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978-0-521-60859-6 - The European Convention on Human Rights: Achievements,
Problems and Prospects

Steven Greer

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THE EUROPEAN CONVENTION ON HUMAN RIGHTS

This book critically appraises the European Convention on Human Rights as it faces some daunting challenges. It argues that the Convention's core functions have subtly changed, particularly since the ending of the Cold War, and that these are now to articulate an 'abstract constitutional model' for the entire continent and to promote convergence in the operation of public institutions at every level of governance. The implications – from national compliance to European international relations, including the adjudication of disputes by the European Court of Human Rights – are fully explored. As the first book-length socio-legal examination of the Convention's principal achievements and failures, this study not only blends legal and social science scholarship around the theme of constitutionalization, but also offers a coherent set of policy proposals which both address the current case-management crisis and suggest ways forward neglected by recent reforms.

STEVEN GREER is Professor of Human Rights at the School of Law, University of Bristol. He has published widely and has also acted as consultant to various organizations, including the Council of Europe.

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To my parents, Crawford and Marie Greer

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FOREWORD

The European Convention on Human Rights, the case law of the Strasbourg institutions and the degree of success with which, for all its problems, the Convention system has met in ensuring respect for fundamental rights in Council of Europe member states are subjects that have attracted much comment and analysis. To this great mass of scholarship, Professor Greer brings a work that stands out in several respects. This is neither a handbook nor a textbook. It is instead a thoroughgoing argument for the constitutionalization of the Convention and its Court, which the author portrays not as a transformation but rather as consolidation. This book comes at a particularly crucial moment for the Convention system. While its history is in fact one of continuous growth, adaptation and reform, the stakes for Europe and its human rights protection system have never been higher. In the matter of fundamental rights, the Strasbourg Court is positioned at the apex of all the national judicial systems in Europe with just one exception. Its ability to function effectively, i.e. to rule authoritatively on the Convention and to administer justice to those who come before it is vital not just to the Strasbourg strand, but to the whole web of institutions and procedures that uphold and enforce the substance of the Convention throughout the *espace juridique européen*. The year 2006 is one of anticipated and much-awaited change, with the expected entry into force of Protocol No. 14, which will effect certain valuable procedural reforms, giving the Court some additional breathing space. But the reflection process continues, steered by the Committee of Wise Persons, an eminent and expert group tasked with mapping the longer road to viability and effectiveness in the years ahead. Professor Greer's arguments and proposals will surely command much attention from all of the actors in this process: national authorities, the institutions of the Council of Europe, the Court itself, and civil society.

In keeping with the distinctive identity of the system, the author devotes much of this book to the evolving purpose and continuing effect

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of the Convention at national level. The impressive second chapter takes the reader into territory that is rarely visited by Convention scholars, where traditional legal analysis, however skilful, will not in itself suffice. Mindful of the difficulty of devising a methodologically sound and scientifically valid means of assessing national rates of compliance with the Convention, the author draws upon scholarship spanning several disciplines to present the reader with an assessment of and possible explanation for the degree to which Council of Europe states have successfully integrated the Convention into their national legal and political orders. In a nicely-turned phrase, the author observes that while the Convention was not the architect of the process of democratization in central and eastern Europe, it can play the role of interior designer. Although more comparative and cross-disciplinary inquiry will be required in this field, this book makes a major contribution to the endeavour.

The present state of the Convention system is described and analysed with great insight. In response to the near-crisis of the individual justice model, the author maps the way towards a more stable scenario by means of improved compliance at national level, modification of the current processes and fresh institutional innovation. Regarding each of these vectors, he advances arguments of considerable force and originality. Professor Greer writes as a friend of the Convention system, speaking with the candour that characterizes true friendship. His call to the Court to rearrange the ‘primordial soup’ of the principles of interpretation is delivered with the audacity of an ally who seeks to speed the institution towards its constitutional destiny.

I might add that since I have myself tried for some time to nudge the Court in the direction of a more constitutional future, it has given me great pleasure to encounter an ally who transcends by far the ‘primordial soup’ of those critics who either are content to advocate different outcomes of individual cases or else want to inflict ideologies on the Court that were never democratically discussed or approved.

I commend Professor Greer for this excellent book, and commend it to all those to whom the Convention’s present and future are entrusted.

Luzius Wildhaber

President, European Court of Human Rights

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PREFACE

This book critically appraises the European Convention on Human Rights at a time of considerable change. Unlike the many excellent textbooks now available it does not seek to offer a comprehensive description of relevant institutions, procedures and norms. Nor does it attempt to contribute to every issue-specific debate conducted in the periodical literature. Instead, it discusses both the key successes and a cluster of systemic problems which require resolution if the Convention is to be as successful as it could, and should, be in the twenty-first century. Some of the latter derive, ironically, from what is universally said to be its most notable achievement – the individual applications process – and others from the political, economic, constitutional, and legal environment in Europe, radically transformed by the post-1989 upheavals. Yet others stem from the way in which the European Court of Human Rights has interpreted both the Convention text and its own role. There is wide consensus on both the nature of some of these problems and how they should be resolved. Others provoke intense controversy and sharp differences of opinion. Yet others have been largely, and some even entirely, ignored.

Six core issues, organized around the theme of ‘constitutionalization’, are considered in the following pages. First, Chapter 1 argues that, at the close of the twentieth century, the original *raison d’être* for the Convention underwent subtle, yet fundamental, change. At its foundation the Convention provided both an expression of the identity of western European liberal democracy, self-consciously contrasted with the rival communist model of central and eastern Europe, and also a means by which states could seek to defend each other from the internal threat of authoritarianism by bringing complaints to an international judicial tribunal. However, at the beginning of the twenty-first century, the Convention’s principal roles are to articulate an ‘abstract constitutional model’ for the entire continent – including and especially for the newly-admitted post-communist states – and to provide a device for

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promoting convergence in the deep structure and function of public institutions at all levels of governance in Europe.

The rest of the book is an attempt to discern what this might mean. Given that each member state, likely soon to be joined by the EU, bears the primary responsibility for the realization of Convention values within its jurisdiction, the second of the core issues, considered in Chapter 2, concerns how compliance might be measured and which factors most promote it. Chapter 3 addresses the third issue, the Court's case overload crisis, which is unlikely to be solved by the Protocol 14 reforms, scheduled to come into effect in late 2006 or early 2007. With an annual average of 45,000 individual applications, and only 800–1,000 judgments a year, the right of individual petition has become, contrary to the received wisdom, the Convention's biggest problem rather than its greatest success. Further changes are, therefore, urgently required, whether or not the existing institutional structure is altered. Two further difficulties concern the method of adjudication and the substantive case law. Chapter 4 argues that the coherence and impact of the Court's judgments could be improved if the former showed greater fidelity to the Convention's primary constitutional principles, while Chapter 5 pursues the logic of this analysis in the jurisprudence. Chapter 6 considers the sixth issue – the institutional changes which are required if Convention compliance is to be improved. It argues that, in addition to making all the Court's judgments binding on all member states, including their courts, a European Fair Trials Commission should be created. However, it also maintains that, in the final analysis, the best prospects for improving national compliance lie in the creation of National Human Rights Institutions, established according to a common model, which would provide the Court and the European Commissioner for Human Rights with reliable information about systemic national problems, and which could also be empowered to bring test cases to the Court, either through the Commissioner or on their own initiative. Finally, Chapter 7 seeks to weave the conclusions of the previous chapters into a coherent summary of the book's main themes, arguments, and proposals.

As with virtually all Convention scholarship, a key data source for this study has been the case law of the European Court of Human Rights, and, to a lesser extent, that of the European Commission of Human Rights (abolished in 1998). The *European Human Rights Reports* (EHRR), the Council of Europe's *Decisions and Reports* (DR) and the *Yearbooks of the European Convention on Human Rights* (YB) have

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provided particularly useful collections of the most significant decisions and judgments. However, for two reasons, no attempt has been made to cite this now substantial body of jurisprudence comprehensively, particularly in Chapters 4 and 5 where the temptation to do so was strongest. First, Convention case law typically takes the form of abstract principle applied to facts. Rarely, if ever, does it amount to what jurists in the common law tradition would recognize as an integrated system of judicially constructed ‘legal rules’. This is an inevitable consequence not only of the highly abstract character of Convention rights and principles, but also of the fact that the concrete elements of any judgment will probably only apply to the specific respondent state because the precise legal and factual matters at issue are unlikely to be reproduced in all relevant particulars elsewhere. Unlike common law systems, where each judicial decision can plausibly be regarded as a component piece in a complex and integrated legal mosaic, judgments of the European Court of Human Rights tend, therefore, to illustrate how a relevant principle applies to certain facts. It follows that any one or more of several judgments can usually be cited for that purpose. Second, since the Court tends to restate its interpretation of a given principle verbatim in verdict after verdict, there is little need to refer to every occasion on which it has done so. For these reasons, and in keeping with the publisher’s policy for this series, there is, therefore, no table of cases. Furthermore, in seeking answers to the questions raised by this research, the parameters have had to be cast much wider than is typical in most legal scholarship. Relevant contributions from philosophy, history, political science, international relations, and comparative law have also been consulted. My preliminary reflections on some of the core themes appeared in earlier publications, particularly in two short monographs published by the Council of Europe in the Human Rights Files series in 1997 and 2000, and in four articles in 2003, 2004, and 2005, in the *Oxford Journal of Legal Studies*, the *Cambridge Law Journal*, and *Public Law*. Further details can be found in the Bibliography. I am grateful to the respective publishers for allowing up-dated and revised versions of some of this material to be included here.

Without the assistance of a great many people and organizations this book would have been impossible or much more difficult to write. Needless to say, responsibility for the conclusions it contains remains mine alone. However, I would like to express my profound gratitude to the following for their contributions. The British Academy gave the project a flying start by awarding me the ‘Thank-Offering’ to Britain

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Research Fellowship which I held at the University of Bristol in the academic year 2002–3, funds for which were generously provided by Jewish refugees who fled anti-semitism in continental Europe in the 1930s. I was also fortunate to receive a British Academy Small Research Grant which helped defray the costs of two visits to Strasbourg, in June 2003 and January 2004, when key players in the debate about the reform of the Convention system were interviewed. The University of Bristol not only contributed to the costs of these trips, and to a visit to London in 2004 when representatives of Amnesty International were interviewed, but also enabled me to accept the ‘Thank Offering’ Fellowship, and generously granted a further period of study leave in the academic year 2005–6 to hasten the project’s completion. By commissioning the two monographs referred to in the previous paragraph, the Council of Europe helped inspire this study, provided and permitted the publication of some statistics otherwise not in the public domain, and also kindly facilitated three visits to Strasbourg where I was received with great courtesy and hospitality. David Crowe, of the Information and Publications Support Unit in the Council of Europe’s Directorate General of Human Rights, not only expertly edited the Human Rights Files monographs, but also went to a great deal of trouble to arrange two of these visits, showed great kindness and friendship throughout my time there, and responded positively and promptly to various queries since. The Universities of Bristol, Ulster and Essex, and the Society of Legal Scholars and the Socio-Legal Studies Association, together provided no less than nine opportunities for embryonic versions of some of the ideas presented here to be exposed to probing questions and constructive criticism from colleagues in various staff seminars or conferences. Professor Colm Campbell of the University of Ulster, Professor David Feldman of the University of Cambridge, Professor Martin Lynn, formerly of Queens University Belfast (now sadly deceased), and Professor Malcolm Evans, Professor Rachel Murray, Dr Tonia Novitz, Dr Pat Capps, Dr Julian Rivers, Dr Phil Syrpis, Dr Achilles Skordas, and Chris Willimore of the University of Bristol, either referred me to sources I might otherwise have missed, commented on earlier drafts, enthusiastically debated the issues with me, or simply offered their encouragement and support. Mike Drew assisted with the graphics, Windy Hon and Esther Yee helped edit the Bibliography, and Esther also checked the figures. The Finnish delegation to the Council of Europe kindly invited me to attend a Symposium on the Reform of the European Court of Human Rights,

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held in Strasbourg on 17 November 2003 which provided an illuminating insight into the reform debate. Finola O'Sullivan and her colleagues at Cambridge University Press expertly piloted the project from submission of the initial proposal to publication. Finally, the love and support of Susan, my wife, and Cara, Lucy, and Hope, my daughters, helped, as always, to sustain me.

Steven Greer
Bristol
2006