

# The European System for the Promotion and Protection of Human Rights

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Let me begin by saying how very privileged I feel to be here today and to have been invited to speak to you on the significance of the European Human Rights protection system. One preliminary remark I must make is that a library of books has been written on the European Convention. One has a feeling that it has become almost impossible to say anything original on this subject.<sup>1</sup> I could cite at least thirty-five distinguished authorities for almost everything I will be saying. Therefore, I will limit myself today to pointing out some of the main characteristics of the European system. Hopefully, this might be of use to American lawyers who would like to find out what a regional system can do to a country!<sup>2</sup>

First, I will discuss the significance, or, may I say, the justification, of regional systems, as opposed to the global, United Nations approach, for the protection of human rights. Second, I will look into the very special circumstances surrounding the creation of the Council of Europe and the so-called "Strasbourg system." Third, I would like to outline the most important characteristics of the Strasbourg system. These include: the guarantees it provides, its jurisdictional and evolutive character, and the influence it has on the national law of the member states. Last, I will address, very briefly, the question

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<sup>1</sup> Out of the number of documents, books, and articles consulted I will mention only some, for direct references, in the footnotes. Excellent bibliographical information, as well as information on procedures and in case law, is provided by the Council of Europe in Strasbourg: European Convention, 8 Protocols, Rules of Procedure of the European Commission and the European Court of Human Rights; Publications of the European Court of Human Rights (Series A contains decisions and judgments, Series B contains pleadings, oral arguments and documents); Year-books of the European Convention on Human Rights; Activities of the Council of Europe in the Field of Human Rights (annual survey); and Stocktaking on the European Convention on Human Rights (a periodic survey).

<sup>2</sup> So far, there has been no serious consideration given to possible United States accession to the European System. *But see* Sohn, *Problems Involved in Opening the European Convention on Human Rights to the Accession by the United States and Canada*, in A. ROBERTSON, *HUMAN RIGHTS IN NATIONAL AND INTERNATIONAL LAW* 353-55 (1968) [hereinafter ROBERTSON].

of human rights protection in the framework of the European Community, as well as in the framework of the Helsinki Final Act of the Conference on Security and Cooperation in Europe. We cannot, and may not, ignore the new developments in Europe and the myriad of questions they seem to provoke, every day now, for European policy-makers and lawyers.

### I. REGIONALISM VERSUS UNIVERSALISM

We know, and we have been reminded of it again both yesterday and today, how the end of World War II marked a new era in the protection of human rights. The adoption of the Universal Declaration by the General Assembly in 1948 really marked this new beginning. It did so in two very important but, I submit, fundamentally different ways. On the one hand, it recognized for the first time that respect for human rights by governments is not only of national but also of international concern; that there is a link between international peace and security and the way governments treat human beings under their jurisdiction;<sup>3</sup> and that there should be a system of international accountability for a government's behavior. This concerns the creation of an international machinery for the protection of human rights.

On the other hand, the Declaration did recognize, for the first time, the universality of human rights. This means that those rights are inherent to every human being, without distinction as to race, sex, language or religion. In my opinion, of these two achievements, the latter is at least as important as the former, and both elements should be taken into account in the debate concerning regionalism versus universalism in the protection of human rights.

Of course, far-reaching regional implementation systems may well serve the cause of human rights. Governments may experience profound embarrassment at the mere thought of international concern or judgment, especially by a friendly or neighboring state. Regional systems may well function as a catalyst for other regional ventures, especially where a universal system is not yet in operation.

But the "promotion" of regional protection systems cannot mean that there are people in this world with better defined or more sophisticated rights than others. It cannot stand for the notion that

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<sup>3</sup> See Universal Declaration of Human Rights, G.A. Res. 217 A(III) (1948), Preamble, para. 1.

human rights are for some people only or that they are related to culture, race, religion, language, and custom as a "basic common denominator."<sup>4</sup> This kind of regionalism would be in direct contradiction with the "Universal" in the Universal Declaration and it has, rightly I think, been called "extraordinarily disquieting and disturbing, . . . an alarming attempt at the fragmentation of the international action to promote human rights, an artificial creation of parochialism under the pseudonym of regionalism. . .".<sup>5</sup>

Only exceptional circumstances could justify such a violation of the principle of universality. Apparently, in 1950, the case of Western Europe was very special. The European concern with human rights originated directly from what happened in Europe during the Second World War and from a fear of communist expansion into Western Europe. Safeguarding the most essential democratic freedoms became the first goal of a wider European cooperation as laid down in the Constitution of the Council of Europe. Having been instrumental in the drafting of the Universal Declaration, and in anticipation of the creation of a full-fledged implementation system within the United Nations (which finally entered into force only in 1976, twenty-eight years later!),<sup>6</sup> Europe set out to establish its own implementation system.

Thus, the European Convention for the Protection of Human Rights and Fundamental Freedoms was signed in Rome on November

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<sup>4</sup> R. LILICH & F. NEWMAN, *INTERNATIONAL HUMAN RIGHTS, PROBLEMS OF LAW AND POLICY* 328 (1979) ("Perhaps the most successful way to implement human rights would be on the regional level, where the member states would have a basic common denominator of at least geography, if not race, religion, language and customs").

<sup>5</sup> Schwelb, *The Protection of Human Rights within the Framework of Existing Regional Organizations*, in Robertson, *supra* note 2, at 330-42, 355-56 (commenting on the report of J. Lalive); *see also id.* at 358 (comments by C.W. van Santen, member of the Committee of Experts on Human Rights) ("the point to be made in any propaganda for the Strasbourg achievement should be its more extensive legal force and its enforcement machinery, not its regional character. . .").

<sup>6</sup> From the beginning, it had been the intention to create, within the framework of the United Nations, an "International Bill of Human Rights" with its own implementation and control mechanisms. Due to several circumstances (the problem of civil and political rights versus economic, social and cultural rights, and the problem of collective versus individual rights) it was not until 1966 that the General Assembly was able to adopt the two Conventions: the Covenant on Civil and Political Rights (CCPR) and the Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200 A (XXI) (1966). Under the Covenant on Civil and Political Rights, a "Committee on Human Rights" was to receive inter-state complaints and also individual petitions, but only with regard to states which had ratified a special Optional Protocol. The Covenants and the Protocol entered into force in 1976.

4, 1950, and entered into force in 1953.<sup>7</sup> Currently, all twenty-three members of the Council of Europe are parties to the Convention, except Finland which has so far only signed it. The twenty-two states have also recognized, by express declaration, the competence of the organs under the Convention to receive petitions from persons, groups of individuals, or non-governmental organizations.<sup>8</sup>

## II. THE MAIN CHARACTERISTICS OF THE STRASBOURG SYSTEM

### A. *The Guarantees*

The Convention indicates that the relationship between the Universal Declaration and the aim of the Council of Europe is in "securing the universal and effective recognition and observance of the Rights of the Declaration by taking the first steps for the collective enforcement of certain of these rights."<sup>9</sup> We have already touched upon the two basic points of departure. The European Convention does not protect all of the rights enumerated in and protected by the Declaration. Only those rights capable of direct application are included. Thus, economic, social and cultural rights are excluded.<sup>10</sup> In addition, some fundamental rights such as ownership of property, freedom of movement, asylum from persecution, right to participate in government and public life, and the right to universal suffrage by secret ballot are not mentioned in the original text of the Convention.<sup>11</sup> On the other hand, defining the rights less generously than in the United Nations texts made it possible to offer more tangible guarantees to individuals by way of quasi-jurisdictional control by a Commission and a Court of Human Rights.

### B. *The Implementation System*

Time does not allow me to go into great detail over the procedures of the Strasbourg system. In short, it proceeds as follows: the individual<sup>12</sup> communicates a complaint to the Secretary-General of

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<sup>7</sup> Nov. 4, 1950, 213 U.N.T.S. 222 [hereinafter European Convention].

<sup>8</sup> COUNCIL OF EUROPE: THE EUROPEAN CONVENTION ON HUMAN RIGHTS 13-14 (1989).

<sup>9</sup> European Convention, *supra* note 7, Preamble.

<sup>10</sup> Later, a separate Social Charter was drawn up in the Council of Europe. See European Social Charter, Oct. 18, 1961, Europ. T.S. No. 35 (its supervisory machinery however is much less effective than that of the Convention).

<sup>11</sup> Some of these rights have been incorporated into the Convention's system by separate protocols. See *infra*, § D.

<sup>12</sup> See European Convention, *supra* note 7, art. 25, at 236 (parties may declare

the Council of Europe, who forwards it to the European Commission of Human Rights. The Commission<sup>13</sup> is an organ of inquiry and conciliation. It determines the admissibility of the complaint, contacts the state in question in order to obtain explanations and clarifications, and tries to secure a friendly settlement.

If a settlement proves impossible, the Commission drafts a final report on the facts and states its opinion as to whether these constitute a breach by the state concerned. The Commission's report is transmitted to the Committee of Ministers of the Council of Europe, a political decision-making body, which decides whether there has indeed been a violation of the Convention. It then prescribes certain measures to be taken by the state concerned within a certain period of time. The Committee's decision is binding.

However, within a period of three months after the date of the transmission of the report, the Commission or the state concerned may refer the case to the European Court of Human Rights. The Court is a judicial decision-making organ. It pronounces judgment which is binding upon the states.<sup>14</sup>

### C. *The Right of Individual Complaint*

According to the rules of procedure of the Court, the individual who has lodged the complaint is not a party. Only the Commission and the state concerned appear before the Court. It is true that since the 1983 amendment to the Rules of Court, the individual may be asked to present his case in person. However, an individual still may not institute proceedings before the Court.

One of the main achievements of the Strasbourg system has been the importance it has given to the right of individual complaint. In its efforts to promote human rights it has "made use" of the individual to an extent which has so far only been possible in regional systems but has now become a guiding principle for every international human rights implementation system.

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that they recognize the competence of the Commission to receive petitions "from any person, non-governmental organization or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in this Convention").

These Declarations may be for a limited duration, and may be renewed, or be of an unlimited duration. However, reservations *ratione materiae* are not allowed. *Id.*

<sup>13</sup> Each of the 22 Member States have the right to nominate a member of the Commission. It need not be a national of that state. For example, Liechtenstein nominated a Canadian national, Professor R. St. Mac Donald.

<sup>14</sup> See M. Eissen, *La Cour Européenne des Droits de l'Homme*, in 5 BULL. DE L'ASS. POUR LA FIDÉLITÉ À LA PENSÉE DU PRÉSIDENT RENÉ CASSIN 13 (Oct. 1983).

Why is this right of individual petition so crucial for the implementation of human rights? Is it because this is the only way in which a victim may secure redress, rehabilitation, or reinstatement of his rights? Of course not! The concern of international human rights far exceeds the interests of the single human being or of the single case. However, the individual's role and cooperation has become indispensable.

The victim is "utilized" as a source (or, in the case of "patterns of gross violations," as sources) of firsthand information. Who else is going to provide that information? Certainly not the guilty state! Furthermore, in presenting the details of his case, the individual provides the international machinery with the opportunity to define a specific problem in direct terms. No excuse exists for clothing accusations in politically vague and evasive wording. The problem is there in writing, the circumstances of the case must be looked into by the state concerned, and explanations may be demanded! Finally, the cooperation of the individual makes it possible to deal with a certain problem in a jurisdictional way. This is important because it provides the proper international body with the opportunity, given the facts and the legal issues, to pronounce judgment with all the ensuing international legal consequences for the state concerned.

The right of individual complaint is the heart of international human rights protection because the influence of the findings of a court or another international body far exceeds the individual case. The European Court has recognized this in a number of cases, stating that "[t]he Court's judgments . . . serve not only to decide those cases brought before the Court but, more generally, to elucidate, safeguard and develop the rules instituted by the Convention. . ."<sup>15</sup>

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<sup>15</sup> Case of Ireland v. United Kingdom, 25 Eur. Ct. H.R. (ser. A) ¶ 154 (1978). For a discussion of this case *see infra*, § E.

In an earlier decision, the Court decided to strike the case off its docket because, while the case was before the Court, Belgium had amended its legislation on the point in question. See *De Becker v. Belgium*, 4 Eur. Ct. H.R. (ser. A) (1962). Consequently, the Court found that the question whether *De Becker* had been the victim of a violation of the Convention had become one of "historical interest." However, one judge found that

. . . This question could have been answered in the positive if the function of the Court had been to enforce private claims, which a claimant may, if he wishes, modify during proceedings. According to the Convention, the function of the Court is to ensure the observance of the engagements undertaken by the High Contracting Parties in the present Convention (Art. 19) . . . The Commission may bring the question for final decision before

Therefore, I do not agree with the opinion, so often expressed in the past, that the right of individual petition is a "European belief." The right of individual petition is the cornerstone of human rights protection everywhere. In any case, recent developments and experience within the United Nations system, with the recognition of the right of petition in several treaties and by ECOSOC Resolution 1503, support this view.

*D. The Evolutive Character of the Strasbourg System*<sup>16</sup>

One of the most significant and, to some member states, disquieting aspects of the European system is its evolutive character. This evolution has taken a variety of forms. First, several additional protocols<sup>17</sup> have added various rights to the scope of the Convention. For instance, the right to "peaceful enjoyment of possession"<sup>18</sup> and the right to education<sup>19</sup> have been added to the overall number of rights. Other rights include the addition of "horizontal protection" for women in the private atmosphere,<sup>20</sup> the obligation to hold secret ballots at regular intervals,<sup>21</sup> and the abolition of the death penalty.<sup>22</sup>

Second, and even more important because an individual state has little or no control over this, it has been through the interpretation

the Committee of Ministers or before the Court. When the proceedings have gone that far, the public interest requires that the question whether a violation has or has not taken place shall be decided regardless of whether the applicant is or is not interested in the continuance of the proceedings.

*Id.* at ¶ 6 (Ross, J., dissenting).

The Court itself has followed this line of reasoning. *See* Guzzardi Case, 39 Eur. Ct. H.R. (ser. A) (1980) ("proceedings under the Convention frequently serve a declaratory purpose. . ."); Tyrer Case, 26 Eur. Ct. H.R. (ser. A) (1978) ("the substance of the issue before the Court, namely whether judicial corporal punishment as inflicted on the applicant in accordance with Manx legislation is contrary to the Convention. . .").

<sup>16</sup> *See generally* J. MERRILLS, *THE DEVELOPMENT OF INTERNATIONAL LAW BY THE EUROPEAN COURT OF HUMAN RIGHTS* (1988).

<sup>17</sup> By the end of 1989 eight additional Protocols had been adopted. Some of them have been incorporated into the text of the Convention (Third and Fifth Protocol), some added certain rights and freedoms to the ones already protected (First, Fourth, and Seventh Protocols), one granted the Court the competence to give advisory opinions (Second Protocol), one concerned procedural matters (Eighth Protocol) and one abolished the death penalty (Sixth Protocol).

<sup>18</sup> Protocol No. 1 to the Convention, Mar. 20, 1952, art. 1, 213 U.N.T.S. 262.

<sup>19</sup> *Id.*, art. 2.

<sup>20</sup> Protocol No. 7 to the Convention, art. 5.

<sup>21</sup> Protocol No. 1 to the Convention, art. 3, 213 U.N.T.S. 264 (yet universal suffrage was *not* granted).

<sup>22</sup> Protocol No. 6 to the Convention, 1983 Y.B. EUR. CONV. ON HUM. RTS. (Eur. Comm'n on Hum. Rts.) 1.

of the Convention by the Commission or by the Court that a certain evolution has occurred. Because the European system may, in a unique way, encroach on member states' domestic jurisdiction, it has been argued that the Convention requires a most cautious interpretation. Thus, Sir Gerald Fitzmaurice in his separate opinion in the *Golder* case, one of his many separate or dissenting opinions, was of the opinion that this:

. . . could justify even a somewhat restrictive interpretation of the Convention, but without going as far as that, they must be said unquestionably not only to justify, but positively to demand, a cautious and conservative interpretation, particularly . . . where extensive construction might have the effect of imposing upon the contracting States obligations they had not really meant to assume, or would not have understood themselves to be assuming.<sup>23</sup>

The Court itself, however, has, with varying degrees of emphasis, generally adopted an activist approach towards the Convention. The most outspoken statements expressing judicial restraint figure in dissenting opinions. The Court has consistently stressed the overall importance of the main purpose of the Convention as laid down in the Preamble, "the maintenance and further realization of Human Rights and fundamental freedoms."<sup>24</sup> It has sought "effective interpretation" as a means to further this purpose and it has done so by way of what it has called "autonomous interpretation."

The Court first employed this interpretation by stating that "the right of access constitutes an element which is inherent in the right stated in Article 6(1)."<sup>25</sup> Moreover, "this is not an extensive interpretation forcing new obligations on the Contracting States . . . but [is] . . . based on the very terms of the first sentence of Article 6(1) read in its context and having regard to the object and purpose of the Convention."<sup>26</sup> The second instance concerned torture and inhuman and degrading treatment. The question was "whether the Commission and the Court would be able to look beyond the particular conceptions of 1950 and take into account contemporary ideas." The Court had to recall that "the Convention is a living instrument which, as the Commission rightly stressed, must be in-

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<sup>23</sup> *Golder Case* 18 Eur. Ct. H.R. (ser. A) ¶ 39 (1975).

<sup>24</sup> European Convention, *supra* note 7, Preamble, at 2.

<sup>25</sup> *Golder Case*, 18 Eur. Ct. H.R. (ser. A), at ¶ 36 (1975).

<sup>26</sup> *Id.*

terpreted in the light of present-day conditions.”<sup>27</sup> Thereafter, the Court considered a narrow interpretation of the exceptions provided for in the Convention Article 8(2). “This paragraph, since it provides for an exception to a right guaranteed by the Convention, is to be narrowly interpreted.”<sup>28</sup> Finally, “. . . the principle of freedom of expression that is subject to a number of exceptions which must be narrowly interpreted.”<sup>29</sup>

Even when a certain interpretation is “dictated” by the *travaux préparatoires*, the Court has sometimes displaced those by other considerations. In the case of *Young, James and Webster*, concerning the closed shop issue, i.e. the right not to belong to a union, the Court avoided “the message of the *travaux* which it plainly found unacceptable.”<sup>30</sup> Finally, the Court has departed from the traditional view of human rights protection as an “obligation to abstain.”<sup>31</sup> Instead it recognized a positive obligation to guarantee, through adequate legislation, the various rights and fundamental freedoms which “. . . implies an obligation for the State to act in a manner . . .”<sup>32</sup> consistent with the Convention.

The question then arises as to the influence of the Strasbourg system on the national law of the member states.

#### *E. Influence of the Convention on the Domestic Law of the Member States*

For this purpose, I would like to discuss with you, briefly, two cases. The first case involved an individual complaint concerning the status of natural children under Belgian law. Alexandra Marckx was born in 1973 in Antwerp, Belgium. She is the daughter of Paula Marckx, a national of Belgium, who was unmarried. Under Belgian law, there is no legal bond between an unmarried mother and her child. The maternal affiliation of an “illegitimate” child arises by means of a voluntary recognition by the mother. However, the establishment of maternal affiliation had only limited effects with regard to family relationships and inheritance-rights. In principle, it created

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<sup>27</sup> Tyrer Case, 26 Eur. Ct. H.R. (ser. A), at ¶ 31 (1978).

<sup>28</sup> Case of Klass and Others, 28 Eur. Ct. H.R. (ser. A) ¶ 42 (1978).

<sup>29</sup> The Sunday Times Case, 30 Eur. Ct. H.R. (ser. A) ¶ 65 (1979) (admittedly, nine dissenting opinions were filed in this case).

<sup>30</sup> *Young, James and Webster Case*, 44 Eur. Ct. H.R. (ser. A) ¶ 51 (1981), analyzed in Merrills, *supra* note 16, at 86.

<sup>31</sup> *Marckx Case*, 31 Eur. Ct. H.R. (ser. A) ¶ 45 (1978).

<sup>32</sup> *Id.*

a bond with the mother alone. The child did not become a member of his mother's family.

For the mother, if she decided to remain unmarried, the only means of improving this situation was adoption. However, while creating certain rights over the adopter's estate, this did not give the child any rights in intestacy in the estate of the adopter's relatives. Only legitimation could place an "illegitimate" child on exactly the same footing as a "legitimate" child. Both of these measures, however, presupposed the mother's marriage.

The complaint by Paula and Alexandra Marckx concerned not only the way in which affiliation was established under Belgian law, but also the question of the child's family relationship and the patrimonial rights of mother and daughter. Belgian law was, according to the applicants, in violation of the rights guaranteed by Article 8 of the Convention (the right to respect for family life), Article 1 of the First Protocol (the right of peaceful enjoyment of one's possessions), and Article 14 (the prohibition of discrimination).

In its judgment, the Court stated that:

. . . although . . . distinction was traditional . . . the Court could not but be struck by the fact that the domestic law of the great majority of the Member States of the Council of Europe has evolved, and is continuing to evolve, in company with the relevant international instruments, towards full juridical recognition of the maxim *mater semper certa est*.<sup>33</sup>

Thus, taking into account the evolving position in most European States, the Court decided that existing Belgian legislation was in violation of Articles 8 and 14 of the Convention. However, the question remained, since the Court had found certain rules of Belgian law to be incompatible with the Convention, whether this would mean that these rules had been so since its entry into force in Belgium (June 14, 1955).

The Court said *no*, because "differences of treatment between 'legitimate' and 'illegitimate' children, for example in the matter of patrimonial rights, were for many years regarded as permissible and normal in a large number of contracting states. . . Evolution towards equality has been slow . . ." <sup>34</sup> Thus, Belgium was dispensed from reopening legal acts or situations predating the Court's judgment. In

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<sup>33</sup> *Id.* ¶ 41.

<sup>34</sup> *Id.* ¶ 58.

any case, Belgium was under an obligation, from the date of the judgment, to change its legislation. Notwithstanding the fact that this took almost ten years, the law in Belgium, *de facto*, had changed on the very day of the Court's decision. Notaries and solicitors were to take this into account when drafting wills and other legal documents. The Courts were also to take this into account.<sup>35</sup>

However, the legal effect of a judgment is not limited to the national jurisdiction of the state concerned. It may have consequences for the law in the other member states where legislation may also be in violation of the Convention. For example, with regard to the *Marckx Case*, the Supreme Court of the Netherlands lost no time and declared in a judgment of January 18, 1980 that "as the law now stands, no discrimination nor distinction may be made between legitimate and illegitimate children."<sup>36</sup> A lower court had found in a judgment of April 17, 1979 (antedating the *Marckx Case*) that an aunt of an illegitimate child could not be its guardian because the relevant articles of the Dutch Civil Code referred only to legitimate children. The Supreme Court stated that it would apply the Strasbourg judgment in all cases pending before Dutch courts.<sup>37</sup>

It has been pointed out that this would constitute retroactivity with regard to the Court's judgment, but as it only was applied to cases pending, this retroactivity, if at all, was only limited. Nevertheless it is an illustration of the far-reaching impact of the Strasbourg system.

This impact also is illustrated by a second case,<sup>38</sup> an inter-state complaint under Article 24 of the Convention. In 1971, a first complaint was lodged concerning the application of a 1922 "Civil Authorities Act" in August 1971. It involved a "decision to intern without trial persons suspected of serious terrorist activities but against whom there was not sufficient evidence to bring court proceedings."<sup>39</sup>

In 1972, this complaint was withdrawn in the light of an undertaking by Prime Minister Edward Heath. Meanwhile, use had been made

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<sup>35</sup> Time does not allow us to deal with the question of direct applicability of certain provisions of the Convention in the differing legal systems of the member States, and of the legal effect of the Court's judgments. I must refer to the extensive national literature on this subject.

<sup>36</sup> *In re X.*, 21 NJB 141 (1980), summarized in Barnhoorn, *Netherlands Judicial Decisions Involving Questions of Public International Law, 1980-81*, 13 NETHERLANDS Y.B. OF INT'L L. 363 (1982).

<sup>37</sup> *Id.*

<sup>38</sup> *Case of Ireland v. United Kingdom*, 25 Eur. Ct. H.R. (ser. A) (1978).

<sup>39</sup> *Id.* ¶ 36 (a violation of arts. 5 and 6).

of the "five techniques for in-depth interrogation" on fourteen persons known by name. However, thousands of people were processed under the Civil Authorities Act. In its complaint, Ireland stated that detention and internment under Northern Ireland emergency legislation was an "administrative practice" in violation of Articles 5 and 6. However, that under the "methods of treatment of persons in custody . . . interrogation . . . constituted an administrative practice in breach of Article 3".<sup>40</sup>

During the proceedings before the Court in 1973, the United Kingdom Attorney-General stated that:

The Government of the United Kingdom have [sic] considered the question of the use of the 'five techniques' with the very great care and with particular regard to Article 3 of the Convention. They now give this unqualified undertaking that the 'five techniques' will not in any circumstances be reintroduced as an aid to interrogation in the United Kingdom.<sup>41</sup>

Of course, the effect of inter-state complaints is political rather than legal, but nevertheless may profoundly influence public opinion and thus, directly and indirectly, a government's policy. In my view, this is one of the most important aspects of international inquiry and international findings. It gives to the public, and specifically to non-governmental organizations (NGO's), of a certain country, a tool to use in bringing about changes or to put an end to certain human rights violations. Certainly, representatives of human rights NGO's should welcome this kind of international criticism and put it to use.

### III. EVALUATION OF THE STRASBOURG SYSTEM

Summing up, briefly, we may conclude that the Strasbourg system has had a tremendous impact on the evolution and development of the national law of the member states. It has far exceeded the importance of the various individual cases. It has to a certain extent contributed to harmonization and integration in Europe. Finally, it has been so successful that at this moment it is virtually drowning in its own success. To cite some numbers, while the Court decided one or two cases (or none at all) per year during the first period of its activities, or until about 1975, this number began to rise steadily during the next period (ten cases in 1982) but then more than doubled

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<sup>40</sup> *Id.* ¶ 156.

<sup>41</sup> *Id.* ¶ 153.

until it reached the current number of twenty-five per year or more. Proposals for a re-structuring of the system have been made, and since the entering into force of the Eighth Protocol on January 1, 1990, some improvements have been made. Eventually, however, a complete overhaul of the now only semi-permanent and very much under-staffed system will be necessary.

On the other hand, some have expressed their disappointment over the direction the European system has taken over the years.

It is abundantly clear (at least it is to me) - and the nature of the whole background against which the idea of the European Convention on Human Rights was conceived bears out this view - that the main, if not indeed the sole object and intended sphere of application of Article 8, was that of what I will call the "domiciliary protection" of the individual. The individual and his family were no longer to be subjected to the four o'clock in the morning rat-a-tat on the door; to domestic intrusions, searches, and questionings; to examinations, delayings, and confiscation of correspondence; to the planting of listening devices (bugging); to restrictions on the use of radio and television; to telephone tapping or disconnection; to measures of coercion such as cutting off the electricity or water supply; to such abominations as children being required to report upon the activities of their parents, and even sometimes the same for one spouse against another, - in short the whole gamut of fascist and communist inquisitorial practices such as had scarcely been known, at least in Western Europe, since the eras of religious intolerance and oppression, until (ideology replacing religion) they became prevalent again in many countries between the two world wars and subsequently. Such, and not the internal, domestic regulation of family relationships, was the object of Article 8, and it was for the avoidance of these horrors, tyrannies, and vexations that "private and family life . . . home and . . . correspondence" were to be respected, and the individual endowed with a right to enjoy that respect - not for the regulation of the civil status of babies.<sup>42</sup>

#### IV. THE ROLE OF THE EUROPEAN COMMUNITIES

At this point, the question may well be asked whether the European Economic Communities (EEC) would not have a role to play in the

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<sup>42</sup> Marckx Case, 31 Eur. Ct. H.R. (ser. A) ¶ 7 (1978) (Fitzmaurice, J., dissenting).

regional system for the protection of human rights.<sup>43</sup> The treaties establishing the Communities have as their principal goal the creation of a common market, and not the protection of fundamental rights and freedoms. Nevertheless, the creation of a common market has had the effect of extending beyond national frontiers the area over which the freedoms of the citizen, especially in the economic sector, may be exercised.

From the beginning, it has been recognized by the Community's institutions that the individual citizen has certain inviolable rights and that their protection is an essential element of any democracy. Therefore, they must also be ensured within the framework of the Community's structures. However, even when there has been no uncertainty over the basic principles, it has been difficult to reach agreement on their scope and effect.

The European Court of Justice, the Court of the European Communities, which has its seat in Luxemburg, has contributed significantly to the elaboration of certain standards. It has recognized a number of important general principles of human rights law such as the principle of proportionality, the requirement of legal certainty, observance of the right to be heard and to defend one's rights in legal proceedings, the *ne bis in idem* principle, and the principle of non-discrimination.

This has put to rest the concern that citizens within the Community would be subjected to a new authority bound neither by national fundamental rights nor by a catalog of fundamental rights at the Community level. Nevertheless, with the EEC member states now embarking on a road towards a political union, the question remains whether the protection of human rights should be incorporated into the Community's legal order.

This may be achieved in different ways. First, the European Parliament may, and has done so in the past, adopt resolutions with regard to human rights violations anywhere in the world. Of course, these resolutions are of a political character. They do not address the individual's situation nor do they have the binding effect of judgments or findings of international tribunals.

Second, to make that possible, two possibilities exist. Either draft a separate catalog of basic rights for the Community or have the

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<sup>43</sup> It would be impossible in this context to go into details over European Community organs' activities in the field of Human Rights. I limit myself to this brief overview, referring interested readers to the vast literature and documentation on the subject, and more specifically to the case law of the European Court of Justice.

Community become a party to the Strasbourg system. Both possibilities have their own advantages and disadvantages, as has been pointed out on numerous occasions in a debate that has been going on now for more than fifteen years.

Meanwhile, it is not as if Community citizens are deprived of the protection of any of their fundamental human rights. All of the member states are now parties to the European Convention, and the European Court of Justice can, in every case in which a problem of fundamental rights is raised, be guided by the optimum level of these rights.

As pointed out before, the Luxemburg Court has done so on numerous occasions. Furthermore, various separate projects of the European Commission have led to quite extensive community legislation in the field of economic and social rights on subjects such as the social situation of migrant workers, equal pay for men and women, and equality of treatment for men and women as regards access to employment, vocational training, promotion, and working conditions.

#### V. THE FUTURE OF HUMAN RIGHTS PROTECTION IN EUROPE

The question remains whether a separate European system is still justified after forty years. The answer must be in the affirmative, but apparently on an altogether different level than the universal United Nations system. For other systems and regions, the European system may in some ways serve as a model. It remains a fact that the great troubles, the "patterns of gross violations", have not been really "touched" by it.

Therefore, it is my conviction that we also should continue to work for a wider, more refined, maybe more jurisdictional, system on the global level of the United Nations. We should also work for an improved system for the implementation of the United Nations instruments, for more support for the Optional Protocol, and for the work of the Committee where very important progress has already been made.

This is why I have read with pleasure that Eastern European countries have sought the advice of United Nations experts to help them promote a greater respect for their citizens' human rights. The countries of the Council of Europe no longer form the countries of Europe. Things are changing so fast that nobody dares to predict what is going to happen. As to the role of the Community, its role in Europe will certainly remain very important. But as of now, there are other scenarios available which will prove to be more successful,

at least with regard to human rights protection. One of these scenarios is that some of the Eastern European countries will seek membership in the Council of Europe and will accede to the Convention. This will on the one hand enhance the status and the significance of the Strasbourg system, but on the other hand concentrate on only some, admittedly basic, civil and political rights and their jurisdictional protection.

Another scenario would be that these countries would join the states which have ratified the United Nations Covenants and Optional Protocol and are actively participating in the implementation system. This would enhance the universality, as opposed to the regional approach, of human rights protection in Europe and it would recognize the principle of indivisibility of civil and political rights, and economic, social and cultural rights.

However, in the field of human rights there already exists a framework, everybody is desperately searching for frameworks these days, for pan-European cooperation: the Final Act of the Helsinki Conference on Security and Cooperation in Europe and its follow-up machinery.<sup>44</sup>

Of course, this Final Act is not a self-contained instrument in which human rights guarantees are given. It is a formal undertaking by the signatory states to respect human rights "as laid down in the existing Human Rights instruments." Even though the Final Act is not itself a legally binding international agreement, it refers repeatedly to existing international instruments, such as the Charter of the United Nations and its aims and principles, as well as the United Nations human rights treaties. Interestingly enough, the Final Act refers also to General Assembly resolutions such as the Universal Declaration and the Declaration on Friendly Relations and Cooperation between States, which at the time of their adoption were not considered to have binding force. This reference seems to create a "mutual reinforcement" of both the Final Act and the General Assembly resolutions mentioned here.

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<sup>44</sup> See 73 Dep't St. Bull. 323 (1975). The Helsinki Conference on Security and Cooperation in Europe took place from 1973-1975. It was concluded with a session of Heads of State and Governments of all European States (with the exception of Albania) and the U.S. and Canada, who signed, on 1 August 1975, the Final Act of the Conference.

Human Rights questions were included mainly at the request of the United States and found a place in Part I (a), Declaration on Principles Guiding Relations between Participating States, Principle VII: Respect for human rights and fundamental freedoms, including the freedom of thought, conscience, religion or belief.

In any case, the scope and influence of the Final Act depends upon the political will of the participating states to implement its principles. This fall, a special conference will be convened for all the participating states, including the United States and Canada, to discuss the future of the Helsinki system, and to consider existing proposals for improvement and fortification of its legal character. It might be the beginning of a whole new era of human rights protection in Europe.

