kudla v. Poland*, violations of Article 6 may also include the violation of Article 13, the denial of an effective remedy.[41] Rolv Ryssdal, former President of the ECHR, pointed out that the failure to comply with one of the most fundamental guarantees of Article 6 (and now Article 13) is in danger of becoming a common feature of the European Convention system.[42]

The Registry of the ECHR has had to grow in order to accommodate the increased caseload. While this takes a burden off judges, it also strains the resources of

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37 *Kudla v. Poland*, No. 30210/96, 26 October 2000

38 *Steel and Morris v. The United Kingdom*, 15 February 2005, Application No. 68416/01.

39 Article 35 of the European Convention

40 The Right Honourable The Lord Woolf, "Review of the Working Methods of the European Court of Human Rights." Review. Dec. 2005. 3 Feb. 2009 <http://www.echr.coe.int/Eng/Press/2005/Dec/LORDWOOLFSREVIEWONWORKINGMETHODS2.pdf>.

41 Leach, Philip, and Nicolas Bratza. Taking a Case to the European Court of Human Rights. Ed. John Wadham. New York: Blackstone P, 2005. pp. 261-261

42 R. Ryssdal, "The Comin of Age of the European Convention on Human Rights", 1 *European Human Rights Law Review* (1996) p.22.

the COE.[43] The Court's budget derives from the COE's general budget, decided annually by the Committee of Ministers. This not only increased from €7 million in 1989 (including that attributed to the former Commission on Human Rights) to €41.7 million, in 2005, but has also accounted for a continuously increasing proportion of the COE's total budget , rising from 10 per cent in 1989 to 16.2 per cent in the draft budget for 2002.[44] The bulk of the Court's funds are spent on staffing. The number of permanent officials at the ECHR's Registry alone rose from 74 in 1989 to 484 in 2005.[45] Other costs include informational technology, legal aid to applicants, and, increasingly, fact-finding missions to respondent states where particular applications require it.[46]

The increasing caseload and, consequently, problems abiding by Article 6 initiated a movement to streamline the ECHR through the adoption of Protocol No. 11 to the European Convention. Protocol No. 11 was created for the purpose of restructuring the Court system so as to shorten the length of Strasbourg proceedings.[47] It did so by dissolving the Commission into a single, full-time Court composed of an equal number of judges to that of parties to the Convention.[48] These judges sit as Chambers of 7 judges or, in exceptional cases, as a Grand Chamber of 17 judges. The

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43 Paraskeva, Costas. "Reforming the European Court of Human Rights: An Ongoing Change." Nordic Journal of International Law 76 (2007): 204.

44 Report of the Evaluation Group to the Committee of Ministers on the European Court of Human Rights, EG Court (2001) 1, 27 September 2001 paras. 16-17

45 Greer, Steven, Laurence Gormley, and Jo Shaw. The European Convention on Human Rights : Achievements, Problems and Prospects. New York: Cambridge UP, 2006. p.36; Paraskeva, Costas. "Reforming the European Court of Human Rights: An Ongoing Challenge." Nordic Journal of International Law 76 (2001): 137.

46 Greer, 137.

47 Explanatory Report to Protocol No. 11 (1998): 10-18

48 Prior to Protocol No. 11 individual applicants applied to the European Commission of Human Rights, which would launch a case in the Court on the individual's behalf; *European Convention on Human Rights*

Court utilizes a number of judge "rapporteurs" as well as committees to replace the closed down Commission which was responsible for examining the admissibility and merits of submitted applications. The Committee of Ministers of the Council of Europe still supervises the execution of the Court's judgments.

Individual applicants gained a great deal of power from Protocol No. 11. The optional character of the right to individual application was abolished and applicants gained direct access to the Court.[49] In the years which followed the entry into force of Protocol No. 11 the productivity of the ECHR increased considerably; the new ECHR delivered more judgments in two years than its predecessor in 39 years.[50] Despite the Protocol's achievements, statistics clearly reveal that the changes failed to reduce the enormous disparity between disposed of applications and those being newly lodged each year.[51] As former ECHR President Luzius Wildhaber described, "The continuing steep increase in the number of applications to the Court is putting even the new system under pressure." Wildhaber goes on to describe the Court's newest obstacle, "The volume of work is already daunting, but it is set to become more challenging still, especially as applications come in from countries which ratified the European Convention on Human Rights in the late 1990s."[52] When drafting Protocol No. 11, the authors failed to consider the potential magnitude of cases that could be brought

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49 Paraskeva, Costas. "Reforming the European Court of Human Rights: An Ongoing Challenge." Nordic Journal of International Law 76 (2001): 202.

50 *Press Release* issued by the Registrar of the ECHR, 5 December 2000.

51 The European Court of Human Rights. *Some Facts and Figures 1998-2008.* (2008):14-19.

52 *Press Release* issued by the Registrar of the ECHR, 21 June 1999.

against the new contracting states of the former Communist Bloc.[53]

Of the factors which contribute to the ECHR's current exponential caseload growth, the addition of Eastern and Central European member states has, undoubtedly, been one of the largest. In the early 1990's, Eastern and Central European states transitioning out of communism sought membership with the COE and its "club of democracies."[54] Despite a poor human rights record in these states, the COE extended membership to the East in hopes of integrating a "wider family of European pluralist democracies."[55] In doing so, the COE experienced an unprecedented amount of growth and in less than two decades the COE's membership jumped from twenty-three member states in 1990 to a current total of forty-seven states, consisting of 800 million citizens.[56]

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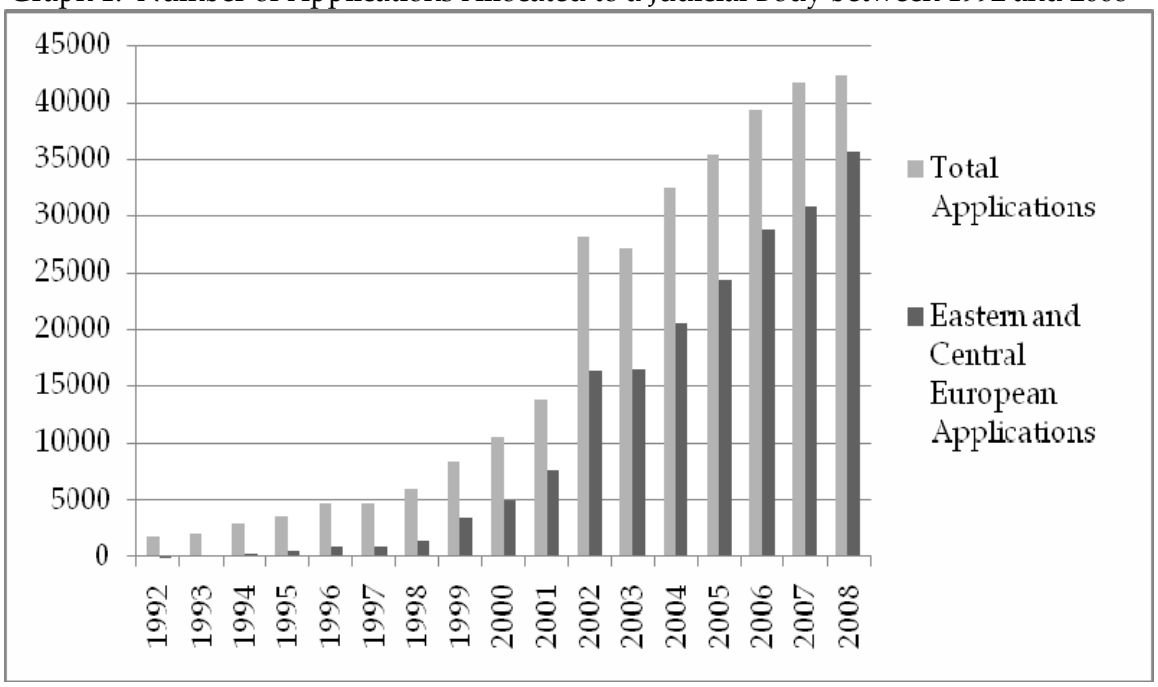
[53] Hioureas, Christina G. "Behind the Scenes of Protocol No. 14: Politics in Reforming the European Court of Human Rights." Berkeley Journal of International Law 24 (2006): 723; Steven Greer, *Reforming the European convention on Human Rights: Towards Protocol 14*, P.L. 2003, 663.

[54] Sudre, Frederic. "La Communaute europeenne et les droits fondamentaux après les Traite d'Amsterdam: Vers un nouveau systeme europeen de protection des droits de l'homme?', *La Semain Juridique*, 7 Jan. 1998, pp. 9-16.

[55] Robert Harmsen , "The European Convention on Human Rights after Enlargement." The International Journal of Human Rights Winter 5 (2001): 21. See also: Palmer, John. "Human rights court to expand." The Guardian [London] 1 Oct. 1993, sec. Foreign , Page: 11; Barber, Tony. "Europe's human rights watchdog starts to bite; "The Secretary-General of the Council of Europe tells Tony Barber in Salonika why ex-Communist states want to join." The Independent [London] 7 June 1996, sec. International: 10.

[56] The COE is now made up of the following countries: Albania, Andorra, Armenia, Austria, Azerbaijan, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, German, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Moldova, Monaco, Montenegro, Netherlands, Norway, Poland, Portugal, Romania, Russia, San Marino, Serbia, Slovakia, Slovenia, Spain, Sweden, Switzerland, The FYR Macedonia, Turkey, Ukraine, and The United Kingdom

Graph 1: Number of Applications Allocated to a Judicial Body between 1992 and 2008[57]



As would be expected, such an expansion in the ECHR's jurisdiction amplified the growing caseload and applications lodged with the Court rocketed from only 5,875 in 1992 to 34,509 just ten years later. Although awareness increased throughout all of Europe as a result of media interest in the Court's decisions during the 1990's,[58] Eastern and Central European citizens have become particularly aware of their ability to bring a case to the ECHR.[59] As shown above in Figure 1, states from Eastern and Central Europe have represented an increasingly large proportion of cases reviewed by the

[57] Figures for the years 1992 through 1998 are adapted from Robert Harmsen , "The Eruopean Convention on Human Rights after Enlargement." The International Journal of Human Rights Winter 5 (2001): 26. Statistics for later years are my own calculations based on figures from the annual reports of the ECHR.

[58] Greer, Steven, Laurence Gormley, and Jo Shaw. The European Convention on Human Rights : Achievements, Problems and Prospects. New York: Cambridge UP, 2006. p.36; Paraskeva, Costas. "Reforming the European Court of Human Rights: An Ongoing Challenge." Nordic Journal of International Law 76 (2001): 197.

[59] Robert Harmsen , "The European Convention on Human Rights after Enlargement." The International Journal of Human Rights Winter 5 (2001): 27.

Court. Around 19 per cent of total applications allocated to a judicial body[60] were from this region in 1997, but by 2008 the figure rose to approximately 84 per cent. In November of 2008, Russia (19.3), Romania (10.9), Ukraine (9.8), and Poland (8.8) had the largest percentage of applications lodged with the ECHR against them.[61] Russia, in particular, has been firmly situated at the top of the list of states that have applications registered against them since 1999.[62] Although these numbers are already quite large, they have been described as just "the tip of the iceberg" as the European Court is still relatively unknown in the newest member states. What is saving Strasbourg, as Human Rights Commissioner Alvaro Gil-Robles explained, is that people still do not know about it.[63] Additionally, the volume of applications from the original states is not diminishing; their rates of increase are simply not as high as those of the COE's newest members.[64]

The influx of applications from Eastern and Central Europe which currently slows the ECHR's productivity was largely a self-inflicted problem. Because these financially weak countries emerging from a long history of totalitarian government were required to ratify the European Convention within a very short time (typically within a year) after joining the COE, there was little time within which to bring their

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60 As previously mentioned, when applications are made on the application form provided by the Registry and are accompanied by copies of all relevant documents, they are "allocated to a decision body" which opens the way to judicial examination.

61 The European Court of Human Rights. *Some Facts and Figures 1998-2008.* (2008):14-15.

62 The European Court of Human Rights. *Some Facts and Figures 1998-2008.* (2008):14-15.

63 Lord Woolf, "Review of Working Methods of the ECHR". December 2005. p. 9

64 The European Court of Human Rights. *Some Facts and Figures 1998-2008.* (2008):14-15.

legal systems into conformity with the Convention system.[65] Russia, for example was required to ratify the European Convention within one year after its membership, which was quite stringent considering its size and weak human rights record. Romania also ratified the Convention after only one year in spite of reports revealing potential difficulties with compliance due to the economic and social conditions at the time.[66] Former Deputy Secretary General, Peter Leuprecht, stated that "intellectual honesty requires acknowledging that some of the countries admitted clearly did not comply with the statutory requirements at the time of accession." He further declared that "as far as the European Convention is concerned, some of the new member states have rushed into ratification without bringing domestic law and reality into line with its requirements".[67] Leuprecht resigned dramatically from his post after 37 years of service with the ECHR due to his disagreement with premature expansion to Eastern and Central Europe. While he noted the concerted efforts of some new member states[68] to bring their systems into line with the requirements of the ECHR, he equally stressed the lack of any real commitment on the part of some of the other new member states to respect the undertakings which they had made to meet the standards of the European Convention.[69] By enlarging so quickly with new contracting parties that were likely

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[65] Wildhaber, "Consequences for the ECHR of Protocol No. 14 and the Resolution on Judgments Revealing an Underlying Systemic Problem-Practical Steps of Implementation and Challenges", in *Applying and Supervising the ECHR-Reform of the European Human Rights System, Proceedings of the High-Level Seminar,Oslo,* 18 October 2004.

[66] The Center for Human Rights Investigation. " The Impact of the European Convention on Human Rights upon the Romanian Legal System". *Romanian Review of Human Rights.* 5 (1994): 65.

[67] P. Leuprecht, "Innovations in the European System of Human Rights: Is Enlgargement Compatible with Reinforcement?", *Transnational Law and Contemporary Problems,* Vol. 8, No. 2 (1998), pp. 325-35

[68] Leuprecht cited Poland, Hungary, the Czech Republic, and Slovenia as examples.

[69] P. Leuprecht, "Innovations in the European System of Human Rights: Is Enlgargement Compatible

unprepared to meet European Convention standards, the COE brought the problem of case overload upon itself.

In short, the unforeseen consequences of the COE's ambition to consolidate a democratic Europe now diminish the ECHR's ability to perform its fundamental duties. The swift inclusion of members transitioning to democracy doubled the COE's membership, therefore, instigating a sharp rise in the Court's caseload, greatly straining available resources. Being unable to manage this increased workload, the Court began backlogging cases to such a great extent that it now routinely infringes applicants' right to a fair and expeditious trial under the European Convention. The combined consequences of expansion to Eastern and Central Europe have challenged the ECHR's effectiveness and raise concern for its continued role as a European human rights protector.

PART III

THE CHANGING NATURE OF CASES AND THE NEED FOR JURISPRUDENTIAL REORIENTATION

The challenges facing the Court involve not only the rapid expansion of member states and the influx of new cases but also a simultaneous transformation in the nature of these cases and, thus, the Court's function.[70] Only in the recent history of the Court have allegations of torture, arbitrary killing, and other violations of physical security

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with Reinforcement?", *Transnational Law and Contemporary Problems,* Vol. 8, No. 2 (1998), pp. 325-35

[70] Woolf, Lord H. (2005) *Review of the Working Methods of the European Court of Human Rights*, December 2005.

become routine complaints. As explained below, the rise in complex cases from Eastern and Central require greater resources from the Court and lower its overall output. The ECHR must, therefore, reorient its jurisprudence to accommodate these cases which stem from troubles transitioning to democracy.

During its first forty years, the Court mainly sought to protect individuals from the "excesses of majoritarianism in healthy democracies".[71] Member states party to the European Convention during this time were those in which the rule of law had been firmly established and human rights were, for the most part, highly esteemed and protected. According to former ECHR President Rolv Ryssdal people mainly used the ECHR to seek redress for cases considered "relatively minor" or for "very ordinary situations."[72] Most violations found during this time concerned the rights of liberty and security, fair trial, and respect for private life (Articles 5, 6, and 8). For example, Italy was involved in many violations concerning the state's inability to try cases within a reasonable time, such as a case which lasted sixteen years[73]. Out of the 755 total judgments between 1960 and 1997 the Court found only 15 violations of non-derogable rights[74] almost half of which were from the United Kingdom. Besides two violations of

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71 Mahoney, Paul. "New Challenges for the European Court of Human Rights Resulting from the Expanding Case Load and Membership", *Penn State International Law Review*. 21(2002), 110-111.

72 Greer, Steven, Laurence Gormley, and Jo Shaw. The European Convention on Human Rights: Achievements, Problems and Prospects. New York: Cambridge UP, 2006: 40

73 *Ferrantelli and Santangelo v. Italy* (No. 19874/92) 7 August 1996

74 Non-derogable rights are those which a state may never take from its citizens, even in times of national emergency. Under Article 15 the European Convention identifies the right to life (Article 2), the prohibition of torture (Article 3), the prohibition of slavery and forced labor (Article 4), and the prohibition of punishment without law (Article 7) as non-derogable; Survey of Activity 1950-1998, pps. 27-77.

concerning troubles with the Irish Republican Army,[75] the United Kingdom's violations of non-derogable rights concerned issues such as the likelihood that applicants deported to another state may be tortured,[76] retrospective criminal penalties,[77] and corporal punishment.[78]

Since 1998, however, violations of non-derogable rights have become a more standard component of cases found on the Court's docket. For example, between 1998 and 2008 the ECHR found 128 violations of the right to life, 43 violations of the prohibition of torture, 14 violations of punishment without law, and even one violation of the prohibition of slavery out of 7,856 total violations.[79] Forty-six per cent[80] of these violations were attributable to member states from Eastern and Central Europe, which is rather high considering their relatively new membership. Furthermore, given the number of pending cases[81] and the presence of armed conflict in that region, one may predict a steady rise in the proportion of cases involving non-derogable rights.

Returning to the discussion of Part II, the changing nature of the ECHR's caseload reinforces the Court's backlog as greater resources are allocated to a minority of cases. A conscious decision by the Court to concentrate its efforts on more complex and serious cases has resulted in a lower total output of judgments. Because these fundamental rights "enshrine one of the basic values of the democratic societies making

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75 *Ireland v. UK* (No. 5310/71) 18 January 1978 ; *McCann and others v. UK* (No. 19009/04) 13 May 2008
76 *Chahal v. UK* (No. 70/1995/576/662) 15 November 1996; and *Soering v. UK* (No. 14038/88) 7 July 1989
77 *Welch v. UK* (No. 17440/90) 26 February 1996
78 *Tyrer v. UK* (No. 5856/72) 25 April 1978
79 The European Court of Human Rights, *Some Facts and Figures 1998-2008*
80 The European Court of Human Rights, *Some Facts and Figures 1998-2008*
81 According to the ECHR's 2008 Annual Report, 72,000 cases from Eastern and Central Europe were pending before a judicial formation

up the Council of Europe",[82] they are subject to "the most careful scrutiny"[83] by the Court and receive more time and attention than other cases. For example, substantial resources are needed to establish facts which remain fundamentally disputed in cases concerning allegations of grave human rights abuses.[84] The ECHR must conduct difficult and costly fact-finding hearings (by hearing witnesses) and on-the-spot investigations when domestic courts are unable or unwilling to carry out any form of their own investigation into allegations. A significant number of these hearings can take up to a week and involve at least five or six ECHR officials (usually three judges, a registrar, and lawyers) and interpreters.[85] In a fact-finding mission organized for *Druzenko and others v. Ukraine*[86], three Court Judges were required to travel to a Ukrainian prison in order to gather evidence from witnesses and research accusations of inhuman and degrading treatment after the domestic government refused its own investigation. In another case, *Shamayev and 12 others v. Georgia and Russia*,[87] the ECHR coordinated a fact-finding mission in September of 2003 to Russia when domestic authorities would not allow the Court or the applicants' representatives to contact the applicants.[88] After the Russian government tried to halt the mission in October, Strasbourg issued a reminder of Russia's obligation to the European Convention and

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82 *McCann v UK*, No. 18984/91, 1996 paragraph 147

83 *Gül v Turkey*, No. 22676/93, 2002 paragraph 78

84 Greer, Steven, Laurence Gormley, and Jo Shaw. The European Convention on Human Rights: Achievements, Problems and Prospects. New York: Cambridge UP, 2006: 40

85 Leach, p. 65

86 *Druzenko and Others v. Ukraine*, No. 17674/02 and 39081/02

87 *Shamayev and 12 Others v. Georgia and Russia*, No. 36378/02, 12 April 2005

88 Registrar of the ECHR, *Shamayev and 12 others v. Georgia and Russia*, No. 36378/02, Press Release No. 455, September 19, 2003 [online].

the investigation finally advanced.[89] Although it was eventually determined that no violations had been committed, the fact finding mission illustrates how cases concerning non-derogable rights may consume a disproportionate share of the Court's resources. As a result of the ECHR's decision to focus on more complex cases in 2007, there were 4 per cent fewer judgments delivered than in 2006 and cases pending before a judicial formation grew by 19 per cent within the year.[90]

In addition to reinforcing the backlog, the changing nature of violations has transformed the Court's role from one of "fine-tuning well-established and well-functioning democracies"[91] to that of an "adjudicator in transition," drawn into the process of democratic transformation and consolidation.[92] In other words, incomplete reform in Eastern Europe has generated cases which require the Court to participate in the establishment of democracy, as opposed to its fine-tuning. The creation of a genuinely independent judiciary or a major improvement in prison conditions, for instance, requires long and sustained efforts of reform. It is now more important than ever for individual cases to establish clear interpretive rules which provide a general jurisprudential doctrine. Should member states abide by the guidelines set forth in the European Convention (to be discussed in greater detail in Part IV), attention to established case law will help states identify their weaknesses and sometimes even

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89 Registrar of the ECHR, *Shamayev and 12 others v. Georgia and Russia*, No. 36378/02, Press Release No. 524, October 24, 2003 [online].

90 Annual Survey 2007, p.134

91 Mahoney, Paul. "New Challenges for the European Court of Human Rights Resulting from the Expanding Case Load and Membership", *Penn State International Law Review.* 21(2002), 110-111.

92 Robert Harmsen , "The European Convention on Human Rights after Enlargement." The International Journal of Human Rights Winter 5 (2001): 30.

specifically spell out the way to begin reform.

To summarize, the COE's expansion to Eastern and Central Europe has affected not only the size but also the character of the Court's caseload. The ECHR now regularly deals with cases which raise complex issues involving the violation of core rights to physical security. The Court must invest more resources in the investigation and resolution of every case which ultimately intensifies the already demanding backlog. Because these complex cases deal mainly with Eastern and Central Europe's transition to democracy, the Court has transformed from that of a fine-tuner to an adjudicator preparing the ground for democratic institutions.

PART IV

COMPLIANCE WITH JUDGMENTS

In recent years, the failure of certain member states to meet judgment obligations has undermined the Court's effectiveness. As explained below, recurring patterns of violations, which give rise to this phenomenon, occur mainly under the responsibility of Eastern and Central Europe's emerging democracies. In consequence, the Court suffers from drained resources and diminished authority which inhibit its ability to safeguard individuals' rights.

Under the European Convention, states "undertake to abide by the final judgment of the Court in any case to which they are parties."[93] The Committee of

[93] Article 46, European Convention

Ministers is responsible for the supervision of the execution of the Court's judgments. Member states must demonstrate to the Committee the cessation of the particular violation, erasing its consequences as far as possible, and the prevention of similar violations from reoccurring.[94] Among other things, this normally entails payment of just satisfaction.[95] Because the Court's judgments clearly define the measure of compensation, compliance involves a relatively simple task. In 2007, however, just satisfaction awarded to applicants averaged out to €25,182 for the total number of new cases examined by the Committee of Ministers.[96] This figure is quite small in comparison to the damages awarded at the similar Inter-American Court of Human Rights which often amount to tens of thousands of dollars. [97]

In certain cases, just satisfaction cannot adequately remedy injuries suffered by an applicant. Therefore, depending on the circumstances, judgments may also require respondent states to take individual measures in favor of the applicant. Individual measures are taken in order to ensure that the injured party be put, as far as possible, in the same situation he or she enjoyed before the violation occurred. This may include

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[94] https://wcd.coe.int/ViewDoc.jsp?id=814763&BackColorInternet=9999CC&BackColorIntranet=FFBB55&BackColorLogged=FFAC75

[95] If the law of the contracting state only allows for partial reparations to be made, the Court may afford just satisfaction to the injured party under Article 41 of the European Convention. This payment is typically a sum of money to cover pecuniary and non-pecuniary damage in addition to costs and expenses.

[96] "First Annual Report (2001) of the Supervision of the Execution of Judgments of the ECHR". Committee of Ministers (COE) p. 227. Can be found at: http://www.coe.int/t/e/human_rights/execution/CM_annreport2007_en.pdf

[97] La Canta v. Peru, Series C No. 162, 26 November 2006. para. 219(i); Boyce et al. v. Barbados - Series C No. 169, 20 November 2007. para. 132; Saramaka People v. Suriname, Series C No. 172, 28 November 2007. para. 208; Additional representative cases may be found at: <http://www.corteidh.or.cr/casos.cfm>

the re-opening of unfair proceedings, the destruction of information gathered in breach of the right to privacy, the revocation of a deportation order issued despite the risk of inhumane treatment in the country of destination, etc.[98] For example, in *Kutic (and 18 other similar applications) v. Croatia*,[99] domestic authorities had to correct the consequences of a violation in addition to making payments of just satisfaction. The case concerns their compensation claims, lodged with Zagreb Municipal Court, following various explosions which destroyed their property - their house in Martinec village (Croatia), on 26 December 1991, and, their garage and the adjacent storage room and a meat-curing shed in Bjelovar, on 13 November 1994. The local court stayed both sets of proceedings, in accordance with an amendment to the Civil Obligations Act introduced on 17 January 1996 by the Croatian Parliament. The amendment provides that all proceedings concerning actions for damage resulting from terrorist acts be stayed pending the enactment of new legislation on the subject. After waiting several years for new legislation, the applicant submitted complaints to the ECHR, which found that Croatia had violated the applicant's right to a fair trial under Article 6. Obliged to comply with Court judgments, the Croatian Supreme Court awarded the applicant damages of €10,000 and adopted a resolution instructing the competent courts to resume all civil proceedings stayed under the 1996 legislation and without a specific request from the parties. This remedy also illustrates the general (rather than individual) measures which respondent states must undertake to prevent the

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99 *Kutic v. Croatia* (No. 48778/99) 01 March 2002. (The 18 other similar cases being Multiplex, Culjak, Kastelic, Acimovic, Crnojevic, Varicak, Freimann, Dragovic, Marinkovic, Dragicevic, Zovanovic, Pikic, Peic, Nevenka I Milorad Mihajlovic, Kljajic, Lulic and Becker, Zadro, Urukalo, and Nemet v. Croatia.)

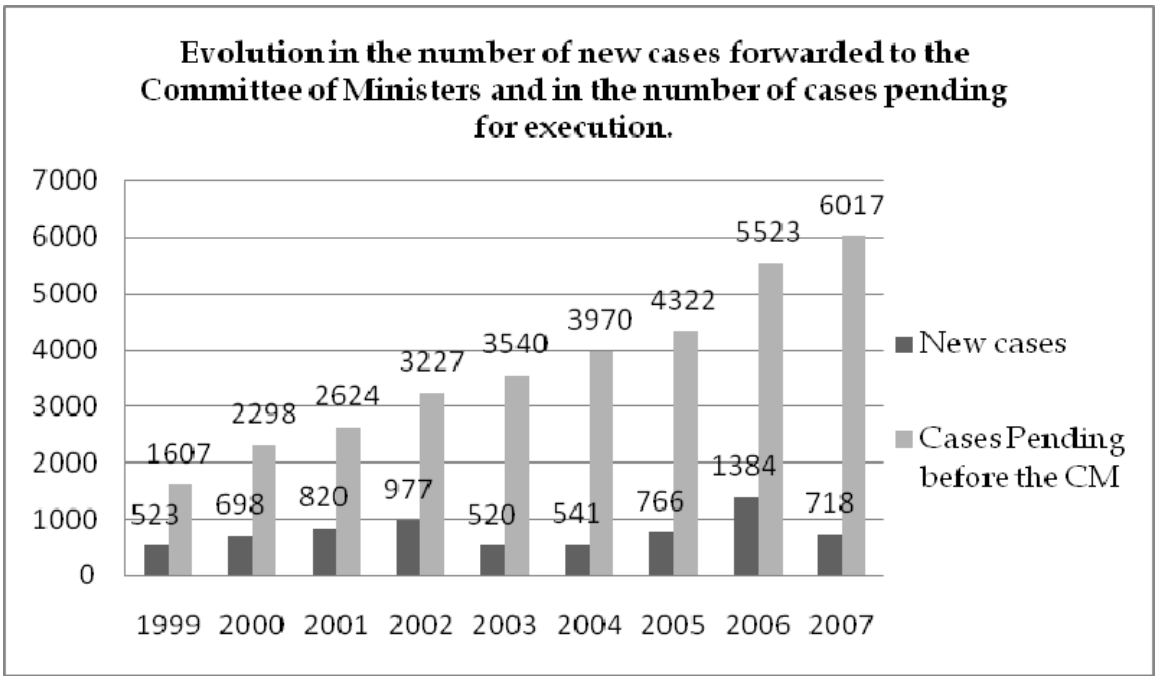
recurrence of similar violations. To that end, the Croatian Parliament passed a law in 2003 enabling the determination of civil claims that involve damage from terrorist acts. While this law helped remedy violations found for individuals' cases, the action as a whole prevents such a violation from becoming a concern again.

Although states have an obligation to respect the Court's judgments, they enjoy wide latitude in choosing the means of interpretation. The Committee of Ministers (assisted by the Department of the execution of judgments) does, however, ensure that measures taken are appropriate and actually achieve the outcome sought in the Court's judgment. Additionally, the ECHR can itself directly require member states to take certain measures as it deems necessary; albeit this possibility was not utilized until 2004 for the cases *Assanidze v. Georgia*[100] and *Ilascu and others v. Russia and Moldova.*[101] In both cases Grand Chambers[102] held unanimously that the respective states must secure the immediate release of applicants who were being arbitrarily detained in breach of Article 5 of the Convention.

[100] *Assanidze v. Georgia,* No. 71503/01, 8 April 2004

[101] *Ilascu and others v. Russia and Moldova,* No. *48787/99*, 8 July 2004

[102] In cases which are considered to raise important issues, a chamber may relinquish its jurisdiction to a grand chamber of 17 judges (under Article 30; rule 72). A case can be relinquished to the grand chamber at any time before a chamber has given its judgment, however, it is possibly for one party to the case to object to the relinquishment.



In spite of the Court and Committee's efforts to prevent the recurrence of particular violations, statistics in the figure above clearly demonstrate a remarkable increase over recent years in the number of new cases transmitted to the Committee of Ministers and the number of cases pending for supervision of execution.[103] There is no indication that the Committee's workload will lessen unless the volume of new cases submitted for supervision can drop over a sustained period. Eighty per cent of new cases submitted to the Committee in 2007 were categorized as clone or repetitive cases,[104] meaning that they reflect a systemic or general problem already raised before the EHCR in leading cases[105] and, therefore, make no significant contribution to the

[103] "First Annual Report (2007) of the Supervision of the Execution of Judgments of the ECHR". Committee of Ministers p. 13. Can be found at: <http://www.coe.int/t/e/human_rights/execution/CM_annreport2007_en.pdf>

[104] "First annual report on the supervision of the execution of judgments". Committee of Ministers (2008): 218

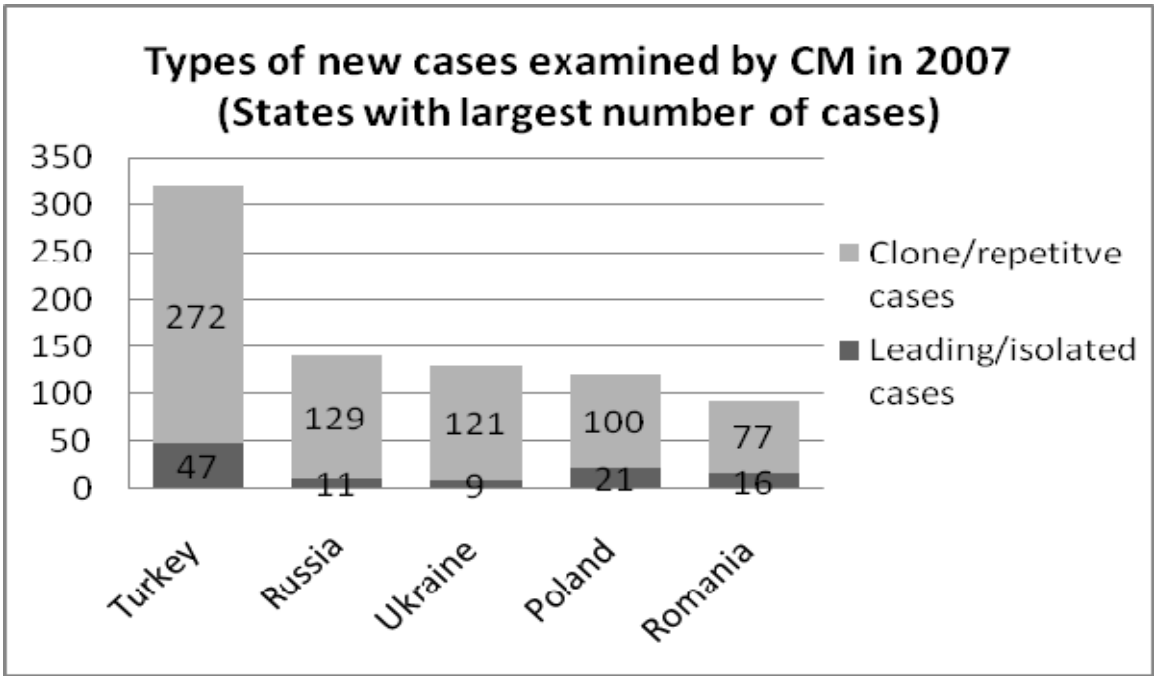
[105] Cases which reveal a new systemic/general problem in a respondent state and which thus require the adoption of new general measures, more or less important according to the case(s).

case-law of the Court. Rather, these cases signal member states' failure to exercise preventative individual or general measures effectively.

Because most repetitive cases concern underlying structural problems within a state, they make up a large proportion of applications filed against Eastern and Central European members still transitioning to democracy. As mentioned in the discussion in Part II, many states from this region were allowed to enter the COE with fragile political systems and methods of rights protection. Given that perhaps the most attractive prize in the gift of the Council of Europe is membership itself, conceding it at an early stage in a process of democratic transition runs the risk of lackadaisical compliance with Convention obligations. This is only offset by the fact that members who wish to join the EU and NATO must prove their conformity to the "shared values" of Europe and, therefore, are more likely to execute obligations.[106] Additionally, the COE can do little with a state persistently in violation, short of suspending its voting rights on the Committee of Ministers or expelling it from the organization altogether, neither of which is likely in any but the most extreme circumstances to prove productive.[107] These circumstances allow some states, such as Russia, to value sovereignty over their pledge to observe key European human rights norms.[108] As a result, allegations against transitioning democracies increasingly deal with issues already addressed by the Court. An average of almost 60 per cent of new cases examined in 2007 against the twenty-two member states from Eastern and Central Europe were categorized as repetitive, in

[106] Editors, "Walter Schwimmer, Timid Moral Policeman," *The Economist*. 27 Nov. 1999, p. 56
[107] "Protocol No. 14 to Convention", para. 100
[108] P. Jordan, "Does Membership Have Its Priveledges?: Entrance into the Council of Europe and Compliance with Human Rights Norms", *Human Rights Quarterly* 25 (2003): p. 686

contrast to the 35 per cent average from Western Europe.[109]



As shown above, the greatest absolute numbers of repetitive cases examined by the Committee in 2007 came from (in respective order) Turkey, Russia, Ukraine, Poland, and Romania – representing the vast majority of cases for each state.[110] As noted by its former President Wilderhaber, repeated findings of violations which have no obvious effect in the state concerned seriously undermine the Court's credibility.[111] Recently, in an effort to combat the growing proportion of repetitive cases, the Court has started providing better identification of the issues found underlying violations and giving indications as to the execution measures required. For example, in the case of

[109] First Annual Report (2007) of the Supervision of the Execution of Judgments of the ECHR". Committee of Ministers (COE) p. 217-218. Can be found at: http://www.coe.int/t/e/human_rights/execution/CM_annreport2007_en.pdf

[110] Data in graph gathered from: First Annual Report (2007) of the Supervision of the Execution of Judgments of the ECHR". Committee of Ministers (COE) p. 218-220. Can be found at: http://www.coe.int/t/e/human_rights/execution/CM_annreport2007_en.pdf

[111] L. Wilderhaber, "The Role of the ECHR: An Evaluation", *Mediterranean Journal of Human Rights,* 8 (2004) 9-32 at 27

Broniowski v. Poland,[112] the Court held that expropriation by the government (of property belonging to the applicant east of the Bug River which Poland ceded to the Soviet Union after the Second World War) constituted a violation of Article 1 of Protocol No. 1 because inadequate compensation had been paid. The Court expressly stated that the violation of the applicant's right "originated in a widespread problem which resulted from a malfunction of Polish legislation and administrative practice and which has affected and remains capable of affecting a large number of persons".[113] It therefore required Poland to adapt appropriate measures to secure an adequate right of compensation or redress, not just for this particular applicant, but for all similar claimants.[114] This was the first time that the Court had used what has become known as a "pilot judgment" procedure as a device for dealing with systemic problems. Following that judgment, in July 2005 the Polish Government passed a new law setting the ceiling for compensation for Bug River property at 20% of its original value.[115] This saved the ECHR an enormous amount of time and labor by dealing with all the 167 related cases pending before it and giving a solution for the 80,000 Bug River potential applicants within a single judgment. Solutions created on the basis of a single case, however, may not reveal the different aspects of the systemic problem involved and should not be wholly relied upon to deliver the ECHR from its burdens. Additionally, the pilot case approach only works for states willing to systematically oblige to the pilot

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[112] *Broniowski v. Poland* (No. 31443/96), 22 June 2004

[113] (2005) 40 EHRR 495 at para. 189

[114] (2005) 40 EHRR 495 at para. 200

[115] Press release issued by the Registrar, "First 'pilot judgment' procedure brought to a successful conclusion: Bug River cases closed"

judgment in all future cases. For these reasons, respect of the European Convention and, in particular, of the Court's judgments, is a crucial element of the Council of Europe's system for the protection of human rights, rule of law and democracy.[116]

Full execution of judgments is necessary to enhance the Court's prestige and the effectiveness of its action and has the effect of limiting the number of applications submitted to it. Given that "the acid test of any judicial system is how promptly and effectively judgments are implemented,"[117] one may reasonably conclude the current ECHR system's legitimacy to be in serious danger. Until the transition to democracy in Eastern Europe can allow for the full harmonization of domestic law with that of the European Convention, repetitive cases will continue to make up a majority of the Court's caseload.

PART V

THE EUROPEAN COURT OF HUMAN RIGHTS AS AN EXAMPLE

The COE's experience with complete pan-continental membership (excluding Belarus) could be valuable to other international organizations seeking expansion. In particular, Eastern and Central European states' effect on the ECHR may serve as a powerful warning to the European Union and North Atlantic Treaty Organization, two very influential organizations which have already implemented multiple stages of eastward expansion. Problems in the ECHR resulting from the premature inclusion of

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[116] Execution of judgments of the European Court of Human Rights. Council of Europe. 24 Mar. 2009 <http://www.coe.int/T/E/Human_rights/execution/>.

[117] CDDH, "Guaranteeing Long-Term Effectiveness", April 2003, p. 34, para. 1

members transitioning to democracy, such as strained resources and altered goals, exemplify the need for great caution with international growth.

As argued in preceding sections, the ECHR's current limitations are rooted in the political and judicial weaknesses of new members. The COE's policy of rapid expansion offered little time for member states to resolve underlying structural deficiencies contributing to systemic human rights violations. Internal issues of stability demand a transitioning state's full attention, making concentration on external obligations difficult. By accepting states into the COE before such shortcomings were fully addressed, the ECHR opened itself to their vulnerabilities while also giving those states only interested in membership little incentive to improve. The resources of the ECHR were taxed beyond capacity as the needs of new, weaker members grew. Of greater concern, however, is how the nature of the Court's focus shifted as it began accommodating these transitioning democracies.

With that said, it is interesting that the EU and NATO have already initiated multiple stages of expansion into Eastern and Central Europe. In 2004, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Slovakia, and Slovenia became the first Eastern European members to join the EU and in 2007, the enlargement continued with an extension of membership to Bulgaria and Romania. The European Council[118] deemed these states to have met EU membership accession criteria which include: political stability and respect for the rule of law and human rights, a

[118] The European Council gathers together the heads of state or government of the member states of the European Union and the President of the Commission.

functioning and competitive market economy, and lastly adherence to the aims of the political, economic, and monetary union.[119] Similarly NATO found several Eastern and Central European states eligible for membership after it concluded that they were not only democratically and economically stable but also committed to the peaceful resolution of conflicts and able to make military contributions in NATO operations.[120] This allowed the Czech Republic, Hungary, and Poland to join NATO in 1999; Bulgaria, Estonia, Latvia, Lithuania, Romania, Slovakia, and Slovenia in 2004; and predictably Croatia and Albania will accept membership this year. Other Eastern and Central European states which have yet to show substantial progress in their democratization will likely not be granted membership to either the EU or NATO until conformity to Western ideals and standards are clearly observed.

Despite exercising caution in their expansion policies, the EU and NATO have already experienced threats to their effectiveness at the hands of transitioning democracies. Both organizations are controlled by states with great economic, political, and military power, which these members risk under expansion to weaker states. For example, the European Union's comfortable authority in the international market, particularly its 30 per cent share of the nominal gross world product,[121] is currently at stake due to unstable Eastern European economies. The recent global economic downturn has exposed the financial fragility of new Eastern European members "fed

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[119] http://europa.eu/scadplus/glossary/accession_criteria_copenhague_en.htm

[120] http://www.nato.int/cps/en/natolive/topics_49212.htm#1995

[121] *World Economic Outlook Database, April 2008 Edition*. International Monetary Fund. April 2008. <http://www.imf.org/external/pubs/ft/weo/2008/01/weodata/weorept.aspxsy=2006&ey=2008&ssd=1&sort=country&ds=.&br=1&c=998&s=NGDPD%2CPPPGDP&grp=1&a=1&pr.x=46&pr.y=7>

from the tidal wave of liquidity and easy money".[122] Imploding financial systems upset the EU's single market system and demonstrate the vulnerability Eastern and Central Europe may bring to the organization's economic success. The EU is now faced with the task of deciding whether and how members should help their weaker brethren.[123] The European Bank of Reconstruction and Development, the European Investment Bank and the World Bank said they would jointly provide $31.1 billion to support Eastern European nations, but much more will be needed to deliver fragile states from ruin.[124] Only five years after expansion, the EU has noticeably shifted its focus from fostering regional economic prosperity to simply ensuring the economic stability of all its members. Each member state's level of contribution to the EU's budget further emphasizes the strain that new members place on the organization's resources. As shown in the chart below,[125] most Western states' net benefit (the money received minus that contributed) from the European Union's budget amounts to negative figures.[126] Clearly, states from the former Soviet bloc make up the overwhelming majority of those receiving the most EU expenses. Just as with the ECHR, organizational resources are threatened by the presence of states not fully prepared for the demands of membership.

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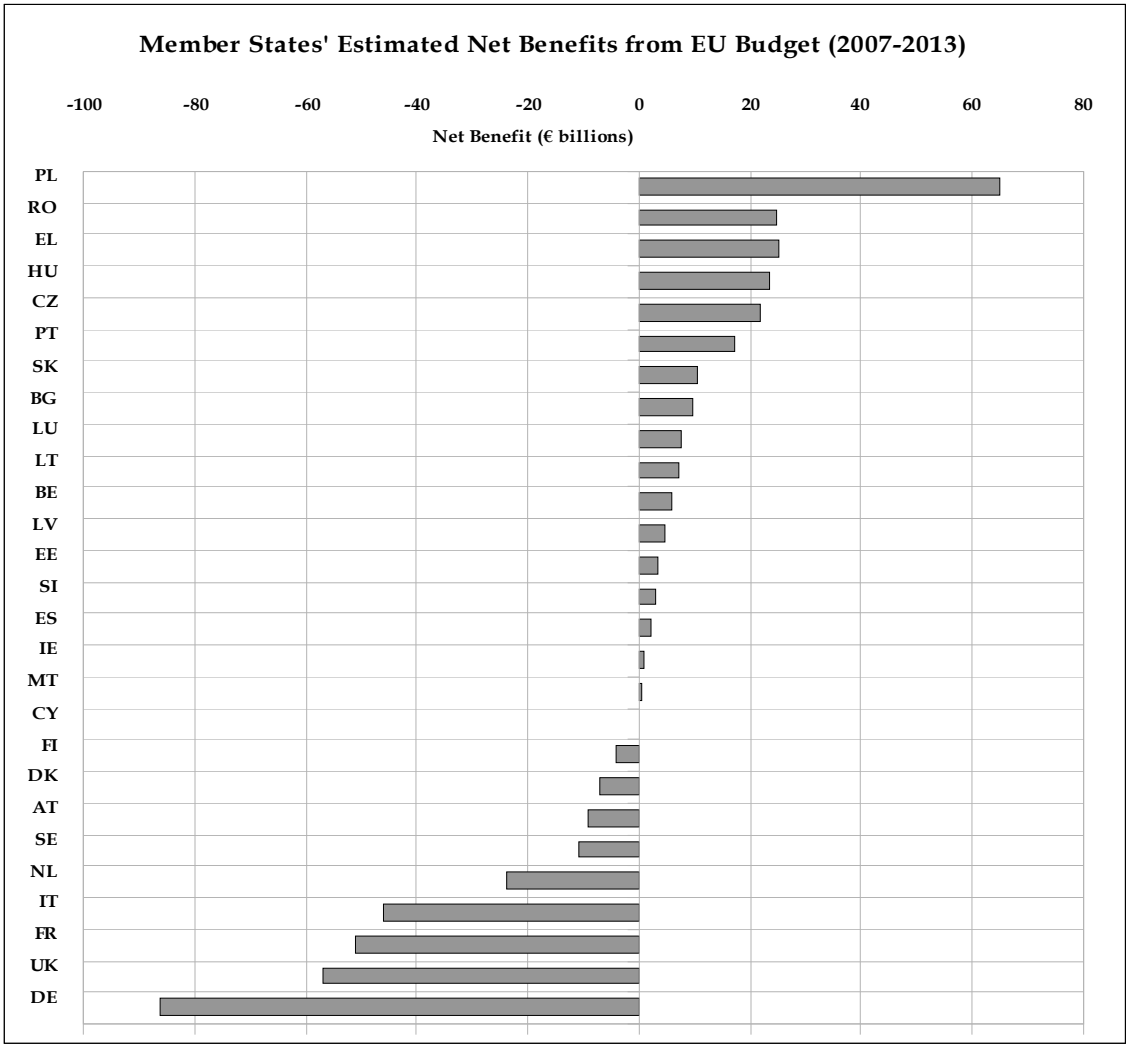
[122] Saltmarsh, Matthew. "Eastern Europe showing new vulnerability." International Herlad Tribune [New York] 17 Feb. 2009. <www.iht.com>.

[123] Maddox, Bronwen. "EU must pay price to keep Eastern poor relations in the family." The Times [London] 3 Mar. 2009, World sec. <http://www.timesonline.co.uk/tol/comment/columnists/bronwen_maddox/article5835067.ece>

[124] Castle, Stephen, and Steven Erlanger. "Growing Economic Crisis Threatens the Idea of One Europe."The New York Times, New York ed.: A1.

[125] Data represents an estimate of the EU-27 budget for the years 2007-2013. Statistics collected from: Briefing note: European Communities (Finance) Bill. Issue brief. 2007. Open Europe. 20 Apr. 2009: p. 3 <http://www.openeurope.org.uk/research/budget07.pdf>

[126] Figures for both Luxembourg and Belgium may be inflated due to the large number of companies based there with subsidiaries located in another state.



The character of NATO has also experienced dramatic changes as former Warsaw Pact states[127] find a growing representation in the Alliance. Because the fall of the Soviet bloc disassembled the main adversary of NATO, the organization was forced to reevaluate its existence. NATO now aims to ensure multilateral military cooperation and guarantee international peace and security;[128] however, expansion to Eastern

[127] The Warsaw Pact was created in 1955 as the communist response to NATO. It was founded by Albania, Bulgaria, Czechoslovakia, Hungary, Poland, Romania and the Soviet Union. The German Democratic Republic joined later in 1956.

[128] "Welcome to NATO." North Atlantic Treaty Organization. 10 Mar. 2009 <http://www.nato.int/nato-welcome/index.html>; Wallander, Celeste. "NATO's Price: Shape Up or Ship Out." Foreign Affairs.

Europe has encouraged tensions between the organization's members[129] as well as with longtime rival Russia. In fact, NATO's plans for expansion towards Russia likely exacerbated the circumstances leading up to conflict in South Ossetia last year.[130] The inclusion of economically weaker new members from Eastern and Central Europe strains NATO's burden sharing budget system which is based upon per capita GDP.[131] As the organization expands, it incurs additional costs to accommodate the new members. While new members contribute to such costs, older and financially stable members end up paying the most.[132]

Just as with the ECHR, the premature extension of membership to the transitioning democracies of Eastern and Central Europe could pose a serious threat to the goals of an international organization. The uneven development levels of EU member states currently strain the organization's solidarity under the financial crisis and causes delays in decisions on economic recovery.[133] Not only are the organization's resources now turned to the East but its goal for economic prosperity has been replaced with simply stability. Additionally, new members to NATO unable to build up

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Dec. 2002. The Council on Foreign Relations. 10 Mar. 2009. <www.foreignaffairs.org>

[129] Kupchan, Charles A. "NATO divided." International Herald Tribune 9 Apr. 2008. 11 Mar. 2009 <http://www.iht.com/articles/2008/04/09/opinion/edkupchan.php>.

[130] Friedman, Thomas. "What did we expect?" New York Times 20 Aug. 2008, New York ed., Op-Ed sec.: A23; "Putin warns NATO expansion `is direct threat to security of Russia'" The Australian [Sydney] 7 Apr. 2008, 1st ed., World sec.: 13.

[131] "NATO Handbook." 2006. NATO. 20 Apr. 2009: p.57 <http://www.nato.int/docu/handbook/2006/hb-en-2006.pdf>.

[132] Ek, Carl W. NATO Common Funds Burdensharing: Background and Current Issues. Rep. no. RL30150. 20 Jan. 2006. Congressional Research Services. 20 Apr. 2009 <http://digital.library.unt.edu/govdocs/crs/data/2006/upl-meta-pcc-1156153389knordstr_nt104619_unt/RL30150_2006Jan20.pdf>.

[133] Castle, Stephen, and Steven Erlanger. "Growing Economic Crisis Threatens the Idea of One Europe."The New York Times, New York ed.: A1.

substantial defenses on their own rely on the military assistance of allies. Eastern European states anxious to thwart Russian aggression demand preemptive protection, causing strife within NATO over plans such as building missile defense shields and diminishing the ability of the organization to act harmoniously.[134] These developments underscore the need for caution when considering expansion to Eastern and Central Europe.

CONCLUSION

After experiencing a rapid expansion of jurisdiction beyond the traditional geo-political boundaries of the Cold War, the ECHR found itself challenged by the poor human rights background of its latest members. The new Eastern and Central European members brought with them many of the problems now threatening the Court such as an overwhelming caseload, a rise in serious violations to non-derogable rights, and low compliance with judgments. Altogether these developments have taken a toll on the ECHR's capacity to fully process received applications, thus reducing its ability to protect human rights in Europe. While the ECHR has executed the protection of individual's rights more effectively than any other trans-national process, its continued success now faces an uncertain future.

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[134] Lobjakas, Ahto. "NATO split over Baltic defense." Asia Times Online 9 Oct. 2008. World News Network. 10 Mar. 2009 <http://article.wn.com/view/2008/10/08/NATO_split_over_Baltic_defense/>; Lok, Joris Janssen. "NATO Struggles With Missile Defense." 10 June 2007. Aviation Week and Space Technology. 11 Mar. 2009 <http://www.aviationweek.com/aw/generic/story_channel.jsp?channel=defense&id=news/aw061107p2.xml>.

A high symbolic 10,000th[135] judgment delivered on 18 September 2008 for the case of *Takhayeva and Others v. Russia*[136] represented not only the Court's accomplishments but also the challenges which it has increasingly encountered over the past two decades. For example, when this case was allocated to a decision body in 2004 along with 32,490 others,[137] the ECHR had it backlogged due to the characteristically high influx of applications. The Court currently requires approximately five years to fully process a case – a time period which threatens an applicant's right to a fair and expeditious trial under the European Convention.[138] Although a slight exception to the trend, *Takhayeva and Others v. Russia* took four years to receive a final judgment from the Court. Furthermore, the nature of the applicants' complaints concerned serious violations of rights to physical security. Non-derogable right violations have become more prevalent in recent years, especially in areas suffering from armed conflict such as Chechnya. In *Takhayeva and Others v. Russia*, the ECHR found violations of Articles 2 (right to life), 3 (prohibition of inhuman or degrading treatment), 5 (right to liberty and security) and 13 (right to an effective remedy), all concerning the abduction of the applicants' relative from their village in Chechnya by Russian servicemen.[139] Such

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135 Registrar press release. "The European Court of Human Rights delivers its 10 000th judgment." *The European Court of Human Rights*. 18 Sept 2008. <http://cmiskp.echr.coe.int/tkp197/view.asp?item=2&portal=hbkm&action=html&highlight=takhayeva%20%7C%2023286/04&sessionid=21084097&skin=hudoc-pr-en>.

136 *Takhayeva and Others v. Russia* (no. 23286/04)18 Sept 2008; Registrar press release. "The European Court of Human Rights delivers its 10 000th judgment." *The European Court of Human Rights*. 18 Sept 2008.

137 "Some Facts and Figures of the European Court of Human Rights: 1998-2008". *Council of Europe*. Nov. 2008, p. 15.

138 Article 6 of the European Convention

139 Registrar press release. "The European Court of Human Rights delivers its 10 000th judgment." *The European Court of Human Rights*. 18 Sept 2008.

politically sensitive cases require the Court to expend greater resources gathering crucial information from applicants and member states. Additionally, the high volume of similar allegations against Russia for violations of non-derogable rights during anti-terrorist operations in Chechnya signal Russia's failure to take individual and general measures for the applicant's remedy and prevention of the violation's recurrence. What is more, the high level of applications from the Chechen region illustrates the presence of systemic problems in Russia's human rights policies which is something that the ECHR must now take upon itself to correct. The extra workload only strains the Court's already limited resources and threatens its overall effectiveness. In this instance, the Court's experience with one of its members provides an invaluable indication of expansion's costs to other organizations such as the EU and NATO.

Despite the aforementioned obstacles to the delivery of Court's judgments, it is the only international human rights court able to claim such a high output of judgments. This year the ECHR celebrated its fiftieth anniversary, where ECHR President Jean Paul Costa presented a speech not only emphasizing the vast improvements made in the realm of human rights but also need for the Court's continued presence in a Europe where xenophobia, racism and intolerance still reside.[140]

<http://cmiskp.echr.coe.int/tkp197/view.asp?item=2&portal=hbkm&action=html&highlight=takhayeva%20%7C%2023286/04&sessionid=21084097&skin=hudoc-pr-en>.

[140] Speech by President of the European Court of Human Rights, Mr Jean-Paul Costa. Solemn hearing of the European Court of Human Rights on the occasion of the opening of the judicial year. 30 January 2009.

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