What's Wrong with the European Convention on Human Rights?

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ABSTRACT

The European Court of Human Rights faces a potentially fatal case overload crisis. But this is not the only problem confronting the European Convention on Human Rights. The underlying difficulty is the reluctance of the Strasbourg institutions, and others, to acknowledge that the Convention's main function is not to provide remedies for each deserving applicant. It is, rather, to promote convergence in the operation of public institutions at all levels of governance in Europe by articulating an abstract constitutional model which member states should then apply in their own domestic constitutional systems. This article seeks to make the case for "constitutionalization" and to explore the policy implications.

I. INTRODUCTION

The European Convention on Human Rights is widely regarded as the most successful experiment in the transnational, judicial protection of human rights in the world. It began in 1950 as an international treaty on mostly civil and political rights, making a largely symbolic statement of the liberal democratic identity of its ten founding members in the Cold War aftermath of the Second World War. Now, it embraces every state in Europe except Belarus, with a land mass stretching from Iceland to Vladivostok and a com-

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bined population of nearly 800 million. In spite of the widespread, though not universal, institutionalization of democracy, human rights, and the rule of law in Europe, the continent still has numerous human rights problems many of which are also, prima facie, violations of the Convention. Some, for example those arising out of prison conditions in Russia, are country-specific, while others, such as those relating to migration, human trafficking, and terrorism/counter-terrorism, extend beyond national boundaries. However, the Convention system will be less able to address problems such as these unless it effectively tackles five systemic challenges which threaten to compromise its future. Indeed, one of these systemic problems jeopardizes its very survival. The purpose of this article is to discuss how these core difficulties might be resolved.[1] But first, the Convention's creation and original purpose, as well as how both it and its surroundings have changed since its inception, need to be carefully considered.

II. HALF A CENTURY OF CHANGE

The structure, design, and content of the Convention were the result of compromise between competing visions. Both it, and its parent organization—the Council of Europe—emerged from the negotiations of the late 1940s primarily intended to promote four main goals: to contribute to the prevention of another war between Western European states, to provide a statement of common values contrasting sharply with Soviet-style communism, to reinforce a sense of common identity and purpose should the Cold War turn "hot," and to establish an early warning device by which a drift towards authoritarianism in any member state could be detected, and dealt with by complaints to an independent trans-national judicial tribunal.[2] Even this "early warning" function was also inextricably linked to the prevention of war because the slide towards the Second World War suggested that the rise of authoritarian regimes in Europe made the peace and security of the continent more precarious.

However, those who designed the Convention agreed that its *modus operandi* should be complaints made to an independent judicial tribunal by states against each other (the "interstate process"), and not those made by

1. Earlier versions of this article, which attempt to summarize the central thesis of Steven Greer, The European Convention on Human Rights: Achievements, Problems and Prospects (2006) and to analyze subsequent key developments, were presented at faculty seminars at the School of Social Sciences and Law, Brunel University, and at the Centre for International Governance, the University of Leeds, in April and November 2006, respectively, and at the University of Connecticut School of Law, and the School of Law, Queens University Belfast, in April and May 2007, respectively.
2. Greer, *supra* note 1, at 56–57.

individuals against governments.[3] At its inception, therefore, the Convention was much more about protecting the democratic identity of member states through the medium of human rights, and about promoting international cooperation between them, than it was about providing individuals with redress for human rights violations by national public authorities. As an international treaty the Convention is, nevertheless, unusual in that it does enable individuals to bring complaints to an international court, the European Court of Human Rights in Strasbourg. This facility was, however, originally optional rather than mandatory for member states.

For most of its first thirty years, the Convention was largely ignored by just about everybody, including victims of human rights abuse, lawyers, jurists, politicians, and social scientists. Only 800 or so individual complaints were received by the Strasbourg institutions a year.[4] But from the mid-1980s onwards things began to change dramatically. First, the rate of formal individual applications to the Court began to rise steeply. By the late 2000s, the annual average had reached over 40,000, over fifty times the annual average for the first thirty years.[5] This was due partly to the second significant change: the huge expansion in the number of countries belonging to the Convention system, from a mere ten in 1950 to forty-six by the end of the 1990s, including all the former communist states of central and Eastern Europe except Belarus.[6] Third, as the twentieth century drew to a close it also became clear that interstate complaints—just under two dozen in the Convention's entire history[7]—were largely a dead letter, not least because they undermine the Council of Europe's rationale. Litigation is, after all, a hostile act in most circumstances and, therefore, not an ideal vehicle for cultivating international interdependence. The fourth change, and one of the key factors in the rising application rate, is the fact that the Convention is now much better known by lawyers and by the general public in all member states.

The fifth change, in response to the rising application rate, was the reform of the judicial process by Protocol 11, effective November 1998.[8]

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3. *Id.* at 20.
4. *Id.* at 36.
5. Registry of the Eur. Ct. H.R., European Court of Human Rights Survey of Activities 2007, at 62 (2008).
6. There are now forty-seven. Montenegro briefly left the Convention system when it gained independence from Serbia on 3 June 2006, but rejoined on 11 May 2007.
7. Protocol No. 14 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, Amending the Control System of the Convention, Eur. T. S. 194 (2004), *available at* www.echr.coe.int/NR/rdonlyres/D62AC993-3D21-4CB7-BA5A-D5ED5ED73640/0/Protocol14.pdf [hereinafter Protocol No. 14]; Explanatory Report as Adopted by the Committee of Ministers at its 114th Session, 12 May 2004, ¶ 11, n.3, *available at* http://conventions.coe.int/Treaty/EN/Reports/Html/194.htm.
8. European Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocol No. 11, *adopted* 1 Nov. 1998, Europ. T.S. No. 155, *available at* http://conventions.coe.int/Treaty/en/Treaties/Html/005.htm [hereinafter European Convention on Human Rights].

The European Commission of Human Rights was abolished, and the restructured Court became a full-time institution. It retained its original functions of delivering legally-binding judgments on whether or not the Convention had been violated, and of providing advisory opinions upon request to the Committee of Ministers, the Council of Europe's executive body. But it also assumed responsibility for all the Commission's previous tasks of registering applications, ascertaining the facts, deciding if the admissibility criteria were satisfied, and seeking friendly resolution of complaints. Protocol 11 also stripped the Committee of Ministers of the power it had hitherto enjoyed to settle cases on the merits, a responsibility deemed incompatible with the Committee's political character and the now enhanced judicial complexion of the applications process. From then on, the Committee's role in the complaints machinery has been limited to supervising the execution of the Court's judgments, which remains a political process involving negotiation with the respondent state. Both the right of individual petition and acceptance of the Court's jurisdiction became compulsory. However, by the 1990s, each had already been voluntarily endorsed by all member states.[9]

The sixth change concerns the decrease in the risk of conflict, between liberalism and authoritarianism over the "ideological identity" of the post-Cold War European nation state—the context out of which the Convention emerged—with a concomitant increase in the risk of conflict over its "existential identity," particularly as ethnic and religious animosities stifled by communism can now be more easily re-asserted, as, for example, in the Balkans, Chechnya and parts of the Caucasus.

Seventh, since the 1990s the Council of Europe has increasingly been shadowed—some would say overshadowed—by a parallel organization to which twenty-seven of its members now also belong. This institution, the European Union, started life in 1951 with six member states and a different name, dedicated to preventing another Franco-German war by integrating French and German coal and steel production.[10] Since then it too has expanded geographically. But, unlike the Council of Europe, it has also greatly enlarged its mission. While its main goal has become the deepening and widening of European economic integration, it is also now committed to harmonizing the approach of member states towards a host of political and human rights issues arising out of foreign policy, security, and police and judicial cooperation. Two of the most tangible expressions of this trend are the promulgation of the Charter of Fundamental Rights in 2001, and the inauguration of a Fundamental Rights Agency in 2007. Since the beginning of

9. Greer, *supra* note 1, at 36–38
10. Robert Schuman, Declaration of 9 May 1950, *European Parliament, Selection of Texts Concerning Institutional Matters of the Community for 1950–1982*, 47 (Luxembourg, OOPEC, 1982).

the twenty-first century, therefore, a complex, and in many respects opaque, relationship has begun to develop between the EU human rights activities and those of the Council of Europe.

Eighth, the identity which the Convention originally provided for Western Europe has now become an "abstract constitutional identity" for the entire continent, linking the former communist zone with the west, and the EU with all but one of the rest. As a result, the European Court of Human Rights has effectively become the constitutional court for greater Europe. This constitutional identity is, however, abstract in three senses. First, it provides the constitution for only a partial polity, that is to say one with executive and judicial, but no legislative functions. Second, the jurisdiction of the European Court of Human Rights is limited to declaring whether or not the Convention has been breached. It does not have the power, as possessed by some national constitutional courts, to annul legislation, nor to prescribe to states precisely what needs to be done in order to correct a violation. Third, as a result of its highly abstract character, and the fact that the Court's role is subsidiary to that of national authorities, the Convention leaves considerable scope for a range of equally Convention-compliant national norms, institutions and processes.

III. CORE PROBLEMS

As already indicated, the most visible and pressing problem facing the Convention system is the case overload crisis. The other concern is how persistent violations can be effectively tackled, and how the Court's method of adjudication and its impact in the jurisprudence can be improved. However, the most pervasive problem, underlying all of these, is a lack of commitment to the delivery of constitutional justice.

A. "Constitutional" v "Individual" Justice

There is great reluctance on the part of the Council of Europe as a whole, some judges on the Court, human rights NGOs, jurists, and others to recognize that the dominant model for the Convention system—individual justice—is discredited, and that the only other alternative—constitutional justice—now provides the only viable way forward. The model of individual justice assumes that the European Court of Human Rights exists primarily to provide redress for Convention violations for the benefit of the particular individual making the complaint, with whatever constitutional or systemic improvements at the national level might thereby result. The model of constitutional justice maintains, on the other hand, that the Court's primary responsibility

is to select and to adjudicate the most serious alleged violations, brought to its attention by aggrieved applicants, with maximum authority and impact in the states concerned. According to this model, the function of individual applications is mainly to alert the Court to specific systemic compliance problems in member states. Individual applications are, indeed, not the only, and may not even be the best, way to achieve this objective. The official mantra, that the Court has a dual mission to deliver both individual and constitutional justice, is inescapably true in the sense that the only justice the Court can deliver, given the effective demise of interstate complaints, is through individual applications; but this misses the point. The real issue is whether the Court can *systematically* deliver individual justice—i.e., justice to all deserving applicants—or whether it must concentrate upon the delivery of constitutional justice instead.

A fundamental problem with the model of individual justice, thus defined, is that nobody has yet sought to set out a coherent case in its defense. Instead, it tends to take the form of blunt and largely unsupported assertions, or largely inexplicit assumptions, held by those who regard any departure from the admissibility tests (discussed below) as a threat to the right of individual petition. Particular aversion has been expressed to the kind of discretionary admissibility test adopted by the US Supreme Court and other national constitutional courts in Europe and elsewhere. The absence of a coherent defense of the model of individual justice is not surprising since there are at least three compelling reasons why such a case cannot be sustained.

First, as already indicated, the delivery of individual justice was not what the Convention system was originally set up for. At its inception it was intended to contribute to the peace of Western Europe, in the context of the Cold War, by providing a distinctive forum in which states could conduct international relations. While the promotion of international peace in Europe may now be shared with the European Union, the Convention's fundamental role and rationale continue to be the defense of the character and integrity of European political, constitutional and legal systems through the language and medium of human rights, and not benefiting individual applicants per se.

Second, as a result of the changes of the past half century, there is no realistic prospect of justice being systematically delivered to every worthy applicant. Unless it is systematic, individual justice becomes arbitrary and is, therefore, not justice at all. In any conceivable set of circumstances, the European Court of Human Rights, like national constitutional courts, is capable of judging less than 5 percent of the applications it receives, although some 94 percent of these result in a finding of violation.[11] Officially such a

11. Greer, *supra* note 1, at 39. Just over 2 percent of complaints the Court receives, and 4 percent of those which are presented on the appropriate forms, proceed to adjudication on the merits.

huge proportion is rejected because the applicants in question failed some of the procedural formalities, for example they did not apply in time, or their application was "manifestly ill-founded"[12] (they did not have an arguable case). It is naïve, however, to regard the manifestly ill-founded criterion as an objective test. Determining if an application is, or is not, manifestly ill-founded requires the exercise of judgment and the interpretation of conduct, facts, and norms; it is, therefore, inescapably discretionary. Some commentators maintain that many complaints are rejected on this basis simply because the Court does not have the resources to consider them properly.[13] Moreover, over any given time-frame it would almost certainly be possible to find, amongst the 95 percent or so of formal applications which do not proceed to judgment on the merits, other 5 percent batches that could just as plausibly have been chosen for adjudication instead.

Third, for many applicants a judgment that their Convention rights have been violated is a hollow victory because levels of compensation are low and other rewards few. Although states never refuse to honor obligations to pay compensation where the Court has ordered it, the justice delivered to the lucky few otherwise tends to be much more symbolic than instrumental. One clear illustration is the fact that applicants who have managed to persuade the Court that their conviction for a criminal offence occurred in circumstances where their right to a fair trial was breached, are very unlikely to have their convictions quashed as a result.[14]

It follows that the Court could only be said to deliver individual justice in the tiny fraction of applications it adjudicates, if, and only if, the vast majority it rejects without adjudication are objectively complaints without any shred of merit; but this cannot be rationally assured. It is vital, therefore, that the cases the Court does select for adjudication represent the most serious Convention compliance problems in Europe, and that they are settled with maximum authority and impact; in other words they deliver constitutional justice. But this is not the basis upon which applications are currently chosen. For this to be so, a more honest admission would be required that some worthy applicants must be turned away empty handed; not because they were mistaken in thinking that their Convention rights had been breached, but because the Court did not consider the alleged violation sufficiently serious in view of other, more pressing, demands upon its time stemming from more substantial systemic compliance problems.

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12. European Convention on Human Rights, *supra* note 8, art. 35 (3).
13. Jessica Simor & Ben Emmerson, Human Rights Practice ¶ 20.039 (2005)
14. E. Lambert-Abdelgawad, *The Execution of Judgments of the European Court of Human Rights*, 15–17. Human Rights Files No. 19 (2002).

B. Case Overload

The "individual-constitutional justice" debate is inextricably linked to the alarming rate of formal individual applications to the European Court of Human Rights, currently around 40,000 a year and rising.[15] It has been predicted that, if this process continues unchecked, by 2010, a colossal backlog of 250,000 files will have accumulated awaiting a decision about admissibility, the threshold which all applications must cross before being considered on the merits.[16] Both the former president of the Court, Luzius Wildhaber, and the current President, Jean-Paul Costa, have warned that the system will asphyxiate unless this problem is tackled effectively soon.[17]

Regrettably, the Council of Europe's track record provides little cause for optimism. The failure to commit to the delivery of constitutional justice has led to the quest for managerial and administrative solutions within the flawed paradigm of individual justice when much more imaginative and radical alternatives, suggested by constitutional justice, are required instead. As already indicated, after years of debate the Convention system was modified by Protocol 11 in 1998. But by 2000 this was already officially recognized as inadequate, not least because the consequences of the post-communist enlargement had not been adequately anticipated. In May 2004, after further debate characterized by a blizzard of papers and proposals by a multiplicity of contributors, another modest reform package, Protocol 14, was unanimously endorsed by all state parties and its implementation was scheduled for late 2006 or early 2007.[18] However, by early 2005 it had already become clear that this too would not make much difference and that something much more radical was required. The Heads of State and Governments, meeting at a summit in Warsaw in May 2005, therefore, convened a Group of Wise Persons to make further proposals.[19] In December 2005 the retired British judge, Lord Woolf, also delivered the report of a panel which had been invited, by the Secretary General of the Council of Europe and the president of the European Court of Human Rights, to review the Court's working methods.[20]

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15. European Court of Human Rights Survey of Activities 2007, *supra* note 5.
16. Lord Woolf, Review of the Working Methods of the European Court of Human Rights 4 (2005).
17. Press Release, Eur. Ct. H.R., Steep Rise in Workload of European Court of Human Rights (21 June 1999), *available at* www.echr.coe.int/Eng/Press/PressReleases.htm; Press Release, Eur. Ct. H.R., Spotlight on Second Restructuring of European Court of Human Rights (8 June 2000), *available at* www.echr.coe.int/Eng/Press/PressReleases.htm; Press Release, Eur. Ct. H.R., Urgent Need to Implement Reforms to Secure Future of European Court (25 Jan. 2007), *available at* www.echr.coe.int/Eng/Press/PressReleases.htm.
18. Protocol No. 14, *supra* note 7. GREER, *supra* note 1, at 42–47.
19. *Third Summit of Heads of State and Government of the Council of Europe: Action Plan (Warsaw, 16–17 May 2005),* Doc. WSIS-II/PC-3/CONTR/7-E (7 June 2005), *available at* www.itu.int/wsis/docs2/pc3/contributions/co7.pdf.
20. Woolf, *supra* note 16.

The Wise Persons Report is based on the assumption that Protocol 14 will soon come into effect. Made public in November 2006, it has inaugurated a fresh round of deliberation also likely to take several years.[21] However, neither the Wise Persons nor anyone else could have foreseen that, in December 2006, and in spite of the fact that Russian government representatives sitting on the Committee of Ministers had already approved Protocol 14, the Russian state Duma would refuse to ratify it. Officially, this was because the Duma objected to the departure from the principle of collegiality, which stemmed from the transfer of decisions about the admissibility of individual applications from three-judge committees to single judge "formations," the details of which are discussed below.[22] A cynic might claim that, in spite of post-communist progress, there are more pressing difficulties with the rule of law and judicial independence that remain in the Russian legal system itself. The Duma must, therefore, have had other motives such as the desire to incapacitate the Convention system before the Court embarks on a series of judgments likely to condemn the Russian Federation for its conduct of the Chechen wars. Whatever the reasons, the result is that the whole carefully-constructed and laboriously-approved reform process contained in Protocol 14 has stalled, the case overload crisis has deepened, and the future of the entire Convention system is in more doubt than ever before. Frantic diplomatic efforts to reverse this set-back have yet to bear fruit. Even if they do, vital time will have been lost.

If and when it is implemented, Protocol 14 will streamline the preliminary screening of applications, the most time-consuming aspect of which is selecting the small number which cross the admissibility threshold and proceed to judgment on the merits. The current committees of three judges (advised by a Judge-Rapporteur and Registry lawyer), will be replaced by new single-judge formations staffed by a judge and Registry rapporteur. A new admissibility test will also be added to those already in force. Under the pre-Protocol 14 arrangements, an individual application could, and can still, be declared inadmissible on one or more of eight grounds: (1)the complaint is anonymous, (2)the applicant has not pursued it as far as possible at the national level ("failure to exhaust domestic remedies"), (3)more than six months have elapsed since the final decision on the matter by the domestic legal system, (4)it is an abuse of process, (5)it is incompatible with the Convention, (6)the applicant is not a victim of a Convention violation, (7)the complaint is substantially the same as a matter already examined by

21. *See* Council of Europe Committee of Ministers, Report of the Group of Wise Persons to the Committee of Ministers, CM(2006)203 (15 Nov. 2006), *available at* https://wcd.coe.int/ViewDoc.jsp?id=1063779&BackColorInternet=9999CC&BackColorIntranet=FFBB55&BackColorLogged=FFAC75.
22. *Duma Gives it to the European Court*, Kommersant, 21 Dec. 2006.

the Court or another international process, or (8)it is manifestly ill-founded.[23] Protocol 14 adds a further ground of inadmissibility. An application will be declared inadmissible if "the applicant has not suffered a significant disadvantage, unless respect for human rights as defined in the Convention and the Protocols thereto requires an examination of the application on the merits and provided that no case may be rejected on this ground which has not been duly considered by a domestic tribunal."[24] A new summary procedure will also enable committees of three judges to settle admissibility and merits simultaneously in applications which disclose clear Convention violations. The European Commissioner for Human Rights will be empowered to submit written comments and to take part in hearings (although not to initiate litigation). The Committee of Ministers will be able to enlist the Court's support in the enforcement of judgments and in the supervision of the implementation of friendly settlements and the EU will be permitted to accede to the Convention.[25]

The Wise Persons report contains few new proposals and largely recycles ideas rejected in the course of the Protocol 14 debate. The suggestion that, for example, national courts be permitted to seek advice from the European Court of Human Rights is unlikely to result in anything substantial, not least because such requests are intended to be optional, and the advisory opinions themselves would not be binding on national courts.[26] Some of the Wise Persons' other ideas such as greater flexibility in the procedure for reforming the Convention's judicial machinery, improving dissemination of Convention case law in member states, and transferring authority for the settlement of compensation to national courts, may, or may not, be worthy in themselves. Some have already excited considerable controversy.[27]

However, three of the Wise Persons' proposals might contribute to reducing the mushrooming application rate, if implemented, though, of themselves, are unlikely to solve the problem. First, recruiting a new cadre of judges, the "Judicial Committee"—to filter out inadmissible applications and to settle admissibility and merits in clear cut cases of violation—would allow the Court itself to concentrate more fully on applications alleging more contentious serious violations. Still, this is unlikely to obviate the need to replace the "manifestly ill founded" admissibility criterion with one based on the seriousness of the alleged violation, a discretionary test very

23. European Convention on Human Rights, *supra* note 8, at art. 35.
24. Protocol No. 14, *supra* note 7, art. 12.
25. *Id.*
26. Greer, *supra* note 1, at 175–76.
27. *See, e.g.,* Future Developments of the European Court of Human Rights in the Light of the Wise Persons' Report, Colloquy Organised by the San Marino Chairmanship of the Committee of Ministers of the Council of Europe, San Marino, 22–23 Mar. 2007, Proceedings (Apr. 2007), *available at* http://www.coe.int/t/dc/files/themes/cedh/disc_sg_en.asp?.

similar to that adopted by the US Supreme Court and the German Federal Constitutional Court.[28]

Second, many potential applications could be diverted back to national authorities if the Court were to deliver more "pilot judgments"—those made in single applications raising a systemic compliance problem—which not only condemn the violation suffered by the given applicant, but also recommend specific action by the respondent state. Relief would then be offered to a wider class of victims without each having to bring a separate complaint to Strasbourg. In its turn this would reduce the large number of judgments in "repeat" applications—some 60 percent of the Court's judgments[29]—which condemn breaches of the Convention the Court has already found in the state in question.

A third proposal—that states should introduce more effective domestic remedies for delays in the administration of justice—might also help reduce such complaints, the most fertile single source of findings of violation. Between 1999 and 2005, for example, 58 percent of Convention violations concerned the right to fair trial under Article 6, while 37 percent related to unreasonable delays in the administration of justice, a specific fair trial violation.[30] However, the challenge here will be to make sure such measures are effective. Italy, for example, has suffered from chronic sclerosis in its judicial processes for decades. The "Pinto law" of 2001 permits those suffering from such delays to receive compensation, thereby enabling the European Court of Human Rights to declare some applications inadmissible which it could not have done before. But in *Scordino v. Italy* the Grand Chamber of the Court declared that proceedings under this law are not entirely sufficient and, therefore, do not deprive applicants of their status as victims for the purpose of making an application to Strasbourg.[31] The Council of Europe's advisory body on constitutional matters, the European Commission for Democracy through Law (the "Venice Commission") has also recently declared:

> While the payment of pecuniary compensation must be granted in cases where undue delays have occurred pending the possibly necessary reforms and improvements of the judicial systems and practices, it should not be regarded or accepted as a form of fulfillment of the obligations stemming from Article 6 and from Article 13 . . . (the right to an effective remedy) . . . of the Convention.[32]

The problem of delays in the administration of justice at the national level has been endemic, and visible for many years. Nevertheless, the Council of Europe is only beginning to address it. It was not until 2002, for example,

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28. Greer, *supra* note 1, at 181–89.
29. Explanatory Report, *supra* note 7, ¶ ¶ 7, 68.
30. Greer, *supra* note 1, at 74–76.
31. Scordino v. Italy, App. No. 36813/97, 45 Eur. H.R. Rep. 7 (2007).
32. Venice Commission, Can Excessive Length of Proceedings be Remedied? 63 (2007).

that the Committee of Ministers established the European Commission for the Efficiency of Justice (known by its French acronym the CEPEJ) to analyze how judicial systems function, to identify the difficulties they encounter, and to define concrete ways in which they could be improved. The Commission's profile was initially very low, with neither its mandate nor even its creation featuring in the Protocol 14 debate. The Council of Europe's Director General of Human Rights, Pierre-Henri Imbert, for example, addressing a high level seminar in Oslo in 2004 on the Reform of the European Human Rights System, discussed the problem of delays in the administration of justice without referring to the CEPEJ at all.[33] It was not until 2005 that the CEPEJ began to publish data relating to European judicial systems and to identify the constituent problems. However, no proposals for reform have yet begun to emerge.[34]

The model of constitutional justice also suggests broadening the "victim" test to enable the European Commissioner for Human Rights and National Human Rights Institutions (NHRIs)—state-sponsored but formally independent national human rights monitoring and promoting agencies—to bring class actions to the Court. Once NHRIs are more fully established throughout Europe, consulting them should also become a formal part of the "exhaustion of domestic remedies" requirement in order both to discourage "no-hope" applications from proceeding, and to encourage more viable complaints to be joined with others alleging the same violation. However, a refusal by an NHRI to endorse a complaint should not preclude the applicant from petitioning the European Court of Human Rights.

C. Persistent Violations

The third systemic problem with the Convention system, intimately linked to complaints about delays in the administration of justice, is that the Council of Europe has failed to tackle persistent Convention violations in member states effectively. While it is undeniably true that many national laws have been changed as a result of successful applications to the Court, the paradox is that, in spite of this, violation patterns in Western Europe, where the Convention has been in force longest, show an enormous resistance to change.

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33. Pierre-Henri Imbert, *Follow-up to the Committee of Ministers' Recommendations on the implementation of the Convention at the domestic level and the Declaration on "Ensuring the effectiveness of the implementation of the European Convention on Human Rights at national and European levels," in* Reform of the European Human Rights System: Proceedings of the High-Level Seminar 33–43 (2004).
34. Only time will tell if the CEPEJ contributes to the debate about improving the administration of justice in Europe in a manner which would make the creation of a European Fair Trials Commission, proposed in Greer, *supra* note 1, at 282–89, unnecessary.

There are two key indicators. First, as already noted, some 60 percent of the Court's judgments concern "repeat applications" involving complaints about violations already condemned in the state concerned. The original judgment, often reinforced by a string of others, has simply not led to the problem being solved.

Second, the official violation tables for Western European states, recorded in Table 1, show remarkably little variation over the years.[35]

Table 1
Western European States Ranked by Annual Average Violation Rates: 1960–2000 and 1999–2006

(a) *1960–2000*[36]	(b) *1999–2006*[37]
1. Italy (84.94)	1. Italy (158.00)
2. France (18.55)	2. Turkey (134.50)
3. Turkey (5.36)	3. France (53.88)
4. Portugal (4.29)	4. Greece (32.25)
5. Greece (4.02)	5. UK (17.63)
6. UK (3.91)	6. Austria (13.88)
7. Austria (3.52)	7. Portugal (9.25)
8. Netherlands (1.48)	8. Germany (6.63)
9. Switzerland (1.30)	9. Belgium (6.25)
10. Finland (1.03)	10. Finland (5.88)
11. Belgium (0.95)	11.Netherlands (5.06)
12. Sweden (0.92)	12. Cyprus (3.63)
13. Spain (0.87)	13. Switzerland (3.38)
14. Germany (0.70)	14. Spain (3.00)
15. Cyprus (0.58)	15. Malta (1.75)
16. Malta (0.29)	16. Sweden (1.63)
17. San Marino (0.25)	17. Luxembourg (1.38)
18. Ireland (0.22)	18. San Marino (1.00)
19. Norway (0.16)	19. Norway (1.00)
20. Denmark (0.11)	20. Ireland (0.88)
21. Liechtenstein (0.05)	21. Denmark (0.63)
22. Luxembourg (0.05)	22. Iceland (0.50)
23. Iceland (0.04)	23. Liechtenstein (0.50)
24. Andorra (0)	24. Andorra (0.13)

35. Figures compiled from European Court of Human Rights Violation by Article and by Country 1999–2006.
36. Information derived from Fundamental Rights in Europe: The European Convention on Human Rights and its Member States, 1950–2000, 26, Tbl. 1.4 (Robert Blackburn & Jorg Polakiewicz eds., 2001).
37. Information derived from European Court of Human Rights Violation by Article and by Country 1999–2006.

The first conclusion that can be drawn from Tables 1 (a) and (b) is that the same states—Italy, France, and Turkey—appear at the top, and the same ones—Ireland, Norway and Denmark—near the bottom of both, leaving aside the micro-states. Second, there is also remarkably little change in the position of other states. Third, the annual average violation rate for 1999–2006 is higher for all states than their 1960–2000 score, even for those countries whose position in the later table is lower than the position held in the earlier one. It would be premature, however, to conclude that respect for Convention rights is deteriorating throughout Western Europe. It is much more likely that long-standing structural or systemic compliance problems are simply becoming more visible and more litigated.

Returning to the top of both tables, Italy's position is no surprise. Its problems with breaches of the right to fair trial under Article 6 of the Convention, stemming from unreasonable delays in the judicial process, are well documented. Nor is there any great surprise in finding Turkey, long regarded as having the worst human rights record in Western Europe, in third and second places in the 1960–2000 and 1999–2006 tables respectively. Its uniquely authoritarian, secular, centralist, and militaristic process of modernization and democratization are also well known. Nevertheless, this has begun to change in the past few years as a result of improvements in the bitter conflict over Kurdish autonomy, together with pressure to fulfill human rights targets derived from the Copenhagen Political Criteria for membership of the EU. It is much less clear why France should come so close to the top of both violation tables, given its long historical record of championing human rights. The absence of an individual right of constitutional complaint, and an historic reluctance—albeit one currently undergoing rapid change—on the part of French courts to apply Convention standards might help explain this paradox.[38]

Table 2 shows National Violation Rates as Found by the European Court of Human Rights 1999–2006 for all Council of Europe states. Few, if any, reliable insights can be derived from this exercise, however, because the time-frame is too short to enable clear patterns to become established. Slovenia, for example, rocketed to fourth place in this table from sixteen out of seventeen in 1999–2005.[39] Other sources suggest that the human rights records of Russia and the Caucasian republics are worse than those of the central European states and that, in the Balkans, Croatia, and Macedonia are doing better than Albania, Bosnia and Herzegovina, and Serbia.[40]

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38. Greer, *supra* note 1, at 87–93.
39. *Id.* at 118.
40. *Id.* at 114–31.

Table 2
National Violation Rates as Found by the European Court of Human Rights: 1999–2006[41]

Country	*Date of right of individual petition*	*Total*	*Average*
1. Italy	1.8.73	1264	158.00
2. Turkey	28.1.7	1076	134.50
3. France	2.10.81	431	53.88
4. Poland	1.5.93	318	39.75
5. = Greece	10.11.85	258	32.25
5. = Ukraine	11.9.97	258	32.25
7. Russia	5.5.98	197	24.63
8. Slovenia	20.6.94	188	23.50
9. Romania	20.6.94	152	19.00
10. United Kingdom	14.1.66	141	17.63
11. Austria	3.9.58	111	13.88
12. Bulgaria	7.9.92	109	13.63
13. Czech Republic	18.3.92	106	13.25
14. Slovakia	18.3.92	104	13.00
15. Hungary	5.11.92	84	10.50
16. Portugal	9.11.78	74	9.25
17. Croatia	6.11.96	72	9.00
18. Germany	5.7.55	53	6.63
19. Belgium	7.9.92	50	6.25
20. Finland	10.5.90	47	5.88
21. Moldova	12.9.97	42	5.25
22. Netherlands	28.6.60	36	5.06
23. Cyprus	1.1.89	29	3.63
24. Switzerland	28.11.74	27	3.38
25. Spain	1.7.81	24	3.00
26. Lithuania	20.6.95	23	2.88
27. Latvia	27.6.97	16	2.00

41. European Court of Human Rights Violation by Article and by Country 1999–2006, *supra* note 37. No violations were recorded against Armenia or Monaco where the Convention entered into force on 26 April 2002 and 30 November 2005 respectively.

Country	*Date of right of individual petition*	*Total*	*Average*
28. Malta	1.5.87	14	1.75
29. Sweden	4.2.52	13	1.63
30. = Luxemburg	28.4.58	11	1.38
30. = The FYRO Macedonia	10.4.97	11	1.38
32. Georgia	16.4.96	9	1.19
33. Estonia	20.5.99	9	1.13
34. = San Marino	22.3.89	8	1.00
34. = Norway	10.12.55	8	1.00
36. Ireland	25.2.53	7	0.88
37. Denmark	13.1.53	5	0.63
38. = Iceland	29.3.55	4	0.50
38. = Liechtenstein	8.9.82	4	0.50
40. Albania	2.10.96	3	0.38
41. Serbia	3.3.04	1	0.35
42. Bosnia Herzegovina	12.7.02	1	0.23
43. Azerbaijan	15.4.02	1	0.21
44. Andorra	22.1.96	1	0.13

It is regrettable that the Council of Europe has never sought to identify national factors which produce low Convention violation rates in a systematic, and scientifically rigorous, manner. Indeed, the fact that it lacks a dedicated research department has been the subject of criticism.[42] Nevertheless, there is some evidence that two national factors are particularly important: a strong, deeply embedded culture of respect for rights on the part of national judicial and non-judicial public authorities, and effective judicial processes for challenging violations, in particular a process of constitutional complaint.[43] Contrary to the perceived wisdom, formal incorporation of the Convention in national law does not appear to be a conclusive factor. In fact, the tables even suggest an inverse relationship because the states with the highest violation rates all formally incorporated the Convention a long time ago, while those with the lowest did so comparatively recently.[44] Regardless of formal

42. Greer, *supra* note 1, at 189.
43. *Id.* at 131–35.
44. *Id.* at 83–85.

incorporation, what matters most is that domestic judges take Convention standards seriously in arriving at their decisions whether or not these are formally part of national law.

The challenge for Europe, is to find effective ways of cultivating compliance with Convention standards, especially among persistent violators. NHRIs could play a key role as an integral component of national constitutional systems. The Council of Europe should have a much more robust and committed policy to this end. The primary responsibility of European NHRIs should be effectively to "domesticate" the European human rights debate and to "Europeanize" the national equivalent. Ideally, they should become conduits in a two-way flow of information between Strasbourg and national publics about national compliance with Convention standards. Dispute resolution, however, would distract from this goal. Instead, NHRIs should have the power to bring test cases to national courts and to the European Court of Human Rights.

D. The Method of Adjudication

The Convention's fourth systemic problem concerns the haphazard method of adjudication adopted by the European Court of Human Rights. This is particularly apparent with respect to two distinct, quintessentially constitutional issues—the normative question of what a given Convention right means, including its relationship with other rights and with collective interests, and the institutional question of which institutions (judicial versus non-judicial and national versus European) should be responsible for providing the answer.

The key to the resolution of individual complaints ultimately lies in how the Court interprets the Convention's sparse text. In addition to the guidance provided by the precise terms of particular provisions, which typically specify limits to rights, the process of interpretation is said to be governed by the application of a dozen or so interpretive principles. Some of these are explicit in the text, while others have been inferred by the Strasbourg institutions. Some are sharply distinct from each other, while others are closely linked. The principles of interpretation can be distinguished and classified in a variety of ways, but the widely-held view is that they fall in no particular order.[45] It is, however, strange that such an unstructured approach should be so uncritically accepted because some of these principles are obviously more intimately connected with the Convention's core purpose than are others. For example, democracy, the effective protection of Convention rights, and legality—rule of law—procedural fairness are more closely linked with the

45. Particularly useful accounts have been provided by Human Rights Practice. *See* Simor, *supra* note 13, ¶ ¶ 1.026–.089; B. Emmerson, Q.C. & A. Ashworth Q.C., Human Rights and Criminal Justice 59–114 (2001).

Convention's core purpose than the margin of appreciation (the room the Court will permit national authorities to maneuver in complying with their Convention obligations), or autonomous interpretation (the responsibility the Court has claimed for itself to define key terms of the Convention). This distinction suggests that the principles of interpretation are more formally and hierarchically structured than has yet generally been acknowledged.

A more consistent commitment to the delivery of constitutional justice requires that the Court improves its currently haphazard method of adjudication in favor of a much more rigorous and authoritative alternative, which would give the case law greater coherence and authority. But how might this be achieved? A more formal distinction needs to be drawn between the Convention's primary constitutional principles—the "rights" principle, the "democracy" principle, and the "priority-to-rights" principle, each of which incorporates the rule of law principle—and secondary principles such as proportionality, non-discrimination and the margin of appreciation. The rights principle holds that, in a democratic society, Convention rights should be protected by national courts and by the European Court of Human Rights through the medium of law. The democracy principle maintains that, in a democratic society, collective goods should be pursued by democratically accountable national non-judicial public bodies within a framework of law. The priority-to-rights principle mediates the relationship between the rights and democracy principles by emphasizing that Convention rights take procedural and evidential, but not conclusive, priority over the democratic pursuit of the public interest, according to the terms of given Convention provisions. It should be observed that each of these three primary constitutional principles incorporates the legality or rule of law principle, which might otherwise be regarded as a fourth such principle. However, provided the role of the legality principle is recognized as integral to the other three, little of consequence results from counting them one way or the other. It needs to be emphasized that this "methodologically individualist" approach does not amount to the readmission of the model of individual justice by the back door. Its objective is not merely to secure the Convention rights of the specific applicant, but through the medium of individual complaints and the priority-to-rights principle, to deliver constitutional justice to the many whose rights are likely also to have been violated by, or to be under threat from, the public authorities in question.

If the Court followed the methodologically individualist model, two things in particular would become clearer. First, where the nature and scope of Convention rights have to be defined in the absence of any competing public interest (such as "national security" or the "prevention of disorder or crime"),[46] the matter should be settled authoritatively in Strasbourg with

46. *See, e.g.*, European Convention on Human Rights, *supra* note 8, arts. 8(2), 10(2), 11(2).

universal application in member states. There is no genuine scope for national discretion on the part of domestic non-judicial bodies concerning how Convention rights should be understood. However, there is a legitimate national discretion on the question of whether the disputed conduct is compatible with those rights thus defined. Second, where a conflict between Convention rights and public interests has to be resolved, the Court's main responsibility is not simply to "balance" these two elements against each other, but to ensure that the principle of priority-to-rights has been properly observed. Unlike the balance metaphor, which is pervasive in the jurisprudence, the priority principle insists that when weighing rights and public interests, the scales should be loaded procedurally and evidentially, but not decisively, in favor of rights. Different resolutions of the tension between Convention rights and public interests may, therefore, be tolerable in different circumstances in different states.

E. The Jurisprudence

There is scope for debate about many aspects of the jurisprudence of the Strasbourg institutions, which include the opinions of the European Commission of Human Rights, abolished in 1998. However, the core constitutional problem, and the fifth systemic difficulty affecting the Convention system, is that the priority-to-rights principle, implicit in the Convention's constitution, has not been applied consistently. Its effects are apparent in many cases, although not expressly in these terms. Yet in others, a much looser balancing test has been used to settle the conflict between Convention rights and competing public interests. The strongest versions of the priority principle are found in relation to the formally unqualified prohibitions on torture, inhuman and degrading treatment and punishment, slavery and servitude, and retrospective criminalization found in Articles 3, 4(1) and 7(1) of the Convention, respectively.[47] The Strasbourg institutions have generally well understood that this permits no competing considerations of the common good to limit the application of these rights.

Strong versions of the priority principle can also be found in the absolute and strict necessity tests in Articles 2(2) and 15(1). Article 2(2) provides that killing is not a violation of the right to life

> when it results from the use of force which is no more than absolutely necessary: (a) in defense of any person from unlawful violence; (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; [or] (c) in action lawfully taken for the purpose of quelling a riot or insurrection.[48]

47. *Id.* arts. 3, 4(1), 7(1).
48. *Id.* art. 2(2).

In other words, the right to life cannot merely be balanced against these competing goals but takes a strong evidential and procedural priority. Similarly, Article 15(1) provides that "in time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law."[49] Article 15(2) provides that there shall be no derogation from Articles 3, 4(1), and 7.[50] While the jurisprudence on Article 2(2) is now generally compliant with the Convention's constitutional principles, the case law on Article 15(1) lacks a clear requirement that the democratic character of a given state must be threatened if any Convention right is to be legitimately suspended. The Court has also been criticized for being too generous with national authorities seeking to derogate from the Convention.[51]

Weaker versions of the priority principle are found in Articles 2(1), 5, 6, 8–11, and in Article 1 of Protocol No. 1. The obligation in Article 2(1) that "[e]veryone's right to life shall be protected by law" implies, at a minimum, an entitlement to legally-regulated processes concerning the criminalization, proper investigation, and legal sanctioning of culpable killing.[52] Although the priority principle means that these rights cannot be directly balanced against competing public interests like the administrative costs and convenience of such investigations, there is scope for "adjectival discretion" on the part of national non-judicial institutions. This is because determining if some of the essential ingredients have been satisfied, such as whether a particular death is suspicious, may require the exercise of judgment based on inconclusive evidence.

The right not to be subject to arbitrary arrest and detention in Article 5 permits certain public interests to be considered in defining what an arbitrary deprivation of liberty means.[53] However, there is a clear presumption that the right prevails unless there are relevant and sufficient reasons that it should not, as in bail applications. Similarly, the right to trial by independent and impartial tribunals found in Article 6(1) cannot be balanced against such competing public interests as administrative convenience and costs.[54] Nor can such interests be directly weighed against the specific procedural guarantees in Article 6(2) and (3), although there is scope for some administrative discretion over what, for example, constitutes "prompt" with respect to the right to be informed "promptly" of the nature of any criminal

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49. *Id.* art. 15(1).
50. *Id.* art. 15(2).
51. Greer, *supra* note 1, at 248.
52. European Convention on Human Rights, *supra* note 8, art. 2(1).
53. *Id.* art. 5.
54. *Id.* art. 6(1).

accusation, and "adequate" in relation to the right to adequate time and facilities for one's defense.[55]

However, the case law on the relationship between Convention rights and collective goods in Articles 8 through 11 is unprincipled and confused. This is largely because the Strasbourg institutions have not fully appreciated the implications of the priority principle, and have too often sought refuge in the margin of appreciation and balancing as a substitute. The main effect of the priority principle, in this context, is to require respondent states to discharge a more exacting burden of proof, than is currently recognized to be the case, when seeking to justify interference with Convention rights on public interest grounds. Where conflicts between Convention rights have to be resolved, the key issues are how the rights in question are to be defined and whether, thus defined, the conduct in question constitutes their violation or realization.[56] For example, where a ban upon a particular form of expression is defended by national authorities, on the grounds that it infringes the right to freedom of thought, conscience, and religion, the two key issues are how the competing rights are defined and how the disputed conduct can be interpreted by reference to them. While the right to freedom of expression includes the right stridently to criticize religious and other views, it does not entail the right gratuitously to vilify and cause offense to deeply held religious or other beliefs. Conversely, the right to freedom of thought, conscience, and religion includes the right to be legally protected from vilification and gratuitous offense, but not from strident criticism. When a controversial film, play, or publication threatens a competing right, the case for permitting it is more persuasive if there are viable means to limit the threat. This can be accomplished by, for example, controlling its distribution, or seeking to restrict public access with age-limits or advisory warnings.

The weakest form of the priority principle applies to the right to the peaceful enjoyment of possessions under Article 1 of Protocol No. 1., which provides that "[e]very natural or legal person is entitled to the peaceful enjoyment of his possessions [and] [n]o one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law."[57] The state is also entitled to control the use of property by law in accordance with, amongst other things, the "general interest."[58] Some rights found in other protocols, such as the rights to education and to free elections in Articles 2 and 3 of Protocol No.1, could also arguably be included in this category because of

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55. *Id.* art. 6(3)(a)–(b).
56. Greer, *supra* note 1, at 277.
57. European Convention on Human Rights as amended by Protocol No. 11, art. 1, *adopted* 20 Mar. 1952, Eur. T.S. No. 5, *available at* http://conventions.coe.int/Treaty/en/Treaties/Html/009.htm.
58. *Id.*

the implicit broad public interest constraints. In litigation under Article 1 of Protocol No. 1 the Court has often used the balance metaphor, and has granted states wide margins of appreciation.[59] But a weak version of the priority principle nonetheless applies in this context since it has also been held that the principle of proportionality must be observed, that arbitrariness is avoided, that other alternatives for achieving the aim in question have been properly considered, that appropriate procedural safeguards are available, that due regard has been paid to the consequences of the interference for those affected by it, and, most importantly of all, that interferences are adequately compensated.[60]

IV. CONCLUSION

The case overload crisis currently afflicting the Convention system, its most visible systemic problem, is a savage indictment of the Council of Europe's effectiveness. It greatly undermines the acclaim the individual applications process has, hitherto, universally received from the worldwide human rights community. What was once the Council of Europe's most celebrated success is now its greatest problem. In spite of two rounds of reform, the crisis has progressively deepened since the early 1990s and shows no sign of improvement. The official response has been characterized by inertia, excessive bureaucratization, chronic indecisiveness, institutional incoherence, minimalism, and a profound reluctance to analyze and debate its nature and source with the systematic thoroughness required.

The future looks bleak but all is not yet lost. The key prerequisites for brighter prospects are properly recognizing the Convention's central achievements, and finding appropriate ways of securing and developing them. Emerging from the shadows of the individual applications crisis is a much more subtle, but nonetheless vital, achievement. The European Court of Human Rights has effectively become the Constitutional Court for greater Europe, sitting at the apex of a single, transnational, constitutional system, which links former communist states with the West, and the EU with non-members. The exercise of public power at every level of governance is formally constrained within this framework by a set of internationally justiciable, constitutional rights. As the twenty-first century has unfolded it has become increasingly clear that the Court's main task is to administer this system by delivering "constitutional justice" and, in the process, gently to nudge European public authorities towards the fuller acceptance of common Convention standards. This will promote operational convergence around

59. Greer, *supra* note 1, at 274–76.
60. *Id.* at 274.

the "common European institutional model" defined by the core Council of Europe principles of democracy, human rights and the rule of law. Although this is a much more subtle and indirect function than either the systematic delivery of individual justice (which the Court is structurally incapable of realizing) or the more substantial constitutional justice administered by those national constitutional courts which have the power to annul legislation, it is, nevertheless, an important function for the present and future well-being of Europe and all its peoples.

The greatest failure of the Convention system, on the other hand, is that the Court has not yet been fully able to realize its constitutional mandate because of the continued dominance of the individual justice model in the case management process, and an uneven commitment to constitutional justice in its own method of adjudication and case law. Neither Protocol 14, nor the Wise Persons report, expressly endorses the constitutional justice model. Yet if implemented, both would move the system in this direction. Although this would fall far short of a definitive solution, it would at least buy time for more careful reflection on the future of the transnational protection of human rights in Europe, particularly important as confusion between the roles of the Council of Europe and the European Union is likely to increase.