European Court of Human Rights

The European Court of Human Rights (ECHR) is an organ of the Council of Europe and, more broadly, of the European regional human rights system. Located in Strasbourg, France, the ECHR was set up to protect the rights enumerated in the European Convention for the Protection of Human Rights and Fundamental Freedoms. While its mandate thus extends beyond strictly transitional justice issues, it has played an important role in adjudicating claims concerning such issues as property restitution, lustration, and dictatorial- and conflict-related human rights violations. The international normative framework of transitional justice is growing, resulting in human rights norms and mechanisms playing an increasingly vital role (Brems 2011).

Political Background

The Council of Europe was established on 5 May 1949 with the goal of promoting democracy, human rights, the rule of law, and unity in post-World War II Western Europe. Though it would eventually grow to include forty-seven states (at this writing), it had only ten founders: Belgium, Denmark, France, Ireland, Italy, Luxembourg, the Netherlands, Norway, Sweden, and the United Kingdom. On 4 November 1950, its members adopted the European Convention for the Protection of Human Rights and Fundamental Freedoms, an international treaty in which state parties agree to secure the enumerated civil and political rights to all persons within their jurisdiction, regardless of citizenship. It went into force in 1953. The first court of its kind, the ECHR was founded in January 1959 as the judicial enforcement mechanism for this emerging European human rights system.

Mission, Organization, and Activity

The ECHR rules on applications alleging violation of the rights in the European Convention filed by individuals, states, and non-governmental organizations. For applications to be admissible, domestic remedies must be exhausted, the allegations must concern rights defined in the Convention, the complaint must come within six months of the final decision of the relevant domestic body, the

applicant must have been a direct and personal victim of the violation and have suffered a significant disadvantage, and the complaint must be lodged against a state party to the Convention.

At this writing, the ECHR is composed of forty-seven judges, one per member state. Each state provides a list of three candidates to the Parliamentary Assembly of the Council of Europe, which elects one for a non-renewable nine-year term. The judges are independent and do not represent their state of origin. Cases may be heard in four different formations: a single judge, a three-judge Committee, a seven-judge Chamber, and in exceptional cases, a Grand Chamber of seventeen judges. The Council of Europe provides the Court's budget, which in 2018 amounts to 71, 670, 500 million Euros.

The ECHR's jurisprudence has reflected its concern with sustaining the support of its member states, seeking to balance effective international human rights supervision with respect for member states' autonomy to make choices within their particular domestic socio-cultural and political contexts. With high rates of compliance with its binding rulings, the ECHR's approach has proved effective. The Court has been strengthened over time, along with the role of victims in its processes. Its jurisdiction also grew with the expansion of the Council of Europe's membership. Each applicant for membership has to prove that it is a genuine democracy, that it respects the rule of law and human rights, and that it will collaborate sincerely and effectively with the Council in these areas.

While growth in membership occurred over the post-war decades, the ECHR faced a significant challenge in the post-Cold War period, when the Council of Europe expanded to include many of the formerly communist countries of Central and Eastern Europe. This enormously increased the system's administrative burden, as applications rose dramatically. The ECHR initially existed as part of a two-tier system, where applications were filed with the European Commission of Human Rights, an independent body of experts (one per member state), which would review the applications. If a friendly settlement could not be found, the Commission could issue a report of its opinion. If this did not lead to

state compliance, the case could be referred to the Court. In 1994, significant restructuring was proposed, and in 1999, Protocol No. 11 to the Convention came into force, resulting in "the new Court," which works full time. The Commission was dissolved into the ECHR, whose jurisdiction was also made compulsory (previously, states could participate in the Commission without participating in the ECHR). In 2010, Protocol No. 14 entered into force, with the goal of guaranteeing the ECHR's efficiency in the long term. June 2013 saw Protocol 15, which makes explicit reference in the preamble to the principle of subsidiary and margin of appreciation, is now in force. Protocol 15 reduces from 6 to 4 month the time limit to make applications to the Court from the date of the final domestic decision. Protocol 16, in force in 2018, requests the Court to give advisory opinions on questions of principles relating to the interpretation or application of rights and freedoms enshrined in ECHR and protocols. Concerning the Court's workload, the 2017 statistics show that the new system for Single-Judge formation that was introduced in Protocol 14 (noted above) and was finally adopted to provide reasoning for the rejection of an application was a welcome feature. In 2017, 63,350 applications were allocated to a judicial formation, and 49,400 of these were identified as Single-Judge cases likely to be declared inadmissible (Council of Europe webpage). Also in 2017, 85,951 applications were disposed of judicially (Council of Europe webpage). Applications pending before the Court decreased over the year, by 29% from 79,750 to 56,250 (Council of Europe webpage). With respect to inadmissibility, it is important to note that the European Court of Human Rights can only deal with events that occurred after the entry into force of the European Convention on Human Rights for the state concerns. An interpretation of the European Convention on Human Rights' provisions that overcomes this hurdle of temporal jurisdiction has been advanced. But the temporal jurisdiction of the European Court of Human Rights continues to have implications for transitional justice when, for example, compensation for persecution during the predecessor state's rule is being sought and is denied on grounds of temporality.

Given the large number of newer members who had undergone recent regime change or violent struggles with minorities, these cases have included significant transitional justice issues such as, property restitution, lustration and human rights violations within contexts of dictatorship and conflict.

Property Restitution

The vast majority of cases that have been heard by the ECHR in the realm of transitional justice have related to unresolved property disputes. Under the broad umbrella of property restitution, two finite sets of cases can be distinguished.

One set of complaints has been rooted in the failure of certain Central and Eastern Europe states to resolve disputes over properties that were nationalized or redistributed under communist rule and/or during settlements that accompanied the end of World War II. Since the Court can only rule on violations that have taken place after a given state has acceded to the Council of Europe, restitution-related complaints have not focused directly on the legality of property acquisitions under communist rule. Rather, they have attended to the failure of certain post-communist governments to effectively and justly resolve communist-era property disputes. As the governments of Poland and Romania (see separate entries) both failed to introduce explicit restitution legislation during the first decade of post-communist rule, citizens of those states have lodged a particularly large number of complaints.

Romania's first post-communist governments rejected public calls for action on restitution, on the grounds that Romania faced more pressing economic concerns. Despite the absence of explicit restitution legislation, local courts in Romania still proved willing to hear restitution claims throughout the early 1990s. This judicial autonomy was rejected by Romania's governing elites in 1994, however, and the country's prosecutor general moved to annul all decisions that had been handed down by local courts over the previous years. By way of response, Romanian citizens reverted to Strasbourg, complaining that there was no legal basis for the Romanian government's annulment of prior court decisions. When the first ECHR judgment of such a complaint was handed down in 1999, the Court

agreed that the right of Dan Brumărescu to a fair trial of his restitution claim had been violated, along with his right to property. The Court ordered that Brumărescu's property be returned or significant compensation be paid. This first case set a precedent for the Court's rulings on similar complaints and, by 2004, the ECHR had instructed the Romanian government to pay out a total of 4.6 million Euros in compensation (Stan 2006). While Romania did ultimately introduce effective restitution legislation in 2001, the ECHR continued to hear cases from those Romanians whose cases were not being resolved efficiently at the national level. By 2010, around 1,500 near-identical Romanian complaints lay before the ECHR. In response to that backlog, the Court chose to invoke its 'pilot judgment' procedure. This mechanism sees ECHR judges identify structural arrangements within a given state that are giving rise to repeated violations of the European Convention. The Court then calls for the offending states to introduce domestic reforms that will resolve all pending cases.

The pilot-judgment procedure was first invoked by the ECHR in response to a restitution complaint lodged by Polish citizen Jerzy Broniowski, whose family had lost its land when they were forced to relocate to Poland from the Soviet Union, as part of a post-war settlement. When the Court's final judgment on the so-called "Bug River" case was handed down in 2005, ECHR judges found that there had been a violation of Broniowski's right to property and, in a friendly settlement, he was awarded due compensation. The Court also noted that, since 80,000 Polish citizens found themselves in the same position as Broniowski, the Polish state should introduce domestic reforms that would allow for those cases to be treated at the national level. The Polish government responded by duly introducing new legislation, which served to resolve pending cases of a similar nature (Brems 2011).

Alongside complaints heard from citizens of post-communist states, the ECHR has also heard a second set of restitution cases, which relate to property disputes stemming from the 'frozen conflict' in Cyprus (see entry on Turkey). According to the International Crisis Group (2010), almost half of the Cypriot population lost property between 1963, when inter-communal conflict broke out, and 1974,

when Turkey occupied northern Cyprus. Population displacements that accompanied the Cypriot conflict have left behind a legacy of running disputes over the ownership of properties that were 'abandoned' by ethnic Greeks, who fled to the south during the conflict, and ethnic Turks, who fled to the north. Since the end of armed hostilities, the (Greek) Republic of Cyprus has continued to recognize Turkish Cypriots as the legal owners of any property that they were forced to leave behind, although it has placed their properties under the control of the Cypriot Interior Ministry. The (unrecognized) Turkish Northern Republic of Cyprus, meanwhile, has claimed control over any properties that were left by Greek Cypriots and allocated those properties to displaced Turkish Cypriots. The latter, in turn, have been asked to renounce claims to land that they held in the south.

Given the lack of agreement between north and south over the question of property rights, Cypriots began to turn to international courts (Williams 2010). The ECHR was first called to rule on a Cypriot complaint in the case of *Loizidou v. Turkey* (1996). In a landmark decision, the Court ruled that, in practice, Turkey controlled northern Cyprus and, as such, it was responsible for any property violations committed there. The Court also argued that, since the Turkish Northern Republic of Cyprus was not an internationally recognized authority, its decision to confiscate and redistribute properties abandoned by Greek Cypriots had no legal foundation. Consequently, when the Court found that the applicant had been denied a right of access to her property, the Turkish state was ordered to pay compensation. Since the Loizidou case, the Court has continued to hear complaints from Greek Cypriots against Turkey, continued to find in favor of the applicants, and continued to call for Turkey to compensate the applicants. While Turkey has appealed against a number of those decisions, the Turkish Northern Republic of Cyprus has responded to the Court's call for the introduction of a domestic remedy that will address the compensation claims of Greek Cypriots at the national level. Specifically, in 2005, the Turkish Northern Republic of Cyprus established the Immovable Property Commission. In a 2010 decision, the ECHR recognized the legitimacy of the Commission as a

compensatory body and indicated that it would no longer hear cases from Greek Cypriots unless they had first brought their cases before the Commission.

Lustration

A second area in which transitional judicial measures have been challenged before the ECHR is in the vetting and lustration of public officials. In contrast with restitution complaints, which have been lodged in the thousands, only a handful of lustration cases have been brought before the Strasbourg court (see entries on Lustration and Purges). This is, in part, due to the fact that only certain Central and Eastern European states have demanded that senior public officials be vetted for collaboration with communist-era structures of repression. It is also due to the fact that, where lustration laws have been introduced, that legislation appears to have been consistent with the principles laid down in the European Convention on Human Rights. This consistency has been made clear on the few occasions in which the ECHR has been asked to rule on lustration cases; in its decisions, the Court has not issued objections to the legitimacy of the lustration laws in question. Rather, it has simply raised concerns over the way in which those laws have been implemented (Horne 2009).

One set of procedural concerns has related to the right of European citizens to a fair hearing of their cases at the national level (Article 6.1 of the European Convention). Specifically, in 2007 and 2008, the Court found that the Polish state had violated this right when managing the respective lustration cases of Wanda Bobek, Tadeusz Matyjek, and Zbigniew Luboch. When initial hearings of these cases were run in Poland, each of these applicants was accused of lying about their alleged collaboration with the communist-era secret services and so, under the terms of Poland's 1997 vetting law, each faced the prospect of being suspended from public life for a period of ten years. The respective applicants then complained to Strasbourg that they had not received a fair trial in Poland, since they had not enjoyed the same access as their prosecutors to the secret service files that were used as the evidential basis for their respective prosecutions. In each case, the Court found in favor of the

plaintiffs and insisted that the Polish state pay the applicants' legal fees. These decisions built upon precedent that had been set in 2006, when the Court reached a similar conclusion in the case of *Turek v. Slovakia*.

A second set of objections raised by the ECHR in reference to lustration and vetting relates to the scope of lustration laws. These objections were first made manifest in the Court's treatment of the cases of *Sidabras and Džiautas v. Lithuania* and *Rainys and Gasparavičius v. Lithuania*, which challenged Lithuania's implementation of the KGB Act, a 1999 law that barred former secret service officers from holding specific public and private positions (see entry on Lithuania). Each of four the complainants had worked for the Lithuanian branch of the KGB during Soviet times. Consequently, when the KGB Act came into force, Sidabras and Džiautas were dismissed from the positions that they held in public organizations. They were also banned from holding public positions and various private sector posts, for a period of ten years. Rainys and Gasparavičius, meanwhile, were both dismissed from their positions as private-sector lawyers and, equally, barred from holding specific public and private sector positions until 2009. In response to complaints brought by the two sets of parties, the ECHR found that while the Lithuanian state was entitled to bar certain individuals from holding public posts, it was not justified in depriving the applicants of their right to seek work in the private sector. Consequently, Lithuania was found to have violated Articles 14 (anti-discrimination) and 8 (respect of private life) of the European Convention and it was ordered to pay damages to the complainants.

Human Rights

The third area in which the ECHR has had an impact on matters of transitional justice is in the processing of cases that relate to dictatorial and conflict-based human rights violations. As suggested above, complaints should only be heard by Strasbourg after all domestic remedies have been exhausted. However, where individuals are able to demonstrate that they have been systematically denied effective remedies in their home states, their cases may be deemed directly admissible to the ECHR. Members of

Turkey's Kurdish minority succeed in making such a claim in the mid-1990s, in relation to violations allegedly committed by the Turkish state during the intensification of its armed conflict with the Kurdistan Workers' Party (commonly known as the PKK).

The first Kurdish case directly admitted by the ECHR was that of *Akdivar and Others v. Turkey* (1996), which pertained to claims that Turkish authorities had condoned the burning of a Kurdish village. The willingness of Strasbourg to hear the case prompted a flood of further applications from Kurds. As Başak Çalı (2010) argues, the Court's decision to directly hear these complaints created a practical problem; since the cases had not been effectively investigated and tried in Turkey, Strasbourg had little evidential basis upon which it could build its assessment of the cases in question. The response from Strasbourg was to send fact-finding teams to Turkey. Although the teams complained about a lack of cooperation from Turkish officials, they were able to review certain documents and summon witnesses from the government and from Kurdish villages in southeast Turkey. Based on the evidence that emerged from those missions, the ECHR found that Turkish officials had failed to respect the rule of law in its fight against terrorism. Turkish authorities were reluctant to recognize the legitimacy of the ECHR processes, but pressure from the European Union in wake of the decisions led to the introduction of structural reforms that addressed a number of the violations. Specifically, from 2004, compensation was provided to those who were found to have suffered "losses resulting from terrorism and from measures taken against terrorism" (Çalı 2010).

From 2005, the ECHR also proved willing to judge cases of violations that were brought against the Russian Federation by those affected by the armed conflict in Chechnya (see entry on Russia). Although Russia tried to argue that the Chechen claimants had failed to exhaust domestic remedies, ECHR judges found that neither civil nor criminal processes in Russia had afforded Chechens effective legal redress for the grave human rights violations they had suffered (allegedly at the hands of the state). The Court's findings on diverse conflict-related crimes in Chechnya have been decisive and

damning (Leach 2008). Between 2005 and 2008, ECHR judges found that Russian authorities were responsible for violating Chechens' right to life in thirty-three cases (out of thirty-seven heard). In twenty-six cases, the Convention's prohibition on torture and degrading treatment was found to have been violated. The right to liberty and security was also seen to have been violated in twenty-four of the cases brought forward. Given that Russian authorities proved reluctant to cooperate with the ECHR in processing the complaints that Chechens brought to Strasbourg, it is perhaps surprising that the Russian government has in fact shown a willingness to pay the 2,571,343 Euros in damages that were awarded to victims by the ECHR. In fact both Turkey and Russia have been parties to a series of ECHR case concerning enforced disappearances. The European Court of Human Rights has fine tuned its approach in the former, to apply in the latter, Russian cases. The test now places the burden of proof on the state to show it was not behind the disappearance, which can be a violation of torture, inhuman and degrading treatment. Enforced disappearances are at the center of the *Janowiec and Others v Russia* case concerning the Katyn massacre. The lack of temporal jurisdiction meant that the Polish victims are still not recognized. Free speech has become an important transitional justice issue. *Vajnai v Hungary* concerned the criminalization of the five-pointed red star, found to be a violation of the freedom of expression by the European Court of Human Rights which claimed

> Almost two decades have elapsed from Hungary's transition to pluralism and the country has proved to be a stable democracy . . . It has become a Member State of the European Union, after its full integration into the value system of the Council of Europe and the Convention. Moreover, there is no evidence to suggest that there is a real and present danger of any political movement or party restoring the Communist dictatorship.

Latvia's exclusion of active members of the former Communist Party, the Court made clear that the transitional justice context acts as a strong mitigating factor in *Zdanoka v Latvia*. Time does play a role.

As it passes, such measures restricting freedoms can no longer be justified, they are not indefinite. This is part of the concept of 'militant democracy', measures that address the threat of persecution and terror by curtailing certain rights and freedoms, such as the freedom of expression or participation in civil service/public life

Conclusion

The significant enlargement of the Council of Europe in wake of the Cold War has given rise to an increase in the scope and number of cases being brought before the ECHR. A subset of those cases has attended to issues of transitional justice. Specifically, the ECHR has become both a court of first instance for conflict-related human rights violations and a court of last resort for questions of property restitution and lustration in Central and Eastern Europe. Despite its increasing activism in the realm of retributive justice, the Court's role as an institutional vehicle for transitional justice is ultimately limited by the fact that human rights violations committed under the auspices of communist rule cannot be judged directly, since they took place prior to the accession of Central and Eastern European and former Soviet states to the Council of Europe. Consequently, while the ECHR can be considered an established institutional actor in the realm of transitional justice, it should also be considered a constrained actor.

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Cross references: European Union; Law of armed conflict/International humanitarian law; Lithuania; Lustration; Poland; Purges; Restitution of Property; Romania; Russia; Turkey; Vetting.

Further Readings:

Başak Çalı. 2010. The Logics of Supranational Human Rights Litigation, Official Acknowledgment, and Human Rights Reform: The Southeast Turkey Cases before the European Court of Human Rights, 1996–2006. *Law & Social Inquiry* 35(2): 311-337.

Brems, Eva. 2011. Transitional Justice in the Case Law of the European Court of Human Rights. *The International Journal of Transitional Justice* 5(2): 282-303.

Buyse, Antoine.

Council of Europe, https://www.coe.int/en/web/human-rights-convention/

Fijalkowski, Agata

Fijalkowski, Agata and Raluca Grosescu.

Horne, Cynthia M. 2009. International Legal Rulings on Lustration Policies in Central and Eastern Europe: Rule of Law in Historical Context. *Law & Social Inquiry* 34(3): 713-744.

International Crisis Group. 2010. *Cyprus: Bridging the Property Divide*. Europe Report n. 210, available at: http://www.crisisgroup.org/~/media/Files/europe/turkey-cyprus/cyprus/210%20Cyprus%20-%20Bridging%20the%20Property%20Divide.pdf (accessed on 18 July 2011).

Leach, Philip. 2008. The Chechen Conflict: Analysing the Oversight of the European Court of Human Rights. *European Human Rights Law Review* 6: 732-761.

Stan, Lavinia. 2006. The Roof over Our Heads: Property Restitution in Romania. *Journal of Communist Studies and Transition Politics* 22(2): 180-205.

Williams, Rhodri C. 2010. Demopoulos v. Turkey (Eur. Ct. H.R.), Introductory Note by Rhodri C. Williams. *International Legal Materials* 49(3): 816-849.

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