The Reform of the European Mechanism (ECHR) for the Protection of Human Rights

Titus Corlăţean

"The European Court will further have to deal with an excessive case-load."

The European Court of Human Rights is a body under the Council of Europe, created not based on the Statute of the Council of Europe, but under the European Convention on Human Rights. This instrument set out, in its initial form, the establishment of the European Commission of Human Rights and of the European Court as bodies of the Council of Europe.

The Convention established the Court in order to ensure observance of the commitments undertaken by States Parties. It is a jurisdictional body, specialized in the field of human rights, operating on a non-permanent basis and of optional jurisdiction. It has general subject-matter jurisdiction (relating to all rights stipulated by the European Convention on Human Rights, therefore concerning the field of civil and political rights) and jurisdiction and proper venue limited to the European regional level.

Titus Corlăţean
Lecturer at Dimitrie Cantemir Christian University in Bucharest, Romanian Minister of Foreign Affairs. Author, among others, of the book **Executarea hotărârilor Curţii Europene a Drepturilor Omului** (The execution of the European Court of Human Rights decisions) (2011).

Background

From the entry into force of the Convention until the early ’90s, the number of Contracting Parties almost tripled. Nowadays, all 47 Member States of the Council of Europe are party to the European Convention on Human Rights. This consequently entailed an exponential rise in the number of cases pending with the Commission and the Court, which eventually called for a reform to be implemented in the control system.[1] These reforms were essentially aiming at the improvement of the effectiveness of protection means, shortening of procedures and preservation of the current quality level of human rights protection.

It is interesting to point out that the number of applications with the European Commission of Human Rights reached 401 in 1981, 2037 in 1993, the ascending trends being accountable not only through the increase in the number of states parties to the Convention, but also owing to the notoriety gained at public opinion level by the Strasbourg control mechanism.

According to statistics, it was found that against this background, the delay accumulated in the examination of the cases pending with the European Commission of Human Rights became quite excessive (seriously impacting the procedures carried out before the Court), the end of the 1994 January session having 2,672 cases pending, out of which 1,487 had not been examined at all. At the time, it took an average period of 5 years to examine a case until a final decision was pronounced by the European Court of Human Rights or the Committee of Ministers.

If prior to 1988, there had not been more than 25 cases referred to the Court on an annual basis, the figure reached 31 in 1989, 61 in 1990, 93 in 1991, 50 in 1992 and 52 in 1993. At the same time, if, at the end of 1992, the Committee of Ministers had 15 cases pending for the decision on the merits of the case, their number rose to 189 at the end of 1993.

After the adoption of Protocol 11 to the European Convention on Human Rights which introduced the first major reform of the Strasbourg control system through the unification of the Commission and of the Court into one single and permanent Court of Human Rights, it was ascertained within a quite short while that adoption of new additional reforms became a necessity.

An assessment carried out at the Council of Europe almost 5 years after the entry into force of Protocol 11 stated that the objectives were met only partially and that this was owed particularly to the exponential rise in the number of applications filed with the Court, which basically led to a state of semi-blockage. We should consider only that the number of applications registered in 2002 rose

to approximately 35,000 as compared to the 14,000 which were recorded for the year 1997.

This situation generated a special concern both at the level of the Court itself and at political level for the identification of certain short-term solutions, but also of substantial and deeper solutions, considering even the possibility of a new reform of the Convention.

A call was made for the need to increase both the financial and the human resources[2] to be made available to the Court for making its activity more efficient, and the substance-related resources, such as: tightening of admissibility criteria or concentration of the Court's activity mainly on matters raising questions of fundamental interpretation, as a matter of principle, of the provisions of the Convention (which would rule out a large amount of the applications deemed usual); reintroduction of another "filtering" body meant to facilitate the Court's activity; introduction of an actual double jurisdiction at Court level; the appointment of a second judge in the Court for each and every state, etc.

This accordingly led to the political decision to adopt a new Protocol, namely Protocol 14 to the European Convention on Human Rights, starting from the ascertainment that although it constituted a step forward, Protocol 11 did not solve the problem of the significant increase in the number of individual applications lodged with the European Court failing to limit the risk of impact upon the effectiveness and the credibility of the Strasbourg control system.

Besides, an official recognition of this problem occurred two years after the entry into force of Protocol 11, at the 2000 Ministerial Conference on Human Rights held in Rome, on the occasion of the 50th anniversary of the execution of the European Convention on Human Rights. In its first resolution passed in Rome, the Conference requested the Committee of Ministers "to initiate, as soon as possible, a thorough study of the different possibilities and options with a view to ensuring the effectiveness of the European Court of Human Rights in the light of this new situation through the Liaison Committee with the European Court of Human Rights and the Steering Committee for Human Rights."[3]

The Conference deemed this process to be "indispensable, taking into account the rising number of applications, and that *urgent actions* had to be taken in order to support the European Court to fulfil its functions and, consequently, a thorough consideration had to be initiated as soon as possible in connection with various possibilities and options."[4]

In answer to the first Resolution adopted at the Rome Conference, the Committee of Ministers Deputies established on 7 February 2001 an Evaluation Group to make proposals on the means of guaranteeing the effectiveness of the European Court. The Steering Committee for Human Rights (CDDH) created also a Reflection Group on the consolidation of the mechanism for the protec-

tion of human rights. The CDDH[5] progress report adopted in June 2001 was sent to the Evaluation Group which, in turn, prepared a report in September 2001.

These documents led to the adoption of the Declaration of the Committee of Ministers at its 109th ministerial session as of 8 November 2001 concerning the "Protection of Human Rights in Europe. Ensuring the long-term effectiveness of the European Court of Human Rights."

Based on the instructions from the Committee of Ministers and after the submission of an Interim Report[6] in October 2002, the CDDH put forward actual proposals meant to ensure the long-term effectiveness of the European Court, which were sent to the Committee of Ministers on 4 April 2003.

Such proposals targeted three main domains:

• "Preventing violations at national level and improving domestic remedies";

• "Optimizing the effectiveness of the filtering and subsequent processing of applications";

• "Improving and accelerating execution of judgments of the European Court."[7]

The reflection and elaboration process thus initiated progressed so that, afterwards, on 15 May 2003, the Committee of Ministers adopted the Declaration "Guaranteeing the long-term effectiveness of the European Court of Human Rights." The CDDH adopted, in turn, in November 2003 an Interim Progress Report[8] and the Final Report in April 2004,[9] respectively. This document contains the draft Protocol 14 to the European Convention on Human Rights, an explanatory report, a draft declaration, a draft Recommendation and a draft Resolution of the Committee of Ministers destined for the Member States.

According to the regulations of the Council of Europe, the Committee of Ministers invited the Parliamentary Assembly to issue its Endorsement on Draft Protocol 14. This endorsement, putting forward a series of amendments, was adopted by the Parliamentary Assembly on 28 April 2004.

The reflection and elaboration process came to an end on 13 May 2004, once the Committee of Ministers adopted the "Reform Package":

• The Declaration "Ensuring the effectiveness of the implementation of the European Convention on Human Rights at national and European levels";

• the text of Protocol 14;

• five Recommendations to the member states aiming at ensuring effective protection of the rights stipulated in the European Convention under national legal systems.

Protocol 14 was the outcome of almost five years of reflection and its essential goal was "to preserve and improve the effectiveness of the control system on a long-term basis, particularly considering the prospect of the continuing increase in the workload of the European Court as well as that of the Committee of Ministers of the Council of Europe."[10]

Several proposals to reform the system were analyzed during the period after the 2000 Ministerial Conference until the final approval of the Protocol.

Main Characteristics of the Reform Introduced under Protocol 14

Protocol 14 to the European Convention on Human Rights is an amending Protocol. Unlike the additional Protocols to the Convention, the entry into force of Protocol 14 was conditional upon its ratification by all States Parties to the European Convention.

Therefore, until quite recently, its entry into force had been blocked by the Russian Federation which refused the ratification and, implicitly, the submission of the ratification instrument on grounds that "the application of the new instrument would augment the pressure considered unfair by the Russian authorities, for the execution of a potentially growing number of judgments of conviction of political motivation" (Paraskevas 2010, 47).

As a matter of fact, this political position had been expressed in a negative vote recorded as of 20 December 2006 in the State Duma of the Russian Federation. Following international pressures by the member states of the Council of Europe, the Committee of Ministers and the Parliamentary Assembly of the organization,[11] the Russian Federation completed the domestic procedures for the ratification of Protocol 14 in the first half of the year 2010, becoming the 47th member state to accept the instrument referred to above, which allowed for the instrument to become effective on 1 June 2010.

Basically, the reform introduced by Protocol 14 aims at the following essential elements:

- treatment of the admissibility applications by a single judge. The difference from the previous system is that the preliminary decision concerning the admissibility of the application may be made by a single judge, assisted by legal advisers of the Court Registry and not by a three-judge panel, including also a judge-rapporteur and the assistance offered by the legal advisers of the Court Registry, respectively;
- introduction of a new admissibility criterion, namely, the considerable damages suffered by the claimant;
- introduction of a procedure meant to accelerate the examination of the repetitive cases which, at the same time, were deemed to be clearly substantiated ("clone" cases), in the form of establishing "the procedure of the decision in a pilot case";[12]

- change in the term of the judge of the European Court. To reinforce their independence and impartiality, judges shall be elected for a single nine-year term, which cannot be renewed and which is to expire on their 70th anniversary.[13] The previous system stipulated a six-year term which allowed for renewal;
- change in the procedure for the appointment of ad-hoc judges;
- possibility to enter into amicable regulations at any time during the procedure;
- possibility to notify the European Court, by decision of the Committee of Ministers, if a state refuses to execute judgments;
- reinforced role of the Commissioner for the Human Rights of the Council of Europe within the procedure carried out before the Court;
- possibility for the European Union to join the European Convention on Human Rights.

To conclude, the reforms introduced by Protocol 14 aim at the two main past and present challenges of the European Court of Human Rights: a tremendous case-load, many of them statistically confirmed as unsubstantiated; the burden to examine the merits of the case and deliver a decision, including with regard to fixed indemnification, in a great many repetitive or routine well-grounded cases.

At this stage, any conclusion concerning the effects and the effectiveness of the new instrument is premature. However, one could refer, in this context, to the public position stated by the former President of the European Court, Luzius Wildhaber, who declared that, although Protocol 14 "is a step in the right direction, the European Court will further have to deal with an excessive case-load" (Paraskevas 2010, 56).

Protocol 14-Bis

The opposition expressed by the Russian Federation for several years to the entry into force of Protocol 14 and the reform of the control mechanism this instrument had introduced forced the other member states to identify an interim solution, of provisional nature. This solution was conceived in order to help the European Court, even for a definite period of time, until the full ratification of Protocol 14, to preserve its functionality and credibility and dilute the pressure generated by the excessive case-load.

The initiative launched by the Council of Europe in order to prevent the collapse of the European Court took the form of an additional Protocol to the European Convention, whose entry into force, contrary to the amending Protocol, was possible far sooner. Besides, the new instrument called Protocol 14-Bis, to

be signed as of 27 May 2009, could become soon effective, that is on 1 October 2009, after its ratification by only three member states,[14] being undoubtedly opposable solely in relation to the states having ratified it.

The lifetime of such an instrument was determined at the date Protocol 14[15] entered into force.

For proper records purposes, the section "Treaties" of the Council of Europe includes a number of 12 states ratifying Protocol 14-Bis[16] and other 10 states which signed it, but have not ratified it yet,[17] Romania being among these latter states.[18]

Essentially, Protocol 14-Bis took over from the reform package proposed by Protocol 14 two procedural elements intended to be made immediately effective, namely: introduction of the possibility for a single judge to examine and decide on the admissibility applications. Similarly to Protocol 14, this competence was limited by the impossibility to examine the applications filed against the state on behalf of which a judge of the European Court was appointed; granting extended competences to the three-judge panel.

As already shown, the validity of Protocol 14-Bis, effective solely for the 12 states which had ratified it, as mentioned became obsolete once Protocol 14 took effect on 1 June 2010.

Conclusions

The presentation of the control mechanism of the European Convention on Human Rights highlighted the extreme importance and implications of such a mechanism. Considered to be the oldest and the strongest legal instrument for the protection of fundamental rights and freedoms of individuals at European level, it is at the basis of an impressive jurisprudence which completes the substance of the Convention and both shapes and breathes life into it, surpassing thus the instrument itself. Indeed, the Convention progressed by virtue of the interpretation given to it by both the Commission and the European Court of Human Rights (Gomien 1993, 172).

Interpretations of certain concepts such as supremacy of law and democratic society constitute the fundamentals of the European system of human rights and provided the countries of Central and Eastern Europe with significant reference points. The Convention is not, however, a cure-all meant to allow remedy of any and all problems concerning human rights. It can nevertheless offer a considerable number of precise legal answers to a series of questions relating to the individual aspects of the protection of human rights. On a wider scale,

however, the symbolics of the system (which is equally based on the principle of the exclusion of exclusive national jurisdiction in the field of human rights and of the limitation of state sovereignty as well as on the subsidiarity of international guarantees in relation to the domestic ones), consider that primary responsibility lies with the states themselves. It is therefore of the essence that states should be quickly and substantially perceptive to the messages sent by the Strasbourg control mechanism and even get ahead of them at times, through the promotion of the required domestic reforms, firstly in the legislative and administrative fields, avoiding thus to be further included on the "interest agenda" of the European Court of Human Rights.

Therefore, various reforms of the Strasbourg control mechanism, which are actually necessary, will not be able to ensure a long-term effectiveness of this system which presently is threatened to be smothered due to the tenths of thousands of applications pending with the European Court.

Notes

1. See also the motivations shown in the explanatory report of Protocol 11 to the European Convention on Human Rights.
2. The Committee of Ministers decided in 2002 to allot during 2003–2005 an additional budget to the Court in the amount of EUR 30 million.
3. Resolution I, paragraph 18 ii, "Institutional and Functional Arrangements for the Protection of Human Rights at National and European Levels" CM (2000), 172.
4. Declaration of the Ministerial Conference on Human Rights held in Rome: "50 years of the European Court of Human Rights: What is the future of human rights protection in Europe?"
5. Doc. CDDH–GDR (2001), 010.
6. Doc. CM (2002), 146.
7. Doc. CDDH (2003), 006.
8. Doc. CM (2003), 165.
9. Doc. CM (2004), 65.
10. Preamble of Protocol 14 to the European Convention on Human Rights.
11. See Recommendation 1756 (2006) of the Parliamentary Assembly of the Council of Europe and the answer of the Committee on Ministers adopted on 18 January 2007.
12. Article 28(1) of the European Convention on Human Rights, as amended by article 8 of Protocol 14.
13. Article 23 paragraph 1 of the European Convention on Human Rights, as amended by article 2 of Protocol 14.
14. Article 6 paragraph 1 of Protocol 14-Bis.
15. Article 9 of Protocol 14-Bis.

16. Denmark, Georgia, Ireland, Island, Macedonia, Luxemburg, Monaco, Norway, San Marino, Slovakia, Slovenia, Sweden.
17. Austria, Cyprus, Spain, France, Hungary, Lithuania, the Republic of Moldavia, Poland, Romania, Ukraine.
18. Romania signed Protocol 14-Bis on 15 September 2009.

References

Gomien, Donna. 1993. *Introducere în Convenţia Europeană a Drepturilor Omului*. Trans. Bucharest: ALL.

Paraskevas, Costas. 2010. *The Relationship between the Domestic Implementation of the European Convention on Human Rights and the Ongoing Reforms of the European Court of Human Rights (With a Case Study on Cyprus and Turkey)*. Antwerp: Intersentia.

Abstract

The Reform of the European Mechanism (ECHR) for the Protection of Human Rights

The European mechanism for the protection of human rights established by the Council of Europe is based on the European Convention on Human Rights and the European Court of Human Rights. The increase in the number of State Parties and consequently in the number of the individual complaints addressed to the European Court obliged the member states to promote several reforms of the legal system in Strasbourg. The protocol 14 to the European Convention, adopted on 13 May 2004, put in place the latest reform in this regard.

Keywords

European Convention on Human Rights, European Court, reform, Protocol 14