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A CRITIQUE ON THE HUMAN RIGHTS PROTECTION MECHANISM BEFORE THE EUROPEAN COURT OF HUMAN RIGHTS: THE CROATIAN PERSPECTIVE

MR. TUNJICA PETRASEVIC[1]

The paper gives a critical review of the working methods of the European Court of Human Rights (hereinafter: ECtHR), primarily the filtering mechanism. The first part provides an overview of the development of the human rights protection mechanism before the ECtHR with special reference to Protocols No. 11 and 14. Protocol No. 14 saw the introduction of new offices: a single judge, and so-called rapporteurs who assist the single judge. Many have criticized the work of single judges and non-judicial rapporteurs. The critiques come mostly from attorneys. Such criticism is the subject of analysis in the second, central part of the paper. Does the ECtHR itself violate some of the rights guaranteed by the Convention? The third part of the paper tries to answer this question by analyzing the viewpoints of researchers, but also of legal practitioners, principally Croatian attorneys. The fourth part discusses whether there are further legal means following an inadmissibility decision, after which concluding remarks and recommendations are made on how to resolve complaints and remedy shortcomings of the mechanisms of human rights protection as guaranteed by the Convention.
Keywords: European Court of Human Rights, Protocol No. 14, filtering mechanism, individual application

INTRODUCTION

This paper is inspired by the more and more frequent criticism of the mechanisms of human rights protection before the European Court of Human Rights (hereinafter ECtHR, or Court). The criticism comes mainly from the professional community, namely prominent Croatian attorneys with years of experience prior to and following the institution of the filtering mechanism introduced by Protocol No. 14 (2010). Several Croatian independent journalists recognized this problem by organizing a round table on May 29, 2013 entitled "A Critique of the Practices of the European Court in Strasbourg", held May 29, 2013 in Novinarski dom, Zagreb). Serious objections and "charges" against the Court were presented on this occasion. There was certainly no lack of criticism for the ECtHR's work from the scientific community (Gerards, 2014) or the UN Human Rights Committee either.

The aim of this paper is to give a critical review of the working methods of the ECtHR, primarily the filtering mechanism.

The Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: ECHR or Convention) was opened for signature in Rome on November 4, 1950 and took effect in 1953. Ratification of the Convention by the Member States of Council of Europe (hereinafter: CoE) is overseen by the ECtHR, which was established in 1959. The mechanism for the protection of human rights before the ECtHR was significantly changed by Protocol No. 11, which entered into force in 1998. Protocol No. 11 enabled the direct access of individuals to the Court, which resulted in a substantial increase in the number of applications. The accession of transitional countries in eastern and southeastern Europe further led to the Court's overload. It was necessary to make modifications in the mechanism to prevent the collapse of the entire system. To this end, the CoE adopted Protocol No. 14, which entered

[1] Assistant Professor and Vice-Dean, Josip Juraj Strossmayer University of Osijek.

into force in 2010. Among other things, Protocol No. 14 saw the introduction of certain new offices: firstly, a single judge who may declare inadmissible or strike out of the Court's list of cases an application submitted under Article 34, which decision can be taken without further examination and is considered to be final. The second office involves the so-called rapporteurs who assist the single judge (Convention, Art. 25). Both offices have been established with a view to filtering cases before they reach the Court. Many have criticized the work of single judges and non-judicial rapporteurs. The criticism comes mostly from attorneys, and will be the subject of analysis in this paper.

The paper is structured into four parts. The first will provide an overview of the development of the human rights protection mechanism before the ECtHR, with special reference to Protocol No. 11, which enabled the direct access of individuals to the Court and resulted in a substantial increase in the number of applications. The second, central part of the paper will deal with the filtering mechanism as established by Protocol No. 14. The third part of the paper will try to answer the question of whether the ECtHR itself is in breach of the Convention by analyzing the viewpoints of both researchers and legal practitioners (principally Croatian attorneys). The fourth part will discuss whether there are further legal means following an inadmissibility decision, after which concluding remarks and recommendations will be made on how to resolve complaints and remedy shortcomings of the mechanism of human rights protection as guaranteed by the Convention.

THE DEVELOPMENT OF THE MECHANISM FOR THE PROTECTION OF HUMAN RIGHTS BEFORE THE ECTHR

The European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: the Convention) was one of the first fruits of the European integration following World War II. The Convention was adopted under the auspices of the Council of Europe, at the time a newly established international organization seated in Strasbourg. It was created as a result of efforts to regulate the protection of human rights and fundamental freedoms at the European level, and to establish a system of shared values as a basis for future European unity. When it came to adopting the text of the Convention, a battle was fought over its contents. The resulting compromise consisted of ten fundamental rights and freedoms, which were the acceptable minimum to all signatory states. From the start, there was also the idea of establishing a supranational court that would oversee the compliance of Member States (MSs) of the Council of Europe with the Convention. The problem was the question of what powers that body would have and whether individual applications should be allowed or not. Compromise was reached by giving the MSs the option to choose whether they want to accept the jurisdiction of the ECtHR for individual applications or not. However, if the states opted to allow individual applications, individuals were not allowed immediate access to the Court, but given the option to address the European Commission of Human Rights, which would then review the application and forward the cases they deemed to be well founded. The immediate right to institute proceedings before the ECtHR was thus assigned to the European Commission of Human Rights and MSs. The Commission began its work in 1954 and the ECHR in 1959 (Omejec, 2010).

The Convention is amended by way of protocols. There are two types of protocols: substantive and procedural (Omejec, 2010). Substantive protocols are used for supplementing the catalog of fundamental rights and freedoms, and procedural protocols are used for changing the very mechanism for the protection of rights guaranteed by the Convention. The protocols that are relevant for this paper are procedural, Protocols No. 11 and No. 14, which will be analyzed in detail. The precondition for their entry into force is general ratification from all MSs of the Council of Europe.

Protocol No. 11 was adopted in 1994 and entered into force in 1998. It substantially altered the human rights protection mechanism (Omejec, 2010). The key, but not the only, changes that the Protocol introduced included the possibility of submitting individual applications and the abolition of the Commission of Human Rights. By allowing individuals direct access to the Court, the number of applications increased year after year. The statistical data is interesting. Between 1954 and 1998 there were a total of 121,161 individual applications, and in the years between 1998 and 2003 there were 175,397. It is also interesting that between 1959 and 1997 the Court issued 33,012 decisions, compared to 62,475 between 1998 and 2003 (Annual Report, 2004). In other words, within just five years, both the number of applications and the number of cases on which the Court issued a decision increased significantly.

In the meantime, after 1998, a number of eastern and southeastern European countries acceded to the Convention. Individuals from those countries "flooded" the Court with numerous applications. A large portion of the applications from said countries were a consequence of an unregulated judiciary and frequent human rights violations.

The Court became overburdened and the effectiveness of its work was brought into question. To avoid the collapse of the entire system, it was necessary to make certain changes in the Court's procedure. To this end, the CoE adopted Protocol No. 14, which took effect in 2010 and which, among other things, introduced new offices that are relevant for the topic of this paper. The first was the single judge. The second office were the (non-judicial) rapporteurs who prepare the case for the single judge. The two offices were introduced with the aim of filtering out the inadmissible cases from the mass.

A new admissibility criterion was introduced that referred to the degree of the disadvantage suffered by the applicant, aiming to dissuade those who did not suffer significant disadvantage from applying (Convention, Art. 35(3)b). The introduction of this criterion was deemed necessary due to a growing number of cases before the Court. It serves as an additional tool for focusing on cases for which an examination of the merits is required. In other words, it allows the Court to reject cases that are considered "lighter" based on the principle that judges should not have to decide such cases (*de minimis non curat praetor*). Although there are two related protective provisions, this new admissibility criterion is subject to numerous criticisms. The debate thereon would go beyond the scope of this paper and will therefore be omitted. The filtering mechanism and the role of the single judge is examined below.

THE FILTERING MECHANISM FOR INDIVIDUAL APPLICATIONS

As previously mentioned, due to a large number of cases and the threat of congestion of the entire mechanism of protection before the ECtHR, it was necessary to implement certain reforms. Protocol No. 14 was adopted to that end, but its entry into force was stalled by Russia until 2010. The Protocol introduced a mechanism for filtering individual applications by the single judge (Convention, Art. 27), assisted by so-called (non-judicial) rapporteurs.

While the inadmissibility of individual applications used to be decided by a Committee of three judges, nowadays it is decided by the single judge.

The Court may thus examine applications that have been referred to it as a single judge, as a Committee of three judges, as a Chamber of seven judges or a Grand Chamber of seventeen judges (Convention, Art. 26(1)). When sitting as a single judge, the specific judge cannot examine the cases coming from the state on whose behalf he was elected (Convention, Art. 26(3)).

The single judge decides on the admissibility or inadmissibility of individual applications. The decision of the judge on inadmissibility is final and has the effect of striking out cases from the Court's case list. However, even if the single judge declares a case

admissible, all other instances, i.e. councils, are also authorized to declare a case inadmissible at any later stage if inadmissibility is established during the proceedings (Convention, Art. 27).

Based on the conclusions of the 2010 Interlaken Conference, the Court set up a Filtering Section at the Court's Registry (Interlaken Declaration, 2010). The Section oversees the filtering of cases coming from Russia, Turkey, Romania, Ukraine and Poland, the countries accounting for 50% of the total number of cases before the Court. The Section began its work in 2011 and has proved to be very successful.

The Court itself confirms that the measures introduced by Protocol No. 14 have been successful in dealing with the backlog. On September 1, 2011, the backlog consisted of over 100,000 cases, whereas on October 1, 2013, the backlog was 38,200 what is evident from the Press release issued by the Registrar of the Court (2013). This means that 61,850 cases were resolved in two years. Assuming that a month has 22 working days, if multiplied by 24 months, the number of working days in two years is 528. If we divide 61,580 cases with 528, it may be construed that the Court dealt with 117 cases every day. At that time, there were 36 appointed single judges. It follows that each judge examined an average of 3.25 cases per day. This begs the question: is this realistic, and were certain standards adhered to?

Certain countries support the existing filtering mechanism and even advocate more stringent criteria. In our opinion, this proves that the countries that are far ahead in terms of the protection of fundamental human rights and freedoms do not comprehend the problems faced by countries in transition. These countries mostly advocate very stringent filtering criteria without considering why there are so many applications form certain countries in the first place. We will give an interesting example. In 2011, the Dutch Justice Minister proposed three bizarre solutions to prevent the submission of ill-prepared and *manifestly unfounded applications*. The first measure he proposed involved fines for submitting multiple manifestly unfounded applications; the second called for disciplinary measures against an attorney if the application could be considered an abuse of rights; and thirdly, he advocated the introduction of fees for submitting an application. The Dutch "Adviesraad Internationale Vraagstukken" (AIV) strongly criticized these proposals. The AIV is an independent body consisting of experts who advise the Dutch government and parliament on foreign policy. The first proposal of AIV posed a serious threat to the submitting of individual applications in general, as it is very hard for an individual, if not impossible, to estimate whether their application is founded or not. After submitting the application, the individual cannot influence the outcome of the proceedings and the only way to safely avoid the fine is not to submit the application at all. The second measure could discourage attorneys from representing parties, even when there is high confidence that rights have been violated. The AIV believed that Dutch law already provided for disciplinary measures against attorneys and that new sanctions were not necessary. Lastly, the third measure would hit the most vulnerable categories of citizens the hardest (Advisory letter, 2011).

The above proposals of the Dutch Justice Minister were contrary to the Court's decision in the case *Airey v. Ireland* (1979)[2], wherein the Court defined the right of access and said that the purpose of the Convention is to guarantee rights that are practical and effective, not theoretical or illusory.

ON THE POTENTIAL VIOLATION OF CERTAIN RIGHTS GUARANTEED BY THE CONVENTION BY THE ECTHR ITSELF

The first question is whether the filtering of applications by the single judge represents a step back to the old "dual track" system. Has the single judge assumed the earlier role of the Commission for Human Rights, which was abolished in 1998?

In terms of the number of rejected applications from countries in transition, the statistics are alarming. Around 90% of applications are rejected. This raises the question of whether

[2] [1979] 2 E.H.R.R. 305.

there are two categories of citizens: those from regulated countries (e.g. Switzerland), who submit up to five applications a year, all of which are examined, and those from countries in transition, whose applications are rejected in 90% of cases (Grčar, 2014). Should the citizens suffer the consequences of unregulated judicial systems?

Representatives of the MSs of the Council of Europe met in 2010 in Interlaken (Switzerland) to discuss the future of the Court and the large case backlog it had amassed due to the large number of inadmissible applications. In a solemn declaration, they reaffirmed the central role of the Court in the European system of protection of fundamental rights and freedoms and undertook to increase its effectiveness while preserving the principle of individual applications.

Emphasis was thus put on the importance of preserving individual applications. An agreement was reached under which applicants were given comprehensive and objective information on the application process and the admissibility criteria. For this purpose, the Court published the so-called *Practical Guide on Admissibility Criteria* (2011).

The Court thereby demanded that countries refrain from impeding access to the Court in any way. But could it be that the Court had done this itself? Does the Court enjoy too much discretion in assessing admissibility of applications? Are the admissibility criteria objective and transparent? Are the criteria the same for everyone? All these questions are open for discussion.

Furthermore, when the single judge rules on inadmissibility, the applicant is notified thereof in the form of a "letter". The letter states the following:

> *Having taken into account the submitted documents and to the extent that the said documents fall under the jurisdiction of this Court, the Court has found that admissibility requirements pursuant to Articles 34 and 35 to the Convention have not been met* (Grčar, 2014, p. 9).

There is no formal, reasoned court decision. The letter only states that formal admissibility requirements have not been met in accordance with Articles 34 and 35 to the Convention, but it does not specify the exact requirement(s). We are of the opinion that including the reasoning behind the decision would serve as an additional guideline for cases in which applications need not be submitted simply because they will be rejected as inadmissible. This would prevent the submitting of unfounded applications.

In this regard, it should be noted that Article 45 to the Convention expressly provides the following: "*Reasons shall be given for judgments as well as for decisions declaring applications admissible or inadmissible*." The Court thus delivers judgments on merit, and issues decisions on the admissibility or inadmissibility of an application. Both instruments should be reasoned. The absence of reasons represents a potential violation of Article 45.

Next, some Croatian attorneys claim that, in practice, the "filtering" process is carried out by non-judicial rapporteurs who are not judges and who do not have the legitimacy to decide admissibility, which in turn directly violates Article 6 to the Convention. Article 6 guarantees that "[…] *everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law […]*". This "fairness" is a standard that has been imposed on the MSs, and is one that definitely applies to the Court itself (Uzelac, 2010). It is indisputable. However, the above claim of the Croatian attorneys is incorrect. Non-judicial rapporteurs only prepare the basis for the decision of the single judge and do not issue decisions themselves.

Certain attorneys go as far as to claim that the admissibility of an application is decided upon by officials who were sent by the Croatian Government, which calls their independence and impartiality into question. So, Prodanović said:

> *I believe that it is contradictory that the officials sent to Strasbourg by the Croatian state arbitrarily examine complaints of Croatian citizens who were violated by the Croatian*

> *state. Guided by these regulations as well as by simple logic, the officials will represent the interests of those who provided them with good employment in Strasbourg and not of those whom they should be* pro forma *protecting.* (Grčar, 2014, p. 54)

The author cannot agree with these allegations because it is necessary to be familiar with the method of appointing of non-judicial rapporteurs. They are appointed by the President of the Court on the proposal of the Court Registrar and they form part of the Court's Registry. They are appointed from among the most experienced Registry lawyers, who are in turn appointed and employed by the Court itself, and not the MSs. This hypothesis should hence be dismissed. Furthermore, certain attorneys remind us of the need to distinguish between formal and substantive preconditions of access to the Court. Legal doctrine teaches us that applications are dismissed for formal deficiencies and rejected for substantive ones. When a single judge decides that an application is inadmissible for being manifestly unfounded, it *de facto* implies a substantive deficiency. Even though the decision on inadmissibility and the decision that there is no violation has the same effect on an individual, they are very different from a legal point of view. Review by the Grand Chamber is possible only for Court judgments and not for inadmissibility decisions. Although it is not probable that the Grand Chamber will accept a request for review, the possibility exists in case of decisions on the merits. Here we can agree that dismissal on grounds of substantive deficiency is disputable.

Certain applicants also claim that the Court did not allow access to the case file. That was the situation in case *Bačoka v. Croatia* (2013)[3]. If this is true, we believe that it violates Article 40 to the Convention, which guarantees that hearings will be public and documents accessible.

Lastly, the attorneys see much controversy in the fact that the letter delivered to the applicant is not even signed by the single judge, but rather the advisor, i.e. the non-judicial rapporteur (Grčar, 2014).

Considering all the above, the question is does the ECtHR itself seriously violate the rights under the Convention? This argument was presented at the previously mentioned Roundtable held on May 29, 2013 at Novinarski dom in Zagreb.

We believe that certain attorneys' arguments are justified and reasonable and others exaggerated, and that there is no gross violation of the Court to speak of. Despite certain justified arguments, we are of the opinion that such a conclusion is overblown.

FURTHER REMEDIES FOLLOWING AN INADMISSIBILITY DECISION

As already pointed out, the decision of the single judge on the inadmissibility of an individual application is final and has the effect of deleting the application from the case list. A request for review by the Grand Chamber is not possible. As far as Strasbourg goes, individuals thus have no other options. The question is: can the individual seek "justice" before a different international court or body?

The individual may address the United Nations Human Rights Committee (HRC). The HRC is a body of 18 experts who are elected for a term of four years and who oversee the implementation of the International Covenant on Civil and Political Rights by the signatory states. The Republic of Croatia is a signatory of the Covenant, as well as of the First Optional Protocol to the Covenant of 1976. The signatory states must submit periodic reports on the implementation of the Covenant, and the HRC examines the reports and adopts recommendations in the form of concluding observations. The HRC meets in Geneva three times a year. The HRC may consider inter-State complaints, and the First Protocol provides for the possibility of submitting individual complaints as well. Without going into the details of

[3] Case No. 68449/13, as cited in Grčar, 2014, p. 16

the proceeding before the HRC, we shall focus on the opinion/decision of the HRC in the case *Achabal Puertas v. Spain* (2013)[4] which is relevant for this paper.

In *Achabal*, the HRC concluded that the case that the ECtHR declared inadmissible for being manifestly unfounded was in fact (or should have been declared) both admissible and founded. The decision of the HRC was a big "slap" to the Court. This is the first case in which the HRC examined the working method of the Court by reviewing the reasoning of its decisions on the inadmissibility of individual applications when the reasoning had not been given in the first place. Even though this case was rejected by the Committee of three judges before the entry into force of Protocol No. 14, it is of relevance to us. All other critiques given by the HRC are also applicable in relation to the single judge.

We have pointed out earlier that we find the absence of reasons for the decision to reject applications disputable, and believe making such reasons public would be very useful in the sense of serving as additional guidance to applicants for when not to submit applications. Reasons for decisions on inadmissibility are important for both the internal and the external control of Court decisions; they are the only assurance that the decision has not been issued "illegally" and arbitrarily and that all facts have been taken into account. Reasons are also very important from the viewpoint of fairness for both parties.

The opinion of the HRC is important in terms of criticism of the Court's case law. In *Achabal*, the HRC said that the reasons for the Court's decision were insufficient and scant. Furthermore, the HRC harshly criticized the application of the "manifestly ill-founded" standard. Most criteria for rejection are largely formal or procedural in nature. The problem is the condition set out in Article 35(3)(b), which is not a formal but a substantive criterion requiring prima facie engagement in the assessment of facts, i.e. merits. From the efficiency viewpoint, this criterion is very important. The implementation is very useful when, for instance, an individual submits an application concerning facts, which have already been established as not constituting a violation by the ECtHR. When there is previous practice of the Court, therefore, it is not disputed. However, in item no. 370 of the Practical Guide on Admissibility Criteria, the Court itself states: "The reasons given for the inadmissibility decision in such a case will be identical or similar to those which the Court would adopt in a judgment on the merits concluding that there had been no violation (*Mentzen v. Latvia* (2004)[5]). The Guide does not elaborate on this criterion, but rather the Court itself openly admitted that the single judge is guided by the same criteria as the Council of judges in terms of a decision on merits. It would be good to know in what situations the Court applies Article 35(3)(b), and which standards it is guided by.

What we too find debatable is the fact that the single judge may enter into the merits and dismiss an application as manifestly ill-founded without having to provide reasons. The application of this criterion by the single judge is an enigma.

CONCLUSION

The aim of this paper was to give a critical overview of the working methods of the ECtHR, with special reference to the filtering mechanism of individual complaints.

Regardless of the facts and problems presented herein, we believe that to claim that the Court is intentionally violating human rights under the Convention is an exaggeration. We do not wish to criticize individual judges either. We are of the opinion that these posts are held by highly competent people who are independent in their work.

We have agreed with certain justified criticism from attorney circles and dismissed other arguments. What we do see as problematic is the absence of reasons for the decision to reject an application. The citizens must have an independent and supranational body impartially

[4] Communication No. 1945/2010, U.N. Doc. CCPR/C/107/D/1945/2010 (2013).
[5] Application No. 71074/01, Judgment of 7 December 2004.

examining whether there is indeed a violation or not. We do not wish to asset that the rejected applications should have been accepted and ultimately resolved in favour of the applicant. We did not have access to the records of those cases and it would be frivolous to draw such a conclusion. However, even if we assume that all decisions of single judges were correct, the very *modus operandi* is a concern that in turn raises doubts, especially in those who feel violated. This unfortunately creates a negative image of the Court as a violator of human rights. We personally believe that such a conclusion is overstated, but, due to the high rate of rejection of requests coming from countries in transition, citizens might lose confidence in "Strasbourg".

We believe that by submitting applications, individuals have contributed to raising the level of human rights protection in certain MSs. This is the case in the Republic of Croatia. Since acceding to the Convention, the level of protection has rapidly increased, but it is safe to say it has not yet reached the level of some more advanced democratic countries. Excessively limiting the access of the individual to the Court does not contribute to the strengthening of human rights protection. It might be that the filtering mechanism is too strict. Had this mechanism existed before, some important cases against Croatia might never have come before the Court.

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