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The European System for the Protection of Human Rights:A System in Motion

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BRIEF

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The Right to Seek Asylum: A Dwindling Right?

by Fatimah Mateen and Brian Tittlemore

Article 14 of the *Universal Declaration of Human Rights* provides that "everyone has the right to seek and enjoy in other countries asylum from persecution." The aspirational nature of the Declaration and the pervasive principle of state sovereignty have prevented Article 14 from being entrenched as a right of asylum seekers to enter the borders of countries. Rather, a rule of customary international law appears to have developed that prevents an individual from asserting a right to enter a state unless he or she is a national of the receiving country.

Nonetheless, the manner in which a state exercises its sovereignty has a direct effect upon the ability of refugees to seek protection from persecution, and without a meaningful opportunity to make a refugee application, the "right" to seek asylum is rendered illusory.

Although the media today is filled with reports of ethnic cleansing campaigns, civil wars, anarchy, and brutal dictatorships, there appears to be a trend in many industrialized countries toward restricting the ability of refugees to seek asylum. Many countries are now preventing refugees from entering at their borders, expanding the grounds for denying asylum, and denying refugees social assistance. This shift toward a more rigorous exercise of state sovereignty appears to be

in response to the recent significant increase in the number of asylum seekers around the world. Between 1990 and 1993 the number of asylum seekers in the European Community jumped from 320,000 to

The Universal Declaration of Human Rights provides that "everyone has the right to seek and enjoy in other countries asylum from persecution."

560,000. The deluge of asylum applicants and the economic and social problems that often follow have, in turn, increased xenophobic attitudes in countries that previously protected those fleeing human rights violations.

Restrictions in Europe

The significant increase in the number of asylum seekers in Germany led that country to reform its asylum laws. In June 1993, Germany enacted amendments designed to deny the right to seek asylum to persons travelling through "safe third countries" or who come from "safe countries of origin." Under the revision, a "safe" country is one "where the legal situation, the application of the law and the general political circumstances justify the assumption that neither political persecution nor inhumane or degrading punishment or treatment takes place." As Germany is

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The European System for the Protection of Human Rights: A System in Motion

by Françoise Roth and Claudia Martín

Now ratified by 30 countries, the European Convention for the Protection of Human Rights and Fundamental Freedoms (the Convention), the Council of Europe's most important achievement, is entering one of the most important phases in its evolution. The Convention's control mechanism has recently experienced its most drastic wave of reforms with the adoption of Protocol No. 9—establishing the right to individual action before the Court—and of Protocol No. 11—merging the European Commission and Court of Human Rights into a single judicial authority.

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Opened for signature on November 4, 1950, the Convention came into force on September 3, 1953 after the tenth instrument of ratification was deposited. Since that time, nine Protocols have come into force, among them, four providing for further rights and liberties.

Currently, the Convention provides for a tripartite control structure: 1) a Commission that considers the admissibility of petitions, establishes the facts, promotes friendly settlements, and, when appropriate, gives opinions on whether a violation of the Convention has taken place; 2) a Court that issues final and binding judgements on cases referred by the Commission, by a Contracting Party concerned, or by individuals per Protocol No. 9; and 3) the Committee of Ministers, the Council of Europe's executive organ, which gives final and binding decisions on cases not referred to the Court.

The adoption of Protocols No. 9 and No. 11 is the final result of a reform process that began in the 1980's. At that time, it was already clear that the European system needed certain changes to maintain its high standards of human rights protection. The reforms were aimed at resolving several of the system's weaknesses. First, the inability of individuals to petition the Court conflicted with the principle of "equality of arms." Second, the Commission was faced with a growing number of applications (in 1993, 2,087 cases were registered as opposed to 404 in 1981), and with increasingly complex cases. In addition, since the system was established to work with ten or twelve member countries, it could not function efficiently with 35 or 40. Finally, there was the time consideration: by 1993, an average case took more than five years to move through the Convention organs.

Protocol No. 9: Reaffirming Individuals as Subjects of International Law

Until Protocol No. 9 came into force in May 1994, only the Commission or interested States could petition the Court. This system had been criticized because, as stated in the Explanatory Report of Protocol No. 9, "the right of access to a tribunal for the purpose of defending one's rights, as well as that of the participation of both parties in proceedings concerning an issue between them, was not fully respected."

The idea of empowering individuals to petition the Court was first mentioned in the draft of the Convention drawn up by the European Movement in 1949. Even though it was eventually rejected, the issue was revived in 1972 and periodically raised on several occasions since. The Protocol was signed by the Committee of Ministers in October 1990 and opened for signature on November 6, 1990. The Protocol provides, *inter alia*, that individuals who lodge complaints with the Commission are empowered to refer the case to the Court within three months after the Commission has reached a decision.

Even though Protocol No. 9 theoretically provides individuals with an unrestricted right to petition the Court, in practice this right is subject to certain limitations. Before the Court can hear a case, a three-member panel must decide, by a unanimous vote, whether to refer the case to the Court. According to Article 5 of the Protocol, the Court will not consider a case "if it does not raise a serious question affecting the interpretation or application of the Convention and does not for any other reason warrant consideration." Rather, the case will be referred to the Committee of Ministers, which will render the final decision. It also is important to emphasize that Protocol No. 9 is an optional protocol to the Convention, which means that it is only binding for those States that ratify it.

In any event, Protocol No. 9 will be superseded by the amending Protocol No. 11 which, in addition to creating a single judicial authority, will render the acceptance of the right of individuals to petition the Court compulsory upon ratification of the Convention.

Protocol No. 11: Towards an European Constitutional Review?

Designed to "enhance the efficiency of the means of protection, to shorten procedures and to maintain the present high quality of human rights protection," Protocol No. 11 amends the Convention by merging the Court and Commission into a single, permanent judicial authority, thus giving the system a more juridical character.

Protocol No. 11 was adopted on May 11, 1994, just one year after the start of negotiations over its construction, an outstanding achievement for a reform of this scale. All of the 30 States party to the Convention have signed it, and as of December 1994, four have ratified it: Bulgaria, Slovakia, Slovenia, and the

United Kingdom. It will enter into force one year after its ratification by all of the States party to the Convention. Estimates are that this will occur in two or three years.

As acknowledged by Andrew Drzemczewski (*see Drzemczewski interview, next page*), Secretary of the Council of Europe's Committee of experts for the improvement of procedures for the protection of human rights, Protocol No. 11 is the result of "a difficult political compromise." Even though the member States generally agreed that a major restructuring of the Convention control mechanism was necessary, "the countries were very much divided as to the way they thought the system should work."



During the drafting of the Protocol, some countries questioned whether the merger of the Court and the Commission would solve the problems arising from the overburdening of the supervisory mechanism. It was argued that within the judicial body contemplated, it would be difficult to maintain a procedure for actively promoting friendly settlements because the binding nature of the new Court's decisions could prevent it from acting in such a way. It was also put forward that subjecting the consideration of inter-State cases to a single judicial body would eliminate the political component necessary to reach solutions in highly political cases.

For the proponents of the merger, the system needed to be a purely and exclusively judicial system, independent of political consideration, where the role of

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the Committee of Ministers would be limited to the supervision of the Court's judgements. They also argued that a single Court system would offer the advantage of avoiding the two-fold examination of facts, admissibility, and merits of the present mechanism, and of simplifying the procedure and therefore shortening the length of proceedings by some eighteen months to two years.

Main features of the New System

The new Court will be permanent and will sit in committees, Chambers (set up on an ad hoc basis), and a Grand Chamber to decide the cases (*see chart, page 7*). Three-judge committees will have the power to declare cases inadmissible. The Chambers will then examine issues of admissibility and the merits of the cases. They may relinquish jurisdiction in favor of the Grand Chamber at any time so long as they have not rendered judge-

ment, but only if the parties to the case do not object. This latter point was the result of political compromise. The jurisdiction of the Committee of Ministers, however, will be limited to the supervision of the Court's judgements.

Following a judgement, only parties to the case may request a re-hearing from the Grand Chamber, which will reexamine the case if it "raises a serious question affecting the interpretation or application of the Convention or the protocols ...or a serious issue of general importance" (Article 43 of Protocol No. 11). This was basically aimed at insuring the consistency of the Court's case-law.

In addition, the right of individual petition before the Court will be guaranteed without any restriction, provided that the petition satisfies the criteria for admissibility.

The adoption of Protocols No. 9 and No. 11 can certainly be seen as a "reaffirmation of the commitment by Council of

Europe members to securing human rights" (Jeremy McBride, *A New European Court of Human Rights*, Interights Bulletin, Vol.8 No.2, p.48). It could be argued, however, that setting up a rigid and highly sophisticated procedure could curtail the ability of the system to deal with massive and gross violations of human rights. Moreover, with the states of Central and Eastern Europe ratifying the Convention, the European system for the protection of human rights faces a new dimension as these countries are at an early stage in the consolidation of their democratic governments. ☹

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Before 1989, every country that joined the Council of Europe had fully accepted the control mechanism of the Convention, i.e., the right to individual application before the Commission and the compulsory jurisdiction of the Court. As a consequence, when the new countries applied, in order to be "democratic," they had to accept the same standard. In practice now, although a country can legally ratify the Convention without making the optional declarations, in fact politically, it is inconceivable for a state not to make a commitment to do so when joining the Organization.

Q. Does the Court use differing standards when deciding violations of human rights in different countries, in Turkey or Northern Ireland, for example?

A. The Court has no double standard. However, the fact that the Commission came out with a friendly settlement concerning allegations of torture with respect to Turkey at a time when the Court's jurisdiction had not been accepted by Turkey, and the fact that the Committee of Ministers, unsatisfactorily in the eyes of most outside observers, took into account political considerations, may indeed put into disrepute the Convention mechanism. I think that there are defects in our system that one

has to accept because intricate, non-judicial, mechanisms exist.

Perhaps a positive aspect needs underlining. In the only case to-date concerning the finding of a violation of Article 3 of the Convention, *Ireland v. U.K.*, the Attorney General of the defendant state promised that the five interrogation techniques will never be used again.

I suspect that Protocol No. 11 is the end of a long process rather than something that will take off or again be amended in the near future.

Q. The new control mechanism established by Protocol No. 11 is very jurisdictional and rigid. How do you think the Council of Europe will deal with gross or consistent violations of human rights under such a system?

A. There would be a technical finding of the violation by the Court. This would be objective in terms of political and other considerations not coming into play. There would be a clear situation where, if the court were to find a country in violation of the Convention, it would be for

the Committee of Ministers, the political organ, to decide what to do with the country that is not prepared to abide by the Court's findings (i.e., suspend or exclude it from the Organization). It may also have to take up certain functions, like those of the Inter-American Commission on Human Rights, in relation to matters not discussed in the negotiation process. The juridical system, as such, does prevent major, gross violations from occurring, but the assumption is that you are in a democratic state. But assuming that something very bad occurs, it may or may not be helpful. Time will tell.

Q. How do you see Protocol No. 11 in the evolution of the Organization?

A. I suspect that Protocol No. 11 is the end of a long process rather than something that will take off or again be amended in the near future. We are going into uncharted waters. The Council of Europe is going to go through a difficult period of trying to maintain high, sophisticated human rights standards. Protocol No. 11 will have to be the anchor which holds the Organization down to certain democratically accepted, civilized standards. If it fails, the Organization may well have to change the nature of its existence as we understand it. This is our challenge for the next millennium. ☹