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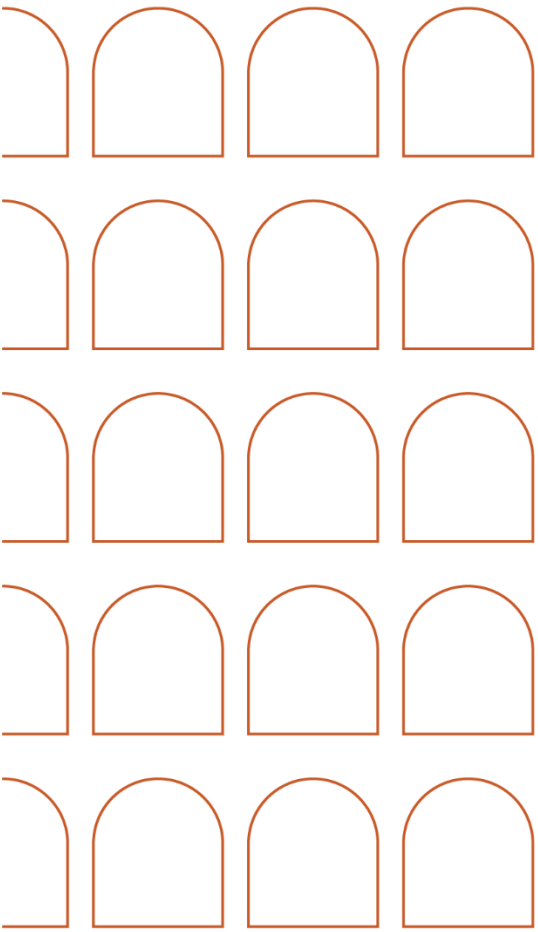

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Is the European Court of Human Rights itself bound by Article 6 ECHR?

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Abstract

In this paper the author looks for an answer to a very simple question: Is the European Court of Human Rights obliged to comply with the guarantees laid down in Article 6(1) of the ECHR for a fair trial? The quasi-unanimous answer of scholars and practicing lawyers is: yes, of course, obviously. The author begs to differ. He puts forward a number of reasons for this stance. Most importantly, Article 6 is to be found in the first section of the Convention, which is directed to the State-Parties to the Convention, not to the Court. It is Section II and the Rules of Court that deal with the establishment and workings of the Court. There one finds a number of guarantees, mentioned in Article 6 as developed in the abundant case-law of the Court, but not all. And why repeat in this section some elements if the Court is already bound by Article 6? Some rules in Section II even contradict the exigencies for a fair trial as laid down in Section I. There are furthermore practices of the Court that deny the requirements for a fair trial laid down in Article 6: most conspicuously the 'within a reasonable time' clause. Many judgments take more than ten years. As Article 6 is, according to the author, not applicable, there is no violation of that requirement. The practice is nevertheless regrettable, because the severity of the Court in judging the practices of national courts is in sharp contrast with the leniency in its own doings. Mind the gap! This difference harms the status and the legitimacy of the ECtHR. Some of the deviations from the fairness of the trial should be remedied by the State- Parties to the Convention. They are the stakeholders for this most valuable institution and should allow it the tools it needs to fulfill its task while living up to the standards of Article 6 of the Convention, applicable or not.

Keywords

European Court of Human Rights, Article 6 ECHR, Section II ECHR, fair trial, reasonable time

Hans Ulrich Jessurun d'Oliveira

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1. Introduction

It's a simple question: is the European Court of Human Rights obliged to comply with the guarantees for a fair trial as laid down in Article 6 ECHR and its own abundant case law on that provision? Or, putting it more broadly: is the Human Rights Court obliged to comply with and guarantee the catalogue of human rights of Section I of the Convention in its own actions and omissions?

The question occurred to me in the context of my study of the deplorable system of 'reservists' within the Supreme Court of the Netherlands.[1] In brief: according to the Act on the Judicial Organisation the Hoge Raad deals with cases in panels of three or five judges. In reality it is a long-standing practice to deliberate in camera on cases with the whole section – civil, criminal, fiscal- involving in total some twelve councillors. Sometimes even judges from the other sections are invited to take part in the deliberations. These judges that do not belong to the panel deceivingly are called 'reservists'. Although this practice aims at time-honoured fundamental values as legal certainty and consistency of the case- law – informally binding the reservists along with the panels in future cases - it is not 'established by law'. Citizens have the right to be judged by a court, established by law, all others involved in the deliberations and decisions are intruders. If a supreme court does not abide by the law, why should the citizens? As a case concerning this system has been waiting for a decision by the ECtHR for quite a while,[2] I was curious as to whether I would still witness it - given the sometimes extremely long time the Court takes to reach its verdict and given my own outrageous age. So, I asked myself: is the Court obliged, in accordance with Article 6 ECHR, to give a decision 'within a reasonable time'? Justice delayed is justice denied.

If I consult other lawyers, experts, and specialists, and ask for their immediate reaction, it is virtually always the same: of course, the Court is bound by Article 6 ECHR. They find it a stupid question.

And yet, If I look for arguments for and against this view, I come to the following, opposite, conclusion.

To start with, it is useful, and maybe decisive, to recall that Section I of the Convention is directed at the Contracting States. They are the ones who, under Article 1, take on the obligations to secure a number of human rights. Thus, Article 13 prescribes that an 'effective remedy before a *national* authority' must be provided. It is a good question whether that requirement can also be imposed on the Court, with its overwhelming case load and all the various means of dealing with that, whether or not they are appropriate. There are probably many cases where no 'effective remedy' is offered. Moreover, the special function of the Court - which is to consider whether national judicial systems meet the standards of Section I - may imply that that requirement does not even need to be set. Once there is a final judgment of the Court, it should - according to Article 46 - be executed under the supervision of the Committee of Ministers; and, if a High Contracting Party fails to fulfil its obligations in this respect, the Committee of Ministers may consider taking measures against such default. Article 15, on emergency measures, explicitly addresses the Contracting States, and could only with difficulty be applied to the Court. In any case, the Court is not a national authority.

The most relevant provision, Article 6, clearly addresses the Contracting States in its paragraphs 2 and 3, which lay down the rights of people charged with a criminal offence. There is no way in which this criminal law part of Article 6 could be made to apply to proceedings before the Court itself. Criminal prosecution does not take place before the Court.

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[1] H.U. Jessurun d'Oliveira, Een boekje open over de Hoge Raad en zijn 'reservisten'. Ars Aequi Libri (2019)

[2] Appl. No. 19365/19 Kuijt v. the Netherlands.

Then in addition, most of the Protocols are addressed to the Contracting States. Take, for example, Protocol No. 13 on the abolition of the death penalty. It is the States that accede to the Protocol which undertake this obligation, not the Court.[3] Or Protocol No. 16, which confers on the highest courts and tribunals of the Contracting Parties the right to request the Court to give an advisory opinion. Admittedly, in this case the Court is also an addressee: it must deliver those advisory opinions.

In Section II, Article 19, however, the Contracting States establish a European Court, the design and functioning of which are regulated in the subsequent provisions. There is nothing in Section II of the Convention which explicitly imposes on the Court an obligation of a fair trial. The inspiration for the organisation and functioning of the Court comes from the Statute and the Rules of Court of the International Court of Justice.[4]

There are certainly a substantial number of procedural provisions to be found in Section II which express component parts of the requirement of a fair trial. How could it be otherwise? Thus, Article 21 requires a high moral character and competence of the judges, and states that they shall not engage in any activity which endangers their independence and impartiality. Article 22 establishes the procedure for the election of judges by the Parliamentary Assembly. Article 26(3) forbids any judge sitting as a single judge to examine an application against his own country; paragraph 4 of that Article, on the other hand, requires the Chamber and the Grand Chamber to include as an ex officio member the judge elected in respect of a country concerned, and if there is none to include an ad hoc judge from that country. That is in itself problematic in terms of the guarantee of a fair trial, as is the implication of Article 26(3).

2. Fragments of a fair trial

Article 30 ECHR offers a way to solve the problem which in the Supreme Court in the Netherlands leads to 'reservists' being involved: if a matter being dealt with by a chamber risks leading to a judgment which is not in line with an earlier judgment of the Court, the case can be transferred to the Grand Chamber.[5] Parties no longer have any influence on the decision to transfer. Unity of the case law is the main concern, like in the Netherlands.

Article 38 states that the parties also take part in the proceedings; Article 40 says that hearings are in public and that as a general rule documents are also public; Article 45 requires judgments to be reasoned.

As a result of these provisions contained in Section II, many of the elements of the guarantee of a fair trial, as recognized by the Court in its rich case law on Article 6 ECHR, are in fact also applicable to the work of the Court itself. Important provisions can also be found in the Rules of Court, adopted by the ECtHR. For instance, on the deliberations, which take place 'in private', and with respect to which communication to others is not allowed.[6] In addition, unlike under Dutch law, the Rules of Court explicitly state who may be present at the deliberations apart from the designated judges. Moreover, a wealth of regularly updated procedural rules are be found in the Rules of Court, which further elaborate the provisions from Section II concerning the principle of *audi et alteram partem*, impartiality and independence and many

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[3] See e.g. Art. 5 of this Protocol: 'As between the State Parties the provisions of Articles 1 to 4 of this Protocol shall be regarded as additional articles to the Convention, and all the provisions of the Convention shall apply accordingly.'

[4] See the Travaux préparatoires on Art. 55 (now Article 25) , which confers on the ECtHR, like the ICJ, the competence to develop Rules of Court.

[5] Cf. the Travaux préparatoires on the content of the Rules of Court, p. 16/17.

[6] Rules of Court Art. 22.

more crucial issues to the fairness of the trial.[7] Thus, e.g. in 2023 rules on recusal of judges were refined. Furthermore, refinements and clarifications are included in the Resolution on Judicial Ethics, adopted by the Plenary Court in 2021, a code intended to regulate the conduct of the judges, including ad hoc judges.[8]

In my view, the fact that a number of the elements of the right to a fair trial are listed in Section II of the ECHR, forms – together with the formal structure of the Convention in two sections – a strong indication that the Court is not itself bound by Section I of the Convention. The catalogue of requirements in Section II, such as those on competence and high moral character, impartiality and independence, the duty to state reasons, to hear both parties, would be superfluous if the Court were already subject to the prescriptions of Article 6. Of course, there is no harm in repeating important texts, so their significance sinks in, but legislators are not very keen on redundancy. The way it is formulated, Article 6 is clearly designed for the administration of justice in the contracting states, and difficult to tailor to a useful formulation for proceedings before the Court.

Is it possible to see Article 6 as a *lex generalis,* and to find *leges speciales* in section II which could be divergent? I don't see that. If that were the case, why repeat in Section II a great number of elements that were already formulated in Article 6? There is nothing special about this, simply repetition.

I therefore assume that those provisions in Section II have an independent meaning, and that the list of requirements they form give a slightly divergent cast to the principles of a fair trial which the Court itself must comply with.

That difference, or limitation, is partly due to the fact that the Court's functions are not the same as those of the national (highest) courts. For example: it does not try suspects, but determines whether the Contracting States comply with the rules for trials as laid down in Article 6, paragraphs 2 and 3.

3. Conflict with Article 6 ECHR

No wonder that there are also aspects of Article 6 which are not to be found in Section II; and Court practice seems occasionally even in conflict with that Article as interpreted in its own rich case law. For example, Judge Vilanova pointed out that the judgment in *Câmpeanu* (2014)[9] is not just incompatible with the stringent requirements[10] on reasoning imposed by the Court on national courts in the context of Article 6 – i.e. that courts should in principle rule on *all* pleas – but is also incompatible with Article 45 ECHR and the obligations that provision contains with regard to the duty to give reasons for judgments and decisions. In his dissenting opinion in *Hakobyan and Amirkhanyan v. Armenia*[11] he summed up a number of dissenting opinions to previous judgments and added '*In my humble opinion, the Convention does not allow for a subjective sifting of the rights and freedoms recognised therein. The parties to a dispute deserve an objective examination (admittedly more or less in-depth) of all the complaints*

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[7] Latest version: 28 March 2024.

[8] These are clauses on Integrity, Independence, Impartiality, Diligence and Competence, Discretion and Confidentiality, expression and contacts, additional activities, honours and decorations.

[9] ECtHR (Grand Chamber) 17 July 2014, Centre de ressources juridiques au nom de Valentin Câmpeanu v Romania, Appl. No. 47848/08.

[10] There are, however, exceptions.See ECLI:CE:ECHR:1994:0419JUD001603490 (Van de Hurk v. the Netherlands) , which saved a Dutch legal arrangement allowing superficial and stereotyped reasoning in cases where no questions involving legal unity or legal development are at stake. It is the same device as the Court is allowing itself in mitigating its workload. Legal protection is not an issue worth giving reasons.

[11] ECtHR 17 October 2019, Hakobyan and Amirkhanan v. Armenia, Appl. No. 14156/0.

raised by them.' He pointed out that the Court itself had asked the parties no fewer than four questions on violation of Article 6, '*a decade later the majority finds these same issues to be secondary and no longer deserving of any examination*.' He urged for a Grand Chamber decision on the construction of Article 45 ECHR: broad or restrictive.

In addition, according to Vilanova, it is probably also incompatible with Article 32, which states, with regard to the jurisdiction of the Court, that it extends to *all matters* concerning the interpretation of the Convention and its Protocols.[12] The point is that in *Câmpeanu,* the Court reserved the right not to rule on all the complaints brought, but to select one complaint as the main one, and leave the others unanswered. This is understandable with an eye to the Court's gigantic workload, but is not in line with the severity with which the obligation to state reasons is inflicted on national courts by that same Court.

Vilanova got his Grand Chamber ruling a year later in Gudmundur Andri Astradsson v. Iceland.[13] The Court sticks to its restrictive practice. In the words of four not unimportant dissenters: '*It is true that the Court has frequently refrained from examining peripheral or secondary complaints or complaints that are in one way or another absorbed by the main complaint to which it has provided an extensive answer. This is a means by which the Court seeks to deal with as many applications as possible, to concentrate on the core legal issues, to avoid overburdening a given judgment and to ensure greater clarity by leaving aside peripheral or secondary claims. However, where claims are neither peripheral nor secondary, skipping an essential and even distinct element of an application could rightly be perceived as a partial "denial of justice".*[14] The practice of cherry-picking is thus, at the very least, dubious; it is incompatible with Article 6 – if that provision is applicable; and it is assailable in the light of the requirements set out in Section II of the Convention. There's a whiff of denial of justice.[15]

4. Ex officio or ad hoc judge: conflict with Article 6?

Article 26(4) was borrowed, though with a slight twist,[16] from the blueprint for the International Court of Justice - a blueprint that was itself already controversial.[17] The provision seems to me to be misplaced, and in conflict with Article 6 ECHR.[18] While it may have some use in disputes between states - in such cases, because it can restore the balance in situations where there is already a judge with the nationality of the opposing State - in the case of dispute between

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[12] Pere Pastor Vilanova, Le juge européen est-il tenu par les règles du procès équitable? In *Liber amicorum Sicilianos*, (2020), p. 391-405. One of the very few publications on the topic.

[13] ECtHR (Grand Chamber) Gudmundur Andri Astradsson v. Iceland, 1 December 2020, Appl. No. 26374/18.

[14] Par. 43 of the Joint Partly Concurring, Partly Dissenting Opinion of Judges O'Leary, Ravarani, Kucsko-Stadlmayer and Ilievski. In this case, it was established that the procedure for appointment of judges laid down by law in Iceland had been breached in various ways, without the second complaint concerning the impartiality and independence of the judge in question being investigated. The dissenters found that this amounted to a denial of justice, incompatible with the Court's obligations. See in the same vein the same dissenting opinion of judge Serghides on this point.

[15] Besides, the question remains whether the ban on *denial of justice* also extends under customary international law to international courts. Jared Hepburn, The international Extension of Denial of Justice, Modern Law Review, (2022) p. 1357-1386.

[16] The Statute of the ICJ, Art. 31, speaks of the *right* to sit in the case; states may choose to exercise that right. For the ECtHR this has become a duty, a change urged upon by the Contracting States.

[17] 'There shall sit as an *ex officio* member of the Chamber and the Grand Chamber the judge elected in respect of the State Party concerned or, if there is none or if he is unable to sit, a person of its choice who shall sit in the capacity of judge.'

[18] See on the topic of the ad hoc judge: Yves Daudet, Le juge *ad hoc* à la Cour Internationale de Justice statuant au contentieux, in: Fair Trial: Regional and International Perspectives. *Liber Amicorum Linos-Alexandre Sicilianos* (2020) p. 106.

an individual and a state, there is immediately a hint of chauvinism around the ad hoc or ex officio judge. Instead of restoring balance, an imbalance is created. The ad hoc judge at the ICJ is even described as a hybrid person, or worse.

Such a hybrid was professor Offerhaus, who taught me and who acted as ad hoc judge for the Netherlands in the Elisabeth Boll case at the ICJ, a private international law case.[19] His co-director at the 'Centrum voor Buitenlands Recht en Internationaal Privaatrecht' at the University of Amsterdam, Prof. I. Kisch (who employed me as a student-assistent at that Centre), acted as one of the Counsels for the Netherlands. The Netherlands lost this case – 12 against 4. In fact, that was exactly as Kisch had predicted, down to the exact numbers. Who wrote a dissenting opinion? Offerhaus, naturally. In his view – as President of the Hague Conference on Private International Law and president of the Dutch State Commission on Private International Law, which at the time was the steering committee of that international organization, the Netherlands should have won the case. It hinged on the interpretation of a convention of the Hague Conference. Some questions arise: did the counsel and the judge perhaps know each other too well, as co-directors of the same institute? And was the judge perhaps too much simultaneously the voice of the Netherlands and of the Hague Conference which had engendered the convention in question?

The function of such a national judge is of course officially to explain the law of their country, but the suspicion is easily raised that they try to avoid their country being condemned. The judge risks becoming an extra defender of that country's view, or at least of giving the appearance of doing so.[20] Avoidance of bias is represented in Article 26(3), prohibiting a single judge to sit on a case in which his own state is involved.

There are actual statistics which are consistent with the premise that the impartiality of the ex officio and ad hoc judges at the ECtHR is under pressure.[21] If a case comes to a favourable conclusion with regard to a country from which these judges come, 95 % or 100 %, respectively, adhere to the majority view, compared with 81 % of the other judges; on the other hand, where the country in question is condemned, then one finds dissenting opinions by 16 % of the ex officio judges and 33 % of the ad hoc judges from that country, compared with 8% of the other judges. Remarkable differences, which certainly indicate bias. According to Article 6, these judges should recuse themselves, or it should be possible to challenge them.

The inclusion of *ex officio* judges and their replacements stems from the need felt by the countries which were at the Convention's genesis to know that they would be represented on the bench. They apparently expected something from those national judges. This ambiguity as to the contribution of national judges – directly knowledgeable about the functioning of the country in question, but apparently also, consciously or not, representative and spokesperson of the country nominating them, would not survive Article 6, at the very least because of the appearance of partiality and breach of the principle of equality of arms.[22] Consequently: this is a second case of rules in Section II which are contrary to Article 6.

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[19] ICJ 28 November 1958, I.C.J Reports 1958, p.55, concerning the Convention of 1902 on Guardianship of Infants. (Netherlands v. Sweden)

[20] A view cautiously supported by judge Ravarani, The Fairness of Proceedings before the European Court of Justice, in: *Liber Amicorum Sicilianos*, p. 457.

[21] See William Schabag, The European Convention on Human Rights. A Commentary (2015), p.692/694, referring to E. Voeten, The Impartiality of International Judges: Evidence from the European Court of Human Rights, American Political Science Review (2008), p. 417.

[22] Daudet, op. cit., p. 107/108 states the same for the ad hoc judge at the ICJ:' (…) il prononce publiquement une déclaration d'impartialité mais pourtant il vote généralement en faveur de l' État qui l'a nommé , alimentant ainsi un soupçon de partialité qui ne pèse normalement pas sur un membre de la Cour de la nationalité d'une partie'.(He

5. An important lacuna: timely decision-making

Among the lacunae in Section II and the Rules of Court, I mention in particular the absence of the important requirement under Article 6 ECHR that the case is decided *within a reasonable time*. In the Court's case law on this point regarding the administration of justice at national level, there are a number of criteria involved in deciding whether the requirement of a 'reasonable time' is met: for example, every case should be judged on its own merits, the proceedings have to be seen as a whole, the influence of actions or inaction by the parties, the complexity of the case, and whether or not there is urgency, such as with marital status, cases involving children, employment disputes, debilitating illness, life-threatening aspects. There are many more.[23] The various issues are summarized in a recent judgment.[24] The Court indicates that Article 6 imposes on the 'États contractants' (not on the Court itself) the obligation to organize their legal systems in such a way that civil cases are decided within a reasonable time. In that context it remarks that it is constant case law that '*l'encombrement chronique du rôle d'une juridiction ne constitue pas une explication valable d'une durée déraisonnable'.(The chronic clog of the roll of a jurisdiction does not constitute a valid explanation for an unreasonable delay.)* The Court cannot look itself in the face in this regard. The Court has found Belgium guilty of failure to comply with the reasonable time requirement in numerous cases,[25] as is even admitted by the Belgian Conseil supérieur de la Justice, which speaks of '*dysfonctionnement du système judiciaire' (dysfunction of the judicial system)* , and it requires Belgium to take measures to address the structural violation of Article 6 by the courts of the Brussels judicial district, under the supervision of the Committee of Ministers of the Council of Europe.

Long delays at the Court are not exceptional.[26] It is common for cases to have to wait ten years or more for a decision. The extraordinary tardiness – as bad as in Italy – has been known about for years. 'F*urthermore, the ECrtHR's procedures are extremely protracted; the reforms enhancing its efficiency have caused a decline in reason giving and have led to frequent decision-making by the registry staff.*'[27] The Court also recognizes this. In the formal session on 27 January 2023, President O'Leary referred to a couple of important cases – including *Ecodéfense v Russie*[28] – and remarked '*La Cour a mis trop de temps à statuer dans l'affaire*.' ('The Court has taken too much time deciding the case'). It is indeed to be noticed that it is the Court that keeps the parties waiting for years and years after their exchange of writs and pleadings.

A small sample. On the Court's website, judgments were announced on 5 March 2024. Of the twenty-one decisions, six were for cases brought in or before 2014: in 2007, 2009 (2), 2010, 2014 (2); thirteen of the twenty-one decisions reached a conclusion after six years or longer. In this sample, the cases which took the Court six years or (much) longer to conclude – after

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pronounces publicly a declaration of impartiality but he nevertheless votes in favour of the State that appointed him, thus casting doubts of partiality that normally does not affect a member of the Court with the nationality of one of the parties.') This applies in particular, but certainly not exclusively, to ad hoc judges appointed by countries not subject to democratic rule.

[23] For a summary, see e.g. Barkhuysen and van Emmerik, Legitimacy of European Court of Human Right's Judgments. Procedural Aspects, in: Nick Huls, Maurice Adams and Jacco Bomhoff, The Legitimacy of Highest Courts' Rulings (2009), p.427 et seq.

[24] ECtHR 5 September 2023, No. 13630/19 (Van den Kerkhof v. Belgium).

[25] Enumerated in par. 104.

[26] See recently the environmental case, ECtHR 19 October 2023, No. 35648/10 (Locascia v. Italy): 13 years.

[27] Lize R. Glas, Translating the Convention's Fairness Standards to the ECrtHR: An Exploration with a Case Study on the Legal Aid and the Right to a Reasoned Judgment, EJLS 10 (2) 2018, p 47 et seq. (50)

[28] 14 June 2022, No. 9988/13. So, 9 years.

the exhaustion of domestic remedies – made up roughly half of the total number of cases which were decided. I think we can assume that not all of these long-running cases would be acceptable in the light of the Court's case law on this element of Article 6 - after all, '*l'encombrement chronique du rôle d'une juridiction' (chronic stoppage of the roll of a jurisdiction)* is no excuse – and would therefore imply a violation of Article 6 were that Article applicable. Moreover, one may wonder whether these cases fit the multicoloured framework the Court itself has developed for the order in which it deals with cases: those heterogeneous factors do not provide much stringency.

The Court has known for decades that it has an enormous backlog and tries to cope with it in various ways. For instance, it appears from the 2021 annual report that the Court will work with 'summary formula', limiting the judgment to 2000 words, in which only one or two central points will be dealt with and briefly explained. This should help reduce the backlog, dealing with it in a 'timely manner', and also give the Court a 'better image'. The report reassures us that the preparation by the staff will not suffer from this: it will remain as careful as before. That means, not much time will be gained by the change. In addition, an urgency system will be introduced, so that important cases (impact cases) and frivolous cases will be dealt with more quickly than the rest.[29] The interstate cases will have absolute priority, and they take a lot of time. There are other measures, too. But I have my doubts as to whether we can expect these to lead to significantly more cases being dealt with 'within a reasonable time'. And I am very far from being confident that I will be around when the 'reservist' case, brought in 2019, is dealt with.

Be that as it may, whatever the causes of the enormous backlog, it does not just impinge on the 'reasonable time', but also has an impact on the 'thinning down' of the requirement to give reasons, the selection of cases and issues, and even on the prohibition of denial of justice. Taking all these considerations together, it is not plausible to consider that the Court is bound by Article 6. The failure to meet the requirements of Article 6 does not entail a violation of that provision, as they are not applicable to the Court. There are no sanctions either. The Court is only bound by the rules in Section II, the Rules of Court, and the Resolution on Judicial Ethics. Rules and practices which are not in conformity with Article 6 are nothing to be proud of, but they do not amount to violation of the Convention.

6. Conclusion and remedies

Although account can be taken of the fact that the Court is a different kind of body compared with national courts, it still leaves an uneasy feeling that it imposes stricter obligations on those national courts than on itself. This divergence, however it arose and however it can be explained, detracts from the legitimacy and authority of the Court, especially if it is caused by other factors than the difference in the function of the Strasbourg Court compared with the function of national courts.

In my view, the Court is, for the above-mentioned reasons, only bound by Section II of the ECHR and its own Rules of Court. I stand not fully alone in this opinion: the problem has already been picked up here and there. For instance, recently, in a dissertation defended in Utrecht, Claire Loven assumes this as an obvious point: *'Since the Court itself is not directly bound by the procedural standards of Article 6 and 13 ECHR, as defined in the case law, the standards discussed in the previous section do not apply directly to the proceedings before the Court.*'[30] The question whether or not they apply *indirectly*, and in that case how, is not addressed.

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[29] Cf. Art. 41 Rules of Court.

[30] Claire Loven, Fundamental Rights Violations by Private Actors and Proceedings before the European Court of Human Rights. A Study of Verticalized Cases. (2022), p. 67. the 'previous section' she refers to does not deal with the 'within a reasonable time' requirement.

Judge Vilanova, writing on the requirement to give reasons – though the same would hold for other elements of a fair trial – holds the view that the Court is not bound by Article 6: '*Bien que la Cour ne soit pas soumise formellement aux exigences de l'article 6, dont le champ d'application concerne exclusivement les juridictions nationales, une telle position risque de nuire à la cohérence et à la légitimité de la Cour*.' (Although the Court is formally not subjected to the requirements of Article 6, of which the field of application is restricted exclusively to national jurisdictions, such a position is liable to harm the consistency and legitimate status of the Court.')

In the scant academic writing, all kinds of attempts have been made to fill the gaps in relation to Article 6 in the Court's procedures, and a range of proposals have been made. In the light of the specific task of the Human Rights Court - not a final instance, and not a first instance either – Lize Glas has argued that some adaptation is needed, translating the principles enshrined in Article 6. Article 6 can serve as a critical authority in relation to the Court's procedures, but can't be taken over word for word, since the provision was drafted to fit actions and omissions of national courts. Glas, and other authors, have therefore developed a number of principles which take account of the specific function of the Court.[31] Loven reaches this conclusion in her thesis: '*In line with commonly accepted principles this study takes the view that the procedural standards of the Articles 6 and 13 ECHR should also apply to proceedings before the ECrtHR, albeit in a slightly adapted or 'translated 'version to take account of the particular role and position of the Court.*'[32] My problem with this is that it is not clear what the legal basis is for these uncontested desiderata. The 'generally accepted principles' have been developed and embraced in the academic literature, are deemed 'desirable' and are not disputed, albeit there are a number of variations around, but there seems to be no legal basis for them. 'Should' is not the same as 'shall'. And bear in mind the Court's case law to the effect that its only task is to apply the Convention, and not to take account of other international instruments.[33] Therefore I cannot derive any obligations from these desiderata. The Court's success – in terms of the overwhelming amount of applications – explains, but does not justify, the infringement of the principle of a fair trial. And it is also not obvious why the specific position of the Court in interpreting section I of the Convention might justify exceptions to Article 6.

There is probably some flexibility to be found with a broader interpretation of the elements of fair trial included in Section II of the Convention, as is the case in the interpretation of Article 6 itself. The obvious thing would be for the Court to take its inspiration from Article 6(1) in its actions, even if the provision is not applicable. In addition, the Court could orient its Rules of Court further towards Article 6 itself, in its own practice. But that would seem to me to be as far as it can go. Part of the deviation from Article 6 in its own practice - such as the limited duty to state reasons, and the selective choice of complaints - stems from the enormous workload and the gigantic backlog. In 2023, there were more than 68,000 pending cases, and more than 6900 rulings made (judgments and decisions), considerably more than in the previous year. The vast majority of applications are 'massaged away' and nipped in the bud. If I understand correctly, about 10 percent of applications are declared (provisionally) admissible. Successful applications are a fraction of these.[34]

If the Court is given sufficient resources, it can revisit its frugal case law. That holds for other defects as well. For instance, it could apply the principle audi et alteram partem to the '*rapports de recherche',* which do influence judicial decisions, after all, and also to the findings of the

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[31] See Glas, op. cit., with further references.

[32] Loven, op. cit., p. 72.

[33] See e.g. ECtHR Appl. No.27801/19, 3 March 2020, Johansen v. Denmark , par. 47: 'The Court recalls in this context that it is competent to apply only the ECHR, and that it is not its task to interpret or review compliance with other international conventions as such.' That applies also in relation to norms for its own conduct.

[34] Solemn hearing. Opening of the Judicial Year, 26 January 2024 , Speech by President Siofra O'Leary.

jurisconsult,[35] who provides 'opinions and information'.[36] The right to react to the observations of the *jurisconsult* is excluded in ECtHR proceedings, but the equivalent is obligatory in the administration of justice in a number of Member States. So, yes, indeed: bringing things into line will take more time and effort, but according to the Court being careful is more important than speed.

Of course, taken as a whole this is not good for the legitimacy and authority of the Court's work. The lacunae and procedural shortcomings prompt criticism, and lead to feeling that an authority which lectures national courts should show that it takes account of those lessons itself.[37] One vice-president of the Supreme Court of the Netherlands even spoke to me indignantly of 'hypocrisy'. The willingness of convicted states to abide by a judgment, in conformity with Article 53, is not increased as a result. Alas, the Court cannot escape from these restrictions à la Houdini. Ultimately, it is the Contracting Parties of the Council of Europe which have to give the Court the means to do its work properly. Sufficient resources, adequate facilities, new protocols – these are the means by which the Court's authority could be boosted. We must not forget that year after year Article 6 ECHR scored highest as the ground for complaints under the Convention. If the Court itself falls short, that will not increase confidence in its case law; and that is undesirable.

So, no: Article 6 ECHR does not apply to the Court itself, there are provisions in Section II which conflict with Article 6, and there are plenty of practices which deviate from what the Court lays down for national courts. There are dubious rules, which take account of its special position, but for the rest the Court has to make the best use of the skimpy tools at its disposal. Real improvement has to come from the Contracting States.[38] It is no longer possible to say that those States are straightforwardly enthusiastic in this regard. Fair trial is not in good hands in all the Member States, especially if it requires financial sacrifices. Backsliding Member States which have been systematically found guilty of infringements, such as Poland, are also not that keen. Russia was even expelled from the Council of Europe in 2022, and that will eventually make a difference to the Court's case load. At the end of 2023 there were still 12,450 cases against Russia pending, 18% of the total.

In 2022, a new president of the human rights court was chosen by her colleagues: Siofra O'Leary. The first Irish President, the first woman. During her mandate she made a successful plea to the Committee of Ministers and the Parliamentary Assembly of the Council of Europe [39] [40] In her speech on the occasion of the opening of the judicial year 2024, she referred to the

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[35] See Rules of Court Art. 18.B.

[36] The jurisconsult plays more or less the same role as the advocate general at the European Court of Justice, or the public prosecutors office at the highest courts of the Netherlands. The Court of Justice of the EU refused, in a decision of the Grand Chamber, to give parties the possibility to react to the Advocate General's Opinion, ECJ 9 juni 2022, Case C-673/20 (RP v. Préfet du Ger, Institut national de la statistique et des études économiques (INSEE)). As is well known, the plenary of the ECtHR decided in Borgers v. Belgium (Appl. No. 12005/86 of 30 October 1991) that parties should be able to reply to submissions by an official of the procureur général's department; this is known in the Netherlands as the Borgersbrief. (It is no mere coincidence that there were robust dissenting opinions from the Belgian ex officio judge, Storme, and the Dutch judge Martens, who saw the impending consequences for their supreme courts.)

[37] See also Barkhuysen and Van Emmerik, op. cit. p.430: ' As far as this procedure is concerned, one can seriously doubt whether the Court itself abides by the guarantees of the Convention, especially Article 6 (fair trial, reasonable time, right to a well-reasoned judicial decision) as developed in its own case law.'

[38] For a similar view, see judge Georges Ravarani, The Fairness of Proceedings before the European Court of Justice, in *Liber Amicorum Sicilianos*, p. 469.

[39] She received her doctoral degree in 1993 at the European University Institute, for a wonderful PhD dissertation on 'The Evolving Concept of Community Citizenship'. I may add that I was her proud and lucky supervisor.

[40] Cf. Rules of Court Art. 9(1).

Reykjavik Declaration of the Committee of Ministers, and 'wholeheartedly [thanked the] States for having translated political support for the Convention system and the values it upholds into the provision of more sustainable financing.'[41] Will it help?

[41] See Appendix IV to the Reykjavik Declaration, where the states undertake, amongst other things, 'to ensure the allocation of sufficient and sustainable resources to enable the Court to exercise its judicial functions and deal with its workload expeditiously.' O'Leary, after fulfilling her nine year mandate, was succeeded as per 2 July 2024 by Marko Bosnjak.