

## THE EUROPEAN COURT OF HUMAN RIGHTS: ACHIEVEMENTS AND CHALLENGES\*

### Abstract

*Respect for human rights and fundamental freedom is anchored on the sanctity of life and dignity of man. It is an expression of equality of men. It is the core principle of the constitution of every democratic society. Today, the principles have been documented with solemn declaration and undertaking to respect and observe same at national, regional and world over. This work is limited to the European Court of Human Rights, its successes and failures and a call for reform to enhance its productivity in the attainment of the core objectives for which it was established in 1953. The research employs critical content analysis of relevant legislation. It found that the regional court system has enhanced respect for human rights in the region and calls for stiffer sanction for disobedience to the decision of the court.*

**Key words:** *European, court, human, human rights.*

### 1. Introduction

The European Court of Human Rights is a regional court established in 1953. This was after the Statute of Council of Europe of 5 May, 1949 had created the Council of Europe. Article 15 of the Statute authorized the Committee of Ministers to act on behalf of the Council by way of drafting conventions, agreements etc. In pursuance of this mandate, the European Convention on Human Rights was drafted and adopted on November 4, 1950 and entered into force on September 3, 1953. The Convention created the European Court of Human Rights which is the thrust of this work. On 21 January and 23-28 February, 1959, the first members of the court were elected and the court held its first session respectively. It adopted its Rules on 18 September 1959 while its first judgment was rendered on 14 November 1960. The 'new court' was instituted on November 1, 1998 when Protocol No11 to the Convention entered into force. Finally, Protocol No 14 whose aim was to guarantee the long-term efficiency of the court entered into force on June 1, 2010<sup>1</sup>.

The court is based in Strasbourg, France. It has 47 Council of Europe member states that have ratified the Convention. By the Convention, member states agree to secure fundamental civil and political rights not only to their own citizens but also to everyone within their jurisdiction. The court is conferred with the jurisdiction to ensure the implementation and enforcement of the European Convention and its Protocols by the contracting states. And this jurisdiction has been recognized by the 47 member states to the Convention. In 1998, the court became a full-time institution and the European Commission of Human Right which used to decide admissibility of applications was abolished by Protocol II. Notwithstanding the positive impact of Protocol II, the workload of the court remained high among others. Consequently, the contracting states opted for further reform and in May 2004, the Council of Europe Committee of Ministers adopted Protocol 14 to the European Convention on Human Rights. It became effective on June 1, 2010 after it was ratified by all the 47 contracting states to the Convention. The Protocol increased and reinforced the capacity of the court to deal with clearly inadmissible applications. A single judge can reject plainly inadmissible application which previously only committee of three judges could rule on. Although in case of doubt, the single judge may refer same to the committee of three judges. But a single judge cannot examine application against the state which nominated him.

The Protocol also introduced new admissibility criteria one of which is that where an applicant has not suffered significant disadvantage, his application would be declared inadmissible. An application may be lodged by: (a) an individual; (b) a group of individuals; (c) any of the contracting states; (d) two or more of the contracting states. And an application can only be lodged against one or more of the contracting states and no other. The current president of the court is Guido Raimondi of Italy. Andraisi

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\*By **Chinedu Akam IGWE, LL.M, BL**, Lecturer, Ebonyi State University, Abakaliki, Pmb 053, Abakaliki, Ebonyi State Nigeria, Email: Legaljournal2016@Yahoo.Com. PHONE: 07031814067

<sup>1</sup> See generally [www.echr.Coe.int/pages/home.aspx?P=court&c=](http://www.echr.Coe.int/pages/home.aspx?P=court&c=). Accessed 11-03-2016.

Sajo and Isil Karakas of Hungary and Turkey respectively are Vice Presidents. There is provision for an ad hoc judge. He is appointed by the President of the Court from a list submitted in advance by the government concerned when a national judge is unable to sit in the case. Since the inception of the court, it has delivered over 10,000 judgments. Nearly half of the judgments concerned 5 countries namely – Turkey (3,095), Italy (2,312), The Russian Federation (1,604), Romania (1,113) and Poland (1,070). Of the total judgments, the court has found at least one violation of the convention by the Respondent state in 84% of the cases<sup>2</sup>.

## 2. Composition and Jurisdiction of European Court of Human Rights

### 2.1 Composition

The Convention for the protection of Human Rights and Fundamental Freedoms otherwise known as European Convention on Human Rights is the regional legal framework upon which the substratum of the European Court of Human Rights rests<sup>3</sup>. The court was established in the main, to ensure the observance of the engagements voluntarily undertaken by the High Contracting Parties to the Convention and the Protocols thereto. Section II article 19 of the Convention established the European Court of Human Rights on a permanent basis. The court consists of judges equal to the number of contracting parties<sup>4</sup>. The Convention sets criteria for election of judges and restrictions after the election. The judge is required to possess high moral character in addition to either qualifications for appointment to higher judicial office or be jurisconsult of recognized competence<sup>5</sup>. To guarantee the independence of the judges, they sit on the court in their individual capacity and shall not engage in any activity which is incompatible with their independence, impartiality or with the demand of a fulltime office<sup>6</sup>. The court is constituted by election. The Parliamentary Assembly elects members of the court by majority of the votes cast from a list of three candidates nominated by each member states<sup>7</sup>. Membership of the court is tenured upon election for a period of nine years or upon the attainment of the age of 70. However, a judge whose tenure has elapsed and either replaced or yet to be replaced shall continue to deal with such cases as he already has under consideration<sup>8</sup>. In view of this, issue of transfer of a case to another chamber or reconstitution of a chamber arises only in case of death, ill – health, resignation of a judge or in the extreme case, dismissal from office by two thirds majority decision of other judges<sup>9</sup>.

### 2.2 Jurisdiction of the Court

The jurisdiction of the court shall be discussed from the perspective of constitutive and subject matter jurisdiction.

**2.2.1 Constitutive Jurisdiction:** The court in its plenary makes formations to *wit*: Single Judge, Committee of three Judges, in Chambers of seven Judges, and a Grand Chamber of seventeen Judges<sup>10</sup>.

- (a) **Single Judge:** A single judge has the competence to consider application submitted pursuant to article 34 where such a decision can be taken without further examination and either declares it inadvisable or strike it out of the court's list of cases and such decision is final<sup>11</sup>. But he lacks the competence to examine any application against the High Contracting party in respect of which he was elected. Where a single judge declares an application admissible, he shall forward same to a committee or to a chamber for further examination<sup>12</sup>.
- (b) **Committee of Three Judges:** The committee entertains applications submitted under article 34 and may by unanimous vote either (a) declare it inadmissible or strike it out of its cause list

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<sup>2</sup> Overview 1959 – 2004 ECHR, Available [www.echr.coe.int](http://www.echr.coe.int). Accessed 11-03-2016.

<sup>3</sup> The European Court of Human Rights is hereinafter simply referred to as “The Court”.

<sup>4</sup> European Convention on Human Rights, Section 11, article 20.

<sup>5</sup> *Ibid.* Article 21 (1).

<sup>6</sup> *Ibid.* Article 21 (2) (3).

<sup>7</sup> *Ibid.* Article 22.

<sup>8</sup> *Ibid.* Article 23 (1) (2) (3).

<sup>9</sup> *Ibid.* Article 23 (4)

<sup>10</sup> *Ibid.* Article 26 (1)

<sup>11</sup> *Ibid.* Article 27 (10) (2).

<sup>12</sup> *Ibid.* Article 27 (3).

where such decision can be taken without further examination or (b) declare it admissible and render judgment on the merit. The committee only determines the merit of the case if it borders on the interpretation or application of the Convention or the Protocols thereto in respect of a subject of well-established case law of the court. The decision rendered on merit shall be final<sup>13</sup>. However, if the judge elected in respect of a contracting party is not a member of the committee, the court may at any stage of the proceedings invite such judge to take the place of one of the members of the committee. This is moreso where such contracting party has contested the procedure where the committee determined the admissibility or otherwise of the application<sup>14</sup>.

- (c) **Chambers of Seven Judges:** Where a single judge or committee of three judges is unable to take decision on admissibility of individual application submitted to it under articles 27 or 28 respectively; or the committee did not render judgment on merit thereto, a chamber shall decide on both admissibility and merit accordingly. And the decision on admissibility may be taken separately<sup>15</sup>. Again, the chamber has the competence to decide on the admissibility and merit of inter-state applications brought under article 33. The decision on admissibility may be taken separately unless the court, in exceptional cases, decides otherwise<sup>16</sup>. But the chamber may relinquish jurisdiction in certain serious legal issues. One, where the case raises a serious question on the interpretation of the Convention or the Protocols thereto. Two, where the resolution of the question before the chamber might have a result inconsistent with judgment previously delivered by the court. In either of this likely situations, the chamber, unless one of the parties to the case objects, may at any time before it has rendered its judgment, relinquish jurisdiction in favour of the Grand Chamber<sup>17</sup>. In any case where the chamber delivers judgment, it shall be finally and published unless: (i) Where the parties accept that they will not request that the case be referred to the Grand Chamber; or (ii) Three months after the judgment was rendered, no request is made for the reference of the case to the Grand Chamber; or (iii) Where the penal of the Grand Chamber rejects the request upon referral to the Grand Chamber under article 43<sup>18</sup>.

By virtue of article 29 (1) (2), the Chamber has appellate jurisdictional competence in respect of individual applications and competence as court of first instance in respect of interstate applications.

- (d) **The Grand Chamber:** This is the highest formation of the court. It is more of appellate section. It does not entertain applications directly from individuals or High contracting parties. Its powers are exercisable as follows: (a) To determine applications submitted pursuant to article 33 or article 34 where a chamber has relinquished jurisdiction under article 30 or when the case has been referred to it under article 43; (b) To decide issues referred to it by the Committee of Ministers in accordance with article 46 paragraph 4; and (c) To render advisory opinion under article 47. Except on referral to the court by the Committee of Ministers: (a) for the determination of question whether a High Contracting party has failed to fulfill its obligation to abide by the final judgment of the court in any case to which it is a party and (b) to render advisory opinion on legal questions concerning the interpretation of the Convention and the Protocols thereto, the Grand Chamber is deservedly a reserved appellate court.

The Grand Chamber includes the President of the court, the Vice Presidents, the Presidents of the Chambers and other judges chosen in accordance with the Rules of the court<sup>19</sup>. And where a case is referred to the Grand Chamber by way of appeal of the judgment of the Chamber which a panel of five judges has accepted as involving a serious question of interpretation or application of the convention or

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<sup>13</sup> *Ibid.* Article 28 (1) (a) (b) (2).

<sup>14</sup> *Ibid.* Article 28 (3).

<sup>15</sup> *Ibid.* Article 29 (1).

<sup>16</sup> *Ibid.* Article 29 (2).

<sup>17</sup> *Ibid.* Article 30.

<sup>18</sup> *Ibid.* Article 43 (1) (2) (3).

<sup>19</sup> *Ibid.* Article 26 (5).

the Protocol or a serious issue of general importance<sup>20</sup>, no judge in the chamber which rendered the judgment shall sit in the Grand Chamber except the president of the Chamber and the judge who sat in respect of the High Contracting party concerned<sup>21</sup>.

**2.2.2 Subject Matter Jurisdiction:** This deals with various subjects or issues that the court has judicial competence to decide. It must be observed that the subject matter jurisdiction of the court is limited to the interpretation and application of the Convention and the Protocols thereto which are referred to it in accordance with article 33, 34, 46 and 47 of the Convention. The jurisdiction covers the right and freedoms defined in section 1 of the Convention ie civil and political rights guaranteed in the Convention. Some of them include:

(i) **Right to Life:** The Convention acknowledges the right to life of everyone and proceeds to provide that such right shall be protected by law. Article 2 provides:

- (1) Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
- (2) Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:
  - (a) in defence of any person from unlawful violence;
  - (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
  - (c) in action lawfully taken for the purpose of quelling a riot or insurrection.

By section 1, article 2 (1), capital punishment is recognized by the Convention. However, Protocol No 6 to the Convention for the protection of Human Rights and Fundamental Freedoms concerning the Abolition of the Death Penalty 1983<sup>22</sup> partly abolished death penalty. Protocol No. 6, article 1 states: 'the death penalty shall be abolished. No one shall be condemned to such penalty or executed'. But its article 2 preserved death penalty in term of war or imminent threat of war. Subsequently upon the realization and recognition of the fact that right to life is a basic value in a democratic society and that its abolition is essential for the full protection of the inherent dignity of all human beings, the member of states of Council of Europe made protocol No 13<sup>23</sup> for the abolition of death penalty in all circumstances.

The Protocol not only abolished death penalty in all circumstances, it went further to prohibit derogation from its provisions<sup>24</sup>. The Protocol equally prohibits reservation to any of the provisions thereof<sup>25</sup>. In any case of breach of the provision relating to right to life, an individual or High Contracting party may bring application to the court<sup>26</sup>.

(ii) **Prohibition of Torture:** Torture includes inhuman or degrading treatment or punishment<sup>27</sup>. In *M. C. v. Bulgana*<sup>28</sup> a young woman filed a complaint with the police accusing two men of rape. A prosecutor authorized an initial investigation but dropped the inquiry when it was found that the use of force or threats in the commission of the rape was not established beyond reasonable doubt as required by law at the material time, although the victim argued that she was unwilling but unable to resist due to shock and fear. Before the European Court of Human Right, the young woman alleged violations of several European Convention articles including article 3, on prohibition from torture and inhuman or degrading treatment, article 8 on right to respect for private and family life. The court affirmed state's positive obligation to secure respect for private life and extends the obligation to 'apply to the violations

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<sup>20</sup> *Ibid.* Article 43 (1) (2) (3).

<sup>21</sup> *Ibid.* Article 26 (5).

<sup>22</sup> Protocol No. 6 was signed at Strasbourg on 28 April, 1983.

<sup>23</sup> Protocol No 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the abolition of the death penalty in all circumstances signed 2002.

<sup>24</sup> *Ibid.* Articles 1 and 2.

<sup>25</sup> *Ibid.* Article 3.

<sup>26</sup> European Convention on Human Rights, articles 33 and 34.

<sup>27</sup> *Ibid.* Article 3.

<sup>28</sup> 2003 – III Eur. Ct. H.R.I.

suffered by the young woman' to which the state was under obligation to conduct an official investigation while the court may assess the effectiveness of such an investigation<sup>29</sup>.

(iii) **Prohibition of Slavery and Forced Labour:** The Convention prohibits in absolute term slavery or servitude, forced or compulsory labour. This was held to be one of the fundamental values of democratic societies<sup>30</sup>. One important thing about this provision is that no exception or derogation from it is permissible even in the event of public emergency threatening the life of the nation<sup>31</sup>. In interpreting the provision of article 4 of the Convention, the court is guided by international instruments relevant to the article such as the 1926 Slavery Convention, ILO Convention No. 29<sup>32</sup>.

It must be stated that the court in its interpretation and application of the Convention considers the rules set out in Vienna Convention on the Law of Treaties of 23 May 1969 wherein the court is required to ascertain the ordinary meaning of words in the context of the purpose of the provision. The object of the Convention as a living document should be interpreted to advance effective and practical protection of the rights and freedoms guaranteed therein. Consequently, trafficking in human being which by its very nature is exploitative, punitive and degrading is within the ambit of torture<sup>33</sup> in article 4 of the Convention.

Similarly, the scope and content of slavery may be ascertained with reference to the classical definition of slavery in the 1926 Slavery Convention which defines slavery as 'the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised'. In *Siliadin v. France*<sup>34</sup>, the applicant, an eighteen years old Togolese national worked as domestic servant fifteen hours a day without a day off or pay for several years. The court held that what she suffered amounted to servitude, forced and compulsory labour and not slavery<sup>35</sup>. Unfortunately, the court in *Seguin v. France*<sup>36</sup> defined 'servitude' to mean an obligation to provide one's services that is imposed by the use of coercion, and is to be linked with the concept of slavery:. Again, 'forced or compulsory labour' means 'all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily'<sup>37</sup>. The court considers 'disproportionate burden'<sup>38</sup>, 'threat of penalty'<sup>39</sup> etc to determine cases of forced or compulsory labour.

Article 4 (3) of the Convention excluded certain works and services from the concepts of servitude, forced or compulsory labour. It provides:

3. For the purpose of this Article the term 'forced or compulsory labour' shall not include:

- (a) Any work required to be done in the ordinary course of detention imposed according to the provisions of Article 5 or during conditional release from such detention;
- (b) Any service of a military character or, in case of conscientious objectors in countries where of compulsory military service;

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<sup>29</sup> *Osman v. United Kingdom*, 1998 – VIII Eur. C.H.R 3124; Lee Hasselbacher, 'State Obligations Regarding Domestic Violence; The European Court of Human Rights, due Diligence, And international Legal Minimums of Protection' North Western Journal of International Human Rights, Vol.8 Issue 2, 2010, P. 13.

<sup>30</sup> *Siliadin v. France*, No. 73316/01, ECHR 2005-VII *Stummere v. Austria* (GC), no. 37452/02, ECHR 2011.

<sup>31</sup> *C. N. v. The United Kingdom*, no 4239/08, 13 November 2012 *Stummer v. Austria* supra.

<sup>32</sup> *Forced Labour Convention*. See also *Van der Musselle v. Belgium*, 23 November 1983, Series A no. 70; Council of Europe Convention on Action against Trafficking in Human Beings and the Protocol to prevent, Suppress and Punish Trafficking in Persons, especially Women and Children Supplementing the United Nations Convention Against, Transnational Organized Crime, 2000.

<sup>33</sup> *M and others v. Italy and Bulgaria* 40020/03, 31 July 2012 *Rautsev v. Cyprus and Russai*, no 25965/04, ECHR 2010 (extracts)

<sup>34</sup> *Supra*.

<sup>35</sup> See also *M. and Others v. Italy and Bulgaria*. *Supra*.

<sup>36</sup> *Seguin v. France* (dec.), no 42400/98, 7 March 2000.

<sup>37</sup> *Van der Musselle v. Belgium* supra. *Grazian – Weiss v. Austria*, no 31950/06, 18 October, 2011 *Stummer v. Austria* supra.

<sup>38</sup> *Van der Musselle v. Belgium* supra.

<sup>39</sup> *C. N. and V. v France* no. 67724/09, 11 October, 2012.

- (c) Any service exacted in case of an emergency or calamity threatening the life or well-being of the community;
- (d) Any work or service which forms part of normal clinic obligations.

In effect, works or services referred during lawful detention or conditional release<sup>40</sup> are excluded from forced or compulsory labour. In *Floroiu v. Romania*<sup>41</sup> where prisoners rendered either paid work or works that do not give rise to remuneration but entitle them to a reduction in their sentence. Under the domestic law, prisoners were allowed to choose between the two types of work after being informed of the condition applicable to each. Consequently, the court held that the work performed by the applicant can be regarded as work required to be done in the ordinary course of detention<sup>42</sup> within the meaning of article 4 (3) of the Convention. Military services<sup>42</sup>, services required during an emergency or calamity<sup>43</sup> and normal civil obligation<sup>44</sup> are excluded.

iv. **Right to Liberty and Security**<sup>45</sup>: Article 5 (1) of the Convention states: ‘Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law...’ In substance, the provision contemplates the physical liberty of a person. It is intended to ensure that no one is deprived of his liberty except as allowed by law<sup>46</sup>. The deprivation of liberty is not limited to the classic cases of detention following arrest or conviction. It can take other numerous forms<sup>47</sup>. In determining whether a person’s liberty has been deprived in a manner inconsistent with the Convention, the court is not bound by the legal reasoning and conclusions of domestic authorities. It undertakes independent assessment of the situation<sup>48</sup>. The starting point is always the concrete situation of the applicant<sup>49</sup>. It suffices that neither the consent of the applicant was voluntarily obtained nor was the deprivation authorized by law in a democratic society<sup>50</sup>. The factors to be considered include the possibility to leave the restricted area, the degree of supervision, control over the person’s movement, the extent of isolation and the availability of social contact<sup>51</sup>. An element of coercion in the exercise of police powers of stop and search is indicative of a deprivation of liberty notwithstanding the short duration of the measure<sup>52</sup>. And the fact that a person is not handcuffed, put in a cell or otherwise physically restrained<sup>53</sup> or is legally incapable of consenting to or disagreeing with the action<sup>54</sup> does not constitute a decisive factor in establishing the existence of a deprivation of liberty. It is therefore unarguable that the question of deprivation of liberty has arisen in a variety of circumstances including:

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<sup>40</sup> *Van Droogenbroeck v. Belgium*, 24 June 1982, Series A No. 50, *De Wilde, Ooms and Versyp v. Belgium* Nos. 2832/66, 2835/66 and 2899/66, 18 June 1971.

<sup>41</sup> *Florolu v. Romania* (dec), no 15303/10, 12 March 2013.

<sup>42</sup> *Bayatyan v. Armenia* (GC), No 23459/03, ECHR 2011, *W. X. Y and Z v. the United Kingdom* as 3435/67 et al, Commission decision of 19 July 1968.

<sup>43</sup> *S. v. Germany*, no 9686/82, Commission decision of 4 October 1986, Dr 39.

<sup>44</sup> *I. v. Norway*, No. 1468/62, Commission decision of 17 December 1963.

<sup>45</sup> *European Court of Human Rights*, Guide on Article 5 of the Convention, Right to Liberty and Security, Publishing @ acgv.coe.int or www.echr.coe.int.

<sup>46</sup> *Creanga v. Romania* (GC), No 29226/03, 23 February 2012., *Engel and Others v the Netherlands* 8 June 1976, series A no 22

<sup>47</sup> *Guzzardi v. Italy*, 6 November 1980 Series A no 39.

<sup>48</sup> *H. L. v. the United Kingdom* No 45508/99, ECHR 2004 – IX, *H. M v. Switzerland* no 39187/98, ECHR 2002-11

<sup>49</sup> *Guzzardi v Italy* supra., *Medredyer and Others v France* (GC), No 3394/03 ECHR 2010.

<sup>50</sup> *Storck v Germany* No 61603/00, ECHR 2005 – V, *Stanev v. Bulgaria* (GC), No 36760/06, 17 January 2007.,

<sup>51</sup> *Ibid.*

<sup>52</sup> *Krupko and Others v. Russia* no 26587/07, 26 June 2011, *Foka v. Turkey* supra. 4, *Gillan and Quinton v. the United Kingdom* no 4158/05, ECHR 2007 – 11, *Shimovolos v. Russia* no 30194/09, 21 June 2011, *Brega and Others v. Moldova* no 61485/08, 24 January 2012

<sup>53</sup> *M. A. v. Cyprus* no 41872/10, ECHR 2013.

<sup>54</sup> *H. L. v. the United Kingdom* no 45508/99, ECHR 2004-IX, *Stanv v. Bulgaria* supra., *Stitukaturov v. Russia* no 44009/05, ECHR 2008, *D. D. v. Lithuania*, no 13469/06, 14 February 2012.

- (e) The placement of individuals in psychiatric or social care institutions;<sup>55</sup>
- (f) Confinement in airport transit zones;<sup>56</sup>
- (g) questioning in a police station;<sup>57</sup>
- (h) Stop and search by the police;<sup>58</sup>
- (i) House arrest;<sup>59</sup>
- (j) Crowd control measures adopted by the police on public order grounds<sup>60</sup>.

In all of these, there was detention otherwise than in accordance with the procedure prescribed by law. These are circumstances whereby detention did not conform to the substantive and procedural rules of national law<sup>61</sup> or international law<sup>62</sup> where appropriate or not in compliance with the prescriptions of the convention. Eg. the court had held that there was violation of article 5 where the authorities had failed to lodge an application for extension of a detention order within the time limited by law<sup>63</sup>. Although the court is primarily concerned with the interpretation and application of the Convention, it does in certain cases exercise power to review whether domestic laws have been complied with<sup>64</sup>.

v. **Right to Fair Trial:** Article 6 provides for right to a fair trial in the determination of civil rights and obligations or in the event of criminal charge against anyone. This includes trial within reasonable time by an independent and impartial tribunal established by law. Hearing and judgment shall be published except where the interest of morals, public order, national security in a democratic society, interest of juveniles or the protection of the private life of the parties so require. An accused is presumed innocent till proved guilty according to law.

Everyone charged with a criminal offence has the following minimum rights: (a) To be informed promptly, in the language he understands and in details of the nature and cause of the accusation; (b) Adequate time and facilities for the preparation of his defence; (c) The defence himself in person or through legal assistance of his own choice or to be given free legal assistance where the justice of the case demands; (d) Right to examine witnesses; (e) Right to free interpreter if required<sup>65</sup>.

Other provisions of the Convention which create and upon which subject matter jurisdiction is vested in the court include; (i) Right to respect for private and family life;<sup>66</sup> (ii) Freedom of thought, conscience and religion;<sup>67</sup> (iii) Freedom of expression;<sup>68</sup> (iv) Freedom of assembly and association;<sup>69</sup> (v) Right to marry;<sup>70</sup> (vi) Right to effective remedy;<sup>71</sup> (vii) Prohibition from discrimination<sup>72</sup>.

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<sup>55</sup> *De Wilde, Ooms and Versyp v. Belgium*, 18 June 1971, Series A No 12., *Nielsen v. Denmark* 28 November 1988, Series A No 144.

<sup>56</sup> *Amuur v. France*, 25 June 1996, Reports of Judgments and Decisions 1996 – III., *Shamsa v. Poland nos* 45355/99 and 45357/99, 27 November 2003., *Mogos and Others v. Romania* (dec) no 20420/02, 6 May 2004., *Mahdid and Hadder v. Austria* (dec) No 74762/01, ECHR 2005 – XIII.

<sup>57</sup> *I. I. v. Bulgaria*, no 44082/98, 9 June, 2005, *Osypenko v. Ukraine* No 4634/04, 9 November 2010, *Creanga v. Romania* supra.

<sup>58</sup> *Foka v. Turkey* no28940/95, 24 June 2008, *Shimovolos v. Russia* supra.

<sup>59</sup> *Mancini v. Italy* No 44955/98, ECHR 2001 – IX, *Lavents v. Latvia* No 58442/00, 28 November 2002., *Dacosta Silva v. Spain* no 69966/01, ECHR 2006-XIII.

<sup>60</sup> *Austin and Others v. the United Kingdom* (GC) nos 39692/09, 40713/09 and 41008/09, 15 March 2012.

<sup>61</sup> *Del Rio Prada v. Spain* (GC), no 42750/09, ECHR 2013.

<sup>62</sup> *Toniolo v. San Marino and Italy* no 44853/10, 26 June, 2012.

<sup>63</sup> *G. K. v. Poland* no 38816/97, 20 January 2004.

<sup>64</sup> *Creanga v. Romania Supra*, *Baranowski v. Poland* no 28358/95, ECHR 2000-III, *Benham v. the United Kingdom* 10 June 1996 Reports 1996-111.

<sup>65</sup> Section 1, Article 6 (2) (3) (a) (b) (c) (d) (e) of the Convention.

<sup>66</sup> Section 1, Article 8 of the Convention.

<sup>67</sup> *Ibid* Article 9.

<sup>68</sup> *Ibid* Article 10.

<sup>69</sup> *Ibid*. Article 11.

<sup>70</sup> *Ibid* Article 12.

<sup>71</sup> *Ibid* Article 13.

<sup>72</sup> *Ibid* Article 14. It is noted that various Protocols to the convention further created subject matters upon which the court is vested with jurisdiction. Examples Protocol of 1952 added right to protection of property, rights to education

### 3. Admissibility Criteria

The court is not bound to accept and adjudicate on every application made to it. Certain factors are considered to determine the admissibility of applications. These include:

- (1) Domestic remedies: The applicant must show that all available domestic remedies have been exhausted in accordance with the generally recognized rules of international law and within a period of six months from the date of the final judgment<sup>73</sup>.

And the court does not entertain an application submitted by an individual, non-governmental organization or group of individuals which is anonymous or substantially the same as another that has already been examined by the court or has already been submitted to another procedure of international investigation or settlement and contains no relevant new information. Furthermore, the court shall declare inadmissible any individual application which it considers: (i) Compatible with the provisions of the Convention or the Protocols thereto, or manifestly ill-founded or an abuse of the right of individual application; or (ii) The applicant has not suffered a significant disadvantage<sup>74</sup>. In any case, no case may be rejected on a ground which has not been duly considered by a domestic tribunal.

### 4. Hearing and Judgments of the Court

Hearings are conducted at public places unless the court in exceptional circumstances decides otherwise<sup>75</sup>. The hearing and examination of the case shall be undertaken by the court together with the representatives of the parties. Where the court goes into investigation, the High Contracting parties concerned shall furnish all necessary facilities<sup>76</sup>. There is third party intervention in all cases before a Chamber or the Grand Chamber. The third party could be a high contracting party one of whose nationals is an applicant or any High contracting party whose national though not a party to the proceeding is invited by the president of the court, in the interest of the proper administration of justice to submit written comment or take part in the hearing. However, in all cases before the Chamber or Grand Chamber, the Council of Europe Commissioner for Human Rights may submit written comment and take part in the hearings<sup>77</sup>. At any state of the proceeding, the case may be settled friendly<sup>78</sup>, struck out<sup>79</sup> or continued till judgment is rendered<sup>80</sup>. The following grounds may justify the striking out of a case: (i) If the circumstance is such that it appears the applicant does not intend to pursue his application; (ii) The matter has been resolved; (iii) If it appears to the court that it is no longer justifiable to continue the examination of the case<sup>81</sup>. However, the court may restore an application to its list of cases if it considers that the circumstances justify such a course<sup>82</sup>.

In the same vein, the court with the consent of the parties may secure friendly settlement on the basis of respect for human rights as defined in the Convention and the Protocols thereto. In brief statement, the court shall state the facts and the solution reached which shall be transmitted to the Committee of Ministers to supervise its execution<sup>83</sup>. Any formation of the court that entertains an application renders a decision or judgment. Precisely, the judgment of the Chamber is final except in certain exceptional circumstance wherein the judgment may be referred to the Grand Chamber. Article 43 (1) states that

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and election in Articles 1, 2 and 3 respectively; Protocol No. 4 included freedom of movement, prohibitions of imprisonment for debt and expulsion of nationals in Articles 2, 1 and 3 respectively; Protocol No 6 of 1983 included abolition of death penalty except in time of war and prohibition of derogation in Articles 1 and 3 respectively; Protocol No 7 of 1984 further provided for right of appeal in criminal matters, right not to be punished twice in Articles 2 and 4 respectively. Of great importance is article 5 of Protocol 7 which provides for equality between spouses both in terms of right and responsibility. See also Protocol No 12 of 2000 and Protocol No 12 of 2002.

<sup>73</sup> Section 11, Article 35 (I) of the Convention.

<sup>74</sup> *Ibid.* Article 35 (3) (a) (b).

<sup>75</sup> *Ibid.* Article 35 (4).

<sup>76</sup> *Ibid.* Article 40 (1).

<sup>77</sup> *Ibid.* Article 38

<sup>78</sup> *Ibid.* Article 36 (1) (2) (3).

<sup>79</sup> *Ibid.* Article 39.

<sup>80</sup> *Ibid.* Article 37.

<sup>81</sup> *Ibid.* Article 42 and 45.

<sup>82</sup> *Ibid.* Article 37 (1) (a) (b) (c).

<sup>83</sup> *Ibid.* Article 37 (2).

within a period of three months from the date of the judgment of the Chamber, any party to the case may, in exceptional cases, request that the case be referred to the Grand Chamber. If the case raises a serious question affecting the interpretation or application of the Convention or the Protocols thereto or a serious issue of general importance, a panel of five judges of the Grand Chamber shall accept the request. Consequently, the Grand Chamber shall decide the case by means of a judgment<sup>84</sup>. And every judgment shall contain the reason thereof including decisions declaring applications admissible or inadmissible. Article 45 (2) permits a separate opinion from a dissenting judge<sup>85</sup>. Undoubtedly, the judgment of the Grand Chamber is final while the judgment of the Chamber shall only become final: (a) when the parties declare that they will not request that the case be referred to the Grand Chamber; or (b) three months after the date of the judgment, if reference of the case to the Grand Chamber has not been requested; or (c) when the panel of five judges of the Grand Chamber rejects the request of refer the case to the Grand Chamber.<sup>86</sup> Besides judgments on merit, the court on request of the Committee of Ministers renders advisory opinions on legal questions concerning the interpretation of the Convention and the Protocols thereto. The request of the Committee of Ministers requires a majority vote of the representatives entitled to sit on the committee<sup>87</sup>. Advisory opinions are communicated to the Committee of Ministers<sup>88</sup>.

### 5. Execution of the Final Judgment of the Court

First, the High Contracting parties undertake to abide by the final judgment of the court in any case to which they are parties<sup>89</sup>. Where this solemn undertaking is respected, the implementation of the final judgment of the court calls for no further deliberation. It will only require the Committee of Ministers to supervise the execution<sup>90</sup>. But where the supervision of the execution is hindered by a problem of interpretation of the judgment, the Committee of Ministers may refer the matter to the court for ruling on the question of interpretation. Such referral decision shall require a majority vote of two thirds of the representatives entitled to sit on the committee. In the same vein, ‘if the Committee of Ministers considers that a High Contracting Party refuses to abide by a final judgment in a case to which it is a party, it may, after serving formal notice on the party and by decision adopted by a majority vote of two thirds of the representations entitled to sit on the committee, refer to the court the question whether that party has failed to fulfill its obligation under paragraph 1.’<sup>91</sup> Where the court finds violation of paragraph 1, it shall refer the case to the Committee of Ministers for consideration of the measures to be taken. On the other hand, if the court finds no violation, it still shall refer the case to the Committee of Ministers which shall close its examination of the case<sup>92</sup>. Regrettably, the measure the committee may take is not stated in the Convention. The Convention rather provides in its article 54 that nothing in the Convention shall prejudice the powers conferred on the Committee of Ministers by the Statute of the Council of Europe<sup>93</sup>. Under the Statute, members of the Council of Europe accepted the principles of the rule of law and of the enjoyment by all persons within their jurisdiction of human rights and fundamental freedoms and to work together sincerely and effectively in the realization of the aim of the Council<sup>94</sup>. It seems that the only clear cause of action to punish members who refuse or fail to obey the final judgment of the court is the invocation of article 8 of the Statute. It states: ‘Any member of the Council

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<sup>84</sup> *Ibid.* Article 39 (1) (2) (3) (4)

<sup>85</sup> *Ibid.* Article 43 (1) (2) (3)

<sup>86</sup> *Ibid.* Article 45 (1) (2)

<sup>87</sup> *Ibid.* Article 44 (1) (2) (a) (b) (c). Final judgments are to be published.

<sup>88</sup> European Convention, section 11, Article 47 (1) (2) (3).

<sup>89</sup> *Ibid.* Article 48, 49 (1) (2) (3).

<sup>90</sup> *Ibid.* Article 46 (1).

<sup>91</sup> *Ibid.* Article 46 (2).

<sup>92</sup> European Convention, Section II, Article 46 (4). Paragraph 1 of Article 46 States that each High contracting party undertakes to abide by the final judgment of the court in any case to which it is a party.

<sup>93</sup> European Convention, Section II, Article 46 (5). Note that the High Contracting parties have undertaken that except by special agreement, they will not avail themselves of treaties, Conventions or declarations in force between them for the purpose of dispute resolution arising out of the interpretation or application of this Convention other than those provided for in this convention. Article 55.

<sup>94</sup> The Statute of Council of Europe otherwise known as Treaty of London (1949) as signed on 5 May, 1949. It created the Council of Europe. The Statute entered into force on 8 August 1949 when Belgium deposited the 7<sup>th</sup> instrument of ratification. The original signatories were Belgium, Denmark, France, Ireland, Italy etc.

of Europe, which has seriously violated article 3 may be suspended from its right of representation and requested by the Committee of Ministers to withdraw under article 7<sup>95</sup>. If such member does not comply with this request, the committee may decide that it has ceased to be a member of the council as from such date as the committee may determine<sup>96</sup>. The consequences of a member state withdrawing or being expelled may range from the state being isolated from discussion of questions of common concern to non involvement of the state in common action in economic, social, cultural, scientific, legal and administrative matters and in the maintenance and further realization of human rights and fundamental freedoms among the European states<sup>97</sup>. This remains the highest sanction that may be melted out on any defaulting High Contracting party.

## 6. An Overview of the Rules of the Court 2016

The court has the power to make and adopt its own rules of procedure. The new edition of the Rules of the court entered into force on 1 January, 2016. The rules covers the working of the court<sup>98</sup>, its composition<sup>99</sup>, the Registry<sup>100</sup>, general rules of procedure<sup>101</sup> including institution of proceedings<sup>102</sup>, proceedings on admissibility<sup>103</sup> and after the admission of an application<sup>104</sup>, hearings<sup>105</sup> Grand Chamber proceeding<sup>106</sup>, judgments<sup>107</sup>, advisory opinions<sup>108</sup> among others. Innovatively, the rules now includes Practice Directive which provides for request for interim measures, written pleadings, just satisfaction claims, secured electronic filing by governments, Requests for anonymity, electronic filing by applicants etc. The detailed overview shall be restricted to the activities of the Registry and hearing.

**6.1 The Registry:** The plenary court elects its Registrar. The candidate must be of a high moral character and possess the legal, managerial and linguistic knowledge and experience necessary to carry out the functions of the office. The election is for a term of five years and may be re-elected. The election is by secret ballot and an absolute majority of the votes cast. If no candidate receives an absolute majority of the votes cast, an additional round(s) of voting shall take place until one candidate has achieved an absolute majority. The voting process incorporates elimination method. Hence, on each round of voting, any candidate who receives ‘fewer than five votes shall be eliminated; and if more than two candidates have received five votes or more, the one who has received the least number of votes shall also be eliminated. In the event of a tie, in an additional round of voting, preference shall be given, firstly, to the female candidate, if any, and, secondly, to the older candidate’<sup>109</sup> The Registrar takes an oath or solemn declaration before he assumes office<sup>110</sup>.

There is also the office of Deputy Registrars. The plenary court elects one or more Deputy Registrars on the same mode for the election of the Registrar. Both the registrar and the Deputy Registrar(s) may not be dismissed from office when the court in plenary decides by a majority of two – thirds of the elected judges in office that the concerned officer has ceased to fulfill the required condition of election.

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<sup>95</sup> The Statute of Council of Europe, 1949, Article 3. The aim of the council is to achieve a greater unity between its members for the purpose of safeguarding and realizing the ideals and principles which are their common heritage and facilitating their economic and social progress. See Article I.

<sup>96</sup> Italics mine for emphases.

<sup>97</sup> Under Article 7 of the Statute, a member of the Council may withdraw its membership of the Council by formally notifying the Secretary – General of its intention to do so.

<sup>98</sup> Chapter 1, Article 1 (b) of the Statute.

<sup>99</sup> Rules of the Court 2016, Rules 19-23A.

<sup>100</sup> *Ibid.* Rules 24 – 30.

<sup>101</sup> *Ibid.* Rules 15-18B

<sup>102</sup> *Ibid.* Rules 31-44E

<sup>103</sup> *Ibid.* Rules 45-47

<sup>104</sup> *Ibid.* Rules 51-57

<sup>105</sup> *Ibid.* Rules 58 62A

<sup>106</sup> *Ibid.* Rules 63 - 70

<sup>107</sup> *Ibid.* Rules 71-73

<sup>108</sup> *Ibid.* Rules 74 - 81

<sup>109</sup> *Ibid.* Rules 82 - 90

<sup>110</sup> *Ibid.* Rules 15 (1) (2) (3)

In any case, the person shall be heard by the plenary court<sup>111</sup>. The Registry is responsible for the organization and activities of the court under the authority of the president of the court. It keeps the custody of the archives of the court and sermons the channel for all communications and notification to and from the court in connection with cases brought or to be brought before it. Subject to the duty of discretion, the Registrar replies requests for information about the activities of the court and in particular, enquiries from the press<sup>112</sup>.

**6.2 Hearing:** Generally, hearings are conducted in public. However, under the following exceptions, it may be heard in camera, namely: (a) in the interests of morals, public order or national security in a democratic society; (b) where the interest of juveniles or the protection of the private life of the parties so require; (c) if in the opinion of the chamber, publicity would prejudice the interest of justice. Application for hearing in camera may be at the request of a party or any other person concerned or at the instance of the chamber<sup>113</sup>. Any such request must state the reasons and specify whether it concerns all or only party of the hearing. At the hearing, the President of the Chamber directs and prescribes the order in which those appearing before the chamber shall be called upon to speak. And in order to do substantial justice, any judge may put questions to any person appearing before the chamber<sup>114</sup>. In case any of the parties scheduled to appear before the chamber fails to appear, the chamber may still proceed with the case if proper administration of justice demands. On the directive of the President, the Registrar shall make verbatim record of the hearing of the case. The record shall include: (a) The composition of the chamber (b) List of those appearing before the chamber, (c) The text of the submissions made, questions put and replies given; (d) The text of any ruling delivered during the hearing.

It is the responsibility of the Registrar to arrange translation of the verbatim record from non-official language into one of the official languages of the court if all or any part of the verbatim record is in non-official language of the court. Representatives of the parties are entitled to a copy of the verbatim record in order to make corrections subject to the control of the Registrar or the President of the Chamber, provided no correction shall alter or change the substance of the verbatim record. Upon the necessary corrections, the verbatim record shall be signed by the President of the Chamber and the Registrar and it shall become the certified matters of record<sup>115</sup>.

## 7. Achievements and Challenges of the Court

**7.1 Abolition of Death Penalty:** The Council of Europe played a pioneering role on the struggle for the abolition of capital punishment which it regards as having no place in a democratic society. In April 1983, it adopted protocol No. 6 of the European Convention on Human Rights which abolished death penalty save in times of war. This was followed in May 2002 by Protocol No 13 on abolition of death penalty in all circumstances. Currently, abolition of death penalty is a pre-condition for accession, and no execution has been carried out in any of the organization's 47 member states since 1997.

**7.2 Strengthening of Human Rights:** Countries that have joined the council of Europe are subject to the Independent Monitoring Mechanism which accesses the country's compliance with human rights and democratic practices. There exists Council of Europe Committee for the Prevention of Torture which regularly makes unscheduled visits to places of detention in the 47 member states (prisons, police stations, holding centres for foreign nationals) in order to evaluate the way in which people deprived of their liberty are treated. Non- discrimination, fight against racism and gender equality are areas the council through the court has made great impact. In any true democracy, gender equality is important to the country's growth. The council aims to combat all forms of discrimination against women. This is to be achieved by enhancing greater equality between women and men including in the composition

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<sup>111</sup> *Ibid.* Rules 15 (4)

<sup>112</sup> *Ibid.* Rules 15 (2), 16 (1)

<sup>113</sup> *Ibid.* Rules 17 (1) (2) (3)

<sup>114</sup> *Ibid.* (As amended by the court on 7 July 2003). Rule 63 (1) (2) (3).

<sup>115</sup> *Ibid.* Rule 64 (1) (2).

of the court and in the election of the Registrar and the deputy registrars<sup>116</sup>. The court has been able to hold state responsible for not putting in place an effective measure to deter commission of offences against a person. In *Osman v. United Kingdom*<sup>117</sup> the court upheld that state's obligation extends beyond its primary duty to secure the right to life by putting in place effective criminal law provisions with adequate law enforcement machinery to deter commission of offences against persons. The court was firm that states obligation 'extends beyond its primary duty to secure the right to life by putting in place effective criminal law provision to deter the commission of offences against the person backed up by law-enforcement machinery for the prevention, suppression and sanctioning of breaches of such provision', provided it is proved that the state knew or ought to have known at the time of the existence of real and immediate risk and failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk<sup>118</sup>. In the same vein, the court is not without its own challenges. First members of the council of Europe are the parties to the statute.<sup>119</sup> And the Committee of Ministers is one of the organs of the council and acts on behalf of the Council of Europe. It is in principle, the decision making body but in practice its decision takes the form of recommendation to the government of members. It then behooves on the government of members to inform the committee of its action with regard to such recommendation. In reality, the government of members is in charge of both the affairs of the council and the court. Yet cases that go to court are instituted against the state. Second, the execution of the final judgment of the court lies on the shoulders of the government of members through the Committee of Ministers. The Committee of Minister monitors execution. But where supervision of execution of the final judgment is being hindered by the problem of interpretation, the committee of ministers on 2/3 majority vote shall refer it to the court for interpretation. If the committee is unable to secure 2/3 majority vote, it simply means that the final judgment cannot be executed on ground of interpretation. Third, where a High contracting party neglect to abide by the final judgment of the court, the Committee of Ministers by 2/3 majority vote shall refer the case to the court on the question whether the concerned High contracting party has violated the decision of the court. If the court finds violation, the Committee of Ministers shall decide the measure to take. This measure to take against such party is not specified in the convention<sup>120</sup>. Fourth, the convention is subject to the statute of the Council of Europe. To this end, the real powers and authority of the court and Committee of Ministers are as provided for in the statute rather than the convention<sup>121</sup>. Hence, the privileges and immunities of the judges are as provided for in the statute<sup>122</sup>. Finally, the Council of Europe bears the expenditures of the court. Thus, the court has no independent source of revenue. Any conspiracy by the majority members of the council to deny fend to the court actually and adversely affect the court<sup>123</sup>.

## 8. Conclusion

This work has x-rayed the activities of the European Court of Human Rights. Since the establishment of the court, the European council has continued to take measures to improve and strengthen the court. No doubt, the court has achieved much save for the problem of enforcement of the final judgment of the court in the event of a contracting state refusing to comply with the said final judgment. The court has raised the standards for the promotion and protection of human rights and fundamental freedom throughout the community of the High Contracting parties.

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<sup>116</sup> Google Image Result for <http://www.coe.int/documents/5492562/7038987/COE-Logo-Quadri.png/5b078783-4008-4825-8721-c04c329844d2?t=1401723151000>. Accessed 7-03-2016.

<sup>117</sup> 1998 - viii Eur. Ct. HR. 3124 p. 115.

<sup>118</sup> *Ibid.* at p. 116. See also *M. C. v Bulgaria* 2003 – XIII Eur. Ct. H.R.I.

<sup>119</sup> Article 46 (4) (5) of the Convention.

<sup>120</sup> *Ibid.* (As amended by the court on 17 June and July 2002). Rule 70 (1) (a) (b) (c) (d) (2).

<sup>121</sup> Article 54 of the Convention.

<sup>122</sup> Article 40 of the Statute.

<sup>123</sup> Article 50 of the Convention.