The bureaucratic court? Administrative justice and the admissibility decision-making of the European Court of Human Rights

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Thesis abstract

How should the European Court of Human Rights “decide what cases to decide”? This thesis examines the procedural justice of the admissibility decision-making of the Strasbourg court. Reappraising the “individual vs constitutional” debate which continues to dominate the Convention literature, this thesis draws on socio-legal administrative justice theory to analyse the complexities, discrepancies and tensions which have characterised debates about how Strasbourg’s docket-filtering should be organised. Having established the relevance and force of this new conceptual framework, this thesis identifies four distinct and competitive conceptions of how the Court’s docket-filtering should be designed: the Strasbourg as court, constitutional court, bureaucracy and tribunal models. I show that the ongoing debates about admissibility reform and institutional design in both the Council of Europe and the academy have been premised on neither a rigorous empirical analysis of the Court’s working practices, nor a detailed analysis of its admissibility jurisprudence.

This thesis addresses these lacunae. Drawing on an empirical analysis of the evolving text of the Convention, Council of Europe policy papers, evidence of the Court’s working practices, and a critical examination of its published admissibility decisions, this thesis demonstrates that the orthodox, doctrinal analysis of the Court’s admissibility decision-making misunderstands and misrepresents most of the Court’s working practices. The dominant voice in the literature contends that Strasbourg has now become a “constitutional court.” My data shows that while judges retain a superficial responsibility for decision-making at the threshold in Strasbourg, in practice, the Court’s Registry has quietly accrued greater and greater responsibility for the docket while judicial participation in decision-making has been marginalised. The law on the books, it is shown, remains a poor guide to how the law operates in practice. These socio-legal insights allow a radical reappraisal of our understanding of the Court, and the theoretical and methodological limits of the existing literature on the Court and the law of the Convention.

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1. Three decades of crisis: docket-filtering, Convention reform and the European Court of Human Rights

In January 2012, the Eurosceptic *Daily Telegraph* and *Daily Mail* newspapers published articles suggesting that the United Kingdom 'loses three in four' of its cases before the European Court of Human Rights in Strasbourg.[1] The claim was based on a research report commissioned by a group of back-bench Conservative Party members of Parliament and published during a period of unparalleled press and political interest in the reform of the European Convention on Human Rights, and controversy about the Court's jurisdiction and legitimacy.[2]

Two months later, representatives of the governments of the 47 Member States of the Council of Europe gathered in Brighton, to discuss the 'future of the European Court.'[3] That discussion would produce Protocol No. 215, the sixth amendment to the Convention in the last twenty-five years. Past iterations of Convention reform had 'stirred not a whisper on this side of the Channel,' with 'no or little public or media discussion' about the Court's problems and challenges.[4] After the Westminster General Election of 2010, however, this hitherto 'obscure tribunal in Strasbourg'[5] has been the subject of what its British former President, Nicolas Bratza, described as 'a sustained attack' by 'senior British politicians'

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[1] Hereafter, "the Court". A Hough & T Whitehead (2012) 'Britain loses 3 in 4 cases at human rights court' *The Telegraph* 12th January 2012 and J Slack (2012) 'Europe's war on British justice: UK loses three out of four human rights cases, damning report reveals' *Daily Mail* 12th January 2012.

[2] R Broadhurst (2012) *Human Rights: Making them work for the people of the UK* available at www.makinghumanrightswork.org.uk/ last accessed 14.01.2014. Ten MPs, who contributed a collective foreword to Broadhurst's report. These were Chris Heaton-Harris, Guto Bebb, Jackie Doyle-Price, Bernard Jenkin, Andrea Leadsom, David Nuttall, Christopher Pincher, Jacob Rees-Mogg, Henry Smith and Martin Vickers. All were elected in respect of the Conservative Party and represent its most Eurosceptic wing.

[3] Council of Europe (2012) *Brighton Declaration on the Future of the European Court of Human Rights* (Strasbourg, Council of Europe).

[4] F Gibb (1992) 'Paths to faster justice' *The Times* May 26th 1992; M O'Boyle (2008) 'On reforming the operation of the European Court of Human Rights' *European Human Rights Law Review* 1 – 11, 10 - 11.

[5] M Goldhaber (2009) *A People's History of the European Court of Human Rights* (London, Rutgers), 1.

and the ‘popular press’ which he characterised as ‘often based on a misunderstanding of the court's role and history, and of the legal issues at stake.’[6]

Bratza may well have had the *Daily Mail* and *Telegraph* headlines in mind. Drawing on the Court’s official statistics, Robert Broadhurst’s Tory research paper recorded that between 1959 and 2010, the Court had handed down 443 judgments in respect of the United Kingdom.[7] Of these, 271 judgments (actually 61%, not three quarters of the total) found that at least one of the rights protected by the European Convention had been violated, while only 86 of the Court’s judgments (19% of the total) absolved the UK of infringing applicants’ rights.

For the *Telegraph* and *Mail*, these figures demonstrated ‘Europe’s war on British justice,’ establishing empirically that the European Court interferes inordinately in the United Kingdom’s internal affairs, and is ‘making a relentless attack on British laws laid down over centuries by Parliament.’[8] The Conservative parliamentarians came to the same conclusion, demanding that the UK government ‘end rule by judges and reinstate Parliamentary democracy.’[9] The impression cultivated was that most applicants to the Court, however ‘frivolous’ their complaints, tend much more often than not to win their cases in Strasbourg.[10] This claim is demonstrably false, the statistical vice, omission.

Conspicuous by its absence from these reports was the Court’s decision-making on the admissibility of individual petitions. In the Court’s official terminology, cases decided against the admissibility criteria now set out in Article 35 of the Convention are characterised as “decisions” rather than “judgments”, and quantitatively speaking, these cases are far more abundant than the Court’s comparatively few judgments.[11] Between 2001 and 2011, the Court rendered a total of 409,289 decisions and judgments on

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[6] N Bratza (2012) ‘Britain should be defending European justice, not attacking it’ *Independent* January 24th 2012.
[7] European Court of Human Rights (2010) *Tableau de Violations 1959 – 2010*, 2.
[8] J Slack (2012).
[9] In foreword to R Broadhurst (2012), 2.
[10] A Hough & T Whitehead (2012).
[11] The words “application”, “petition” and “case” are employed throughout this thesis to describe litigation before the Court. These terms are, as in much of the literature on the law of the Convention, used interchangeably and should not be understood as an attempt to distinguish between different types of Strasbourg case.

applications submitted to it. Judgments represented just 17,198, or 4%, of the Court's total count of judicial disposals of cases. The Court's 329,091 decisions on the admissibility and striking out of applications, by contrast, accounted for 96% of all of the decisions adopted by the institution between 2001 and 2011: the overwhelming majority of disposals.

The fate of cases lodged against the United Kingdom did not and does not differ from this overall picture. Official statistics released by the Court show that judgments were handed down in just 23 of the total of 1,198 applications against the United Kingdom decided in 2010 (1.9%), in 30 of 2011's total of 1,058 decided cases (2.8%), and in 35 of 2012's 2,082 (1.7%).[12] Cases rejected as inadmissible cannot be reopened or appealed, and applicants' complaints against the respondent state are not further examined by the Court. Where an application is determined to be inadmissible, Strasbourg proceedings end. The Court will not declare that a violation of the Convention has occurred and there is no possibility for the applicant to receive any award of damages. In every important respect, a finding of inadmissibility represents defeat for the applicant, and a "victory" for the respondent state.

The number of cases in which applicants prevail over the government is tiny. In 2012, the Court issued twenty-four judgments in cases taken against the United Kingdom.[13] Of these, thirteen found that Britain had not violated any human right protected by the Convention, while the remaining judgment was decided without resort to the merits of the case. A further 2,047 applications against the UK were declared inadmissible by decision that year. Quite apart from the UK losing three quarter of cases lodged against them in Strasbourg, the country's real rate of defeat is closer to 0.5% of cases lodged. Europe's 'war on British justice' amounted to ten adverse judgments. By factoring its admissibility back into our understanding of how the Court operates, the straw warrior depicted by the Court's critics collapses.

The journalists of the *Daily Mail* and *Daily Telegraph* are not the first or only analysts of the Convention to overlook the significance of the Court's admissibility decision-making.

[12] European Court of Human Rights (2013) *Analysis of Statistics 2012*, 60.
[13] *Ibid*. This number is smaller than the total number of applications against the United Kingdom decided by judgment in 2012. This is attributable to the Court rolling multiple applications together, deciding them in a single judgment. Hence the number of applications decided *by judgment* is higher than the number of *judgments* handed down.

This elision arguably reflects a wider perception – held by much of the legal academy – that admissibility decision-making and the Court's inadmissible cases are of limited and peripheral interest to students and scholars of the Convention. Marie-Bénédicte Dembour has described the institution's admissibility decisions as the Court's 'forgotten cases.'[14] If anything, however, this metaphor of forgetfulness misses the wider puzzle. Admissibility decision-making has been both (a) at the heart of Convention reform debates for the last three decades and (b) strangely neglected, empirically and jurisprudentially, by the Convention's reformers and the legal academic community, analysing the Court's work.

Why admissibility decision-making matters

In the sixty years since its ratification in 1950, the European Convention on Human Rights and Fundamental Freedoms and its institutional 'control machinery' has undergone radical development.[15] The human rights protected by the core document have been elaborated by the inclusion of new protections in additional Protocols.[16] Optional in the Convention's first iteration in 1950, the jurisdiction of the Court is now mandatory. Today every natural and legal person is invested with the right to lodge an application with the Court, alleging that a member state which has ratified the Convention has violated one of the rights it protects. Between 1959 and 1998, the international court operated on a part-time basis, deciding just a handful of cases a year, while it sister institution, the European Commission on Human Rights, filtered individual petitions against the admissibility criteria established in the Convention, determining which applications were communicated to the Court for a

[14] M B Dembour (2006) *Who Believes in Human Rights?* (Oxford, OUP) 127.
[15] Council of Europe (1990) *Explanatory Report to Protocol No. 9 of the Convention for the Protection of Human Rights and Fundamental Freedoms*, para 20.
[16] (1952) Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, Paris, 20.III.1952; (1963) Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms securing certain rights and freedoms other than those already included in the Convention and the First Protocol thereto, Strasbourg, 16.IX.1963; (1983) Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the Abolition of the Death Penalty, Strasbourg, 28.IV.1983; (1984) Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Strasbourg, 22.XI.1984; (2000) Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4.XI.2000; (2000) Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4.XI.2000; (2002) 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, Vilnius, 3.V.2002.

judgment on their merits.[17] A single judge and member of the Commission was appointed in respect of each signatory state. For much of their early life, both institutions were supported by a skeleton staff of permanent employees. In 1993, the Commission was assisted by forty-five lawyers, and the Court by just seventeen.[18] Two decades on, the Court has incorporated the Commission's docket-filtering functions, operates on a full-time basis, consists of forty-seven judges, and as of 2012, employs 640 legal and support staff to assist its decision-making at a cost of £57,578,914 per annum to its member states.[19] Since 2006, the Court's jurisdiction encompasses forty seven member states and a population of more than 800 million people, its *espace juridique* stretching from Reykjavik to Vladivostok.

Today, the European Court of Human Rights is engulfed in individual applications. By the end of January 2013, the Court recorded a backlog of 126,850 pending cases,[20] with a further 21,950 new applications at a pre-judicial phase, awaiting allocation to one of the Court's judicial formations.[21] Even if the Court ceased accepting new applications tomorrow, at its current pace it will take the Court just over 29 years to clear out all of the cases currently on its docket.[22] In January 2013 alone, the Court received around 5,600 new applications.[23] The scale of Strasbourg's caseload crisis dwarfs the difficulties faced by any other international tribunal or national supreme or constitutional court. In 2006, a group of experts charged by the Committee of Ministers of the Council of Europe to examine potential Court reforms found that 'the system is in danger of collapsing', the 'explosion in the number of cases' filling the Court's docket representing 'serious threat to the survival of the judicial protection of human rights and the Court's ability to cope with its workload', a 'dramatic development jeopardises the proper functioning of the

[17] Hereafter, "the Commission".
[18] H G Schermers (1993) 'The European Court of Human Rights after the merger' *European Law Review*, 504.
[19] European Court of Human Rights (2013) *Annual Report 2012*.
[20] European Court of Human Rights (2013) *Statistics 1/1-3/1/2013* (Strasbourg, European Court of Human Rights).
[21] *Ibid*.
[22] In 2012 the Court decided 1,678 applications by judgment, of which 1,472 concerned the more complex "chamber cases" which cannot be decided according to the Court's well-settled case-law. By the end of 2012, some 43,000 chamber cases are pending. European Court of Human Rights (2013) *Analysis of Statistics 2012* (Strasbourg, European Court of Human Rights), 5.
[23] *Ibid*, 5.

Convention's control system.'[24] While the institution has not collapsed, the crisis they described in 2006 has been considerably aggravated in the intervening period. The problem of admissibility decision-making is more salient than ever.

The scale of the challenge faced by the Court in the last three decades is sobering. Steven Greer has distinguished three stages in the development of the Court's workload since it was established 1959: 'dormancy' covering the period between 1959 and the mid-1980s, 'activation' during the late 1980s till the late 1990s, and 'case overload' stretching from the late 1990s until the 2000s.[25] An analysis of the Court's statistics suggests that the tribunal has entered a fourth stage: hyperactivity.

The key tool employed by the Court to manage its case-load has been the Convention's admissibility criteria, which lay out legal conditions governing whether individual applications can be accepted for full review on their merits. There is an understandable impulse to regard these 'filtering provisions' and their operation as a 'technical' stage in Strasbourg proceedings, the 'bland administrative work' of applying 'merely formal admissibility tests' to incoming petitions.[26] As the Dutch jurist Tom Zwart has argued, however, 'in their simplest form admissibility conditions identify which claims may be brought by whom and when.'[27] The conditions and their interpretation determine who is and who is not able to gain access to the Court and to have their human rights complaints examined, and on what terms. They shape the Court's substantive decision-making agenda and its standard-setting. As the former President of the Court, Jean-Paul Costa, recognised in the preamble to a recent French-language edited collection on the admissibility criteria, these are important considerations which go to the heart of how the Convention works:

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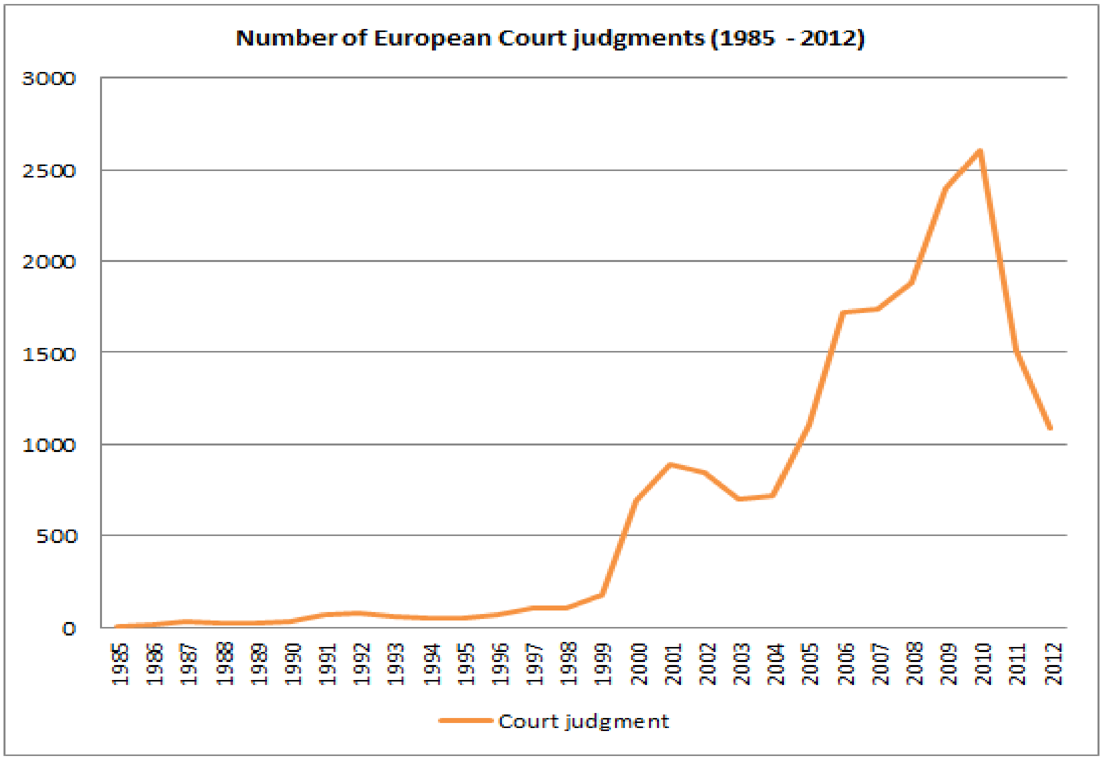
[24] Group of Wise Persons (2006) *Report of the Group of Wise Persons to the Committee of Ministers* CM (2006)203 979bis, para 28.
[25] S Greer (2006), 33.
[26] T Zwart (1994) *The Admissibility of Human Rights Petitions* (Antwerp, Intersentia), 4; A Tomkins (1999) 'Civil liberties in the Council of Europe: A critical survey' in Conor Gearty (ed) (1999) *European Civil Liberties and the European Convention on Human Rights: A Comparative Study* (Martinus Nijhoff, the Hague) 1 – 52, 14; W Sarduski (2009) 'Partnering with Strasbourg: Constitutionalisation of the European Court of Human Rights, the Accession of Central and Eastern European States to the Council of Europe, and the Idea of Pilot Judgments' *Human Rights Law Review* 9:3 397 – 453, 406.
[27] T Zwart (1994), 4.

De prime abord, ce theme peut sembler moins spectaculaire que des sujets touchant au fond des droits et des litertés grantis par la Convention, et plus technique aussi. En realité, les conditions de saisine de la Court européenne des droits de l'homme sont au coeur du mécanisme de la Convention.[28]

Quantitatively, admissibility decisions are also far more representative of the Court's decision-making work than its influential but comparatively rare judgments. While Court statistics show substantial increases in the number of judgments made by the Court per annum after 1999, the area of most dramatic inflation has been in the number of decisions declaring applications inadmissible or striking applications from the Court's list.

Figure 1.

[28] J P Costa (2011) in P Dourneau-Josette and E L Abdelgawad (eds) (2011) *Quel filtrage des requetes par La Cour européenne des droits de l'homme?* (Council of Europe, Strasbourg), 7.



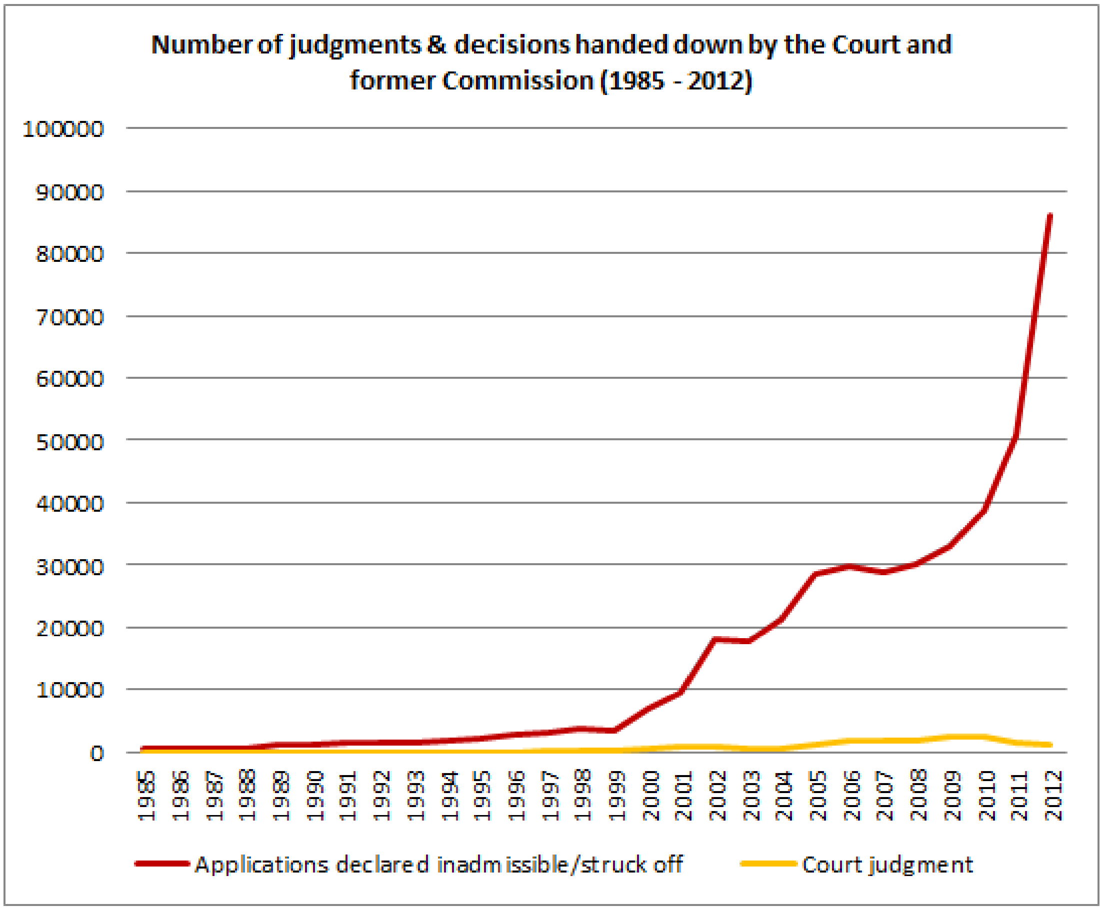
Under Article 37 of the Convention, the Court may strike out applications in three circumstances, where 'the circumstances lead to the conclusion' that (a) 'the applicant does not intend to pursue his application', that (b) 'the matter has been resolved' or (c) 'for any other reason established by the Court, it is no longer justified to continue the examination of the application.'[29]

Although decisions on admissibility and striking out decisions are not disaggregated in the Court's annual statistics, of the two, official data from 2011 confirms that it is decisions rejecting applications as inadmissible that represent the runaway growth figure. While a total of 50,677 applications were decided by the Court in 2011 either on grounds of admissibility or striking a case from the list, declarations of inadmissibility numbered 47,007, or 93% of that total.[30] Between 1999 and 2012, the number of applications declared inadmissible and struck from the list increased by 2,349%, with a 70% increase in the number of decisions made on these grounds between 2011 and 2012 alone.

[29] ECHR, Article 37 § 1(a), (b) and (c).

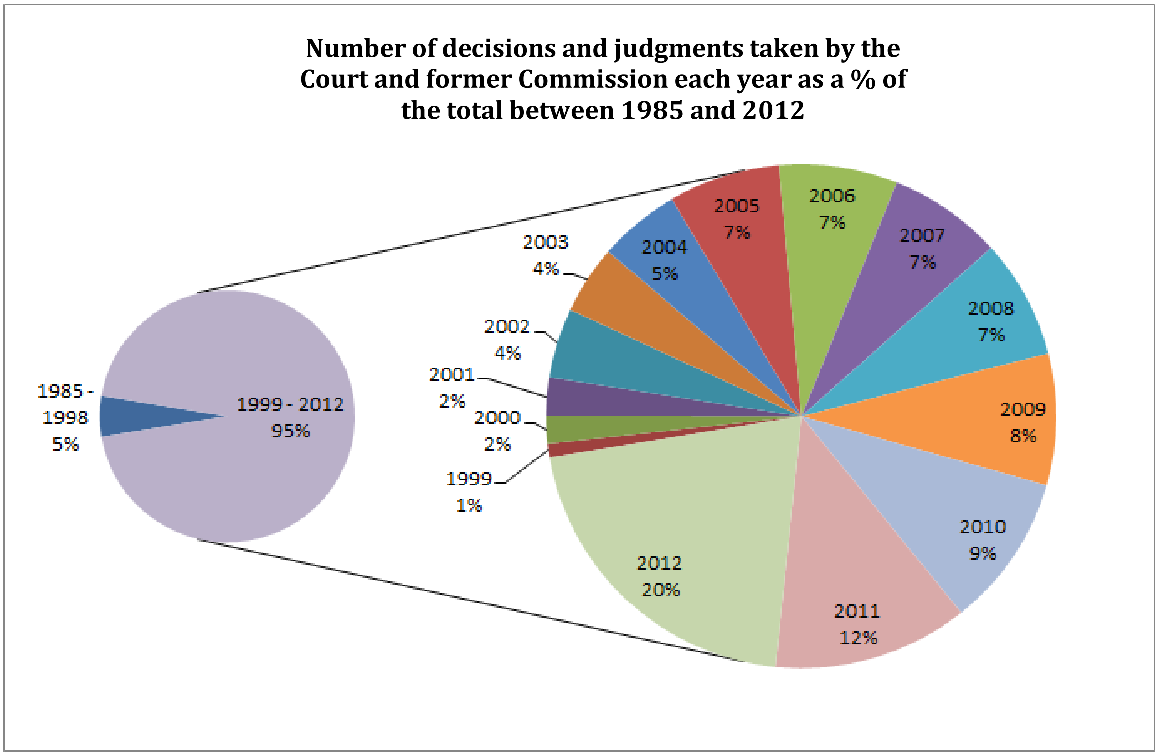
[30] European Court of Human Rights (2012) *Annual Report 2011* (Strasbourg, European Court of Human Rights), 151; European Court of Human Rights (2012) *Admissibility Checklist: Facts About Admissibility.*

Figure 2.



These developments are reflected in the exponential increase in the total number of decisions and judgments adopted by the Commission and Court from 1985 onwards. The Court's official statistics show that 95% of *all* of the decisions and judgments taken by the Court between 1985 and 2012 were made *after* 1998, and the decision-making pace is quickening. Incredibly, in 2012 the Court pronounced 20% of *all* of the judgments and decisions it has made in the last twenty-seven years of its work.

Figure 3.



For the vast majority of applicants, a negative decision on the admissibility of their petition is the full extent of their proceedings before the Court. As Dembour has argued, most of these decisions will:

> never find their way into a legal commentary. Quantitatively, however, they are far more representative of the Strasbourg case law than the comparatively few judgments which are, by contrast, the subject of abundant commentary.[31]

As a consequence of this still dramatically-escalating caseload, over the last three decades, the admissibility decision-making has been the focus of considerable attention in the analysis of the 'mounting pressure on the Convention system.'[32] Harmsen has observed that the:

> language of imperative reform, suggesting that measures are urgently required to save a system at breaking point, has perhaps in its own way become something of

[31] M B Dembour (2006) *Who Believes in Human Rights?* 127.
[32] R Wolfrum & U Deutsch (eds) (2009) The European Court of Human Rights Overwhelmed by Applications: Problems and Solutions (Berlin, Springer Verlag).

> a reassuring constant for those concerned with the institutional system established by the European Convention on Human Rights. For some three decades now, discussions of the reforms needed to deal with a rapidly (indeed exponentially) growing caseload have figured prominently in any analysis of the future prospects of the Convention system.[33]

Since 1985, the 'filtering' of the Court's docket, the criteria which could and should be applied at this jurisdictional stage of proceedings, and the procedures which the Court might employ to apply them, has consumed four independent research reports commissioned by Council of Europe institutions, several high level intergovernmental meetings, six new Protocols amending the admissibility decision-making criteria and procedures set down in the Convention, and hundreds of meetings of the Council of Europe Steering Committee on Human Rights (CDDH), staffed by diplomatic representatives of signatory states and charged by the Committee of Ministers with the investigation and coordination the Council's Court and Convention reform efforts.

How should a European human rights court 'decide which cases to decide'?[34] Should the Court be recast as a quasi-constitutional court, managing its docket and setting its agenda by exercising discretionary review only of those applications which the Court considers to be particularly significant, deserving or important? Alternatively, does the universality of human rights and the importance of the right of individual petition require that every application should be accepted for full review where certain formalistic criteria for its admissibility are met? What about indigent applicants without access to professional legal advice? Should the process take account of their limited economic and social capital? Where, on the evidence, does the Court's practice sit on this 'sifting' continuum? Should responsibility for 'filtering' the Court's caseload rest exclusively with judges, or might it be permissible to empower the Court's bureaucracy to determine the fate of applications?

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[33] R Harmsen (2011) 'The Reform of the Convention System: Institutional Restructuring and the (Geo-)Politics of Human Rights in *The European Court of Human Rights between Law and Politics* (Oxford, OUP), 119.
[34] This phrase is borrowed from the title of Perry's seminal study of agenda-setting in the United States Supreme Court. H W Perry (1991) *Deciding to Decide: Agenda Setting in the US Supreme Court* (Harvard College, Harvard).

Today, these issues remain largely unresolved, the object of lively political controversy and the topic of extensive debate in the legal academy. However, that debate suffers from striking limitations. Despite being implicated in the Court's caseload crisis, and of the essence to three decades of high level and coordinated policy and legal debate, admissibility decision-making and inadmissible cases remain under-researched and poorly understood.

Missing empirical work on the European Court and its admissibility decision-making

The Court and its admissibility decision-making are only now beginning to be subject to rigorous empirical research. In recent years, scholars have identified an increasingly 'empirical turn in international legal scholarship', employing a range of quantitative, qualitative, mixed methods and theories derived from different social science disciplines to elaborate 'how international law works in different contexts.'[35] Empirical studies of judicial institutions have contributed significantly to that development. By contrast, the European Court of Human Rights stands out as an academically-neglected international tribunal.

Empirical work engaging with the Court has been fragmented in focus and approach, and limited in scale. No socio-legal study to date has focussed on the Court's admissibility decision-making. Christoffersen and Madsen have argued that 'scholarly understanding of the ECtHR remains comparatively unexplored in law and particularly the social sciences.'[36] By contrast, the socio-legal literature on the Court of Justice of the European Union is substantial.[37] The field of international criminal law and transitional justice in

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[35] G Shaffer and T Gingburg (2012) 'The Empirical Turn in International Legal Scholarship' *The American Journal of International Law* 10, 2,

[36] J Christoffersen and M R Madsen (2011) 'Introduction' in *The European Court of Human Rights between Law and Politics* (Oxford, OUP), 3.

[37] Recent developments, summarised here: W Mattli and A Slaughter (1998) 'Revisiting the European Court of Justice' *International* Organisation 51:1, 177 – 209. One academic commentator has suggested that 'social scientists have produced more research on the ECJ, and its impact on markets and politics, than on any other court in the world, with the single exception of the United States Supreme Court'. A Stone Sweet (2010) 'The European Court of Justice and the judicialization of EU governance' *Living Reviews in European Governance* 5, 2.

post-conflict situations has produced significant empirical work, examining the internal workings of international criminal tribunals,[38] their reception and impact,[39] exploring the experiences of participants in proceedings.[40]

There are signs, however, of 'growth of interdisciplinary approaches to human rights' in Europe, challenging and elaborating what one scholar described as the 'still predominantly legalistic' character of the field.[41] Almost all of these studies have emerged since the early 2000s, most of them drawing on the theoretical resources and methodologies of well-established forms of socio-legal research. In the late 1990s, Hungarian lawyer (and now far-right politician) Krisztina Morvai, published a critical account on her experiences working for the Registry of the Court's predecessor in admissibility decision-making, the European Commission.[42] There are qualitative empirical elements in Dembour's work on the Court, though her study mainly draws on the familiar sources of the Court's published jurisprudence and conceptual philosophical debates about human rights claims as such.[43] Arold drew on theories of 'legal culture' to examine how the Court's diverse bench of judges were able to achieve consensus in their deliberations, despite their diverse educational, legal and social backgrounds in different legal systems across Europe.[44]

[38] See J Hagan (2003) *Justice in the Balkans: Prosecuting War Crimes in The Hague Tribunal* (Chicago, University of Chicago Press).
[39] See, among many other examples, E Stover and H M Weinstein (eds) (2004) *My Neighbor, My Enemy: Justice and Community in the Aftermath of Mass Atrocity*; J Tošić (2006) 'Transparent broadcast? The reception of Milošević's trial in Serbia' in M Dembour and T Kelly (eds) (2006) *Paths to International Justice*, 83 – 110.
[40] See, for example, E Haslam (2006) 'Law, civil society and contested justice at the International Criminal Tribunal for Rwanda' M Debour and T Kelly (eds) (2006) *Paths to International Justice*, 57 – 82.
[41] M Freeman (2011) *Human Rights: An Interdisciplinary Approach* 2nd edn (Cambridge, Polity), viii.
[42] K Morvai (1998) 'The construction of the other in the European human rights enterprise: a narrative about democracy, human rights, the rule of law and my neighbour Uncle Blaze' in P Fitzpatrick & J H Bergeron (eds) (1998) *Europe's Other: European law between modernity and postmodernity* (Aldershot: Dartmouth)
[43] M Dembour (1996) 'Human rights talk and anthropological ambivalence: The particular contexts of universal claims' in O Harris (ed) (1996) *Inside and Outside the Law: Anthropological Studies of Authority and Ambiguity* (London, Routledge) 19 – 40; M Dembour (2002) '"Finishing off" cases: The radical solution to the problem of the expanding ECtHR Caseload' *European Human Rights Law Review* 604 – 23; M Dembour and M Krzyzanowska-Mierzewska (2004) 'Ten years on: the popularity of the Convention in Poland' *European Human Rights Law Review* 400; M Dembour (2006) *Who Believes in Human Rights?* (Oxford, OUP).
[44] N Arold (2007) The Legal Culture of the European Court of Human Rights (Matinus Nijhoff, Leiden, Boston)

In 2010, Dzehtsiarou supplemented his primarily doctrinal analysis of the idea of a European consensus in the jurisprudence of the Court with interviews with five judges.[45] White & Boussiakou produced some qualitative interview material derived from their primarily quantitative study on the phenomenon of dissenting and separate opinions in the Court,[46] while the American legal journalist Michael Goldhaber's *People's History of Human Rights* (2007) uses interview and biographical material to 'flesh out' the individual applicants involved in some of the most jurisprudentially 'noteworthy' judgments of the Court, including Paula Marckx, who successfully challenged Belgium's bastardy laws before the Court in 1979,[47] and Jeffrey Dudgeon, who successfully contested the criminalisation of homosexual acts in Northern Ireland in Strasbourg in the 1980s.[48] Dembour and Kelly's edited volume marshalled various empirical contributions on 'paths to international justice',[49] including Sal Buckler's ethnographic research exploring gypsy communities' experiences of five unsuccessful cases brought against the United Kingdom in the European Court[50] and Zerilli and Dembour's account of the gap separating the applicants' understandings of what was at stake in his litigation against Romania, to recover a family home which had been expropriated during Communist rule and the European Court's representation of the nature of the dispute in its judgment.[51]

At a more structural level, focussed on the reception and perception of the Court's norms and legitimacy, Greer's work (2006), though primarily jurisprudential in approach, attempted to assess levels of state compliance with the European Convention,[52] while Halliday and Schmidt's (2004) edited collection of essays offered a range of country-

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[45] K Dzehtsiarou (2010) 'Consensus from within the Palace Walls' *UCD Working Papers in Law, Criminology and Socio-Legal Studies Research Paper* no. 40/2010
[46] R C A White & I Boussiakou (2009) 'Separate opinions in the European Court of Human Rights' *Human Rights Law Review* 9: 37 – 60; R C A White and I Boussiakou (2009) 'Voices from the European Court of Human Rights' *Netherlands Quarterly of Human Rights* 27 167.
[47] *Marckx v. Belgium* App no 6833/74 (ECtHR, 13th June 1979) (judg).
[48] *Dudgeon v. the United Kingdom* App no 7525/76 (ECtHR, 22nd October 1981) (judg.)
[49] M B Dembour & T Kelly (eds) (2007) *Paths to International Justice* (Cambridge, CUP), 6.
[50] S Buckler (2007) 'Same old story? Gypsy understandings of the injustices of non-gypsy justice' in M Dembour & T Kelly (eds) (2007) *Paths to International Justice* (Cambridge, CUP) 243 – 261.
[51] F M Zerilli & M Dembour (2007) 'The House of Ghosts: Post-Socialist Property Restitution and the European Court's rendition of human rights in Brumarescu v. Romania' in M Dembour & T Kelly (eds) (2007) 189 – 215, 212.
[52] S Greer (2006) 'Convention compliance' in (2006) *European Convention on Human Rights: Achievements, Challenges, Prospects* (Cambridge, CUP) 60.

specific analyses about the reception and impact of the Court's interpretation of Convention rights in a range of national legal systems.[53] Adopting a similar structure, Stone Sweet and Helen Keller's (2008) *A Europe of Rights* attempts to quantify the reception of European human rights norms in a sample of national legal orders.[54]

Quantitative studies have been even more limited in number, and their analysis of admissibility issues, peripheral. Drawing on American political science approaches to the study of judicial politics, political scientist Erik Voeten extended quantitative methods of data analysis employed in the American judicial context to examine strategic behaviour in judicial appointments to the Court and to test theories of biases, activism and restraint in European judges' voting behaviour according to their voting behaviour in a sample of the Court's judgments.[55] Political scientists Çali, Koch and Bruch also employed quantitative methodologies in their large-scale study, collecting and analysing a substantial dataset on perceptions of the legitimacy of the European Court among 'domestic elites' in UK, Ireland, Germany, Turkey and Bulgaria, including national judges, domestic politicians and legal practitioners involved in litigation before the Court.[56] Although they found that legal practitioners suspected that the Court was declaring 'cases inadmissible in order to cut down on its caseload,' like the rest of these studies, Çali, Koch and Bruch prioritised the Court's judgments as a source of data, and hardly touch on issues of admissibility.[57]

Inadmissible cases: beneath the iceberg

One consequence of this academic neglect is that the processes of admissibility decision-making and the characteristics of inadmissible cases remain poorly understood. Writing in 1994, W G Schermers described admissibility-decision making as sunk invisibly into the

[53] S Halliday and P Schmidt (eds) (2004) *Human Rights Brought Home: Socio-Legal Studies of Human Rights in the National Context* (Oxford, OUP).
[54] H Keller & A Stone Sweet (eds) (2008) *A Europe of Rights* (Oxford, OUP).
[55] E Voeten (2007) 'The Politics of International Judicial Appointments: Evidence from the European Court of Human Rights *International Organization* 61(4) 669 – 701; E Voeten (2008) 'The Impartiality of International Judges: Evidence from the European Court of Human Rights' *American Political Science Review* 102(4) 417 – 433.
[56] B Çali, A Koch and N Bruch (2011) *The Legitimacy of the European Court of Human Rights: The View from the Ground*, 6.
[57] B Çalı, A Koch and N Bruch (2011) *The Legitimacy of the European Court of Human Rights: The View from the Ground* (UCL, London), 36.

institutional permafrost: 'the workload of the Strasbourg institutions is like an iceberg. Only a little tip remains visible to the outside world; the great mass remains hidden under water.'[58] Little has changed in the two intervening decades. Dourneau-Josette and Abdelgawad describe admissibility as '*un aspect délaissé et très mal connu de la jurisprudence de Strasbourg.'*[59] Political scientist Erik Voeten echoed this diagnosis in his contribution to a 2011 collection, arguing that 'there is virtually no empirical evidence about the admissibility process.'[60] For Keller, Fischer and Kuhne, admissibility decisions 'remain unnoticed,' likening the Court's decision-making to a 'black box' – a metaphor classically employed to describe systems whose inner workings are unknown, the operation of which may only be discerned in terms of its inputs and its outputs.[61] Leach endorses this view in describing the analysis of admissibility decision-making in recent Convention reform debates. 'There needs to be', he argued:

> an evidence-based approach to considering and seeking to solve the problems faced by the Court. It has not always been apparent that the reform debate in recent years has been founded on objectively established evidence, rather than subjective opinion.[62]

Even the Court's former President, Jean-Paul Costa, recognised while in office that the 'causes of this phenomenon [the high levels of cases declared inadmissible] need to be analysed.'[63] As Leach observes, given the centrality of admissibility decision-making to every recent Convention reform debate since the 1980s, 'it is remarkable that such an analysis was not undertaken years ago.'[64]

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[58] W G Schermers 'The Eleventh Protocol to the ECHR' 19 *European Law Review* (1994) 367, 370.
[59] P Dourneau-Josette and E L Abdelgawad (eds) (2011) *Quel filtrage des requetes par La Cour européenne des droits de l'homme?* (Council of Europe, Strasbourg).
[60] E Voeten (2011) 'Politics, Judicial Behaviour, and Institutional Design' in J Christoffersen and M R Madsen (eds) (2011) *The European Court of Human Rights between Law and Politics* (Oxford, OUP), 76.
[61] H Keller, A Fischer and D Kuhne (2011) 'Debating the future of the European Court of Human Rights after the Interlaken Conference: Two Innovative Proposals' *European Journal of International Law* 21 1025 – 1048, 1027, 1046.
[62] P Leach (2009), 727.
[63] J P Costa (2009) *Memorandum of the President of the European Court of Human Rights to the States with a view to Preparing the Interlaken Conference* (3rd July 2009), 2.
[64] P Leach (2009), 727.

Frozen legal scholarship: the neglected admissibility jurisprudence

Perhaps surprisingly, critical *legal* analysis of the Court's approach to the interpretation of the admissibility criteria also remains in a nascent state. Even though docket-filtering has remained at the heart of Convention reform debate for three decades, doctrinal scholarship examining the Court's admissibility jurisprudence has remained limited – and has even retreated – during the same period. The substantive provisions of the Convention, the Court's published judgments and the Court's major canons of interpretation[65] have continued to attract a wealth of jurisprudential analyses and thematic commentaries.[66] The Convention's procedural sections, by contrast, have largely been neglected by the legal academy.

Since admissibility decision-making under the Convention began in 1959, Laurids Mikaelsen's (1980) *European Protection of Human Rights: The Practice and Procedure of the European Commission of Human Rights on the Admissibility of Applications from Individuals and States* and Tom Zwart's *The Admissibility of Human Rights Petitions* (1994) have remained the only substantial legal academic monographs which have engaged with the Convention's admissibility criteria in a sustained and comprehensive way.[67] The most recent was published two decades ago. In 2010, the Court's Research Division produced a *Practical Guide on Admissibility Criteria* for the first time. Designed as a

[65] See, amongst many other examples, H C Yourow (1996) *The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence* (Dortrecht, Martinus Nijhoff), G Letsas (2009) *A Theory of Interpretation of the European Convention on Human Rights* (Oxford, OUP); S Greer (2006) *The European Convention on Human Rights: achievements, problems and prospects* (Oxford, OUP); S Sottiaux and G van Der Schyff (2008) 'Methods of International Human Rights Adjudication: Towards a More Structured Decision-Making Process for the European Court of Human Rights' *Hastings International and Competition Law Review* 31 115; Y Arai-Takahashi (2002) *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* (Antwerp, Intersentia).
[66] See, amongst many other examples, N Mole (2007) *Asylum and the European Convention on Human Rights* (Council of Europe, Strasbourg); P Bartlett, O Lewis, O Thorold (2007) *Mental Disability and the European Convention on Human Rights* (Martinus Nijhoff, Antwerp); A R Çoban (2004) *Protection of Property Rights within the European Convention on Human Rights* (London, Ashgate); O M Arnardottir (2003) *Equality and Non-Discrimination under the European Convention on Human Rights* (Dordrecht, Martinus Niihoff).
[67] T Zwart (1994) *The Admissibility of Human Rights Petitions: The case law of the European Commission of Human Rights and the Human Rights Committee* (Dordrecht, Martinus Nijhof); L Mikaelsen (1980) *European Protection of Human Rights: The Practice and Procedure of the European Commission of Human Rights on the Admissibility of Applications from Individuals and States* (Alphen aan den Rijn, Sitjhoff and Noordhoff)

reference document 'aimed primarily at legal practitioners,' the *Guide* is a substantial text which marshals authorities from the Court's published case-law, and aims to provide 'comprehensive and objective information on the application procedure and admissibility criteria.'[68] While a systematic and careful piece of legal work, the *Guide*'s aims are not primarily analytical or critical. As one might expect from an official publication, tensions, discrepancies and complexities in the Court's case-law on the admissibility criteria are generally not explored or highlighted.

Similar limitations characterise the treatment which the admissibility criteria have received in legal textbooks on the law of the Convention, aiming to provide 'comprehensive understanding of the work of the Strasbourg organs and the current state of the European Convention case law.'[69] These textbooks are regularly updated, have all run to several editions, and are all expanding in scale, adding pages, and new themes and topics, to the authors' analyses. While all of these major works include sections devoted to the elucidation of the admissibility criteria, looking back over recent editions, their sections on the Court's admissibility jurisprudence are all either shrinking in scope, or stagnating in content.

For example, while the third edition of Van Dijk and Van Hoof (published in the year the Court took over the European Commission's responsibility for admissibility decision-making, in 1998) found forty-five pages in their 893 page work to expend on admissibility jurisprudence, Harris, O'Boyle and Warbrick expend only thirty of 902 in their latest edition, Jacobs and White sixteen of 506 pages, Mowbray seven of 1,058, and Reid thirty of 903. In the expanded fourth edition of Van Dijk and Van Hoof, published in 2006, the attention paid to admissibility conditions shrinks substantially. While the text has increased

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[68] European Court of Human Rights (2011) *Practical Guide on Admissibility Criteria* (European Court of Human Rights, Strasbourg), 8, 7.

[69] The seven most influential, and widely circulating, are: A Mowbray (2012) *Cases and Materials on the European Convention on Human Rights* 3rd edn (OUP, Oxford); K Reid (2012) *A practitioner's guide to the European Convention on Human Rights* 4th edn (London, Sweet and Maxwell); F Van Dijk, F Van Hoof and A Van Rijn (eds)(2006) *Theory and Practice of the European Convention on Human Rights* 4th edn (Antwerp, Intersentia); J Simor & B Emmerson (2000) *Human Rights Practice* (London, Sweet and Maxwell); P Leach (2011) *Taking a Case to the European Court of Human Rights* 3rd edn (Oxford, OUP), Jacobs, R White and C Ovey (2010) *The European Convention on Human Rights* 5th edn (Oxford, OUP); D Harris, M O'Boyle, C Warbrick and E Bates (2009) *The Law of the European Convention on Human Rights* 2nd edn (Oxford, OUP).

from 893 to 1190 pages between editions, only six pages of the latest edition are now committed to the exegesis of the admissibility criteria.

Ovey and White added eighty-five pages to the fourth edition of their textbook. Save for a few technical changes in their discussion of the Court's procedure for declaring cases inadmissible, their section on admissibility conditions is repeated verbatim, unaltered, without introducing any new case law or supplementary analysis whatsoever. Taken alone, such rough comparative page counts tell us relatively little about the academic treatment which admissibility decision-making has received. It is clear, however, that despite the ballooning number of cases rejected by the Court against these criteria, and the centrality of admissibility decision-making to the policy debates on Convention reform, the attention paid to the admissibility conditions in these important pedagogical texts is both modest, and sometimes retreating.

A small number of articles published in academic journals have explored the nature of the European Commission's admissibility decision-making before 1998 in greater detail.[70] Elsewhere, there are signs that some legal scholars have begun critically to engage in a more sustained way with the admissibility jurisprudence. In the context of their wider discussion of Convention reform, Keller, Fischer and Kühne have questioned the coherence, consistency and transparency of the Court's published jurisprudence on the ground of 'manifest ill-foundedness.'[71] In 2011, I attempted a similar critique of aspects of the superficially more formalistic six-month and anonymity admissibility rules.[72] Chapters in a recent French edited collection also do so.[73] Protocol No. 14, which introduced the new admissibility ground of 'significant disadvantage' in 2010, has also encouraged the

[70] A McNulty (1965) 'The Practice of the European Commission of Human Rights' *Howard Law Journal* 11 430 – 441.
[71] H Keller, A Fischer and D Kühne (2011).
[72] A Tickell (2011) 'Dismantling the Iron-Cage: The Discursive Persistence and Legal Failure of a Bureaucratic Rational Construction of the Admissibility Decision-Making of the European Court of Human Rights' *German Law Journal* 12 1786.
[73] M Eudes (2011) '*L'examen du grief manifestement mal fondé: le cas de l'article 8*' in P Dourneau-Josette and E L Abdelgawad (eds) (2011) *Quel filtrage des requetes par La Cour européenne des droits de l'homme?* (Council of Europe, Strasbourg) 165 – 180; M Lanter (2011) '*L'épuisement des voies de recours internes et l'exigence d délai de six mois*' in P Dourneau-Josette and E L Abdelgawad (2011) 53 – 84.

emergence of work, critically assessing the Court's jurisprudence under the new criterion.[74] Save for the sources cited, none of the other, older admissibility criteria have yet been subject to similar treatment by legal scholars. As a consequence, our legal *and* empirical understandings of (a) the decision-making process (b) the legal criteria and (c) how they are applied, are problematically thin.

Admissibility decision-making in Convention reform literature

Despite these significant lacunae, a very substantial scholarly literature on reform has developed in parallel to the official Convention reform debates. This material will be critiqued in much more detail in chapter 8 of this thesis. For now, however, it suffices to sketch a few of the limitations of this material. Produced principally by legal scholars, these commentaries have focussed on narrating and critiquing proposals for the reform of admissibility decision-making which have circulated in the official Convention reform debate. Conceptually, this literature has been much-exercised by the question of whether Strasbourg does, can and should aim to dispense systematic **individual justice**, **constitutional justice**, or is able to reconcile these distinct goals in a model of **dual functionality**.

Generally speaking, proponents of the first model contend the Court should offer individual judicial decision-making in respect of all cases submitted to it, that judges should enjoy no discretion to select cases. Access to the Court should be as of right, if the admissibility criteria are met. The second, constitutional model argues, by contrast, that the judges of the Court should be empowered to select which cases to examine from the correspondence sent to it with a view to pronouncing judgments of principle which are potentially of Europe-wide significance, or are of particular importance for the respondent state concerned. The

[74] P Lemmens & W Vandenhole (eds) (2005) *Protocol No. 14 and the reform of the European Court of Human Rights* (Antwerp, Intersentia); X Ruedin (2008) 'De minimis non curat the European Court of Human Rights: the introduction of a new admissibility criterion (Article 12 of Protocol No. 14)' *European Human Rights Law Review* 80; A Buyse (2013) 'Significantly Insignificant? The Life in the Margins of the Admissibility Criterion in Article 35 § 3 (b) ECHR' in B McGonigle Leyh, Y Haeck, C Burbano Herrera and D Contreras Garduno (eds) (2013) *Liber Amicorum for Leo Zwaak* (Antwerp, Intersentia) (Forthcoming); P Roublot (2011) '*La nouvelle condition de recevabilité des requêtes devant la Cou européenne des droits de l'homme: enjeux et perspectives*' in P Dourneau-Josette and E L Abdelgawad (2011) 213 – 224.

dual functionality model argues that the Court is capable of reconciling both goals, adjudicating every case while setting standards which contribute to a Europe-wide *ordre publique*.

This literature suffers from two key deficiencies. Firstly, it has relied primarily on normative arguments about how the Court ought to operate, while incorporating (almost always only implicit) legal and empirical assumptions about (a) the nature of the admissibility criteria and (b) how the Court currently applies them in practice. As a consequence of the two lacunae I have already outlined, this theoretical literature is not based on empirical data about how admissibility decision-making works in practice and due to the dearth of jurisprudential enquiries, nor are they built on careful readings of the Court's admissibility case-law.

Too often, writing in the field has tended to rely instead on the implicit assumption that admissibility decision-making may adequately be understood on the basis of the legal standards and procedures enshrined in the text of Convention itself. It is a *locus classicus* of socio-legal studies that the social practice of legal decision making is not immediately 'predictable from scrutiny of legal rules themselves.'[75] As a consequence, the current court reform literature is characterised by significant and problematic methodological limitations. Introducing a socio-legal perspective into the Convention reform debate and its understanding of the Court's admissibility decision-making is urgent.

Secondly, the individual vs constitutional justice debate has arguably become gyroscopic and torpid. Well-established since the early 2000s, the constitutional justice vs individual justice debate continues to dominate academic engagements with Convention reform – but little more may useful be said within the confines of this conceptual orthodoxy, which is at risk of becoming fossilised into the circular reiteration of well-established arguments and positions. Conceptually, the analysis of the Court's work needs refreshed and reappraised. This thesis argues that this orthodox opposition has reached the end of its usefulness. As chapter two explores more fully, this initially powerful and constructive normative

[75] K Hawkins (1992) 'Using legal discretion: Perspectives from Law and Social Science' in K Hawkins (1992) *The Uses of Discretion* (Oxford, Clarendon), 11.

reappraisal of the Court reform debate suffers from important limitations which this study attempts both to illuminate and transcend, both *conceptually* – in terms of how Convention reform is theorised – and *methodologically* – in terms of the breadth and depth of quantitative and qualitative data which informs that conceptual analysis.

It does so by reappraising admissibility reform from the new, more nuanced and ultimately – I argue – more insightful perspective of socio-legal administrative justice theory. Methodologically, it does so by enlarging the evidence canvassed to inform that analysis, from a narrow focus on Convention provisions, to encompass (a) empirical evidence including qualitative data from Convention reform debates, (b) evidence of how admissibility decision-making takes place in practice in the Court and (c) an in-depth analysis of the standards for admissibility decision-making elucidated in the Court's admissibility jurisprudence.

This thesis

What is admissibility decision-making for? How should it be undertaken? Should it be a formal, black-or-white decision-making process? Or should it call for the nuanced judgment or straightforward implementation of well-established standard? And should these decisions be taken by judges or Court officials? Ought the Court to think about the practical and effective barriers which limit some of its applicants' access to justice, or should it treat every application as it finds it, irrespective of the applicant's poverty, or their vulnerability, or the limits on their access to legal counsel? How much participation in the process should litigants be granted before their cases are kicked into oblivion, or onto the privileged roll of cases which the Court analyses with greater care, with the greater hope of an effective remedy and just satisfaction for the alleged wrongs committed? The individual vs constitutional justice debate suggests these are straightforward questions with binary answers. Using the resources of administrative justice theory, this thesis shows that they are not.

An orthodox understanding of the Court's overwhelmingly negative admissibility decision-making sees Strasbourg as the 'victim of its own success.'[76] A half 'asphyxiated' Sisyphean figure, 'bombarded by useless'[77] inadmissible applications, 'swamped by unmeritorious cases' and subjected to the 'tedious drudgery' of their administration, preying upon the 'sanity'[78] of the Court's judges and lawyers and diverts their 'time, attention and resources away from more important and deserving cases.'[79] Mechanical factory metaphors and unsentimental descriptions of the mass-production of negative admissibility decisions abound. Sympathy is solicited for the judges of the Court and its Registry lawyers, oppressed by the hopelessness and boredom of this arid administrative work, while applicants who submit inadmissible complaints are generally constructed as unimportant, grasping, ignorant or vexatious. Solutions are envisaged in terms of strategies to 'stem the tide'[80] of new applications, focussing on encouraging Member States to improve the domestic remedies available in national judicial proceedings, furnishing potential applicants with 'comprehensive and objective information on the application procedure and admissibility criteria',[81] thereby encouraging them not to submit their concerns to Strasbourg at all and quietly to keep their human rights complaints to themselves.[82] This thesis shows that the superficially judicial character of the European Court of Human Rights has been to a very significant extent compromised in practice by a bureaucratic vision of how the Court operates. In contrast with the increasingly tired and unrealistic binaries of the individual vs constitutional justice debate, this thesis shows that

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[76] European Court of Human Rights (2010) *FAQ: The ECHR in 50 questions* (European Court of Human Rights, Strasbourg), question 45.
[77] M O'Boyle (2011) Question and answer session after his keynote address on 'The legacy and future of the European Court of Human Rights', delivered at University College Dublin, 1st April 2011.
[78] J Hedigan (2011) 'The European Court of Human Rights, Yesterday, Today and Tomorrow', delivered at University College Dublin, 2nd April 2011.
[79] H Woolf (2005) *Report on the Working Practices of the European Court of Human Rights*, 25. My emphasis.
[80] P Leach (2009) "On Reform of the European Court of Human Rights" 6 *European Human Rights Law Review*, 725, 726.
[81] European Court of Human Rights (2010) *Practical Guide on Admissibility Criteria* (Strasbourg, Council of Europe), 7.
[82] A key recommendation to arise out of the high level ministerial meeting at Interlaken on the 'future of the European Court of Human Rights'. The Registry of the Court responded in December 2010, by publishing a *Practical Guide to the Admissibility Criteria*, primarily intended for legal practitioners. A 'second, more lightweight document drafted in less technical terms will serve as a learning tool for a wider and less well-informed readership' is promised, but to date, has not materialised. European Court of Human Rights (2010) *Practical Guide to the Admissibility Criteria* (Strasbourg, Council of Europe), 7.

a complex, competing and often inconsistent idea of how admissibility decision-making should work operates in the diverse forums of (a) the abstract, terse and vague text of the Convention (b) the high and remote level of Council of Europe policy conferences (c) the quotidian and repetitive world of the Court's day-to day-docket-filtering practices and (d) in the unrepresentative but symbolically-powerful domain of the Court's published admissibility decisions.

This thesis argues that studying any one of these data sources in insolation produces an incomplete picture of the contradictions and tensions in the Court's approach to deciding 'which cases to decide' at the threshold.[83] Only a multi-level analysis, considering each of these relevant sources of data in turn, fully illuminates the depth and extent of those contradictions and the extent to which the Court manages these tensions by evoking different voices to different audiences. Across four chapters, examining each of these sources of data in turn, I show the Court has skilfully – and often opportunistically – exploited a range of conflicting legitimating discourses to explain how and why it organises its docket-filtering work and the functions it serves. In the lofty, vague and compromising venue of Council of Europe reform debates, it projects one image; in its flexible and accommodating admissibility jurisprudence, another; and in its resource-conscious, bureaucratic, unsentimental working practices day-to-day, yet another. I show the unsophisticated binary choice between individual and constitutional justice offered in the literature fails to capture the richness, and the tensions, in the Court's flexible and inconsistent representations of its docket-filtering work and the values it embodies.

Why focus on this data?

One secondary finding of this thesis is that it is difficult to study the admissibility decision-making of the European Court empirically. In terms of the data sampled and analysed in this thesis, I rely mainly on (a) the evolving text of the Convention in respect of docket-filtering, (b) reports of the public proceedings of high level reform debates which introduced those changes to the Convention, (c) evidence from the policy documentation

[83] H W Perry (1991).

of the Court about the evolving nature of its docket-filtering, and (d) doctrinal legal analysis of the Court's judgments and decisions on the admissibility criteria which have been published on the Court's HUDOC archive.

Uniting these four key sources of data are their public-facing character. Reflecting it preoccupation with administrative justice theory, this thesis is principally concerned with *legitimation strategies*, and the different and sometimes competing ways the Court and the policy infrastructure of the Council of Europe explains and justifies how the Court filters its docket. These four sources of data offer critical empirical insight into the values which have informed the analysis of admissibility decision-making at different levels, from international policy formulation and institutional reform, to the application and justification of the Court's disposals of particular cases.

In socio-legal research into parallel institutions, scholars have been able to use a broader range of quantitative and qualitative methods to gain insight into how courts filter their dockets. As these docket-filtering processes are often of some sensitivity, securing access to these institutions has not always been unchallenging for researchers. Of those who have secured access, some have coded apex courts' decision-making *a limine* on a grand quantitative scale, using published or curated datasets to attempt to identify the main factors contributing to the outcome of cases, or to track the strategic interventions of different actors involved in the process, including advocates, judges, and their clerking staff. Other scholars have sought to shed light on these courts' decision-making processes through qualitative research methods, either by engaging in participant observation of the decision-making process, or by securing qualitative interviews with judges and clerking staff involved in this work to shed light on the values and strategies informing this process.

While these would also be effective ways of better understanding Strasbourg's admissibility decision-making, they are contingent on the data – whether qualitative or quantitative – being made accessible by institutional gatekeepers, or being accessible through existing datasets and archives. It became slowly apparent during the research design phase of this thesis that the European Court would not be cooperative in facilitating the study of its admissibility decision-making. Quantitative data on admissibility decision-making remains extremely limited, particularly in respect of the Court's inadmissible case-load. Opportunities to apply qualitative research methods to the process of admissibility decision-making were also not forthcoming.

I gradually established senior figures within the Court were either unresponsive or even actively hostile towards the research endeavour of this thesis. On one memorable occasion, a senior ECHR functionary immediately broke off discussion with me, on learning about my research interests. This spirit of exclusion is reflected in the bureaucratic rules governing access to the Court's archive of case-files. Even access to this resource is surprisingly limited, with the Court's policies on the retention of documents being strongly orientated towards its judgments on the merits, rather than its decisions on admissibility.

While in principle, the Convention provides that Court documentation should be publicly accessible, the reality is that this is severely circumscribed, particularly in respect of applications the Court rejects as inadmissible.[84] To access files retained in the Court's archive, researchers are required to identify 'exact references of each case' they wish to consult.[85] Thematic or country-based sampling of this documentation is not permitted. Complicating matters, application numbers – which are necessary to identify case-files to be examined – are only published for the small minority of cases which are either (a) communicated to the respondent state, (b) subject to a reasoned decision on their admissibility or (c) reasoned disposal by a judgment of the court. This puts the researcher of inadmissible decisions in a double bind. In order to access files in cases disposed of as inadmissible, the researcher must identify the individual case number he or she wishes to consult. Where a case is disposed of as inadmissible, however, nowhere are these numbers published. Effective access to this material is further frustrated by the Court's policy on the destruction of documents, which is particularly effects those case-files declared to be inadmissible by the court. Combined, these rules make meaningful archival research into admissibility decision-making is effectively impossible.

[84] Article 40(2).
[85] European Court of Human Rights (2015) 'Access to Case-Files' http://www.echr.coe.int/Pages/home.aspx?p=court/howitworks#n1368167237303_pointer last accessed 22.05.2015.

In view of this thesis's findings about the admissibility decision-making process, this official antipathy to these research methods is perhaps unsurprising. The Court places minimal quantitative or qualitative information in the public domain about the cases it rejects as inadmissible. This seems unlikely to be accidental. The Court is an institution with good reasons to orientate understanding of its work towards its reasoned judgments on the merits, and away from its case-filtering practices and the outcomes of those practices. This thesis shows that in respect of its admissibility decision-making, the European Court is engaged in a form of managed self-presentation, donning different costumes in its reasoned decisions, in its engagement with Convention reform, and in how it has designed its internal working practices. Against this backdrop, where silences can be as telling as words, it is perhaps unsurprising that the Court was generally uncooperative in facilitating research into how its docket-filtering works in practice.

Thesis Structure

This thesis is structured in nine chapters. Chapter 2 introduces the theoretical lens of the project. Having puts flesh on the theoretical bones of the dominant individual vs constitutional justice approach introduced here, I argue that admissibility decision-making reform can more usefully be analysed in terms of administrative justice theory. Drawing on established socio-legal research into administrative justice, I introduce four competitive administrative justice models for admissibility decision-making which, I argue, may inductively be identified in the qualitative data. These are the (a) **Strasbourg as court,** (b) **constitutional court,** (c) **bureaucracy** and (d) **tribunal** models, reflecting four distinct conceptions of the procedural values which admissibility decision-making might be thought to embody.

The subsequent four chapters take those administrative justice models and analyses their strength in four key sources of data about the law, policy, practice and judicial standards of admissibility decision-making. Chapter 3 focusses on the changing text of the Convention between 1949 and 2014, setting out the evolving institutions, procedures and norms enshrined in the Convention itself, and exploring the administrative justice values which have been expressed in these Council of Europe treaties and protocols. While the

Convention anticipates judicial responsibility for decision-making, I show it is ambivalent on the broader values which ought to characterise the Court's docket-filtering work.

With reference to the dominant discourses of Convention reform, chapter 4 moves on to consider the international policy debates, and the justice agendas they have pursued. I show that these debates have been dominated by a powerful formalistic understanding of how the Court should filter its caseload, antipathetic to any exercise of judicial discretion in winnowing admissible from inadmissible cases and hostile to bureaucratic decision-making. Chapters 5 and 6 take us behind the palace walls, examining how the Court's admissibility decision-making works in practice, considering the administrative justice values which are expressed in Strasbourg's working practices in handling cases *a limine*.

In contrast with the vision set out in the Convention text, across these two chapters I show that judicial decision-making has become theoretical and illusory rather than practical and effective in an admissibility process now dominated by Registry officials. The empirical evidence shows that Strasbourg level bureaucrats rule the docket and take most of the critical decisions about which cases are and are not examined by the Court. Chapter 5 focusses on the "prejudicial phase" of the Court's decision-making, shining a light on this almost entirely neglected area of its decision-making. Chapter 6 focusses on the role of the Court's judges in docket-filtering, arguing that judges' responsibilities have gradually been redesigned along bureaucratic lines to cope with the influx of cases.

Chapter 7 brings the four administrative justice models to bear in the analysis of the Court's admissibility jurisprudence. What vision of admissibility decision-making does Strasbourg's published case-law anticipate? In contrast with the policy preoccupations of the reform debate, and the institution's working practices, I show the Court's case-law envisages admissibility decision-making which is flexible, adjudicative and context sensitive: not a bureaucratic exercise but a matter of judgement, alive to the social context and social and legal capital of particular applicants.

Chapters 8 marshals these empirical insights to review the integrity and usefulness of the dominant "individual vs constitutional justice" debate on Convention and admissibility reform. I show that both of these conceptualisations of the Court and its work rest on problematic empirical claims, and fail fully to account for the breadth of arguments about fair procedures which are expressed in the Convention reform debates, in the Court's working practices, and in its admissibility jurisprudence. Chapter 9 offers some final reflections on where a Court reform debate, informed by the evidence and approach of this thesis, might go.

This thesis makes a number of original contributions to knowledge. Methodologically, it brings a socio-legal attitude to bear on the vexed questions of Court reform. Considering sources of empirical data about admissibility decision-making which have been neglected in the existing scholarship and pulling together different strands of data which have too often been isolated in earlier studies, its approach allows us to reappraise the challenges and tensions in admissibility reform more holistically. Theoretically, it connects the two distinct literatures of Convention reform and administrative justice in a new and fruitful way, bearing insights both for students of the Court and for scholars of administrative justice. Caught on the prongs of the individual vs constitutional justice debate, the academic debate has stagnated. Revisiting these old questions from a new conceptual standpoint illuminates the contribution and the limitations of the dominant, orthodox analysis of these issues in the literature, and in the official reform debate itself. Administrative justice theory allows us to sketch those debates in sharper detail, and to see the fundamental questions of justice which lie behind the superficially arid vision of docket-filtering as 'engineering work to be deal with by reports prepared by technical experts.'[86]

In so doing, I hope to contribute to a more honest and self-aware discussion of the significant justice trade-offs and compromises which characterise this increasingly bureaucratic Court's work. 'Admissibility conditions identify which claims may be brought by whom and when.'[87] They go fundamentally to the justice Strasbourg does and does not – and can and cannot – dispense for the thousands of people vying for its attention in a legal Europe stretching from Atlantic beaches to the Bering Strait. As the *Daily*

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[86] K Altiparmak (2009) 'The European System for the Protection of Human Rights in Crisis: The End of the Road?' *Journal of European Criminal Law* 3(4) 5 – 23, 7.
[87] T Zwart (1994), 4.

Telegraph discovered, without taking these decisions into account, any image of the Court would be distorted, and incomplete. The former President of the Court, Jean-Paul Costa has observed, '*le recevabilité, comme les droits de l'homme, c'est l'affaire de tous.*'[88] This thesis represents a small effort to lend substance to that aspiration.

2. Beyond "individual vs. constitutional justice": administrative justice theory and the Court's admissibility decision-making

This chapter introduces the theoretical lens of this thesis. Departing from the orthodox conceptual resources of the "individual vs. constitutional justice" debate which continues to dominate the literature on Court and Convention reform, I argue that debates about the

[88] J P Costa (2011) in P Dourneau-Josette and E L Abdelgawad (eds) (2011) *Quel filtrage des requetes par La Cour européenne des droits de l'homme?* (Council of Europe, Strasbourg), 7.

Court's admissibility decision-making and its reform may more fruitfully be situated in the context of socio-legal administrative justice theory and research. This chapter connects these two hitherto distinct literatures, bringing a new socio-legal approach to bear on the now well-established field of theoretical and doctrinal legal analysis of the reform of the Court and its docket-filtering.

The basic themes and policy anxieties of the official Council of Europe reform discourse are well-established. The Court is in crisis. Further reforms are necessary if the institution is to avoid collapsing under its enormous caseload. Its decision-making must become faster and more efficient. More inadmissible cases must be disposed of more rapidly, using the minimum possible financial and human resources, to ensure that judges have the time to adjudicate new and important controversies about the scope of the substantive rights protected in the Convention. Since the Court was re-established as a full-time institution in 1998, and invested with responsibility for deciding on the admissibility of individual petitions, the discourse of an always promised but never appearing collapse in its functioning and legitimacy has prompted a more or less permanent ferment of reform debate in Strasbourg and beyond, and a string of high-level ministerial summits and amending protocols to the Convention.

Theorising Court and admissibility reform: the orthodox approach

These reform debates, and the fundamental questions they raise about institutional design of human rights courts have attracted a considerable body of academic commentary and analysis in parallel.[89] That commentary has been chiefly structured around the "individual

[89] See, amongst other examples, H G Schermers (1994) 'The Eleventh Protocol to the ECHR' *European Law Review* 19 367; H G Schermers (2000) 'A European Supreme Court' in Mahoney et al (eds) (2000) *Protecting Human Rights: The European Perspective. Studies in Memory of Rolv Ryssdal* (Köln, Heymanns) at 1271; E A Alkema (2000) 'The European Convention as a constitution and its Court as a constitutional court' in P Mahoney et al (eds) (2000) *Protecting Human Rights: The European Perspective: Studies in Memory of Rolv Ryssdal* (Cologne/Berlin/Bonn/Munich, Carl Heymans Verlag); L Wildhaber (2002) 'A Constitutional Future for the European Court of Human Rights?' *Human Rights Law Journal* 23 161; M Dembour (2002) '"Finishing off" cases: The radical solution to the problem of the expanding ECtHR Caseload' *European Human Rights Law Review* 604 – 23; T Said & J Wadham (2002) 'What price the right of individual petition: Report of the Evaluation Group to the Committee of Ministers on the European Court of Human Rights' *European Human Rights Law Review* 169; P Mahoney (2003) 'New Challenges for the European Court of Human Rights Resulting from the Expanding Case Load and

vs. constitutional justice" debate. At one level of abstraction, this debate has focussed on the fundamental question, what is the Court for? What functions can and should the institution serve, given the limits to its resources, the extent of its jurisdiction, and the weight of its caseload? Theorists' answers to these questions have informed their practical visions of how the Court's docket-filtering should be designed and their arguments about the values and priorities which it should reflect.

Both approaches recognise that how the Court approaches its docket-filtering is more than a technocratic question of practicalities and optimal resource allocation. It goes to the heart of the conception of procedural justice which the Court pursues, and determines which applicants have access to substantive judicial remedies for their complaints. The

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Membership' *Penn State International Law Review* 21 101 – 114; F Bruinsma & S Parmentier (2003) 'Interview with Mr Luzius Wildhaber, President of the ECHR' 21 *Netherlands Quarterly of Human Rights* 21 185; S Greer (2003) 'Constitutionalizing Adjudication under the European Convention on Human Rights' *Oxford Journal of Legal Studies* 23 405; M Beernaert (2004) 'Protocol 14 and new Strasbourg procedures: towards greater efficiency? And at what price? *European Human Rights Law Review* 544; P Lemmens & W Vandenhole (2005) *Protocol no. 14 and the reform of the European Court of Human Rights* (Intersentia, Antwerp); P Leach (2006) 'Access to the European Court of Human Rights – From a Legal Entitlement to a Lottery?' 27 *Human Rights Law Journal* 11; S Greer (2006) *The European Convention on Human Rights: Achievements, Problems and Prospects* (Cambridge, CUP); C G Hioureas (2006) 'Behind the Scenes of Protocol No. 14: Politics in Reforming the European Court of Human Rights' *Berkeley Journal of International Law* 24 718 – 757; L Caflisch (2006) 'The Reform of the European Court of Human Rights: Protocol 14 and Beyond' *Human Rights Law Review* 6 403; P Egli (2007) 'Protocol No. 14 to the European Convention for the Protection of Human Rights and Fundamental Freedoms: Towards a more effective control mechanism?' *Journal of Transnational Law and Policy* 17(1) 1 – 34; R Harmsen (2007) 'The European Court of Human Rights as a "Constitutional Court": Definitional Debates and the Dynamics of Reform' in J Morison, K McEvoy and G Anthony (eds) (2007) *Judges, Transition and Human Rights Cultures* (Oxford, OUP) 33-53; X Ruedin (2008) 'De minimis non curat the European Court of Human Rights: the introduction of a new admissibility criterion (Article 12 of Protocol No. 14)' *European Human Rights Law Review* 80; A Lester (2009) 'The European Court of Human Rights after 50 years' *European Human Rights Law Review* 462; J A Goldston (2009) 'Achievements and challenges – insights from the Strasbourg experience for other international courts' *European Human Rights Law Review* 603; A Mowbray (2009) 'An Examination of the European Court of Human Rights' Approach to Overruling Its Previous Case Law' *Human Rights Law Review* 9 179; A Mowbray (2009) 'Crisis Measures of Institutional Reform for the European Court of Human Rights' 9 *Human Rights Law Review* 647; P Leach (2009) 'On reform of the European Court of Human Rights' *European Human Rights Law Review* 725; R Wolfrum & U Deutsch (eds) (2009) *The European Court of Human Rights Overwhelmed by Applications: Problems and Solutions* (Berlin, Springer Verlag); A Mowbray (2010) 'The Interlaken Declaration – The Beginning of a New Era for the European Court of Human Rights?' *Human Rights Law Review* 10 519; H Keller, A Fischer and D Kuhne (2011) 'Debating the future of the European Court of Human Rights after the Interlaken Conference: Two Innovative Proposals' 21 *European Journal of International Law* 1025 – 1048; F de Londras (2013) 'Dual Functionality and the Persistent Frailty of the European Court of Human Rights' *European Human Rights Law Review* 11; K Dzehtsiarou and A Greene (2013) 'Restructuring the European Court of Human Rights: preserving individual petition and promoting constitutionalism' *Public Law* 710 – 719; S Flogaitis, T Zwart, J Fraser (eds) (2013) *The European Court of Human Rights and its Discontents: Turning Criticism into Strength* (Cheltenham, Edward Elgar).

'constitutional justice' perspective, represented pre-eminently by Steven Greer and the Court's former president, Luzius Wildhaber, contends that the Court should be invested with authority to pick-and-choose which cases to examine at the admissibility stage, having regard to the 'seriousness' or 'importance' of the issues raised by the litigation.[90] Proponents of constitutional justice envisage that the Court's authority for deciding which cases to review in full should only be lightly defined, leaving considerable latitude to judges to select, and to decline, cases for review at the admissibility phase. In defence of this vision of the Court, writers such as Greer rely on international and national comparisons, and the approach to docket-filtering employed by apex national and supreme courts, which characteristically enjoy greater latitude than first instance tribunals about the proceedings they entertain. They also rely on the argument that a more discriminating filtering process would allow 'more time for the ECtHR to spend on issues of the greatest significance' and ensure that its 'judges are left with sufficient time to devote to what have been called constitutional judgments', characterised by the Court's deputy registrar as 'the adjudication of cases of constitutional import that establish standards *erga omnes* to be taken into account in the national law and practice of all European States.'[91]

Proponents of constitutional justice argue that empowering the Court to decline to review repetitive cases would allow the Court to focus its limited judicial resources on adjudicating new and complex issues of human rights law, devoting its time and energies to the production of fewer, high quality, high impact judgments instead of infusing those resources into the mass production of negative decisions and in issuing judgments in the large number of repetitive cases which derive from structural problems in respondent States. Delays in Italian court proceedings, in violation of Article 6 fair trial rights, for example, have been an abundant source of clearly well-founded applications. Proponents

[90] See, for example, S Greer and L Wildhaber (2012) 'Revisiting the Debate about "constitutionalising" the European Court of Human Rights' *Human Rights Law Review* 12(4), 655 – 687.
[91] L Wildhaber (2005) 'The Place of the European Court of Human Rights in the European Constitutional Landscape' Speech to the Conference of European Constitutional Courts XIIth Congress; M O'Boyle in European Court of Human Rights (2011) *The Conscience of Europe* (Strasbourg, Council of Europe), 201.

of constitutional justice seek to relieve the Court of the obligation of adjudicating these cases and applicants of a *right* to a remedy.[92]

Advocates of individual justice, by contrast, argue that admissibility decision-making should be inflexible, rule-bound and deterministic: foreseeable, bare minimum standards of receivability which all applications should be obliged to meet.[93] If these demands are satisfied, individual justice scholars contend, the Court must accept all admissible petitions for review on the merits and judgment: judges should have not latitude, above and beyond the criteria, to decline to accept cases for adjudication. For individual justice scholars, the Court's norm-setting and controversy-resolving role should not be privileged over its individual adjudicative function and its docket-filtering should reflect those dual functions of norm-production and norm-application. They argue that repetitive applications, relying on well-established principles of Convention jurisprudence, must be adjudicated on the merits, whether or not they advance the Court's interpretation of substantive Convention rights, and merely reiterate a State's structural failure to uphold established standards. In common with constitutional justice, individual justice scholars are also committed to the principle of a 'fully judicial' Convention complaints mechanism and are hostile to any delegation or transfer of decision-making functions from judges to Court officials.

Methodologically, these two schools of thought have a great deal in common. Products of black-letter legal scholarship, their analysis is mainly normative, but relies on understandings about the nature of the Court's working practises and the (often unarticulated but pervasive) assumption that the law on the books is reflected by the law in action. While the character of the norms of admissibility and nature of the Court's *a limine* decision-making is central to the controversy, the arguments of neither school are premised on robust empirical research into how the Court organises its work, and the extent to which the sketchy procedures set down in the Convention represent a reliable or exhaustive guide to how docket-filtering works in practice. Detailed jurisprudential analysis of the Court's

[92] See, for example, S Greer and A Williams (2009) 'Human Rights in the Council of Europe and the EU: Towards "Individual", "Constitutional", or "Institutional" Justice?' *European Law Journal* 15(4) 462 – 481.
[93] See, for example, K Dzehtsiarou and A Greene (2013) 'Restructuring the European Court of Human Rights: preserving individual petition and promoting constitutionalism' *Public Law* 710 – 719.

approach to the interpretation of admissibility criteria is also missing from both approaches. Although the character of the norms of admissibility is of the essence to the dispute – flexible and adjudicative or clear, constant rules for mass implementation? – neither body of scholarship has used the tools of legal analysis and the resource of the Court's published cases to try to substantiate their representation of the norms of admissibility jurisprudentially. While the individual vs. constitutional justice debate has been framed by doctrinal legal scholars, and doctrinal legal assumptions, it is not undergirded by their doctrinal research skills.

Limitations of the traditional theoretical starting points

The binary opposition between constitutional and individual justice visions has become the dominant conceptual starting point for theorists of Convention reform. Greer and Wildhaber describe the conflict as the 'dominant analytical framework' for debating the principles undergirding Court reform.[94] For Harmsen they are the two 'opposing well-articulated' 'visions of the European Court's role.'[95] The preponderance of scholarly publications accept the debate, and its conceptual limits, as the axiomatic theoretical starting point for analysing admissibility reform and the normative issues engaged.[96] The argument continues to attract committed partisans, locating themselves on either side of the debate. Harmsen has argued that the 'majority academic opinion' has come 'down squarely on the side of the individual justice thesis.'[97] On the basis of published monographs and articles touching on the debate, scholarly support for individual justice is now by no means as emphatic as Harmsen suggests. If anything, the current balance of academic opinion seems to favour "constitutionalising" Strasbourg, and investing the

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[94] S Greer and L Wildhaber (2012) 'Revisiting the Debate about "constitutionalising" the European Court of Human Rights' *Human Rights Law Review* 12(4) 655 – 687, 659.
[95] R Harmsen (2011) 'The Reform of the Convention System: Institutional Restructuring and the (Geo-)Politics of Human Rights in J Christoffersen and M R Madsen (2011) *The European Court of Human Rights Between Law and Politics,* 140.
[96] For example, amongst others, Harmsen contrasts the two 'distinctively articulated "constitutionalist" and "individual justice" visions of the role of the Court' in R Harmsen (2011) *Ibid,* 126. In the same volume, Christoffersen accepts the binary opposition as exhaustive: J Christoffersen (2011) 'Individual and Constitutional Justice: Can the Power Balance of Adjudication Be Reversed?' in J Christoffersen and M R Madsen (2011) *The European Court of Human Rights Between Law and Politics,* 181.
[97] R Harmsen (2011), 130.

Court with power to pick-and-choose its caseload. This preponderance is reflected in the recent academic submissions to the 2014 Council of Europe *Comité directeur pour les droits de l'Homme* on future directions in Court reform, the majority of which promote constitutionalist restructuring of the institution.[98] Either way, the terms of the debate continues to dominate legal scholarship on Convention reform.

This dominance in the literature has given the debate and the models of justice promoted an appearance of inevitability and theoretical exhaustiveness. Goronowska identifies a 'visible process of transformation' from individual to constitutional justice in the Court's practice, which she suggests represents 'an unavoidable consequence of present day realities.'[99] In prosecuting the case for constitutional justice, de Londras argues that 'there are two potential competing conceptualisations of the Court', either constitutional or individual (she calls it adjudicative) justice.[100] But why, as a matter of principle, should there be *only* two opposing visions of how the Court should organise its work? While the opposition between two entrenched positions it is a fair summary of the polarised way in which scholars have theorised Convention reform in the literature up to this point, as a theoretical claim about the conceptual boundaries of debate about how the Court ought to function, it is highly problematic.

This may be demonstrated by considering, in outline, some of the issues raised in subsequent treaty renegotiations, which deal with re-imagining and reshaping the Court's approach to filtering its docket. While official Convention reform debates have considered key issues raised by the academic debate – case selection, the nature of the admissibility criteria – these discussions have ranged far more widely, considering issues which go unaddressed by either the individual or the constitutional justice model. To what extent should bureaucrats be empowered to participate in the Court's decision-making? How is that participation to be legitimated? What is the relationship between the nature of the filtering standards being employed, and the legitimacy of bureaucrats applying them

[98] Council of Europe (2013) *Longer-term future of the system of the European Convention on Human Rights and the European Court of Human Rights: Consultation Responses*, accessible at www.coe.int/t/dghl/standardsetting/cddh/reformechr/Consultation_en.asp.
[99] B Goronwska (2013) 'The Strasbourg Court – Between Individual or General Justice' *Comparative Law Review* 15 103 – 121, 103.
[100] F de Londras (2013), 38.

without judicial supervision? What additional formalities or costs might be attached to the right of individual petition? What effects might these have on indigent applicants, and how do these impacts relate to fundamental questions of legal principle, court function and institutional design? Chapter 4 considers these questions of institutional design in greater empirical detail. The key point here, however, is that the orthodox opposition between individual and constitutional justice has little to say about any of these issues, yet each touches on fundamental principles about how the Court ought to function and how its admissibility decision-making process and standards should be designed to promote those principles. Even on this summary analysis, the claim that there are only *two* viable conceptual approaches to Court reform is revealed as empirically unsound and questionable in theory. Even a cursory analysis of recent reform debates – and as chapter 7 considers, the Court's admissibility jurisprudence – shows that more perspectives can be identified.

For many scholars of the Convention, the official Court reform debates have been understood as dominated by 'questions of practicality,' a discussion of a 'technical nature and not a systematic one', given to 'technocratic' 'tinkering' with decision-making procedures and admissibility standards but leaving the 'fundamental' questions of the Court's purpose unaddressed.[101] The construction of official debates as instrumental, boring and technocratic, and the neglect of their detail in the theory-building normative literature, are interrelated. Prominent Convention scholars have criticised the 'lack of vision' of the official debate.[102] Greer and Wildhaber argue that the discussions have been 'dominated by official papers churning over largely the same "shopping list" of possible procedural and institutional reforms' and are

[101] F de Londras (2013), 38; B Goronwska (2013) 'The Strasbourg Court – Between Individual or General Justice' *Comparative Law Review* 15 103 – 121, 110; L R Helfer (2008) 'Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime' *European Journal of International Law* 19(1), 125 – 159, 127; S Greer and L Wildhaber (2012) 'Revisiting the Debate about "constitutionalising" the European Court of Human Rights' *Human Rights Law Review* 12(4), 655 – 687, 658.
[102] S Greer and L Wildhaber (2012), 660 – 1.

> characterised by an unwillingness to discuss thoroughly what the primary functions of the Court could and should be, by minimalism, and by a mixture of confusion about, and hostility and indifference towards, constitutionalisation.[103]

In her own writing, promoting Strasbourg's redesign along more constitutional lines, de Londras contends that the analysis 'must go beyond the questions of practicality that have dominated' recent ministerial conferences on reform, 'and confront instead fundamental questions of purpose,' with the obvious implication that recent "practical" reform efforts have not engaged with fundamental questions about the Court's purpose.[104]

Considered from an administrative justice perspective, these criticisms are problematic. At its most simple, administrative justice theory insists on the relevance of the language of justice to these commonplace, routine processes. Devising any form of routine decision-making necessarily embodies procedural values, and judgements about 'what the administrative process' of admissibility decision-making is 'supposed to achieve' and how the process should be designed to achieve those ends.[105] Constitutional justice scholars like Greer, Wildhaber and de Londras would doubtless approach these questions differently from the Convention reformers responsible for devising recent protocols, but the pervasive idea that Convention reform is technocratic tinkering and lacks any vision – or competing visions – of justice susceptible to analysis, is unpersuasive.

A new generation of Convention research has begun to challenge the orthodox conceptualisation of Court reform as a binary choice between individual and constitutional justice. Hennette-Vauchez has criticised it as a 'false alternative' on pluralistic grounds, arguing that Strasbourg does not articulate one 'constitutional' vision of justice, but an account of Convention rights which will be interpreted in different, and potentially radically different, ways in different national judicial contexts. [106] Hennette-Vauchez's critique focuses on the more abstract question of the implications of constitutional

[103] *Ibid*, 659.
[104] F de Londras (2013), 38.
[105] S Halliday (2004) *Judicial Review & Compliance with Administrative Law* (Oxford, Hart), 122.
[106] S Hennette-Vauchez (2011) 'Constitutional v International? When Unified Reformatory Rationales Mismatch the Plural Paths of Legitimacy of ECHR Law' in J Christoffersen and M R Madsen (2011) *The European Court of Human Rights Between Law and Politics* (OUP, Oxford), 145.

pluralism for how the Court's fundamental object and purpose should be understood. She has little to say about issues of admissibility decision-making and institutional design deriving from these broader normative questions. Her focus is on how the external impact of Court judgments is theorised, not the internal Court dynamics and processes which determine which applications are admitted or repelled at the threshold. Helfer too has been critical of the comprehensiveness both of the individual vs. constitutional justice and official Convention reform debates, though his own engagements largely replicate the logic of constitutional justice theorists, contending that the Court should be invested with more latitude to set its agenda and the doubtful claim that the official debate should be understood as merely pragmatic and unprincipled.[107] While adding a useful additional perspective on the evolving geo-politics of the Convention mechanism, Helfer's work reinforces rather than revises the academic orthodoxy.

Hence, the existing literature is characterised by four key limitations. Firstly, in method, it privileges only those sources of data about the Court's approach to admissibility decision-making which are accessible to doctrinal analysis. In the absence of empirical research about how the Court approaches its docket-filtering in practice, it assumes that the protocols enshrined in the Convention reflect the lived experience. Secondly, while incorporating the assumptions of a doctrinal legal approach, the literature has neglected to use those doctrinal skills to consider whether the evidence of the Court's practice, reflected in its admissibility jurisprudence, jars with or supports their empirical assumptions and normative claims about how the sifting criteria have been interpreted and applied by the Court. Admissibility decision-making is characteristically represented as unpredictable by constitutional justice scholars and as predictable, accessible minimum standards by proponents of individual justice. Neither body of literature has substantiated these legal claims.

Thirdly, the conceptual limits of the academic discourse map poorly onto the more wide-ranging interests and concerns of the official debate, but remain largely unconscious of this

[107] L R Helfer (2008) 'Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime' *European Journal of International Law* 19(1) 125 – 159.

misfit and the elisions and disconnections which they produce between the two discourses of Court and Convention reform. Fourthly, although purporting to be a gloss on official Convention debates, the individual vs. constitutional justice debate has treated official debates as a pragmatic, technical concern, the justice values of which do not warrant empirical examination. As chapter 4 shows, this diagnosis is radically misconceived. This failure to consider the justice arguments of the official debate reinforces the problematic divergence between the academic discourse on Convention reform which represents itself as comprehensive, but cannot even comprehend many of the issues dominating the official debate within its narrow conceptual terms. These weaknesses in the orthodox theoretical frame commend finding a new conceptual starting point to think about the contested values which ought to inform the Court's docket-filtering responsibilities. This thesis proposes administrative justice theory as an alternative, applicable and illuminating socio-legal lens through which admissibility decision-making may be analysed.

A different theoretical starting point: administrative justice

Drawing on established socio-legal research into administrative justice, this chapter introduces four competitive administrative justice models for admissibility decision-making which, I argue, can inductively be identified in the qualitative data analysed in each subsequent chapter. These are the (a) **Strasbourg as court,** (b) **constitutional court,** (c) **bureaucracy** and (d) **tribunal** models, reflecting four distinct normative conceptions of the procedural values which admissibility decision-making might be thought to embody.

The concept of administrative justice used in this thesis can be understood as a concern about the fairness of decision-making processes, and the values and principles against which the fairness of those processes can be evaluated and justified. Returning to those more elemental questions significantly widens our field of vision in the analysis of Strasbourg's docket-filtering, posing more basic questions about how this docket-filtering is designed and the values expressed by that design. Justice – like fairness – is a philosophically and politically contested concept.[108] Reflecting this, Rawls helpfully distinguishes between the *concept* of justice, on the one hand, and particular *conceptions* of justice on the other. While different conceptions of justice may make use of a shared vocabulary of justice or fairness, different conceptions' understandings of what justice demands may deviate radically from one another – and even directly conflict.[109] This plurality of understandings of justice applies to philosophical and political debates about the just distribution of benefits and burdens in society. It also applies to how different communities and institutions understand, operationalise and critique the fairness of decision-making *procedures*, whether in the criminal or civil court room, the ATOS assessment suite evaluating an applicant's entitlement to the Universal Credit, or participating in an appeals process against an adverse decision in a tribunal.

Galligan defines the concept of procedural fairness as consisting 'in the relationship between procedures, fair treatment, and authoritative standards' which may differ in different legal and social contexts.[110] Whether in the courtroom, the administrator's office, or the tribunal hearing room, the processes followed, and the rules applies embody particular conceptions of procedural justice. Administrative justice, as understood in this thesis, tracks those conceptions, exploring 'the principles that can be used to evaluate the justice inherent in administrative decision-making,' comprising:

> procedural fairness, which is concerned with the process of decision making, that is, with the ways in which individual citizens are treated, as well as substantive justice, which refers to the outcomes of decision making, that is, to the benefits or burdens that are conferred on individual citizens.[111]

Reviewing research using the conceptual apparatus of administrative justice, Halliday identifies 'two distinct approaches to research concerning normative conceptions of

[108] See, amongst innumerable other commentaries, J Rawls (1971) *A Theory of Justice* (Cambridge, Harvard); A MacIntyre (1988) *Whose Justice? Which rationality?* (London, Duckworth); A Sen (2010) *The Idea of Justice* (London, Penguin).
[109] J Rawls (1971), section 2.
[110] D J Galligan (1997) *Due Process and Fair Procedures: A Study in Administrative Procedures* (Oxford, OUP), 53.
[111] M Adler (2003), 323 – 4.

administrative justice.' The first approach 'seeks to build or dissect normative theories of administrative justice.'[112] Returning to Rawls' distinction, in essence, these studies attempt to elaborate, defend and critique a particular normative *conception* of what fair procedures requires in a given decision-making environment. The *individual vs. constitutional justice* debate can be understood in these terms, as contrasting attempts to generate normative accounts of the values which the Court ought to serve, and the structures, procedures and standards which would promote those values and to critique alternative conceptions of what procedure is due *a limine* in Strasbourg. In contrast with this, Halliday identifies a second strain of administrative justice research which does not principally seek to elaborate or defend *its own normative conception* of what process is due in a particular decision-making environment, but instead empirically tracks the impact different conceptions of administrative justice have had, whether on the administration of homelessness relief, social security, or the mass decision-making of the European Court.[113]

This thesis adopts this second approach, taking 'a plurality of normative conceptions of administrative justice' as the starting point for empirical enquiry.[114] As the next section of this chapter outlines, I argue four key conceptions of how Strasbourg's admissibility decision-making should be structured emerge from the data. I have dubbed these the Strasbourg as court, Strasbourg as constitutional court, Strasbourg as bureaucracy, and Strasbourg as tribunal models. Each of these models is a normatively compelling account of how admissibility decision-making could be organised and justified. Each conception expresses a distinctive set of procedural justice values. Rather than attempting to defend a particular conception of how this element of Strasbourg's work should be organised, this thesis tracks the influence of these competing - and sometimes collaborating – conceptions about the procedural values informing the Court's admissibility decision-making over time. In other policy contexts, administrative justice theory has been particularly effectively employed in order to analyse processes of institutional change, tracking the impact of developments in public policy on the form of decision-making agencies in the

[112] S Halliday (2004), 114 – 5.
[113] S Halliday (2004), 114 – 5.
[114] *Ibid*, 115.

field of social security, and the consequences of these innovations for applicants.[115] As procedural reforms must be explained and justified, a range of social actors are compelled to explain how the changes can be justified or resisted during periods of policy innovation. Both the justification and the critique mobilises particular conceptions of procedural justice. Because of its recognition of normative plurality, socio-legal administrative justice represents a particularly effective theoretical lens with which to gain critical purchase on the tensions, ambivalences, contradictions and outright confusions which have characterised three decades of change to how Strasbourg filters its docket.

Applying administrative justice to admissibility decision-making reform

At its most simple, administrative justice theory insists that the language and concerns of justice are relevant to the work of state agencies and administrative decision-makers, both in the narrow sense of the positive administrative law on procedural fairness, but also much more broadly, in terms of the principles, such as accountability and equal treatment, which ought to inform public administration. They are, this thesis argues, also relevant to an institution like the European Court, expressing simultaneously features of an apex court, and features of a hyperactive bureaucratic agency.

Employing administrative justice theory to re-evaluate the Court's admissibility decision-making may seem *prima facie* implausible. Administrative justice theory has focussed on the primary decision-making of state agencies and different forms of remedial review, from internal review, to tribunal proceedings and judicial review. On the level of primary decision-making, state bureaucracies which have been analysed in these terms include local government agencies responsible for the relief of homelessness, the administration of disability entitlements and decision-making regarding social security claims, such as unemployment benefit. The institutions which have been the focus of these studies have been creatures of the executive branch of government, staffed by officials, employing

[115] M Adler and B Longhurst (2002) *Discourse, Power and Justice* (London, Routledge); M Adler (2003) 'A socio-legal approach to administrative justice' *Law and Policy* 25 323; M Adler (2006) 'Fairness in Context' *Journal of Law and Society* 33 615; M Adler (2010) 'Social Security and Social Welfare' in P Cane and H Kritzer (eds) (2010) *The Oxford Handbook of Empirical Legal* Research (Oxford, OUP) 399 – 423.

administrative procedures to facilitate the mass-production of decisions, without the adversarial nature or formality of court proceedings. Strasbourg, by contrast, is an international tribunal, its decision-making – at least in theory – judicial, adjudicating questions of fundamental rights, employing often mercurial concepts such as proportionality and the margin of appreciation. Indeed, a dominant strain in the literature asks, "has the ECtHR become or is it becoming a constitutional court for Europe?" As Mashaw reckoned in his seminal study of bureaucratic justice during the 1980s, few institutions seem more antithetical to classical administrative values than apex courts. If, as many scholars contend, Strasbourg *has* become a constitutional court, the idea that administrative justice theory will be relevant to its work must seem far-fetched.

Administrative justice theory can be understood as an attempt to extend the language and ideas of procedural justice from courts to state agencies, and to decouple questions of procedural justice from positive law. That state bureaus have a role in terms of *distributive* justice ought to be uncontroversial. Administration has been an indispensable tool of redistributive social policy during the last century, pooling taxation and employing bureaus working to legislative policy agendas, to reallocate wealth according to political judgement of need and entitlement. However, as substantial administrative law has long recognised, the behaviour of state agencies is not subject to evaluation solely in terms of its outputs and the efficient use of resources to realise policy goals, but also in terms of the justice and legitimacy of the procedures employed to achieve those ends. Mashaw's distinctive contribution was to expand those debates about what process was due from the legal domain into broader debates about how agencies should design their functions, and the values which their procedures ought to express.

Common concerns preoccupy debates on the reform of the Court and its admissibility decision-making, but the questions posed in those debates extend beyond the narrow opposition between individual and constitutional justice. To what extent should officials be permitted to participate in the Court's docket-filtering? What kinds of principles should admissibility decision-making embody? Should it represent a flexible stage of proceedings, attentive to the circumstances of applicants, or should it be a formalistic, inflexible body of norms? Should the Court's focus be on ensuring that its admissibility decision-making is accurate, or fair according to traditional conceptions of adversarial legal proceedings? Should the Court be passive or active? Should it make accommodations for legally unrepresented litigants, unfamiliar with its jurisprudence and submitting incomplete files, or should such failures be rejected, preferring traditional administrative values of equality before the law, predictability, and a vision of legal rationality? All of these are questions about which fundamental procedural values the Court ought to pursue. Several of them have been expressed in the Court's official reform debates over the last three decades and in the institution's innovations and changes to its working practices during that period. Because of its interest in the operation of bureaucracies, and the procedural values expressed in institution design and delivery, I argue administrative justice theory is well-placed to bridge the apparent gulf between traditional visions of judicial decision-making, and administrative work. It is to my four typologies of administrative justice in admissibility decision-making I now turn.

Typologies of Administrative Justice

The typology introduced by American scholar Jerry Mashaw in *Bureaucratic Justice* has been influential in the field of empirical research on the administrative justice of primary decision-making, and furnishes a useful starting point for thinking about how Strasbourg has designed its admissibility decision-making.[116] Examining the literature on the disability scheme, and policy debates of the federal government, Mashaw detected 'three broad and different perspectives on the goals of the administration and on how it should unfold,' which he labelled 'bureaucratic rationality,' 'professional treatment' and 'moral judgment' respectively.[117] These models furnish a useful conceptual framework to import into our understandings of how competing visions of how the Court's admissibility decision-making should be designed. While the Court jurisdiction must be theorised, in general terms, as a subsidiary form of remedy, its mass admissibility decision-making bears hallmarks of a primary decision process. Mashaw's models were an attempt to map competing justificatory claims about how social security benefits for disabled Americans

[116] *Ibid.*
[117] S Halliday (2004), 116.

should be administered and designed. For Mashaw, administrative justice is defined as 'the qualities of a decision process that provide arguments for the acceptability of its decisions.'[118] Adler reframes the definition slightly differently, suggesting that it should be understood as 'the qualities of a decision process that provide arguments for the legitimacy of its outcomes.'[119]

The critical point about these definitions is that they emphasise the function of *process* values to legitimate decision-making outcomes, irrespective of whether or not participants would accept that the result was the right one, assessed in deontological or consequentialist terms. For example, a litigant defeated in their final appeal may be disappointed with the result, but may regard the outcome as a result of a procedurally fair process.[120] Mashaw was not attempting to advocate, elaborate or defend a particular normative account of what the "just" administration of disabled Americans' social security entitlements should be. Rather, he sought to employ these models analytically, to understand competing justificatory claims about how the administration of American Disability claims should be shaped, recognising that to adopt different models of administrative justice is to shape your administrative practice in very different ways.

As Mashaw's 'assumption of normative conflict' recognises, each of these models represents a coherent, potentially attractive, but incompatible vision of how decision-making could and should be designed.[121] For Mashaw, these justice models are not mutually exclusive. They may co-exist simultaneously in agencies, reflected in trade-offs between different elements of the three models, but he argues that 'the internal logic of any one of them tends to drive the characteristics of the others from the field as it works itself out in concrete situations.'[122] This is the principle of normative *competition*. Mashaw characterises these three conceptions of administrative justice as 'in part empirical and in part intuitive and analytic,' relying on different 'types of claims for legitimation' with

[118] J Mashaw (1983) *Bureaucratic Justice: Managing Social Security Disability Claims* (New Haven, Yale University Press), 24.
[119] M Adler (2003), 329.
[120] J Thibault and L Walker (1975) *Procedural Justice: A Psychological Analysis* (Hillsdale, Lawrence Erlbaum); E A Lind and T R Tyler (2013) *The Social Psychology of Procedural Justice* (London, Springer).
[121] M Adler (2003) 331.
[122] J Mashaw (1983), 23.

different sources of 'justificatory appeal.'[123] He argued that the three models each appealed to a different set of legitimating values and primary goals, reflected by different organisational structures and the application of different cognitive techniques in decision-making. The first model of bureaucratic rationality is strongly influenced by Max Weber's account of the principles of bureaucratic organisation, including hierarchy, impersonality and formal rationality.[124] Under this conception of good administration, the primary focus of the agency should be:

> *accurate* decision-making carried on through processes appropriately rationalized to take account of costs. The legitimating force of this conception flows both from its claim to *correct implementation* of society's *pre-established goals* in some particular domain while conserving social resources for the pursuit of other valuable ends.[125]

This model envisages legitimate decision-making as the 'uniform implementation of centrally devised rules, vertical accountability and official responsibility for fact-finding.'[126] Its emphasis on accuracy is reflected in its conception of exemplary *injustice* as relying on a 'nonreplicable, non-reviewable judgment or intuition' to reach decisions.[127] As Halliday notes, in a bureaucratic rational normative framework:

> judgments by individual officers are antithetical to the goals of accuracy and consistency. Instead, the administrative system must operate on the basis of clear rules and guidance which tell low-level officers how to process claims and which promote consistency of decision-making. Systems of internal supervision and control buttress the detail of the rules.[128]

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[123] *Ibid*, 17.
[124] P Du Gay (1994) 'Making up managers: bureaucracy, enterprise and the liberal art of separation' *British Journal of Sociology* 45(4) 655 – 674, 656; M Weber (1994) 'The profession and vocation of politics' in P Lassman and R Speirs (eds), *Weber: Political Writings*. (Cambridge, CUP).
[125] J Mashaw (1983), 26.
[126] R A Kagan (2010) 'The Organization of Administrative Justice Systems: The Role of Political Mistrust' in M Adler (ed) (2010) *Administrative Justice in Context* (Oxford, Hart) 161-180, 166.
[127] J Mashaw (1983), 26.
[128] S Halliday (2004), 117.

From a socio-legal perspective, it is important to emphasise that this normative vision of just administration is a problematic empirical description of rules-based legal decision-making.[129] It relies on what Lacey has described as the 'law-discretion dichotomy,'[130] eliding the extent to which judgment is 'heavily implicated in making sense of rules and in making choices about the relevance and use of rules.'[131] While this socio-legal insight is important to keep in mind, it must also be emphasised that the bureaucratic rational administrative justice model is primarily an extreme ideal type and a justificatory strategy, not an empirical description of how agencies and legal reasoning function.

Mashaw's second administrative justice model – professional treatment – derives from a medical model of disability, a therapeutic account of the fundamental goals and purposes of the disability administration. Emphasising the knowledge of appropriately qualified professionals to assess need, the justice of this model 'lies in having the appropriate professional judgment applied to one's particular situation in the context of a service relationship.'[132] Professional treatment is not concerned with the strict adherence to re-established rules, or observing formalistic adjudicative procedures, but is justified by expert knowledge-claims. This:

> translates into a claimant-centred and needs-based administrative process. The goal of the system is to meet the needs of the individual claimant. The administrative system revolves around the claimant and is about matching available resources to claimants' needs through the medium of professional and clinical judgment. Information about the claimant must be obtained, but accuracy is not really a fundamental concern – or at least not a normative concern.[133]

Lastly, Mashaw distinguishes administrative justice conceived as "moral judgment." Potentially a confusing phrase, this model derives from traditional notions of court-centred

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[129] C Tata (2007) 'Sentencing as Craftwork and the Binary Epistemologies of the Discretionary Decision Process' *Social and Legal Studies* 16(3) 425 – 447.
[130] N Lacey (1992) 'The Jurisprudence of Discretion: Escaping the Legal Paradigm' In K Hawkins (ed) (1992) *The Uses of Discretion* 361 – 388, 362.
[131] K Hawkins (1992) 'Using legal discretion: Perspectives *from Law and Social Science' in The Uses of Discretion* (Oxford, Hart), 13.
[132] J Mashaw (1983), 28 – 9.
[133] S Halliday (2004), 118.

adjudication, a passive adjudicator, and strictly upheld adversarial forms of procedure. For Mashaw, 'the "justice" of [the moral judgment] model inheres in its promise of a full and equal opportunity to obtain one's entitlements.' This entails that applicants must be afforded procedural protections in the resolution of the dispute so that they can have an equal opportunity to present their case, test the evidence, rebut allegations against them, and argue for their interests to be privileged. Pursuing this administrative justice model can be conceived as the 'redesign of administrative processes in the image of the judiciary.'[134]

> the adversarial element often cannot be transposed over to the context of administrative adjudication, but in certain respects the claimant is nevertheless treated *as if* he/she is in dispute over a rights claim. The administrative system views the claimant as someone who has come to claim a right, and revolves around giving the claimant a fair opportunity to fully participate in the process of adjudicating whether the right exists or is to be denied.[135]

Critiquing and developing Mashaw

Mashaw's approach has five key limitations. Firstly, his analysis concerns a specialised sub-field of the administrative system. As Halliday has noted, issues germane to the administration of disability benefits may not have 'general applicability within the world of government administration.'[136] In particular, the role played by medical treatment in Mashaw's analysis will clearly not always be relevant, but other potential justice models, not identified in Mashaw's study, may emerge. Secondly, his analysis must be seen historically, with reference to where and when it was written and the dominant policy discourses of the day. These too are dynamic and susceptible to elaboration, as conceptions of public administration change. Recent engagements with 'new public management' in administrative justice theory reflect the importance of understanding Mashaw's typology as limited by the context from which it emerged.

[134] J Mashaw (1983), 4.
[135] S Halliday and C Scott (2010) 'A Cultural Analysis of Administrative Justice' in M Adler (ed) (2010) *Administrative Justice in Context* (Oxford, Hart).
[136] S Halliday (2004), 119.

Thirdly, as Adler has argued, by focussing primarily on the forms of administrative justice expressed by agency working practices, Mashaw's study wrongly assumed a greater degree of consensus about the *aims* of disability welfare scheme than was actually the case. The competition between different justice values need not be limited to agency and decision-making design. It may also 'be taken to apply to competing models of *policy* as well as competing models of administration.'[137] Analysing the substantive principles of UK administrative law, Halliday has recognised that these competitive models of administrative justice are also 'reflected in administrative law doctrine' articulated by the courts in their case-law. Judicial review principles also embody and reflect conceptions of just decision-making, which may differ, in turn, from the visions of good administration dominating policy discourse in the legislature, the administrative justice values written into primary legislation establishing the scheme, and from the values expressed by the way in which bureaus organise their working practices.[138] Recognition of this limitation adds a second, third and fourth level to Mashaw's administrative justice analysis (written law, policy debates, jurisprudence), adding complexity and enriching his analysis by recognising the tensions and discrepancies which can exist between the administrative justice values expressed in political and policy debates, law and judicial decisions, and those elaborated internally, in an agency's working practices.

Ruling out managerialism, markets and consumerism

Reflecting the dynamic character of the administrative justice field, evolving conceptions of statecraft, and neo-liberal developments in the politics of public sector management, from the 1980s onwards recent work in the administrative justice field has extended Mashaw's threefold typology to take account of the influence of 'new public management' theory on public administration and the visions of administrative justice which predominate.[139] Characterised by its critique of bureaucracy – conceived in its classical hierarchical, formal rational form – the new public management critique promotes the

[137] M Adler (2010) *Administrative Justice in Context* (Oxford, Hart) 151.
[138] S Halliday (2004) 149.
[139] See generally, P Du Gay (2000) *In Praise of Bureaucracy: Weber, organization and ethics* (London, Sage); P Du Gay (2005) *The Values of Bureaucracy* (Oxford, OUP).

extension of discourses, practices and expectations of private sector enterprise and markets into the provision of public services. Characteristic features of new public management driven reforms include the introduction of internal markets in public sector service delivery and the promotion of managerial freedom to design services and allocate resources however they see fit in the pursuit of politically-mandated targets for service delivery. This approach incorporates an audit culture to assess and monitor levels of managerial success and to sanction failures to meet goals. The construction of service-users as *consumers* is also a characteristic feature of this extension of market discourse to the public domain, emphasising the importance of respecting consumer expectations about service delivery, customer care and satisfaction, and the consumer's ultimate remedy of transferring their resources to alternative, superior service providers in a competitive field. Adler and Sainsbury's analysis of recent developments in the administration of unemployment benefits indicate that this new generation of public sector reforms has sanctioned departures from the orthodox, rule-governed form to expand the opportunities for social security administrators to take professional judgements, in determining whether or not to sanction jobseekers who fail to observe agreed goals.[140]

While the analysis and reform debate around questions of admissibility draws to some extent on managerial vocabulary which would not be out of place in the context of a new public management driven reform, concepts of modernisation, streamlining and efficiency are arguable applicable to more traditional bureaucratic forms of institutional design, applying standards to instances on a grand scale, where the work of individual staff is buttressed by hierarchical supervision, and values 'strict adherence to procedure, acceptance of hierarchical sub- and super-ordination, the abnegation of personal moral enthusiasms' in the impartial filtering of the Court's docket against the admissibility criteria.[141] The inapplicability of market-driven conceptions of good decision-making to the Court's work is attributable to the tribunal's nature and functions. Applicants are not customers, but participants in judicial proceedings, with legitimate procedural expectations

[140] R Sainsbury (2008) 'Administrative justice, discretion and the "Welfare to Work" project' *Journal of Social Welfare and Family Law* 30 323 – 338.
[141] P Du Gay (1994) 'Making up managers: bureaucracy, enterprise and the liberal art of separation' *British Journal of Sociology* 45(4) 655 – 674, 656.

about how their case will be handled and what legal principles will be applied to their case. Nor are applicants to an international human rights court readily constructed as rational consumers of human rights solutions, selecting optimal international litigation services in a competitive tribunal market, whose choice the Court must attract and retain. Given the supply-side glut of cases, defending a competitive market share of European human right litigation is *one* problem which the Court is not currently afflicted by.

On the other hand, one might expect Adler's third innovation on Mashaw's models – consumerism – to enjoy greater institutional purchase in thinking about how Strasbourg operates. Putting 'the plight of the citizen is at the heart' of the process, as Halliday usefully summarises, in a consumerist model:

> the administrative system revolves around producing consumer satisfaction. This involves an active engagement with the citizen as a consumer of public services, and a responsiveness by the administration to dissatisfaction on the part of its consumers. The levels of service to be enjoyed by consumers, the standards of good administration, are often defined in "customer charters". In contrast to managerialism, accountability comes from the ground up – from the consumers themselves – through the complaints system. [142]

In parallel with appeal mechanisms, the behaviour of most national judiciaries are subject to independent complaints mechanisms, allowing independent ombudsmen to examine complaints about judicial conduct, reaching beyond traditional appellate questions of whether or not judges have reached the correct legal conclusion, or have properly observed principles of natural justice in their deliberations. Claims that the European Court is accessible and transparent form an established part of the institution's self-image, circulated in its publicity materials. It characterises itself as the "conscience of Europe." In one promotional video, Judge Villiger employed the architecture of the Human Rights Building in Strasbourg as a metaphor for wider values served by the Court:

[142] S Halliday (2004) 120 – 1.

> The architect used a great deal of glass. He wanted to highlight the transparency of the Court. If you think about other buildings, and other courts in the 19^{th} and 20^{th} centuries, people who entered them seeking justice were often afraid, overwhelmed by stone and concrete, so they felt very small. Here, the architect wanted people to feel welcome. The glass symbolises the transparency of what goes on here. People need to understand that the Human Rights protection system is something welcoming, not something to be afraid of.

Although not a perfect simulacrum of consumerist rhetoric, Villiger's remarks incorporate cognate concerns about the treatment, experiences and feelings of those involved in Convention litigation. The influence of consumerist discourse has not gone unfelt in domestic legal agencies and institutions which we might expect to be comparably resistant to its influence. For example, Scottish state prosecutors now maintain a "customer care" unit to deal with enquiries, freedom of information requests and its relations with the general public. It remains unclear, however, which categories of people, amongst the many sectors of society which prosecutors interact with, they regard as their "customers", or how their "caring" ethos is expressed in practice.

The European Court, and the debate about its reform, incorporates few of these concerns. The voice of the individual "consumer" of the Court's justice is structurally excluded from Convention reform debates, where only States governments enjoy voting and participation rights on reform proposals. While NGO groups self-identify as speaking for applicants in this process, this claim is not unproblematic. Applicants should not be treated as a homogeneous group with unified interests and priorities. Different applicants will undoubtedly have different experiences and perspectives on how the Court operates. In redesigning its working practices, the Court has never attempted to canvass that diversity of opinion or to quantify levels of applicant satisfaction with its treatment of their cases, nor are there standard, easily accessible protocols facilitating public complaints making.

The Court also offers none of the various "accountability mechanisms" which have become familiar in domestic administrative settings with a consumer focus. It operates no clear freedom of information policy, or mechanisms for the internal review of decisions not to release data held by the tribunal. While there are mechanisms to solicit data held by the tribunal, if the experience of conducting this research is anything to go by, the Court is episodically unresponsive, informal (and occasionally unprofessional) in its administration of this mechanism, and operates no protocol for the reasoned internal review of decisions to answer – or not to answer – complaints and queries from members of the public.

The idea that applicants (in addition to state governments) should be able to have confidence in the accuracy and fairness of the Court's adjudication of their cases is largely missing from the Convention debates, displaced, as subsequent chapters show, by negative construction of applicants and the overriding bureaucratic imperative to find ways of rejecting more applications, more quickly, employing fewer resources. As reform debates are the province of state representatives, and applicants enjoy no formal representation in these discussions save for more sympathetic but marginalised NGO participation in the process, it is unsurprising that their interests have been largely elided in these official debates and that a consumer focus has not emerged. The absence of a consumer discourse has a defensive aspect to it to. For reasons explored in subsequent chapters, given the summary and negative character of most of the Court's decision-making, it seems unlikely that satisfaction levels with Strasbourg's handling of cases is high. The absence of established complaints mechanisms arguably represents a tacit recognition of this fact.

Pluralistic administrative justice and competing values

To identify that social security is administered along classically Weberian lines according to the values of hierarchy, impersonality and formal rationality, or that courts adjudicate legal disputes employing adversarial procedures, would be banal and uninteresting. Where administrative justice theory comes into its own is in the analysis of institutions, where traditional approaches and ideas of just decision-making are challenged, compromised or combined in new ways: where there is 'competition between strong value systems which can co-exist within the decision-making environment.'[143]

[143] S Halliday (2004), 106.

In this context, it is worth recalling that Weber's account of bureaucracy itself emerged from a comparative analysis of the values undergirding feudal forms of governance, and the Prussian bureau's normative innovations and departures from more traditional approaches to statecraft and public organisation. The literature throws up a range of examples, where forms of bureaucratic and legal decision-making are challenged, displaced and reshaped by invasive normative logics, alternative justice visions and knowledge systems, jostling for domination. Mashaw's analysis of the administration of United States disability benefits reflects United States policy controversies of the 1980s and the interventions of the United States Supreme Court during this period concerning the proper scope of constitutional 'due process' protections in the administrative field, and the extent to which administrative decision-making ought to be modelled according to traditional expectations of judicial processes, including oral hearings, legal argument and cross-examination.[144] In the wake of *Ridge v Baldwin*, cognate questions continue to arise in UK administrative law about the doctrines of procedural fairness, and the nature and scope of the procedural rules which the courts should impose on decision-makers to ensure decision-making is fair, without 'emasculating' of administrative process by 'over-judicialisation.'[145] Should the law impose limits in administrative law in how decision-makers approach their work, and if so what limits, and in which circumstances should they apply? What procedural protections, if any, should applicants be entitled to in the administration or adjudication of rights in social security, say, or in participation in a planning inquiry?[146] In what circumstances must an oral hearing be conducted, and where will a "paper" hearing suffice? When, if at all, should parties be entitled to call and cross-examine witnesses in administrative proceedings? What reasoning, if any, should citizens be entitled to, explaining decisions which have been taken in their case?

Other areas of UK public law have seen the invasive logic of one conception of administrative justice effectively annexing parts of the administration, transforming them, albeit gradually, into adjudicative bodies forming part of the judicial branch of government. Most tribunals emerged as adjuncts to the administration in the United Kingdom, supported

[144] J Mashaw (1983), 3 – 4.
[145] Lord Bingham in *Begum v. London Borough of Tower Hamlets* [2003] 2 AC 430, para 5.
[146] See, for example, *R (Alconbury) v. Secretary of State for the Environment* [2003] 2 AC 295.

by central government department, distinct from the judiciary, employing different working methods and different personnel. Gradually, however, the fragmented tribunal system became systematised along increasingly judicial lines: a development reflected by and entrenched in the UK government's 2007 reforms, which rechristened tribunal members "judges" and transferred these adjudicative bodies from the executive to the judicial branch of state, partly as a consequence of the European Court's Article 6 jurisprudence on the independence and impartiality required if a trial was to be thought fair. While Mashaw and *Ridge* raised tensions about the extension of characteristically judicial procedural values and expectations into the administrative domain, the logic may run in the other direction. For example, during the 1990s, a political critique of 'serious disparities in federal criminal sentences' in the United States prompted a concerted attempt by the Congress to regulate, regularise and curb judicial discretion, by re-envisioning 'sentencing as an administrative process,' and attempting to subject judges to detailed and binding rules to govern and control sentencing outcomes.[147]

In the field of the administration of disability rights, Mashaw identified further potential tensions resulting from the introduction of professional expertise and knowledge and authority claims into the administrative system. Further studies have explored this tension between traditional bureaucratic and adjudicative modes of adjudication, and alternative knowledge systems introduced into the decision-making system. For example, Richardson and Machin have empirically explored potential tensions between legal and clinical approaches to decision-making of Mental Health tribunals in the United Kingdom. Charged with reviewing the detention of persons on psychiatric grounds under the Mental Health Act 1983, these tribunals incorporate specialised lay, legal and medical members into the decision-making panel, departing from the traditional approach of ordinary courts, where medical experts serve as witnesses, but not as decision-makers.[148]

Administrative justice scholars have identified new domains of professionalisation, where decision-making is justified, not on the basis of adversarial forms of procedure or

[147] R F Wright (1991) 'Sentencers, Bureaucrats, and the Administrative Law Perspective on the Federal Sentencing Commission' *California Law Review* 79(1) 1 – 90, 4 –5.
[148] Since the Tribunals, Courts and Enforcement Act 2007, and the streamlining of the reserved tribunals system, their technical designation is First Tier Tribunal (Mental Health).

bureaucratic compliance with centrally devised rules, but on the basis of expert or professional judgement. In the administrative field, for example, Adler and Sainsbury have employed administrative justice models to explore the impact of new public management discourse in shaping public sector reform. Emphasising values such as management autonomy, audit culture and customer satisfaction, these innovations have challenged many traditional bureaucratic approaches to decision-making. In a study focussing on the administration of sanctions imposed on recipients of jobseeker's allowance after the 'New Deal' British reforms of the 1990s, Adler argues that the shift to a new management discourse of administration has entailed a shift from bureaucratic and legalistic agency decision-making to more flexible professional and managerial approaches to imposing sanctions. This shift is characterised by a range of procedural innovations and changes in approach, from increased target-based working and audit-culture, to investing case-workers with greater explicit decision-making autonomy in their relationship with jobseekers, and in determining whether sanctions for non-compliance with their directions should be imposed.[149] Sainsbury's analysis of the justice implications of the 'Welfare to Work' scheme in the UK reached similar conclusions.[150] In a radically different context, Adler and Longhurst's study of the administrative justice principles undergirding the management of Scottish prisons also identified the importance of prison governors' claims to expert judgment in shaping prison organisation.

While Halliday has questioned the extent to which Mashaw's *professional treatment* model was capable of 'general applicability within the world of government administration,' Adler and Sainsbury have effectively demonstrated that administrative justice claims rooted in the exercise professional *expertise*, if not professional *treatment* in a medical sense, may be generalised effectively beyond the narrow confines of the administration of disability benefits which concerned Mashaw.[151] Mashaw's focus on the application of *medical* knowledge in the context of a client's needs may be theorised as a particular expression of a more general form of legitimation of decision-making through expertise,

[149] M Adler (2008) 'The Justice Implications of "Activation Policies" in the UK' T Erhag, S Stendahl and S Devetzi (eds) *A European Work-First Welfare State* (Goteborg, University of Goteborg) 95 – 131.
[150] R Sainbury (2008), 323 – 338.
[151] S Halliday (2004), 119.

arising from the broader (but not uncontested) construction of disability as an issue to be understood through the lens of medical expertise.[152]

Although not explicitly employing administrative justice typologies, Moorhead's empirical study on the impact of litigants-in-person in English and Welsh civil proceedings draws on cognate ideas of the 'traditional notions of judging' as passive arbitration between parties.[153] Moorhead contends that the absence of lawyers in legal proceedings, and the difficulties unrepresented people have in successfully navigating complex litigation systems, and making judgments about relevancy in law and fact in the presentation of their cases, challenges traditional conceptions of party control of litigation, and undermines traditional conceptions of judging as passive arbitration, obliging judges to undertake a more facilitative, interventionist role if substantive justice is to be done. This approach is not unknown in continental, more inquisitorial systems. Just as the absence of lawyers compromises the vision of the good judge as a passive arbiter, their *presence* and procedural expectations can oblige the administrator to approach decision-making in a manner more characteristic of adjudication. Socio-legal scholars have also identified the effect of the presence of lawyers in circumstances where their absence predominates in decision-making. With strong procedural expectations coloured by their experience of litigation, the involvement of legal professionals can significantly alter the form dispute resolution mechanisms take. In their study of procedures for reviewing of decision-making in the administration of homelessness rights, for example, Cowan and Halliday found that the presence of an applicant's legal representative in internal review processes 'shifted' the character of the decision-making process:

> the intrusion of a legal representative into the administrative arena through internal review brings with it a sense of adversarialism. Rather than the internal review being a simple internal check on the accuracy of the internal decision, it becomes

[152] See generally, M Oliver (1990) *The Politics of Disablement* (London, Macmillan).
[153] R Moorhead (2007) 'The passive arbiter: Litigants in person and the challenge to neutrality' *Social and Legal Studies* 16(3) 405 – 424.

> the locus of legal debate (between the local authority and the external legal representative) about the applicant's entitlements under homelessness law.[154]

Administrative justice theory comes into its own, when faced with circumstances where the dominant construction of the justice of process if being challenged or undermined, or in institutions which, by dint of the plurality of values undergirding their compositions, experience tensions between different knowledge claims and choices between which administrative justice principles to privilege. The European Court of Human Rights shows many of these compromised qualities on which administrative justice theory can afford critical purchase. It is a judicial institution, but incorporates a substantial bureaucracy which is involved to a significant extent in its filtering the Court's docket and applying criteria of admissibility. It is notionally committed to delivering adversarial justice, but most cases submitted to the Court are never communicated to respondent governments or adversarially tested. Its admissibility decision-making bears some superficial similarities to the decision-making of national superior courts on admitting or refusing appeals, but as the last chapter establishes, in scale the institution's caseload is more akin to that of a large-scale executive agency than any supreme court.

While the Court's work clearly includes adjudication which articulates European human rights standards, resembling the work of apex national courts, Council of Europe policy consistently envisages the Court as an institution retaining much wider adjudicative responsibilities to decide every admissible case on the merits, however well-established the underlying legal principles being applied may be. The Court is a judicial institution delivering adversarial justice, but is also one committed to universality in the "practical and effective" realisation of human rights, attracting a range of litigants and encompassing a very broad jurisdiction, in which a range of different social and economic circumstances prevail, and effective access to national courts and legal advice varies considerably. Academic scholarship urges the Court to adopt a more discriminating – and resource-conserving – approach to filtering its docket, judges exercising their professional judgment about which of the petitions it receives ought to be the focus of the institution's limited

[154] D Cowan and S Halliday (2003) *The Appeal of Internal Review and the (Non-) Emergence of Disputes* (Oxford, Hart), 196.

resources. Just as litigants-in-person pose significant challenges to conceptions of judgecraft as passive arbitration in domestic proceedings, so too the goal of enforcing 'practical and effective' human rights in contemporary Europe cannot but incorporate concerns about the objective circumstances of disadvantaged, unpopular and marginalised applicants, and the impact this may have on the way cases in Strasbourg are pursued. Human rights claims are characteristically defended in terms of checking illiberal or prejudiced democratic majorities, and extending rights protection to potentially unpopular minorities.

However, in many European states, these are precisely the people who may face discrimination, struggle to earn a living, to afford legal advice, and present a professional brief to Strasbourg, informed by an understanding of the latest developments in the Court's case-law, and setting out a comprehensive, well-ordered, evidentially supported and legalistic statement of their grievances. Reflecting these commitments, and the ethically-coloured dimension of human rights adjudication, the Court identifies itself, amongst other things, as the "Conscience of Europe." However, an awareness of the socio-legal evidence about the characteristic limits and challenges posed by judicial, adversarial justice to people without access to legal resources raises questions about the extent to which the visions of formal, adversarial adjudication and achieving substantive human rights justice for unlettered, unrepresented people may seamlessly be fused. These ambivalences, tensions and competing demands about how the Court should structure its work can be seen as expressing distinctive administrative justice values and are susceptible to analysis in these terms.

The administrative justice of admissibility decision-making: four competing visions

Employing Mashaw's administrative justice typology, as developed by Adler and Sainsbury, and based on the academic literature, policy debate and admissibility jurisprudence, a four-fold typology of administrative justice arguments may be identified: Strasbourg as court, Strasbourg as constitutional court, Strasbourg as bureaucratic and

Strasbourg as tribunal. The last of these does not derive from the administrative justice literature, but emerged inductively from the data of the Convention reform debate and the Court's admissibility jurisprudence as a distinctive set of principles for how the Court should organise its docket-filtering work. They are represented on the chart below, adapted to the Court's particular circumstances from Kagan (2010). The characteristics of each model are then analysed.

Figure 4.

Decision-making procedure	Degree of legal control	
	Informal	Formal
Hierarchy	**Strasbourg as constitutional court** (“Expert or political judgment”)	**Strasbourg as bureaucratic** (“Bureaucratic legalism”)
Participation	**Strasbourg as tribunal** (“Accessibility, flexibility”)	**Strasbourg as court** (“Adversarial legalism”)

Strasbourg-as-court: admissibility decision-making as passive judicial arbitration

The first and most obvious lens through which the Court’s activities may be conceptualised and understood is that of a traditional judicial institution, the court. It is beyond the parameters of this thesis to give a systematic treatment of the genealogy of contemporary conceptions of courts and their activities, and the rich and complex history of ideas and practices from which these institutions emerge. Cast in administrative justice terms, this vision of the Court may be identified with Mashaw’s moral judgment model, recast by Adler as the ‘legal’ ideal type of decision-making, where the justice of the process inheres in the opportunity afforded to the parties to participate fairly in the process of adjudicating whether their rights claim has substance. The Council of Europe's jurisdiction encompasses a range of legal systems, incorporating different traditions of adversarial court procedures and more inquisitorial justice in their national courts. However, as a former president of the Court has explained, the Court is established by member states for the adjudication of individual complaints, owing procedural duties to both of the 'parties' to a Convention case. President Costa observed:

> Of course, our Court is a court and therefore an impartial tribunal which must respect the equality of arms between the parties and which does not given an *a priori* opinion in favour or the applicant or the respondent state.[155]

In this model, in contrast with the investigatorily active bureaucracy seeking the information necessary to process an entitlements claim, or a more inquisitorially active tribunal, the judicial 'decision-maker is traditionally unbiased and passive,' reflecting the procedural 'notion that a court cannot provide extensive assistance to one party without compromising its impartiality.'[156] Moorhead describes this vision of judgecraft as passive arbitration as '*the* classic paradigm for common law adjudication,' under which:

> two parties contest the rights and wrongs of their case, in front of a generally passive, non-intervening judge, who 'holds the balance between the contending parties without himself taking part in their disputations' (Lord Denning in *Jones* v *National Coal Board* [1957]). The idea of the passive arbiter is partly founded on a theory of party control: a belief that party control is the most effective method of articulating cases and ensuring that the parties will believe that justice has been done regardless of the outcome.[157]

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[155] J P Costa (2008) Speech, '*Colleque "Dix ans de la "nouvelle" Cour européene des droits de l'homme: bilan et perspectives,*' Strasbourg 13th October 2008.

[156] S Halliday (2004) 118; R Engler (1999) 'And Justice for All, Including the Unrepresented Poor: Revisiting the Roles of the Judges, Mediators, and Clerks', *Fordham Law Review* 67 1987–2070, 2023.

[157] R Moorhead (2007), 406.

The Court's official publications align their accounts of the Court's work with this justice conception, explaining that 'the procedure before the ECtHR is adversarial and public,'[158] although more recent *Official Reports* recognise that the Court's approach to decision-making 'is largely a written procedure.'[159] This adversarial account of the institution's procedural values is fostered by and reflected in the images of its decision-making presented in the Court's published jurisprudence. Its published judgments and decisions characteristically emphasise the interplay of arguments between state and applicant submissions, affording each party to comment on, and rebut, contentions advanced by the other party. This approach is vividly reflected in the Court's (albeit very rare) oral hearings, which are characterised by their characteristically adversarial form of ritualised turn-taking and right of reply.[160]

Applying this approach to the Court's docket-filtering, the passivity of the Strasbourg-as-court model for administrative justice emphasises the persuasive and legal burdens and responsibilities of the parties (and in particular, of applicants) to establish a credible case, to furnish the passive adjudicator with sufficient material to allow a decision to be made, and to persuade the Court that the admissibility criteria have been satisfied. If the applicant fails to do so, whether through ignorance of the law, incompetent or incomplete adduction of evidence, or because of the inaccessibility of professional legal services, they 'must live with the consequences' of their failure.[161] In terms of the formal vision of administrative justice articulated by this model, they have been treated fairly and the principle of the equality of arms has been upheld. The Strasbourg as Court model accordingly falls within the participatory but formalistic administrative justice quadrant, in the sense that it emphasises the interaction between the party and the tribunal in procedural terms, but this vision of adversarial legalism does not afford the Court the broad latitude of a constitutional

[158] European Court of Human Rights (2002) *Annual Report European Court of Human Rights 2001* (Registry of the Court, Strasbourg), 11.
[159] European Court of Human Rights (2007) *Annual Report European Court of Human Rights 2006* (Registry of the Court, Strasbourg), 15.
[160] An online archive of all of the Court's oral hearings webcast since 2007 is accessible at http://www.echr.coe.int/Pages/home.aspx?p=hearings&c=#n1357300199863_pointer.
[161] R Engler (1999), 1989.

court to set its agenda or of a tribunal to vary procedural demands based on the circumstances of its applicants.

Critics of this approach to decision-making have argued that the 'system that routinely favours parties with lawyers over parties without, regardless of the merits of the cases, cannot be viewed as impartial.'[162] In common with the experience of unrepresented litigants presenting cases in ordinary courts in national settings, judicial passivity and the formal equality of arms it upholds may be productive of significant structural disadvantages in lodging cases. Without access to or resources to employ professional legal advice, ignorant of the admissibility criteria and the Court's approach to the interpretation of substantive Convention rights, this formal, adversarial conception of procedural justice is likely to see litigants in person struggling to deal with legal complexity, 'translate disputes into a legal form' a 'broader, and understandable, confusion of law with social or moral notions of 'justice.'[163] In administrative justice terms, however, adversarial legalism privileges formal equality of arms at the admissibility phase over substantive equality of outcome. While 'on the surface, it may seem that if this approach is mainly about getting the facts right so as to apply legal rules correctly it is little different to bureaucratic rationality,'[164] the model reflects the broader 'goal of awarding entitlements on the basis of a notion of the deservingness of the parties in the particular context, giving rise to a claim of right … this model implies a just process of proof and decision.'[165]

Strasbourg as constitutional court: admissibility as agenda-setting

The case for constitutional justice, articulated by Greer, Wildhaber, Mahoney, de Londras and others, embodies the **Strasbourg as constitutional court** model of administrative justice. It contends that the Court should give primacy to its responsibility for 'constitutionalist decision-making':

[162] *Ibid*, 2023.
[163] R Moorhead (2007), 406.
[164] T Buck, R Kirkham, B Thompson (eds) (2011) 'Concepts, Theories and Policies of Administrative Justice' in *The Ombudsman Expertise and Administrative Justice* (Farnham, Ashgate), 66.
[165] *Ibid.*

> clarifying standards, holding states to account for them, and sometimes developing those standards beyond their literal (or, indeed, "original") conceptions in order to reflect more contemporary understandings or what is considered to be a more appropriate level of limitation of state action.[166]

This should be reflected in the Court's approach to its admissibility decision-making. Under this model, the justice of individual admissibility decision-making is conceived not as the *accurate* application of settled rules to instances, or as an adversarial process of contextual interpretation which extends procedural protections and guarantees of participation to the parties to the case, but an opportunity for judges to exercise their professional judgement in selecting cases for review, setting the Court's substantive agenda according to lightly-defined legal criteria. For example, in contrast with 'of right' appeals, the United Kingdom Supreme Court is only obliged to review a case if its three-justice appeals committee determines that the matter raises 'an arguable point of law of general public importance' which the Supreme Court should 'examine at this time.'[167] The three limbs of this lightly-defined appeals test – arguability, importance, and timeliness – are essentially matters of judgment. Similar qualitative tests apply in constitutional courts elsewhere, although the precise latitude extended to judges varies.[168] This justice model identifies Strasbourg's admissibility decision-making with these practises and the judicial authority claims and professional prestige undergirding them.

The model's emphasis on the exercise of judgment by the senior judiciary locates the **Strasbourg as constitutional court** model in the hierarchical but informal quadrant of the chart. Hierarchical, because the judge 'controls the process and standards for decision,' yet informal in the sense that 'the decision's authoritativeness rests on the professional or political judgment of individual officials, not conformity with detailed legal rules.'[169] Although there are sometimes opportunities for opposing parties and interveners to make

[166] F de Londras (2013), 40.
[167] *Perera (Appellant) v Grunwick Processing Laboratories Limited (t/a Bonus Print) (in administration) (Respondent)* UKSC 2012/0241 refused leave to appeal, 8 March 2013.
[168] See, amongst other examples, the German Federal Constitutional Court: D P Kommers (1994) 'The Federal Constitutional Court in the German Political System' *Comparative Political Studies* 26(4) 470 – 491 and the Canadian Supreme Court, R B Flemming (2004) *Tournament of Appeals: Granting Judicial Review in Canada* (Vancouver, UBC Press).
[169] R A Kagan (2010), 165.

submissions to the Court before decisions are taken on granting leave to appeal, in general these decisions are taken by judges on the papers submitted by the appellant, with reference to the facts, the legal issues raised in the appeal petition, and the substance of the judgments of the courts below. The unpredictability and flexibility of the norms being applied under this model sets it apart from the vision of rigorous and uniform decision-making promoted by the Strasbourg as bureaucratic model. In contrast with adversarial decision-making in ordinary courts and first-tier appellate decision-making, 'constitutional' decision-making of this kind relies for its justification, not on the *procedures* adopted before reaching decisions, but on the *judgement* of the court on whether a particular case is sufficiently important to warrant allocating the Supreme Court's limited judicial resources to hearing and reasoning a particular case.

Strasbourg-as-bureaucratic: human rights adjudication as factory line

Thrown against the background of the dominant academic view of Strasbourg as *sui generis* constitutional court, the idea that the Court should be understood through a bureaucratic or administrative lens may appear problematic. However, there is no reason of principle why the characteristic values of a bureaucratic rationality (Mashaw) or bureaucratic legalism (Kagan) should not represent a viable, attractive, competing conception of how the Court's docket-filtering should be undertaken. Chapters 4, 5 and 6 show that this conception has had a significant impact in the administrative justice principles reflected in Convention reform debates and working practises.

Under an admissibility regime designed according to bureaucratic principles, docket-filtering would involve the 'uniform implementation of centrally devised rules, vertical accountability and official responsibility for fact-finding.'[170] This administrative justice model gravitates around questions of accuracy, consistency and cost-effectiveness of decision-making. In this model, the Court is understood to have settled the interpretation of the admissibility criteria in a formalistic form, enabling the straightforward application of the norms to a large volume of incoming cases. The function of sifting the docket is 'to

[170] *Ibid*, 166.

implement those preferences on a grand scale in as accurate and consistent a way as possible, with a concern for economy.'[171]

The **Strasbourg-as-bureaucratic** model is located in the *hierarchical* and *formal* quadrant of the chart. On this account of administrative justice, the idea that the Court should adopt an informal, flexible, unpredictable approach to its docket-filtering – whether by exercising professional judgement to select cases for adjudication (Strasbourg as constitutional court) or to suspend procedural demands in an unpredictable way with reference to the facts and circumstances of individual cases (Strasbourg-as-tribunal) is anathema. The admissibility criteria are constructed as uniform formalities to be observed and processed through the Court's justice factory achieving uniform and predictable outputs. This approach reflects a particular conception of the rule of law and the strict enforcement of legal equality between different applicants. Under the bureaucratic model, every applicant can justly expect to have the same criteria applied to their case as obtain for the tens of thousands of other applications filtered out of the Court's docket as inadmissible every year: to suspend procedural demands in one case and not in others would represent a clear instance of administrative *injustice* for a vision rooted in the values of bureaucratic legalism.

A few vivid examples illustrate the potential significance of this image of just admissibility decision-making for Convention reform. The Court's former Registrar, Paul Mahoney, observed that the Court's docket-filtering:

> is organised as a kind of factory with production lines to process the mass of committee cases through standardised procedures and standardised solutions, set out in handbooks that are translated into all the languages for all the different language divisions. I always used to explain this approach as being a bit like the food-production procedures imposed by McDonald's so as to ensure the same quality, the same taste and the same service in every McDonald's wherever you go in the world. Likewise, the Registry is concerned to make sure that all the different

[171] S Halliday (2004), 117.

> language divisions dealing with hundreds of comparable cases a day, as they do, apply comparable procedures and comparable solutions.[172]

Other commentators on the Strasbourg system appeal to similar industrial and mechanistic metaphors in describing the Court's work. Lester has described the institution as 'a factory system, dominated by the Registry, attempting to achieve high productivity in delivering mass production of mainly negative decisions.'[173] Dembour has described the Court as operating like 'a big and fast-processing judicial factory line.'[174] Greer has criticised the institution as excessively 'bureaucratised', while de Londras has expressed concerns about the Court's 'hyper-bureaucratisation' under the pressures of the case-load crisis.[175] These theorists do not generally attempt further to define the conception of bureaucracy informing these criticisms. On this conception of bureaucratic values, however, the procedural justness of admissibility decision-making is predicated, not on the appropriate exercise of professional judicial or administrative *judgement,* or by employing procedural forms enshrined in 'traditional notions of court-centred adjudication,' but in the accurate, efficient, consistent and predictable application of well-settled rules of admissibility.[176]

Strasbourg-as-tribunal: the 'street corner court'[177]

The fourth and final administrative justice model proposed in this thesis is the **Strasbourg-as-tribunal** model. In contrast with the other three models, which are adapted forms of Mashaw's ideal types of administrative justice, adapted to the Court's particular character and circumstances, the Strasbourg-as-tribunal model emerged inductively from the empirical evidence of Convention reform debates, the Court's admissibility jurisprudence, and in the administrative justice values promoted in the academic literature. Sitting in the

[172] P Mahoney quoted in R Wolfrum & U Deutsch (eds) (2009) *The European Court of Human Rights Overwhelmed by Applications: Problems and Solutions* (Berlin, Springer Verlag), 48.
[173] A Lester (2009) 'The European Court of Human Rights after 50 years' *European Human Rights Law Review* 462, 472.
[174] M B Dembour (2002) '"Finishing off" cases: the radical solution to the problem of the expanding ECtHR caseload' *European Human Rights Law Review,* 604 – 623, 613.
[175] F de Londras (2014) *Submission to the CDDH on future directions in Court reform*, 2 accessible at http://www.coe.int/t/dghl/standardsetting/cddh/reformechr/gt-gdr-f/de_Londras.pdf.
[176] S Halliday (2004), 118.
[177] M B Dembour (2002), 621.

participative and *informal* quadrant, this vision of how the Court should approach its docket-filtering is informed by the universality of human rights norms and recognition of the challenges faced by indigent, vulnerable, or disadvantaged applicants in steering even well-founded petitions safely through the obstacle course of admissibility decision-making. As Leach argued in his submission to the Council of Europe's court reform process:

> the right of individual petition is a "cornerstone" of the Convention system. In order to make this right "practically realisable", it should never be forgotten that some potential applicants in Europe face significant disadvantages, such as those who live in geographically remote areas, those affected by armed conflict, refugees and IDPs who do not have access to very basic services, those living in regions with no or only poor access to the internet, and those whose social conditions means that they have no or limited access to expert legal advice.[178]

Reflecting these challenges, Leach argues that the Court's procedures should 'allow for appropriate judicial discretion to ensure effective access to justice for people in Europe with these, and similar, vulnerabilities.'[179] This is a classic statement of the *Strasbourg-as-tribunal* approach. This conception of the Court has a great deal in common with the characteristic aspirations for tribunal justice in the United Kingdom.

The history of the emergence tribunal system in the United Kingdom is a complex one. Emerging *ad hoc* as adjudicative 'adjuncts of the administrative process,'[180] specialised tribunals were established in a range of central government departments from 1911 onwards – pre-eminently in the field of social security decision-making – to afford citizens 'an independent means of challenging possible mistakes and illegalities which was faster, simpler and cheaper than recourse to the courts.'[181] Other, party-to-party bodies, such as employment tribunals, were also established. The development of tribunals was notoriously piecemeal and unsystematic, with significant diversity in their composition,

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[178] P Leach (2014) *Submission to the CDDH on future directions in Court reform* http://www.coe.int/t/dghl/standardsetting/cddh/reformechr/GT-GDR-F/Leach.pdf last accessed 05.12.2014.
[179] *Ibid.*
[180] M Elliott (2012) 'Tribunal Justice and Proportionate Dispute Resolution' *The Cambridge Law Journal* 71 297 – 324, 299.
[181] A Leggatt (2001) *Tribunals for Users: One System, One Service Report of the Review of Tribunals* (London, Department for Constitutional Affairs), para 2.18.

appointment procedures, working practices, administrative support and appeal rights against adverse decisions, with different rules and time-limits applying in different tribunals.[182] Subsequent governmental reviews gradually established tribunals as a more coherent administrative justice system, reflecting a distinctive and coherent set of aspirations and principles, independent of those pursued in ordinary courts, and independent of the bureaucratic values then dominating the administration.

In 1957, the Franks Committee concluded that 'tribunals are not ordinary courts' but 'should properly be regarded as machinery provided by parliament for adjudication rather than as part of the machinery of administration.'[183] So what distinguishes tribunal adjudication from the decision-making of ordinary courts? For Franks, the peculiar characteristics of tribunal justice were 'cheapness, accessibility, freedom from technicality, expedition and expert knowledge of their particular subject.'[184] The more recent Leggatt Review (2001), which contributed to the systematisation of the tribunal system in the United Kingdom and its integration into the judicial branch of the state by the Tribunals, Courts and Enforcement Act 2007, offered a similar list of cardinal principles for tribunal justice, reflecting the values of 'accessibility, participation, flexibility, specialisation and efficiency.'[185]

What do these concepts mean concretely? The concept of accessibility has a range of facets. Firstly, in terms of cost, tribunal justice is intended to be inexpensive and thus, in principle, more accessible to those of limited financial means than ordinary courts. Fees have not historically been levied for commencing tribunal proceedings, and tribunal users have characteristically not been expected or required to engage professional legal representation in the presentation of their case. The corollary of this principle, from a governmental perspective, is efficiency. By marginalising and eliminating formality, lawyers and adversarialness from the decision-making process, more business is channelled away from

[182] E Jacobs (2009) 'Something Old, Something New: The New Tribunal System' *Industrial Law Journal* 38(4) 417; M Adler (2012) 'The rise and fall of administrative justice – A cautionary tale' *Socio-Legal Review* 8(2) 29 – 54.
[183] O Franks (1957) *Report of the Committee on Tribunals and Inquiries* Cmnd 218, para 40.
[184] *Ibid,* para 38.
[185] A Leggatt (2001) *Tribunals for Users: One System, One Service Report of the Review of Tribunals* (London, Department of Constitutional Affairs).

expensive court forums, legal professionals and the under-pressure legal aid system. The tribunal system is also expected to deal with a much larger volume of cases, more rapidly, than the often ponderous and time-consuming proceedings of civil courts. In contrast with a classic model of judicial decision-making as passive arbitration, tribunal justice also envisages that decision-makers will adopt more inquisitorial and enabling approaches to the litigation before them, to allow more effective access to justice and meaningful participation by ordinary citizens.

This entails an expectation of procedural transparency, simplicity and flexibility in the conduct of proceedings, adaptable to the difficulties faced by litigants-in-person to identify the legally relevant issues raised by their case, and a facilitative approach to ascertaining the facts. The specialisation of tribunals also promotes the goals of greater efficiency and access to justice and contributes to the subversion of traditional conceptions of judicial passivity and party control of proceedings. The concentration of a tribunal's efforts on the review of a particular set of administrative practices, established under a particular legal framework, fosters specialism in that area of policy and law. The assumption of the tribunal's knowledge of the law, in principle allows litigants, ignorant of the relevant legal tests and provisions and unable to engage legal assistance, to present the facts of the case, and vindicate their rights, without imposing (the potentially impossible to discharge) burden on litigants to make detailed, relevant and accurate submissions on legal aspects of the dispute. Empirical socio-legal research in the field has questioned the extent to which tribunals realise many of these goals of accessibility and informality in practice.[186] Nevertheless, this normative conception of tribunal justice represents a coherent, distinctive and attractive set of administrative justice principles against which the operation of adjudicative institutions can be judged.

Under the Strasbourg-as-tribunal model, the Court and former Commission's approach to admissibility decision-making under the Convention reflects many of these principles of tribunal justice. The Court charges no fee for lodging cases, and recent proposals to

[186] See generally, M Partington, E Kirton-Darling and F McClenaghan (2007) *Empirical Research on Tribunals: An Annotated Review of Research Published Between 1992 and 2007* (London, Ministry of Justice).

introduce one have been stalwartly resisted by States and NGO representatives. While the affordability of Strasbourg litigation is significantly diminished in practice by the requirement that often expensive domestic remedies must be exhausted before seizing the Court of the case, the absence of additional costs in commencing Court proceedings reflects a commitment to facilitating the effective exercise of individual petition by securing affordable access for a broad range of applicants to Strasbourg. Legal representation is not mandatory at the admissibility phase, nor are applicants required to frame their initial correspondence with the Court as a model legal brief. A great many applicants do not do so. Although not widely appreciated or reflected in the literature arguing Strasbourg 'is a constitutional court,' the ECHR is pre-eminently a forum for litigants in person, particularly at the admissibility phase.[187] Only a tiny proportion of the Court's docket consists of cases which have already been subject to the review of national supreme and constitutional courts. Unpublished official statistics suggest that around 69% of cases are submitted without legal assistance, many of them in the form of 'handwritten' letters.[188]

Krisztina Morvai, who worked as a lawyer in the registry of the Commission during the early 1990s, reflected on this enabling approach to decision-making she adopted in the interpretation and analysis of applicants' letters.[189] Firstly, she observed, 'these submissions were not model legal briefs, or even homework done for legal writing, but long, detailed testimonies of suffering, pain or "just" allegations of injustice.'[190] This 'long description of facts is typically not followed by reference to a particular provision of the Convention, or where there is such a reference, it is hardly "accurate."'[191] In the tribunal model, the Court's duty is to bring a pro-active approach to sifting through these cases, employing its specialist knowledge of the Convention and its admissibility criteria 'to make legal sense of the applications, to translate them from Life-language to Law-language' to

[187] A Stone Sweet (2009) 'On the Constitutionalisation of the Convention: The European Court of Human Rights as a Constitutional Court', 1.
[188] European Court of Human Rights (2011) 'Note on compulsory legal representation of applicants' DH-GDR(2011)026.
[189] K Morvai (1998) 'The construction of the other in the European human rights enterprise: a narrative about democracy, human rights, the rule of law and my neighbour Uncle Blaze' in P Fitzpatrick & J H Bergeron (eds) (1998) *Europe's Other: European law between modernity and postmodernity* (Aldershot: Dartmouth), 247.
[190] K Morvai (1998), 247.
[191] *Ibid*, 247 – 8.

ensure justice is done both to the multi-millionaire, able to defend his human rights with extensive resources, and the illiterate, penurious, suffering, vulnerable and discriminated against applicant, for whom even lodging a case can represent a significant challenge.[192]

These administrative justice values are distinct from those articulated by the Strasbourg-as-court, constitutional court and bureaucratic models. Admissibility decision-making in this vision is not justified by its *accuracy*, as an exercise of professional *judgement*, or by traditional passive forms of *arbitration* characterised by party control, but a more informal approach to decision-making *a limine* which takes realistic account of the barriers faced by applicants in lodging their cases. This approach tries to compensate for their deficiencies and limitations by being procedurally pro-active, identifying relevant legal issues in the facts and prompting the submission of material – critical for a decision on admissibility – but perhaps understandably missing from a case-file composed by an ordinary person without specialist training or a detailed understanding of the Court's Convention jurisprudence. This vision is consistent with what one unnamed 'insider' described to Dembour as 'the Strasbourg "*acquis*" of being' a "street-corner court."'[193]

This approach is characteristically justified in terms of substantive access to justice arguments and their particular significance in the field of human rights. As the former President of the Court, John-Paul Costa, has recognised, the Court is 'not a jurisdiction like others. It is a Court of human rights, a Court for human rights, and that is enough to ensure its distinctiveness' from other judicial decision-making bodies.[194] Costa did not further elucidate the particular features and values he associated with a court *of* and *for* human rights, as opposed to an ordinary court of civil jurisdiction. However, the Strasbourg-as-tribunal model represents one credible elaboration of Costa's observation. This approach is reflected in the claim that the admissibility criteria must be interpreted accommodatingly

[192] *Ibid*, 248.
[193] M B Dembour (2002), 621.
[194] J P Costa (2008), Speech, 'Colleque "Dix ans de la "nouvelle" Cour européene des droits de l'homme: bilan et perspectives, Strasbourg 13th October 2008.

in the light of the Convention's broader objects and purposes, with 'some degree of flexibility and without excessive formalism.'[195]

This vision reflects the broader view that Convention interpretation must reflect the instrument's object and purposes 'which, in so far as it constitutes a treaty for the collective enforcement of human rights and fundamental freedoms, must be interpreted and applied so as to make its safeguards practical and effective', rather than 'theoretical and illusory.'[196] For the *Strasbourg-as-tribunal* model, excessive and unstinting formalism at the threshold threatens those principles and risks undermining the effective universal protection of human rights by privileging values of judicial passivity over effective facilitation of litigation (*Strasbourg-as-court*) or the potentially discriminatory formality of unbending, bureaucratic rationality (*Strasbourg-as-bureaucratic*).

Conclusion: from the "individual vs. constitutional" debate to administrative justice

Just as the caseload crisis has become a 'reassuring constant' for those concerned with the Court's work and its future, the familiar terms of the 'individual vs. constitutional' justice debate has come to dominate academic scholarship since the early 2000s onwards.[197] In view of the limits of this debate, this chapter proposes a break with this theoretical tradition. As Sainsbury has argued, administrative justice theory represents 'a robust framework' within which we can describe developments in administrative decision-making in the real world. And just as importantly, it also gives us a normative tool which can be used to scrutinise and assess those developments.'[198]

Embracing socio-legal administrative justice theory allows us to gain greater critical purchase on the complexity, inconsistencies and tensions which have characterised the

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[195] *Khashiyev and Akayeva v. Russia* Apps no 57942/00 and 57945/00 (ECtHR, 24th February 2005) (judg.), para 117.
[196] C Cojocariu (2011) 'Handicapping Rules: The Overly Restrictive Application of Admissibility Criteria by the European Court of Human Rights to Complaints Concerning Disabled People' *European Human Rights Law Review* 6, 686 – 699, 693.
[197] R Harmsen (2011), 119.
[198] R Sainsbury (2008), 326.

Court reform debate and to reintegrate the concerns of academic theory with the broader range of procedural ideas and innovations canvassed Convention renegotiation process. That process ranges far more widely than the narrow confines of the dominant “individual vs constitutional justice” debate recognises or can accommodate. This approach also connects two hitherto distinct bodies of literature, and embarks on the process of subjecting the work of the Court to much-needed, and long-neglected socio-legal scrutiny.

In empirical terms, this thesis shows that the competitive pluralism of the four models identified better captures the complex, competing and often compromised and incoherent visions which are expressed in scholarship, treaty renegotiations, the Court’s admissibility jurisprudence and working practices. I argue that there are not two, but at least four distinctive, coherent, attractive and competing accounts of how the Court’s admissibility decision-making can be understood, designed and implemented. Employing the ideas of the Strasbourg as court, constitutional-court, tribunal and bureaucratic models, the next five chapters analyse the relative strengths of these models for capturing different facets of admissibility decision-making enshrined in the law of the Convention (chapter 3), the policy arguments raised in official reform debates (chapter 4), in the Court’s bureaucratic and judicial working practices in filtering the docket (chapters 5 and 6) and in the vision of just administration expressed by the Court’s published admissibility jurisprudence (chapter 7). In the light of these empirical insights, in chapter 8 I return to the dominant academic discourse of the “individual vs. constitutional” debate, re-evaluating its representations and claims from the socio-legal perspective gained in the preceding chapters.

3. Admissibility decision-making under the European Convention: institutions, procedures & norms (1948 – 2014)

The text of the Convention is the starting point, and for most current studies, the end point, of their analysis of the admissibility criteria and how they have been applied. This chapter outlines the legal "nuts and bolts" of docket-filtering under the European Convention. Focussing how the text of the Convention has been updated and amended, it examines (a) how the legal procedures governing admissibility decision-making (b) the institutions charged with taking those decisions and (c) the substantive legal grounds governing the admissibility of individual petitions have developed since 1948. The first and second stories are significantly more complex than the third. This chapter adopts a chronological approach to the elucidation of these changes to the legal processes, institutions and standards. Employing an expansive definition of docket-filtering under the Convention, this analysis incorporates not only admissibility decision-making criteria and procedures, but also the examination of analogous legal standards and powers, above and beyond the admissibility criteria, which have been applied by Convention institutions, to limit and determine which applications are subjected to full scrutiny in a judgment of the Court.

While the thinking about admissibility decision-making which informed the first iteration of the Convention in 1950 will be considered in some detail, this chapter does not systematically survey (a) the debates undergirding subsequent Convention reforms, (b) the extent to which these legal provisions are a reliable guide for how admissibility decision-making operates in practice or (c) how the former Commission and Court have approached the interpretation of the Convention's admissibility criteria in their case-law. These tasks are taken up separately in chapters 4 to 7. This chapter performs a dual task. In the first sense, it outlines the basic framework of legal concepts, procedures and institutions for admissibility decision-making, upon which the rest of the thesis relies. Its narrow focus on the evolving text of the treaty also brings out explicitly the ambivalences and the underdetermined character of admissibility decision-making as set out in the Articles and Protocols. In terms of the substantive criteria for admissibility, I show that the Convention is potentially compatible with a competing range of conceptions of admissibility decision-making, from a formalistic filter of detailed rules, to a more open-ended exercise of judgment giving judges greater latitude to decide which cases to hear. A great deal depends on their interpretation; the text does not speak for itself.

I also identify four further key trends in the changing treaty text: (a) the gradual judicialisation of admissibility decision-making; (b) the rise of explicit bureaucratic participation in processing cases *a limine*; (c) the attenuating collegiality of the docket-filtering process and (d) the increasing centrality of the admissibility criteria as the sole basis in law for accepting or excluding cases from full review, by first controlling, then eliminating, the discretionary power of Convention institutions, above and beyond the application of the admissibility criteria, to decline to accept a case for judicial decision.

The origins of the admissibility phase: the Convention of 1950

Alongside debates about the precise scope of the substantive human rights protections to be enshrined in the Convention, during the late 1940s, and early 1950, the character of the institutional machinery which should be established by European states 'for the collective enforcement of certain of the rights stated in the Universal Declaration' also proved controversial.[199] The first draft of the Convention, adopted in 1950 after extensive negotiations between representatives of the Council of Europe's twelve founder states, created two distinct institutions: the European Commission on Human Rights, and the European Court of Human Rights.[200]

No consensus formed between states' delegations on adopting a fully judicial Convention enforcement mechanism, directly accessible to individuals, with mandatory jurisdiction over disputes 'to ensure the observance of the engagements undertaken by the High Contracting Parties.'[201] As Bates has analysed in greater detail, the prospect of being

[199] ECHR (1950), Preamble. Making accurate reference to different versions of the Convention which have obtained since 1950 is challenging. Unlike the treaty reform of European Union institutions, powers and functions, the successive renegotiations and amendments to the Convention have been affected by Protocols, amending and reshuffling the Articles of the Convention in force. The convenient historical reference point of the Lisbon or Amsterdam iteration of the treaty is denied us. Hereafter, "ECHR (1950)" refers to the first draft of the Convention, "ECHR (1994)" to the Convention after the reforms of Protocol 8, "ECHR (1998)" after Protocol No. 11 came into force, and "ECHR (2010)" after Protocol No. 14. Until Protocols No.s 15 and 16 have been ratified, it is this version of the Convention currently in force.
[200] ECHR (1950), Article 19.
[201] *Ibid.*

subject to the judgments of an international human rights court proved too rich for many state governments, concerned about the alienation of national sovereignty, the potential exploitation of Strasbourg proceedings by their political opponents, and the risk of embarrassment at having to defend political choices in judicial proceedings, in public, in future.[202] As drafted, most of the substantive Convention rights represented broad guarantees, not detailed prescriptions. Whether or not one endorses the political arguments behind these sovereigntist objections of some state delegations during the 1940s, it is beyond dispute that the Court has developed the open-textured language of the Convention rights over the last six decades employing considerable creativity,[203] extending the reach of rights and the responsibilities of governments by interpreting the Convention as a 'living instrument' which 'must be interpreted in the light of present-day conditions.'[204] The anxieties of some states' negotiators have not proved altogether ill-founded in the cold light of retrospect.

However, the Commission established in principle in 1950 was the creation of a 'compromise proposal,' on the principles both of (a) the mandatory jurisdiction of Convention complaints mechanisms and (b) of the importance of judicial adjudication and enforcement of fundamental rights claims.[205] The agreed text permitted but did not require contracting states to recognise:

> the optional jurisdiction of a "Commission of Enquiry" with responsibility for filtering the docket of cases submitted under the Convention, investigating their facts and circumstances, with power to refer matters to the Court for judgment according to judicial procedure.[206]

It was envisaged that this Commission would be 'political,' or 'quasi-judicial' in character.[207] The framers saw the Commission as 'a sieve or filter' limiting individual

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[202] E Bates (2010) *The Evolution of the European Convention on Human Rights* (Oxford, OUP), 124.
[203] A Mowbray (2005) 'The Creativity of the European Court of Human Rights' *Human Rights Law Review* 5(1) 57 – 79.
[204] *Tyrer v the United Kingdom* (1980) App no 5856/72 (ECtHR, 25th April 1978) (judg.), para 31.
[205] Council of Europe (1970) *Travaux Préparatoires on Articles 26 and 27 of the European Convention on Human Rights* CDH(70)30.
[206] *Ibid.*
[207] E Bates (2010), 120.

access to the Court, and to a binding judicial determination of whether or not a respondent State has violated the applicant's Convention rights.[208] In addition to determining whether applications were admissible, the Commission was also responsible for establishing the facts of cases and exploring the possibility of negotiating a 'friendly settlement' between the applicant and the respondent state.[209] Its secretariat was to be provided by the Secretary-General of the Council of Europe.[210] The Commission and Court were empowered to entertain two distinct categories of litigation: inter-state and individual petitions.

The first, the 'inter-state' case, allowed the government of one Member State to challenge another Member's compliance with Convention.[211] While the *Travaux* suggest that it was envisaged in the 1940s that inter-state litigation would be the primary means of rights-enforcement under the treaty, this expectation went unfulfilled and the individual complaints mechanism, initially enshrined in Article 25, proved far more significant. Under Article 25, the Court and Commission were empowered to receive petitions 'from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto' – but only if the Member States complained of recognised their jurisdiction.[212] Individual petitions make up the overwhelming majority of the cases considered by the Commission and Court, and have done since the Commission began its work in 1953. Only twenty-six inter-state applications have been made under the Convention to date.

While the Commission's capacity to examine *inter-state* petitions was mandatory from the outset, and all signatory States were required to submit to its jurisdiction,[213] recognition of the *Court's* jurisdiction to entertain inter-state applications, and the Court and Commission's jurisdiction to hear *individual* applications, was merely optional in 1950 and remained so until 1998.[214] States could, by declaration, recognise the institutions'

[208] Council of Europe (1970) *Travaux Préparatoires on Articles 26 and 27 of the European Convention on Human Rights* CDH(70)30.
[209] ECHR (1950), Article 28.
[210] *Ibid*, Article 37.
[211] *Ibid*, Article 33.
[212] *Ibid*, Article 25.
[213] *Ibid*, Article 24.
[214] *Ibid*, Articles 25 and 46.

jurisdiction, but there was no obligation in the first iteration of the Convention so to do so.[215] Declarations could be made for a limited period of time only, or for an indefinite period, and were subject to revocation by States' governments.[216] Of the twelve states involved in the initial negotiations which framed the Convention in 1950 (Belgium, Denmark, France, Ireland, Italy, Luxembourg, Netherlands, Norway, Sweden, UK, Turkey and Greece), only Denmark, Ireland and Sweden made declarations recognising individuals' rights to lodge petitions against them when the Convention came into force on the 3rd of September 1953.[217] Of the remaining nine states, Belgium and Norway made their first declarations in 1955, while the United Kingdom accepted the right of individual petition to the Commission thirteen years later, in 1966. Luxembourg recognised its jurisdiction in 1958, the Netherlands in 1960 and Italy in 1973. The French government did not accept the right of individual petition until twenty-eight years later, in November 1981. They were joined by Greece in 1985 and Turkey in 1987.[218]

The institutions' ability to entertain complaints from individuals has been heralded as the distinctive characteristic of the Convention system and a watershed in public international law. However, the optional recognition of a right of individual petition in 1950 was not the wholesale departure from the prevailing norms and history of international law that is sometimes claimed. As the work of Jane Cowan has highlighted, before its demise in 1946, the League of Nations operated an international minority petitions procedure, empowering its bureau to receive and investigate complaints of mistreatment from recognised national minorities in Member States.[219] These minority petitions could be submitted by individual members of the national minority, and were subject to conditions of 'receivability', which are strikingly similar to the Convention's admissibility criteria.[220]

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[215] *Ibid*, Article 25§ 1.
[216] *Ibid*, Article 25 § 2.
[217] Council of Europe (1998) 'Declarations made pursuant to former Article 25 and 46 of the Convention for the Protection of Human Rights and Fundamental Freedoms (4 November 1950 – 31st October 1998).
[218] *Ibid*.
[219] J K Cowan (2003) 'Who's Afraid of Violent Language? Honour, Sovereignty and Claims-Making in the League of Nations' *Anthropological Theory* 3(3) 271 – 291, 274; J K Cowan (2007) 'The success of failure? Minority supervision at the League of Nations' in M-B Dembour and T Kelly (2007) *Paths to International Justice: Social and Legal Perspectives* (Cambridge, CUP) 29 – 56.
[220] J K Cowan (2003), 274.

Even where the respondent state recognised an individual right of petition against them, for those individuals, access to the Court was further gated by the Commission. Only States and the Commission initially enjoyed 'the right to bring a case before the Court' for judicial determination, even if the admissibility criteria had been satisfied.[221] Individuals wishing to seize the Court of their cases required the Commission not only to (a) declare their applications admissible but also (b) to decide to refer the matter to the Court for further scrutiny and deliberation. Judicial review of the Commission's admissibility decision-making was accordingly limited and asymmetrical. An *adverse* decision from the Commission on the admissibility of a petition was not susceptible to further review or reversal by the Court at the instance of the applicant or any other party. If, by contrast, the Commission declared an application *admissible* and communicated it to the Court, the Court could nevertheless consider the admissibility of the petition for itself at the preliminary objections phase of its proceedings, potentially rejecting the case under Articles 26 and 27. Similarly, there was no mechanism for individuals to challenge decisions of the Commission on whether or not to refer cases which they had declared admissible cases to the Court. Individual applicants relied entirely on the Commission's cooperation and endorsement of their case as one meriting judicial scrutiny.[222] It is to the substantive conditions for admissibility to which I now turn.

Substantive conditions of admissibility (1950 – 2010)

This first iteration of the Convention incorporated eight main heads of admissibility. While, as subsequent sections of this chapter show, the institutions and procedures for taking admissibility decisions changed dramatically over the subsequent decades, the grounds established in 1950 for rejecting cases *a limine* have remained largely unaltered for much of that chequered history of change and reform. Articles 26 and 27 of the first Convention provided that:

> the Commission may only deal with the matter after (i) *all domestic remedies have been exhausted*, according to the generally recognised rules of international law,

[221] ECHR (1950), Article 44.
[222] *Ibid.*

and (ii) *within a period of six months from the date on which the final decision* was taken.[223]

The Convention also provides that the Court shall not deal with (iii) 'anonymous' applications, or petitions which are (iv) 'substantially the same as a matter that has already been examined by the Court' or (v) which have 'already been submitted to another procedure of international investigation or settlement.'[224] (vi) 'Manifestly ill-founded' applications, and those which represented (vii) 'an abuse of the right of individual application', were also inadmissible, as were (viii) applications 'incompatible with the provisions of the Convention or the Protocols.'[225]

The concept of 'incompatibility' with the Convention has been interpreted as encompassing four main limits to the temporal, geographical, personal and material scope of the Court's jurisdiction under international law. Generally speaking, an application will be rejected as inadmissible *ratione temporis* if it concerns events which took place before the respondent State ratified the Convention and its Protocols.[226] This reflects the general principle of international law, that treaties are non-retroactive in their application. This principle is illustrated by several early admissibility decisions of the Commission, rejecting applications as inadmissible which concerned human rights violations committed by German authorities during the 1930s and 1940s.[227] The second of the four heads of 'incompatibility' - *ratione loci* – is concerned with the *geographical* scope of the Convention's application. If the complaints concerned events which took place outside the State complained against, or outwith the 'effective control' of the agents of the State, they are inadmissible.[228]

Applications have also been rejected as incompatible *ratione personae* under this heading. This ground touches on the *identity* of one of the parties to the dispute. In order to be competently lodged, alleged violations of the Convention must have been committed by

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223 *Ibid*, Article 26. *Numbering mine*.
224 *Ibid*, Article 27.
225 *Ibid.*
226 *Ibid.*
227 *Ibid.*
228 For example, *Cyprus v Turkey* App no 25781/91 (ECtHR Grand Chamber, 10th May 2001) (judg.).

agents of a Member State, or otherwise attributable to its authorities. The Court and former Commission has invoked this ground to reject as inadmissible applications lodged against individuals, against state which has not yet ratified the Convention, and complaints about the conduct of other international bodies such as the United Nations, which are not subject to the Court's jurisdiction under the Convention.[229] None of these applications are competent, and will be declared inadmissible.

Finally, applications must also be competent *ratione materiae*, and rely on one of the rights protected by the European Convention and rendered enforceable by its institutions.[230] For example, the right to self-determination of peoples is recognised in international law, but is not enshrined in the Convention. A case relying exclusively on such a right may be declared incompetent *ratione materiae*, as would any application founded on a Convention right – the right to privacy, for instance – which relies on an interpretation which conflicts with the Court's established jurisprudence on point. The failure to meet any of these four criteria will result in an application being declared inadmissible on the basis of 'incompatibility with the Convention' and will not be further examined by the Court.

These eight original grounds of admissibility are open-textured, undefined, and susceptible to a range of interpretations. In common with the substantive human rights protected by the Convention, which are often 'vague, abstract and unspecific' in their terms, the admissibility criteria enshrined are also subject to only very sparse legal explication in the text of the treaty, representing broad, largely undefined concepts, the precise legal substance of which the Convention has left to the Commission and the Court to determine.[231] While the Convention's negotiators expressed general expectations about how the criteria would operate in practice, and the functions which the 'sieve' of the

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[229] See, amongst other examples, *Durini v Italy* App no 19217/91 (ECommHR, 12th January 1994) (dec.); *E.S. v Federal Republic of Germany* App no 262/57 (ECommHR, 28th August 1957) (dec.); *Stephens v Turkey, Cyprus, and the United Nations* App no 45267/06 (ECtHR, 11TH December 2008) (dec.)
[230] Amongst other examples, *X v the Netherlands* App no 7230/75 (ECommHR, 4th October 1976) (dec.).
[231] J D Heydon (2013) 'Are Bills of Rights Necessary in Common Law Systems?' Lecture given at the University of Oxford School of Law, January 2013, 20.

admissibility phase would serve, their ideas were unsystematic, underdeveloped and did not explicitly commit the Commission to any particular vision of administrative justice.[232]

Applying the admissibility rules: Commission procedure

The Commission's decision-making on the admissibility of individual petitions was exercised by majority vote of the whole plenary membership of the Commission,[233] on the basis of a report on the admissibility of a petition, formally composed by a member of the Commission, acting as *rapporteur*.[234] This report contained a summary of the facts relied upon by the applicant, the relevant domestic law, and a recommended disposal of the case under the Convention's admissibility criteria. In addition to determining whether the criteria were met in the instant case, the Commission was also invested with discretion to decide whether or not to submit admissible petitions to the Court for judgment where respondent states had recognised the Court's jurisdiction under Article 46.[235]

Having failed to secure a friendly settlement between the parties, the Commission was required to draw up 'a Report on the facts' of the case and 'state its opinion as to whether the facts found disclose a breach by the State concerned of its obligations under the Convention.'[236] Judges of the Court were required to consider all cases competently brought before them, and enjoyed no additional discretion to decline to consider a case communicated to them. The Convention is silent on the legal principles which should guide the Commission in deciding whether or not to bring a case before the Court.

Although generally considered separately from questions of admissibility in the literature, this conceptually unfettered, unreviewable power substantially empowered the Commission to set its own filtering agenda, applying its own standards in determining which cases received judicial examination. These standards went above and beyond the concepts of admissibility set out in the Convention and interpreted in the case-law. Due to

[232] Council of Europe (1970) *Travaux Préparatoires on Articles 26 and 27 of the European Convention on Human Rights* CDH(70)30.
[233] ECHR (1950), Article 34.
[234] European Commission on Human Rights (1993) *Rules of Procedure*. Rule 47.
[235] ECHR (1950), Article 44: '*may* bring a case before the Court' for judgement. (My emphasis).
[236] *Ibid*, Article 31 § 1.

the secrecy of Commission proceedings, and the absence of any obligation to explain its decisions on referring cases to the Court, it is impossible at present to quantify the precise extent to which the Commission availed itself of this discretion in practice. In law, however, it represented a significant, additional and legally unstructured opportunity for the Commission's gatekeepers to exclude cases from judicial consideration.

Where the Commission declined to bring a petition before the Court, its report was transmitted to the Committee of Ministers of the Council of Europe and to 'the States concerned,' but not otherwise published.[237] Individual applicants were not included in this charmed circle and did not receive copies of the Commission report on their case, or any explanation for the Commission decision not to refer the matter to the Court. Constituted of the foreign ministers of Member States or their substitutes, the Committee was and remains essentially a political and diplomatic body.[238] The adjudicative role given to it under the Convention's first iteration reflected the founder states' ambivalences and anxieties about submitting to international judicial supervision. In these circumstances, the Convention provided that the Committee 'shall decide by a majority of two-thirds of the members entitled to sit on the Committee whether there has been a violation of the Convention.'[239] The Committee was not bound by the Commission's analysis of the case or its conclusions.

This studied ambivalence about the character of Convention proceedings – now political, now legal – characterised thinking about the character of this Commission more generally. It was not a court, but what was it? An investigative bureau, organised along administrative lines? A forum for adjudication, judicial in all but name? Or a hybridised, *sui generis* (even chimerical) institution, reflecting the incoherent, minimum consensus reached by sharply divided international delegations? The rules on its composition reflect the formlessness of the Convention text's vision for the institution. Consisting of a number of members equal to that of signatory States, and serving in an individual capacity, Commission members were elected by the Committee of Ministers of the Council of Europe by an absolute

[237] ECHR (1950), Article 31 § 2.
[238] Council of Europe (1949) *Statute of the Council of Europe*, Article 14, Article 10.
[239] *Ibid*, Article 32 § 1.

majority, from a list of three names drawn up by the Bureau of the Consultative (now the Legislative) Assembly of the Council of Europe. Members served for a renewable six year term in post.[240] No other qualifications for membership were initially devised. The Court, by contrast, was to consist of judges elected by the Consultative Assembly, by majority, from a list of three candidates nominated by each Member State. The Convention also mandated that the judicial candidates 'be of high moral character and must possess either the qualifications required for appointment to high judicial office or be jurisconsults of recognized competence.'[241] This election would be for a renewable nine-year term.[242] It was anticipated that members of the Commission, and judges, would serve their respective bodies on a part time basis.[243]

In the immediate decades after its creation, difficulties in defining the Commission's evolving character continued to pose consternation to commentators, struggling to classify what one writer described as the body's 'peculiar character.'[244] Considerable ambivalence can be detected even in the *Travaux Préparatoires*. In September 1949, delivering the report of the Legal Committee to the Consultative Assembly, Pierre-Henri Teitgen described the Court 'acting as a court of second instance' to the Commission's deliberations, while, in the next breath, distinguished the proposed two-stage system of Commission and Court from the rejected alternative, to enshrine in the Convention an 'entirely judicial' system of rights supervision.[245] Writing in 1956, before the Court had begun operating, another scholar noted that 'the juridical arm of the system [the Court] remains to be set up to complement its administrative machinery [i.e., the Commission].'[246] Another commentary, published in 1970, maintained the distinction, contending that 'the

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[240] *Ibid*, Articles 20, 21 § 1 and 23.
[241] *Ibid*, Article 39 § 1 – 3.
[242] *Ibid*.
[243] *Ibid*, Article 42.
[244] A McNulty (1965) 'The Practice of the European Commission of Human Rights' *Howard Law Journal* 11 430 – 441, 441.
[245] Council of Europe (1970) *Travaux Préparatoires on Articles 26 and 27 of the European Convention on Human Rights* CDH(70)30.
[246] D P Myers (1956) 'The European Commission on Human Rights' *American Journal of International Law* 50, 949 – 951, 951.

Commission is not a "tribunal,"' but struggled positively to classify the nature of the institution and the admissibility decision-making it performed.[247]

This tension between adjudicative and administrative conceptions of the Commission filter through into the characterisation of its decision-making during the first three decades of the Commission's work. It is now commonplace to refer to the 'case-law' and 'jurisprudence of the former Commission and the Court,'[248] and even the Commission's 'judicial decision[s] on admissibility' -- despite the institution's explicitly non-judicial character.[249] Unlike the Court, the Commission was not formed in 1950 with any particularly clear or systematic conception of administrative justice, nor did the Convention clearly align the new institution with bureaucratic values. Characteristically, the text left and leaves a great deal unsaid. The Commission's procedural rules reflect the normative uncertainty of its origins. While its *Rules of Procedure* provided for the possibility of communicating the application to the respondent State for observations on admissibility and conducting a confidential oral hearing in Strasbourg, neither was a mandatory feature of the procedure. The majority of cases were declared inadmissible by the Commission without oral argument or communication to respondent governments.

Between 1955 and 1978, the Commission declared 16,520 applications inadmissible (70%) and 7,249 admissible (30%). Of all applications declared inadmissible in that period, 8,720 (49%) had been communicated to respondent governments for comment before being rejected as inadmissible by the Commission.[250] Hearings were substantially less common, with the Commission holding just 33 hearings in 1988, and 32 in 1990.[251] Reflecting its status as a 'quasi-judicial, quasi-political body,' the Convention did not require the Commission to uphold a number of traditional principles of judicial decision-making.[252]

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[247] S MacBride (1970) 'The European Court of Human Rights, The International Protection of Human Rights' *New York University Journal of International Law and Politics* 1 – 17, 5.
[248] P Uhl, Deputy Vice-Prime Minister on Human Rights, Czech Republic in Council of Europe (2002) *Proceedings: European Ministerial Conference on Human Rights and Commemorative Ceremony of the 50th anniversary of the European Convention on Human Rights Rome, 3 – 4 November 2000* (Strasbourg, Council of Europe), 70.
[249] H Rolin (1965) 'Has the European Court of Human Rights a Future?' *Howard Law Journal* 11 442, 438.
[250] Council of Europe (1979) *Yearbook of the European Convention on Human Rights 1979.*
[251] Council of Europe (1993) *Yearbook of the European Convention on Human Rights 1988*, 25; Council of Europe (1991) *Yearbook of the European Convention on Human Rights 1990,* 33.
[252] E Bates (2010) *The Evolution of the European Convention on Human Rights*, 120.

While the Convention provided that reasons should be given for the Court's judgments, no such stricture bound the Commission to reason its admissibility decisions.[253] Moreover, its proceedings were not public, the Convention providing that the Commission's meetings and hearings were held *in camera*.[254] Not only were the Commission's deliberations private, but the public and press were not admitted to the small number of hearings which it did conduct.[255] Attendance was limited under its Rules to the applicant, witnesses, and legal representatives of the parties, in addition to Commission members and their staff.[256] This secrecy extended to the written record of the Commission's proceedings. Its Rules provided that:

> The contents of all case-files, including all pleadings, shall be confidential. However, the decisions of the Commission on admissibility shall be available to the public, provided that the name or other means of identification of an applicant shall not be indicated, unless the Commission decides otherwise.[257]

This secrecy extended to the written record and submissions considered by the Commission. While a portion of the institution's reasoned decisions on the admissibility of petitions were published, documentation submitted to it by the parties was not and remains inaccessible to public or academic scrutiny. The Court has since determined that the confidentiality of case-files preserved in the Commission archive shall only 'be lifted 75 years after the last entry has been made in the file in order to allow historians access to the Commission's archives without the risk of harm to the applicant(s).'[258] This timetable for publication puts these documents beyond the scope of this thesis. The earliest admissibility decisions of the Commission being made in 1955, these first case-files will remain inaccessible until the year 2030, with the last applications decided by the Commission in 1998 not due to be made available until 2073. Admissibility decision-

[253] ECHR (1950), Article 51 § 1.
[254] *Ibid*, Article 33.
[255] European Commission of Human Rights (1993) *Rules of Procedure*, Rule 17 § 1.
[256] *Ibid*, Rule 37.
[257] *Ibid*, Rule 17 § 2.
[258] European Court of Human Rights (2015) 'Access to Case-Files' http://www.echr.coe.int/Pages/home.aspx?p=court/howitworks#n1368167237303_pointer last accessed 22.05.2015.

making was effectively a confidential decision-making process for 45 of the Convention's 60 years of application.

The Commission's judicial evolution

The Commission's institutional character should be understood, not as settled by the Convention's framers in 1950, but as dynamic and susceptible to development. Given the uneasy truce between administrative and judicial values which gave it birth, the tensions introduced by the theoretical incoherence between these different visions of the institution's responsibilities, and the sparseness of the Convention text, that development might have taken a number of different forms.

In 1950, the Convention as written was more or less neutral between different administrative justice modes for admissibility decision-making. The *Travaux* contain remarkably little comment on the sort of admissibility decision-making which the framers anticipated the Commission would undertake, and the extent to which state negotiators envisaged it could or would advance the substantive interpretation of Convention rights using the admissibility criteria. In the absence of clear normative expectations about the Commission's approach to decision-making, and given the broad-brush manner in which the admissibility criteria had been framed, the institution was afforded substantial liberty to pursue its own approach to the exercise of its jurisdiction.

In practice, over the next 48 years, the Commission embraced an unanticipated but characteristically adjudicative approach to its jurisdiction and to the administration of the admissibility criteria. The Commission adopted an expansive approach to its authority to sculpt understandings of the Convention's substantive rights independently and to assess the merits of applications and the scope of substantive Convention rights. This was not uncontroversial. In 1965, Henri Rolin, a judge of the Court elected with respect of Belgium between 1959 and 1973, referred to his experiences as part of the Constitutive Assembly which framed the institutional expression of the Convention in 1949, strongly emphasised the primarily administrative, formal, technical role which he and his fellow delegates had conceived the Commission would fulfil:

> the Court was considered unanimously by the Consultative Assembly as the principal body. The Commission, we had in mind, was quite essential because we found it quite impossible that the judicial body would have to examine thoroughly lots of applications which did not even make sense. We were quite in favour of the right of individual petition, but we knew because of our experience in our national parliament than more than half of the petitions would be without any link with the provisions of the Convention which the Court was supposed to apply, so that we needed *a filter and a sort of administrative organ* which would retain only what deserves of examination. That's what we had in our minds.[259]

Tensions between the approaches of the Commission and Court, and the diverging interpretations of the Convention underlying them, provided fodder for doctrinal legal analysis and critical interest in how the Commission dispatched its often slippery role as an ostensibly non-judicial body, while operating *in camera* in defiance of most conceptions of open judicial decision-making, while making (often final) determinations about the scope of the rights protected in the Convention, analysing the merits of petitions, and rejecting applications on the basis of the Commission's construction of the Convention's substantive rights. Scholarly commentaries echoed Rolin's anxieties. Van Dijk and Van Hoof were sceptical of the Commission's broad-brush approach to the concept of manifest ill-foundedness, arguing that they were depriving the Court of the opportunity to decide cases, and aggrandising their ambivalent quasi-judicial jurisdiction. They argued:

> From a strictly formal viewpoint the competence of the Commission to declare an application inadmissible on account of manifest ill-foundedness does not fit in very well with the division of power laid down in the Convention. The Commission is competent only to pronounce on the admissibility of the application, while a decision on the *merits* is reserved to the Court.[260]

Van Dijk and Van Hoof also emphasised the apparent inconsistency and adjudication at work in the Commission's admissibility decision-making, addressing an abiding tension in

[259] *Ibid*, 443.
[260] P Van Dijk and J Van Hoof (1998) *Theory and Practice of the European Convention on Human Rights* 3rd edn, 162.

the Convention system: is and ought admissibility decision-making to be regarded as a merely formal, impersonal filtering protocol, or should it be seen as an adjudicative and to some extent subjective mechanism for the selection of cases?[261] For Van Dijk and Van Hoof in 1998, it was clear that the Commission had by interpretation extended the notion of manifest ill-foundedness far beyond the framers' conception of the Commission as a bureaucratic 'filter and a sort of administrative organ' which would formally gate access to the Court, and the proceedings on the 'merits' of applications which were reserved to it.[262] They argued:

> the competence of the Commission to declare an application manifestly ill-founded fits into the framework of the screening function which the drafters of the Convention intended the Commission to perform. For a proper discharge of that function, however, no more is needed than the competence to reject those applications, the ill-founded character of which is actually manifest. In several cases, however, the Commission has used this competence in a way which clearly went beyond this.[263]

The Commission was nevertheless able to establish its adjudicative credentials and increasingly identify itself as a pre-eminently judicial, rather than administrative, institution. The Commission's approach may be partially attributed to the part-time character of the work of its members. While it maintained a full-time secretariat, between 1953 and 1998 the Commission met only tri-annually, increasing to sept-annual decision-making meetings during the 1980s. This lack of permanence made it unlikely that the Commission members would conceive of their work as merely administrative in character, in the sense Rolin and others anticipated in the 1940s.[264] The barrister and seasoned Convention litigator, Anthony Lester, has argued that this part-time operation empowered the Commission's officials. While Commission members were irregular presences in Strasbourg, their bureau continued to operate, receiving and processing files and writing

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[261] *Ibid*, 163.
[262] H Rolin (1965) 'Has the European Court of Human Rights a Future?' 11 *Howard Law Journal* 442, 443.
[263] P Van Dijk and J Van Hoof (1998), *Theory and Practice of the European Convention on Human Rights*, 164.
[264] H Rolin (1965), 443.

up case-notes, on a full-time basis. Paralleling Cowan's observation that League of Nations officials administrating the minority petitions procedure approached their task with an 'increasingly confident, sense of legality and justice,'[265] Lester observes that 'of necessity the dedicated Commission staff came to assume a dominant role, seeing themselves as Platonic guardians of the Court's integrity and the European rule of law.'[266] Perhaps reflecting this confidence, the Commission behaved, not as a bureaucratic adjunct to the Court, but an authoritative co-adjudicator and co-interpreter of Convention rights. As states gradually recognised the Commission's jurisdiction, and individuals increasingly availed themselves of their right of individual petition, cases accumulated in Strasbourg, putting this role under considerable operational pressure. Apprehensions about the efficiency of the Commission's decision-making, and a desire to reflect the institution's increasingly legalistic and judicial character in the Convention text, prompted the first major reform to the enforcement machinery in 1985.

Protocol No. 8 (1988): "streamlining" admissibility decision-making

Over three decades after the Convention was first adopted, Protocol No. 8 to the Convention, agreed in Vienna 19th March 1985, made the first in what would become a series of substantial alternations to the original text of the treaty, 'with a view to improving and expediting' the Commission's admissibility decision-making.[267] These changes came into force in 1988. In place of the formal requirement to adopt admissibility decisions in a plenary session of all members, Article 1 § 2 of the Protocol empowered the Commission to meet in 'Chambers' of seven members to examine petitions 'which can be dealt with on the basis of established case-law or which raise no serious question affecting the interpretation or application of the Convention.'[268] The Protocol also provided for smaller

[265] J K Cowan (2007) 'The success of failure? Minority supervision at the League of Nations' in M-B Dembour and T Kelly (2007) *Paths to International Justice: Social and Legal Perspectives* (Cambridge, CUP) 29 – 56, 36.
[266] A Lester (2009) 'The European Court of Human Rights after 50 years' *European Human Rights Law Review* 462, 466.
[267] Council of Europe (1985) *Protocol No 8 to the European Convention on Human Rights*, Preamble.
[268] *Ibid*, Article 1 § 2.

formations, involving fewer Commission members, to take decisions on the inadmissibility of petitions:

> the Commission may set up committees, each composed of at least three members, with the power, exercisable by unanimous vote, to declare inadmissible or strike from its list of cases a petition … when such a decision can be taken without further examination.[269]

In the language of the *Explanatory Report*, this power was 'to reject individual petitions which are manifestly inadmissible.'[270] Anticipating the terms and structure of the reforms to the Court's admissibility decision-making which would be made by Protocol No. 14 in 2004, it was envisaged that these 'restricted committees' of the Commission would:

> offer a double advantage: the plenary Commission and Chambers will be freed from the task of dealing with such petitions, thereby allowing them more time for the consideration of serious cases, and the waiting-time for a decision on manifestly inadmissible petitions will be considerably reduced.[271]

In addition to amending the process for Commission decision-making, Protocol No. 8 introduced additional qualifications for appointment, extending the judicial qualifications of 'high moral character' and 'the qualifications required for appointment to high judicial office or be jurisconsults of recognized competence' to candidates for membership of the Commission.[272] This development both reflected and reinforced what would become a systematic trend in Convention reform over the next two decades: (a) the *de facto* judicialisation of the Commission and (b) the gradually diminishing collegiate scrutiny received by applications at the admissibility stage of Convention proceedings.

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[269] *Ibid*, Article 1 § 3.
[270] Council of Europe (1985) *Explanatory Report to Protocol No. 8 to the European Convention on Human* Rights, para 9.
[271] *Ibid.*
[272] Council of Europe (1985) *Protocol No. 8*, Article 2.

Protocol No. 9 (1994): expanding judicial filtering responsibility

During the 1980s, the controversy attaching to the recognition of individuals' right to bring cases before an international dispute resolution mechanism during the 1940s had gradually eroded. By the end of the decade, the overwhelming majority of signatory states recognised the Court and Commission's jurisdiction to consider individual petitions lodged against them. This slow development in international sensibility was reflected and further promoted by the reforms of Protocol No. 9, agreed in 1990 and entering into force in 1994. This reform eliminated the Commission's discretionary power, above and beyond the admissibility criteria, to decide whether or not to seize the Court of individual applications. Protocol No. 9 empowered individuals directly to submit cases to the Court which had been declared admissible by the Commission. The *Explanatory Report* to the Protocol portrays this development as 'a logical development of the Convention's system of control.'[273] In practice, this gave the Commission's interpretation of the admissibility criteria an added significance. A finding of inadmissibility was now the only mechanism available to the Commission to prevent an individual petition from being subject to judicial scrutiny.

However, this extension of individuals' capacity to seize the Court of their cases was limited by the creation a further panel, composed of three judges, to sift through individual requests for referral, and to determine whether or not to accept them for full examination on the merits. The national judge was *ex officio* a member of panels considering complaints against the respondent State in respect of which he or she had been elected.[274] The panel was required to determine whether applications referred to it 'raised a serious question affecting the interpretation or application of the Convention' or 'for any other reason warrants consideration by the Court.'[275] If the three judges agreed unanimously that an application did *not* meet either of these tests, the case would not be admitted to the Court for further consideration on the merits, and the Commission's report would be

[273] Council of Europe (1990) *Explanatory Report to Protocol No. 9 of the European Convention on Human Rights and Fundamental Freedoms*, para 12.
[274] Council of Europe (1990) *Protocol No. 9 of the European Convention on Human Rights and Fundamental Freedoms*, Article 5.
[275] *Ibid.*

communicated to the Committee of Ministers. In any other circumstances, the case was brought before the Court for judicial examination.

While this reform left the formal admissibility decision-making in the hands of the Commission, and individual cases would only reach the Court's judicial panels if the Commission declared the applications admissible, the Protocol introduced a number of important changes. Firstly, it judicialised part of the decision-making about whether or not individual cases merited full review for the first time in the Convention system. Before 1994, the Court had no option but to consider every case transmitted to it by the Commission. The Protocol transferred this additional flexibility, on top of the interpretation and application of the admissibility criteria, from the Commission to judges. Subsequent reforms would build on and expand this judicial responsibility. Secondly, it introduced greater legal structure to that decision-making and conceptual clarity about the concepts and principles which should inform how the Court's docket should be filtered. Although the Protocol's new 'serious question' test was lightly-defined and left panels considerable scope for judgement, the reforms represented a significant development on the Commission's arbitrary decision-making on referral, which had gated individuals' access to judicial proceedings since 1953.

Protocol No. 11 (1998): "fully judicialising" admissibility decision-making

In the event, Protocol No. 9's reforms and the judicial filtering mechanism it created proved short-lived. By the time its amendments to the Convention came into force on the 1st of November 1994, the final text of Protocol No. 11 had already been agreed by Member States, although Protocol No. 11's radical changes to the Convention 'enforcement machinery' and admissibility decision-making structures would not come into force until the 1st of November 1998. The Protocol abolished the 'quasi-judicial, quasi-political' Commission,[276] transferring its admissibility decision-making functions to the re-founded

[276] E Bates (2010) *The Evolution of the European Convention on Human Rights*, 120.

Court, which would operate on a full-time basis, invested with direct responsibility for determining both the admissibility and merits of all applications submitted to it.[277]

This was represented as the completion of the work of the 1940s, and a historical defeat for the sovereigntist equivocations of 1950, finally realising the high aspirations of the compulsory judicially enforcement of human rights at the European level. Tellingly, after the Commission was abolished in 1998, only porous professional boundaries separated the two institutions. The gradual *de facto* judicialisation of the Commission since the 1950s reached its logical conclusion: the legal staffs of the former Court and Commission were merged and of the 37 judges elected to serve on the new Court, seventeen were new appointees, ten were former judges and ten were former members of the Commission.[278]

Although by 1994, the right of individual petition to the Commission and Court was recognised by the majority of Council of Europe states, the right of individual petition and the Court's compulsory jurisdiction became fully mandatory with Protocol No. 11.[279] The Committee of Ministers' residual adjudicative functions were also abolished.[280] Under Article 34 of the redrafted Convention, the new Court was empowered to receive applications:

> from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto.[281]

Reflecting traditional principles of judicial decision-making, the amended Convention provided that proceedings before the Court must be public 'unless the Court in exceptional circumstances decides otherwise.'[282] This publicity extended to the Court's oral hearings, and to the written record of proceedings before it, 'unless the President of the Court decides

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[277] Council of Europe (1994) *Protocol No. 11 to the European Convention*, Article 1 and 2.
[278] European Court of Human Rights (2002) *Three Years' Work for the Future: Final Report of the Working Party on Working Methods* (Strasbourg, European Court of Human Rights), XX.
[279] *Ibid.*
[280] *Ibid.*
[281] ECHR (2010), Article 34.
[282] *Ibid*, Article 40 § 1.

otherwise.'[283] This commitment to ideals of publicity and access to justice was further reflected in the new provision that 'reasons shall be given for judgments as well as for decisions declaring applications admissible or inadmissible' under the Convention.[284] In contrast with the secret and often unreasoned disposals adopted by the Commission, Protocol No. 11's judicialisation of admissibility decision-making, and its subordination to judicial principles, represented a significant departure from the Convention's traditional approach to docket-filtering.

Equally importantly, the judicial filtering panels formed by Protocol No. 9 were superseded and the Court was invested with sole responsibility for rendering judgment in all admissible cases. The additional 'serious question' sifting criterion introduced by Protocol No. 9 was not retained and the Commission's discretion to decline to submit a case for full review was not revived. Legally, this represented a significant diminution in the capacity of the filtering body to reject cases on grounds extraneous to the traditional grounds of admissibility. After 1998, a finding of inadmissibility was the sole legal basis for the Court refusing to admit a case for full review. Protocol No. 11 left the admissibility criteria adopted in 1950 otherwise unchanged.

In procedural terms, the Protocol drew on the efficiency savings of Protocol No. 8, envisaging that the Court would sit in three 'formations', consisting of three judge Committees, seven-judge Chambers, and a seventeen-judge Grand Chamber.[285] Committees were seen as the primary engine of admissibility decision-making, able to declare applications inadmissible where three judges agreed unanimously that 'such a decision can be taken without further examination.' Where unanimity was impossible, the case was to be referred up to a chamber of the Court for further deliberation on and determination of its admissibility. It was and remains common practice for chambers of the Court to declare applications admissible and render judgments on their merits simultaneously, although under Protocol No. 11, the substantial majority of applications, as now, were rejected as inadmissible by the most summary judicial formation without

[283] *Ibid*, Article 40 § 2.
[284] *Ibid*, Article 45 § 1.
[285] Council of Europe (1994) *Protocol No. 11 to the European Convention on Human Rights*, Article 27.

adversarial exchanges or debate between the petitioner and the respondent State. In common with Commission procedure, under Protocol No. 11 all formations of the Court retained competence to reject applications as inadmissible at any point in proceedings. Decisions on admissibility which were adverse to the applicant were final.[286] The Court's admissibility decision-making was not generally the subject of oral hearings and argument in Strasbourg. Although the number of decisions and judgments has increased dramatically since 1998, the Court has continued to hold no more than thirty hearings per annum in total on the merits and admissibility of individual petitions.

The Protocol also put the Court's bureau on an explicit Convention footing, providing that

> the Court shall have a registry, the functions and organisation of which shall be laid down in the rules of the Court. The Court shall be assisted by legal secretaries.[287]

No secretaries were ever appointed, but the wide language of this provision invested the Court with significant latitude to organise the work of its officials and marked the beginning of the more explicit recognition of the Registry and its work in the treaty text. Yet Protocol No. 11 remained no more unambiguous than the first iteration of the Convention about the precise scope of the official 'functions' it envisaged and how far the 'assistance' provided by Court officials to judges might extend.

Protocol No. 14 (2010): the reform of the reform

Mounting concerns about the scale of the Court's caseload, and the efficiency of its decision-making procedures, saw a further round of reform debate in the first five years after the Court was invested with responsibility for filtering its docket. Further procedural "streamlining" of the Court's case filtering systems was the order of the day. Protocol No. 14, finalised in 2004 but only coming into force with Russian ratification in 2010, made further important alterations to the procedural aspects of admissibility decision-making in

[286] Council of Europe (1994) *Explanatory Report to Protocol No. 11 to the European Convention on Human Rights*.
[287] Council of Europe (1994) *Protocol No. 11 to the European Convention on Human Rights*, Article 25.

the name of judicial economy and efficiency. The Protocol also introduced the first changes to the Convention's substantive admissibility criteria since 1950.

Under Protocol No. 11, unanimous three judge committees were the Court's summary formation, and rejected the bulk of cases as inadmissible. Protocol No. 14 empowered single judges – or to use its language, 'single judge formations' – to declare inadmissible or strike out individual applications (but not inter-state applications) 'where such a decision can be taken without further examination' of the application.[288] The decision of the single judge is final and not subject to any appeal or revision by a larger bench of the Court.[289] Where the single judge cannot declare an application inadmissible or strike it from the list on the material before her, she is required to refer it to a three judge Committee or seven judge Chamber of the Court 'for further examination.'[290]

In deciding on questions of admissibility, Protocol No. 14 envisaged that 'single judge formations' would be 'assisted' by non-judicial Registry *rapporteurs*. Characteristically, the text of the Protocol does not attempt to define the scope of *rapporteurs'* duties, giving the Court latitude to organise its functions and the work of its functionaries as it sees fit. In a legal sense, this administrative assistance is at least formally limited to the preparation of the case, with judges retaining the sole authority to take the final decision on whether petitions have complied with the admissibility criteria or not.

As socio-legal research in other environments has shown, however, 'decisions have histories' and may be the work of many hands.[291] An understanding of a decision-making process cannot be reduced to an analysis only of the final stage of proceedings when a conclusion is formally reached. As Halliday argues, 'the decision-making process is better conceived as a network' of influences, interpretations and choices, culminating in a final outcome which is highly contingent on' the participation of multiple actors.[292] As the empirical evidence marshalled in chapters 5 and 6 shows, the balance of administrative and judicial responsibilities depicted in the Convention text is misleading guide to the Court's

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[288] ECHR (2010), Article 27 § 1.
[289] *Ibid*, Article 27 § 2.
[290] *Ibid,* Article 27 § 3.
[291] S Halliday (2004), 41.
[292] *Ibid.*

practice. *De facto*, judges have effectively delegated their adjudicative responsibilities to their "assisting" officials, but *de jure*, judges retain exclusive competence to decide cases.

Protocol No. 14 also introduced the first new criterion for admissibility since 1950, empowering the Court to reject applications as inadmissible on the additional ground that:

> the applicant has not suffered a *significant disadvantage*, unless respect for human rights as defined in the Convention and the Protocols thereto requires an examination of the application on the merits and provided that no case may be rejected on this ground which has not been duly considered by a domestic tribunal.[293]

The Protocol also provided that while this new criterion would not apply to applications which had already been declared admissible, it would apply to pending cases, whenever they had been lodged with the Court, wherever their admissibility had not yet been determined.[294] For a two year period after the Protocol came into force, use of the power to reject applications on grounds that 'no significant disadvantage' had been suffered was limited to seven-judge Chambers and the Grand Chamber of the Court,[295] 'to establish clear case-law principles for the operation of the new criterion in concrete contexts.'[296] After June 2012, the criterion may be applied by all decision-making formations of the Court, including single judges assisted by Registry *rapporteurs*.

In common with the 'on their face rather vague and subjective' 1950 admissibility criteria, the negotiators of the Protocol did not define the concept 'significant disadvantage,' leaving the interpretation and application of the new criterion to the Court.[297] As chapters 4 and 7 further explore, the justice values informing the introduction of this new criteria were contested in official debates. Criticised by human rights organisations as a 'rather

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[293] *Ibid*, Article 35 § 3(b).
[294] Council of Europe (2004) *Protocol No. 14*, Article 20 § 2.
[295] *Ibid.*
[296] Council of Europe (2004) *Explanatory Report to Protocol No. 14*, Article 84.
[297] T Zwart (1994) *The Admissibility of Human Rights Petitions: The case law of the European Commission of Human Rights and the Human Rights Committee* (Dordrecht, Martinus Nijhof) *Petitions*, 5.

vague, even potentially arbitrary condition,'[298] the *Explanatory Report* to the Protocol envisaged that the Court would develop 'clear-cut jurisprudential criteria of an objective character capable of straightforward application.'[299] As drafted, however, the language of the new criterion is anything but clear or straightforward.

Protocol No. 15: the latest 'tinkering'[300]

Barely three years into the application of Protocol No. 14, Council of Europe governments negotiated further changes to the admissibility conditions in Protocol No. 15. Finalised in June 2013 after ministerial conferences in Interlaken, Izmir and Brighton between 2011 and 2012, Protocol No. 15 leaves the institutional and procedural innovations of Protocol No. 14 intact, but introduces two additional changes to the substantive admissibility criteria. Firstly, it will reduce the time-period available to applicants for lodging applications from six months to four.[301] The Protocol also further amends the significant disadvantage criterion, deleting the second safeguard clause that 'no case may be rejected on this ground which has not been duly considered by a domestic tribunal.'[302] These changes are not yet in force. As of the end of April 2014, the Protocol has been ratified by seven States.[303] Its changes will come into force three months after the Protocol is ratified by all 47 signatory States.[304] Given the recent experience of Protocol No. 14, and the Russian Federation's isolated, more than half-decade long refusal to ratify it, it is difficult to predict when Protocol No. 15's provisions will become effective with any confidence or precision.[305]

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[298] Amnesty International et al (2004) *Updated Joint Response to Proposals to Ensure the Future Effectiveness of the European Court of Human Rights, signed by 114 NGOs,* April 2004.
[299] Council of Europe (2004) *Explanatory Report to Protocol No. 14,* § 79.
[300] S Greer and L Wildhaber (2012) 'Revisiting the Debate about "constitutionalising" the European Court of Human Rights' *Human Rights Law Review* 12(4), 655 – 687, 658.
[301] Council of Europe (2013) *Protocol No. 15,* Article 4.
[302] *Ibid,* Article 5.
[303] Estonia, Ireland, Liechtenstein, Monaco, Montenegro, San Marino and Slovakia.
[304] Council of Europe (2013) *Protocol No. 15,* Article 5.
[305] On Russian non-ratification, see generally J W Reiss (2009) 'Protocol No. 14 ECHR and Russian Non-Ratification: The Current State of Affairs' *Harvard Human Rights Journal* 22 293 and B Bowring (2010) 'The Russian Federation, Protocol No. 14 (and 14*bis*), and the Battle for the Soul of the ECHR' *Goettingen Journal of International Law* 2 589.

These changes reflect Convention reformers' increasing concern, not with the *institutions* and *procedures* for filtering human rights petitions, but with the substantive criteria against which individual applications are to be judged. Although these reforms are said to be justified on the basis that they will allow the Court to focus on 'serious' cases, the application of a shorter time-limit is a remarkably unfocussed mechanism for doing so. Although as chapter 7 shows, an analysis of the Court's jurisprudence on the six-month rule shows that decision-making on time is less 'purely' 'formal or procedural' than many Convention commentators imagine, in practice, the reforms of Protocol No. 15 will only allow the Court to declare otherwise *well-founded* cases lodged outside the new four-month period inadmissible.[306] The reform does not strike at the frivolous, vexatious, or evidentially unsupported cases which Convention reformers fret over, but only at cases where the Court would, at present, find a *prima facie* violation of the Convention to have been made out, reflecting the 'hyper-bureaucratic' Convention reform discourse, criticised by de Londras and considered in detail in the next chapter.[307]

While it remains unclear when the provisions of Protocol No. 15 will become active, the Council of Europe Steering Committee on Human Rights has already begun a new scoping exercise, canvassing further ideas and proposals for the reform of the Court and its admissibility decision-making. Depending on one's perspective, the 'reassuring constant,' or frustrating interminability, of Convention reform debate now looks set to continue into its fourth decade. [308]

Conclusion: institutions, procedures and norms (1950 – 2015)

From its first iteration to the latest developments, admissibility decision-making under the Convention has evolved considerably since 1950. Four key trends in the legal development of the Convention have been identified: (1) the gradual judicialisation of the admissibility

[306] J Gerards (2014) 'Inadmissibility Decisions of the European Court of Human Rights: A Critique of the Lack of Reasoning' *Human Rights Law Review* 14 148 – 158, 155.
[307] F de Londras (2014) *Submission to the CDDH on future directions in Court reform*, accessible at http://www.coe.int/t/dghl/standardsetting/cddh/reformechr/gt-gdr-f/de_Londras.pdf.
[308] R Harmsen (2011) 'The Reform of the Convention System: Institutional Restructuring and the (Geo-) Politics of Human Rights in *The European Court of Human Rights between Law and Politics*, 119.

process; (2) its retreating collegiality; (3) Strasbourg's increasingly visible bureaucracy and (4) the curtailing of discretion and the increasing centrality of admissibility as a tool for docket-control.

Docket-filtering has been transformed from a secret, 'quasi-judicial, quasi-political' process into a fully judicial function.[309] The process has gradually become more judicial, first by dint of the Commission's approach to its jurisdiction; a development reflected and entrenched by Protocol No. 11's integration of admissibility decision-making into the Court's core functions in 1998. Procedurally, admissibility decision-making under the Convention has been characterised by the steady diminution in the judicial and quasi-judicial collegiality required to reach decisions since 1950. On the other hand, against the grain of the gradual transformation of admissibility decision-making into a judicial competence, the role of Court officials in docket-filtering has become increasingly visible in the language of the Convention. Yet the balance of duties and responsibilities between the Strasbourg administration and judiciary, and their approach to docket-filtering, remains largely opaque.

As drafted, the admissibility criteria enshrined in the Convention, old and new, are characterised by their vagueness and imprecision, leaving considerable latitude to the Court to shape the administrative justice values in defining and applying them. Beyond the admissibility criteria, this systematic survey also shows that degree of discretion which has been afforded to Convention institutions to decline to accept cases for full review in a judgment of the Court is considerably more ambivalent than is often recognised. While it has become a commonplace in the literature and reform debates to characterise the right of individual petition to the Court as 'fundamental' and a 'cornerstone' of the Convention system, the historical record shows that the realisation of these 'essential' features came relatively late on in the process of Convention design.[310] Tracking the evolving text of the treaty also undermines the claim, which dominates official debates on treaty reform, that giving the Court a 'discretionary power to decide whether or not to take up cases' on the

[309] E Bates (2010) *The Evolution of the European Convention on Human Rights*, 120.
[310] M A Beernaert (2004) 'Protocol 14 and new Strasbourg procedures: towards greater efficiency? And at what price? *European Human Rights Law Review* 5, 544 – 557, 556.

merits would be 'alien to the philosophy of the European human rights protection system' and 'would undermine the right of individual petition and tend to politicise the system and risk inconsistency, if not arbitrariness, in decision-making.'[311]

As this chapter shows, such a power was available to the Commission, and subsequently to judicial filtering panels of the Court, for forty-eighty of the Convention's sixty-five year history, disappearing only in 1998, and leaving the admissibility criteria as the sole legal grounds to justify rejecting a case. The elimination of this agenda-setting flexibility arguably reflects an increasingly formal bureaucratic vision of docket-filtering, which informed and drove Protocol No. 15's renewed focus on the character and detail of the substantive admissibility criteria.[312] The idea that the Court should not be invested with such a power to pick and choose its cases may legitimately be defended on principled grounds. The historical record demonstrates, however, that introducing such a power would not represent an unprecedented departure, but the recovery and revival of a forgotten strand of the Convention legal tradition.

The legal re-engineering of the Court and the Commission's admissibility decision-making over the last six decades tells us a great deal about the Convention's direction of travel, but also leaves considerable gaps in our understanding. What struggles and shifts in the administrative justice models in Convention reform debates have driven these changes? Does the Court's working practices bear out the image of "fully judicial" admissibility decision-making, promoted since Protocol No. 11? How have the vague admissibility criteria been interpreted, and what vision(s) of *a limine* justice have they promoted? To answer these questions, we must now depart from the bare Convention text, and turn to the social data and jurisprudential evidence.

[311] NGO comments on the Group of Wise Persons' Report in Council of Europe (2007) *Future Developments of the European Court of Human Rights in the light of the Wise Persons' Report* (Council of Europe, Strasbourg), 78.
[312] F de Londras (2014).

4. “You don’t have to be a judge to count to six”: Administrative justice and visions of admissibility decision-making in Convention reform debates (1980 – 2014)

Chapter 1 argued that for many scholars of the Convention, the official Court reform debates of the last three decades have been seen as uninteresting, technical, and instrumental: just ‘technocratic issues of judicial housekeeping.’[313] Dominated by ‘questions of practicality,’ ‘tinkering’ around the edges of the admissibility criteria and focussed on administrative policy and the effective allocation of resources, the temptation to regard this as functionary’s work, important for the survival of the Court but of limited conceptual interest to the legal theorist, has been considerable.[314] As a consequence, the considerable body of written evidence about the transactions of Convention reform has gone largely unmined.

One consequence of this attitude towards the official debate is that the literature has generally overlooked how the competing visions of just admissibility decision-making have evolved and been contested in subsequent renegotiations, and how these visions relate to the dominant academic discourse of individual and constitutional justice. Those limited political science studies which have analysed the treaty renegotiations have interpreted the process through a strategic lens, focussing on the question - which groups or institutions were best able to realise their stated preferences for institutional design? Given their stated preferences, which actors had ‘the greatest influence in drafting’ recent Protocols?[315] With its emphasis on the *attitudes* of key actors in the contested space of Convention reform, this approach again neglects the characteristics, assumptions and structure of the underlying reform discourse. It adopts an excessively linear approach to understanding the often messy process of policy formulation, privileging policy choice over policy

[313] L R Helfer (2008) ‘Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime’ *European Journal of International Law* 19(1), 125 – 159, 127.
[314] F de Londras (2013), 38; S Greer and L Wildhaber (2012) ‘Revisiting the Debate about “constitutionalising” the European Court of Human Rights’ *Human Rights Law Review* 12(4), 655 – 687, 658.
[315] C G Hioureas (2006) ‘Behind the Scenes of Protocol No. 14: Politics in Reforming the European Court of Human Rights’ *Berkeley Journal of International Law* 24(2) 718 - 757, 721.

inheritance, and the extent to which understandings and representations of policy problems – in this case, the reform of a human rights court with a limited budget and too many cases – are influenced by inherited assumptions, path dependence based on past choices and understandings, unclear preference rankings between contrasting policy goals, and limited knowledge and research capabilities in formulating solutions and considering alternatives.[316] All of these factors complicate the simplistic strategic picture in Hioureas' study.

This chapter rejects this approach and investigates this neglected material, arguing that important procedural values and choices lie behind even the most quotidian, the most bureaucratic discourse of Convention reform. This chapter re-evaluates official Convention reform debates through the lens of administrative justice theory, reconsidering the 'questions of practicality' which have been overlooked by doctrinal scholars and the competing visions of good administration which undergird them.[317] As the last chapter establishes, the text of the Convention as drafted and amended since 1950 gave and gives only very general direction to Convention institutions about how they should filter individual petitions on admissibility grounds. The current text envisages both administrative and judicial involvement in the docket-filtering process, but is silent on the precise division of responsibilities, beyond the requirement that judges must, in the last instance, decide the fate of cases. The admissibility criteria are expressed in imprecise terms in the Convention. They do not clearly commit the Court to an identifiably bureaucratic form of decision-making, require judges to adopt a flexible and accommodating approach to procedural demands, or mandate an adversarial, participative approach to adjudicating admissibility questions. The text of the Convention could be compatible with any of these visions of administrative justice and approaches towards filtering the Court's docket.

This chapter asks the empirical questions: what sorts of administrative justice models have Convention reform debates appealed to? What empirical claims about admissibility

[316] See generally, F R Baumgartner and B Jones (2005) *The Politics of Attention: How Government Prioritizes Problems* (Chicago, University of Chicago); P Cairney (2011) *Understanding Public Policy: Theories and Issues* (Hampshire, Palgrave Macmillan).
[317] F de Londras (2013), 38.

decision-making and inadmissible cases has that debate mobilised? How have the terms of this debate, and the administrative justice conceptions appealed to, changed since 1950? In answering these questions, this chapter will generate a rich, empirically-informed picture of the complexity, tensions and shifts of approach which have characterised the competing vision of admissibility decision-making expressed by Council of Europe officials, diplomats, judges, politicians and NGO representatives in Convention renegotiation processes from the 1980s to the present, exploring Convention reformers' evolving, and sometimes conflicting, conceptions and representations of what admissibility decision-making 'could and should be like.'[318] This chapter does not attempt to offer an exhaustive timeline of recent Convention reform proposals and counter-proposals. Instead, I attempt to distil and outline the plural, competing and evolving conceptions of procedurally just docket-filtering which the reform debates between 1950 and 2014 have advanced. I argue that the policy debate since 1950 has seen the rise of an understanding of admissibility decision-making which represents the process as (a) essentially bureaucratic in character (*Strasbourg as bureaucracy*) but one which is (b) conducted by judges according to traditional conceptions of the judicial role (*Strasbourg as court*). Despite their strength in the academic literature, and as chapter 7 shows, in the Court's published admissibility jurisprudence, I argue that the policy priorities of the *Strasbourg as constitutional court* and *Strasbourg as tribunal* models have both been marginalised consistently by Convention reformers. Admissibility decision-making has been construed as a dull, dogged and predictable process of judges dispensing with Strasbourg's unimportant cases. In every respect, this representation is problematic.

Four phases of Convention reform (1949 – 2014)

For economy of expression, in its analysis of Convention reform debates, this chapter distinguishes four main historical phases in the course of the Convention's sixty-four year history. Not all of these phases are of equal significance in terms of the construction of admissibility decision-making and inadmissible cases, but each of these phases, to a greater

[318] M Adler (2010) 'Social Security and Social Welfare' in P Cane and H Kritzer (eds) (2010) *The Oxford Handbook of Empirical Legal Research* (Oxford, OUP) 399 – 423, 403.

and lesser degree, speak to the prevailing, and developing, understandings of the docket-filtering process, its functions and goals.

Firstly, the *origin* phase, during which the initial modalities and standards for admissibility decision-making were first established (1949-1950), discussed in the last chapter. This phase is followed by what I will characterise as the "*Commission efficiency*" phase. The debates of this period, which began in earnest at the beginning of the 1980s, were ultimately enshrined in the major procedural reforms of Protocol No. 8, adopted in 1985. During this phase, the multi-lateral policy debate focussed on identifying and agreeing mechanisms to increase the Commission's overall capacity for decision-making, truncating its procedures with a view to increasing the pace at which admissibility decisions could be taken.

I describe the third phase of reform debates, spanning between 1985 and 1994, as the "*merger*" stage, during which states' governments finally determined, after considerable controversy, to abolish the still part-time Commission and to transfer its docket-filtering functions to a re-founded Court, to operate on a full-time basis. The fourth phase of official reform debates, which I characterise as the "*Court efficiency*" stage, began almost immediately after the formation of the new full-time Court in 1998. Revisiting the reforming themes of the early 1980s, the primary focus of this period has been on identifying additional procedural efficiencies to accelerate admissibility decision-making and cut back the docket. It is this forth, nineteen-year phase, which will be the primary focus of this chapter.

Negotiating Convention reform: key participants, key sources of data

The mounting case-load crisis engulfing the Convention institutions has been an insistent locus of anxiety and concern for the Council of Europe and its membership since at least the 1980s. As Harmsen has argued, 'a constant refrain of reform focused on an ever-expanding caseload has marked discussions surrounding the Convention system for three decades now', with:

> the language of imperative reform, suggesting that measures are urgently required to save a system at breaking point, has perhaps in its own way become something of a reassuring constant.[319]

This persistent turbulence facilitates an empirical analysis of the administrative justice norms asserted in these debates. Periods of change and contestation are a rich source of administrative justice data. As Adler has noted, of researching a similarly contested period in Scottish prisons policy, in contrast with 'more settled' situations, where the underlying principles of administrative justice can be implicit, taken for granted and difficult to access, periods of reform mean that 'the arguments advanced by powerful interests were forcefully expressed and easily accessible, and because their struggles for control were overt and visible.'[320] The same is true of the Council of Europe's never-ending story of admissibility reform.

While the underlying problem of an excessive number of cases, and insufficient capacity to process and decide them in good time has remained a constant concern of these debates, much else has changed. The number of member states participating in reform debates has increased exponentially alongside the Court's expanding jurisdiction. This has transformed the character of these negotiations, and aggravated the already substantial challenges of achieving consensus between state governments. In formulating the first draft of the Convention in 1950, the governments of only twelve states had to agree terms. In 1985, delegations from twenty-one states were involved in the process of agreeing Protocol No. 8. By 1994, the number of states participating in the debates had increased to thirty. Today, Protocol No. 15 must be endorsed by all forty-seven members of the Council of Europe. While the geo-political scale of the Council of Europe has expanded significantly, the formal mechanisms for changing the Convention and the institutions it creates has not altered since 1950. All alterations still require the consent of all members of the Council.

[319] R Harmsen (2011) 'The Reform of the Convention System: Institutional Restructuring and the (Geo-)Politics of Human Rights in J Christoffersen and M R Madsen (2011) *The European Court of Human Rights Between Law and Politics*, 140.
[320] M Adler (2004), 338.

As the *Travaux Préparatoires* to the Convention record, achieving unanimity between twelve states in 1950 on the nature of the institutional machinery to establish to enforce the Convention was often impossible. As chapter 3 discusses, the first iteration of the Convention was characterised by significant compromises about the extent to which the fundamental rights it protects could be judicially enforced, and the extent to which individual citizens were empowered to hold their governments to account before its institutions. These challenges are even greater today.

Formally, decision-making is by unanimity of Council of Europe states governments in the Committee of Ministers, however the reform process encompasses a broader range of processes and participants capable of exercising a decisive influence on reform agendas. While the final text of protocols and declarations are agreed by representatives of national governments at high-level ministerial conferences, to regard the proceedings of these meetings as the primary *decision-making* processes in Convention reform is problematic. During the latest round of Convention renegotiations, meetings were held in Interlaken (2010), Izmir (2011) and Brighton (2012). As the leaked draft Brighton declaration of 2012 shows, the detail of the texts adopted by these conferences is extensively 'prediscussed' and pre-negotiated by governments in private through diplomatic channels beforehand.[321] The public dimension of these debates is primarily justificatory or critical, glossing or defending particular reforms adopted, and laying down markers for future renegotiations by expressing optimism, qualms or disappointments about the rejection of a proposal favoured by the member state, or the overall direction of the reform consensus reached. Records of proceedings at these ministerial meetings and diplomatic encounters, including the observations of national delegations, Council of Europe functionaries, Court judges and officials, declarations, new Protocols to the Convention and Explanatory Reports, are the first key source of evidence for this chapter.

Behind these conferences and meetings, the Council of Europe has employed a range of mechanisms to guide and direct its (more or less constant) discussion of Convention reform

[321] (2012) 'Draft Brighton declaration on the future of the European Court of Human Rights' *The Guardian* 28th February 2012 accessible at http://www.theguardian.com/law/interactive/2012/feb/28/echr-reform-uk-draft; D Kovarova – Minister of Justice, Czech Republic (2010) *Proceedings: High Level Conference on the Future of the European Court of Human Rights*, 46.

over the last three decades. The investigation and analysis of proposals and counter-proposals for Court reform has primarily been undertaken by a range of Council of Europe committees and subcommittees, with the Committee of Experts on the Reform of the Court and the Steering Committee for Human Rights (known, after the French *Comité Directoire de Droits de l'Homme*, as the "CDDH") pre-eminent. Proceedings of these committees are public, and their agendas, minutes and papers are published. Membership of these committees is not, as their names might imply, determined by professional qualifications. As an international membership organisation, all states in the Council enjoy representation on the CDDH, alongside officials, including the Commissioner on Human Rights, and the Secretary General. State representatives tend to be diplomats, civil servants, and their understudies. To an extent, however, the CDDH operates (and investigates reform proposals) autonomously from the governments of member states. Historically, the *Comité* has set its own reform agenda against the broad policy backdrop ordained by the Committee of Ministers, ruling detailed reform proposals in, and out of, serious consideration. The role of the Committee is unusual, to the extent that its membership is constituted by representatives of member states, yet it makes collective recommendations to the Committee of Ministers about which Convention reforms to pursue and not to pursue.

Their advice is not binding, but the CDDH has a critical agenda-setting and information-gathering role, investigating the viability of particular reform ideas, and identifying proposals at an early stage in the agenda-setting process which are capable or incapable of attracting the necessary unanimity between States' governments. This allows reform agendas bearing some possibility of success to be subject to more detailed discussion and empirical investigation in cooperation with Council of Europe civil servants and court officials. While the final reforms adopted may vary from the proposed drafts promulgated by the CDDH, in practice, proposals ruled out by the *Comité* rarely resurface as serious prospects in the course of high level Convention renegotiations. Proceedings of and papers submitted to these Council of Europe steering committees are the second key source of data informing this chapter.

Committee deliberations have been assisted *ad hoc* by a series of independent bodies, tasked with considering options for the reform of the Court and its working practises. Three such reviews reported between 2001 and 2006, charged with drawing up 'an overall strategy' to ensure 'the long-term effectiveness of the ECHR control mechanism' and exploring 'what steps can be taken' 'to deal most effectively and efficiently' with the Court's 'current and projected caseload.'[322] These form the third key source of data.

Other Council of Europe bodies and institutions have also participated in Convention reform, including the Court and former Commission, and the Parliamentary Assembly of the Council of Europe. Constituted by delegations of national parliamentarians from the legislatures of the Council's 47 member states, the Assembly has debated and its committees have scrutinised and criticised Convention reform proposals introduced by national governments since the 1980s. Participation in reform debates by individuals and bodies outwith the formal Council of Europe machinery has historically been very limited. Dominated by representatives of state governments and their factotums, applicants' perspectives on the impact or desirability of reforms have not been canvassed and are entirely missing from the reform process.

However, during the *Court efficiency* phase from 1998 onwards, non-government and civil society human rights organisations – such as Amnesty International, JUSTICE, the AIRE Centre and others – have taken a more active hand in the reform process, lobbing states and putting their names to joint opinions on reforms proposed. NGO contributions have also been sought in recent years as part of the CDDH policy formulation process, while civil society representatives have occasionally being permitted to attend and speak at high level conferences. Claiming to 'speak for the victim of violations,' NGO contributions to these debates have characteristically been critical of the direction of travel of recent Convention reform, which they see as restricting the right of individual application unduly and undermining the Court's moral and legal *raison d'etre*.[323] Their contributions represent the final body of empirical data considered here.

[322] Evaluation Group (2001) *Report of the Evaluation Group to the Committee of Ministers on the European Court of Human Rights*; Group of Wise Persons (2006) *Report of the Group of Wise Persons to the Committee of Ministers*, para 2; H Woolf (2005), 2.
[323] N Mole, Director of the AIRE Centre (2002) *Proceedings: European Ministerial Conference on Human Rights and Commemorative Ceremony on the 50th anniversary of the European Convention on Human Rights, Rome 3 – 4 November 2000* (Strasbourg, Council of Europe), 153.

First, the boilerplate: "efficiency, effectiveness, streamlining and modernisation"

During the final three phases of reform debate, a caseload crisis of variable scale has been the critical problem onto which Convention reform has been projected. The total collapse of the Convention's 'enforcement machinery' – or its 'paralysis' – is the peril always promised but never appearing.[324] Much of this discussion has been dominated by the superficially banal jargon of public administration in a time of limited resources, particularly during the latter *Court efficiency* phase. In 2006, former President of the Court, Jean-Paul Costa, summarised the key concepts which have been invoked consistently in the debates since the *Commission efficiency* phase, emphasising the importance of 'rationalising, modernising and increasing efficiency'[325] if the European human rights supervision system was to be 'strengthened and 'streamlined,'[326] and the Court's 'long-term effectiveness' secured.[327] Use of the vocabulary of 'efficiency savings'[328], of 'strengthening of the Court's administrative capacities and well-management of the workload'[329] and 'efficiency and productivity'[330] extend to all participants in these debates – including the critical NGO perspective – although participants disagree about the practical decision-making modalities entailed.[331]

[324] European Law Institute (2012) *Statement on case-overload at the European Court of Human Rights* (Vienna, European Law Institute), 7.

[325] J P Costa – President – Foreword in European Court of Human Rights (2007) *Annual Report European Court of Human Rights 2006* (Registry of the Court, Strasbourg), 5.

[326] E Papazoï – Alternate Minister for Foreign Affairs - Greece (2002) in (2002) *Proceedings: European Ministerial Conference on Human Rights and Commemorative Ceremony of the 50th anniversary of the European Convention on Human Rights, Rome, 3 – 4 November 2000*, 80.

[327] CDDH (2009) *Final Opinion and Activity Report Guaranteeing the long-term effectiveness of the control system of the European Convention on Human Rights* 68th meeting, Strasbourg 24th – 27th March 2009.

[328] G Papp – Hungarian State Secretary for Public Law at the Ministry of Justice (2010) *Proceedings: High Level Conference on the Future of the European Court of Human Rights* 57, 58.

[329] B Kasmi – Deputy Albanian Minister of Justice (2010) http://www.coe.int/t/dghl/standardsetting/conferenceizmir/Speeches/Speech%20Albania.pdf last accessed 04.07.2011, 1.

[330] J P Costa in Council of Europe (2007) *Future Developments of the European Court of Human Rights in the light of the Wise Persons' Report*, 36.

[331] 'Joint NGO appeal (7 December 2009)' in Council of Europe (2010) *Preparatory contributions to the Interlaken conference*, 34.

Boilerplate aspirations, such as the 'improvement of filtering mechanism' or the 'sustainable efficiency of the protection mechanism,' are empty slogans without concrete explanations of what these concepts mean in practice.[332] The bare invocation of *modernisation* and *effectiveness*, without explicit normative commitments about what an effective and modern European Court is envisioned to be. In treaty renegotiations, efficiency has generally been treated as a synonym for any 'speedier procedures,' which enable the Court to reject applications as inadmissible more rapidly, and is employed to welcome any and every measure which allows the Court to accelerate its disposal of cases and diminish its backlog of pending files.[333] This approach is problematic. Rapidity of disposal is not coterminous with efficiency. To talk about the efficiency of decision-making, without first having specified the values, goals and procedures of that decision-making, is to put the cart before the horse. If efficiency is reducible to *speed* of decision-making, the most "efficient" approach available to the Court would be to burn all correspondence it receives from applicants, unread. Such a regime would clearly not reflect the Court's wider goal of adjudicating whether applicants' fundamental rights have been violated employing a fair, independent and impartial judicial procedure. It would be a judicial scandal, not a basis for warm tributes to the success of Strasbourg's streamlining and modernising measures.

Other, less extreme, examples underline the same point. Deciding not to give detailed reasons for decisions would, for example, undoubtedly speed up the disposal of cases and eliminate the additional tasks of composing bespoke reasons for claimants. However, such a policy can only be said to be efficient or inefficient with reference to other goals and values. One man's procedural inefficiency is another's critical safeguard against arbitrariness. Nor are these concerns limited to judicial institutions. An executive agency, charged with the administration of welfare entitlements, whose officers ignored the rule-

[332] E Babayan – Deputy Armenian Minister of Justice (2010) http://www.coe.int/t/dghl/standardsetting/conferenceizmir/Speeches/Speech%20Armenia.pdf last accessed 04.07.2011, 1. H Tichy – Austrian Ambassador (2010) http://www.coe.int/t/dghl/standardsetting/conferenceizmir/Speeches/Speech%20Austria.pdf last accessed 04.07.2011, 1.

[333] B Kasmi – Deputy Albanian Minister of Justice (2010) http://www.coe.int/t/dghl/standardsetting/conferenceizmir/Speeches/Speech%20Albania.pdf last accessed 04.07.2011, 2.

bound legal criteria for its decision-making and pursued their own subjective sense of justice and entitlement, are unlikely to be characterised as an efficient outpost of the bureaucracy, even if their idiosyncratic, reflexive welfare regime reached decisions more rapidly than their plodding, by-the-book counterparts upholding democratically-mandated entitlements elsewhere. In constructing Court reform debates as 'engineering work' to be dealt with by 'technical experts,' scholars of the Convention take their cue from the slipperiness, banality and superficially technocratic vocabulary of the reform discourse itself.[334]

"Accelerating" filtering: the emergence of the "manifestly inadmissible case"

After 1950, the first explicit re-evaluation of admissibility decision-making came in the first half of the 1980s. Under the aegis of the CDDH, the *Committee of Experts for the Improvement of the Procedure* examined 'means of accelerating the procedure' before the Commission and Court to 'the Convention's 'supervisory organs remain in a position to cope adequately with their ever-increasing caseload.'[335] The Parliamentary Assembly conducted a parallel review process. In contrast with the high-level meetings which would characterise later reforms during the *Court efficiency phase*, the debates of the *Commission efficiency phase* were arguably even narrower and more technocratic. As the last chapter summarises, Protocol 8 empowered the Commission to introduce new, smaller decision-making panels, including 'restricted committees' to reject cases as inadmissible. In justifying these changes, reformers invoked the concept of 'manifestly inadmissible petitions' for the first time, though did not elaborate on how or why cases might be identified as clearly inadmissible, or express clear expectations about how the Commission ought to interpret and apply the admissibility criteria.[336] The primary focus of the *Commission efficiency* stage was the permissible decision-making procedures and structures, and not the decision-making criteria. Even at this stage, reformers' expectations

[334] K Altiparmak (2009) 'The European System for the Protection of Human Rights in Crisis: The End of the Road?' *Journal of European Criminal Law* 3(4) 5 – 23, 7.
[335] Council of Europe (1980) *Explanatory Report to Protocol No. 8*, para 2.
[336] *Ibid*, para 22.

about the administrative justice principles undergirding admissibility decision-making remained unclear.

Although Protocol No. 11 radically reformed the Convention institutions' approach to admissibility decision-making, the construction of admissibility decision-making was more peripheral to the *merger* debates than the *Commission efficiency* debates which had preceded it. While managerial discourses about the 'efficiency of the Convention machinery' were also to the fore during this period, reformers' main focus was not on the "clearly inadmissible case", but on backlog, delay and duplications of functions between the Court and the Commission -- owing in part to the Commission's *de facto* status as a court of first instance on the merits of individual cases. At the beginning of the Commission's session in July 1992, its unexamined backlog stood at 2,397 cases.[337] On average, it took between five and six years of proceedings before the Commission and Court after an application had been lodged, before a final decision on the merits of an application was made.[338] While the majority of cases were declared inadmissible, and the Commission's approach to manifest ill-foundedness had eroded the distinction between admissibility decision-making and an assessment of a petition's merits, the reform discourse of 1985 to 1994 was mainly concerned about the length of time it took for cases to be decided. The Parliamentary Assembly's Legal Affairs Committee summarised the debate in 1992:

> The most common argument advanced in favour of replacing the Commission and Court by a single body is that this would be the most efficient way of enabling the control machinery to cope with its ever increasing workload. There is consensus that the current length of proceedings under the convention is unacceptable: replacing the existing complex and, to a significant extent, overlapping two-stage procedure by a single – and full time – body would appear the most logical way to

[337] Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe (1992) *Report: The reform of the control mechanism of the European Convention on Human Rights 15 September*, Doc 6659, para 3.2.
[338] *Ibid*, para 3.1.

> provide a durable solution which will overcome the present difficulties and, at the same time, meet foreseeable future needs.[339]

With the *Court efficiency* phase of reform after 1998, the language and prominence of the "manifestly inadmissible" case in Convention reform discourse was restored. Unlike the *Commission efficiency phase*, however, the interpretation of the idea of "manifest inadmissibility" gradually became associated with a vision of admissibility decision-making as 'accurate' decision-making, 'predetermined by a set of rules.'[340] The new Court's case-load crisis did not abate in the manner the reformers anticipated, accumulating throughout the next decade, and accompanied by ongoing Convention reform discussion, beginning at the Rome Conference of 2000 and extending to the adoption of Protocol No. 15 in 2013. Ironically, the achievement of Protocol No. 11's vision of a 'unified, fully judicial system' of human rights adjudication coincided with the decisive emergence of the bureaucratic construction of admissibility decision-making which has dominated Convention reform ever since.[341]

A bureaucratic vision of admissibility: "uniform and consistent decision-making"

During the *Court efficiency* phase from 1998 onwards, Convention reformers became much more explicit in their understanding of admissibility decision-making as an essentially technical, rule-bound, predictable procedure. Terry Davis captured the dominant view particularly vividly during this term as Secretary General of the Council of Europe. Speaking at a diplomatic colloquy on reform in 2005, Davis explicitly linked an exaggerated bureaucratic rational understanding of admissibility decision-making to the idea that the Court's bureaucrats should assume responsibility for these decisions:

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[339] *Ibid*, para 5.3
[340] R Sainsbury (2008) 'Administrative justice, discretion and the "Welfare to Work" project' *Journal of Social Welfare and Family Law* 30 323 – 338, 325.
[341] M Eaton, Chairman of the Steering Committee for Human Rights (CDDH), quoted in Council of Europe (2007) *Future Developments of the European Court of Human Rights in the light of the Wise Persons' Report*, 54.

> Personally, I think that we should seriously consider another idea, not contained in the proposals of the Wise Persons. I am referring to making it possible for the Registry itself to reject obviously inadmissible applications, which are inadmissible because, for instance they fall outside the time limit of 6 months, and frankly speaking, I do not think you need a judge in order to count to six.[342]

The idea that applying the admissibility criteria amounts to basic arithmetic came to dominate Convention reform discourse. Davis' understanding of the admissibility criteria is consistently reflected in subsequent statements of policy. The Interlaken Declaration, adopted by all participating states in 2010, called for the 'uniform and rigorous application of the criteria concerning admissibility.'[343] The most recent Ministerial Conference, held in Brighton in 2012, echoed the joint texts adopted by Member States at Interlaken and Izmir in 2010 in this respect, arguing that:

> It is for the Court to decide on the admissibility of applications. It is important in doing so that the Court continues to apply **strictly** and **consistently** the admissibility criteria, in order to reinforce confidence in the **rigour** of the Convention system and to ensure that unnecessary pressure is not placed on its workload.[344]

The most recent declaration, adopted by States in Brighton in 2012, emphasised the same values, encouraging the Court to apply the admissibility criteria 'fully, consistently and foreseeably.'[345] This understanding of admissibility decision-making as 'the few basic formal requirements for bringing a case' has been repeatedly echoed by state delegations and Council of Europe officials during the *Court efficiency stage*,[346] emphasising the need for a 'stable, transparent and predictable case-law' on the criteria and calling for a 'full,

[342] T Davis, Secretary General of the Council of Europe, *Ibid*, 14.
[343] CDDH (2009) 'Opinion of the Steering Committee for Human Rights (1 December 2009)' in Council of Europe (2010) *Preparatory contributions to the Interlaken conference*, 20 – 21.
[344] Council of Europe (2012) *Brighton Declaration*, para 14 (my emphasis).
[345] *Ibid*, para 15(b).
[346] J P Costa (2010) 'Opening of the Judicial Year 29 January 2010' in European Court of Human Rights (2011) *Annual Report European Court of Human Rights 2010* (Registry of the Court, Strasbourg), 38.

consistent and foreseeable application by the Court of admissibility.'[347] These principles are classically associated with a bureaucratic vision of administrative justice, and are antipathetic in principle to the more flexible approach to docket-filtering represented both by the Strasbourg-as-constitutional court and Strasbourg-as-tribunal models.

Significantly, this construction of admissibility decision-making is not limited to one body of participants in these debates, or to those who favour or oppose the gradual introduction of additional formalities into Convention litigation. This unanimity is best demonstrated by NGOs' submissions to negotiating states. During the *Court efficiency* phase, NGOs have been the pre-eminent dissenters from the dominant line, opposing reforms and criticising proposals to introduce any new formalities or admissibility criteria. Nevertheless, NGO contributions to the policy debate also appeal to bureaucratic expectations about admissibility decision-making. The 2010 joint NGO Response to the draft text of Protocol No. 14 set out an understanding of admissibility decision-making, which demanded:

> an efficient, fair, consistent, transparent and effective screening of applications received, in order to identify the admissible applications from the very high proportion (around 90 per cent) of applications that are inadmissible under the current criteria.[348]

NGO representatives have not been entirely consistent in this respect. Although their common contributions to the reform debates after 1998 have continued to incorporate the dominant discourse, and harp on a bureaucratic rational string, individual speakers at reform conferences have articulated contrasting understandings of how admissibility decision-making operates and ought to operate. For example, in 2011, Nuala Mole of the AIRE Centre argued that while 'admissibility decisions should be judicial' 'she disagreed

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[347] A Konovalov – Russian Minister of Justice (2010) *Proceedings: High Level Conference on the Future of the European Court of Human Rights*, 89; A Davutoglu – Turkish Minister of Foreign Affairs (2010) *Contribution to the Izmir Conference* http://www.coe.int/t/dghl/standardsetting/conferenceizmir/Speeches/Opening%20address%20by%20Mr%20Ahmet%20DAVUTOGLU%20Minister%20of%20Foreign%20Affairs%20of%20Turkey.pdf last accessed 03.07.2011, 2.

[348] Joint NGO Statement to the Izmir Conference 2010 http://www.coe.int/t/dghl/standardsetting/conferenceizmir/Amnesty%20International%20-%20Joint%20NGO%20Statement.pdf last accessed 03.07.2011.

that decisions of manifest inadmissibility were always easily reasoned,' undermining the claim that admissibility decision-making under the existing criteria should be understood as straightforward and unadjudicative.[349] These occasional dissenting voices despite, even amongst those most critical of the direction of Convention reform, bureaucratic values predominate. Some state delegations have also employed these norms to criticise perceptions of the Court's practice. For example, at Izmir, the Hungarian Minister of Justice argued that:

> *La Cour ne peut pas continuer la pratique de permettre de plus en plus des exceptions a la conformité aux critères de recevabilité; ainsi, par exemple, par l'exemption de l'obligation de l'épuisement des voies de recours internes donnée à un requérant potentiel, la Cour met fin au principal système de filtrage, qui peur empêcher un afflux de requêtes déposées à Strasbourg.*[350]

The Russian delegation at Interlaken made similar points, complaining that:

> among the most important procedural issues that need to be better regulated I would cite the following … consistency in applying the criteria for the admissibility of claims and in rendering justice in general.[351]

Strikingly absent from the official debate is any recognition, drawing on the principles of the *Strasbourg-as-tribunal* or *Strasbourg-as-constitutional court* models, that adopting a flexible approach to the application of the admissibility criteria, and suspending procedural demands, may promote important values and ensure that the Court represents a practical and effective remedy for applicants lodging cases in difficult and disadvantageous circumstances. As chapter 7 shows, the lack of uniformity in the jurisprudential approach which the Hungarian and Russian delegations at Izmir detected in the Court's decision-making is not be without foundation. However, that these complaints are couched in terms

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[349] Committee of Experts on the Reform of the Court (DH-GDR) (2011) 'Report of the Consultation with representatives of civil society and national human right institutions' *Report 6th Meeting 9 – 11th February 2011* DH-GDR(2011)R6 Add I.
[350] R Répássy – Hungarian *Ministre d'Etat à la Justice* – http://www.coe.int/t/dghl/standardsetting/conferenceizmir/Speeches/Discours%20Hongrie.pdf last accessed 04.07.2011, 1.
[351] A Konovalov, Russian Federation Minister of Justice (2010) *Proceedings*, 88.

of a perceived *absence* of a 'uniform and rigorous' admissibility decision-making system merely reinforces the fact that uniformity and rigor are the values states envisage the admissibility decision-making *should* be organised along: the impugned outcomes are characterised as illegitimate deviations from a bureaucratic norm.

They are also illustrative of the gulf separating the idea, promoted by constitutional justice theorists, that judges should be allowed to pick-and-choose which cases to examine in detail according to their professional judgement, from the critique of judicial arbitrariness and judgement articulated in the reform debate. Kagan has noted that 'political mistrust' of institutions can be critical in shaping 'the structure of, administrative decision-making system' promoted at a policy level.[352] As the most recent round of Convention renegotiations have shown, there is considerable mistrust of the Court's approach to its docket-filtering. Insisting that admissibility decision-making is designed to be predictable and formal is both an 'appealing and naïve' answer to these suspicions.[353] As Kagan observes, 'adopting a legalistic style of rule-application provides bureaucratic officials a somewhat safe haven.'[354] For the Court, the bureaucratic rational *image* of admissibility decision-making represents both a sword and a shield, justifying its mass, negative disposals of cases, while to some extent protecting the institution from allegations of politicisation, arbitrary decision-making and subjective agenda-setting.

"Alien" constitutional justice: the exaggerated disavowal of discretion

The influence of this formal rational image of admissibility decision-making is underlined by the exaggerated disavowal of discretion which has characterised Convention reform debates in the *Court efficiency* phase. This exaggerated disavowal has been expressed in two distinct ways: firstly, to justify the rejection of Convention reforms which propose the introduction of admissibility criteria affording the Court a greater explicit latitude to decide

[352] R A Kagan (2010) 'The Organisation of Administrative Justice Systems: The Role of the Political Mistrust' in M Adler (ed) (2010) *Administrative Justice in Context,* 168.
[353] R F Wright (1991) 'Sentencers, Bureaucrats, and the Administrative Law Perspective on the Federal Sentencing Commission' *California Law Review* 79(1) 1 – 90, 12.
[354] *Ibid*, 179.

which cases to submit to full review, and secondly, to criticise *and* defend reforms which *have* been adopted.

One contributor to a 2009 workshop involving judges, officials and academic participants claimed that 'the Strasbourg Court has no discretion to accept or reject a case *a limine*.'[355] Tomuschat's exaggerated disavowal of judgement at the admissibility phase is echoed in two earlier independent research reports. The Evaluation Group reported in 2001. Set up by the Committee of Ministers in consultation with the President of the Court, the Group – formally composed of the President of the Court, the Irish Ambassador to the Council of Europe and the Secretary General – rejected a proposal to refashion Strasbourg as a constitutional court, investing judges with the power to select which cases from the Court's docket fully to review:

> The most far-reaching modification of this kind would be to provide (without more) that the Court should enjoy an unfettered discretion as to which applications it will accept for examination. Whilst such an arrangement exists in certain countries, the Evaluation Group does not consider it appropriate for Strasbourg. In the countries concerned, the court enjoying such a discretion is the tip of a pyramid of courts of varying levels. Moreover, practitioners and the public would be left with no guidance as to which applications would or would not be accepted for examination and there would be a risk of the Court's laying itself open to charges of inconsistency, if not arbitrariness.[356]

The Wise Persons Report (2006) also refused to countenance such a docket-filtering regime:

> The Group also decided not to pursue the idea of giving the Court a discretionary power to decide whether or not to take up cases for examination (a system analogous to the *certiorari* procedure of the United States Supreme Court). It felt

[355] C Tomuschat (2009) 'The European Court of Human Rights Overwhelmed by Applications: Problems and Possible Solutions' in R Wolfrum & U Deutsch (eds) (2009) The *European Court of Human Rights Overwhelmed by Applications: Problems and Possible Solutions* (London, Springer), 1.
[356] Evaluation Group (2001) *Report of the Evaluation Group to the Committee of Ministers on the European Court of Human Rights*, para 91.

> that a power of this kind would be alien to the philosophy of the European human rights protection system. The right of individual application is a key component of the control mechanism of the Convention and the introduction of a mechanism based on the *certiorari* procedure would call it into question and thus undermine the philosophy underlying the Convention. Furthermore, a greater margin of appreciation would entail a risk of politicising the system as the Court would have to select cases for examination. The choices made might lead to inconsistencies and might even be considered arbitrary.[357]

On the idea of 'developing the Court into a "constitutional court"' reflecting the still-divided state of governmental opinion in the Council, the CDDH observed, diplomatically:

> For current purposes, it can be taken to mean a Court with some degree of power to choose from amongst the applications it receives. The Court might ultimately one day develop in this direction, but the time is not yet ripe to discuss the proposal further. The situation in many member States means that particular emphasis at European level is still needed on the protection of rights through judicial determinations of individual applications to the Court. The new admissibility criterion in Protocol No. 14 and the pilot judgment procedure are developments that could lead in the direction of a "constitutional court", but it is currently not possible to evaluate their effects.[358]

Discretion may be theorised in different ways, and none of these references to the concept spell out their understandings explicitly. Reading between the lines, however, all of these statements appear to promote the exaggerated claim that, in the interpretation of the admissibility criteria, the Court currently enjoys no 'degree of power to choose' which cases to examine.[359] Although dominant in the academic literature, the administrative justice values of the *Strasbourg-as-constitutional-court* model enjoys almost no purchase

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[357] Group of Wise Persons (2006) *Report of the Group of Wise Persons to the Committee of Ministers*, para 42.

[358] CDDH (2009) Final Opinion and Activity Report Guaranteeing the long-term effectiveness of the control system of the European Convention on Human Rights 68th meeting, Strasbourg 24th – 27th March 2009, para 47.

[359] *Ibid.*

in a reform debate devoted to a bureaucratic and formal understanding of admissibility decision-making. In Mashaw's terms, 'the internal logic' of the bureaucratic approach – premised on the idea of accurate admissibility decision-making according to settled and clear criteria – has 'driven' constitutional justice from the policy field.[360]

Conspicuous by its absence here is any reference to the judicial filtering panels formed by Protocol No. 9, and described in chapter 3, which empowered three-judge panels between 1994 and 1998 to decide whether or not to admit a case for consideration on the two bases that it 'raises a serious question affecting the interpretation or application of the Convention' or 'for any other reason warrant[s] consideration by the Court.'[361] These norms, which on their face require the Court to exercise its judgement to decide which cases 'warrant' consideration, or raise 'serious questions' of European human rights law, and its enforcement, are difficult to reconcile with the exaggerated disavowal of judgement as 'alien to the philosophy of the European human rights protection' which predominates in the official reform discourse.[362] Chapter 7 demonstrates that this exaggerated disavowal of judgement is also a problematic interpretation of the Court's case-law on the admissibility criteria. In terms of the policy debate, however, it reinforces the dominant bureaucratic vision of admissibility decision-making.

As Mashaw has observed, flexibility in applying standards to individual cases is a clear example of administrative *injustice* within a bureaucratic model. Mashaw notes,

> reliance on nonreplicable, non-reviewable *judgment or intuition* as a singularly unattractive methodology for decision. The legislature should have previously decided the value questions; and decision on the basis of intuition would cause authority to devolve from the bureau to individuals.[363]

The exaggerated disavowal of judgment in reform debates reflects this logic. This has both descriptive and normative dimensions. On the one hand, the rejection of *certiorari*-style

[360] J Mashaw (1983), 23.
[361] Council of Europe (1990) *Protocol No. 9 of the European Convention on Human Rights and Fundamental Freedoms*, Article 5.
[362] Group of Wise Persons (2006), para 42.
[363] J Mashaw (1983), 26.

decision-making by the two independent reports relies on normative propositions about the principles which *should*, in their assessment, govern the Court's work. For both the Evaluation Group and the Wise Persons, Strasbourg must remain a court of mandatory, rather than discretionary, review if the right of individual petition is to be meaningfully retained and upheld. Notably, their reports attach this normative vision to the *empirical* claim that admissibility decision-making, as currently practiced, actually reflects these principles: introducing a *certiorari*-like scheme is depicted as a radical *departure* from the *status quo*.

This feature of the reform discourse is further illustrated by the terms in which Protocol No. 14 was promoted and defended during the early 2000s. Protocol No. 14 introduced the new admissibility criterion of 'no significant disadvantage' to the Convention, subject to two 'safeguard' clauses, requiring that no case be rejected where it had not been 'duly considered by a domestic tribunal' before being submitted to Strasbourg, and where 'human rights' demanded, in the view of the Court, that the application be examined in full.[364] The new criterion was subject to criticism from two main quarters. 114 European human rights NGOs united to condemn the new provision as a 'rather vague, even potentially arbitrary condition' for admissibility, complaining that 'we have been given no indication as to what "significant disadvantage" is intended to mean.'[365] This diagnosis was echoed by the Parliamentary Assembly, in whose joint opinion, the new test was 'vague, subjective and liable to do the applicant a serious injustice' to applicants.[366] One academic writer described it as 'the addition of an "elastic" condition of inadmissibility' to the existing criteria.[367] Implicit in these criticisms of *introducing* any 'elastic' 'arbitrary' or 'subjective' criterion for admissibility is that the existing criteria are *not* elastic, arbitrary or subjective. Again, there is both a normative claim and an empirical dimension to this construction of admissibility decision-making. It testifies to the strength and dominance of

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[364] Council of Europe (2004) *Protocol No. 14* Article 12.
[365] 114 NGOs (2004) *Updated Joint Response to Proposals to Ensure the Future Effectiveness of the European Court of Human Rights, signed by 114 NGOs*, April 2004; Steering Committee for Human Rights (CDDH)(2003) 'Proposals from the Co-ordinating Group of European National Human Rights Institutions regarding reform of the European Court of Human Rights ' CDDH-GDR(2003)021, para 14.
[366] Parliamentary Assembly of the Council of Europe (2004) 'Draft Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms amending the control system of the Convention' Opinion No. 251 (2004) para 11.
[367] M Dembour (2006) *Who Believes in Human Rights?* 126.

the bureaucratic account of admissibility decision-making that even the Convention reformers' arch-critics – the NGOs and parliamentary representatives – couched their *critique* of the new draft criterion in terms of the formal rational application of well-settled, predictable admissibility rules.

The reformers' response to these criticisms is equally telling. The Explanatory Report conceded that the new admissibility condition was 'open to interpretation' and afforded the Court 'some flexibility.'[368] Significantly, however, it was to classic values of bureaucratic rationality that states and the Council of Europe bureaucracy resorted in defence of the new criterion. While recognising the open-textured language of the concept of significant disadvantage as drafted, States expressed a clear conception of the sort of decision-making which they envisaged would take place under the new criterion. The Explanatory Report to the Protocol maintains that the Court would develop 'clear-cut jurisprudential criteria of an objective character capable of straightforward application' on what constituted significant disadvantage, envisaging that this would, in turn, produce efficiency gains as the implementation of the new criterion would 'be easier for the Court to apply than some other admissibility criteria.'[369]

This characterisation of the new standard for admissibility is clearly identifiable with classic bureaucratic values, envisaging clear pre-established and replicable standards, straightforward to implement and capable of being applied in a 'uniform and rigorous' manner, in the language of the *Interlaken Declaration*, adopted almost a decade later.[370] Chapter 7 analyses whether this bureaucratic representation of significant disadvantage has been reflected in the Court's approach the interpretation of the new criterion in practice. For my purposes here, however, the critical point is that official gloss on the new criterion appealled to and reinforced a bureaucratic rational understanding of admissibility decision-making, both as a normative proposition about how the Court *should* function, and a descriptive claim about how the tribunal is understood *currently* to approach its docket-filtering.

[368] Council of Europe (2004) *Explanatory Report to Protocol No. 14*, § 79.
[369] *Ibid.*
[370] Council of Europe (2010) *Interlaken Declaration.*

Strasbourg as Court: a bureaucratic form, but judicial decision-making

Another indicator of the influence exercised by the Strasbourg-as-bureaucratic model is how strongly numerous reform proposals which have been proposed and discussed have drawn on its logic. The idea of transferring the Court's admissibility decision-making to the Court's bureaucrats has been a recurring, if unsuccessful, debating point throughout the *Court efficiency* phase. In its final report in 2004, the CDDH cited the possibility of 'the discharge of certain judicial powers by members of the Registry' at the admissibility phase of proceedings.[371] The issue revived during the latest negotiations on Protocol No. 15. Nordic state delegations have consistently promoted enhancing the responsibility of Registry officials during subsequent ministerial conferences on Court reform. At Interlaken in 2010, the Finnish Minister for Justice suggested 'the future filtering of clearly inadmissible cases should be simply and cost-effective. That requirement would be met by providing members of the Registry with certain judicial powers.'[372] In Izmir in 2011, the Finnish delegate took up the proposal again, arguing:

> As regards clearly inadmissible cases, it might be that we do not have any more the luxury to fully maintain the glorious judicialisation of the complaint resolution mechanism, as instituted by Protocol No. 11 of the Convention.[373]

The proposition was echoed by Astri Aas-Hansen, the Deputy Norwegian Minister of Justice, who reiterated both the bureaucratic construction of admissibility decision-making and the idea that a sub-category of 'clearly inadmissible' cases are not deserving of judicial scrutiny:

> Norway proposes to transfer the competence to reject clearly inadmissible cases from Single Judges to senior Registry staff. This would be the most flexible and cost effective filtering mechanism. Providing all applicants with a decision within a reasonable time is more important than insisting on decisions by judges also in

[371] 'Opinion of the Steering Committee for Human Rights (1 December 2009)' in Council of Europe (2010) *Preparatory contributions to the Interlaken conference*, 21.
[372] T Brax (2010) *Proceedings*, 50.
[373] http://www.coe.int/t/dghl/standardsetting/conferenceizmir/Speeches/Speech%20Finland%20_2_.pdf last accessed 04.07.2011, 2.

clearly inadmissible cases. Allowing the Registry to process these applications would allow the Judges to concentrate on more important cases.[374]

This bureaucratic construction of the norms of admissibility has been critical in promoting the extension of Court administrators' responsibilities. It is difficult to conceive that such a proposal would be considered, where the underlying norms of admissibility were understood to require the exercise of judgement on the part of decision-makers. The construction of admissibility decision-making as 'clear-cut jurisprudential criteria' is pivotal to the emergence of this pressure.[375] It merely amplifies the logic of the mainstream reform debate.

On the other hand, it is important to emphasise that for many Convention reformers, the idea of empowering Registry staff to reject cases on their own authority remains anathema, and the Convention is also understood as a "fully judicial" complaints mechanism. While the admissibility criteria have been constructed in bureaucratic terms, the idea that docket-filtering decisions must remain judicial has continued to dominate reform debates since 1998. The Strasbourg as court model remains influential. In administrative justice terms, the reform debate is messy, conflicting and normatively pluralistic.

The Committee of Ministers has listed 'the judicial character of European supervision' among the 'principal and unique features of the Convention system.'[376] While State delegations remain divided on the issue, during the formulation of Protocol No. 14 the Parliamentary Assembly argued 'any decision about an individual petitioner's case should be a judicial one and should not be made by an administrator.'[377] A key Council of Europe

[374] http://www.coe.int/t/dghl/standardsetting/conferenceizmir/Speeches/Speech%20Norway.pdf last accessed 04.07.2011, 1.
[375] *Ibid.*
[376] Committee of Ministers (2004) *Request for an opinion, Draft Protocol No. 14 to the European Convention on Human Rights and Fundamental Freedoms, amending the control system of the Convention* 14 April 2004 Doc. 10137, Explanatory Report, para 10.
[377] Parliamentary Assembly of the Council of Europe (2004) *Report of debate Wednesday 28 April 2004*.

committee member observed that 'the main aim and achievement of the Protocol No. 11 reforms was the unified, fully judicial system.'[378]

This assessment is reflected in the Court's own authorised account of its history, which claims that Protocol No. 11's primary purpose was to 'to strengthen the judicial character of the system.'[379] We also find this argument sustained in the NGO submissions to Izmir, rejecting the idea of a new non-judicial filtering body on the basis that 'the judicialisation of the complaint resolution mechanism' is a 'fundamental principle of the Convention system.'[380] During the formulation of Protocol No. 14, and the first explicit recognition of the role of Registry lawyers in decision-making under the Convention, a number of participants were keen to emphasise that 'the [admissibility] decision itself remains the sole responsibility of the judge', rather than the Registry rapporteur 'assisting' her.[381] Various state delegations argued that 'a real and comprehensive judicial process' 'is the particular value of the Court.'[382] For the CDDH too, reflecting this consensus, 'admissibility decisions should be by elected judges'[383]

Yet, in its later contributions to the formulation of Protocol No. 14, the CDDH both mobilised and undercut the dominant bureaucratic account of admissibility decision-making. The claim that all decision-making should be 'fully judicial' was displaced by the nuanced, and much more limited, argument that it was important to:

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[378] M Eaton – Chairperson of the Steering Committee for Human Rights (CDDH) in Council of Europe (2007) Future Developments of the European --Court of Human Rights in the light of the Wise Persons' Report (Council of Europe, Strasbourg), 54.
[379] European Court of Human Rights (2002) *Annual Report European Court of Human Rights 2001* (Registry of the Court, Strasbourg), 9.
[380] 114 NGOs (2010) *Joint NGO Statement to the Izmir Conference* http://www.coe.int/t/dghl/standardsetting/conferenceizmir/Amnesty%20International%20-%20Joint%20NGO%20Statement.pdf last accessed 03.07.2011.
[381] Committee of Ministers (2004) *Request for an opinion, Draft Protocol No. 14 to the European Convention on Human Rights and Fundamental Freedoms, amending the control system of the Convention* 14 April 2004 Doc. 10137, Explanatory Report, para 72; Parliamentary Assembly of the Council of Europe (2004) *Report of debate Wednesday 28 April 2004*;
[382] http://www.coe.int/t/dghl/standardsetting/conferenceizmir/Speeches/Speech%20Denmark.pdf last accessed 04.07.2011, 1.
[383] M Eaton (2007), 53.

> preserve the principle of judicial decision-making for cases where some kind of opinion is needed on the substance of the application, but not for those which clearly do not fulfil even the most basic formal requirements for admissibility.[384]

This twin-track vision of the administrative justice values of admissibility decision-making – substantial cases warrant judicial scrutiny, undeserving cases can be disposed of administratively – is a comparatively marginal argument in Convention reform but a recurring theme in this thesis. Beyond the formal question of what form of decision-making should be enshrined in the Convention, only the Court's President, Luzius Wildhaber, reflected on how Protocol No. 14 would radically reorganise the roles of the judge and the functionary, altering the *de facto* if not the *de jure* extent to which admissibility decision-making would remain a judicial competence, identifying that the Protocol vests:

> greater responsibility in the registry or recognising a responsibility which already exists to some extent. It increases judicial capacity in this field. It will no doubt be possible to introduce less formal procedures and thus to speed up the processing of inadmissible cases. But there is a price for this and this is my second point. The degree of judicial scrutiny will be considerably diminished. Applicants coming to Strasbourg, for whom the procedure is already paired down to the minimum and who receive only the barest reasoning for the rejection of their complaints will enjoy significantly fewer safeguards. We should not conceal this face. It is the inevitable consequence of the growth of the system far beyond its original conception and design. Moreover in principle these are cases which do nothing to enhance the protection of human rights, the strengthening of the rule of law and democracy; their examination and determination does not directly pursue the Court's aim of ensuring that the Contracting Parties observe their engagements under the Convention. Yet we know that behind each application there lies a human story, often a dramatic one. We also know that the Convention and its enforcement mechanism have generated enormous expectations throughout the Member States

[384] Committee of Experts on the Reform of the Court (DH-GDR) (2011) Draft CDDH Report on the Filtering of Applications and treatment of repetitive applications in (2011) *Report 8th Meeting 2 – 4th November 2011* DH-GDR(2011)R8 Appendix III, para 24.

> of the Council of Europe and that the frustration and lack of understanding of applicants whose cases fall outside the Court's jurisdiction is a real problem, which increasingly in itself creates work for the Registry.[385]

Generally speaking, opposition to explicitly expanding the role of the Registry in decision-making in these debates did not emphasise the character of the *norms of admissibility*, but instead argue that the 'fully judicial' character of Strasbourg's supervision mechanisms represents a normatively and politically important gain which ought not lightly to be set aside, irrespective of the clarity and determinacy of the filtering norms which those judges are imposing. The argument is that these decisions are, of their nature, appropriate for judicial decision. Nevertheless, these – thus far unadopted – innovations attest to the ambivalence which characterises understandings of admissibility decision-making in the *Court efficiency* phase of reform, and the pressures which the dominant bureaucratic account, and the caseload crisis, is putting on the commitment to a comprehensive judicial vision of European human rights enforcement.

In their support of fully bureaucratising admissibility decision-making and transferring powers to Registry staff, other state delegations have sounded a more critical note, dissenting from the majority view that the Court's approach to its admissibility decision-making should be understood as 'fully judicial in character.'[386] In a striking and controversial break with the consensus, at the 2010 Interlaken Conference, the Moldovan Minister of Justice proposed that 'the responsibility concerning the committee cases shall be entirely delegated to the Court's Registry,' arguing that 'in the current setting, the judges merely waste their time, by rubber-stamping committee case notes, prepared by others without any real possibility to verify the content of those notes.'[387] He continued:

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[385] L Wildhaber – President of the Court (2004) 'Consequences for the European Court of Human Rights of Protocol No. 14 and the Resolution on judgments revealing an underlying systemic problem – Practical steps of implementation and challenges' in Council of Europe (2004) *Reform of the European human rights system: Proceedings of the high-level seminar, Oslo, 18 October 2004* (Council of Europe, Strasbourg), 30.
[386] See, amongst other examples, L Wildhaber in (2002) *Proceedings: European Ministerial Conference on Human Rights and Commemorative Ceremony of the 50th anniversary of the European Convention on Human Rights Rome, 3 – 4 November 2000*, 149.
[387] A Tănase – Minister of Justice – Moldova (2010 *Proceedings: High Level Conference on the Future of the European Court of Human Rights*, 74 – 75.

> In practice nobody, except for the initial case-lawyer, checks the case-file. Even in the committees of three judges where the national judge is present, the case-file is never verified. It should be noted that there are committees of three judges where the national judges is not present. Accordingly, the judges' decision is totally based on the facts and complaints as prepared by the Registry … It is for this reason that it is necessary to reform the system and to base it on reality and not on hypocrisy. If the Registry is trusted with the preparation of the facts and complaints, it should be trusted with the adoption of the solution.[388]

Support for transferring responsibility to the Registry has not been limited to state delegations. It has also found favour with some Council of Europe officials and with some participants in the CDDH's hearings. In 2011, Professor Robert Wintemute argued that:

> The most flexible, simple system would be to allow the Registry to perform the task. It was not necessary for every case to proceed as far as a judge; the Registry could filter out the most ill-advised applications.[389]

These commitments have generated perhaps the strangest "compromise" proposals in the *Court efficiency* phase of the debate, suggesting that senior members of the Registry should be invested with judicial status for the purpose of determining the admissibility of petitions, but otherwise remain functionaries in the service of the Court's bureaucracy. No example from these debates better or more forcefully communicates the tortured distinctions and conceptual ambivalences which now characterise the Court and its reformers' attempts to distinguish between 'appropriate' administrative and judicial responsibilities in processing cases.[390] While the principle of comprehensive judicial responsibility decision-making has been preserved in the text of the Convention, and the idea of transferring any decision-making power to functionaries continues to be resisted as illegitimate, isolated voices in the debate have posed challenging questions about the extent to which this principled vision is borne out in practice. Chapters 5 and 6 take up these concerns with reference to the

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[388] *Ibid.*

[389] Committee of Experts on the Reform of the Court (DH-GDR) (2011) 'Report of the Consultation with representatives of civil society and national human right institutions' *Report 6th Meeting 9 – 11th February 2011* DH-GDR(2011)R6 Add I.

[390] Council of Europe (2012) *Brighton Declaration*, para 20(a)(ii).

empirical evidence about the Court's working practices and the balance in judicial and official responsibility they reflect. In summary, however, they show the Moldovan Minister of Justice's description is considerably closer to the truth than the text of the Convention itself.

'Providing objective information to potential applicants'[391]

Beyond questions of *who* should decide on the admissibility of petitions and how, the influence of the dominant bureaucratic approach can be felt across a range of sub-topics in Convention reform since 1998. During the latest phase of the *Court efficiency* debate (2010 – 2013), culminating in the limited reforms of Protocol No. 15, Convention reformers placed considerable emphasis on the importance of 'providing objective information to potential applicants on the Convention and the Court's case-law, in particular on the admissibility criteria and application procedures.'[392] The Commissioner for Human Rights took it for granted that the high percentage of applications declared inadmissible by the Court was attributable to applicants' ignorance of objective admissibility standards:

> the fact that 90% of new applications before the Court are clearly inadmissible or manifestly ill-founded appears to indicate serious deficiencies in the provision of information on the European Convention on Human Rights (the Convention) and the Court's procedures.[393]

These concerns were not new. An official paper, circulated by the Secretary-General before a Ministerial Seminar in Oslo in 2004 suggests that:

> In order to reduce the flood of unmeritorious cases, the Court the Council of Europe as a whole, member states and civil society should take measures to ensure that

[391] 'Contribution of the Secretary General of the Council of Europe (18 December 2009)' Council of Europe (2010) *Preparatory contributions to the Interlaken conference*, 44
[392] 'Opinion of the Steering Committee for Human Rights (1 December 2009)' in Council of Europe (2010) *Preparatory contributions to the Interlaken conference*, 22.
[393] 'Memorandum of the Commissioner for Human Rights (7 December 2009) in Council of Europe (2010) *Preparatory contributions to the Interlaken conference*, 26.

> prospective applicants receive sufficient and independent information about the Convention's basic admissibility criteria.[394]

In 2010, the new Secretary General, Thorbjørn Jagland, echoed the Commissioner's attribution of responsibility for the high percentage of inadmissible cases to ignorant applicants, as did President of the Court, John-Paul Costa.[395] Jagland commented:

> Providing objective information to potential applicants about what the Convention system can and cannot offer them may indeed reduce the proportion of "hopeless" applications introduced before the Court.[396]

The Polish, Norwegian and Slovak delegations at Interlaken in 2010 echoed this understanding of the admissibility process:

> the dissemination of relevant information is one of the key elements here as greater knowledge of the case-law by applicants can make their expectations more realistic, contribute to the submission of more precisely formulated complaints, and help to decrease the backlog of the Court, too.[397]

Thus encouraged, the Court published its first *Practical Guide to the Admissibility Criteria* in December 2011 with the goal of addressing applicants' informational needs. The logic of the dominant bureaucratic image of admissibility decision-making cascades throughout this project. It assumes that applicants should be capable of coming to a decisive view *in abstracto*, on the basis of the Court's admissibility jurisprudence, about the fate awaiting their case, should they post it to Strasbourg. It assumes that the admissibility criteria are, as the reform debate claims, 'clear-cut jurisprudential criteria of an objective character capable of straightforward application.'[398] Chapter 7 undermines this construction of the

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[394] Foreword in Council of Europe (2004) *Reform of the European human rights system: Proceedings of the high-level seminar, Oslo, 18 October 2004*, 9.
[395] J P Costa, President of the European Court in Council of Europe (2010) *Proceedings: High Level Conference on the Future of the European Court of Human Rights*, 22.
[396] 'Contribution of the Secretary General of the Council of Europe (18 December 2009)' Council of Europe (2010) *Preparatory contributions to the Interlaken conference*, 44.
[397] V Petríková – Deputy Slovak Prime Minister and Minister of Justice (2010) *Proceedings: High Level Conference on the Future of the European Court of Human Rights*, 92.
[398] *Ibid.*

admissibility rules by analysing the Court's jurisprudence in detail. However, Convention reform debates continue to construct applicants as ignorant of straightforward admissibility requirements, and by consequence, redistributes blame for the high percentage of inadmissible cases from the court to its unknowing and culpable litigants. The strikingly passive actor on this construction of the problem is the Court itself, which appears only as the faithful, overburdened mechanical operator of the admissibility jurisprudence. As chapter 7 shows, the Court's approach to the interpretation of the admissibility criteria cannot be easily or comprehensively stated. This bureaucratic strategy may be an effective discursive move which insulates the Court from responsibility for the outcomes it produces, but it remains a jurisprudentially unconvincing and self-serving one.

Bureaucratic rationality and deposits

The same representations of ignorant applicants and of foreseeable admissibility criteria were deployed in subsequent CDDH debates on the possibility of introducing application fees for commencing Court proceedings. The introduction of fees was ultimately rejected by the CDDH, and by the 2012 Brighton Conference, as being discriminatory against poorer applicants, and excessively costly and imposing additional and unwelcome administrative burdens on the already-struggling Court.[399] The Conference also rejected proposals to introduce mandatory legal representation at the admissibility stage, and to require applicants to submit cases in English and French, also on grounds of cost. The proposals were also criticised by NGOs and some state delegations as discriminatory against indigent applicants, and as an impermissible barrier to justice. This critique represents a very rare invocation of the characteristic values of the Strasbourg as tribunal model in the reform debate, though characteristically, administrative convenience rather than principles of access to justice most exercised the CDDH in its analysis – and rejection – of these policies. Significantly, the same concerns about potential barriers inhibiting access to the Court are entirely missing in the analysis of the *status quo* and the procedural

[399] Committee of Experts on the Reform of the Court (DH-GDR) (2010) *Implementation of the Interlaken Declaration: Draft Report on the issue of access to the Court – Fees for Applications* adopted by the DH-GDR at its 3rd Meeting 5 – 7th May 2010, DH-GDR(2010)008 Addendum I, para 27.

principles reflected in the Court's existing docket-filtering structures, where Terry Davis' 'counting to six' vision of admissibility decision-making predominates.[400]

More interesting than fees, for my purposes, were the proposals that applicants should be obliged to lodge a monetary deposit or caution with the Court when introducing their application, which would not be returned if the case was declared inadmissible, to operate as a 'sanction in futile cases.'[401] The declared objective of this regime was 'to deter inadmissible applications' not 'to raise revenue for the Court.'[402] The CDDH rapporteur argued that:

> people tend to value less something that they receive for free. The right of individual application to the Court is an important feature of the system for the protection of human rights in Europe; it therefore has a great moral value. The intention of any fee, deposit or penalty system would be to place on the right of application a financial value to reflect its moral value, and to ensure that applicants therefore appreciate the significance of an application to the Court. In this way, applicants would be discouraged from abusing the right of application, or treating it frivolously.[403]

As the CDDH noted in its subsequent discussions, a number of domestic courts and tribunals charge applicants even nominal fees, to help defray the cost of adjudication and to discourage entirely speculative legal actions (or at least, discouraging those with modest means from taking their grievances to court). So much is commonplace and generally uncontroversial. The United States Supreme Court, for example, currently levies a docket fee of $300 for filing a petition for a writ of *certiorari*, which may be waived on application to the Court, in the interests of justice, where the applicant is indigent.

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[400] T Davis (2007), 14.
[401] Committee of Experts on the Reform of the Court (DH-GDR) (2011) Draft CDDH Report on the proposal to introduce a sanction in futile cases (2011) *Report 8th Meeting 2 – 4th November 2011* DH-GDR(2011)R8 Appendix V.
[402] Committee of Experts on the Reform of the Court (DH-GDR) (2010) *Implementation of the Interlaken Declaration: Draft Report on the issue of access to the Court – Fees for Applications* adopted by the DH-GDR at its3rd Meeting 5 – 7th May 2010, DH-GDR(2010)008 Addendum I, para 2
[403] *Ibid*, para 18.

A caution regime, by contrast, rests on an essentially different logic. It is well established that the US Court's decision on whether or not to grant *certiorari* and to hear appeals is an unfettered exercise of the nine justices' discretion. Although the petitioner and her legal representatives will do their best to try to catch the justices' eye, and frame their case in an interesting and arresting fashion, whether or not a given petition is accepted is more or less arbitrary. To condition the Court's retention or return of the applicant's deposit on whether or not the case was granted a writ of *certiorari* would, understandably, be viewed as unfair, randomly penalising individual petitioners for outcomes and personal judgements over which they have no control.

It is telling, therefore, that such a caution regime could be considered for Strasbourg, without any apprehension that its operation would and could be problematic. The dominant bureaucratic rational image of admissibility decision-making is at the heart of why this proposal was thought justifiable. While it is arbitrary to deprive applicants of money when decision-making is understood to be unstructured and subjective in character, a caution regime becomes far more attractive and explicable, where the applicable filtering rules are envisaged as straightforward, well-settled and foreseeable. These unsuccessful deposit proposals – rejected primarily on the grounds of excessive administrative cost rather than because of their repugnance in principle – indirectly but powerfully reinforce the depth and breadth of the bureaucratic image of admissibility in these policy debates.

Conflating admissibility and inadmissibility with "serious, important or deserving" cases

The third characteristic but problematic feature of the Convention reform debate during the *Court efficiency phase* is the conflation of the idea of the *admissibility* of individual petitions with their underlying seriousness or importance. The logic of this conflation, and the identification of "serious" cases with admissible cases, entails the claim that inadmissible petitions should be understood as not-serious, not-important and not-deserving. Lord Woolf's summary of the principles underlining his 2005 review of the Court's working practices neatly captures the nature of this prevalent and problematic connection between the understanding of admissibility decision-making and the qualities of inadmissible cases which have dominated official debates on Convention reform:

> Clearly inadmissible cases pose an enormous problem for the Court. They make up approximately 85% of cases arriving in Strasbourg, and serve to clog up the Court system, and divert time, attention and resources away from more important and deserving cases.[404]

Speakers in Convention reform debates have not generally attempted to explain how they envisage this bureaucratic construction of admissibility decision-making connects with the idea that only admissible petitions are serious and deserving. However, as Lord Woolf's comments suggest, most appear to regard the two discourses and accounts of admissibility decision-making as neatly compatible: the "clearly inadmissible" case is understood both as straightforwardly repelled, and inconsequential in substance. From the Court's perspective, its jurisdiction is limited to deciding admissible cases and it may not unilaterally stray outside of that jurisdiction and the legal mandate it finds in the Convention. The idea, however, that our understanding of general terms such as seriousness, importance, or desert should be *monopolised* by admissibility questions seems curious, and at odds with domestic judicial experience. All courts and tribunals, domestic or international, must place pragmatic limits on the scope of their jurisdiction. This is reflected in the principles of legal certainty, and of the finality of judgments.

In practice, this principle is promoted by the imposition of a range of procedural rules on the litigation which these courts will entertain. Some of these rules are analogous to the admissibility criteria applied in Strasbourg. For example, many courts and tribunals impose time-limits on litigants, after which additional appeals, or arguments and defences, will not be countenanced or considered, except in exceptional circumstances. In considering these requirements of domestic law, most would regard these as pragmatic limits on the Court's jurisdiction, not a final comment on the strength or weakness of the untimely appeal. The function of such procedural rules is that they exclude *both* well-founded and ill-founded cases from further judicial consideration. In these circumstances, the overriding public

[404] H Woolf (2005) *Review of the Working Methods of the European Court of Human Rights*, 25.

interest in legal certainty and the finality of judgments trumps the interests of a particular litigant who has been given a fair opportunity to participate in proceedings and misses a critical judicial deadline.

In the discussion of Strasbourg's reform, by contrast, this idea of a pragmatic interest in limiting the Court's jurisdiction finds no echo. At no point are the admissibility criteria discussed as formal requirements which are sometimes, albeit reluctantly, applied to exclude from consideration otherwise deserving and important cases from consideration on the merits by the Court. Lord Woolf does not elaborate or clarify what he means by 'important and deserving cases.'[405] These subjective, emotive and evaluative terms are invoked, but they are not defined. In this respect, he replicates a common feature of Convention reform contributions, where ethically-laden value judgements on the Court's inadmissible cases are invoked as if every participant shared a common standard of "importance", "seriousness" – and as if every case rejected as inadmissible was the same.

This phenomenon arguably reflects the nature of the international negotiations. Achieving consensus is critical if any reform to the Convention's judicial machinery is to be affected. Who would disagree that the Court should focus on important, not unimportant, applications? Vague language helps to foster agreement between State delegations by deferring the inevitable conflict about what a "serious" or "important" human rights application looks like, leaving the Court to resolve these tensions administratively by taking decisions in individual cases. The rhetorical frame enables consensus to be formed around broad principles, while evading divisive debates on the detailed implications of these fundamentals. It is also characteristic of the reform debate that inadmissible cases are constructed more or less homogeneously, as if the 89,000 applications rejected as inadmissible in 2012 could and should be classified uniformly as desertless and unimportant.

[405] *Ibid*, 25. (My emphasis).

No tribunal justice here: the "victim" Court and its (ir)responsible applicants

The reform debate's use of a bureaucratic account of admissibility decision-making to attribute responsibility for the case-load crisis to applicants is not limited to claims about their ignorance of the admissibility criteria. Already in 1988, with reference to the Commission's backlog of cases, the *rapporteur* of the Parliamentary Legal Affairs Committee observed that 'the organs of the convention have become, in the time-honoured phrase, "the victims of their own success."'[406] The phrase, and the image of the struggling but successful Court, has remained a cardinal feature of Convention reform discourse from the 1980s to present, echoed not just in the diplomatic conferences and Council of Europe committees of the official reform debate,[407] but also in the media coverage,[408] academic analyses of, and the Court's own account of its predicament.[409]

On the one hand, the "victim Court" is a picturesque summary of the institution's case-load crisis, and its difficulty in dealing with the number of applications it receives. On the other, the language of victimhood, and to whom victim-status is attributed, is significant.

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[406] See, amongst innumerable other examples over the last three decades: Legal Affairs Committee, Parliamentary Assembly of the Council of Europe (1988) *Report on the improvement of the procedures of the European Convention on Human Rights* 23 September 1988 Dec. 5946, para 41.

[407] For example, in 2010, the Azerbaijani Minister of Justice, Fikrat Mammadov observed 'It is often said that the European Court has become "a victim of its own success"' in (2010) *Proceedings: High Level Conference on the Future of the European Court of Human Rights* 37, 38. See also: A de Fine Skibsted – Danish Human Rights Ambassador (2010) *Proceedings: High Level Conference on the Future of the European Court of Human Rights* 47;D Roche – Irish Minister for European Affairs (2010) *Proceedings: High Level Conference on the Future of the European Court of Human Rights*, 60; Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe (1992) *Report: The reform of the control mechanism of the European Convention on Human Rights 15 September 2002*, Doc 6659. See also Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe (1994) *Report on draft Protocol No. 11 to the European Convention on Human Rights introducing a single court 10th January 1994 Doc. 6983*, para 1.1.

[408] See, amongst other examples, F Gibb (1992) 'Paths to faster justice' *The Times* May 26th 1992; T Judd (2013) 'What has the European Court of Human Rights ever done for us?' *The Independent* 14th January 2013; BBC News (2012) 'Profile: European Court of Human Rights' http://news.bbc.co.uk/1/hi/world/europe/country_profiles/4789300.stm last accessed 01.08.2013.

[409] Among many others, L R Helfer (2008) 'Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime' *European Journal of International Law* 19(1) 125 – 159, 125; K Dzehtsiarou and A Greene (2011) 'Legitimacy and the Future of the European Court of Human Rights: Critical Perspectives from Academia and Practitioners' *German Law Journal* 12(10) 1707 – 1715, 1708; J Donnelly (2013) *Universal Human Rights in Theory and Practice* 3rd edn (New York, Cornell University Press), 173.

As Bacchi notes, in analysing approaches to policy problems, is important to consider 'who is held responsible for the "problem" and how this attribution of responsibility affects both those targeted and the perceptions of the rest of the community about who is to "blame."'[410] The language of Court victimhood is more than a neat metaphor. It reflects the reform debate's dominant moral economy, which claims that it is the *Court*, and not applicants whose cases are delayed, or summarily rejected as a consequence of the administrative pressures, which is conceived of as the principal victim of institution's caseload crisis.

This analysis is reflected in the curious ambivalence which characterises the construction of applicants, their motives, and the seriousness of their petitions in the reform debate. On the one hand, the large number of cases lodged with the tribunal is constitutive of the "success" which is claimed for the Court. The Commissioner for Human Rights told the Izmir Conference in 2011 that 'the number and nature of applications to the ECtHR give an indication of the status of human rights on our continent today.'[411] On the other, all of the reformers' efforts over the course of the last decade have been to identify and adopt measures justifying the ever-more truncated treatment of the majority of cases by the Commission and Court, and attempting to raise the admissibility hurdles faced by applicants to reject more cases. Negative constructions of applicants' motives, and of the importance of their applications, has been at the heart of that process. In reform debates, the applicant appears as a Jekyll and Hyde personality, the one facet used to buttress the Court's own standing, ethical authority and importance, the other to denigrate the significance of their petitions, and to justify their summary rejection.

Before descending to the discussion of the technical detail of particular reforms under discussion, it has become traditional for speakers to pay glowing tribunes to Strasbourg's unique success, 'a glowing bright beacon of hope for millions.'[412] Sentimental stories about the hopes hypothetical applicants invest in the Conscience of Europe' are a ubiquitous

[410] C Bacchi (2007) 'The ethics of problem representation: Widening the scope of ethical debate' *Policy and Society* 26(3), 5 – 20, 14.
[411] T Hammarberg (2010) – Commissioner for Human Rights – Council of Europe to the Izmir Conference http://www.coe.int/t/dghl/standardsetting/conferenceizmir/Speeches/Speech%20CommHR.pdf last accessed 03.07.2011.
[412] J Hedigan (2011) 'The European Court of Human Rights: Yesterday, Today and Tomorrow' *German Law Journal* 12 1716 – 1729, 1726.

feature of these encomia.[413] In 2000, Walter Schwimmer, the Secretary-General of the Council, emphasised that 'every week, hundreds of individuals from all parts of the Continent turn their hopes to the Strasbourg Court.'[414] Lord Russell-Johnston's speech to the 2000 Ministerial Conference in Rome is also characteristic of Convention reformers' sentimental rhetoric. Russell-Johnston, then President of the Parliamentary Assembly of the Council of Europe, emphasised:

> Behind every application there is a human life, a story, sometimes plain and ordinary, but often tragic. But behind every letter, every call and every visit to the Court's headquarters in Strasbourg, there is hope. Hope that grievances will be heard. Hope that wrongs will be made right. Hope that justice will be done. It is this hope, and trust, of hundreds of millions of people living in Europe, from Grozny to Rome to the Isle of Skye, that should set out agenda for today. When we all leave for our capitals, let us not leave behind only empty declarations and speeches.[415]

At Interlaken in 2010, Council of Europe Commissioner for Human Rights Thomas Hammarberg pursued a similar rhetorical theme:

> Today, the Court has become a unique model, an inspiration, a symbol. More importantly, for the individuals who experience or fear human rights abuses in Europe, it is even more: the Court is regarded as their ultimate remedium, their last source of hope to seek redress for human rights violations.[416]

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[413] European Court of Human Rights (2011) *The Conscience of Europe: 50 Years of the European Court of Human Rights*. The phrase has its origin in a remark made by the French delegate, Pierre-Henri Teitgen during the formulation of the Convention in 1949. According to Teitgen, the Convention created 'a conscience in Europe which will sound the alarm. This conscience cannot be other than a Court belonging to Europe itself.'

[414] W Schwimmer (2002) *Proceedings: European Ministerial Conference on Human Rights and Commemorative Ceremony of the 50th anniversary of the European Convention on Human Rights Rome, 3 – 4 November 2000*, 146.

[415] Lord Russell-Johnston (2002) 'Statement made at the opening session, Rome 3 November 2000' in Council of Europe (2002) *Proceedings: European Ministerial Conference on Human Rights and Commemorative Ceremony of the 50th anniversary of the European Convention on Human Rights Rome, 3 – 4 November 2000*, 18.

[416] T Hammarberg in Council of Europe (2010) *High Level Conference on the Future of the European Court of Human Rights*, 27.

For former President Wildhaber, ‘the avalanche of applications that reaches us simply reflects the importance the Court has acquired in the minds and hearts of all Europeans.’[417] This attitude was echoed by the Dutch delegation at Interlaken, ‘one of the consequences of this success is that the Court also serves as a beacon of hope for some many applicants.’[418] The rhetoric of the often-critical NGO participants in the reform process is not distinguishable. Jean-Marie Heydt, the *Président de Conférence des organisations internationales non gouvernementales du Conseil de l’Europe*, suggested that the Court ‘*est avant tout, pour les citoyens européens, un formidable outil porteur d’espoir, et bien souvent pour bon nombre de requérants, l’ultime espoir*.’[419] For the Vice-President of the French *Conseil d’État,* speaking in Strasbourg, the Court is ‘inundated as a result of the confidence it inspires.’ [420]

Given these comments, we might expect the reform debate to reflect elements of the *Strasbourg as tribunal* model of administrative justice, discussing reforms to make the slogan of a ‘street corner court’ a reality by emphasising values of flexibility and accessibility in taking decisions on admissibility.[421] However, the reformers’ characterisation of applicants’ cases radically reverse when they get down to the nitty-gritty of Convention reform. After these inspirational preliminaries, non-formalist ideals of ‘accessibility, participation, flexibility’ dissipate.[422] In characterising applicants and their cases, negative, hydrological metaphors are preferred, with applications represented as a ‘submerging flood’[423] or ‘tide’ or ‘torrent.’[424] The Court is ‘bombarded with useless

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[417] L Wildhaber (2006) ‘Opening of the Judicial Year 20 January 2006’ in European Court of Human Rights (2006) *Annual Report European Court of Human Rights 2005* (Registry of the Court, Strasbourg), 19 – 20.
[418] R K Visser – Dutch Director General for Legislation, International Affairs and Migration at the Ministry of Justice (2010) *Proceedings: High Level Conference on the Future of the European Court of Human Rights*, 79.
[419] J Heydt – *Président Conférence des organisations internationales non gouvernementales du Conseil de l’Europe* (2010) Proceedings: High Level Conference on the Future of the European Court of Human Rights, 108.
[420] J M Sauvé (2010) ‘Opening of the Judicial Year 29 January 2010’ in European Court of Human Rights (2011) *Annual Report European Court of Human Rights 2010* (Registry of the Court, Strasbourg), 46.
[421] M B Dembour (2002), 621.
[422] A Leggatt (2001) *Tribunals for Users: One System, One Service Report of the Review of Tribunals* (London, Department of Constitutional Affairs).
[423] http://www.coe.int/t/dghl/standardsetting/conferenceizmir/Speeches/Speech%20PACE.pdf last accessed 03.07.2011.
[424] P Leach (2009) “On Reform of the European Court of Human Rights” 6 *European Human Rights Law Review*, 725, 726.

cases,'[425] burdened with 'tedious drudgery'[426] as it struggles on through an asphyxiating,[427] suffocating,[428] drowning,[429] choking sea,[430] composed of wave after 'swamping'[431] wave of documents, enveloping the institution, and 'paralysing' it.[432] Importantly, this "flood" of applications is talked about as if it is internally undifferentiated. The assertion of internal homogeneity in the Court's inadmissible case-load is a fundamental feature of the Convention debate in the fourth phase of discussion around treaty reform.

While the brute reality and challenges of the Court's caseload crisis brooks no denial, there is no inevitability about how that "problem" is represented and understood in these reform debates. The delays in examining cases could be attributed to the Court's limited resources, for example, with solutions envisaged in terms of enhancing decision-making capacity with additional staff. That has certainly been part of the official story. However, the Convention reform debate has also relied to a significant extent on attributing responsibility for this "problem" to applicants. The applicant cuts an ambivalent figure. He or she is both the sentimentally-envisioned, grateful, powerless, victim-petitioner whose many complaints burnish the Court's prestige and justify its jurisdiction and the negative-constructed, ignorant and venal time-waster whose fecklessness and greed threaten the Victim Court's very existence.

These negative assessments fall into two main categories. Firstly, reformers consistently emphasise the ignorance of applicants in their discussions. This phenomenon was addressed in the foregoing section on the bureaucratic image of admissibility decision-

[425] M O'Boyle (2011) Question and answer session after his keynote address on 'The legacy and future of the European Court of Human Rights', delivered at University College Dublin, 1st April 2011.
[426] Ibid.
[427] M Çavuşoğlu – President of the Parliamentary Assembly of the Council of Europe (2010) *Proceedings: High Level Conference on the Future of the European Court of Human Rights* 16, 18.
[428] P Mahoney (2009) 'A European Judicial Training Institute on Human Rights' *European Human Rights Law Review* 123, 124; P Mahoney (2002) 'New Challenges for the European Court of Human Rights Resulting from the Expanding Case Load and Membership' 21 *Penn State International Law Review* 21 101 – 114, 110.
[429] M A Beernaert (2004) 'Protocol 14 and new Strasbourg procedures: towards greater efficiency? And at what price? *European Human Rights Law Review* 5, 544 – 557, 544.
[430] J P Costa, President of the European Court in Council of Europe (2010) *Proceedings: High Level Conference on the Future of the European Court of Human Rights,* 21.
[431] A phrase used by the Court's former Irish judge, John Hedigan, in a paper 'The European Court of Human Rights, Yesterday, Today and Tomorrow', delivered at University College Dublin, 2nd April 2011.
[432] European Law Institute (2012) *Statement on case-overload at the European Court of Human Rights* (Vienna, European Law Institute), 7.

making which has predominated. One consequence of this responsibility model is that the Court's role once again escapes direct scrutiny, the victim of circumstances beyond the tribunal's control, and applicants unable to internalise and submit (or not submit) cases, informed by a settled and straightforward set of admissibility criteria. The dominant construction of the "problem" of the case-load crisis absolves the Court of any responsibility, beyond the idea that the tribunal ought to take its decisions faster, ever faster, while attributing blame to applicants falling "clearly" foul of simple rules governing admissibility.

In addition to this characterisation of applicants as ignorant of straightforward standards, the idea that applicants are motivated by venal desire to use human rights litigation before the Court to win monetary awards has been prevalent in the reform debate. Although participants in these debates have not generally made reference to the more-broadly circulating discourse of a 'compensation culture,'[433] and anxieties about the prevalence of baseless litigation, the influence of such ideas can be felt in the suspicion of applicants' motives which have regularly been expressed by Council of Europe officials and state delegations during the Convention reform debate. For example, in 2009, Secretary General Jagland suggested that:

> Part of the problem in funding long-term solutions to the problem, however, is that there is no clear information on its causes, on the reasons why people make inadmissible applications. Are they ignorant of the admissibility criteria or ill-advised? Have they seen news of high awards to successful applicants and decided to try their luck? Does the lack of an application fee make them think they have nothing to lose, even if their chances are slim? Or are they simply desperate for a fair hearing, to see justice done?[434]

It is telling that Jagland was able simultaneously to claim that 'clear information' does not exist about inadmissible petitions, yet he nevertheless felt able to claim that applicants were

[433] A Morris (2007) 'Spiralling or Stabilising? The Compensation Culture and Our Propensity to Claim Damages for Personal Injury' *The Modern Law Review* 70(3) 349 – 378.
[434] T Jagland (2009) 'Contribution of the Secretary General of the Council of Europe' in Council of Europe (2010) *Preparatory contributions to the Interlaken conference*, 44.

motivated by money in lodging their applications. It is significant too that all of Jagland's potential explanations focus on the behaviour of applicants, their ignorance, their alleged greed and their hopelessness: the Court remains a passive figure in this representation of the problem of the case-load crisis. Other speakers in the reform debates of the *Court efficiency* stage make similar allegations, although like Jagland, offer no evidence for the gloss they offer on applicants' goals in lodging cases. At Izmir, the Turkish foreign minister invoked the idea of the financially-motivated applicant, arguing that 'making the practice on just satisfaction more transparent and foreseeable' would 'perhaps discourage applicants with unrealistic expectations' about the financial benefit which winning a case in Strasbourg was likely to bring.[435] During the CDDH review process, participants made similar, specific allegations. Discussing the high caseload and approach to reform of the admissibility criteria, Professor Wintemute referred to 'ill-advised' petitions, continuing that he 'agreed that filtering was essential and regretted that some applicants simply tried their luck, treating the Court as an Ombudsman or "forth instance"' appeal.[436] The *Comité's* investigation of the possibility of introducing fees or deposits for lodging cases was haunted by the construct of 'applicants without a well-founded case whose interest in applying to the Court is based purely on financial considerations.'[437] The CDDH report to the Committee of Ministers attributed similarly venal goals to applicants:

> Anecdotal evidence suggests that many inadmissible applications to the Court arise from a perception that, as an application is free, an applicant has nothing to lose by making their application. Anecdotal evidence also suggests that the potential gain of a sum of money is a motivating factor for applicants to the Court, especially if

[435]H E Ahmet Davutoğlu – Turkey – Minister of Foreign Affairs accessible at http://www.coe.int/t/dghl/standardsetting/conferenceizmir/Speeches/Opening%20address%20by%20Mr%20Ahmet%20DAVUTOGLU%20Minister%20of%20Foreign%20Affairs%20of%20Turkey.pdf

[436] Committee of Experts on the Reform of the Court (DH-GDR) (2011) 'Report of the Consultation with representatives of civil society and national human right institutions' *Report 6th Meeting 9 – 11th February 2011* DH-GDR(2011)R6 Add I.

[437] Committee of Experts on the Reform of the Court (DH-GDR) (2010) *Implementation of the Interlaken Declaration: Draft Report on the issue of access to the Court – Fees for Applications* adopted by the DH-GDR at its3rd Meeting 5 – 7th May 2010, DH-GDR(2010)008 Addendum I, para 20.

> they stand no personal risk in applying. A fee, deposit or penalty would discourage applicants whose application to the Court is purely speculative.[438]

The empirical basis for this claim in qualitative or quantitative evidence was at no point substantiated. It is significant, however, that in the absence of any evidence, participants in these debates *still* felt able to make such concrete, and negatively-charged, assertions.

However, Convention reformers do not all speak with one voice. For example, the Dutch representative at Interlaken in 2010, discussing responsibility for the Court's case-load crisis remarked: 'it would in my view be ludicrous to point the finger at the court. Neither can we blame the applicants for trying all legal avenues – including the one in Strasbourg – to seek reparation for an alleged wrong.'[439] The Cypriot ambassador echoed the point: 'it is not the fault of the applicants if the Court is overwhelmed by cases,' he said.[440] Nevertheless, the fact that these representatives felt such observations *needed* to be made reflects the extent to which negative images of the intentions of applicants, their motives and the importance of their cases have become a feature of mainstream Convention reform debates after 1998.

By externalising responsibility for decision-making from the Court onto its applicants, a bureaucratic vision of administrative justice helps insulate the Court from its uncongenial responsibilities. Although rarely made explicit in Convention reform debates, we may also detect the *Strasbourg-as-court* model at work here, emphasising the limits of the Court's responsibility as a 'passive arbiter,' responding to rather than enabling litigation which is meaningfully controlled by the parties to it.[441] If applicants submit incomplete or wrongheaded petitions, why should judges or Registry officials be held responsible for their failures? As chapters 5, 6 and 7 show, however, the idea that admissibility decision-making is recognisably adversarial form is unpersuasive. The Court's bureau does not operate as a passive arbiter, but as a pro-active agent retaining considerable initiative to

[438] *Ibid*, para 19.
[439] R K Visser – Dutch Director General for Legislation, International Affairs and Migration at the Ministry of Justice (2010) *Proceedings: High Level Conference on the Future of the European Court of Human Rights*, 79.
[440] E Evriviades, Cypriot Ambassador, Permanent Representative to the Council of Europe (2010) *Proceedings: High Level Conference on the Future of the European Court of Human Rights*, 45.
[441] R Moorhead (2007), 406.

accept or reject individual cases. However, in terms of the policy discourse, like the *Strasbourg-as-constitutional court* model, the idea that the Court should filter its caseload with any 'degree of flexibility and without excessive formalism,' has been driven into the margins of Convention reform.[442] For the overwhelming majority of Council of Europe functionaries and state representatives – Strasbourg has no business in being non-formalistic and responsive in deciding whether or not to accept cases for full review.

Conclusion: policy debates and administrative justice

It has become a characteristic rhetorical move of proponents of individual justice to claim that embracing constitutional justice represents 'sacrificing justice for the sake of efficiency.'[443] Reflecting on the official debates on Convention reform, Greer and Wildhaber borrow the trope, arguing that official debates on Convention are unprincipled and only pragmatic. While the reform process has been 'dominated by official papers churning over largely the same "shopping list" of possible procedural and institutional reforms,'[444] they argue, the academic discussion has been marked by 'more serious and thorough attempts' to:

> to identify the core contemporary functions of the Strasbourg process given the seismic changes in the wider European context since the end of the Cold War; to diagnose the central problems; and to identify coherent and integrated frameworks within which detailed reforms could be conceived and implemented.[445]

The evidence marshalled here suggests that both diagnoses are mistaken. The official reform should not be understood as merely pragmatic or unprincipled. While recent debates have been strongly outcome-oriented, this consequentialist focus should be seen in the context of a principled commitment to a bureaucratic account of the administrative justice

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[442] *Khashiyev and Akayeva v. Russia* Apps no 57942/00 and 57945/00 (ECtHR, 24th February 2005)(judg.), para 117.
[443] K Altiparmak (2009) 'The European System for the Protection of Human Rights in Crisis: The End of the Road?' *Journal of European Criminal Law* 3(4) 5 – 23, 14.
[444] S Greer and L Wildhaber (2012) 'Revisiting the Debate about "constitutionalising" the European Court of Human Rights' *Human Rights Law Review* 12(4), 655 – 687, 659.
[445] *Ibid*, 662.

of admissibility decision-making, emphasising ‘accurate’ and ‘cost effective’[446] implementation of ‘clear-cut’ admissibility ‘criteria of an objective character capable of straightforward application.’[447] One may disagree with Convention reformers that admissibility decision-making ought to be approached and designed in this fashion, but the claim that a competing conception of justice is wrong – or produces undesirable outcomes – should not be confused with the argument that, by dissenting from your perspective, your opponent offers no coherent, principled, and potentially defensible vision at all.

As the evidence marshalled in this chapter shows, the official debates’ failure to embrace a constitutionalist model of docket-filtering is not, as Greer has argued, because of indifference to the idea of empowering the Court to pick-and-choose its cases, nor is it attributable to a lack of vision on the part of reformers. Although not uncontested in recent treaty renegotiations, the data shows that official debates have been characterised by the coherence of their vision for admissibility decision-making as a ‘rigorous and uniform’ exercise, involving the application of ‘clear, consistent’ norms to cases.[448] This *Strasbourg-as-bureaucratic* model is deeply entrenched, both as a matter of principle, but also as an understanding of how the Court currently operates. For most Convention reformers, the Court is and should be understood as a judicial ‘factory’ *a limine.*[449] In 1983, Mashaw described the emergent right to participate in American administrative law as entailing the ‘judicial redesign of administrative processes in the image of the judiciary.’[450] The Strasbourg reforms, by contrast, have demanded the administrative redesign of the admissibility process while preserving the *image* of judicial decision-making.

This analysis of the administrative justice values which have played out in the Convention reform debates underline that one of the major insights and strengths of Mashaw’s analysis is ‘to show that aspects of the models can, and do, co-exist though possibly in competition

[446] J Mashaw (1983), 25.
[447] Council of Europe (2004) *Explanatory Report to Protocol No. 14*, § 79.
[448] T Jagland, Secretary General of the Council of Europe in Council of Europe (2010) *Proceedings: High Level Conference on the Future of the European Court of Human Rights* 12, 14.
[449] P Mahoney, quoted in R Wolfrum and U Deutsch (eds) (2009) *The European Court of Human Rights Overwhelmed by Applications: Problems and Solutions*, 48.
[450] J Mashaw (1983), 4.

or tension.'[451] In contrast with Mashaw, however, in Convention reform, we do not find the 'internal logic' of any one of our models straightforwardly driving 'the characteristics of the others from the field.'[452] The situation is more nuanced. The *Strasbourg-as-court* model has, in one sense, been stoutly defended in recent Convention reforms. Since it was established during the *merger phase* in 1998, the Court's 'fully judicial' responsibility for decision-making has been maintained against all critics -- though reformers express few expectations of an adversarial procedure being adopted at the admissibility phase. Subordinated to the bureaucratic account of the admissibility criteria, the demand has been for more decisions, made more rapidly, with fewer procedural stages: a vision of decision-making which is bureaucratic in form, but a judicial responsibility. While the involvement of Registry staff has been increasingly recognised in the Convention, characteristically, treaty-amendment has lagged behind and tended to codify procedural innovations which have already been implemented and the balance between judicial and administrative competencies which have already been struck *de facto*. Rhetorically at least, "fully judicial" admissibility decision-making remains formally enshrined in the Convention. The extent to which the Court's working practises reflect these ideals has only been touched upon in passing in recent Convention renegotiations. The next two chapters consider the evidence more systematically. But in principle, the policy discourse represents a compromise between the *Strasbourg-as-court* and *Strasbourg-as-bureaucratic* visions of administrative justice.

This dominant bureaucratic but judicial vision of 'good administration' does not ignore or neglect ideas of investing judges with greater and more explicit professional responsibility to set the institutional agenda, or to approach the admissibility criteria flexibly to accommodate the needs of litigants in difficult circumstances: it is inimical in principle to either, less formalistic, approach to filtering the docket.[453] This principled rejection of constitutionalism in official debates may be understood as an expression of the wider mistrust of and 'increasing political antipathy towards the Court from a variety of Member

[451] R Sainsbury (2008) 'Administrative justice, discretion and the "Welfare to Work" project' *Journal of Social Welfare and Family Law* 30 323 – 338, 325.
[452] J Mashaw (1983), 23.
[453] S Halliday (2004), 115.

States.'[454] Representing admissibility as technical by-the-book bureaucratic work, rather than flexible agenda-setting, contributes to quelling the anxieties of national governments about the Court's perceived politicisation. In defence of the constitutional model, Greer and Wildhaber have defended empowering the Court to select cases against claims that it 'would make the selection of cases for adjudication at Strasbourg, pragmatic, unprincipled and unpredictable,' on grounds that 'the same criticisms could be laid at the door of every constitutional or supreme court in every member state of the Council of Europe, yet no one would seriously do so' - their implication being, that if national apex courts apply similar principles to their dockets, and are perceived as legitimate, Strasbourg could and should be similarly trusted.[455]

The evidence of the official debates suggests this claim cuts against the mistrustful grain of recent Convention reform, and overlooks the strategic utility of the Court projecting a formalistic image of its *a limine* work. The bureaucratic representation of admissibility decision-making is both a shield against Member State mistrust, and a sword to justify the mass disposal of cases while attributing primary responsibility for that outcome onto applicants themselves. The competing judicial and bureaucratic administrative justice values have been coordinated – perhaps unconsciously – by Convention reformers to produce an instrumentally convenient and normatively defensible explanation of the Court's practices and outcomes. The allegedly bureaucratic character of the admissibility norms redistributes responsibility to applicants for the high level of unsuccessful cases. The insistence that decision-making is judicial ensures that this outcome may be legitimated by appealing to judicial ideas of fair proceedings.

Given the predominant, negative construction of applicants, it is unsurprising that since 1998, arguments rooted in the *Strasbourg-as-tribunal* model have been employed only defensively to resist the introduction of additional formality and cost into Convention litigation. The *status quo* has gone uncritiqued against the same criteria. Given the preponderant bureaucratic account, the direction of travel in Convention reform has been

[454] F de Londras (2013), 38.
[455] S Greer and L Wildhaber (2012), 661.

towards greater formalism, not less.[456] Explicit recognition of the situation of indigent applicants and the barriers they face in taking successful European human rights cases are otherwise missing from the debate about institutional design, with concerns about the practical and effective accessibility of the Court's jurisdiction, subordinated to the overwhelming demand for efficiency savings to accelerate negative decision-making and cut back the roll of pending cases.

As the subsequent three chapters show, however, examining different dimensions of the Court's work reveals different representations of the justice of the admissibility phase in the Court's working practices and in its admissibility jurisprudence. Both of these different subsets of data reflect strikingly different – and incompatible – trade-offs and tensions between the four conceptions of administrative justice which have been analysed in the reform debate. Examining Strasbourg's Court's case-processing practices reveals that the idea that admissibility decision-making is 'a real and comprehensive judicial process' has become increasingly mythological, with bureaucrats gradually acquiring the pre-eminent responsibility for filtering the Court's docket.[457] Examining the Court's admissibility jurisprudence, by contrast, suggests that the *Strasbourg-as-tribunal* model is alive and well in the Court's case-law, suggesting that the admissibility criteria should be understood in a 'flexible', and be 'liberally applied.'[458] It is to the evidence of the Court's working practises, and the administrative justice values they express, that I now turn.

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[456] A Tickell (2015) 'More "efficient" justice at the European Court of Human Rights: but at whose expense?' *Public Law* 206 – 214.
[457] http://www.coe.int/t/dghl/standardsetting/conferenceizmir/Speeches/Speech%20Denmark.pdf last accessed 04.07.2011, 1.
[458] N Simonsen (2013); C Cojocariu (2011), 693.

5. Strasbourg-level bureaucrats: The myth of fully judicial justice and the European Court's pre-judicial docket-filtering

Robes, bundled briefs, a raised bench, oral submissions by advocates in public, adversarial proceedings, judgments: in costume, output and ritual, the image projected by Strasbourg situates the institution firmly in the broader family of courts. The Court's webcasting service, broadcasting its hearings online, distributes this image internationally. Photographs of European judges behind their benches in professional attire accompany media and press reports on the Court's work and festoon the institution's official publications. National supreme, constitutional and appellate tribunals refer to its fundamental rights jurisprudence, taking the institution's judicial character for granted. Although bearing the stamp of Strasbourg's collegiate style of deliberation and reasoning, students of that jurisprudence find texts in many respects comparable to those produced by the domestic appellate judiciary, considering submissions, determining objections, and reaching legal conclusions. Even Rumpole of the Bailey has 'taken a case to Strasbourg,' having his case heard by the Court after the unprecedented, fleeting period of a single year.[459] All of these details fashion a powerful image of the European Court as a distinctively judicial decision-making institution.[460]

In the light of these widely-circulating images and understandings, to argue that the Court's decision-making has become pre-eminently bureaucratic in practice, marginalising judicial

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[459] J Mortimer (1996) *Rumpole and the Angel of Death* (Bath, Chivers Press).

[460] On the importance of judicial architecture, ritual and imagery, see generally L Mulcahy (2010) *Legal Architecture: Justice, Due Process and the Place of Law* (London, Routledge).

participation in most of the institution's decision-making, may seem intuitively implausible. It is also at odds with the dominant understanding of the cornerstone principle of individual petition, consistently affirmed by every Council of Europe reform process since 1994. As chapter 4 recounts, judicial responsibility for the adjudication on each case submitted to the Court is a hard-won and hard-defended treaty commitment. The text of the Convention is explicit: formal responsibility for decision-making, whether on admissibility or the merits, lies only with the elected judges of the Court. The idea that any decision-making power should be conferred on the officials of the Registry at the admissibility decision-making phase remains politically unacceptable to the majority of state delegations, NGOs and commentators. The proposal gained no traction and generated little serious debate in the Interlaken-Izmir-Brighton reform process culminating in Protocol No. 15 in 2013.[461] At the level of imagery, policy and law, the Court's judicial credentials appear unquestionable.

But much is missing from this compelling judicial picture. Influential and much cited though many of the Court's judgments undoubtedly are, across the piece, these represent only a very small percentage of the institution's decisions.[462] Hearings, although the most visible form of the Court's work, are held only in a vanishingly small minority of cases. Over the last decade of the Court's permanent operation, in no year did the number of oral hearings conducted in Strasbourg climb over 32, while tens of thousands of cases – and hundreds of thousands, over the decade – were decided.[463] Judges have few occasions to don their gowns: hearing days are precious, rare dramatisations of the institution's official judicial character. This significance is reflected in the behavior of Court staff, who smarten up their dress for these moments, putting their best public face forward on days when the Court formally sits.[464]

On the other side of the bench, only a tiny number of applicants actually follow Rumpole and *take* their case to Strasbourg, enter the courthouse, or receive a hearing. Most send

[461] Steering Committee for Human Rights (2003) 'Contribution of the French Delegation' CDDH-GDR(2003)034 (Strasbourg, 4 November 2003), para 2.
[462] Detailed data on this point is set out in chapter 1.
[463] European Court of Human Rights (2001 – 2013) *Annual Report of the European Court of Human Rights* (Strasbourg, Council of Europe).
[464] Personal communication with former Registry employee.

their submissions by post, and receive their negative answer in the same form. The postbox and the postman are the primary mediators between Strasbourg and most of its applicants. In 1994, Schermers employed the metaphor of an iceberg to describe the Court's work: 'only a little tip is visible to the outside world; the great mass remains hidden under water.'[465] This imagery remains apposite. Above the waterline, the Court's judicial characteristics are taken-for-granted. These characteristic judicial symbols and activities remain an important *part* of the Court's work, but are a deceptive guide to what is going on, deeper in the institutional permafrost. It is at this level, this chapter argues, that Strasbourg has quietly bureaucratised its docket-filtering over the last fifteen years of its permanent operation.

Strasbourg's creeping bureaucratisation

This chapter focuses on the Court's pre-judicial and administrative decision-making on individual applications. Digging beneath the claim that Strasbourg's decision-making is 'fully judicial' in character, I explore (a) how these extra-judicial filtering processes have changed since the Court was invested with responsibility for docket-filtering in 1998 (b) the shifts in administrative justice thinking undergirding these changes, and (c) the extent to which they have empowered Registry bureaucrats to take a decisive view of individual cases. In this chapter, I look beyond the black-letter rules enshrined in the Convention and analysed in chapter 3, focussing instead on the overlooked empirical evidence about the Court's evolving working practices. Drawing on internal Court documents and to a much more limited extent on conversations with former Registry staff, I explore the docket-filtering practices and standards, above and beyond the admissibility criteria and procedures enshrined in the Convention, which they have introduced.

Academic and official debates on Convention reform have showed considerable reluctance to explore the detail of the Court's evolving practices of work. There is some warrant for de Londras' suggestion that 'questions of practicality that have dominated the Interlaken,

[465] H G Schermers (1994) 'The Eleventh Protocol to the ECHR' *European Law Review* 19 367, 370.

Izmir and Brighton conferences.'[466] However, as chapter 4 shows, this is largely a *ends* discourse – more cases should be rejected more rapidly - and not generally a discussion about the practical *means* of doing so – what specific reforms to its working practices has, could and should the Court adopt to achieve those ends? The Court's efficiency and effectiveness have been a core concern of diplomatic policy debates. Decreases in the institution's backlog of pending cases and increases in the volume of cases disposed as inadmissible have been consistently welcomed at the Council of Europe's reforming conferences over the last decade and a half. But even at the level of standing Council of Europe committees, charged with reviewing the detail of Court reform on an ongoing basis, few participants express much interest in *how* the institution realises these outcomes, concerned only that they were achieved, that the tribunal's backlog is falling, and that more cases are being rejected as inadmissible more rapidly.

Legal analysts have also largely overlooked the significance of these changes to the Court's working practices. Reflecting doctrinal approaches to the analysis of legal institutions, most monographs in European human rights law limit themselves to restating the judicial decision-making protocols provided for in the Convention. The dominant construction of these reforms as 'technocratic issues of judicial housekeeping' in the literature has encouraged the view that these changes are uninteresting, divorced from substantive issues of institutional design, and may safely be ignored in studies discussing the Court's functions.[467] Only Dembour, in an article in 2002, has critically examined changes to the Court's working practices, and their implications for wider debates about the institution's functions and legitimacy.[468] This neglect is problematic. As chapter 4 shows, policy debates about the values which ought to inform Convention reform, and the purposes which the Court should strive to serve, mobilise not only normative arguments, but assumptions about how the Court does and could operate. An analysis of the Court's approach to docket-filtering which focuses exclusively on the text of the Convention to understand the process

[466] F de Londras (2013) 'Dual Functionality and the persistent frailty of the European Court of Human Rights' *European Human Rights Law Review* 38, 38.
[467] L R Helfer (2008) 'Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime' *European Journal of International Law* 19(1) 125 – 159, 127.
[468] M Dembour (2002) '"Finishing off" cases: the radical solution to the problem of the expanding ECtHR caseload' *European Human Rights Law Review* 604.

overlooks critical data about the role of bureaucrats and the impact of administrative filtering criteria on the fate of cases and the nature of the Court's current practices for sifting its caseload. This reliance on mistaken empirical assumptions, and the failure to support normative analysis with socio-legal research, has coloured much of the debate in the literature about institutional design. This chapter addresses this lacuna.

Strasbourg-level bureaucrats: the Court's expanding bureaucracy

The Registry of the Court is structured along traditionally bureaucratic, hierarchical lines. Its budget for 2014 is €67,650,400.[469] Its most senior official, the Registrar, is appointed by the plenary Court, along with one or more Deputy Registrars.[470] Under this pyramidal leadership structure, the Court is arranged into five administrative Sections, consisting of a President and Vice-President (both judges) and seven additional judges, allocated to achieve a geographical and gender balance.[471] Each of these Sections has a Section Registrar and Deputy Section Registrar, both senior Registry lawyers, employed on a permanent, full-time basis. Its lawyers are divided into thirty-one case-processing divisions, each supported by an administration team. In order to limit the replication of work, to make best use of Registry lawyers' expertise, and eliminate the need for the applicant's submissions to be translated, the Registry's work on admissibility decision-making is structured along geographic lines, with lawyers working on applications originating from their home jurisdiction, drawing both on their knowledge of the respondent State's legal system, and the language used in the application. In January 2011, the Court introduced a new centralised filtering Section, to examine applications lodged against the countries with the highest count of cases: Russia, Turkey, Romania, Ukraine and Poland.[472]

[469] European Court of Human Rights (2014) *How the Court Works* http://www.echr.coe.int/Pages/home.aspx?p=court/howitworks.
[470] An assembly of all of the Court's judges. It has no jurisdictional function, and decides no cases, but elects the President of the Court, adopts the Rules of Court, amongst other functions.
[471] European Court of Human Rights (2014) Organisation Chart http://www.echr.coe.int/Documents/Organisation_Chart_ENG.pdf.
[472] Registrar of the Court (2011) 'Filtering Section speeds up processing of cases from highest case-count countries' www.echr.coe.int/Documents/Filtering_Section_ENG.pdf.

Registry staff have none of the characteristics of personal judicial servants, and most lack intimate, personal working relationships with judges of the Court. This disconnection is underlined by the fact that judges have no significant role in the appointment of Registry employees, who are engaged not by the Court, but by the Council of Europe which furnishes their salaries. The appointment process for recruiting the Registry's legal staff – competitive public examination based on specialised knowledge of European human rights law – eliminates any exercise of judicial preferences in the selection of Court employees. Although subject in an abstract sense to the authority of the plenary Court, Strasbourg officials are line managed not by judges, but by senior lawyers in the secretariat. The importance of bureaucratic values in the organisation of Registry work is reflected in official characterisations of its activities. In its accounts of the work of its bureau, the Court repeatedly emphasises that its bureaucrats 'do not themselves decide cases' but only provide 'legal and administrative support to the Court in the exercise of its judicial functions.'[473] While the work of clerks and judicial assistants in other constitutional courts is characteristically discussed in terms of meeting the perhaps idiosyncratic demands, personal style and expectations of the judges for whom they work, as courtiers or apprentices, the Registry's labour is characteristically represented employing industrial, mechanised metaphors of mass production.[474]

Today, the Registry currently employs around 640 staff, of which around 270 are legal professionals with an additional 370 support staff, including translators, secretaries, administrators, IT support, public relations staff and archivists. The most up to date Registry figures show that at the beginning of September 2010, 256 full-time case-processing lawyers were employed by the Registry, of which 120 (47%) were 'assistant lawyers' on time-limited contracts of at least one, and up to four years in duration.[475] These

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[473] European Court of Human Rights (2010) *Annual Report 2009*, 16.
[474] A Ward & D L Weiden (2006) *Sorcerers' Apprentices: 100 Years of Law Clerks at the United States Supreme Court* (New York, NYU Press; T C Peppers (2006) *Courtiers of the Marble Palace: The Rise and Influence of the Supreme Court Law Clerk* (Stanford, Stanford University Press); T C Peppers and A Ward (eds) *In Chambers: Stories of Supreme Court Law Clerks and Their Justices* (Virginia, University of Virginia Press); T Nesterchuk (2013) 'The View from Behind the Bench: The Role of Judicial Assistants in the UK Supreme Court' in A Burrows, D Johnston and R Zimmerman (eds) *Judge and Jurist: Essays in Memory of Lord Rodger of Earlsferry* (Oxford, OUP).
[475] Registry of the European Court (2010) 'The Single Judge Procedure – Presentation of Registry for GDR meeting of 15 September 2010' in Committee of Experts on the Reform of the Court (DH-GDR) (2010)

positions are limited to those who have qualified in law in their national jurisdiction, and are open to all law graduates with an adequate command of the official languages of English or French. Recruitment is by competitive written examination.

Assistant lawyers are expected to work within their own language, in cases emanating from their own legal system. They are the primary workhorses of admissibility decision-making. Registry estimates suggested that as much as 65% to 75% of their working time is spent preparing cases for summary disposal as inadmissible.[476] Each assistant lawyer is expected to deal with 400 to 500 such cases per year.[477] In addition to its full-time assistant lawyers and permanent legal functionaries, there is also evidence that just-qualified law students from across Europe on even shorter-term, unremunerated three-month traineeships in the Court's legal division (*stagiaires)* are involved in admissibility decision-making in single judge cases.[478] The evidence suggests that *stagiaires*' involvement is extensive, forming:

> a regular part of the admissibility process, drafting arguments for rejection of applications and, provisionally, applying the 'manifestly ill-founded' label to cases. This was ostensibly standard practice, as was allocating to *stagiaires* petitions that originated from their own home state.[479]

Paralleling the Court's escalating caseload, the scale of the Court's bureaucracy has expanded significantly since 1998. As the number of incoming applications varies significantly between states, (and has changed significantly over time) the number of Registry staff who are nationals of each state is often a good indicator of the current scale of litigation emanating from that country, and the shifting trends in Strasbourg litigation. Significantly, the Court's case-filtering staff is much more substantial than the constitutional courts which Strasbourg is often compared to, and much more strongly identified with bureaucratic values of functional specialism, super and subordination of

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Report 4th Meeting 15 – 17th September 2010 DH-GDR(2010)017, Appendix III; European Court of Human Rights (2009) *Information on the Assistant Lawyers Scheme*, 3.

[476] *Ibid.*

[477] *Ibid.*

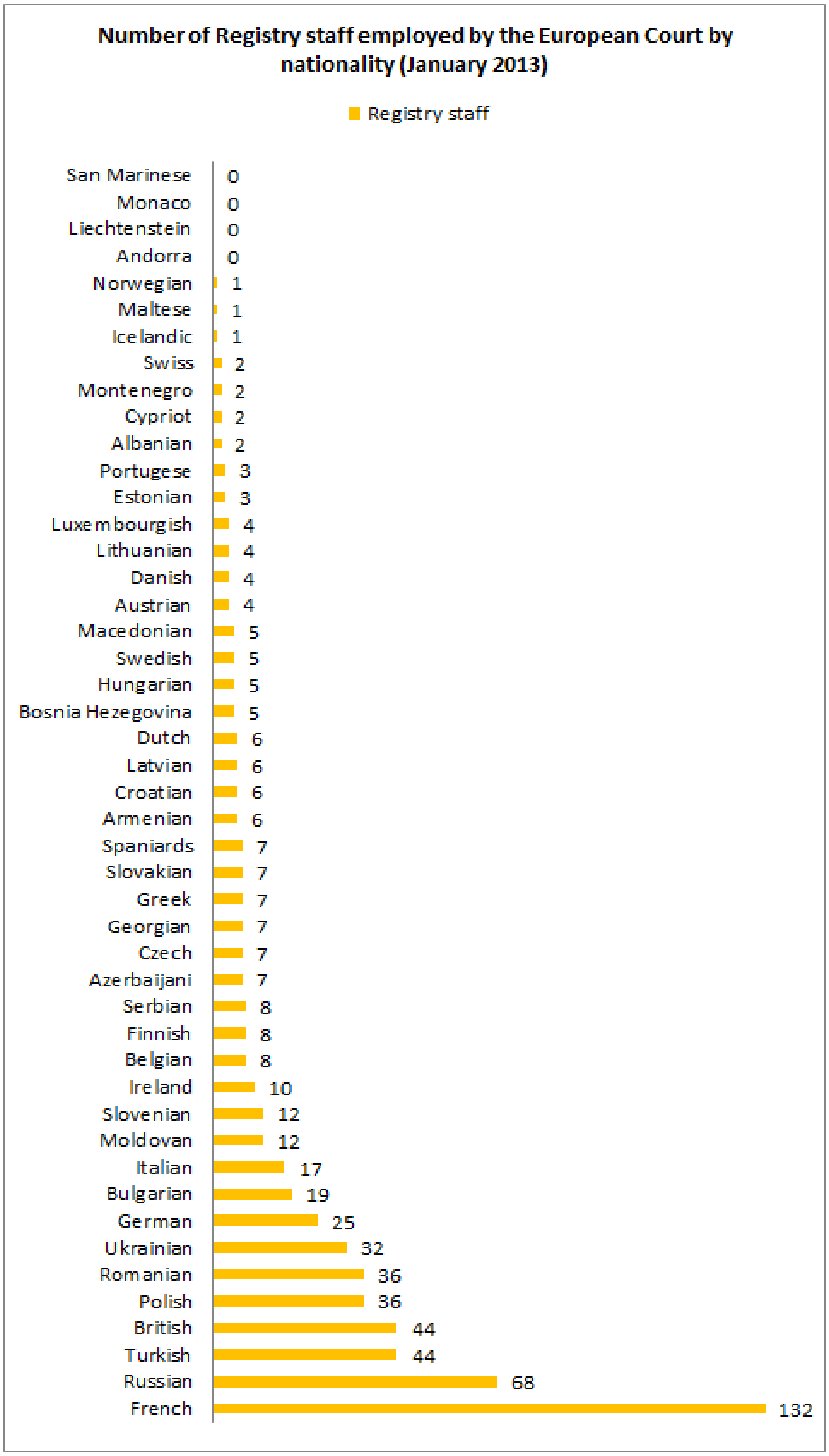
[478] B Jones (2012) 'European Court of Human Rights: is the admissions system transparent enough?' *UK Human Rights Blog* http://ukhumanrightsblog.com/2012/01/27/European-court-of-human-rights-is-the-admissions-system-transparent-enough-ben-jones/ last accessed 01.02.2013.

[479] *Ibid.*

staff in hierarchical relationships. For example, the work of the UK Supreme Court is supported by a slight administration and only a small percentage of these staff contribute to the substance of the Supreme Court's leave to appeal decision-making. As of March 2013, on top of its twelve judicial personnel, the UK Supreme Court employed 47 staff, of which 39 were permanent, and seven temporary employees.[480] Of these, just 28 are employed in the Court's registry, including twenty full-time officials operating as Registrar, justices' secretaries, costs clerks, listing managers, administration officers and court ushers and messengers. A further eight individuals are employed as judicial assistants, seven on a temporary and one on a permanent basis.[481] These are the only officials participating in the Supreme Court's substantive decision-making.

[480] Constitutional Reform Act 2005, s 23(2); UK Supreme Court (2013) *Annual Report 2012-13*, 56.
[481] UK Supreme Court (2013) *UKSC and JCPC Organisational Chart* 9th September 2013 accessible at www.supremecourt.gov.uk/docs/oranagram.pdf last accessed 04.01.2014.

Figure 5.


Number of Registry staff employed by the European Court by nationality (January 2013)
Registry staff
San Marinese 0
Monaco 0
Liechtenstein 0
Andorra 0
Norwegian 1
Maltese 1
Icelandic 1
Swiss 2
Montenegro 2
Cypriot 2
Albanian 2
Portugese 3
Estonian 3
Luxembourgish 4
Lithuanian 4
Danish 4
Austrian 4
Macedonian 5
Swedish 5
Hungarian 5
Bosnia Hezegovina 5
Dutch 6
Latvian 6
Croatian 6
Armenian 6
Spaniards 7
Slovakian 7
Greek 7
Georgian 7
Czech 7
Azerbaijani 7
Serbian 8
Finnish 8
Belgian 8
Ireland 10
Slovenian 12
Moldovan 12
Italian 17
Bulgarian 19
German 25
Ukrainian 32
Romanian 36
Polish 36
British 44
Turkish 44
Russian 68
French 132

The number of French nationals employed by the Court represents an extreme outlier, arguably only reflecting the fact that the tribunal is based in Strasbourg, has French along with English as one of its two official languages, and may accordingly recruit most of its support staff from the local population. The Court also employs more British nationals than might be expected, given the percentage of its docket which emanates from the United Kingdom, but again, this may reflect linguistic influences in terms of recruitment.

This official data is not disaggregated by the nature of the nationals' employment by the Court. However, it is reasonable to deduce that, given the Registry's primary responsibility for analysing case-files in the national language and composing draft decisions for judges, where the Court employs only a few nationals from a member state, most if not all of these employees are likely to be lawyers, rather than administrators or IT support. This is significant from the point of view of admissibility decision-making, as it suggests that in practice, only a handful or even a single Registry lawyer will be responsible for filtering every application emanating from their member state (for example, from the 2013 figures, the Court employs only a single Norwegian national).

In 1993, the Commission employed around 80 staff, of which 45 were legal professionals, arranged into two Applications Divisions.[482] By 1998, and Protocol No. 11's reforms, the Court employed around 260 staff, doubling to 521 employees in 2005, with a further 30% increase to just under 700 employees in 2012.[483] By contrast, between 1998 and 2013, the number of judges on the Court has increased by just 17.5%, from 40 to 47 members. As Strasbourg's caseload has increased, the institution has met and addressed that expansion by expanding its bureaucratic staff. Of itself, this poses questions about the balance of decision-making responsibility between the Court's judges and functionaries. If the caseload crisis has been effectively met by significant expansions in the Court's administrative wing, while the institution's judicial resources have stagnated, what implications has this had for the supposedly fully judicial character of Strasbourg's proceedings? To answer that question, we must turn to the role played by these Registry

[482] T Zwart (1993) *The Admissibility of Human Rights Petitions*, 29.
[483] H Woolf (2005) *Report on the Working Methods of the European Court*, 11; European Court of Human Rights (2013) *Annual Report* 2012.

lawyers in the docket-filtering process. Chapter 6 considers the role of these functionaries in the admissibility decision-making itself. The next section homes in on the most neglected corner of a neglected field of data: bureaucratic decision-taking at the pre-judicial phase of Strasbourg proceedings.

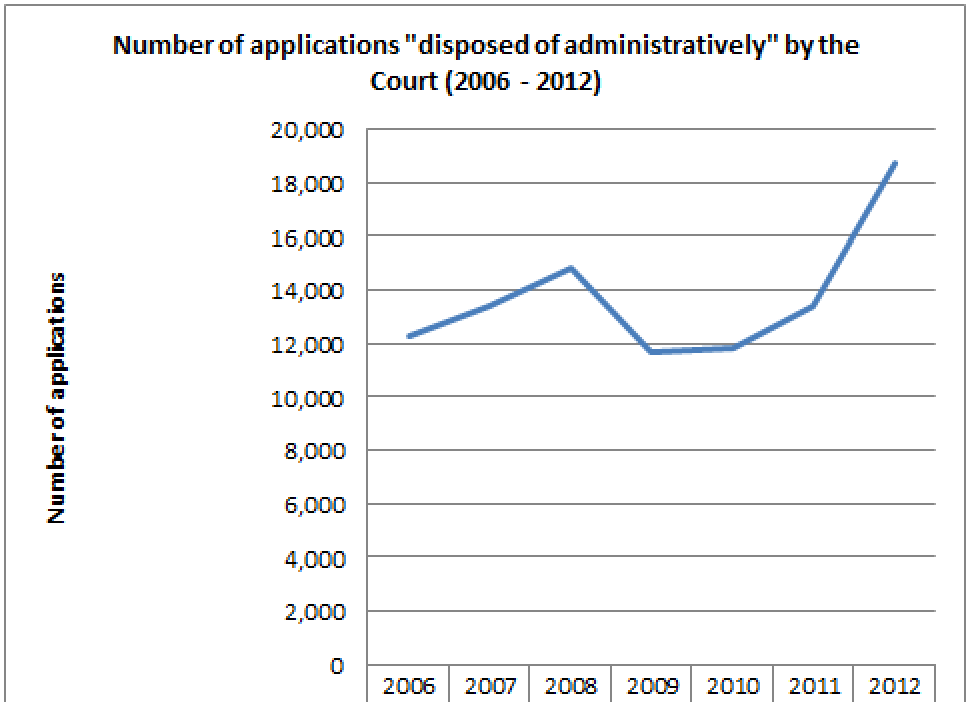
The puzzle of a pre-judicial phase in a "fully judicial" process

The 'administrative disposal' of applications without any judicial examination has not generally been understood as a substantive decision-making stage of Court's docket-filtering process. It is characteristically left out of legal accounts of the Court's approach to processing its case-load and Strasbourg publishes only very limited statistical data about the total number of cases closed each year on this basis. But to overlook this phase of proceedings is to fail to notice a significant number of the Court's (but not its judges') decisions and an important evolving and normatively problematic site of bureaucratic authority for filtering the Court's docket, against uncertain criteria, where judicial input is minimal to nil.

A very substantial number of cases are closed each year on an 'administrative' basis. The Court has only published data on the number of applications it 'disposes administratively' since 2006, but between 2006 and 2012, administrative disposals represented just under a quarter of the institution's total judicial and non-judicial decisions and judgments.[484]

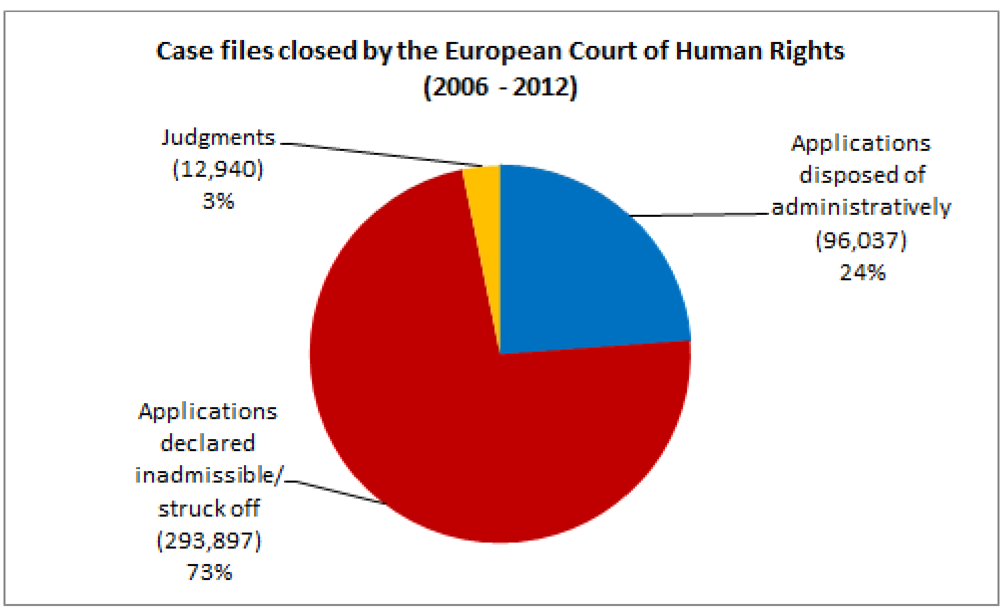
[484] European Court of Human Rights (2007) *Annual Report 2006*.

Figure 6.



	2006	2007	2008	2009	2010	2011	2012
Applications "disposed of administratively"	12,274	13,413	14,800	11,650	11,800	13,400	18,700

Figure 7.



In its official publications, the Court suggests that cases 'disposed of administratively' consist of petitions introduced but 'not pursued', where 'applicants fail to follow up on their initial correspondence with the Court' and are taken to have lost interest in pursuing their litigation.[485] A closer examination of Strasbourg's working practices shows that this is a considerable simplification. The official account of the fate of these cases emphasises *applicants'* decisions to discontinue their litigation. In reality, the Court's bureau plays and has played an active and expanding role in discouraging applicants from persisting with cases, and more controversially, rejecting *pursued* cases at this pre-judicial stage. The characteristics of this administrative phase have evolved significantly since 1998, but the changes may be aggregated into three main periods: 1998 to 2002, 2003 to 2013, and 2014 to date. The transitions are strongly influenced by shifting conceptions of administrative justice.

The pre-judicial phase (1998 – 2002)

In November 1998, the Court adopted practices and Rules of Court respecting admissibility procedures which were 'mainly based' on the Rules of the Commission.[486] This initial continuity was underlined by the merging of the bureaus of the two bodies. Taking over responsibility for admissibility decision-making under Protocol No. 11, the Court continued to distinguish between (a) 'provisional applications' and (b) 'registered applications' which required a decision from the Commission (and subsequently, the Court) on their admissibility. Bureaucratic influence, and the administrative interpretations of the admissibility criteria, exercised a significant influence in the gap separating provisional correspondence and registration. Having received initial correspondence from an applicant, Registry lawyers responded by despatching the Court's *pro forma* application form (form 'PO') soliciting key information about the case.[487]

As chapter 7 further examines, an applicant's failure to return this form in a timely fashion could result in the Court 'reconsidering the date of application' under Article 35 of the

[485] European Court of Human Rights (2013) *Analysis of Statistics 2012*, 6; Council of Europe (2007) *Council of Europe Activity Report 2006*, 40.
[486] Working Party on Working Methods (2002) *Three Years Work for the Future*, 9.
[487] European Court of Human Rights (1998) *Rules of Court*, Rule 47.

Convention. Where applicants returned completed copies of this form, Registry lawyers were obliged as a matter of policy to draft a 'P2' or 'warning letter', which made 'specific warnings as to possible obstacles to the admissibility' of the application.[488] These letters were based on the Registry's interpretation of the admissibility criteria: no judges were directly involved in their formulation. Cases were not registered until a third letter from the applicant was received, ignoring the Registry's warnings and insisting on official registration and a judicial decision. Here, the case-lawyer either (a) gave instructions to the unit secretariat that the application should be registered or (b) 'as a rule' drafted the Committee decision with the *rapporteur's* note, consisting of a single-page 'summary of facts, complaints and reasons for inadmissibility,' forwarding these materials to the Committee's judge *rapporteur* for allocation to one of the Court's decision-making formations.[489]

From the perspective of domestic constitutional or trial and appellate civil courts, the bureaucratic practice of issuing warning letters on the substantive issues to be determined by the litigation might be regarded as an inappropriate administrative usurpation of judicial functions. Few would, for example, regard it as acceptable to make the registration of an application for commencing litigation, or seeking leave to appeal, contingent on a bureaucrat's legal analysis of the case, and a third article of correspondence, rejecting their assessment and nevertheless insisting on registration. In practice, the confident and well-advised applicant may be unlikely to be dissuaded by such measures. The unrepresented applicant, unfamiliar with the Court's practices and its jurisprudence, by contrast, may be less likely to press their cases against the official, but administrative, view.

The evidence suggests that a great many applicants were dissuaded from persisting with their cases at the pre-judicial stage when the Registry warning letter regime was in operation. Between 1999 and the end of 2001, the Court opened 78,344 provisional files. In the same period, it registered just 32,724 cases, representing less than half of all cases lodged. It is not possible on the basis of the available statistics decisively to isolate the influence which these warning letters exercised. The gap between provisional and

[488] *Ibid*, 76.
[489] Working Party on Working Methods (2002) *Three Years' Work for the Future*, 77.

registered cases is not disaggregated by the *stage* at which cases were dropped. Was it before or after the Registry had been sent out its warning letters, or did the majority of applicants lodge initial correspondence and nothing thereafter? We can only make informed guesses. It may be significant, however, that the gap between opened files and registered cases during this period is substantially larger than the percentage of cases *currently* disposed of administratively by the Court, despite the institution's far more substantial docket today. Between 2006 and 2012, only 24% of the Court's applications ended at the pre-judicial phase. Between 1998 and 2002, the equivalent figure was 58%.

These figures afford a clear impression of the extent to which the Court's bureaucratic practices funnelled a very substantial percentage of cases away from judicial attention. Administrative understandings and interpretations of the admissibility criteria were the critical tool in this shadow filtering exercise. The texts of these warning letters are not preserved in the Court's archive. As such, it is not possible to determine whether the Registry's legal analysis was creative or conservative, conforming to bureaucratic expectations of predictability and uniformity, or whether officials made more audacious judgements about the merits of cases, departing from and elaborating upon the admissibility jurisprudence on the Commission and Court. These are problematic missing pieces of the puzzle.

At the normative level, however, a bureaucratic rational understanding of the admissibility criteria was of the essence in rendering these administrative practices defensible. It is difficult to think of another court paralleling this practice, where commencing judicial proceedings is made contingent on rejecting an unsolicited administrative determination of the merits your case by an official. It is difficult to conceive of how such a practice might be justified, where the criterion for admissibility being applied was a flexible one relying on the exercise of judgement, such as the UK Supreme Court's test that the appeals it hears should raise an arguable point of law of general public importance. While not eliminating every objection of principle to this practice, the appeal to the classical, Weberian conception of the bureaucrat, applying well-settled standards to 'clear cases', understood to have ‘inevitable outcomes’, removes some of their sting.[490] As Sainsbury has noted of the bureaucratic model of administrative justice, the key justification for the bureaucratic vision of just decision-making – accuracy – is premised not on the status or qualifications of the decision-maker, or the adversarial character of the procedure employed to reach conclusions, but on their *accuracy* and the idea that judge or functionary, the analysis and decision would be the same. Framed in this way, the Registry lawyer is not understood to be exercising judgement in reviewing the admissibility of cases, but merely anticipating inescapable judicial conclusions. The logic recalls Secretary General Davis’ observation: you do not ‘need a judge in order to count to six.’[491]

Chapter 7 critically examines the credibility of this claim from a jurisprudential perspective with reference to the Court’s case-law on the admissibility criteria. For my purposes here, however, it is enough to observe that the idea that admissibility decision-making *should* be understood according to the values of bureaucratic rationality helped to justify this instrumentally convenient process of using warning letters to whittle down the Court’s docket and justify this bureaucratic activity at the pre-judicial phase. Although problematic in principle, exploiting the resource of administrative adjudication in this way quietly disposed of a substantial number of cases each year on an always-growing docket. It also kept most of them “off book,” in the sense that no formal judicial decisions were required or taken in those cases. The cases ended without a judicial decision, and apparently did so at the instance of applicants themselves, with the bureau’s intervention and decisive role elided in the official records of the Court’s work. This warning letter regime arguably inaugurated the externalisation of responsibility, from the Court to applicants, for the high recorded levels of unsuccessful cases. As the last chapter recalls, Convention reformers have subsequently built on and elaborated this depiction – much to the disadvantage of the applicants who they have structurally excluded from these debates.

These practices undermine the claim that the decision-making of the post-Protocol No. 11 Court represented ‘a real and comprehensive judicial process’ from its very beginnings.[492]

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490 Working Party on Working Methods (2002) *Three Years’ Work for the Future*, 77.
491 T Davis in Council of Europe (2007), 14.
492 D Kendal, Deputy Head of the Department of International Law, Danish Ministry of Foreign Affairs (2011) Speech at the Izmir Conference,

Although the abolition of the Commission was celebrated as completion of the work of the Convention's framers in 1950, realising a fully judicial complaints mechanism, it also heralded the beginning of the systematic bureaucratisation of the docket-filtering process. Under pressure from its burgeoning case-load, the temptations to employ the raw decision-making power of the Court's bureau to cope with the Court's docket grew more and more acute. However, even at this stage in the Court's history, the official designation of the Registry as assistants and facilitators of the Court's work – not decision-makers – is problematic, excessively formalistic and incomplete. While in a legal sense, Registry officials did not and could not decide on the *admissibility* of cases under their own authority, their interpretation of the admissibility criteria assumed a critical, but generally overlooked, role in the docket-filtering process between 1998 and 2002.

After 2002: 'more judicial' Registry working

The quality of that role was shortly to change. Faced with an influx of new cases after 1999, having initially largely incorporated the working practices of the former Commission, the Court quickly decided to review its approach to filtering its caseload. In 1999, the Court formed its Working Party on Working Methods, whose efforts culminated in series of recommendations for reform in 2002. In contrast with the reform discussions considered in chapter 4, the Working Party's membership and public consultation were very narrow. The reforms recommended by the Working Party were of significant practical importance for applicants, and of interest to the wider NGO and legal community. Despite this, the Court engaged in no official, broader civic society engagement in their formulation. Participation was limited to judges of the Court and members of its Registry. Even the *existence* of the *Three Years Work for the Future* report is generally excluded from canonical accounts of the main resolutions and reports of recent Court reform. The Working Party's recommendations are characteristically not preserved in legal archives and libraries, are not published online, and copies remain hard to come by. This lack of transparency characterises the process behind many of the internal reforms considered in

http://www.coe.int/t/dghl/standardsetting/conferenceizmir/Speeches/Speech%20Denmark.pdf last accessed 04.07.2011, 1.

this chapter. This limited circulation, and the lack of interest it expresses in soliciting wider input into the Court's internal reform process, reinforce the representation of case-handling questions as administrative 'engineering work to be deal with by reports prepared by technical experts.'[493] Given the impact which these procedural reforms may have on substantive case outcomes, however, this construction of decision-making on the reform of institutional working practices, and the Court's failure to consult on its proposals, are problematic.

The Working Party's final report proposed 'to find ways of streamlining the processing of applications and, in general, handling cases as efficiently as possible within the framework of the Convention and the Court's human and financial resources.'[494] Its proposals included rationalising the Court's rules on classifying documents and standarising the case numbers to be given to incoming applications, to providing that 'the Registry's correspondence with applicants will be reduced' in future and 'based on standard letters.'[495] This move towards the more systematic standardisation of the Court's work is a classically bureaucratic strategy to increase productivity in decision-making by routinising repetitive decision-processes, and reducing opportunities for the bureau to treat different applicants differently depending on their individual circumstances or the nature of the complaints submitted to the Court. Significantly, in addition to more functional administrative changes, this report also determined that the Court's 'processing complaints before registration should be made more judicial.'[496]

In practice, this meant the elimination of warning letters (leaving some discretion to the Registry lawyer to correspond on a personal basis with applicants about their cases), and the registration of all correspondence, however sketchy or provisional, as an application. The Working Party's understanding of the characteristics of a 'more judicial' approach to docket-filtering is not further theorised in the *Three Years Report*, but given the nature of the reforms adopted thereafter, the reference can be understood as an appeal to the

[493] K Altiparmak (2009) 'The European System for the Protection of Human Rights in Crisis: The End of the Road?' *Journal of European Criminal Law* 3(4) 5 – 23, 7.
[494] Working Party on Working Methods (2002) *Three years' work for the future: Final report of the Working Party on the Working Methods of the European Court of Human Rights*, 3.
[495] *Ibid*, 41.
[496] *Ibid*, 20.

traditional conception of the judge as a 'passive arbiter' in adversarial proceedings, who ought not to furnish legal advice to one party to litigation, arguably infringing the judge's impartiality and the principle of the equality of arms.[497] This change is a good example of the potentially confusing idea of an administrative reform according to the moral judgment (Mashaw) or adjudicative model (Adler) of administrative justice. Within my schema, it is characteristic of the Strasbourg as Court model. As Halliday observes, under these models:

> the decision-maker is traditionally unbiased and passive. In relation to the administration of disability benefits, this translates into an administrative process which is focussed on the individual claimants and his/her procedural rights. The adversarial element clearly cannot be transposed over to the context of benefits administration, but in certain respects the claimant is nevertheless treated *as if* he/she is in dispute over a rights claim. The administrative system views the claimant as someone who has come to claim a right, and revolves around giving the claimant a far opportunity to fully participate in the process of adjudicating whether the right exists is to be denied. [498]

This construction of Court as a passive judicial decision-maker has important implications. Under this conception of justice, if one party bungles their legal submissions, or is ignorant of the Convention jurisprudence, they must 'live with the consequences' of their decision to pursue the case in that fashion: the justice of the process inheres, not in ensuring that all people with a case are facilitated according to their needs, but in ensuring that parties are afforded a formally equal opportunity to participate in the decision-making process.[499]

For Strasbourg, the invocation of 'more judicial' values was employed – ironically – not to *extend* the involvement of judges in admissibility decision-making, or to facilitate greater opportunities for applicants to participate in the docket-filtering process, but in practice only to truncate Registry bureaucrats' responsiveness to applicants. The Court's judicial character was a resource inspiring administrative reform. These 'more judicial'

[497] R Moorhead (2007) 'The passive arbiter: Litigants in person and the challenge to neutrality' *Social and Legal Studies* 16(3) 405 - 424.
[498] S Halliday (2004) 118 – 9.
[499] E Russell (1999) 'And Justice for All, Including the Unrepresented Poor: Revisiting the Roles of the Judges, Mediators, and Clerks' *Fordham Law Review* 67 1987–2070, 1989.

practices did not eliminate or diminish the Registry's decision-making role, but instead only limited the circulation of its lawyers' provisional findings. Under the new dispensation, Registry staff would engage in the same analysis of an application's admissibility, but simply would not correspond with applicants to inform them about their provisional conclusions and the disposal they proposed the Court should adopt.

From the bureaucratic perspective, and a concern about the "efficient" allocation of increasingly scarce resources, the practical benefits of this 'more judicial' reform were substantial. A layer of correspondence was eliminated from the filtering process. Staff were relieved of the time-consuming duty of composing and despatching reasoned, individual legal analysis to applicants on the weaknesses, demerits or jurisdictional problems with their cases.

This construction of the relationship between applicants and the Court had other benefits for the institution. On the one hand, dispensing with warning letters eliminated an effective mechanism to keep a large number of cases off of the Court's docket, inflating the institution's backlog and exposing the Court to the legitimacy challenges this large volume of pending cases entailed. On the other hand, the adversarial logic of the Working Party's approach further underlined the responsibility to applicants for unsuccessful case outcomes *a limine*. While the to-and-fro negotiations of the warning letter system had allowed applicants pro-actively to respond to and potentially address problems with their cases which had been identified by the Registry, this 'more judicial' mode of working justified less responsiveness, emphasising instead the classical adversarial responsibilities of parties to litigation. The applicant bears the legal burden of substantiating the admissibility of their application, and if they do not do so, whether deliberately, or by ignorance, negligence, or accident, applicants must bear the cost of that failure: the passive arbiter is not responsible. The Court's skeletal bureaucracy simply lacked the resources effectively to negotiate with and be responsive to all of its applicants in the first flood of the Court's case-load crisis after 1998. The invocation of passive adjudication arguably legitimated the inevitable, and skilfully externalised the blame.

It would be naïve to imagine that the pre-2002 administrative filtering regime was necessarily any more helpful or sympathetic to the plight of applicants navigating the legal obstacle course of Strasbourg proceedings. One former employee of the Commission during the late 1990s has suggested that, if anything, the opposite was the case, and the Convention bureaucracy was inclined to construct applicants who lodged cases in informal language, without the benefit of professional legal advice, as a 'procedural efficiency issue'. Morvai concluded:

> In my experience, European Civil servants with an annual salary of approximately 100,000 US dollars (tax-free) tend to have little empathy with people who dare to submit an application to the home of European Human Rights without the services of a lawyer.[500]

The primary function of warning letters was not to advise applicants on correctable oversights in their cases, or to help solicit legal argument or evidence relevant to the admissibility of an applicant's case, but to dissuade them from persisting with petitions which Registry staff would in any case advise Commission members and subsequently judges to reject as inadmissible. For Dembour, warning letters represented a bureaucratic usurpation of the Court's judicial functions, improperly attempting to influence applicants according to administrative, rather than judicial, interpretations of the admissibility criteria. She welcomed their elimination from proceedings.[501] While their elimination may be seen to have removed one level of the bureaucracy's influence, and the Court ceased peremptorily dissuading applicants from persisting with cases, since 2002, successive and secretive reforms to the Court's working practices have continued to expand the number and range of cases which Registry staff are able to reject summarily, without reference to judges. Registry influence is undisturbed: it has just been made less visible to the external observer or participant in litigation. In some instances, embracing of the moral judgment model will entail the use of more participative procedures in decision-making, including opportunities to access and to challenge the arguments advanced by the 'other side' of the

[500] K Morvai (1998), 245 – 252, 249, 248.
[501] M B Dembour (2002) '"Finishing off" cases: the radical solution to the problem of the expanding ECtHR caseload' *European Human Rights Law Review*, 604 – 623.

dispute.[502] For Strasbourg, this shift towards the values of moral judgment altered the Court's approach to decision-making in a more unexpected fashion, arguably curtailing rather than extending applicants' opportunities to participate in the decision-making process. Ironically, the Working Party's invocation of judicial values, actually *decreased* the practical opportunities for applicants to comment on the provisional (and almost always final) Registry analysis of their case, bringing obvious errors of fact or of law to the Court's attention, and *de facto* offering the tribunal bureau an opportunity to revise its provisional designation of a case.

The adversarial quality of admissibility proceedings is practically nugatory. Then as now, the overwhelming majority of petitions are not communicated to respondent States. Then as now, most decisions are taken solely on the basis of the applicant's submissions, without the participation of representatives of the impugned State. Then as now, the greatest challenge for applicants was persuading the *Registry* that their case met the Court's admissibility requirements. The elimination of the warning letter stage merely eliminated an opportunity for applicants to contest this assessment and for the mistakes of Registry lawyers to be corrected and reconsidered. Due to the limited statistical record of the Court's work during this period, it is impossible to say for certain how many applicants were able to correct errors in this way, or insist on registration despite the Registry's hostile view, and went on to secure a favourable decision from the Court. Since 2002, the Registry's analysis of the case is not disclosed to the applicant and the recommendations of officials form no part of the official files preserved in the Court's archive. Today, even if the Registry's analysis proceeds on a manifest misconstruction of the case, either in law or in fact, there are no external avenues through which this may come to light before a decision is taken.

The influence of the adversarial logic of the Strasbourg-as-court model may also be felt in the assumptions informing Lord Woolf's subsequent (2005) review of the Court's working methods. The former Lord Chief Justice of England and Wales took the Court's judicial

[502] Cowan and Halliday note, for example, that the legal representation of an applicant requesting internal review of a decision of homelessness administration tended to transform the process into a more adversarial form.

character – and the applicability of the values of the moral judgment model to its work – as axiomatic. The first 'principle' Woolf identified, underwriting his review, was that 'it should be the responsibility of the individual applicant to complete an application form and provide all the information required for processing the application.'[503] Drawing on a comparative approach, Woolf continued:

> This is not, in any way, an attack on the right of individual petition. The requirement to submit a properly completed application is in line with the procedures of many courts. It should, in my view, be the responsibility of the applicant to know what his complaint is, and to provide all the information necessary for processing the case. The right of individual petition should not place unnecessary burdens on the Court.[504]

Missing from Lord Woolf's statement of principles is any recognition that Strasbourg cannot (and perhaps, should not) be straightforwardly identified with other courts, either in terms of the characteristics of the cases it examines, or its aspirations. While national supreme and constitutional courts may be expected to be committed to the ideal of the rule of law, they do not characteristically call themselves the "conscience" of their respective jurisdictions, or rely so explicitly for their legitimacy on the claim that they represent a forum for the downtrodden and disadvantaged to vindicate their rights against the powerful. Aspirations towards informality have been one of the most important characteristics of the Court since its inception, recognising that if its jurisdiction is to be practically and effectively accessible to many applicants, it must sometimes suspend the procedural and formal requirements which characterise access to national courts, including often substantial court fees and the passivity of judicial decision-makers, to realise just outcomes which reflect the universal aspirations of human rights protection.

Although the idea of individual petition proved sufficiently controversial in the late 1940s to result in the majority of states rejecting any automatic right of individuals to access the Commission or the Court, the founders of the Convention rejected proposals to make legal

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[503] H Woolf (2005) *Review of the Working Methods of the European Court of Human Rights,* 17.
[504] *Ibid,* 22 – 23.

representation mandatory and to introduce of court fees. As chapter 4 shows, since then, those aspirations towards informality and low expense have been embattled but defended at the policy level on Convention reform, if only to resist the introduction of additional admissibility grounds, costs and formalities. In the underexposed, practical conversation about the values which should guide the Court's working practices, by contrast, this Strasbourg-as-tribunal model enjoys no discernible purchase, displaced by a bureaucratic construction of the admissibility criteria to justify the decisive role played by administrators in decision-making, and the invocation of passive judicial procedural values to curtail responsiveness, and to emphasise the responsibilities of the parties to the litigation – and in particular, the applicant – to discharge the formal burden of legal argument and proof, on pain of a finding of inadmissibility.

From passive arbitration to bureaucratic formalism (2003 – 2013)

This combination of 'more judicial' passivity and increased formalism was further amplified in the decade between 2003 and 2013. Under new Rules of Court, informed by Lord Woolf's recommendations, applications 'should normally' be made employing the Court's standard application form.[505] Rule 47 specifies the information which individual petitions should contain. This information varies substantially in character, from the nature of the applicant's employment, their age, nationality and date of birth, to requirements that the applicant submit a 'succinct statement of the facts' the 'object of the application' and a 'succinct statement of the applicant's compliance with the admissibility criteria.'[506] Where an application is made other than on the standard form, and does not include all of the information solicited, the Registry required that the applicant or their legal representative complete and return the document to the Court within eight weeks from the date of the Registry letter requesting additional information.[507] In his 2005 report, Lord Woolf recommended that the Court adopt a more inflexible approach, refusing to register any correspondence as an application until a completed form had been submitted.

[505] European Court of Human Rights (2009) *Practice Direction: Institution of Proceedings*, para 3.
[506] European Court of Human Rights (2011) *Rules of Court,* Rule 47.
[507] *Ibid*, Rule 47(1)(f) para 4.

In 2005, the Plenary Court moderated the potential harshness of Woolf's proposals, instead requiring applicants to use its *pro forma* texts but upholding the traditional rule that an initial letter, setting out the complaint in summary form, was capable of "stopping the clock" on Convention time-limits under Article 35. Where, within six months of being asked to do so, the applicant has not returned a duly completed form, the case file will be destroyed by the Registry without being allocated to a judicial formation of the Court for a decision on its admissibility.[508] Failure to return the form within the eight week period may also result in the Court 'reconsidering the date of application', resulting in some cases being ruled "out of time" at the admissibility phase. This aspect of the Court's admissibility jurisprudence is analysed in more detail in chapter 7. The Court publishes no statistical data on the number of applications lodged without employing the standard form. In practice, given the low rates of legal representation in proceedings before the Court, it seems probable that a substantial number of applicants will submit materials which initially fail to provide all of the Rule 47 information, and will require prompting to confirm, for example, that parallel legal proceedings have not been commenced with 'another procedure of international investigation or settlement', or to specify their occupation, where their job is not obviously and directly relevant to their litigation.[509]

Since at least 2011, the Court has instructed its Registry to adopt a more unstinting, formalistic approach to this pre-judicial phase in the examination of cases. While the Court's annual reports continue to characterise these cases as 'not pursued' by applicants, that description has been superseded by the 'Rule 47 Project', under which the Registry rejects pursued but incomplete applications on 'administrative' grounds, with no judicial scrutiny of the case whatever.[510] These innovations have been characterised by their lack of transparency at all levels, and undermine the dominant understanding that Strasbourg's decision-making is fully judicial. The solitary reference to the Rule 47 Project in the public domain appears in the 2011 minutes of the Council of Europe's Steering Committee on Human Rights. John Darcy, a Registry lawyer working to the President of the Court, advised the Committee that the project 'entailed a stricter approach by the Registry to the

[508] *Ibid*, para 6.
[509] ECHR (2010) Article 35 § 2(b). Full data on levels of legal representation, set out in chapter 2.
[510] European Court of Human Rights (2013) *Analysis of Statistics 2012*, 6.

formal requirements for submitting an application, as set out in detail in Rule 47 of the Rules of Court.'[511] Under this new, much more formalistic dispensation, Darcy outlined:

> Failure to provide all the required information would lead to the rejection of the application by the Registry. The applicant would be informed by letter that their application had not been accepted for judicial consideration. This notification was final. The applicant could not submit a new application form, even within the six-month period. Certain categories of case were exempted from the exercise, e.g. applications raising issues under Articles 2, 3, 4, and 5 (these provisions attracting high priority), applications of prisoners, etc. There was also limited discretion for non-judicial rapporteurs in borderline cases. The project would run for six months initially, following [sic] by a first assessment of its impact.[512]

The introduction of this Project may go some way to explaining why the number of cases which the Court 'disposed of administratively' jumped by 39% between 2011 and 2012, though characteristically, nowhere in the Court's official publications and reports is the existence of this project or its implications for applicants even mentioned.[513] The Registry lawyer's account of the nature and scope of the policy to the Committee is also incomplete. Beyond the specific examples listed, it is not clear what categories of applicant and applications were exempted from the project, but applications alleging violations of protected rights to a fair trial, to privacy and home life, rights of expression, association, conscience and religion, property, education and to free and fair elections, are presumably among those which Registry bureaucrats rejected on formalistic grounds under the scheme. Nor is it clear how it was determined that an application was classified as raising an issue under the exempted Articles. Would a case be excluded, simply because an applicant argued that a policy amounted to 'inhuman and degrading treatment', however speculatively? Or would inclusion in the project depend on the Registry *lawyer's*

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[511] Committee of Experts on the Reform of the Court (DH-GDR) (2011) *Report 8th Meeting 2 – 4th November 2011* DH-GDR(2011)R8, para 13.
[512] *Ibid.*
[513] European Court of Human Rights (2013) *Annual Report 2012*, 149.

determination about whether the application raised a credible or arguable Article 3 issue? Nothing in Darcy's statement clarifies these issues.

Nor does he explain how *rapporteur's* 'limited discretion' operates in practice, how often it is exercised, or what the envisaged *limits* on that discretion to register otherwise incomplete applications might be, or the factors informing its exercise.[514] More fundamentally, it is not even clear *how* applications rejected under this scheme can be said to 'borderline.'[515] Borderline in the sense that the information submitted is partially or arguably complete or in the sense that the application may be manifestly incomplete, but senior Registry lawyers may nevertheless decide to accept it for judicial decision anyway, according to undisclosed criteria of its seriousness or significance? The difference is a profound one. The Court left litigants, and the wider public, in the dark.

Finally, in addition to the lack of clarity surrounding the *substantive* norms the Project has been applying, it is not clear at what stage in the process this administrative rejection is liable to occur. It is not uncommon practice to start Strasbourg proceedings with a holding letter, which has historically stopped the six month rule from running, followed up with more substantive submissions thereafter, including all of the information set out in Rule 47. On one reading of Darcy's sketchy account of the Project, instead of sustaining a further round of correspondence where an application omits some solicited factual detail, however minor, in the first round of letters and documents, the Project might result in an unreviewable administrative disposal of the case, without judicial scrutiny, whatever its merits, whether or not, but for that omission, it would have been admissible and likely to result in a judgment that the Convention had been violated.

Considering the stated purpose of the Project – to introduce additional, formalistic reasons for the Court to decline to consider more applications – allowing applicants to address missing points of information in further correspondence would seem to defeat these goals. On the other hand, the unstinting formalism suggested by the Rule 47 Project sits uncomfortably alongside the fragments of the idea of Strasbourg-as-tribunal, and its

[514] *Ibid.*
[515] *Ibid.*

recognition of the challenges which formalistic proceedings before passive decision-makers may impose on applicants unfamiliar with court processes in general, and the Court's rules and jurisprudence in particular. The logic of this programme also sits uneasily between bureaucratic rationality and a vision of docket-filtering as a flexible body of norms, in whose application, judgement is engaged. Socio-legal scholarship, following Mashaw's analysis, has generally understood these different conceptions of administrative justice as competitive. When a given model becomes hegemonic in a policy debate or an administration's approach to organising its work, the characteristic elements of other justice models will be driven from the field. This competition is dynamic and different elements of different administrative justice models may change over time or come to predominate at different stages of a process. For example, Cowan and Halliday have argued that while bureaucratic rationality tends to predominate at the initial stage of decision-making in homelessness administration, the inclusion of a legal representative in internal review processes shifts the process towards the characteristic, participative values characteristic of court-like adjudication.

Curiously, in these formalistic developments to the pre-judicial phase of Court proceedings, the anticipated displacement does not occur. Examined in terms of the administrative justice theory, at no point is a hard choice made *between* the justifications of Strasbourg-as-bureaucratic and tribunal justice by the Rule 47 project. These values are not in competition: they co-exist in parallel, the choice of which set of values and justifications to avow seemingly determined by an assessment of whether or not a given application is categorised as serious or important. If it is not serious, it is constructed as fit for bureaucratic disposal, apparently by the rigorous, unbending and uniform formalities for lodging a case. If the case catches the Registry eye for whatever reason, the same requirements of Rule 47 are no longer determinate rules, but loose guidelines, to be applied without undue formalism, with an eye to the Court's function as an institution *of* and *for* human rights.

As Mashaw notes, for an administration committed to the values of bureaucratic rationality, 'defining 'the questions presented to it by implementing decisions in essentially factual or technocratic terms', unstructured, individual judgements by administrators on the outcome of cases represent a 'singularly unattractive methodology for decision.'[516] It is also difficult to reconcile with the conception of the rule of law which dominates the Convention reform debate, which called for a 'uniform and rigorous application of the criteria concerning admissibility' to all cases.[517] If the precondition for the *application* of formalistic bureaucratic rules is a subjective judgement that a given application is or is not of sufficient interest or importance, there is only the illusion of a uniform, rigorous and foreseeable filtering regime. On the one hand, the characteristic values of bureaucratic rationality are invoked to explain and justify the negative disposal of the vast majority of cases. On the other, informal official judgements are made to waive procedural demands where the facts and circumstances of a particular case seem to merit it.

This twin-track vision of administrative justice in admissibility decision-making recurs throughout the data analysed in this thesis. The majority of cases are constructed as fit for summary and bureaucratic disposal, and the Registry accordingly rejects them – justifying this work by citing unwavering and binding formal requirements – while a minority of cases are constructed as unfit for disposal in this way, and those minimum requirements become flexible, suspendable guidelines. In administrative justice terms, we do not see the driving of one model from the field which Mashaw anticipates. The Court does not make a decisive choice between being a judicial Jekyll or a bureaucratic Hyde: it adopts the persona and the values most congenial to justifying its preferred outcome in any given circumstance, shifting between the two as expedience dictates. This paradoxical, simultaneous avowal of inconsistent administrative justice values may be conceived, not as Mashaw's normative *competition*, but as a pluralistic normative *cooperation*, simultaneously employing the legitimating power of a number of incompatible conceptions of administrative justice to justify its decisions and the processes by which those decisions have been reached. It uses its incoherence as a tool of management.

Also striking, is the extent to which these practices depart from the conclusions of the Convention reform debates considered in chapter 4. Reformers have consistently rejected

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[516] J Mashaw (1983), 26.
[517] CDDH (2009) 'Opinion of the Steering Committee for Human Rights (1 December 2009)' in Council of Europe (2010) *Preparatory contributions to the Interlaken conference*, 20 – 21.

transferring decision-making responsibility to Court officials, while proposals further to elaborate upon or amend the admissibility criteria have been profoundly controversial, with consensus on changes proving difficult or impossible to reach. Despite this, quietly, behind the scenes, the Court has subverted that commitment to ‘a real and comprehensive judicial process’ of docket-filtering which proceeds only according to those legal norms enshrined in the Convention.[518] The Rule 47 project represents an unsanctioned elaboration of the criteria for admissibility, and an unauthorised delegation of the judicial power vested in judges by their elections to unelected functionaries, undertaking decision-making functions which have been expressly ruled out regarded as illegitimate at a political level. The illusion of a fully judicial Convention adjudication process is shattered.[519]

Hyper-bureaucratisation (2014 –)

The latest iteration of administrative decision-making builds on and further amplifies these trends. Despite Darcy’s reassurances, the Court’s ‘first assessment’ of the Rule 47 Project’s ‘impact’ was not published.[520] The lessons taken by the Court from the enterprise, in another unpublished and unscrutinised internal process of review, were enshrined in new Rules of Court. Finalised by the plenary Court in the summer of 2013, the new Rules came into force in January 2014. Although never publicly consulted on, the changes amplify many familiar tensions between visions of the Court as dispenser of decisions according to bureaucratic rationality, serving the informality of tribunal justice, as a passive judicial arbiter between parties who are responsible for the control of the litigation. The Rules also confirm and extend the effective transfer of judicial decision-making responsibility to officials, experimentally embarked upon by the 2011 Project. The reframed Rule 47 further amplifies the formalism of pre-judicial filtering process, expanding the opportunities for

[518] http://www.coe.int/t/dghl/standardsetting/conferenceizmir/Speeches/Speech%20Denmark.pdf last accessed 04.07.2011, 1.
[519] M Eaton in Council of Europe (2007) *Future Developments of the European --Court of Human Rights in the light of the Wise Persons’ Report*, 54.
[520] Committee of Experts on the Reform of the Court (DH-GDR) (2011) *Report 8th Meeting 2 – 4th November 2011* DH-GDR(2011)R8, para 13.

officials to reject more cases at the pre-judicial phase. It provides that every application must include:

> 47(1)(a) the name, date of birth, nationality and address of the applicant and, where the applicant is a legal person, the full name, date of incorporation or registration, the official registration number (if any) and the official address; (b) the name, occupation, address, telephone and fax numbers and e-mail address of the representative, if any; (c) the name of the Contracting Party or Parties against which the application is made; (d) a concise and legible statement of the facts; (e) a concise and legible statement of the alleged violation(s) of the Convention and the relevant arguments; and (f) a concise and legible statement confirming the applicant's compliance with the admissibility criteria laid down in Article 35 § 1 of the Convention.

In addition, the new Rule requires copies of official documents and prescribes forms for their presentation,[521] and the maximum length of additional submissions.[522] Failure to comply with these requirements 'will result in the application not being examined by the Court,' unless:

> (a) the applicant has provided an adequate explanation for the failure to comply;
>
> (b) the application concerns a request for an interim measure;
>
> (c) the Court otherwise directs of its own motion or at the request of an applicant.

In the Rules' most significant innovation, the Court adopted Lord Woolf's (2005) reform proposal almost a decade after it was first made, determining that:

> 6 (a) The date of introduction of the application for the purposes of Article 35 § 1 of the Convention shall be the date on which an application form satisfying the

[521] Rule 47(3)(2): "Documents submitted in support of the application shall be listed in order by date, numbered consecutively and be identified clearly."
[522] Twenty pages. Rule 47(2)(b).

requirements of this Rule is sent to the Court. The date of dispatch shall be the date of the postmark.

(b) Where it finds it justified, the Court may nevertheless decide that a different date shall be considered to be the date of introduction.

There are two easily overlooked consequences of these changes. Firstly, it will be the *Registry* and not judges which will determine whether the Rules have been complied with. Cases rejected will be examined *by the Court* – by its bureaucrats – but if they fall foul of these requirements, no judicial decision on admissibility will be taken. No judge will be involved in decision-making at all, in fact. While the warning letter regime of 1998 to 2002 employed Registry interpretations of the agreed admissibility criteria enshrined in the Convention to organise the Court's systematic non-registration of a great part of its case-load, the new regime relies on formalistic criteria and bureaucratic participation in decision-making which has not been legislated for and the application of filtering criteria which States have not (and arguably could not, for reasons of political controversy explored in chapter 4) explicitly authorised.

The second major implication of the latest reform is that it makes the admissibility of a petition under the Convention time-limits contingent on a bureaucratic assessment that all of the Rule 47 information has been provided. This represents an effective transfer of decision-making on the six-month rule from judges to administrators in many cases. If the Registry determines that the requirements of Rule 47 are satisfied but the application was lodged out of time, the cases will be prepared for single judge decision-making on admissibility grounds. Where the Registry decides Rule 47 is *not* satisfied in time, the case will be disposed of administratively, without being submitted to the single judge. This represents a significant departure from the idea, still officially promoted in the Court's official reports, that these applications are 'not pursued', representing only cases where 'applicants fail to follow up on their initial correspondence with the Court' and are taken to have lost interest in pursuing their litigation.[523] The idea, still insisted upon in the Court's

[523] European Court of Human Rights (2013) *Analysis of Statistics 2012*, 6; Council of Europe (2007) *Council of Europe Activity Report 2006*, 40.

official publications, that Registry ‘lawyers prepare files and analytical notes for the judges, and they correspond with the parties on procedural matters’ but ‘do not themselves decide cases’ is hollow and misleading.[524] Decision-making by the Court’s administrators, so controversial in the reform debates analysed in chapter 4, is both enshrined in the Court’s working practices and simultaneously disavowed at the level of official policy.

In common with the Rule 47 project which preceded it, several of the terms employed in the Rules are open to interpretation, and are not elaborated. For example, applicants are required to lodge a ‘concise and legible account of the facts’ (an amendment on the previous version of the Rules, which required a *succinct* account to be provided. It is not clear whether or not this amendment signifies a more unstinting approach by the Court towards voluminous submissions by applicants.) What is a ‘concise’ account of the facts of a case? Considering the range of briefs Strasbourg examines, from extensively litigated proceedings to judicially unexamined allegations of human rights abuses, it is difficult to envisage a hard-and-fast rule, irrespective of the nature of the complaint, against which the concision of a case-file might be judged. The adequacy of the brief must presumably be considered in all the circumstances of the case. This determination is critical from the applicant’s point of view, but the new Rule has effectively eliminated applicants’ opportunities to correct errors and introduce additional information after their initial correspondence.

De Londras has expressed concerns about the loss of flexibility and the ‘hyper-bureaucratisation of admissibility and other threshold decisions for the purposes of manageability’ of the Court’s docket.[525] The combination of Protocol No. 15’s new four-month admissibility rule and these changes to the Rules are also likely to generate problematic cases, where the pressures to disapply the formal stringency of the Rules will be acute. For example, under the Court’s current jurisprudence, where an applicant has no effective domestic remedy for the alleged violation of the Convention, the time-limit on

[524] European Court of Human Rights (2013) *The Conscience of Europe: 50 Years of the European Court,* 72.
[525] F de Londras (2014) Contribution to the Council of Europe on the Reform of the European Court of Human Rights http://www.coe.int/t/dghl/standardsetting/cddh/reformechr/GT-GDR-F/de_Londras.pdf last accessed 24.02.2014.

commencing Strasbourg proceedings starts to run from the moment that the applicant knew, or ought to have known, that national remedies were ineffective.[526] Several of the most serious cases which the Court examines fall into this category, including disappearance cases, lodged primarily against Turkey and Russia over the last decade, alleging that citizens have been abducted by agents of the state, never to reappear, their fates unknown. In many of these cases, it is clear from the outset that no effective judicial remedies for these complaints are available nationally. For these applicants, the Strasbourg clock starts ticking immediately.

Before January 2014, applicants in these circumstances had six months to lodge their first correspondence with the Court, and time thereafter properly to compose their cases. After January 2014, and when Protocol No. 15 comes into force (probably during 2015), applicants in these circumstances will be required to lodge a completed application form within four months of realising that no effective remedies are available. The pursuit of ineffective remedies does not arrest the Convention time-limit. In this scenario, attempting thoroughly to avail yourself of the available domestic forums for complaint is only likely to result in your Strasbourg case being time-barred.

Given the Court's *raison d'etre*, and considering the European history which helped summon the institution into life during the 1950s, litigation concerning credible allegations of extra-judicial murder, violations of citizens' right to life, and inhuman and degrading treatment ought to be the Court's bread and butter. If rigorously applied, these new formalistic barriers seem likely to trip up the very socially-disadvantaged, impoverished, victimised and suffering litigants which the Court and its reformers insist are their cardinal concern. By contrast, a wealthy, professionally-advised litigant, whose case had already been aired in domestic tribunals, is unlikely to make the same mistakes, or fall foul of the new formalism to the same extent. This new regimen further reflects the concurrent, twin-track organisation of decision-making identified. It is a counterfeit bureaucratisation, appealing to the legitimating force of bureaucratic values of impersonality, predictability

[526] *Siti Bulut & Hatice Yavuz v. Turkey* App no 73065/01 (ECtHR, 28th May 2002) (dec.)

and pre-determination to justify the disposal of the vast majority of cases, while using an unpredictable discretion to save cases deemed sufficiently important.

The pre-judicial phase: the myth of Strasbourg's "fully judicial" justice

The addition of the pre-judicial phase to our understanding of how the Court filters its docket adds considerable complexity to the dominant idea that Strasbourg's decision-making is fully judicial in character. The Court's working practices at the docket-filtering stage reveals a complex administrative justice picture, which cannot be understood with reference to the simple but dominant distinction between proponents of individual or constitutional justice. Driven by the overriding imperative to decide more cases more rapidly, the Court has and continues simultaneously to appeal to a range of administrative justice values to justify its practices. The normative competition between these simultaneously-present models of docket-filtering has been used by the Court with considerable creativity since 1998.

The last decade has seen a significant expansion in bureaucratic responsibility for filtering the Court's docket. The neglected "pre-judicial" phase is a key opportunity for administrative decision-making governing 'the fate of cases' submitted to Strasbourg.[527] In response to the Court's ongoing caseload crisis, the data shows that the Court has considerably bureaucratised its docket-filtering. Faced with the limits of its judicial resources, and the imperative to accelerate its work, the Court has substantially expanded the role of its administrators, opening up new and significant opportunities for bureaucrats to reject cases.

While the Convention reform debates analysed in chapter 4 refused to authorise decision-making by Court officials, this has in any case been introduced at the pre-judicial phase by the Court itself. Proposals further to amend and extend the Convention's admissibility criteria have caused immense controversy in Court reform debates over the last three decades. Only relatively limited changes could be agreed by Member States in Protocols

[527] L Loucaides (2010) 'Reflections of a Former European Court of Human Rights Judge on his Experiences as a Judge' *Roma Rights Journal* 1.

14 and 15. Nevertheless, on its own authority, the Court has not only devolved decision-making responsibility to its officials at the pre-judicial phase, but has also effectively elaborated upon the grounds of admissibility to include further requirements of unclear definition and scope, authorising unappealable decision-making by officials against unpublished and inaccessible standards of review, without individual judicial oversight. These are not the hallmarks of a comprehensively judicial process.

They exemplify, however, the incoherent way in which institutions subject to intense, competing and incompatible policy demands are forced to strike awkward balances between the diverse aims set by their political masters. As chapter 4 has shown, Convention reformers want the Court to deliver a comprehensive judicial decision-making process. They want the judicial docket-filtering process to accelerate, and to decide more and more cases more rapidly, but using existing operating budgets and human resources. They want the Court's sifting processes to reflect the ethical principles underlying its human rights jurisdiction: the 'Conscience of Europe' must be responsive to the plight and objective circumstances of its marginalised and disadvantaged applicants, safeguarding the possibility of a judicial remedy remaining practically and effectively accessible to the poor, the disenfranchised and the dispossessed.

However, they also require the Court summarily to dismiss improperly constituted applications, and for admissibility decision-making to be regular, predictable, formal and unvarying, untouched by the facts and circumstances of particular cases. The Court's inadmissible docket, they say, must consist only of unserious, unimportant, unmeritorious cases, yet they do not explain how the admissibility criteria enshrined in the Convention reflect any of these conflicting aspirations. They demand that the Court makes its modest judicial resources go further, working faster and harder, accommodating more and more *a limine* decision-making. Yet, as they reject proposals to transfer decision-making powers to officials as an anathema to the Convention's fundamental judicial character, they reinforce the Court's administrative capacity as a means of addressing the Court's ballooning docket and the backlog, but leave its judicial capacity unsupplemented.

Some of these aspirations are straightforwardly contradictory. Others are, in a situation of institutional overload and crisis, are impossible to realise simultaneously in full. Yet as chapter 4 has shown, the governments of Member States have been unable to give the Court clear guidance on how these many preferences are to be ordered, and what trade-offs between different aspirations the institution should make. The Court has, perhaps unfairly, been left to make these determinations itself. Inevitably, the pursuit of more rapid case-processing, efficiency and streamlining of decision-making processes has undermined the effectiveness key principles, including the extent to which Strasbourg proceedings reflect the aspiration of a fully judicial complaints mechanism. If the Court's working practices are incoherent, this arguably reflects the incoherence of the many demands made of the institution.

However, pre-judicial and administrative disposals represent only a part of the Court's docket-filtering. The overwhelming majority of applications are resolved by decision on their admissibility. It is to the examination of the empirical evidence about this stage of the Court's working practices, and the administrative justice values that they express, that I now turn.

6. The bureaucratic judge: the bureaucratisation of the Court's admissibility decision-making functions

At the Interlaken Conference of 2010, the Moldovan Minister of Justice, Alexandru Tănase, broke sharply with the inter-governmental consensus, criticising what he perceived as the 'hypocrisy' of the claims that Strasbourg's admissibility decision-making represents an effectively judicial decision-making process.[528] Having in chapter 5 considered the growth in the scale and strength of the bureau's involvement in Strasbourg's docket-filtering since 1998, this chapter focuses on the evolving practices of work which characterise judges' involvement in the admissibility decision-making process. Chapter 5 began to undermine the idea that Strasbourg's docket-filtering should be understood as a fully judicial decision-making process. This chapter completes the task. In echo of the pressures which has seen the Court expand the scope of its administrative case disposals, this chapter argues that Protocol No. 11's full judicialisation of admissibility decision-making in 1998, paradoxically, marked the beginning of its systematic bureaucratisation. I advance two key propositions. Firstly, under pressure from the Court's mounting caseload, judges have gradually retreated from effective control of the admissibility phase of proceedings. Departing from traditional expectations and values of judicial decision-making, since 1998 the Court has gradually ceded effective responsibility for the analysis of cases *a limine* to its more numerous Registry officials in the overwhelming majority of cases. Secondly, insofar as a judicial role in decision-making *has* been retained in this bureaucratically-dominated process, judges have adopted increasingly bureaucratic methods of decision-taking and reason-giving, departing from traditional conceptions of judicial forms and responsibility for adjudication.

Characteristics of judicial decision-making

Before examining Strasbourg's working practices, however, it is necessary first to establish an understanding of the chief values and features of effective judicial decision-making

[528] A Tănase in (2010) *Proceedings: High Level Conference on the Future of the European Court of Human Rights*, 74, 75.

from which it is suggested that the Court has increasingly departed. Firstly, judicial decision-making should be premised on the judicial examination of the substance of the case. It is upon the judge that decision-making responsibility is bestowed, whether by election or appointment. Outsourcing responsibility for examining the submissions of the parties or considering the merits of cases represents an impermissible delegation, and arguably a dereliction, of judicial responsibility. Court staff may contribute to the administrative processing of cases, and even produce summary outlines of cases for decision-makers to assist in the examination of potentially extensive submissions and documentation, but judges should take the decision in cases before them in practical and effective, and not just in theoretical and illusory, terms.

Secondly, judicial decisions should be adequately reasoned. This responsibility is recognised in the Court's jurisprudence under Article 6 of the Convention.[529] In the 2010 case of *Taxquet v Belgium*, the Grand Chamber of the Court explained the importance of reason-giving as a mechanism to ensure legal proceedings were just and fair, emphasising that 'the rule of law and the avoidance of arbitrary power are principles underlying the Convention' and that 'in the judicial sphere, those principles serve to foster public confidence in an objective and transparent justice system, one of the foundations of a democratic society.'[530] The Grand Chamber continued:

> reasoned decisions also serve the purpose of demonstrating to the parties that they have been heard, thereby contributing to a more willing acceptance of the decision on their part. In addition they oblige judges to base their reasoning on objective arguments, and also preserve the rights of the defence. However, the extent of the duty to give reasons varies according to the nature of the decision and must be determined in the light of the circumstances of the case.[531]

Concluding that:

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[529] *Helle v Finland* App no 20772/92 (ECtHR, 19 December 1997) (judg.) para 55.
[530] *Taxquet v Belgium* App no 926/05 (ECtHR, 16 November 2010) (judg.) para 90.
[531] *Ibid*, para 91.

> while courts are not obliged to give a detailed answer to every argument raised (…) it must be clear from the decision that the essential issues of the case have been addressed.[532]

These reflections on the importance of reason giving in judicial proceedings reflects a lengthier tradition of procedural justice, underscoring the importance of reasoned justice. Judicial processes are public processes and should be justified and susceptible to public scrutiny. Reason-giving represents an important dimension of that general commitment to the publicity of judicial proceedings. As Lord Neuberger, the President of the UK Supreme Court, observed 'without Judgments there would be no justice, because decisions without reasons are certainly not justice.'[533] This commitment to reasoned justice reflects principles of 'open justice which underpins the rule of law.'[534] It allows litigants to understand why a decision has been taken and more generally, evinces a commitment to decision-making according to law. In some circumstances, only limited reasons will be required to dispose of a particular case, however, the reasons given must be 'adequate' and 'intelligible' explanations, 'enabling the reader to understand how' the decision-maker 'reached its conclusions on the principal issues of controversy.'[535] On this conception, it would be inadequate for a court merely to invoke a general provision of law to justify a disposal, without reference to how that general provision was engaged by the particular facts and circumstances of the case. In a civil action relying on the delict of negligence, for example, the conclusion that the defender did not owe the pursuer a duty of care is fatal to the pursuer's action for damages. The failure by a judge to explain and justify why no duty arose would not allow the disappointed litigant to determine whether or not this conclusion represented an accurate or an inaccurate interpretation of the law of delict as it currently stood. On appeal, it would not allow the appellate bench properly to interrogate the basis for the decision of the court below.

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[532] *Ibid,* para 92.
[533] Lord Neuberger (2012) 'No Judgment – No Justice' First annual BAILII Lecture 20th November 2012, para 2.
[534] *Ibid,* para 12.
[535] M Elliott (2011) 'Has the Common Law Duty to Give Reasons Come of Age Yet?' *Public Law* 1 56 – 74, 66.

As Elliott argues, the normative basis for this duty may be broken down into instrument and non-instrumental reasons. Under the instrumental heading, it may be argued that the responsibility to give reasons focuses decision-makers on the critical legal questions instead of extraneous matters. If appeal structures are in place, reason-giving allows review processes to be effectively resorted to. Without reasons, the explanation for the outcome is Delphic, or to put it in more characteristically administrative law terms, that the decision had regard to relevant and not irrelevant factors, and was guided by proper and not improper purposes. In the absence of reasons, it cannot with confidence be concluded that decision-making proceeded according to law, and according to a proper construction of the facts of the case. Reason-giving is essential if such errors in construction are to be identified and corrected. Moreover, the requirement of reason-giving may secure confidence in the decision-making body, irrespective of whether the case concludes in a favourable outcome for a particular litigant. Reason-giving offers at least some tangible reassurance that the dispute has been taken seriously, and not dismissed out of hand. This may have an impact on the confidence and esteem in which decision-making institutions are held.

As distinct from *instrumental* reasons for reason-giving, there is also a non-instrumental, dignitarian justification for this commitment to reasoned justice. Allan suggests that 'giving reasons may be regarded as an integral part of treating a disappointed applicant with the respect which his dignity as a citizen demands.'[536] This argument rests on the claim that whether or not reason-giving encourages better outcomes, or fosters confidence in judicial institutions, fair treatment intrinsically requires a reasoned account of the outcome to be provided. For Elliott, the failure to do so treats 'the person concerned as a mere object of official discretion', representing a 'Kafkaesque' way of proceeding which is 'disrespectful of the person's dignity.'[537] Cognate arguments have been made more generally in UK public law about the character of a fair hearing, most recently in the UK Supreme Court case of *Osborn v the Parole Board*, in which Lord Reed explicitly invoked this dignitarian dimension of fair procedures, holding that:

[536] T Allan (1998) 'Procedural Fairness and the Duty of Respect' *Oxford Journal of Legal Studies* 18 497.
[537] M Elliot (2011), 63.

> justice is intuitively understood to require a procedure which pays due respect to persons whose rights are significantly affected by decisions taken in the exercise of administrative or judicial functions. Respect entails that such persons ought to be able to participate in the procedure by which the decision is made, provided they have something to say which is relevant to the decision to be taken.[538]

Jeremy Waldron amplifies this idea, that adopting fair procedures represents an important aspect of recognising the "dignity" of those involved in judicial decision-making:

> Applying a norm to a human individual is not like deciding what to do about a rabid animal or a dilapidated house. It involves paying attention to a point of view and respecting the personality of the entity one is dealing with. As such it embodies a crucial dignitarian idea – respecting the dignity of those to whom the norms are applied as beings capable of explaining themselves.[539]

In summary, traditional conceptions of judicial decision-making are understood to encompass practical and effective judicial responsibility for decision-making and the provision of adequately reasoned explanations for why a particular decision has been taken. On both counts, I argue, admissibility decision-making as it is practiced in Strasbourg falls significantly short of these ideals.

The bureaucratisation of admissibility decision-making: Registry triage

Chapter 3 discussed the evolving rules governing admissibility decision-making under the Convention. In the wake of Protocol No. 14, the vast majority of admissibility decisions are now made summarily by Registry *rapporteurs* and judges, although a small number of admissibility decisions are also made by Committees and Chambers of the Court. In 2012, the Court made 86,201 decisions to declare inadmissible or strike applications from the Court list, of which 81,700 (95%) were decisions notionally taken by single judges.[540] As

[538] Lord Reed in *Osborn v the Parole Board* [2013] UKSC 61, para 68.
[539] J Waldron (2012) 'How Law Protects Dignity' *Cambridge Law Journal* 71 200 – 222, 210.
[540] European Court of Human Rights (2013) *Analysis of Statistics 2012*, 4. Unfortunately, Court statistics do not generally disaggregate this total figure into a) admissibility decisions and b) decisions on striking

the pre-eminent form of the Court's admissibility decision-making, this section will focus exclusively how on single judge and *rapporteur* decision-making works in practice.

Perhaps the most critical, and generally overlooked, phase in the Court's decision-making is the triage role performed by the Court's Registry.[541] Having avoided administrative disposal, applications are allocated to a Registry lawyer, familiar with the legal system in the respondent state and conversant in the language in which it has been submitted, for analysis and review for compliance with the admissibility criteria. On the basis of the lawyer's conclusions, cases are provisionally allocated to a judicial formation of the Court. There is no judicial involvement in this allocation, and no judicial management of the caseload at this level. From the applicant's point of view this triage phase is critical. Considerations of admissibility are formally at the core of the Registry's allocation of the case. Applications identified as inadmissible without further examination are funnelled to single judges for summary rejection. Repetitive, well-founded cases are referred to three-judge Committees, and *prima facie* well-founded cases, breaking new jurisprudential ground, to seven-judge Chambers, for judgment. An application's ultimate fate characteristically coincides with the Court procedure which Registry lawyers allocate it to in triage. This cuts both ways. Of cases sent to single judges for summary disposal, evidence given by the Court to the CDDH in 2011, but not otherwise published, suggests that single judges disagree with the proposed Registry disposal of a case as inadmissible in, at most, 1% of cases.[542]

Of decisions sent to Chambers of the Court for judgments of their merits, there is a substantial correlation between applications being found to be admissible and a finding that the Convention has been violated. In its judgments between 1959 and 2013, the Court has found that at least one violation of the Convention had occurred in 84% of cases declared

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out. In 2011, however, decisions to 'strike out' cases, often on grounds that a 'friendly settlement' had been reached between the applicant and the respondent state, represented around 8% of decisions taken.

[541] Registry of the European Court (2010) 'The Single Judge Procedure – Presentation of Registry for GDR meeting of 15 September 2010' in Committee of Experts on the Reform of the Court (DH-GDR) (2010) *Report 4th Meeting 15 – 17th September 2010* DH-GDR(2010)017, Appendix III.

[542] Committee of Experts on the Reform of the Court (DH-GDR) (2011) Draft CDDH Report on the Filtering of Applications and treatment of repetitive applications in (2011) *Report 8th Meeting 2 – 4th November 2011* DH-GDR(2011)R8 Appendix III, para 19.

admissible.[543] This Registry designation of the case is not disclosed to the applicant, and the number of cases pending to each of the Court's formations is recorded in Court statistics only as totals. As of the 31st of December 2012, for example, 128,100 applications were pending before the Court's Chambers (43,050, 34%), Committees (25,200, 20%) and single judges (59,850, 47%).[544]

As chapter 4 identifies, the Court's practice of using its most summary formations to decide on the admissibility of petitions helps to cultivate and sustain the idea that the cases disposed in this way represent only 'clearly inadmissible' cases. However, the evidence of the early evolution in the Court's working practices problematises this claim. As the Working Group on Working Practices noted in 2002, one of the Court's first procedural departures from the former Commission's approach to filtering the Convention caseload was significantly to expand the use of summary formations to decide on questions of admissibility:

> the most important development [on the Commission's approach to admissibility decision-making] lies in the fact that whereas the former Commission limited the use of Committee cases to more obvious cases which could be declared inadmissible or struck off the list "without further examination" (…) the Court has adopt adopted the rule that all new cases (where the proposal is to declare them inadmissible) should be presented in the form of a Committee case – save in exceptional circumstances.[545]

In practice, this quiet shift in the Court's approach was to have significant consequences, as the accumulating caseload crisis and subsequent Convention reforms further truncated the number of judges required to scrutinise a case to reject it as inadmissible. In 1998, its effect limited the scrutiny received by potentially arguable cases from seven judge Chambers to three judge Committees in cases in which Registry lawyers proposed should be rejected. With Protocol No. 14's further reduction in the number of judges required to sit to consider the admissibility of cases, and no indication that the Court has departed from

[543] European Court of Human Rights (2014) *Violations by Article and by States*.
[544] European Court of Human Rights (2013) *Analysis of Statistics 2012*, 6.
[545] *Ibid*, 71.

its 1998 policy, cases submitted to single judges for disposal include applications, the inadmissibility of which is not 'obvious'. As chapter 4 shows, however, this internal shift in approach in 1998 was not reflected in a more general evolution in the official Council of Europe policy discourse, recognising that cases rejected by the Court *a limine* includes not only 'clearly inadmissible' cases, but also to 'cases raising novel issues of interpretation and application of the Convention which are of general importance.'[546] The stubborn persistence of the idea that cases declared inadmissible by summary formations of the Court are uniformly obviously inadmissible is difficult to reconcile with this early innovation. Where an application evades administrative disposal, and has been identified as amenable to a finding of inadmissibility 'where such a decision can be taken without further examination,' Registry lawyers convey them to single judges of the Court for summary disposal.[547] The Convention provides that single judges are assisted in reaching admissibility decisions in this way by a non-judicial *rapporteur*. Under the Rules of Court, *rapporteurs* are appointed by the President of the Court, on the advice of its Registrar.[548] In 2010, the President appointed 'approximately 60 of these from amongst the permanent, experienced legal staff of the Registry.'[549] Currently, the President has appointed 36 judges to single judge admissibility duties.[550]

Judging as "rubber-stamping"

In practice, however, this image of paired decision-making of a judge assisted by a senior, practiced Registry lawyer is illusory. The vast majority of work on the Court's single judge cases is undertaken by far more junior staff – and even temporary, unremunerated Court interns – as early as their second day of work. Protocol No. 14's introduction of the *rapporteur* was only an apparent innovation. In fact, it only codified and formalised the

[546] A Lester (2009) 'The European Court of Human Rights after 50 years' *European Human Rights Law Review* 462, 470.
[547] ECHR (2010), Article 27 § 1.
[548] European Court of Human Rights (2009) *Rules of Court*, Rule 18A.
[549] Registry of the European Court (2010) 'The Single Judge Procedure – Presentation of Registry for GDR meeting of 15 September 2010' in Committee of Experts on the Reform of the Court (DH-GDR) (2010) *Report 4th Meeting 15 – 17th September 2010* DH-GDR(2010)017, Appendix III.
[550] Registrar of the Court (2013) 'Reform of the Court: Filtering of cases successful in reducing backlog' ECHR 312 (2013).

Court's prevailing practices under Protocol No. 11. The Working Party on Working Methods decided in 2002 that judges should no longer act as *rapporteur* in Committee cases, reviewing case-files and composing a provisional opinion on the admissibility of a petition, to be circulated along with copies of the case-file to the three-judge Committees for their final decision. In place of the judge *rapporteur*, the Working Party decided that functionaries would instead 'prepare a Registry note, which will in fact be similar to the previous rapporteur note', theoretically subject to a 'quality check' by a Section or Deputy Section Registrar, before being bundled along with several other such notes and forwarded to the Committees for their final decision on the admissibility of the application.[551]

From 2002 onwards, the underlying documentation of applicants' casefiles – evidence, domestic judgements, submissions – were no longer circulated to the judges deciding on the admissibility of cases. As the Moldovan delegation stated correctly in Interlaken, almost all of the Court's admissibility decision-making involves judges 'rubber-stamping' case notes 'prepared by others without any real possibility to verify the content of those notes.'

> In practice nobody, except for the initial case-lawyer, checks the case-file. Even in the committees of three judges where the national judge is present, the case-file is never verified. It should be noted that there are committees of three judges where the national judges is not present. Accordingly, the judges' decision is totally based on the facts and complaints as prepared by the Registry.[552]

The Registry's 'very decisive role in the work of the Court' and the marginal role played by judges in the institution's docket-filtering has been corroborated and criticised by Loukis Loucaides, who served as a judge on the Court between 1998 and 2008. Writing of the pre-Protocol No. 14 committee process, Loucaides described his experience of the docket-filtering process thus:

> Suffice it to say that instead of preparing a full report for judges, Registry members could remit cases to committees of three judges for their summary dismissal on the

[551] Working Party on Working Methods (2002), 41.
[552] A Tanase (2010) *Proceedings* 74 – 75.

basis of a judge's general approval of a determinative suggestion of the *functionnaire* concerned. This meant that only a brief statement of the facts and an even briefer explanation regarding the reasons for the case's dismissal was given, such as "non-exhaustion", "fourth instance" (examination would have amounted to a review on appeal from the national court) or "the application does not satisfy the requirements of the Convention". The committee cases formed a bundle of 100 or so reports (generally of one page) which were examined, quickly perused and dealt with to a great extent superficially at meetings held by the sections about once a week. This suited members of the Registry – some of whom were not particularly efficient and diligent – who were dealing with cases because they could be credited for disposing of a substantial number of cases without putting in any significant amount of work into them, even though many deserved extensive study and preparation leading to a full report for decision by a chamber of judges.[553]

This procedure was adapted essentially unaltered to Protocol No 14's new, judicially-leaner admissibility decision-making regime in 2010. As a consequence, today, decisions on the admissibility of almost all of the petitions submitted to the Court are taken after scanty judicial consideration. The examination and the analysis of the underlying case file, argument and documentation is now undertaken exclusively by Court staff. The triage process presents cases to single judges as presumptively inadmissible. Judicial participation in decision-making is limited to reviewing Registry notes, and endorsing or rejecting the outcomes they suggest. These notes are terse, contain limited reasoning, and little legal analysis. Treated as confidential, these case notes are not disclosed to the applicant, nor are they preserved in the Court's archive. However, one senior Registry staff member observes that these notes 'typically contain just one or two brief paragraphs explaining what is clearly wrong with the case' with judges relying on Registry lawyers to 'provide a fair, balanced, reliable, concise yet complete summary and analysis of the pertinent facts and the Convention issues.'[554] These notes are submitted to judges 'at

[553] L Loucaides (2010) 'Reflections of a Former European Court of Human Rights Judge on his Experiences as a Judge' *Roma Rights Journal* 1.
[554] *Ibid.*

regular intervals' in batches which 'can contain dozens of cases, and even hundreds if similar, simple cases have been grouped together where possible.'[555]

Judges are generally afforded a two week period within which to consider these 'draft decisions', indicating their consent by signing a cover page which simply lists the reference numbers for all of the applications presented for decision. The judge produces no individual reasons for adopting these decisions. The rejection of cases having been judicially sanctioned, the Registry then communicates a *pro forma* decision-letter to each applicant whose petition has been declared inadmissible. If judges are dissatisfied with a note's reasoning, and unpersuaded that the case may be rejected as inadmissible without further examination, they may contact the *rapporteur* for clarification, usually by email or telephone. Where the judge still disagrees with the Registry analysis, he or she can refer the matter to a higher formation of the Court for renewed scrutiny.

In practice, however, judicial dissent is very rare.[556] Given the nature of the decision-making process and the materials put before single judges to reach conclusions upon, this is not surprising. The level of comity between the Court and its bureau could be taken to reflect the accuracy and professionalism of the lawyers, and the relative ease with which many cases may be labelled as inadmissible. On the other hand, the notes do not attempt to stimulate disagreement or encourage the exercise of judicial discretion. The basis on which judges formally take the overwhelming majority of admissibility decisions set out, as briefly as possible, why an application ought to be rejected. They contain few resources for judges to reach an alternative conclusion about the dispute, or independently to check the Registry analysis of the case-file. Against proposals that decision-making should be explicitly transferred to Registry lawyers, Tomuschat has argued that:

> the personal responsibility of the judges must remain the key element of the adjudicatory process. It would be unacceptable – and even immoral – to transfer the assessment to be carried out almost in its entirety to the staff people in the

[555] Registry of the European Court (2010) 'The Single Judge Procedure – Presentation of Registry for GDR meeting of 15 September 2010' in Committee of Experts on the Reform of the Court (DH-GDR) (2010) *Report 4th Meeting 15 – 17th September 2010* DH-GDR(2010)017, Appendix III.
[556] No more than 1% of cases, according to Registry estimates. *Ibid*.

> service of the Court. Judges must have the time to familiarise themselves with the cases placed before them. It would be unacceptable to see their role confined to signing a product ready-made by their support services. The judges are elected by the Parliamentary Assembly. They are the people in whom trust resides, not the bureaucrats in the Registry, no matter how able and zealous they are.[557]

In light of the reforms set in train by the Working Party, and reinforced by subsequent developments, the idea that judges have 'personal responsibility' for filtering decision-making in Tomuschat's sense is not credible. While he envisages his critique as prospective, of a hypothetical future situation in which judges retreat from admissibility decision-making, Tomuschat's critique attaches equally effectively to the *status quo*.

This extension in bureaucratic responsibility has been justified, in part, with reference to traditional conceptions of bureaucratic hierarchy and review. Registry notes are subject to a quality check by a superior official before being communicated to judges.[558] It is questionable, however, whether this process really represents an independent review of the intern's or case-lawyer's *conclusions* and their appropriateness in the instant case. Like the judges, the linguistic capacities of the Registry's senior lawyers will not extend to the language of many of the case-files the processing of which they superintend. An analysis of a terse draft Registry note, without independent scrutiny of the underlying documentation and domestic decisions, cannot detect a misunderstanding about domestic law or misconstruction of a critical fact in the case. As has been recognised in administrative law scholarship, one consequence of the failure to give detailed reasons for decisions is that the cogency of those reasons cannot be subject to meaningful review, whether in court or by an administrative superior. Formalistically, the quality check may establish that the note bears an appropriate resemblance to house styles and expectations, but without independent scrutiny of the underlying case-file, it is difficult to see how either

[557] C Tomuschat (2009) 'The European Court of Human Rights Overwhelmed by Applications: Problems and Possible Solutions' in R Wolfrum and U Deutsch (eds) (2009) *The European Court of Human Rights Overwhelmed by Applications: Problems and Possible Solutions*, 10.
[558] Working Party on Working Methods (2002), 83.

this quality check, or the subsequent judicial examination of Registry notes, affords a meaningful opportunity for error-identification and correction.

In instrumental terms, in an institution under intense pressure to slash its backlog and decide more cases more rapidly, this reform was not without its advantages. The internal documentary traffic within the Court was substantially reduced, as the need for 'the physical transfer of hundreds of files' to judge *rapporteurs* and to the decision-making committees and single judges of the Court disappeared.[559] Only the Registry lawyer charged with an application's processing need have access to the case-file, both linguistically and in a physical sense. This shift in labour from judges to bureaucrats also addressed the practical challenges posed by the Council of Europe's linguistic diversity. As a national of the respondent State, the responsible lawyer is likely to be conversant in the language in which the file has been submitted, eliminating the requirement to translate the potentially complex and voluminous correspondence of each and every case-file.

In practice, judge *rapporteurs'* access to the underlying documentation *before* this policy was adopted was also often more theoretical than practical. Applications are submitted to the Court in a range of languages other than English and French. Even if judges enjoyed access to the whole documentary record in the cases they were examining, in very many instances, the detailed letters and pleadings sent by the applicant, and any domestic judicial findings in the case, would be linguistically unintelligible. In the absence of resources to translate the potentially voluminous submissions of every case-file into one of the Court's official languages, judge *rapporteurs* were obliged to place considerable reliance, even before these reforms, on summaries produced by Registry staff. Then as now, although the institution of the judge *rapporteur* seemed to maintain a greater level of judicial control over the admissibility phase, this was undermined by the Court's resource limitations, and the expense of translating every scrap of paper, judgment or submission despatched to Strasbourg by its petitioners. Once again, under pressure of resources, the principle of fully judicial decision-making was compromised and bureaucratic resources and responsibility were deployed to power the Court's decision-making forward.

[559] Working Party on Working Methods (2002), 73.

Can the judicial participation which has been retained in the summary admissibility decision-making process be characterised as fully judicial decision-making? In a domestic court, judicial delegation of the substantive analysis of cases to Court officials, and decision-making on the sole basis of the adversarially untested conclusions of those officials on the merits of the case, would represent an impermissible (and in the UK undoubtedly unlawful) delegation of the Court's discretion and a violation of basic principles of procedural justice and fair court processes. As Lord Mustill observed:

> it is the first principle of fairness that each party to a judicial process shall have the opportunity to answer by evidence and argument any adverse material which the tribunal may take into account when forming its opinion. The principle is lame if the party does not know the substance of what is said against him (or her) for what he does not know, he cannot answer.[560]

Superficially, the procedure adopted by Strasbourg may appear to parallel the decision-making by superior appellate courts on granting or refusing leave to appeal where judicial decision-making is assisted by additional material submitted by court clerks or judicial assistants. However, these comparisons do not withstand scrutiny. In the UK Supreme Court, for example, the justices' eight judicial assistants compose summary notes on applications for leave to appeal. These notes do not suggest how the case should be disposed of, and aim to assist justices' scrutiny of the papers by giving them an 'at a glance' summary of the main issues raised by the appeal to help guide justices through the submissions of the parties.[561] The justices' decision-making is not *exclusively* on the basis of these notes and case-files are distributed to the three-justice appeals panels. It includes reference to the reasoned decisions of the courts below. Effective judicial decision-making is maintained.

The *certiorari* memos of the United States Supreme Court seem more closely to follow the procedures employed in Strasbourg, but again, there are significant differences. The

[560] *Re D and another (minors) (adoption reports: confidentiality)* [1996] AC 593.

[561] T Nesterchuk (2013) 'The View from Behind the Bench: The Role of Judicial Assistants in the UK Supreme Court' in A Burrows, D Johnston and R Zimmerman (eds) *Judge and Jurist: Essays in Memory of Lord Rodger of Earlsferry* (Oxford, OUP).

Court's clerks make recommendations about whether a petition should be granted or refused *certiorari*, and a large number of the Court's decisions are made exclusively on the basis of these *cert* memos. However, unlike Strasbourg, cases are not presented to solitary judges as presumptively inadmissible. The United States Court's decision-making is collegiate, with each of the nine justices receiving each memo, having access to each file if desired, and each voting on whether or not to grant or refuse *certiorari*. The memos are designed to assist justices in the exercise of an open-ended discretionary judicial determination about whether a particular case should be subject to further review. Memos characteristically offer arguments on both sides, for granting and refusing *certiorari*, before coming to a conclusion. Registry notes depart from this approach in important ways. There is no to-and-fro of the reasons to accept and the reasons to reject the petition in Registry notes, which are terse, unargumentative, and conclusive.

Although NGO representatives and others continue to oppose formally transferring decision-making powers from judges to Registry staff, contending that 'admissibility decisions should be judicial,' it is clear from the Court's working practices that critical choices are *already* being made by the bureau.[562] The judicial examination which most cases receive is formal rather than substantive.[563] A comparison of the amount of working time spent by the Registry lawyers and judges working on these cases is telling in this respect. The most up to date Registry figures show that at the beginning of September 2010, 256 full-time case-processing lawyers were employed by the Registry, of which 120 were 'assistant lawyers' on time-limited contracts.[564] Assistant lawyers are expected to work within their own language, in cases emanating from their own legal system. They are the primary workhorses of admissibility decision-making. In addition to its full-time assistant lawyers, there is also evidence that just-qualified young law students from across Europe

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[562] N Mole (AIRE Centre) in Committee of Experts on the Reform of the Court (DH-GDR) (2011) 'Report of the Consultation with representatives of civil society and national human right institutions' *Report 6th Meeting 9 – 11th February 2011* DH-GDR(2011)R6 Add I.
[563] Committee of Experts on the Reform of the Court (DH-GDR) (2010) *Report 5th Meeting 1 – 3rd December 2010* DH-GDR(2010)021, para 4.
[564] Registry of the European Court (2010) 'The Single Judge Procedure – Presentation of Registry for GDR meeting of 15 September 2010' in Committee of Experts on the Reform of the Court (DH-GDR) (2010) *Report 4th Meeting 15 – 17th September 2010* DH-GDR(2010)017, Appendix III Assistant lawyer contracts are of at least one year's duration, and may be up to four years. European Court of Human Rights (2009) *Information on the Assistant Lawyers Scheme*, 3.

on even shorter-term, unremunerated three-month traineeships in the Court's legal division (*stagiaires)* are also actively involved in admissibility decision-making in single judge cases.[565] The evidence suggests that *stagiaires*' involvement is extensive, forming:

> a regular part of the admissibility process, drafting arguments for rejection of applications and, provisionally, applying the 'manifestly ill-founded' label to cases. This was ostensibly standard practice, as was allocating to *stagiaires* petitions that originated from their own home state.[566]

As Ben Jones notes:

> there was little time for the *stagiaires* I met to develop any such subtle understanding, with their being put to consideration of applications on only their second day of work. What was clear to those I informally spoke with was that a high rejection rate was, if not expected, then, at the least, understood to be par for the course and that for an application to be found admissible was a relative rarity.[567]

Moreover, most of these interns may reasonably be expected to come to the Court's work with comparatively little knowledge of the Court's admissibility jurisprudence, not least, as chapter 7 discusses in greater detail, because the leading textbooks in European human rights law incorporate scant analysis of admissibility jurisprudence. The work of these interns may be supervised by more senior staff members, but their involvement, and competence to be involved in admissibility decision-making in this way, has to be questioned, as does the general lack of transparency around admissibility decision-making, of which the unrecognised involvement of *stagiaires* in the Court's substantive work represents just one dimension.

[565] B Jones (2012) 'European Court of Human Rights: is the admissions system transparent enough?' *UK Human Rights Blog* http://ukhumanrightsblog.com/2012/01/27/European-court-of-human-rights-is-the-admissions-system-transparent-enough-ben-jones/ last accessed 01.02.2013.
[566] *Ibid.*
[567] *Ibid.*

Registry estimates that single judges charged with admissibility decision-making now spend just 25% of their working time examining *rapporteurs*' notes.[568] Taking an ordinary working day of seven hours, five days a week, and factoring in six weeks of annual leave, we might expect single judges to spend around 8,060 hours a year on their admissibility decision-making. Assuming an even distribution of 81,700 cases decided by single judges in 2012 across the twenty single judges designated by the President of the Court, we might expect each application to receive on average just under six minutes of examination by a judge, before being rejected as inadmissible.[569]

Single judge admissibility decision-making has, as many commentators have noted, allowed the institution to speed up its disposals and reduce its backlog. Generally unrecognised, however, is the extent to which the fully judicial character of Strasbourg proceedings has become illusory at the admissibility stage. The Court's efficiency gains have only been possible by compromising on basic principles of effective judicial decision-making, expanding the domains of bureaucratic work, delegating substantive judicial tasks, and curtailing the opportunities for judges meaningfully to scrutinise or dissent from administrative recommendations. Instead of representing a considered and independent judicial conclusion on the case, the work of the Strasbourg judge has effectively become that of a legitimating 'rubber stamp', maintaining the fiction of the Court's fully judicial decision-making, while hollowing out its substance in order to cope with the 'onslaught of complaints' which Strasbourg receives.[570]

Setting the evidence of the Court's working practices alongside the law of the Convention (chapter 3) and the policy debates on Convention reform (chapter 4), one cannot but be struck by the discrepancies. The law on the books, and the policy discourse lying behind it, envisages the judicial processing of the Court's docket, 'assisted' by senior Registry

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[568] Committee of Experts on the Reform of the Court (DH-GDR) (2011) 'Draft elements for the CDDH Interim Activity Report' *Report 6th Meeting 9 – 11th February 2011* DH-GDR(2011)R6 Add II, para 14.
[569] In practice, I recognise that there is likely to be variation, with judges expending more time on some case-notes than others, while the number of notes submitted to each judge is unlikely to be uniform. My purpose here is only to give a rough impression, based on Registry information and a few reasonable assumptions, of the amount of judicial time each application declared inadmissible might expect to receive.
[570] M O'Boyle & N Bratza (1997) 'The legacy of the Commission to the new court under the Eleventh Protocol' *European Human Rights Law Review* 211, 216.

rapporteurs who are not themselves responsible for deciding the fate of cases.[571] In practice, this vision of co-decision-making is a fiction. The bulk of the case-processing is undertaken by much more junior staff members. The primary legal decision-takers identified in the Convention essentially assume a secondary, reviewing and outcome-endorsing role.

A bureaucratic construction of admissibility decision-making is again indispensable in justifying the responsibility delegated to Court officials and the brevity of the legal and factual analysis upon which judges are obliged to rely in reaching their conclusions on cases. In principle, it is difficult to see how either of these practices could be justified, if the admissibility criteria are understood as flexible and context-sensitive matters of judgement rather than 'clear-cut jurisprudential criteria of an objective character capable of straightforward application.'[572] In parallel, as Registry bureaucrats have assumed greater authority *de facto* to filter cases, the official reasons given by the Court for its disposals also disclose a shift from judicial to more bureaucratic approaches to decision making. It is to the evolution in these practices since 1998 that I now turn.

From judicial to bureaucratic reason-giving practices

As chapter 3 discusses, while the Convention formally requires the Court to give reasons for its decisions *and* judgments, the Court has read down its responsibility to give reasons for its admissibility decisions to such an extent, that its practices are now difficult to justify in terms of traditional conceptions of judicial decision-making. On the recommendation of its internal Working Party on Working Methods, after 2002 the Court decided to dispense with reasoned decisions in cases rejected as inadmissible by its three-judge Committees, a practice which has now been extended to admissibility decisions reached *de plano* by the Registry *rapporteur* and single judges under Protocol No. 14. The Rules of Court were amended to read that 'decisions given *by a Chamber* shall be accessible to the public.'[573] In its report justifying these changes the Working Party reasoned:

[571] ECHR (2010), Article 24(2).
[572] *Ibid.*
[573] Working Party on Working Methods (2002), 42 (my emphasis).

> under the new Committee system, the Committee's decision will be dispatched to the applicant in the form of a standard letter which may be in a language other than English or French. There will not thus be any "decision document" that could be made available to the public.[574]

The values characteristic of the Strasbourg as tribunal model make a belated and fleeting reappearance to justify this innovation, on grounds that it would make the Court's decision-making more accessible to applicants not conversant in its official languages as 'the applicant should be informed of the Committee's decision by way of a letter, and unlike today, in a language he/she is likely to understand.'[575] Strictly speaking, it is not the case that these decision-letters could not be made publicly available. On request, researchers and members of the public can gain access to these texts, but their systematic publication would be a waste of time, resources and HUDOC bandwidth. They contain very little information, and no substantive legal analysis whatever. The following is a representative example of a decision-letter issued by the Court in 2010 in the case of *Sukharev v. Georgia.* Decided before Protocol No. 14 came into force, Mr Sukharev's case was declared inadmissible by a Committee of three judges – at that time, the most summary formation of the Court, employed to reject cases identified by the Registry as 'clearly inadmissible'.

[574] *Ibid*, 44.

[575] Sub-Group B, Working Party on Working Methods (2002) 'Report of Sub-Group B to the Working Party on Working Methods' (2002) *Three Years Work for the Future*, 74.

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

Г-ну СУХАРЕВУ В.В.
ул. Вишневая, 18
пос. Разумное
Белгородская обл.
РОССИЯ / RUSSIE

SECOND SECTION

ECHR-LE11.0R(CD8)
MIB/mdm

13 April 2010

Application no. 36727/09
Sukharev v. Georgia

Dear Sir,

I write to inform you that on 30 March 2010 the European Court of Human Rights, sitting as a Committee of three judges (V. Zagrebelsky, *President*, D. Popović and N. Tsotsoria), decided to declare inadmissible your application lodged on 7 May 2009 and registered under the above-mentioned number. The Court found that the requirements of the Convention had not been met.

The Court found that you were not directly affected by the alleged violation of the Convention. You could not therefore claim to be a victim of that violation, as required by Article 34 of the Convention. Accordingly, the application was incompatible *ratione personae* with the provisions of the Convention, within the meaning of Article 35 § 3.

This decision is final and not subject to any appeal to either the Court, including its Grand Chamber, or any other body. You will therefore appreciate that the Registry will be unable to provide any further details about the Committee's deliberations or to conduct further correspondence relating to its decision in this case. You will receive no further documents from the Court concerning this case and, in accordance with the Court's instructions, the file will be destroyed one year after the date of the decision.

The present communication is made pursuant to Rule 53 § 2 of the Rules of Court.

Yours faithfully,
For the Court

F. Elens-Passos
Deputy Section Registrar

The vast majority of the Court's applicants will recognise this text, slight variations on which have been received by tens of thousands of petitioners over the last decade, informing them that their cases have been rejected as inadmissible. This letter is almost identical in its terms to the draft letter proposed in the Court's Working Party report of 2002.[576] Where there are differences between the two, these are semantic adjustments, or slight rephrasings. Facilitated by pre-fabricated Registry templates, only eleven elements of the text consistently vary between these mass-produced decision-letters, a combination of formal personalising details and the secretariat's categorisation of the case for internal bureaucratic purposes. These eleven points of difference are:

1. the address of the applicant or their lawyer;
2. the application number and name ("Application no. 23727/09");
3. the internal court reference number ("ECHR-LW11.0R(CD8)")
4. the initials of the lawyer or secretary composing the letter (here "MIB/mdm");
5. the title the applicant is addressed by ("Sir,")
6. the Deputy Section Registrar who "signs" the letter formerly "for the Committee", now pre-eminently for the "single judge";
7. the judge or judges who formally "made the decision";
8. the date of that decision;
9. the date on which the letter itself was composed;
10. the Section of the Court which made the decision; and
11. the second substantive paragraph of the decision letter, summarising the admissibility ground relied upon to reject the application. Even this is based on

[576] Working Party on Working Methods (2002) *Three Years Work for the Future*, 85.

a pre-fabricated text, simply inserted into the particular letter from a range of options.

The layout of this decision letter is similar to the impersonal, mass-produced correspondence common to many contemporary bureaucracies taking decisions in individual cases. Connoting officialness and regularity, the justified, word-processed text is composed in a sober font, adorned only with modest institutional branding. As for the contents of the letter itself, it is easiest to enumerate what the text *does not say* about the application which it declares inadmissible than its positive content. Taking the instance of the 'socially stripped applicant'[577] and what Simmonds has described as the 'featureless juridical person'[578] to an extreme degree, the decision-letter is impersonal to the point of inscrutability, the prose cool, unemotive, unspecific. In contrast with the Court's reasoned and published decisions and judgments, the text is composed without a view to informing any broader public about the complaints, the domestic law engaged, or the human rights which the applicant hoped unsuccessfully to rely upon, or any more or less detailed legal justification explaining why the case was rejected under the admissibility criteria. It is not a judgment in any recognisable sense. Although the Convention provides that 'reasons shall be given for judgments as well as for decisions declaring applications admissible or inadmissible', this decision-letter represents at most a *de minimis* compliance with this letter of this provision, and a significant departure from its spirit.[579]

Of this letter's sole addressee – the applicant – we can say almost nothing. The decision offers no forename, and we can only discern his gender by the formal mode of address employed. The facts and experiences in which his application were grounded upon are not recorded, nor are Convention grounds he may have cited in his application, or the arguments which he may have adduced. The application itself might concern anything, from the most trivial grievance to the most serious allegation of inhuman mistreatment. Whatever the alleged violation he was not 'directly affected' by, we cannot say. More

[577] F M Zerilli and M Dembour (2007) 'The House of Ghosts: Post-Socialist Property Restitution and the European Court's rendition of human rights in *Brumarescu v Romania*' in M Dembour and T Kelly (eds) (2007) *Paths to International Justice*, 189.
[578] N E Simmonds (1993) 'Judgment and Mercy' *Oxford Journal of Legal Studies* 13(1) 52 – 68, 60.
[579] ECHR (1950) as amended by Protocol No. 14, Article 45 § 1.

speculatively, we might guess that the since the decision-letter appears to have been sent to the applicant himself, rather than a lawyer representing him, the petition may have been submitted without the assistance of a legal professional. Mr Sukharev's application may have been a model legal brief or a 'long, detailed testimon[y] of suffering, pain or "just" allegations of injustice.'[580] Nothing in the decision-letter gives much clue.

Where individual information *is* presented in the decision-letters, its engages in a familiar, formal bureaucratic legitimation of the decision-making process – personally identifying the judges involved, dating the decision to a particular occasion. Mr Sukharev undoubtedly never saw the Court building in person, but via this decision-letter, he recevies a monochrome sketch of it. It is impossible, on the basis of the material preserved in the Court's archive, to distinguish one unsuccessful application from another, beyond a few points of information contained in these decision-letters. They lend the applicant the barest of existences, in silhouette. Any attempt to use these judicial documents retrodictively to 'restore the richness of subjectivities and chart the complex fields of social relations, contradictory values and the emotional accompaniment to macro-structures that human rights accounts often exclude' – would be absurd.[581]

The Court's quoted policy of destroying documentation means that the spare decision-note quoted above is now the most abiding public record of Mr Sukharev's unsuccessful application to the Court in 2009. In point of fact, his application arose - along with several thousand others - from the armed conflict between Russia and Georgia in South Ossetia during 2008, though little in the text hints at the historical and political interest of the incident behind the rejected petition.[582] Such eradications are not without consequences. Due to the Court's policy of destroying files in inadmissible cases, introduced after the Working Party report of 2002, historical researchers can say more about criminal proceedings in the Old Bailey from the 1680s,[583] or even the contents of petitions sent to

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[580] K Morvai (1998) 'The construction of the other in the European human rights enterprise: a narrative about democracy, human rights, the rule of law and my neighbour Uncle Blaze' in P Fitzpatrick & J H Bergeron (eds) (1998) *Europe's Other: European Law between Modernity and Postmodernity,* 247 – 8.
[581] *Ibid.*
[582] Registrar of the European Court of Human Rights (2009) Press release on "Seven applications against Georgia concerning hostilities in South Ossetia" 14th January 2009.
[583] Old Bailey Online (2014) http://www.oldbaileyonline.org/ last accessed 01.01.2014.

the Roman Emperors of the late third century AD, than the substantial majority of applications decided by the European Court of Human Rights beyond the last twelve months.[584]

Additional changes to the text of decision-letters after 2010 have further truncated the Court's already negligible reason-giving practises, and further diminished the individual analysis which applicants receive. After the introduction of admissibility decision-making by single judges, the Court's decision-letters have continued to be framed in substantially the same fashion. The Registry *rapporteur*'s identity is not given in the text, but the single judge formally taking the decision is designated. Given the balance in the responsibilities of the judge and the functionary in assessing the case and reaching the decision, the elision of the official is telling and misleading. The evidence also suggests that the Court has still further truncated the already sparse legal reasoning afforded to applicants to justify declaring their cases inadmissible. In place of the formulation in *Sukharev v. Georgia*, which at least cites the *ratione personae* ground specifically as grounds for declining further to examine the applicant's case, the legally operative section of the new decision-letters reads as follows:

> In the light of all the material in its possession, and in so far as the matters complained of were within its competence, the Court found that the admissibility criteria set out in Articles 34 and 35 of the Convention have not been met.[585]

This is the full extent of the Court's legal reasoning. Administratively speaking, this new formulation likely produces additional gains in efficiency, understood in the limited sense of simplifying and accelerating the processing of inadmissible cases. The Registry bureaucrat charged with composing the correspondence is no longer be obliged to expend any time selecting from and inserting a particular legal basis into standard form decision-letters before sending them out. By dispensing with *Sukharev's* reference to a particular ground or basis for the finding of admissibility, the new letter's emaciated reasoning is

[584] S Connolly (2010) *Lives Behind the Laws: The World of the Codex Hermogenianus* (Bloomington, Indiana University Press).
[585] *Klosterkotter-Dit-Rawe v. the United Kingdom* App no 11643/12 (ECtHR, 30th May 2012) (dec.)

essentially a global formula, indistinguishably applicable to every and any of tens of thousands of applications rejected as inadmissible annually.

This practice is difficult to reconcile with traditional conceptions of the characteristics of judicial decision-making. As Lord Neuberger, the President of the UK Supreme Court, recently observed, 'without judgments there would be no justice, because decisions without reasons are certainly not justice.'[586] Neuberger argues that the commitment to reasoned judicial decision-making reflects the principle of 'open justice which underpins the rule of law.'[587] Under the first limb, it may be argued that reasoned decisions afford litigants an opportunity to see that their case has been seriously and carefully examined, the outcome having a principled legal basis. Irrespective of the result, this may have implications for perceptions of the legitimacy of the decision-making process, and the institution responsible for it. Giving reasons for decisions also evinces an explicit commitment to decision-making according to law. The Court is not an institution free to accept or decline cases as it wishes, but must do so according to the admissibility criteria set down in the Convention, and interpreted by the Court and former Commission. In the absence of any reasons, it cannot be concluded with any confidence that decisions have been taken with reference to the appropriate legal norms and authorities, rather than irrelevant or improper considerations. The Court's failure to provide even cursory individual reasons for most of its disposals affords no such reassurance. With reference to the dismay with which one applicant of her acquaintance received such a letter, Dembour has characterised these letters as 'disgraceful',[588] while Anthony Lester, who has regularly represented applicants in litigation before the Court, describes them as:

> peremptory letter[s] reminiscent of the reply to the young narrator in Ring Lardner's novel *The Young Immigrants* who asked her father tenderly whether he was lost on the journey to their new home. 'Shut up', he explained.[589]

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[586] Lord Neuberger (2012) 'No Judgment – No Justice' First annual BAILII Lecture 20th November 2012, para 2.
[587] *Ibid*, para 12.
[588] M Dembour (2006) *Who Believes in Human Rights?* 129.
[589] A Lester (2009) 'The European Court of Human Rights after 50 years' *European Human Rights Law Review* 462, 470.

Gerards argues that while:

> Limited judicial reasoning is certainly understandable from the perspective of efficiency and the need to deal with the immense numbers of clearly inadmissible cases the Court is confronted with. Providing hardly any reasons at all is hard to reconcile, however, with the requirements of the right to a fair trial and openness.[590]

Defenders of and apologists for these innovations characteristically either (a) appeal to consequentialist claims that the Court's survival depends on such efficiency savings and that overriding interest trumps any procedural expectations petitioners might entertain (Gerards) or (b) draw analogies to the limited reason-giving practises of constitutional courts on granting or refusing leave to appeal to justify these practices (Greer).[591] As chapter 4 considers, the official debate on the reform of the Court has been framed around the question, what changes can be made to the Court's working practices to ensure its survival in the face of its substantial docket? Although it may only be sketched here, an equally pertinent question is: should an institution which has departed from all of the traditional canons of judicial decision-making continue to be understood and legitimated as a court? Concepts of procedural fairness in judicial decision-making have characteristically been justified in deontological, rather than instrumental terms. A utilitarian defence of these practices might be mounted, asserting that the greatest good is served by employing Strasbourg's judicial semiotics to legitimate its judgments, while allowing bureaucrats to supplant its judges' decision-making responsibilities in the name of procedural economy and survival. However, it seems unlikely that a Noble Lie of this kind, and the conscious 'hypocrisy' it requires, will or should appeal to many.[592]

Under the second heading, the parallel sometimes drawn between admissibility decision-making and leave to appeal decision-making by national constitutional courts is also problematic. Firstly, Strasbourg does not sit at the apex of an integrated judicial system in a manner paralleling constitutional courts. In its own Article 6 jurisprudence on the

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[590] J Gerards (2014) 'Inadmissibility Decisions of the European Court of Human Rights: A Critique of the Lack of Reasoning' *Human Rights Law Review* 14 148 – 158, 154.
[591] J Gerards (2014) *Ibid.*
[592] A Tănase in (2010), 75.

characteristics of a fair trial, the Court has held that the terse reason-giving practices of superior courts of appeal are justified in part by the more extensive reasons given in the courts below, which appellate and apex tribunals can be said to incorporate into their own shorter decisions, declining or giving permission to appeal. In *Sawoniuk v. the United Kingdom,* for example, the applicant petitioned the House of Lords for leave to appeal, which was rejected, without reasons. The applicant complained, *inter alia*, that the failure to give reasons infringed his Article 6 rights. Holding the application manifestly ill-founded, the Court held that:

> courts are not required to give a detailed answer to every argument and the extent to which this duty to give reasons applies may vary according to the nature of the decision. The reasons for a decision may also be implied from the circumstances in some cases. In the case of applications for leave to appeal, which are the precondition for a hearing of the claims by the superior court and the eventual issuing of a judgment, the Court considers that Article 6 § 1 cannot be interpreted as requiring that the rejection of leave be subject itself to a requirement to give detailed reasons.[593]

In reaching this conclusion, the European Court emphasised that:

> there was no right of appeal to the House of Lords. It was a second and exceptional level of appeal for which leave was required and for which special requirements of public importance were imposed. Having regard to the fact that the applicant's appeal in the Court of Appeal had been examined in a hearing and a lengthy judgment given, the Court does not consider that the refusal of leave to appeal without specific reasons being given infringed the requirements of Article 6 § 1 of the Convention.[594]

Where, for example, the Supreme Court declines to disturb a judgment of the Court of Appeal, the superior court can be construed as endorsing the reasoning of their colleagues in the court below. Considering the litigation seen as a whole, from first instance trial to

[593] *Sawoniuk v. the United Kingdom* App no 63716/00 (ECtHR, 29 May 2001) (dec.)
[594] *Ibid.*

review on appeal, litigants must receive a detailed judicial explanation for the outcome of their case. But this logic cannot justify the Court's admissibility decision-making, as domestic courts do not apply the Convention's admissibility criteria to cases. Admissibility decision-making cannot be seen as a *continuation* of the domestic litigation. Moreover, several of the cases reaching Strasbourg's docket have never been subject to a domestic judicial decision. Although the precise extent of this phenomenon is difficult to assess, the Court's former President, Luzius Wildhaber, has observed that the Court 'has plenty of cases where there is no decision of a lower court, be it because national remedies are inadequate, or because there is a length of proceedings problem.'[595] In those circumstances, the Court cannot incorporate the reasons given in the domestic context, to justify its practices. Secondly, the orthodox view, dominating the policy discussion, is that unlike the UK Supreme Court, Strasbourg is not an exceptional level of appeal, but one accessible to individuals as of right if the admissibility criteria are met. This distinguishes it from apex courts, access to which is regulated by the exercise of professional judgment about the importance of the case (exemplified by the Strasbourg as constitutional court model). Thirdly, a key argument in defence of brief reason-giving by superior courts is that judgements of this kind are not readily reasoned in short compass. In judging whether or not a particular appeal concerns a point of law of general public importance which the highest domestic court ought to examine at this time complexity of which resists straightforward elucidation, particularly where decisions are taken by multi-member panels, and decision-takers may have many different reasons for reaching the same conclusion.

Rejecting Lester's criticism of the Court's failure fully to reason its decisions, Greer relies solely on the claim that requiring the Court to give reasons to justify its disposals would only further aggravate the ongoing crisis in the institution's decision-making capacity, entailing more work and fewer decisions being taken, expanding rather than shrinking the Court's backlog. These objections too are unconvincing. In reviewing the case and drafting the case-note, Registry lawyers must provide a somewhat fuller account of what grounds

[595] L Wildhaber quoted in R Wolfrum and U Deutsch (eds) (2009) *The European Court of Human Rights Overwhelmed by Applications: Problems and Possible Solutions*, 45.

of admissibility a particular application falls foul of, and why. Why not distribute this text not only to the single judge, but also to the applicant, if the single judge endorses its conclusions? If the reasoning of these notes is a sufficiently defensible basis for judges to close case-files without any possibility of appeal, these notes ought to be capable of withstanding more general public scrutiny. Alternatively, if the quality of the Registry analysis in these papers is poor, and indefensible, how can the Court justly rely on their analysis? Both at the level of (a) effective judicial involvement in decision-making and (b) adequate reasoning for decisions, Strasbourg's admissibility decision-making falls well short of ordinary principles of judicial decision-making.

Conclusion: The myth of "fully-judicial" admissibility decision-making

In a 2010 conference on Court reform, Jens Meyer-Ladewig of the Council of Europe Steering Committee on Human Rights asked several important questions about the Court's approach to filtering its docket.

> Who decides on the acceptance or rejection of a case? … Who decides whether a single case is accepted or not? It cannot be a single Judge. Perhaps it can be a committee or a chamber. Anyway, in the last resort, it will always be the Registry, I'm afraid. And we always had the idea that we don't want protection of human rights in the Court by civil servants, we want protection of human rights by judges. And that becomes more and more difficult.[596]

Who decides on the acceptance or rejection of a case? In official reform debates, the law of the Convention, and almost all academic commentary, maintaining the judicial responsibility for the Court's decision-making is paramount. In practice, however, under the pressures of its caseload, this chapter shows that the Court's commitment to fully judicial admissibility decision-making process has been hollowed out to a very significant extent. Remarkably few commentators on the Convention, and commentators on the Court and its reform, have contended with this reality. At the level of the official debates analysed

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[596] J Meyer-Ladewig quoted in R Wolfrum and U Deutsch (eds) (2009) *The European Court of Human Rights Overwhelmed by Applications: Problems and Possible Solutions*, 38.

in chapter 4, the demand that admissibility decision-making remain in judicial rather than bureaucratic hands has triumphed over its opponents and detractors. Having regard to the Court's working practices, however, these victories are superficial. To adapt one of the Court's own characteristic formulations, if the goal of the Convention reformers was to retain admissibility decision-making which was judicial in a practical and effective rather than a theoretical and illusory sense, the Court has frustrated that intention. Ironically, the celebrated full judicialisation of the Convention complaints mechanism by Protocol No. 11 coincided with its effective bureaucratisation.

For understandable reasons, the caseload crisis, and the need to process a high volume of cases as rapidly as possible, has placed substantial pressure on the institution: pressure which the Court has answered by embracing the involvement of a growing number of officials in its admissibility decision-making, and multiplying the opportunities for those officials to take a decisive view of cases. In practice, the Court's efficiency gains and streamlining of its protocols has meant the marginalisation of judges as effective decision-makers, placing more and more reliance on the Court's bureaucracy to examine, process and allocate the overwhelming majority of cases with remarkably little judicial oversight. The participation of judges in the admissibility decision-making process is characterised by a very thin level of independent analysis of the case being decided, relying on Registry productions and provisional, but almost invariably final, designations of cases. While in law and official policy, the Court's work remains fully judicial, resource pressures and the Court's response to them have rendered that commitment is increasingly tokenistic.

In administrative justice terms, the evolution in the Court's approach is an interesting and complex one. The Court faces considerable pressure to accelerate its decision-making and cut back on the extent to which cases are examined. In that atmosphere, responsiveness to the situation of individual, mostly legally unrepresented applicants, corresponding with them to facilitate the effective presentation of their case, imposes substantial costs and demands on the busy work of the bureau. By contrast, the responsibilisation of litigants relieves the Court of two burdens: first, the duty and cost of respond to applicants in a pro-active and facilitative way (Strasbourg as tribunal) and secondly, any attendant culpability for the mass-production of unsuccessful outcomes. This echoes the idea of the victim court identified in chapter 4, and the Sisyphean labours of a passive arbiter troubled by ignorant, incompetent and undeserving litigants.

In that task, administrative justice values of bureaucratic rationality have been a critical resource, justifying the elaboration in the responsibilities and roles of Strasbourg's officials. The exaggerated disavowal of discretion, and dominant understanding of the admissibility criteria as formal tests susceptible to rigorous and uniform application, has been critical in justifying the reduction in judicial scrutiny of the file, the truncation of reason-giving, and the expansion of docket-processing work to the most junior and temporary Registry employees. This approach sits uncomfortably alongside any recognition that complexity and formalism may act as a barrier to access to justice, particularly where individuals without access to lawyers attempt to navigate their claims through the Court complaints process. At the level of policy, and debates about introducing new barriers to lodging cases, the idea of Strasbourg as a 'street-corner court' remains a powerful one.[597] In practice, however, aspirations towards flexibility, and accommodation of the limits of litigants' legal knowledge through a more active and facilitative bench – is largely irrelevant in understanding the values underpinning the Court's working practices. While a veneer of tribunal values are maintained above the waterline, in the less visible work of the bureau below, bureaucratic expediency almost always trumps accessibility and a strategic passivity dominates facilitation.

[597] M B Dembour (2002) '"Finishing off" cases: the radical solution to the problem of the expanding ECtHR caseload' *European Human Rights Law Review*, 604 – 623, 621.

7. Bureaucratic norms or cases of judgement? A legal analysis of four key grounds of admissibility

The analysis thus far has revealed an account of the administrative justice of the Court's admissibility decision-making, characterised by considerable ambivalence and complexity. As drafted, the Convention has evolved in an increasingly judicial, though less collegial, direction since 1950. In parallel, the text has also made explicit the involvement of officials in the Court's docket-filtering, though the treaty remains silent on the precise scope of involvement envisaged. In terms of the admissibility criteria introduced in 1950 and which have since supplemented them, the Convention frames these ideas in very general language, leaving considerable latitude to the Court to shape its approach to filtering its docket and pursue its own filtering policy under its headings.

From the policy debates, a decisive bureaucratic understanding of the Court's docket-filtering has emerged. This claim about the character of the norms being applied is fused, problematically, with the identification of inadmissible cases as uniformly unimportant and undeserving. The idea that admissibility decision-making is effectively judicial is also of signal importance in the official reform debate. A subaltern dimension of these debates argues for what I characterise as the Strasbourg as tribunal model, emphasising the Court's responsibility for actively facilitating the litigation of its applicants, and in particular, to have regard to the circumstances of its petitioners and the challenges they face, when considering whether or not to admit their cases for full review.

An examination of the Court's evolving working practices throws up yet another configuration in the competing administrative justice values which admissibility decision-making is envisaged to pursue. Undermining claims about the fully judicial character of the Court's decision-making processes, chapters 5 and 6 show that the Court has made considerable compromises with a bureaucratic approach to processing cases at the admissibility stage, empowering its officials and refiguring judicial work in more characteristically administrative forms. The representation of the admissibility criteria as formalistic, technical and susceptible to straightforward administrative implementation has been of the essence in justifying the Registry's expanded role in the process, both to the

Court's internal and external audiences. The Strasbourg as tribunal model, by contrast, has been systematically subordinated to the case-processing imperative to decide more cases, more rapidly, with less judicial scrutiny.

This chapter focuses on a fourth body of data: the Court's published case-law on the admissibility criteria. Analysing of the Court's case-law on four key admissibility grounds, this chapter explores the competing administrative justice values which these cases express. If the bureaucratic rational vision of docket-filtering expressed in policy debates is to be a plausible legal account of decision-making, we would expect to be able to identify a straightforward, clear-cut, rule-governed admissibility jurisprudence, fit for bureaucratic implementation. We would not expect to find an admissibility jurisprudence that relies to a significant extent on the exercise of judgement, complex balancing tests, or employing explicitly adjudicative concepts such as reasonableness, or proportionality.[598]

In contrast with the dominance of the Strasbourg as **bureaucratic** model in Convention renegotiation processes, and in the organisation of the institution's working practises, this chapter argues that the Court's published jurisprudence approaches admissibility decision-making with reference to values characteristic of the **Strasbourg as court** and **tribunal** models. While emphasising the Court's role as a passive arbiter, and the adversarial nature of proceedings, the jurisprudential evidence strongly aligns the Court's approach to docket-filtering with the distinctive values of tribunal justice identified in chapter 2, emphasising the importance of context-sensitivity, applicant participation and flexibility in the definition and application of admissibility criteria.

Exploring administrative justice and addressing jurisprudential neglect

As chapter 4 shows, the official Convention reform debate has tended to characterise admissibility decision-making as a solid iron cage of weary but dogged administration, where clear rules or admissibility gate the legally, politically and ethically laden work of adjudication on the merits. The category of the obviously or manifestly inadmissible case is taken to be stable, self-evident and unproblematic. This depiction of admissibility

[598] J Mashaw (1983) *Bureaucratic Justice*, 26.

standards has filtered through into the doctrinal approaches to the analysis of the Convention jurisprudence. With now dated exceptions, we find limited doctrinal analysis of admissibility decisions in contemporary academic treatments of the Court's case-law.[599] Only a handful of scholarly articles have critically examined the admissibility jurisprudence in any detail, and with the exception of my own work, characteristically focus only on the manifestly ill-founded and significant disadvantage grounds.[600]

The most substantial survey of the Convention admissibility jurisprudence which has been undertaken to date is the Court's *Practical Guide on Admissibility*, first published in 2010. However, the *Guide* is not primarily critical or discursive in purpose, neither examining nor exploring tensions and inconsistencies in the Court's admissibility jurisprudence. Leading monographs in European human rights law incorporate only very cursory legal analysis of the Court's decision-making under the admissibility criteria, while prominent scholars continue to characterise the norms as 'merely formal admissibility tests,' and 'straightforward' 'bland administrative work.'[601] As chapter 2 has noted, while the literature on Convention reform has been framed by doctrinal legal scholars, and doctrinal legal assumptions, it is not undergirded by a critical legal analysis of the Court's admissibility jurisprudence. This chapter begins to address that lacuna. A comprehensive

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599 L Mikaelsen (1980) *European Protection of Human Rights: The Practice and Procedure of the European Commission of Human Rights on the Admissibility of Applications from Individuals and States*; T Zwart (1994) *The Admissibility of Human Rights Petitions*.

600 X Ruedin (2008) 'De minimis non curat the European Court of Human Rights: the introduction of a new admissibility criterion (Article 12 of Protocol No. 14)' *European Human Rights Law* Review 80 – 105; H Keller, A Fischer and D Kuhne (2010) 'Debating the future of the European Court of Human Rights after the Interlaken Conference: Two Innovative Proposals' *European Journal of International Law* 21 1025 – 1048; A Tickell, (2011) 'Dismantling the Iron Cage: the Discursive Persistence and Legal Failure of a "Bureaucratic Rational" Construction of the Admissibility Decision-Making of the European Court of Human Rights' *German Law Journal* 12 1786 – 1812; A Buyse (2013) 'Significantly Insignificant? The Life in the Margins of the Admissibility Criterion in Article 35(3)(b) European Convention on Human Rights' in B McGonigle Leyh, Y Haeck, C Burbano Herrera and D Contreras Garduno (eds) *Liber Amicorum for Leo Zwaak* (Antwerp: Intersentia); J Gerard (2014) 'Inadmissibility Decisions of the European Court of Human Rights: A Critique of the Lack of Reasoning' *Human Rights Law Review* 14 148 – 158; C Cojocariu (2011) 'Handicapping Rules: The Overly Restrictive Application of Admissibility Criteria by the European Court of Human Rights to Complaints Concerning Disabled People' *European Human Rights Law Review* 6, 686 – 699.

601 W Sarduski (2009) 'Partnering with Strasbourg: Constitutionalisation of the European Court of Human Rights, the Accession of Central and Eastern European States to the Council of Europe, and the Idea of Pilot Judgments' *Human Rights Law Review* 9(3) 397 – 453, 406; A Tomkins (1999) 'Civil liberties in the Council of Europe: A critical survey' in C Gearty (ed) (1999) *European Civil Liberties and the European Convention on Human Rights: A Comparative Study* (Martinus Nijhoff, the Hague) 1 – 52, 14.

analysis of the whole corpus of admissibility jurisprudence is beyond the scope of this chapter. Here, the Court's case-law on four grounds of admissibility are analysed in detail. The four grounds are (a) the Court's jurisprudence on 'reconsidering the date of introduction' of an application under the 'six month' rule; (b) its case-law on the admissibility of 'anonymous' applications (c) the assessment that the applicant has 'suffered no significant disadvantage' and (d) that an application is 'manifestly ill-founded'. Why examine these particular admissibility grounds?

Both anonymity and the Court's six month time-limit are superficially the most formal grounds of admissibility under the Convention.[602] Generally being conceived as technical in character, and treated cursorily in existing legal studies, anonymity and the six-month rule buttress the bureaucratic image of admissibility decision-making as being 'basic formal requirements for bringing a case.'[603] By contrast, the Court and former Commission's approach to the interpretation manifest ill-foundedness has already been the focus of critical comment in the literature. Gerards has characterised application of the criterion as 'clearly not straightforward and easy,' 'an enigma.'[604] For Keller, Fischer and Kuhne:

> the term "manifestly ill-founded" resembles an empty "black box", the content of which to be filled through interpretation. The conceptual indeterminacy of this term necessarily leaves the Committee a wide measure of discretion in giving substance to it. Without definitional criteria which serve to restrain at least to some extent the otherwise almost unfettered discretionary power of the Committee in considering whether to classify an application as manifestly ill-founded or not, the chances are that the pressing need to free up judicial resources leads the Committee to carry its interpretative powers beyond what was originally conceived to be the legitimate limits of Article 28 ECHR. In other words, there is the danger that the category of

602 S Greer (2006) *The European Convention on Human Rights: Achievements, Problems, Prospects* (Cambridge, CUP), 144 – 5.
603 J P Costa (2010) 'Opening of the Judicial Year 29 January 2010' in European Court of Human Rights (2011) *Annual Report European Court of Human Rights 2010*, 38.
604 J Gerards (2014), 156 – 7.

manifestly ill-founded applications is used as a tool to control the caseload of the Court.'[605]

If anonymity and time-limits reinforce the Strasbourg as bureaucratic administrative justice conception which dominates Convention reform debates, the Court's approach to manifest ill-foundedness represents the most visible challenge to it. Lastly, the comparatively novel significant disadvantage ground sits ambivalently between the two competing visions of the administrative justice. As chapters 3 and 4 have examined, when introduced by Protocol No. 14, this criterion was criticised as 'vague, even potentially arbitrary'[606] – an objection which the governments sought to rebut in the *Explanatory Report* to the Protocol, which maintained that the Court would develop 'clear-cut jurisprudential criteria of an objective character capable of straightforward application' on the scope of the new admissibility condition.[607] A legal analysis of how the Court has interpreted the concept of significant disadvantage affords a direct insight into the slippages between the administrative justice conceptions articulated in the international policy debates examined in chapter 4, and the concrete cast which the Court has given to the concept in its published case-law.

Choosing to analyse the case-law on these four grounds also maps onto the quantitative data on the Court's docket, affording an overview from the most to comparatively less regularly invoked admissibility grounds. According to unpublished official estimates, the six-month rule accounts for about 8% of inadmissible applications: the third most common ground for rejecting a case after failures to exhaust domestic remedies.[608] Although a modest percentage of the total, given the massive volume of Convention litigation, this represents a very large number of cases. The Court declared 89,737 applications inadmissible in 2013, meaning that more than around 7,000 turned on the construction of time-limits.[609] Official figures suggest that findings of manifest ill-foundedness account for around 73% of adverse admissibility decisions: the overwhelming majority (over

[605] H Keller, A Fischer and D Kuhne (2011), 1046.
[606] Updated Joint Response to Proposals to Ensure the Future Effectiveness of the European Court of Human Rights, signed by 114 NGOs, April 2004.
[607] Council of Europe (2004) *Explanatory Report to Protocol No. 14*, § 79.
[608] Personal communication, Registry official.
[609] European Court of Human Rights (2014) *Annual Report 2013*.

65,500 in 2013, using Registry estimates).[610] Decisions taken on the basis of anonymity and significant disadvantage may be assumed to account for <1% of disposals, but even then, given the scale of the Court's docket, may account for several hundred cases per annum. The limits of the data produced in the Court's official reports prevent any more precise quantification.[611] Taken together, these four grounds traverse the superficially more and less bureaucratic grounds, and cover the regularly and less-regularly employed criteria. Collectively, they afford a clear insight into the competing conceptions of administrative justice which the Court's admissibility jurisprudence expresses.

Interpreting admissibility and "practical and effective, not theoretical and illusory" human rights protection

In interpreting the admissibility criteria, the Convention institutions have repeatedly emphasised the importance of approaching the text purposively. The Convention 'constitutes a treaty for the collective enforcement of human rights and fundamental freedoms,' and as such 'must be interpreted and applied so as to make its safeguards practical and effective', rather than 'theoretical and illusory' protections.[612] Similar considerations extend to the admissibility criteria. Although the Court offers only subsidiary protection of human rights, requiring applicants to 'exhaust domestic remedies' before lodging a complaint in Strasbourg, the Court's approach to the interpretation of the admissibility criteria govern tens of thousands of individuals' ability to gain access to an international remedy for alleged violations.[613] As Zwart observes, 'in their simplest form, admissibility conditions identify which claims may be brought by whom and when.'[614] From the applicant's point of view, how those conditions are interpreted is vital.

This purposive approach is reflected in the Court's general commentary on its approach to the interpretation and application of the admissibility criteria, reflecting values characteristic of the Strasbourg as tribunal model. In *Varnava and Ors v. Turkey*, for

[610] *Ibid.*
[611] European Court of Human Rights (2014) *Annual Report 2013*.
[612] *Varnava and Ors v. Turkey* App No. 16064/90 et seq (ECtHR, 18th September 2009), para 160.
[613] ECHR, Article 35(1).
[614] T Zwart (1994), 5.

example, a case concerning the disappearance of an applicant's family member, the six-month admissibility rule, and a delay in lodging a petition in Strasbourg, the Grand Chamber observed:

> The Court cannot emphasise enough that the Convention is a system for the protection of human rights and that it is of crucial importance that it is interpreted and applied in a manner that renders these rights practical and effective, not theoretical and illusory. This concerns not only the interpretation of substantive provisions of the Convention, but also procedural provisions.[615]

This approach has led some scholars to argue that there is a 'trend in the Court's case-law towards relaxation of procedural constraints on access to justice' and that the Court's jurisprudence is characterised by 'liberally applied, restrictions on admissibility.'[616] Cojocariu argues that the Court 'has adopted a flexible approach to its admissibility requirements, subordinated to the imperative that the Convention must be 'interpreted and applied in a manner which renders its rights practical and effective, not theoretical and illusory.'[617] The Court's case-law seems to bear out this general analysis. For example, in *Khashiyev and Akayeva v. Russia*, elucidating the admissibility requirement that applicants exhaust domestic remedies before submitting their cases to Strasbourg, the Court emphasised

> that the application of the rule of exhaustion of domestic remedies must make due allowance for the fact that it is being applied in the context of machinery for the protection of human rights that the Contracting States have agreed to set up. Accordingly, it has recognised that Article 35 § 1 must be applied with some degree of flexibility and without excessive formalism. It has further recognised that the rule of exhaustion is neither absolute not capable of being applied automatically; for the purposes of reviewing whether it has been observed, it is essential to have regard to the circumstances of the individual case. This means, in particular, that

615 *Varnava and Ors v. Turkey* App No. 16064/90 et seq (ECtHR, 18th September 2009), para 160.
616 N Simonsen (2013) 'The Strasbourg Court, the 'Exhaustion of Domestic Remedies' Rule, and the Principle of Subsidiarity: Between a Rock and a Hard Place?' *Oxford Human Rights Hub* http://ohrh.law.ox.ac.uk/?p=1235 last accessed 01.08.2013.
617 C Cojocariu (2011), 693.

> the Court must take realistic account not only of the existence of formal remedies in the legal system of the Contracting State concerned but also of the general context in which they operate, as well as the personal circumstances of the applicant. It must then examine whether, in all the circumstances of the case, the applicant did everything that could reasonably be expected of him or her to exhaust domestic remedies.[618]

Several features of this approach weigh against a bureaucratic rational construction of the process values of admissibility decision-making. *Khashiyev* does not propound clearly delineated *rules* but identifies *factors* relevant to the decision, emphasising *ad-hoc* balancing and contextual interpretation of the applicant's circumstances. I argue that this general approach is reflected in the case-law on each of the four grounds of admissibility considered here. In stark contrast with the Strasbourg-as-bureaucratic account which predominates in the Court's working practices and in the expectations of policy debates, the Court's published jurisprudence reflects a radically different and conflicting account of the administrative justice values which the Court brings to its admissibility decision-making. It is to the Court's jurisprudence on the first of these criteria to which I now turn.

The 'six month rule': general jurisprudence

Article 35 § 1(1) of the Convention provides that 'The Court may only deal with the matter … within a period of six months from the date on which the final decision was taken.'[619] The admissibility requirement that applications are lodged with the Court within six-months of the domestic 'final decision' appears *prima facie* to be the most formalistic of the Convention's admissibility criteria. Greer identifies time limits as 'largely formal grounds' of inadmissibility, as distinct from other 'substantive grounds related to issues of policy or principle.'[620] Even Dembour, a legal anthropologist who has been critical of the

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[618] *Khashiyev and Akayeva v. Russia* Apps no 57942/00 and 57945/00 (ECtHR, 24th February 2005) (judg.), para 117.
[619] ECHR (2010), Article 35 1(1).
[620] S Greer (2006) *The European Convention on Human Rights: Achievements, Problems, Prospects*, 144 – 5.

orthodox understanding of the Court's admissibility decision-making, which she suggests 'denies that inadmissible decisions have legal and political value', is willing to concede that while the summary administrative disposal of applications according to pre-established, formal rules might be acceptable on:

> purely technical grounds (such as the six-month limit), it is highly problematic with respect to the "manifestly ill-founded" ground and also in respect of other grounds that require interpretation.[621]

However, the bare text of Article 35 § 1(1) also poses a number of questions of interpretation, and as drafted, the language is 'far from clear' or comprehensive about the precise rules on time which the Court should apply.[622] The Court has explained the six month rule in the following, often repeated, formulation, holding that it reflects:

> the wish of the contracting Parties not to have old decisions challenged after an indefinite period, serves not only the interests of the Government but also legal stability as an intrinsic value while also answering the need to leave the applicant time to decide whether to apply to the Court and to prepare his application. This rule also places a time-limit on the supervision provided by the Court and tells both private individuals and State authorities the period beyond which its supervision ceases.[623]

However, in *Sapeyan v. Armenia* the Court recognised the importance of applying the rule flexibly, stating that the rule 'must be construed and applied according to the facts of each individual case, to ensure the effective exercise of the right to individual application' and must be applied 'with some flexibility.'[624] This flexibility sits uncomfortably beside the bureaucratic model of admissibility decision-making which was supported by the analysis of the data from the last three chapters. To recall former Secretary General Davis' arresting

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[621] M Dembour (2002) '"Finishing off" cases: the radical solution to the problem of the expanding ECtHR caseload' *European Human Rights Law Review* 604, 613.
[622] A Tomkins (1999), 14.
[623] *Otto v. Germany* App no 21425/06 (ECtHR, 10th November 2009) (dec.)
[624] *Sapeyan v. Armenia* App No 35738/03 (ECtHR, 13TH January 2009) (judg.) para 26 – 27.

phrase, you cannot ‘count to six’ ‘with some flexibly.’[625] The ‘conceptions of good administration’ expressed in the Convention reform debate, and those reflected in the Court’s Article 35 jurisprudence, are entirely at odds.[626] The six-month rule has a number of additional specialities, including how the date of ‘final decision’ is to be calculated, when the time-period begins, the effect of pursuing an extraordinary domestic remedy on the time-period and when the period commences when no effective remedy is available. An exegesis of the whole jurisprudence is beyond the scope of the present chapter. Instead, I focus on one delimited aspect of that case-law, where the Court ‘reconsiders’ the date on which an application is taken to have been introduced. What administrative justice values does this body of decisions reflect?

The six month rule: “reconsidering” the date of introduction

One form of flexibility the Convention bodies have afforded themselves in the interpretation of this criterion springs from the judgment that:

> it would be contrary to the spirit and aim of the six-month rule if, by any initial communication, an application could set into motion the proceedings under the Convention and then remain inactive for an unexplained and unlimited length of time.[627]

In these circumstances, it has been the ‘established practice of the Convention organs’[628], reflected in the Rules of Court that:

> The date of introduction of the application for the purposes of Article 35 § 1 of the Convention shall as a general rule be considered to be the date of the first communication of the applicant setting out, even summarily, the subject matter of the application, provided that a duly completed application form has been submitted within the time-limits laid down by the Court. The Court may for good cause

[625] T Davis (2007) *Future Developments of the European Court of Human Rights in the light of the Wise Persons’ Report*, 14; *Ibid.*
[626] S Halliday (2004), 115.
[627] *Garnham v. the United Kingdom* App no 16309/90 (EComHR, 17th October 1991) (dec.)
[628] *P.M. v the United Kingdom* App No 6638/03 (ECtHR, 24th August 2004) (dec.)

> nevertheless decide that a different date shall be considered to be the date of introduction.[629]

The Court has held that setting out the application 'even summarily' requires 'some indication of the nature of the alleged violation under the Convention is required to introduce a complaint and thereby interrupt the running of the six-month time-limit.'[630] In particular, the simple annexation of documents from earlier domestic proceedings to an introductory letter does not suffice.[631] Under the Rules, the Registry affords applicants a period of eight weeks to return the completed form.[632] While Rule 47(5) emphasises the discretion of the Court to 'consider' another date to be the date of introduction, Registry correspondence with applicants, by contrast, suggests a more inflexible rule. They note:

> Failure to comply with this time-limit will mean that it is the date of submission of the completed application form rather than that of your first communication which *will* be taken as the date of the introduction of the application. Your attention is drawn to the fact that it is the date of introduction that is decision for compliance with the time-limit set out in Article 35(1) of the Convention.[633]

The Court and Commission have previously rejected cases as out of time on this basis of an amended 'date of introduction', where there has been unexplained interval of four years, two years, and one year.[634] Cases rejected on this basis can involve allegations of serious violations of Convention, including the right to life.[635] For example, in *Erik v. Turkey* a Kurdish applicant complained under Articles 2, 6 and 13 of the Convention that her son had been:

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[629] European Court of Human Rights *Rules of Court* (Registry of the Court, Strasbourg, 2010) Rule 47(5).
[630] *Ibid.*
[631] *Bozinovski v. the former Yugoslav Republic of Macedonia* App no 68368/01 (ECtHR 1st February 2005) (dec.)
[632] European Court of Human Rights (2009) 'Practice direction, institution of proceedings' *Rules of Court* (Registry of the Court, Strasbourg), para 4. The later practice in the European Commission on Human Rights afforded a shorter period of six weeks *Nee v. Ireland* App no 52787/99 (ECtHR, 30th January 2004) (dec.).
[633] Registry letter to the representative of the applicant, quoted in *Kemevuako v. the Netherlands* App no 65938/09 (ECtHR, 1st June 2010) (dec.) (my emphasis).
[634] *Garnham v. the United Kingdom* App no 16309/90 (EComHR, 17th October 1991) (dec.); *De Bono v. Malta* App no 20608/92 (EComHR, 2nd December 1992) (dec.); *G.H. v. the United Kingdom* App no 17366/90 (EComHR, 19th February 1992) (dec.)
[635] ECHR (2010), Article 2.

> intentionally killed by two conscripted soldiers and a non-commissioned officer of the Turkish army and that the investigation into the circumstances of his death was inadequate and ineffective.[636]

Although *Erik's* first communication was received on the 13th June 1997, her completed application was not received until the 28th October 1999, two years and four months later. No explanations were forthcoming. The Court rejected the case as out of time. *Erik* is also a clear example of how problematic the assumption is that the Court's inadmissible caseload is universally 'frivolous', 'not serious' and 'that inadmissible decisions have no legal and political value'.[637]

Although Erik's application was rejected, other published decisions on this basis expose the extent to which the Court's application of this rule is flexible and context-dependent. In *P.M. v. the United Kingdom,* a fourteen week gap separated the applicant's initial introductory letter of complaint and completion of the official application form.[638] While the introductory correspondence was lodged *within* six months of the final domestic decision, the completed application form was not. In their preliminary objections, the UK government sought to persuade the Court that it should consider later date to be the date of introduction, thereby ruling the complaint out of time. Rejecting the government's preliminary objections, the Court emphasising flexibility of its approach:

> where a substantial interval follows before an applicant submits further information about his proposed application or before he returns the application form, the Court may examine the particular circumstances of the case to determine what date should be regarded as the date of introduction with a view to calculating the running of the six month period imposed by Article 35 of the Convention.[639]

Applying those values to the instant case, the Court noted that the applicant had

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[636] *Erik v. Turkey* App no 55962/00 (ECtHR, 9th January 2007) (dec.)
[637] M Dembour (2002), 613.
[638] *P.M. v the United Kingdom* App No 6638/03 (ECtHR, 24th August 2004) (dec.)
[639] *Ibid.*

kept the Registry appraised of their progress, ensuring that there was not appearance of the matter lying dormant. In the circumstances, the Court does not consider that the overall period discloses a lack of expedition or any abusive or unreasonable conduct on the part of the applicant's representatives.[640]

As a result, the introductory letter continued to be taken to be the day of introduction and *P.M.* could not be faulted for failure to comply with the six month rule. The case subsequently resulted in a judgment in favour of the applicant and finding a violation of Article 14.[641]

By contrast, in *Nee v. Ireland*, a thirteen month delay separated receipt of the applicant's initial letter from the lodging of a completed application.[642] *Nee's* representatives afforded no explanation for the delay during the course of proceedings, but subsequently justified their conduct on four grounds. Firstly, they cited the complexity of the domestic legal proceedings which prompted the application. Secondly, they argued that *Nee's* solicitor had lacked familiarity with Convention jurisprudence and that research into the relevant authorities had taken time. Thirdly, that there had been delays in receiving instructions from the England domiciled applicant, and further delays for the West of Ireland based solicitor to take advice from counsel. Finally, they argued that 'the solicitor understood at all times that the important date was that of the letter of introduction', despite a warning letter from the Court which emphasised the potential consequences of delayed submission of the application form. The Court pronounced itself unconvinced by these explanations for the delay and 'reconsidered' the application to have been introduced when the completed form was submitted. Since this was more than six months after the final decision of the domestic tribunal, *Nee's* application was declared out of time and inadmissible.

The Court's approach in *Nee* contrasts with its assessment of the admissibility in *Chalkley v. the United Kingdom*.[643] A case concerned with police use of listening devices which the

[640] *Ibid.*
[641] *P.M. v the United Kingdom* App No 6638/03 (ECtHR, 19th July 2005) (judg.)
[642] *Nee v. Ireland* App no 52787/99 (ECtHR, 30th January 2004) (dec.)
[643] *Chalkley v. the United Kingdom* App no 63831/00 (ECtHR, 26th September 2002) (dec.).

applicant alleged violated Articles 6, 8 and 13 Convention,[644] the applicant's representatives, Liberty, submitted a brief description of the complaint in December 1998. Further submissions did not follow until November 2000, almost two years after the first letter of introduction. A completed application form did not reach the Court until April 2001. Unlike *Nee*'s representatives, who were informed of implications of delay only once, Liberty received such warnings 'on a number of occasions.'[645]

Justifying their delays, the applicant's representatives submitted that correspondence with a prisoner was time consuming and that his relevant case papers were 'exceptionally voluminous', noting that that had attempted 'to keep the Court fully updated with information on the reasons for delay and delayed in anticipation of a judgement of the Court on a similar case.' Despite the warnings, the lapse of almost two years separating the first correspondence and submission of a completed form, the Court held that the 1998 date of introduction should not be 'reconsidered', and consequently, the application was not held to be inadmissible as out of time:

> On due consideration, however, the Court does not find that the applicant's representatives have acted in an abusive or unreasonable manner overall and considers that they kept in touch with the Court with sufficient regularity to prevent any appearance of the matter lying dormant.[646]

In contrast with this generosity, in the more recent case of *Kemevuako v. the Netherlands*, the Court much more stringently enforced the eight-week rule set out in the Rules of Court.[647] The applicant's final appeal against the refusal to grant him a Dutch resident permit was rejected in June 2009. His representative sent a fax to the Court in December, initiating proceedings in the final days of the six-month period. The Registry informed *Kemevuako*'s lawyer that a completed application form should be returned not later than the 4th March 2010. On the 4th March 2010 the applicant's representative faxed the Registry a covering letter, a completed form and an authority form signed by applicant and lawyer.

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644 Subsequently found to violate Article 8 and 13 in *Chalkley v. the United Kingdom* App no 63831/00 (ECtHR, 12th June 2003) (judg.)
645 *Chalkley v. the United Kingdom* App no 63831/00 (ECtHR, 26th September 2002) (dec.).
646 *Ibid.*
647 *Kemevuako v. the Netherlands* App no 65938/09 (ECtHR, 1st June 2010) (dec.)

All documents were dated for the 4th of March. A paper copy these documents, postmarked for the 10th, was received by post on 12th. The Court held that the material faxed to the Court was 'irrelevant as long as the original form was not despatched within the eight-week period,'[648] holding that:

> transmissions by fax of these documents are, without originals of these documents being provided to the Court, insufficient to constitute a complete or valid application.[649]

Accordingly, the applicant's materials were 'taken' to have been received on the day the paper copies had been posted – in *Kemevuako*'s case this was the 10th of March 2010.[650] Since this fell six days after the Registry deadline for returning a completed form, the Court 'reconsidered' the date on which *Kemevuako* was taken to have submitted his application, declaring the application inadmissible as out of time.

Analysis: 'reconsidering the date of introduction'

Contrary to the formal, technical understanding of the six month admissibility rule which dominates the literature, an analysis of the Court's jurisprudence shows that the Court has applied the rule in with considerable flexibility and unpredictability. While in some cases, the Court adopted creative interpretations to save the case from inadmissibility, in others, no such efforts were made. Presented with clear choices in terms of how a case should be constructed – should day A or day B be taken as the date of introduction? Should C or D constitute a valid application? – a formalistic construction was deployed to repel the application in some cases, while a 'saving' judgement was exercised in others. Given the immense pressures of the Court's caseload, it seems probable that in practice, the Court makes extensive use of this eight-week rule to re-consider the date on which applications are taken to have been submitted, furnishing it with an administrative mechanism, speedily to declare a number of cases *out of time*, despite the fact that the applicant's initial contact

[648] *Ibid.* para 23.
[649] *Ibid*, para 22.
[650] *Ibid.*

with the Court was made within six months of the final domestic decision. However, as *Chalkley* makes clear, such an approach can be resisted in a given case. If the Court decides to be benevolent, despite a longer period of delay, it is willing to find an application falls *within* the six-month rule, by refusing to 'reconsider the date of introduction'. By contrast, where no such determination is made to save the case, such as *Kemevuako*, a much shorter delay in the submission of a completed application can be taken to justify a finding of inadmissibility.

Critically, for the bureaucratic rational image of admissibility decision-making under this aspect of the six-month rule, the difference between these cases is not one of *time*. In *Kemevuako*, the delay in submitting an application form amounted to six days, and the application was declared inadmissible as being outside mandatory Convention time-limits. In *Chalkley*, the delay in submitting a completed application form was almost two years – but the application was *not* declared to be time-barred. This suggests that whether or not a case is found to be time-barred can have relatively *little* to do with the period of time which actually passes between an application's introduction and the submission of an application forms and supporting documentation: other, undeclared, less readily calculable factors are more important.

Put most starkly, it can be envisaged that the submission of a completed application form could be delayed by the *same* length of time in two cases, yet one case could be declared 'inadmissible' as time barred, and the other not. The two cases could differ in every material respect, *except* the one which the admissibility criteria is notionally being applied to, yet generate two different outcomes, one application being rejected as 'clearly inadmissible', another leading to examination on the merits, judgment, a finding of violation – and an award of damages. Despite this case-by-case inconsistency, the Court's jurisprudence does not entirely relinquish the language of rules. For example, in *Nee*, declaring the application inadmissible, the Court strongly emphasised that the applicant's representatives had received an article of correspondence, warning them about the risks of delay in submitting their full legal materials, as if this was determinative of the issue. By contrast, in *Chalkley*, the applicant received *several* warning letters about his delays, but these were not taken as grounds sufficient to reject *Chalkley's* application.

Similarly, in *Kemevuako,* the Court invoked the necessity of bureaucratic construction of time limits to reject the case, in *Chalkley*, the *same* rule was identified as flexible, and given the particular circumstances of his application, its demands were generously varied. Ironically, the Court's jurisprudence does not suggest that this inconsistency is regarded as problematic, either for the status of the questionably-admitted exceptional case, saved by judicial discretion (*Chalkley*); nor do these 'rescued' cases appear to render questionable the category of 'clearly inadmissible' cases, where judges do not trouble themselves to vary procedural demands (*Kemevuako*). The jurisprudential instability of the category of the 'clearly inadmissible' case under this heading of admissibility is striking. Quite apart from formal administration gating adjudication, and a time-bar jurisprudence which is applied impartiality and evenly, Court's case-law on 'reconsidering the date of application' explicitly relies to a significant extent on that 'nonreplicable, non-reviewable judgment or intuition' which, for Mashaw, is incompatible with a bureaucratic rational conception of administrative justice.[651]

Anonymity: the Convention and general jurisprudence

A symmetrical invocation of mandatory rules *and* the flexible and *ad hoc* suspension of their demands can be identified in the second, ostensibly technical admissibility ground of anonymity. Article 35 § (2)(a) of the Convention provides that the Court shall not deal with any individual application that is 'anonymous.'[652] There is comparatively little case-law on this ground of inadmissibility. However, the published decisions are characterised by their inconsistency in approach. For example, in *X v. Ireland,* the applicant styled themselves the 'lover of tranquillity.'[653] The supporting documentation contained 'no single clue as to the identity of the applicant.'[654] No further information on that identity being forthcoming, the Commission rejected the application as inadmissible. More generally, anonymity appears to be treated as a ground of inadmissibility which is rectifiable within the

[651] J Mashaw (1983) *Bureaucratic Justice*, 26.
[652] ECHR (2010) Article 35 § (2)(a).
[653] *X v. Ireland* App No 361/58 (EComHR)(dec.) quoted in P Van Dijk and F Van Hoof (1998) *Theory and Practice of the European Convention on Human Rights*, 109.
[654] *Ibid.*

procedure, only likely to result in a finding of inadmissibility where the applicant deliberately persists in their anonymity or where further communication does not follow initial correspondence.[655] The potentially exclusionary effect of this Convention provision is moderated by the Rules of Court, which attempts to answer concerns at-risk applicants may have about their identities being exposed by proceedings. Rule 47 § 3 of the Rules of Court provides that:

> applicants who do not wish their identity to be disclosed to the public shall so indicate and shall submit a statement of reasons justifying such a departure from the normal rule of public access to information before the Court. The President of the Chamber may authorise anonymity or grant it of his or her own motion.[656]

In practice, such applicants are identified by pseudonymous letters of the alphabet and those who have concerns about their identities being disclosed have little excuse not to inform the Court of their real names.

What a difference a name makes: the Court's inconsistent anonymity jurisprudence

The authorities are curiously at odds on whether disclosure of applicant's name is mandatory, if applications are not to be dismissed as inadmissibly 'anonymous' under Article 35. In its 2003 decision and 2005 judgment in *Shamayev & Twelve Ors v. Georgia and Russia*, the Court dealt with the admissibility of a case arising in the context of armed conflict in the Chechen Republic.[657] Over the course of proceedings, the twelve applicants provided the Court with several names, including names that they subsequently admitted to be false. Even at the stage of judgment, the veracity of some of the identities given by applicants remained unclear. The Court noted that the applicants had seized it of the pseudonymous nature of their applications. Responding to the Russian government's preliminary objections under Article 35 § (2)(a), the applicants argued that their continuing

[655] *Kuznetsova v. Russia* App No 67579/01 (ECtHR, 19th January 2006) (dec.)
[656] Last amended in July 2009.
[657] *Shamayev & Ors v. Georgia and Russia* App No 36378/02 (ECtHR, 16th September 2003) (dec.) and *Shamayev & Ors v. Georgia and Russia* App No 36378/02 (ECtHR, 12th April 2005) (judg).

pseudonymity was justified. Circumstances in the Russian Federation were such that they felt obliged not to reveal their true names to the Court, in order to protect family members who continued to live in Russian territory.

Holding that 'behind the tactics of concealing their real identities for understandable reasons were real people identifiable from a sufficient number of indications, other than their names' and that there existed a 'sufficiently close link between the applicants and the events in question,' the Court decided that the applications were not inadmissibly "anonymous" under Article 35.[658] Dissenting, Judge Kovler argued that the applicants' use of a 'strategy of false names', provision of false and unverified and unverifiable surnames, addresses and dates of birth, 'prevented their identity from being established before our Court.'[659] The Court notably rejected Russian Government's preliminary objections, directing it to the Greek etymology of the word anonymous, meaning 'without a name', finding that a surfeit of names, and in some cases, *no* verified name, did *not* constitute inadmissible anonymity.[660]

Contrast this with the Court's decision six years later, in *"Blondje" v. the Netherlands.*[661] The applicant refused to identify himself in domestic judicial proceedings, concerned with the legality of his presence in the Netherlands. His application to the Court identified him as "Blondje alias NN cel 07 alias Nn.PI09.m.20081101.1100". His lawyer's authority to represent him before the Court was signed only "X". The Court asked the applicant's representative to furnish it with a copy of 'a valid identity document of his client.'[662] His lawyer was unable to produce such a document. In a brief decision, the Court placed firm emphasis on the absence of "*Blondje's*" name, noting that his case file containing no 'mention of his name' nor indicating 'any element enabling the Court to identify the applicant'. The application was rejected as anonymous under Article 35 § (2)(a).

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[658] *Ibid.*
[659] *Shamayev & Ors v. Georgia and Russia* App No 36378/02 (ECtHR, 12th April 2005) (judg), para 302.
[660] '*Anonymous'*: *An-* (without) + *onoma* (name) (1996) *Oxford Concise Dictionary of English Etymology* (Oxford, OUP) The term *'anonyme'*, etymologically identical, is used in equally authoritative French text of the Convention.
[661] *Blondje v. the Netherlands* App no 7245/09 (ECtHR, 15th September 2009) (dec.)
[662] *Ibid.*

In "*Blondje*", as is the case in the vast majority of admissibility decisions, proceedings were not adversarial, as the application had not been communicated to the Dutch government. However, through his representative, the applicant had laid detailed descriptions of domestic proceedings taken against him before the Court, including his periods of incarceration. The applicant was, at that time, detained in Dutch custody. It seems likely, had the case been communicated to the Government, that this evidence could have gone uncontested. Indeed the numerical aliases "*Blondje*" provided read like official case numbers, allocated by institutions of the state, although this is an inference which cannot be confirmed from the Court's short decision. There seems no question, therefore, that behind *Blondje's* tactics of concealing his real identity was 'a real person, identifiable from a sufficient number of indications, other than his name'[663] and that there existed a 'sufficiently close link between' him and the complained of legal 'events in question.'[664] Given the extent to which the Court was willing to be flexible in *Shamayev,* its claim in *Blondje* that the submitted material afforded no 'element enabling the Court to identify the applicant' appears forced, the issue of the applicant's failure to give the Court his name seeming the substantive *sine qua non* of their finding his application inadmissible. In *Shamayev,* by contrast, the Court was at pains to justify why non-provision of an applicant's real name was *not* determinative of the 'anonymous' character of an application.

The deviation in the authorities might well be justified on the basis of one element of the *Shamayev* judgment: an assessment of whether persistent pseudonymity was for 'understandable reasons', although no explicit reference is made to such an assessment in the *"Blondje"* decision, nor does the Court's decision in *Shamayev* explicitly lay down such a test. Blondje's application concerned complaints lodged under Articles 5 and 6 of the Convention concerning his detention by the Dutch *Vreemdelingenpolitie*, while the applications in *Shamayev* concerned allegations of inhuman and degrading treatment of prisoners in the context of the notoriously volatile and often brutal Chechen situation. Adopting such a flexible approach may appear unproblematic if admissibility decision-

[663] *Shamayev & Ors v. Georgia and Russia* App No 36378/02 (ECtHR, 16th September 2003) (dec.).
[664] *Ibid.*

making is conceived of as an adjudicative enterprise, sensitive to contexts and having regard to the 'practical and effective' realisation of judicial human rights protection (Strasbourg as tribunal).[665] It is, however, difficult to reconcile with the dominant official discourse that admissibility decision-making represents accurate bureaucratic implementation of settled well-settled, clear-cut requirements.

The case-law on anonymity suggests a formalistic standard – applicants must provide their real names or have their applications declared inadmissible – co-exists with interpretative flexibility, allowing the Court to reason its way out of its own strictures, if it wishes to make the effort to 'save' a case from inadmissibility. The implication of this jurisprudence is that the Court's 'anonymity' standard can simultaneously generate two applications which a bureaucratic rational rule on anonymity would find 'clearly inadmissible' for exactly the same reason – no name being furnished – but an assessment of one application's interest or seriousness results in that application being accepted, and the other rejected. In contrast with discourses constructing admissibility decision-making as bureaucratic and mechanical, administration gating merit-weighing adjudication on the substance of the complaint, the Court's 'anonymity' jurisprudence suggests that even decisions on *prima facie* formalistic admissibility standards can engage much more extensively with the substance of applications than has generally been supposed.

Significant disadvantage: the Convention and general jurisprudence

The third body of admissibility jurisprudence examined in this chapter is the Court's decision-making on significant disadvantage, which came into force in 2010. Protocol No 14 provided that the Court could declare applications inadmissible where:

> the applicant has not suffered a significant disadvantage, unless respect for human rights as defined in the Convention and the Protocols thereto requires an examination of the application on the merits and provided that no case may be

[665] *Varnava and Ors v. Turkey* App No. 16064/90 et seq (ECtHR, 18th September 2009), para 160.

> rejected on this ground which has not been duly considered by a domestic tribunal.[666]

This section focuses exclusively on the main element of the criterion, and the concept of 'significant' disadvantage. During the two-year period within which Chambers enjoyed exclusive competence to reject applications on this ground, the Court considered applying the criteria in forty-two published cases, and rejected a total of twenty-six of those applications (62%) as inadmissible on this basis during that time.[667] Twenty two of those cases concerned infringements of a range of fair trial rights protected under Article 6 of the Convention. Just under half of all cases in which the new criterion was considered involved an assessment of the significance of the financial disadvantage suffered by the applicant. Accordingly, the Court's case-law on the lack of a significant *financial* disadvantage is the most developed branch of its jurisprudence. If we were to find evidence in law for a clear-cut set of rules on significant disadvantage, distinguishing between admissible and inadmissible cases in a straightforward way, we would expect to be able to identify them from these decisions.

No significant financial disadvantage? *Korolev* and *Ionescu*

The leading cases, and the Court's first decisions interpreting the new admissibility provision, were *Korolev v. Russia* and *Ionescu v. Romania*, both decided on the basis of the insignificance of the financial disadvantage suffered by applicants.[668] In *Korolev*, the applicant, having been denied access to documents pertaining to delays in issuing his new passport, brought actions in various domestic courts to secure the papers. The Russian courts ordered the Passport and Visa Department to allow the applicant access to all the documents and materials relating to the issuing of his passport and held that the Department should pay the applicant 22.50 roubles – less than one euro in value – in consideration of his court fees. *Korolev* complained that the Russian authorities' failure to pay him this

[666] ECHR (2010), Article 35(3)(b).
[667] European Court of Human Rights (2012) *The new admissibility criterion under Article 35 s 3 of the Convention: Case-Law Principles Two Years On* (Strasbourg, Council of Europe), para 32.
[668] *Korolev v. Russia* App no 25551/05 (ECtHR, 1 July 2010) (dec.); *Ionescu v. Romania* App no 36659/04 (ECtHR, 1 June 2010) (dec.)

amount had violated his rights under Article 6 and Article 1 of Protocol No. 1. *Ionescu*'s complaints concerned various alleged infringements of his right of access to court in the course of an unsuccessful civil action in pursuit of damages of a value of €90, alleging a failure to perform a contract of carriage.

The critical question for the purpose of this chapter is: to which models of administrative justice as set out in chapter 2 do the Court's admissibility decisions conform? In articulating a *general* approach to the assessment of the significance of damage, did the Court articulate a clear, stable, unwavering minimum threshold of value, or adopt a looser, more mobile standard of judgement? The language employed by the Court in *Korolev* clearly aligns with more adjudicative criteria for decision-making. The Court held both that the concept of 'significant disadvantage' is 'not susceptible to exhaustive definition' but also that it:

> hinges on the idea that a violation of a right, however real from a purely legal point of view, should attain a minimum level of severity to warrant consideration by an international court. The assessment of this minimum level is, in the nature of things, relative and depends on all the circumstances of the case. The severity of a violation should be assessed, taking account of both the applicant's subjective perceptions and what is objectively at stake in a particular case.[669]

But how is this relative assessment of the impact of the claim at stake, assessed on the basis of all the circumstances of the case, to be made? In *Ionescu*, the Court elaborated that 'criteria such as the financial impact of the matter in dispute or the importance of the case for the applicant' must be taken into account in assessing the significance of the disadvantage.[670] In the facts and circumstances of *Ionescu*'s case, the Court noted that:

> the applicant's alleged financial loss on account of a failure to perform a contract of carriage was limited. The amount in issue, according to the applicant's own estimation, was 90 euros for all heads of damage, and there is no evidence that his

[669] *Korolev v. Russia* App no 25551/05 (ECtHR, 1 July 2010) (dec.)
[670] *Ionescu v. Romania* App no 36659/04 (ECtHR, 1 June 2010) para 34.

> financial circumstances were such that the outcome of the case would have had a significant effect on his personal life.[671]

In *Korolev,* the Court also identified the absence of significant disadvantage due to the 'tiny and indeed almost negligible size of the pecuniary loss which prompted the applicant to bring his case to the Court.'[672] However, the Court shied away from outlining any general bright line rule on a minimum pecuniary interest necessary, if an application is to escape inadmissibility on grounds of want of significant disadvantage. Emphasising the case-by-case nature of assessing what constitutes 'significant disadvantage', the Court continued that it was:

> conscious that the impact of a pecuniary loss must not be measured in abstract terms; even modest pecuniary damage may be significant in the light of the person's specific condition and the economic situation of the country or region in which he or she lives.[673]

Subsequent cases, citing the formulations in *Korolev and Ionescu,* have rejected applications concerning disputes of a value up to €504,[674] and up to a cumulative total of 901.34 euros in a closely connected extension of the Court's jurisprudence on rejecting applications as an 'abuse of the right of individual petition', on the basis of the 'trivial' nature of the litigation.[675]

By contrast, in other cases, such as *Gaglione and Others v. Italy,* the Court has rejected the government's preliminary objections on the basis of the Court's no significant disadvantage jurisprudence.[676] The *Gaglione* judgment simultaneously considered four hundred and seventy five Italian complaints, all concerning delays in the payment of damages awarded for excessively long domestic proceedings in Italian domestic courts.

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[671] *Ibid,* para 35.
[672] *Korolev v. Russia* App no 25551/05 (ECtHR, 1 July 2010) (dec.)
[673] *Ibid.*
[674] *Kiousi v. Greece* App no 52036/09 (ECtHR, 20 September 2011) (dec.)
[675] Although the Court could not reject the application on the ground of no significant disadvantage, as *Dudek's* cases had 'not been duly considered by a domestic tribunal' in Germany, the Court instead declared the case inadmissible on the basis that it was an 'abuse of the right of individual application'.
[676] *Gaglione & Ors v. Italy* App no 45867/07 (ECtHR, 21 December 2010) (judg).

Strasbourg had held that justice delayed was justice denied, in violation of Article 6's fair trial rights. The delays ranged from nine to forty-nine months, and the level of damages awarded from €200 to €13,749.99. The Court rejected the government's preliminary objection to the admissibility of the complaints, holding that *all* of the applicants had suffered a significant disadvantage, including the applications of *Apice* (a 12 month delay to pay €200), *Eventi* (a 20 month delay to pay €200) and *Romano* (€320, and a delay of 17 months). The judgment contains no analysis, however, of how it reached its conclusion that all of the applications considered in *Gaglione* satisfied the criterion.

The legal standards articulated in *Korolev* or *Ionescu* are clearly not framed in terms of a clear rule. Neither *Ionescu* nor *Korolev*, nor subsequent decisions of the Court in other cases, contain any explicit analysis of the legal significance of the various relevant factors which are identified as important in weighing up the significance of the disadvantage suffered by the applicant. Such 'balancing' of factors arguably 'takes adjudication outside the realm of rule-governed behaviour and into the domain of unregulated judicial discretion.'[677] It is clear that decision-making about the significance of any financial disadvantage involves an assessment of (a) the 'specific condition and economic situation' of the individual applicant; (b) the 'importance' of the case to the applicant; and (c) an explicitly 'relative' interpretation of the significance of disadvantages suffered, the adjudication of which 'depends on all the circumstances of the case.'[678]

Hitherto, the Court has not made it clear how any *changes* in any one of these factors might impact on the outcome in terms of its assessment of the significance of the disadvantage caused to the applicant. For example, might the case have been decided differently, if *Ionescu* had been seriously disabled and in receipt of social security, on the breadline, where every penny counted? Alternatively, even if he was less well off, would the cash value of *Korolev's* case still be so low that no application based on such a paltry amount could be considered a significant disadvantage to any applicant? Nothing in any of the Court's decisions affords much clue as to how the Registry lawyer might structure their decision-making where all of these factors are relevant, and what weight ought to be

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[677] S Greer (2006), 204.
[678] *Korolev v. Russia* App no 25551/05 (ECtHR, 1 July 2010) (dec.)

afforded to them. From the perspective of a formal-rational vision of admissibility decision-making, and the framers' expectations that the admissibility criteria would 'clear-cut jurisprudential criteria of an objective character capable of straightforward application,' the Court's initial jurisprudence is not promising.[679]

In no case yet considered has the Court elaborated on how the second condition it mentions – 'the economic situation of the country or region' from which the applicant hails – ought to be incorporated into its decision-making, or might affect the admissibility of an application. One could envisage circumstances in which the Court might impose a typology on member states in terms of their general economic status, which varies very substantially across the Court's jurisdiction, applying higher wealth hurdles to overcome for applicants lodging cases against wealthier countries, while setting up lower bars for applicants to overleap, where they hail from less well-off states. Such a bureaucratic scheme would not, however, be without its potentially perverse consequences, with objectively poorer applicants from wealthier states having their cases declared inadmissible while the application of richer citizens from poorer states would be examined. Whatever the merits or demerits of such an approach, however, the Court has articulated nothing like this kind of standard in its admissibility jurisprudence under this heading.

While in some cases, it may be relatively straightforward to identify the "money value" of the dispute, according to the Court's jurisprudence, the value of the dispute alone cannot be determinative of admissibility. Both an inadmissible and an admissible application under this criterion may seek the same cash sum. On the basis of the 2010/2012 authorities on significant disadvantage, the Court might well find A's application inadmissible, and B's admissible. In a subsequent case, the Court has held that 'the level of severity shall be assessed in the light of the financial impact of the matter in dispute and the importance of the case for the applicant.'[680] How is the financial impact of the complaint on the applicant to be assessed? On what information can the Court make this financial assessment, and what limits might there be to the financial information which is potentially relevant for admissibility? Nowhere in its cases is a procedure explicitly mandated. Hitherto, the

[679] Council of Europe (2004) *Explanatory Report to Protocol No. 14*, § 79.
[680] *Bazelyuk v Ukraine* App no 49275/08 (ECtHR, 27th March 2012) (dec.).

Court's decisions appear to have been based primarily on (potentially groundless) assumptions about the scale of the remuneration attaching to the applicant's employment.

The Rules of Court do not require applicants to make financial declarations as to their wealth, but do ask about the applicant's professional occupation.[681] The Court has made explicit reference to this information in its significant disadvantage. In *Fernandez v. France* the Court held that the 'economic situation of the applicant' – who was a senior judge in the Marseille administrative court of appeal – 'particularly reduced' any disadvantage she may have suffered, which in financial terms totalled at a €150 fine for speeding, along with a €22 cost order and a single penalty point on her driving licence, and declared her application inadmissible on this basis.[682] In *Dudek v. Germany,* a case concerned with the length of civil proceedings, Dudek made five applications to the Court, with the sum at issue across the five applications totalling €901.34. The Court characterised the sums sought as 'petty' and noted 'the fact that these sums concerned the applicants dental practice whose very existence was not put in jeopardy by the amounts involved,' the implication presumably being, that had the 'petty' sum demonstrably threatened the economic viability of *Dudek's* practice, his application might not have been rejected.[683]

The Court engaged in no explicit financial assessment in either of these cases, merely assuming instead in one case that French administrative judges benefit from substantial salaries, and Mr Dudek's dentistry practice was otherwise economically healthy. An individual might, for example, have a well-remunerated job, but be engulfed by bankruptcy proceedings – say if their spouse suffered a financial catastrophe, and pulled the shared matrimonial assets under with them. Moreover, not every professional label is so easily associated with an income bracket. A self-employed entrepreneur may have accumulated hundreds of thousands or pounds, or struggle to make ends meet. An unwaged, unemployed applicant might have substantial capital assets in their name, own several heritable

[681] European Court of Human Rights (2011) *Rules of Court*, Rule 47(1)(a).
[682] The original French text reads, '*la situation économiqe de la requérante, premier conseiller à la cour administrative d'appel de Marseille, de sorte que le prejudice allégué était particulièrement réduit' Fernandez v. France* App no 65421/10 (ECtHR, 17th January 2012) (dec.).
[683] *Dudek v Germany* App no 12977/09 (ECtHR, 23rd November 2010) (dec.)

properties or a large share portfolio, or be the beneficiary of being embedded in a wealthy family, though generating little employment income themselves.

If we pursue this line of reasoning, we might also be obliged to look at other factors impacting on the applicant's income. Say, for example, that in addition to being a judge on the administrative appeal court of Marseille, *Fernandez* had been an indebted single mother, supporting a large number of children. That too might alter the significance of a fine of 180 euros, compared to a fine imposed on a senior administrative judge who was single, and had no offspring. Would that penalty point added to her driving licence by a procedure potentially objectionable under Article 6 have a heightened significance if it resulted in a driving ban, and she lived in an isolated rural location, and relied on her car to deliver her children to school and herself to her place of employment?

From the applicant's perspective, such factors may be keenly relevant to the significance of the disadvantage suffered. From the Court's perspective, however, labouring under an exhausting caseload, sapped of resources and time for unnecessary correspondence, and making most decisions without adversarial proceedings on the basis of the applicant's submissions alone -- the idea that such remote factors may be held to be relevant to the apparently formal and bureaucratic admissibility decision-making seems surprising. Such an approach also sits uncomfortably beside the idea of the equality of persons in the eyes of the law and the universality of human rights, which at least in theory 'belong' as much to the affluent applicant as to his or her penniless fellow citizens. More significantly, however, the Court seems ill-equipped, in terms of its overstretched resources, effectively but accurately to "means-test" human rights justice in the way its jurisprudence seems to dictate. In practice, Strasbourg almost certainly does not do so systematically.

The Court's jurisprudence under this new criterion ordains no procedure for and imposes no obvious limits on the information potentially relevant to a calculation of the financial disadvantage which the applicant has suffered. In practice, however, it may well become the case that the Court is able to use concepts of legal burdens, and its ignorance of the applicants' financial situation, to reframe the more adjudicative decision-making envisaged by the Court's jurisprudence into a more bounded, rule-governed practice. Citing a formal rather than substantive conception of justice, and emphasising the equality of arms between the parties, it would be possible for the Court to emphasise that it is for *applicants* to avail the Court of all of the relevant information concerning their cases. If applicants do not include personal financial information critical to the assessment of the significance of the disadvantage which they have suffered, so much the worse for them.

This sort of reasoning is not unproblematic, however. If financial considerations are important, in fairness to potential applicants, you would expect the Court adequately to inform the public about this requirement, and to facilitate the submission of the relevant information. Since Protocol No. 14 came into force in June 2010, the Court has taken no steps to brief applicants on the potential significance of their financial situations to the admissibility of their applications and the application form has been not been amended to reflect the Court's potential interest in these questions. In that context, an emphasis on the legal burdens to be discharged by applicants, might in practice prove a pretext for the exploitation of the majority of applicants' ignorance of the Court's jurisprudence, generating a number of cases which might be declared inadmissible solely because unrepresented applicants, unprompted by the Court, leave what has become critical but otherwise extraneous-seeming information about their general financial state from off of their application forms.

This is not remote speculation. In the early case-law, decided on the basis of adversarial proceedings which will not be typical of most of the Court's decision-making in future under this heading, we can already find examples of the Court employing the language of legal burdens of evidence and proof to justify findings that the applicant had suffered no significant disadvantage. In March 2012, the Court declared Bazelyuk's application against the Ukraine inadmissible under the new criterion. His application concerned pecuniary damages of a value of €445. Relevant to the Court's assessment that *Bazelyuk* did not experience a significant disadvantage, was the finding that:

> the refusal to award the applicant the amount claimed did not impose a significant financial burden on him. In particular, the applicant did not claim reimbursement of any amounts already spent by him and *did not provide any evidence* that his

> financial circumstances were such that the outcome of the case would have had a significant effect on him.[684]

In the absence of evidence not habitually solicited by the Court, *Bazelyuk* was assumed to be insignificantly impacted upon by his complaint, and his case rejected. This recovery of the language of passive arbitration, and of applicants bearing the brunt of their failure to adduce all of the relevant information, reflects the Strasbourg-as-court model's distinctive emphasis on adversarial legalism.

On its own terms, however, the Court's significant-disadvantage jurisprudence is neither clear-cut nor straightforward, but more open-ended decision-making; the significance of different factors such as the applicant's financial situation, and the sum claimed, variable. The reformers' vision of 'clear-cut jurisprudential criteria of an objective character capable of straightforward application' under the heading has not materialised.[685] Like its anonymity and its six-month jurisprudence, the application of the Court's case-law on significant disadvantage is unpredictable, and characterised by considerable context-dependency and flexibility.

"Manifestly ill-founded"

The fourth and final admissibility ground analysed in this chapter, manifestly ill-founded, has similar characteristics. From the perspective of a bureaucratic conception of the Court's admissibility decision-making, the concept of manifest ill-foundedness lacks immediate promise. The six-month and anonymity rules appeared, on their face, to be formalistic requirements. Significant disadvantage, although defined only to a very limited extent by Protocol No. 14, nevertheless emerged from a policy debate which emphasised the importance of foreseeable, consistent and rule-like admissibility criterion for judges to apply. With manifest ill-foundedness, however, the former Commission and Court began

[684] *Bazelyuk v Ukraine* App no 49275/08 (ECtHR, 27th March 2012) (dec.) (my emphasis).
[685] Council of Europe (2004) *Explanatory Report to Protocol No. 14*, § 79.

applying the concept to individual petitions with little in the way of a conceptual steer from the Convention's framers about the envisaged scope of the criterion.

Introduced to the text of the Convention as a consensus measure to allay fears that the Court would be 'inundated with frivolous or mischievous litigation', delegates only cursorily discussed the filtering function which they anticipated manifest ill-founded would serve, doing little to substantiate the sort of decision-making which they envisaged the Commission would undertake under this section of the Convention.[686] The concept of manifest ill-foundedness was not a transplant important from the domestic legal orders of the Contracting Parties. In the late 1940s, neither French public and constitutional law, nor British, accommodated the concept. Despite this, in the official record of these negotiations, 'ill-founded and irregular' applications and 'obviously inadmissible' petitions were treated as if the scope of these concepts was self-evident.[687] On the ordinary meaning of these terms, we might expect *manifest* ill-foundedness to exclude only clearly eccentric, irrelevant applications from consideration on their merits and would not expect the criterion to be used to resolve 'serious and complex problems' of Convention jurisprudence.[688]

In practice, however, the Commission adopted a much more expansive approach to the interpretation of the manifestly ill-founded criterion during its tenure between 1950 and 1998, which was inherited and has been replicated by the full-time Court since 1998. In the Commission's hands, manifest ill-foundedness became, in practice, an adverse decision on the merits of applications, without the formality of the case being considered "on the merits" in a binding judgment of the Court. Decisions taken on this basis went beyond questions of the bare arguability of the petitioner's case, or the adequacy of the documentation and evidence submitted by applicants, instead settling important questions about how the material law of the Convention, and the substantive rights it protects, should be interpreted. Writing extra-judicially in 1965, Henri Rolin, a judge of the Court and participant in the debates which framed the text of the Convention in the late 1940s,

[686] Council of Europe (1970) *Travaux Préparatoires on Articles 26 and 27 of the European Convention on Human Rights* CDH(70)30.
[687] *Ibid.*
[688] L Mikaelsen (1980), 172.

criticised the 'very extensive application' which the Commission had given to this admissibility criteria.[689] The Commission's approach, Rolin argued, deprived the Court of its proper jurisdiction to decide applications on their merits, flying in the face of the intentions of the Convention's framers, who had conceived the Court as the 'the principal body' and the Commission as 'a filter and a sort of administrative organ' to protect the new Court from a 'deluge' of irregular applications.[690]

Accordingly, the Commission's use of manifest ill-foundedness became an important force in shaping how European human rights law developed between the early 1950s and 1998, resolving many controversial points of legal construction in admissibility decisions, adverse to the applicant, unappealable, and without any judicial deliberation on the case. For example, in the 1975 case of *X v. the United Kingdom,* the applicant alleged a violation of his right to free expression, protected under Article 10 of the Convention. A Buddhist prisoner serving a five year sentence, the applicant corresponded with the editor of a magazine devoted to his beliefs, sending him an article for publication during his time in custody. When prison authorities discovered this, the applicant was denied permission to send further material for publication in future. Declaring the application manifestly ill-founded, the Commission determined that the authorities' interference with the applicant's right to free expression was 'necessary in a democratic society for the prevention of disorder or crime within the meaning of Article 10(1),' declining to forward the complaint to Court.[691] As Van Dijk and Van Hoof note, 'to put it mildly, it was doubtful whether this was so obvious an interpretation of the said provision of the Convention that no difference of opinion was possible among reasonable persons.'[692]

Today, the Court describes manifest ill-foundedness as a ground of 'inadmissibility based on the merits', continuing that 'it is clear from the settled and abundant case-law of the Convention institutions … that the expression is to be construed more broadly, in terms of

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[689] H Rolin (1965) 'Has the European Court of Human Rights a Future?' 11 *Howard Law Journal* 442 - 451, 445.
[690] *Ibid*, 443.
[691] *X v. the United Kingdom* App no 5442/72 (EComHR, 1975) (dec.).
[692] P van Dijk & G J H van Hoof (1998) *Theory and Practice of the European Convention on Human Rights* 3rd edn, 165.

the final outcome of the case.'[693] As the CDDH usefully summarised during its discussions on Convention reform:

> the present "manifestly ill-founded" test does not just exclude cases which are *manifestly* ill-founded in layman's terms. A decision to declare a case inadmissible may have been one which the chamber was in disagreement and/or which requires upwards of 20 or 30 pages of detailed legal reasoning to explain why the case is "manifestly" ill-founded.[694]

Any application will be considered manifestly ill-founded if a preliminary examination of its substance does not disclose any appearance of a violation of the rights guaranteed by the Convention. This approach is reflected in the statistics concerning the outcomes of Convention cases, summarised in the introduction to this thesis. Of the small percentage of applications which the Court declares admissible and decides in a judgment on the merits, the applicant wins a finding that the Convention has been violated in 88% of cases.[695] By contrast, the filtering concepts employed by other appellate and constitutional courts, are often very weak predictors for the final outcome of appeals. In the 2011/12 term, for example, the UK Supreme Court received 249 petitions seeking leave to appeal, granting 64 (26%). Of the 70 cases decided by the UK Court during 2011/12, appeals were allowed in 37 cases (53%) and refused in 33 (47%).[696]

Mikaelsen suggests that this approach to manifest ill-foundedness entails 'transgressions of the borderline between the formal and material law of the Convention.'[697] The approach arguably goes further than mere transgression, effectively collapsing the boundary between (a) decisions of the Court finding no violation after a petition has been considered on its merits, and (b) an adverse finding during the admissibility stage that the application is manifestly ill-founded. The idea that 'cases need to be subjected to an admissibility

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[693] European Court of Human Rights (2011) *Practical Guide on Admissibility*, 68 (my emphasis).
[694] Steering Committee for Human Rights (CDDH) 'Submissions of NGO Reform of the Court Group on the Swiss-German Proposals for Optimising the Effectiveness of the Filtering and Subsequent Processing of Applications to the ECHR' CDDH-GDR(2003)006 (Strasbourg, 3 February 2003), para 34.
[695] This data is derived from the Court's *Annual Reports* (2001 – 2013).
[696] This date is derived from the UK Supreme Court's permission to appeal data (2010 – 2013), accessible at www.supremecourt.uk/news/permission-to-appeal.html.
[697] L Mikaelsen (1980), 167.

analysis before they can proceed to merits arguments' cannot be sustained when the admissibility of applications turn on arguments about the merits of the case.[698] If the underlying merits of applicants' petitions become a mainstay of filtering the Court's docket at a preliminary stage, the traditional distinction drawn between admissibility decision-making and consideration of the merits of cases, identifying one with adjudication and the other with administration, prove impossible to maintain.

From the perspective of the administrative justice values of admissibility decision-making, this collapse in the boundary separating the Court's filtering and adjudication is not necessarily problematic. For example, if the Court's decisions on the interpretation of substantive rights adopted an approach to decision-making which was characterised by determinacy and consistency, even "admissibility decision-making on the merits" could be characterised by adherence to stable, predictable legal norms (Strasbourg as bureaucratic). If, by contrast, the Court's approach to the adjudication on the merits is casuistic and flexible in its general approach, any admissibility test "on the merits" cannot credibly be rendered in *more* deterministic terms.

An exhaustive account of the Court's use of the concept of manifest ill-foundedness is beyond the scope of the current chapter and thesis to offer. Because of the expansive manner in which this criterion has been employed by the Court and Commission, thousands of published cases and tens of thousands of unpublished decisions on admissibility have been made under its authority. However, the *general* contours of the Court's approach to decision-making "on the merits" may be delineated. On the basis of this understanding of the Court's general approach to "decisions on the merits", an assessment may be made about whether admissibility-decision making which employs these concepts is capable of bureaucratic rational construction in the manner claimed by official debates. It is to the issue of the Court's general approach to adjudication "on the merits" to which I now turn.

[698] F de Londras (2013) 'Dual functionality and the persistent frailty of the European Court of Human Rights' *European Human Rights Law Review* 38 – 46, 39.

Manifestly ill-founded: the nature of admissibility decision-making "on the merits"

One consequence of the neglect of the admissibility criteria by legal scholars focussing on the doctrinal analysis of the Court's approach to the interpretation of the Convention's substantive rights has been the failure to connect their insights and criticisms of the Court's *substantive* approach to the debate on institutional reform, and the way the Court has interpreted the Convention's *procedural* sections. As Sottiaux and van der Schyff note, 'in recent years, the Strasbourg Court's decision-making process has been increasingly subject to criticism for its lack of theoretical and conceptual coherence' in its approach to the interpretation of the Convention's substantive rights.[699] The Court's approach to the rights guaranteed by Articles 8 to 11 have been a particular focus of scholarly critique.[700] The following section will focus on the Court's approach to adjudication in the merits in cases involving these four Convention provisions.

Articles 8 to 11 are structured two parts, the first section of the Article identifying the scope of the right guaranteed ('privacy, family life, home and correspondence', for example), while the second "limitation clause" outlines justifications for the infringement of these rights, which will nevertheless be compatible with the Convention. For example, Article 8(2) provides:

> There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Considering a hypothetical application is anchored in Article 8 of the Convention, according to the Court's jurisprudence, what stages must a decision-maker go through, to

[699] S Sottiaux & G van der Schyff (2008) 'Methods of International Human Rights Adjudication: Towards a More Structured Decision-Making Process for the European Court of Human Rights' 31 *Hastings International and Comparative Law Review* 115 – 156, 155.
[700] Article 8 (right to respect for private and family life), Article 9 (freedom of thought, conscience and religion), Article 10 (freedom of expression) and Article 11 (freedom of assembly and association).

identify the manifest ill-foundedness of the petition? Firstly, the Court must determine whether the interest invoked by the applicant engages Article 8's protections of private and family life, home, and correspondence. If not, the application falls to be declared inadmissible. Secondly, where the complaint engages the Article's protections, the Court must consider whether respondent state authorities amount to an interference with the applicant's rights. Interference with a protected right is not necessarily fatal to the respondent government's case. If state interference with a protected right is established, the Court must then determine whether that interference is justified or justifiable. In order to do so, the Court must consider three distinct questions: firstly, whether the interference (a) is "in accordance with the law" in the respondent State, (b) whether the interference pursued a "legitimate aim" under the Convention's limitation clauses and (c) whether the measure is "necessary in a democratic society" (i.e. whether the infringing measures employed by the respondent State are proportionate to the end pursued). In assessing the proportionality of the interference, the Court is required to determine the scope of the "margin of appreciation" afforded by the Court to Member States in the area, which varies considerably 'depending on the circumstances, the nature of the right protected and the nature of the interference' in each case. [701]

Academic criticism of the Court's approach to decision-making on the merits has ranged across the interpretative concepts employed in this process, including the scope of legitimate aims which may justify interference with the human rights protected by the Convention, the proportionality of interference, the necessity of the interference in a democratic society and the margin of appreciation allowed to states. The perceived inconsistency and unpredictability of the Court's approach to the construction of all four of these cardinal principles of Convention interpretation has been at the heart of these scholarly critiques. These criticisms have a strong normative dimension, censuring the Court for adopting an unprincipled approach to adjudication which, for some scholars, undermines basic principles of the rule of law.[702] For the purposes of this chapter, however, it is not necessary to adopt or to defend a normative position on the principles and

[701] European Court of Human Rights (2011) *Practical Guide to the Admissibility Criteria,* 72.
[702] See generally, J A Brauch (2005) 'The Margin of Appreciation and the Jurisprudence of the European Court of Human Rights: Threat to the Rule of Law' *Colombia Journal of European Law* 11 114 – 150.

approaches which *ought* to govern the Court's substantive review of Member States' compliance with human rights, and interpretation of the Convention.

Here, I am primarily concerned with whether an analysis of the legal norms employed by the Court in its admissibility decision-making is compatible with the ideal types of administrative justice. For my purposes, the important question is not whether flexible canons of Convention interpretation are justifiable, but *whether* the admissibility criteria are flexible or not. Insofar as it has become a "merits" test, manifestly ill-founded inevitably incorporates these features of the Court's substantive jurisprudence into its substance.

Criticism of the Court's approach to decision-making "on the merits"

In terms of its approach to assessing the proportionality of interference, the scope of member states' legitimate aims, and the margin of appreciation which the Court affords states to identify and pursue policy measures, McHarg has argued 'radical indeterminacy both in the formulation of each element and in the way they relate to one another', arguing that 'rather than being a "test" in the conventional, dispositive sense', the Court's conceptual framework 'provides a set of highly imprecise justificatory strategies which can be used to support a number of approaches' to decision-making.'[703] Greer has observed that the scope of all four concepts is marked by 'confusion and indeterminacy', appearing in 'orthodox haphazard form' in the Court's jurisprudence, with decision-making on the merits being 'characterised by the application of principles, rather than rules, to facts', and amounting 'in most cases to little more than "decisions on the facts" and lacking the depth and authority they might otherwise possess.'[704]

Several other scholars echo this general diagnosis in specific treatments of individual doctrines. Sottiaux and van der Schyff argue that 'most commentators agree that the "legitimate purposes" are fluid and are not underpinned by any clear and coherent

[703] A McHarg (1999) 'Reconciling Human Rights and the Public Interest: Conceptual Problems and Doctrinal Uncertainty in the Jurisprudence of the European Court of Human Rights' *Modern Law Review* 62(5) 671 – 696, 687.
[704] S Greer (2006), 259, 208, 211, 323.

rationale.'[705] On the margin of appreciation doctrine, Kavanaugh emphasises 'the imprecision of the doctrine and the failure by the Court to adopt a consistent analytical framework for its application.'[706] Lester has criticised the Court's tendency to engage in '*ad hoc* balancing under the margin of appreciation doctrine, which lacks legal certainty and adherence to clear principles', having previously described the doctrine more vividly, as 'slippery and elusive as an eel' and used by the Court 'as a substitute for coherent legal analysis of the issues at stake' in cases.[707] Greer echoes Lester's assessment, describing the Court's use of the doctrine as 'loose and unprincipled.'[708] Brauch criticises the 'boiler-plate language' employed by the tribunal, characterising the Court's use of the doctrine, arguing that 'today the doctrine remains broad, vague, and largely undefined, leading to unpredictable and often arbitrary results', continuing:

> At times the concept is meaningless – at least as a legal standard. It of course exists as a tool in the Court's rhetorical arsenal. The Court has use the concept to rationalize the result it chooses to reach. But the basic rule of law concepts are missing. The legal test is not clear. Outside of vague "weighing", no one knows how much weight will be given to the various factors identified by the Court.[709]

On proportionality, a number of academic legal commentators have also emphasised the unpredictability of the Court's approach to reviewing the actions of respondent States. Greer has described the Court's approach as 'unprincipled ad-hoc proportionality review',[710] a diagnosis echoed by Sottiaux and van der Schyff, for whom:

> the European Convention's proportionality test was never formulated, nor intended to operate as a strict rule. Quite to the contrary, the central justificatory standard

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[705] S Sottiaux & G van der Schyff (2008), 258.
[706] K Kavanaugh (2006) 'Policing the margins: rights protection and the European Court of Human Rights' *European Human Rights Law Review* 422, 423.
[707] A Lester (2009) 'The European Court of Human Rights after 50 years' European Human Rights Law Review 462, 474; A Lester (1995) 'The European Convention on Human Rights in the New Architecture of Europe: General Report' in *Proceedings of the 8th International Colloquy on the European Convention on Human Rights*, 227.
[708] S Greer (2006), 258.
[709] J A Brauch (2005), 125, 137.
[710] S Greer (2006), 117.

> applied under the European Convention exhibits all the characteristics of a flexible, open-ended balancing test.[711]

Similar criticisms extend to the Court's approach to interferences with protected rights being necessary in a democratic society. In his systematic account of the doctrine in the Court's case-law, Arai-Takahashi has described the 'unsystematic fashion with which the doctrine is applied, coupled with its vague nature.'[712] For Sottiaux & van der Schyff 'the Strasbourg organs have never given a systematic definition of what a democratic society amounts to, apart from statements regarding a number of its cardinal principles.'[713] On the application of these cardinal principles, they argue:

> the necessity standard functions as a highly flexible formula, allowing the Court to weigh competing claims of individual rights and collective goals on a case-by-case basis. In its most rudimentary form, the democratic necessity standard gives no indication as to which of the traditional proportionality principles are to be applied to particular fact situations, as to what their sequence must be, or the strictness with which they are to be applied. In other words, not only is the democratic necessity test a balancing test, it is a wholly unstructured one.[714]

These jurisprudential accounts *all* of the critical concepts employed critically to examine the *prima facie* admissibility of a petition are themselves variable, flexible, and indeterminate. Insofar as admissibility decision-making on the basis of the manifest ill-foundedness criteria engages with these concepts, it inevitably incorporates the indeterminacy and flexibility of decisions on the merits which Greer and others have criticised. Normatively, the Court's flexible approach to adjudication on the merits is not necessarily problematic. For some scholars, the flexibility which characterises the Court's proportionality review is an inevitable feature of judicial deliberations balancing

[711] S Sottiaux & G van der Schyff (2008), 131.
[712] Y Arai-Takahashi (2001) *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* (Oxford, Intersentia), 229.
[713] S Sottiaux & G van der Schyff (2008), 135.
[714] *Ibid*, 133.

fundamental rights, and legitimate and reasonable abridgments of those rights by Member States. For Christoffersen, for example:

> the Court's use of the fair balance-test in widely different areas of case-law reflects the inherent and unavoidable resolution of conflicting interests flowing from the complex nature of the cases put before the Court as well as the flexibility of the norms of the ECHR.[715]

This chapter cannot make a significant contribution to these debates about how the Court ought to approach adjudication of substantive rights. What is important, however, is that their implications for our admissibility decision-making on the merits, employing the manifest ill-founded ground, are understood. The expansive approach to the interpretation of manifest ill-foundedness adopted by the Court and Commission ruptures the distinction between administrative docket-filtering and adjudication of cases on the merits. It also ruptures the boundary which has traditionally separated academic critiques of the Court's approach to adjudication on the merits on one hand, and the analysis of the admissibility criteria on the other. Decision-making on the merits has been the subject of trenchant academic criticism, emphasising the unpredictability and thin reasoning which characterises the Court's approach.

Insofar as manifest ill-foundedness is now merits test, these critiques of the Court's approach inevitably extend to admissibility decision-making under this head. Although never promising from the perspective of a bureaucratic rational construction of the Court's admissibility decision-making, examining the Court's approach to weighing and balancing the merits of applications in some detail renders the image of the criteria in the reform debate even more problematic. If, as the weight of academic legal opinion suggests, it is difficult to discern a consistent approach in the Court's jurisprudence to assessing the merits of applications, *admissibility* decision-making on the merits cannot involve the application of filtering norms capable of uniform and consistent application and bureaucratic implementation across the Court's docket. In common with the time-limit,

[715] J Christoffersen (2009) *Fair Balance: Proportionality, Subsidiarity and Primarity in the European Convention on Human Rights* (Leiden, Brill), 203.

anonymity, and significant disadvantage jurisprudence, the evidence of the Court's published decisions suggest that decisions on manifest ill-foundedness cannot be understood as 'purely technical' work, detached from the real adjudicative business which only takes place after the admissibility stage.

Conclusion: admissibility jurisprudence and administrative justice

In their analysis of the Court's admissibility jurisprudence, Convention critics including Gerards, Dembour, Keller, Fischer and Kuhne have sought to draw a distinction between 'formal' and 'purely technical' grounds of admissibility, and those such as the manifestly ill-founded ground, and significant disadvantage, which they regard as problematic on the basis of their perceived flexibility, unpredictability, and potential arbitrariness of their application.[716] This chapter challenges the assumption that the Court's admissibility jurisprudence can be understood in this way. The case-law shows that not only are significant disadvantage and manifestly ill-founded grounds incapable of being expressed as 'clear-cut jurisprudential criteria of an objective character capable of straightforward application,' this approach also extends to the Court's approach to time-limits and anonymity.[717] Greer has argued, of the Court's jurisprudence on the substantive Convention rights, that:

> Convention case-law typically takes the form of abstract principle applied to facts. Rarely, if ever, does it amount to what jurists in the common law tradition would recognise as an integrated system of judicially constructed "legal rules".[718]

Doctrinal analysis of the Court and former Commission's jurisprudence on these four grounds of admissibility suggests that this observation also extends to the Convention's procedural sections. Drawing on the fourfold typology set out in chapter 2, this chapter set out to examine the conceptions of administrative justice expressed by the Court's admissibility jurisprudence. Does it bear out or challenge the extreme ideal type of a mechanical, bureaucratic rational admissibility decision-making which has dominated

[716] M Dembour (2002), 613.
[717] Council of Europe (2004) *Explanatory Report to Protocol No. 14*, para 79.
[718] S Greer (2006), xvii.

Convention reform debates? Does it support or challenge representations of the admissibility standards which we find in individual and constitutional justice scholarship? Or does it articulate a different sense of the objects and purpose of the Court's docket-filtering altogether?

What emerges from a careful analysis of these four grounds of admissibility is an adjudicative conception of admissibility decision-making which is strikingly at odds with the values promoted in the policy debates and in the Court's bureaucratically dominated working practices. The Court's decisions across all four of the criteria analysed in this chapter place considerable emphasis on context-dependency and flexibility and judgement, expressing indifference to critical bureaucratic values of strict equality, formal, predictable admissibility standards and inflexible procedural demands at the admissibility stage. Although marginalised in Convention reform debates, and almost entirely excluded from the internal organisation of the Court's working practices, Strasbourg's externally-oriented account in its case-law of the principles informing its docket-filtering consistently associates the process with the values of tribunal justice identified in chapter 2. Its published decisions are applicant-centred, often flexible and forgiving of failures to meet procedural demands where circumstances appear to warrant it. In this respect, the Court's published admissibility decisions arguably reflect the Court's broader approach to Convention interpretation, which is characterised by 'a balancing process or standard-like decision-making' ensuring 'adaptability to changing social conditions and the particular circumstances of each case' rather than categorical or rule-like decision-making compatible with classical bureaucratic values of consistency, stability and predictability.[719]

Considered in isolation from the broader socio-legal data about the institution's working practices and the statistics on the overwhelming majority of cases which are rejected, Simonsen and Cojocariu's identification of a 'trend in the Court's case-law towards relaxation of procedural constraints on access to justice' and a 'flexible', 'liberally applied' admissibility jurisprudence is understandable.[720] This is how the Court represents its approach to the interpretation and application of the criteria in its published decisions. Yet

[719] S Sottiaux and G van der Schyff (2008), 115.
[720] N Simonsen (2013); C Cojocariu (2011), 693.

Schermer's 'iceberg' caution must always be remembered.[721] As chapters 5 and 6 show, beneath the waterline, unpublished, radically different administrative justice values and assumptions about the character of docket-filtering are at work.

Mashaw identified the possibility, even the likelihood, of normative competition between different conceptions of administrative justice within a decision-making agency, suggesting that the domination of one model tended to drive others from the field. In Strasbourg, by contrast, competing and incompatible ideas of the nature of the admissibility criteria and the justice of their application co-exist on twin tracks. Although in principle, the same admissibility criteria apply equally to all cases, the character of the norms and the treatment of cases above and below the waterline radically differs. In the small number of published cases which rise out of the surf, the visible segment of the Court's decision-making, decision-making is judicial, adversarial and non-punctilious, turning on context-dependent matters of judgment. Submerged invisibly in the ice block of the Registry, however, the overwhelming majority of cases are constructed as fit for bureaucratic disposal, subject to an unparticipative, unstinting decision-making regime, dominated by bureaucrats whose conclusions are subject only to light judicial scrutiny, and justified on the basis that the norms of admissibility are clear-cut and straightforward to implement. These two visions of the justice of admissibility decision-making are antagonistic and incompatible, but paradoxically co-exist within the same institution. Only by adopting a socio-legal approach, and considering the jurisprudence, reform debates and working practices at the same time are these discrepancies revealed. The next chapter comes full circle, returning to the individual vs. constitutional justice debate to consider the implications of the socio-legal data presented in the last five chapters for the orthodox opposition between the two which continues to dominate the literature on admissibility reform.

[721] H G Schermers (1994) 'The Eleventh Protocol to the ECHR' *European Law Review* 19 367 – 382, 370.

8. The doomed quest for individual and constitutional justice: four myths exposed

One of the best-established staples of contemporary scholarship on the European Convention is the "individual justice vs. constitutional justice" debate. Should the European Court of Human Rights offer a judicial decision on the admissibility of every case according to simple, transparent and consistent admissibility criteria, or ought the Court to be empowered to pick and choose the cases it subjects to full review and determination, with a view to promoting the tribunal's constitutional functions of enunciating *erga omnes* human rights norms for the European continent? In a nutshell, the academic literature on Convention reform has suggested that Convention reformers face this binary choice: should the overburdened Court ineffectively continue to pursue an individual justice model, or should a "constitutional model" of justice be adopted?

This thesis has adopted a different theoretical starting point. Employing and adapting administrative justice theory, chapter 2 identifies key conceptual limitations of the orthodox opposition between individual and constitutional justice. A critical weakness of both individual and constitutional justice scholarship is the absence of a socio-legal perspective on the key assumptions informing its respective visions for the Court's institutional design. The debate has proceeded on the basis of untested assumptions and normative arguments about the nature of the Court's working practices and the character of the admissibility criteria, based exclusively on the procedures and norms set out in the Convention, and their interpretation by academic lawyers. In the light of the socio-legal evidence marshalled in chapters 4 to 7, this chapter critically re-evaluates the dominant normative and analytic framework for the analysis of Convention and admissibility decision-making reform.

The argument of this chapter proceeds in two main stages. The first section reintroduces the main characteristics of the individual and constitutional justice models in Convention literature. Drawing on my empirical and jurisprudential analysis in chapters 4 to 7, in the second part, I show that all five of the key empirical claims about admissibility decision-making advanced by individual and constitutional justice scholars are either clearly false or significantly compromised by the Court's current approach to filtering its docket. In contrast with the either/or choice between individual and constitutional justice which dominates the Convention reform literature, I show that neither individual *nor* constitutional justice represents a practically viable model for Strasbourg to pursue systematically.

Defining individual & constitutional justice

At its most basic, the constitutional justice model argues that Strasbourg should be invested with discretion to pick-and-choose which cases to examine and determine in detail from its docket. Applicants would have no right to a judgment in their favour, even if the respondent State had clearly violated their rights according to the well-settled jurisprudence of the Court, or where their application gave rise to new questions of European human rights law which the Court had not yet authoritatively resolved. The Court's judges would be exclusively empowered to determine which controversies to hear. The legal principles they would employ to reach those determinations would be minimal, open-textured, and matters of judgment. The exercise of this discretion would be unreviewable once a decision was taken, and be largely unreasoned in nature, to parallel decision-making on granting or refusing leave to appeal in national supreme and constitutional courts where access to the tribunal is not "of right". What "importance" might mean in this context is contested. Scholars both sympathetic to and critical of constitutional justice have offered different ideas about the sorts of cases which the Court might admit for full review.[722] For my purposes here, however, it is sufficient to note that the Court would be capable of using such a discretionary admissions regime to pursue different (and potentially inconsistent and competing) conceptions of what makes a particular case important or serious.

By contrast, individual justice theorists reject any further constraints on the Court's substantive jurisdiction to determine applications in judgments on their merits. In practice,

[722] See generally S Greer and L Wildhaber (2012) 'Revisiting the Debate about "constitutionalising" the European Court of Human Rights' *Human Rights Law Review* 12(4), 655 – 687; K Dzehtsiarou and A Greene (2013) 'Restructuring the European Court of Human Rights: preserving individual petition and promoting constitutionalism' *Public Law* 710 – 719; F De Londras 'Dual functionality and the persistent frailty of the European Court of Human Rights' *European Human Rights Law Review* 38 – 46.

this position entails opposition to the introduction of any new admissibility criteria or attaching any additional formalities – such as mandatory legal representation, or court fees – to lodging applications. The judicial character of all of the Court's decision-making is also jealously guarded in individual justice theory, rejecting the notion of transferring any decision-making power away from judges to their officials at the admissibility stage. The individual justice model also characteristically incorporates the claim that admissibility decision-making does not and should not leave any flexibility to the Court to pick and choose which cases to admit for full scrutiny. Echoing the reform debate analysed in chapter 4, under an individual justice approach, the admissibility criteria are understood as well-settled, formal and universally-applicable minimum standards to be met by every application on the same terms. As Harmsen observes, individual justice scholars have rejected 'any attempt by the Court to restrict its caseload – either by way of the "significant disadvantage" criterion or through the adoption of a more robust US-style *certiorari* mechanism – would seriously risk compromising its legitimacy.'[723] Understandably, given these premises, a strong distinction between admissibility decision-making and decision-making "on the merits" is emphasised in individual justice theory.

Individual and constitutional models: key principles

Undergirding the practical dimensions of the two models are divergent understandings of the role which the European Court ought to serve, and is capable of serving in the prevailing circumstances, given its current jurisdiction and docket. Paul Mahoney, a former Registrar, elected to serve as a judge on the Court in 2013, has defined the 'two visions of the purpose' of the Convention underlying these two models as follows:

> One perspective, that of individual justice, views as the soul of the Convention the entitlement of each and every complainant to examination of his or her complaint and, if it is upheld, to individualized relief. The other, that of constitutional justice, regards the Convention as a constitutional instrument of European public order in

[723] R Harmsen (2011) 'The Reform of the Convention System: Institutional Restructuring and the (Geo-)Politics of Human Rights in J Christoffersen and M R Madsen (2011) *The European Court of Human Rights Between Law and Politics,* 129.

> the field of human rights, and thus the mechanism of individual applications as the means by which defects in national protection of human rights are detected with a view to correcting them; thereby raising the general standard of protection of human rights, both in the country concerned and in the Convention community of States as a whole.[724]

In Greer's polemical definition, individual justice represents:

> the attempt by the Convention system to ensure that every genuine victim of a violation receives a judgment in their favour from the Court however slight the injury, whatever the bureaucratic cost, whether or not compensation is awarded, and whatever the likely impact of the judgment on the conduct or practice in question.[725]

Its proponents take a more sympathetic tack. For Dembour:

> the *raison d'etre* of the Strasbourg Court is precisely that it will hear any case, from anyone who claims to be a victim of the Convention, there are no unworthy cases (except of course those which traditionally have been declared inadmissible.)[726]

And for Said and Wadham:

> it is essential to ensure that the fundamental right of individuals to gain redress for violation of Convention right(s) is not compromised in the quest for speed and efficiency.[727]

In this respect, individual justice theorists depart from the assessment of Court's outspoken Deputy Registrar – a supporter of the constitutional model – who has argued that:

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[724] P Mahoney (2003) 'New Challenges for the European Court of Human Rights Resulting from the Expanding Case Load and Membership' 21 *Penn State International Law Review* 101 – 114, 104.
[725] S Greer (2006) The European Convention on Human Rights: achievements, problems and prospects (Cambridge, CUP), 166.
[726] M B Dembour (2002) '"Finishing off" cases: the radical solution to the problem of the expanding ECtHR caseload' *European Human Rights Law Review*, 604 – 623, 621.
[727] T Said and J Wadham (2002) 'What price the right of individual petition: Report of the Evaluation Group to the Committee of Ministers on the European Court of Human Rights' *European Human Rights Law Review* 169, 170.

> the Court's major contribution to the protection of human rights lies not only in the examination of serious allegations of human rights violations in different settings but also in the adjudication of cases of constitutional import that establish standards *erga omnes* to be taken into account in the national law and practice of all European States.[728]

Individual justice theorists are not unconcerned with what De Londras has described as the Court's 'constitutionalist' function, of

> clarifying standards, holding states to account for them, and sometimes developing those standards beyond their literal (or, indeed, 'original') conceptions in order to reflect more contemporary understandings or what is considered to be a more appropriate level of limitation of state action.[729]

While recognising the importance of this constitutionalist function, individual justice theorists contend that 'the primary role for the Court is to provide victims with an effective international remedy' on an individual basis.[730] The Court's duty to reach a judicial conclusion in respect of each and every case submitted to it is the Convention's 'crown jewel.'[731] Constitutional justice theorists such as Greer and Williams invert this priority, contending that 'the Court's primary responsibility is to select and to adjudicate the most serious alleged violations, brought to its attention by aggrieved applicants, with the maximum authority and impact in the states concerned.'[732]

This commitment both to constitutionalism and to individual adjudication has been described by De Londras as 'dual functionality', and arguably represents the orthodox

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[728] M O'Boyle (2012) *The Conscience of Europe,* 201.
[729] F de Londras (2013) 'Dual functionality and the persistent frailty of the European Court of Human Rights' *European Human Rights Law Review* 38 – 46, 38.
[730] K Altiparmak (2009) 'The European System for the Protection of Human Rights in Crisis: The End of the Road?' *Journal of European Criminal Law* 3(4) 5 – 23, 11.
[731] L R Helfer (2008) 'Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime' (2008) 19 European Journal of International Law 19 125, 159.
[732] S Greer and A Williams (2009) 'Human Rights in the Council of Europe and the EU: Towards individual, constitutional or "Institutional" Justice?' *European Law Journal* 15(4) 462 – 481, 466.

individual justice answer to the constitutional justice critique today.[733] We find this logic reflected both in the academic and in official debates. Beernaert has suggested 'the Convention system has been able to fulfil two key roles: to provide an avenue for redress for every individual with human rights complaints and to function as a (quasi-) constitutional instrument of European public order.'[734] The Group of Wise Persons also invoked the twin functions in their 2006 report to the Committee of Ministers, arguing that the 'protection mechanism' of the Convention:

> confers on the Court at the one and the same time a role of individual supervision and a constitutional mission. The former consists in verifying the conformity with the Convention of any interference by a state with individual rights and freedoms and making findings as to any violation by the respondent states. Its other function leads it to lay down common principles and standards relating to human rights and to determine the minimum level of protection which states must observe.[735]

For individual justice theorists, these two priorities are not only reconcilable, but may both effectively be pursued by the Court without seriously compromising one or the other. By contrast, constitutional justice theorists argue that the Court is incapable of pursuing individual adjudication systematically, and the attempt to do so impacts negatively on the Court's ability to pursue a focussed constitutional agenda of standard-setting: 'the Court is incapable of providing individual justice to all applicants and consequently a mechanism for the selection of cases based on their importance should be introduced.'.[736]

De Londras favours the term adjudicative justice over individual justice. This innovation in terms is in many ways a helpful one, though for the purpose of this chapter, the more familiar usage of individual justice theory is retained. As Greer notes, in any court taking decisions on the basis of particular sets of facts, circumstances and legal provisions,

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[733] F de Londras (2013), 40. Reflected most recently in the work of K Dzehtsiarou and A Greene (2013) 'Restructuring the European Court of Human Rights: Preserving the Right of Individual Petition and Promoting Constitutionalism' *Public Law* 719 – 19.
[734] M A Beernaert (2004) 'Protocol 14 and new Strasbourg procedures: towards greater efficiency? And at what price?' *European Human Rights Law Review* 544 – 557, 556.
[735] Group of Wise Persons (2006) *Report of the Group of Wise Persons to the Committee of Ministers,* para 24.
[736] K Dzehtsiarou and A Greene (2013), 1.

individual justice will always, in one minimal sense, be dispensed. The United States Supreme Court, although embracing a freewheeling, discretionary admissions regime, always decides a particular controversy rather than an abstract question unattached to a particular litigant and her circumstances. In one sense, the Court dispenses individual justice. Its justices do not, however, *adjudicate* all of the cases put before them. It is this conception of adjudication which sets the case for the systematic delivery of individual justice apart from a constitutional justice approach.

Although the Court reform debate has been largely insulated from the influence of regulatory theory, the individual and constitutional justice debate may usefully be recast in more socio-legal terms, as two competitive accounts of the regulatory function which the Court ought to serve, and the regulatory style appropriate to that function. The reform debate is characterised by its use of the language of the regulation of State behaviour, with the Court representing the 'judicial control mechanism', 'supervisory machinery' or 'control system' charged, in the language of the Wise Persons Report, with 'supervising compliance by the Contracting Parties with the rights recognised in the Convention.'[737] Individual and constitutional justice can be identified with Hawkins' conception of 'punish or persuade' compliance strategies respectively. A 'persuade' compliance strategy, identifiable with the constitutional justice model, primarily:

> seeks to prevent harm rather than punish an evil. Its conception of enforcement centres upon the attainment of the broad aims of legislation, rather than sanctioning its breach. Recourse to the legal process here is rare, a matter of last resort, since compliance strategy is concerned with repair and results, not retribution. And for compliance to be effected, some positive accomplishment is often required, rather than simply refraining from an act.[738]

In the Convention context, constitutional justice theorists construct the Court primarily as 'a pan-European standard-setter, with individual cases in effect serving as the vehicle by

[737] Group of Wise Persons (2006) *Report of the Group of Wise Persons to the Committee of Ministers,* para 22; Council of Europe (1994) *Explanatory Report to Protocol No 11,* Para 19; Council of Europe (2004) *Explanatory Report to Protocol No. 14,* para 11.
[738] K Hawkins (1984) *Environment and enforcement: regulation and social definition of pollution* (Oxford, Clarendon), 4.

which problems are signalled and principles established,' resolving new controversies about the scope of the Convention, and guiding the conduct of Member States through a more limited number of decisions articulating clear legal principles.[739] On this conception, like a domestic supreme or constitutional court, Strasbourg should not be concerned with every human rights violation of committed by Member States but should instead focus on resolving "important" legal disputes, eliminating uncertainty and promoting new standards of European human rights law in cases judged to be significant. On this conception, the Court's primary function is to articulate standards of European human rights law, and not to use its judgments systematically to sanction breaches of those standards. This approach is encapsulated by Greer and Williams' assessment that the Court's 'much more subtle and indirect function' under a constitutional justice regime is 'gently to nudge European public authorities towards the fuller acceptance of common Convention standards.'[740]

For the individual justice theorist, by contrast, Strasbourg's role is primarily concerned with the adjudication of individual complaints, and the judicial determination of whether the Convention has been violated in those cases, irrespective of whether or not they raise new issues of legal principle. In pursuit of its mandatory adjudicative functions, the Court will intermittently be required to consider and rule on new arguments and new situations. European human rights law is thereby – indirectly – advanced, but the Court's primary function is to sanction every breach of the Convention brought to its attention. For most individual justice theorists, the appropriate domestic parallel for Strasbourg is not a domestic appellate tribunal with power to allow or disallow the presentation of appeals before it, but with a civil domestic 'court of first instance', which cannot decline to adjudicate a case, however insignificant the legal issues raised may seem, and must decide all competently-lodged cases before it.[741] For adherents to individual justice, embracing constitutional justice would represent 'a move from a mandatory determination of all admitted appeals to a system under which admissibility was a matter of the Court's

[739] R Harmsen (2011), 129.
[740] S Greer and A Williams (2009), 470.
[741] N von Werdt, President, Second Civil Law Division of the Swiss *Bundesgericht* (2014) *Submission to the CDDH on future directions in Court reform* http://www.coe.int/t/dghl/standardsetting/cddh/reformechr/GT-GDR-F/von_Werdt.pdf last accessed 05.12.2014.

discretion.'[742] Where a case is ill-founded, whether the pursuer's legal arguments are deficient or where the proven facts do not support their case, an adverse judgment on the merits is envisaged as the appropriate remedy. Under this model, the admissibility criteria are seen in similar terms to domestic time-limits for lodging answers and defences to a pursuer's case: as formal and pragmatic requirements of litigation, distinct from any determination of the legal or factual merits or demerits of the case. This distinction is reinforced by the familiar (but as chapter 7 has shown, problematic) distinction between decision-making on the merits and on admissibility. For individual justice theorists:

> The proper interpretation and implementation of the Convention rights by the domestic tribunals must be analysed by the Court at the merits stage, not at the admissibility stage.[743]

Approaching the understanding of individual justice theory in this way can make sense of apparently chimerical arguments advanced on its behalf. NGOs objected to the language of the leaked draft Brighton Declaration of March 2012, arguing that the 'admissibility criteria must never be used to adversely restrict the substantive jurisdiction of the Court' warning that 'doing so could, in practice, undermine the universal application of the Convention rights across the Council of Europe region and the long-term credibility of the Convention.'[744] This argument is problematic. While universality is a basic feature of human rights theory, even after the right of individual petition was recognised by all Member States in 1998, access to the Court has always been subject to conditions. The basic function of the admissibility criteria *is* to restrict, in some cases adversely, which cases the Court entertains. Even under the *status quo* defended by Amnesty International and their colleagues, cases lodged outwith the six-month time period receive no remedy from the Court, nor will those submitted by anonymous applicants, or by people who have not yet exhausted the national remedies available to them.

[742] R C A White and I Boussiakou (2009) 'Voices from the European Court of Human Rights' *Netherlands Quarterly of Human Rights* 27 167, 188.
[743] Amnesty International et al (2012) *Joint NGO Preliminary comments on the first draft of the Brighton Declaration on the Future of the European Court of Human Rights*, March 2012 (my emphasis).
[744] *Ibid.*

The idea that these rules do not represent adverse restrictions on the Court's substantive jurisdiction lacks realism. While the proper *extent* of these restrictions may be debated, if you accept the pragmatic necessity of imposing any admissibility criteria, you are accepting, in some circumstances, restrictions on the Court's substantive jurisdiction – with unfavourable consequences for some petitioners, seeking to raise actions in Strasbourg. While Amnesty International and their NGO colleagues may credibly argue about the *extent* to which the Court's jurisdiction to hear cases should be curtailed at the admissibility phase, this is a difference only of *degree* from the Convention reformers they criticise, not of *kind* as their argument implies.

For constitutional justice theorists, by contrast, the appropriate comparator for Strasbourg is not domestic courts of first instance, but apex national courts enjoying greater latitude to determine which appeals they accept for full review. On this conception, the Court does not and should not have mandatory jurisdiction to hear every case which meets bare procedural requirements. Conceived this way, the Court's admissibility regime calls for a more searching exercise of judgment on the part of decision-makers, above and beyond the individual justice conception of minimal, formal requirements for lodging cases.

Individual and constitutional justice: muddling the normative and the descriptive

Although the academic arguments for individual and constitutional justice are 'largely normative', both bodies of deliberation and commentary are concerned to analyse how the Court does, could and should operate.[745] These are not abstract academic exercises, delineating the character of the best-of-all-possible European Courts of Human Rights, but exercises in practical reason, concerned with how reforms relate to (and depart from) the *status quo*. While the distinction between normative and descriptive propositions is analytically defensible, as the qualitative material examined in chapter 4 exemplifies, descriptive and normative statements often muddle together, and draw strength from one another. Both individual and constitutional justice models are complex knots of

[745] S Greer and L Wildhaber (2012), 680.

interconnected normative and descriptive claims. In addition to value judgements, the arguments advanced by both individual and constitutional justice theorists in support of their positions are characterised by substantial descriptive content, and detailed claims about the institution's current practices.

Individual justice theorists overwhelmingly understand themselves to be conservative defenders of the Court's *status quo,* and its hard-won principles and characteristics. For individual justice, to adopt a discretionary admissions regime would represent 'sacrificing justice for the sake of efficiency,' and in the process, offend principles including the rule of law, equal treatment, and the universality of human rights norms.[746] The position of constitutional justice theorists is more ambivalent. For many of its proponents, embracing constitutional justice represents a radical departure from the *status quo*. More recently, however, two leading lights in the case for constitutional justice have suggested that today, the case for constitutional justice is 'much more about consolidation than it is about transformation', merely amplifying existing tendencies in the Court's practice, and being more explicit, and more honest, about those tendencies than at present.[747] An incomplete or inaccurate understanding of that *status quo* is liable to lead, not only to empirical misapprehensions about the Court's work, but also to normative and practical confusion, allowing misleading assumptions to guide arguments over institutional design. As this chapter shows, the substantial gap between the qualitative empirical understandings of admissibility decision-making relied on by both models and the socio-legal evidence undermines the credibility of both models, and the utility of the dominant scholarly assessment that Court reformers face a binary choice between the two.

The victories of individual justice

The myth of individual justice is sustained by four main empirical claims about the Court's admissibility decision-making, as currently practised: (a) that admissibility decisions are reasoned (b) that admissibility decision-making involves the application of foreseeable, formal and universally applicable filtering criteria to cases (c) that it is "fully judicial" in

746 K Altiparmak (2009), 14.
747 S Greer and L Wildhaber (2012), 674

character and (d) that the procedure, as currently practised, affords justice to each individual applicant; that is, "relief" or "access to justice" in a meaningful fashion, valued and appreciated by applicants, and worth preserving in the face of the constitutional justice critique.

Superficially, at least, an analysis of the letter of the law and the articulated aspirations and values of the Court reform debate since 1950 suggests that this individual justice vision has had a significant impact on the Convention reform agenda. This impact has been recognised and lamented by leading constitutional justice scholars. Wildhaber has criticised the pervasive influence of:

> a motley group of self-styled "friends of the applicants and perhaps also friends of the Court". This group, composed of NGOs, academics and even a minority of judges, believes that they are principled and everybody else is pragmatic, and that they will not allow the right of individual petition to be cut down. They have unfortunately been extremely successful.[748]

Wildhaber suggests that the success of this 'ideology' has resulted in reform debates which have only 'tinkered with short-term considerations' without addressing the Court's abiding structural problems.[749] Full judicialisation of litigation taken under the Convention was enshrined in 1998 and has since been successfully defended. While Protocol No. 14 formally recognised the pre-existing practice of Registry *rapporteurs* in Committee cases, proposals to transfer decision-making powers to Court officials have been resisted, during both 2004 and 2013 Convention renegotiations. So, too, were proposals to give the Court explicit, free-ranging *certiorari*-style discretion to prune its caseload. The duty to give sufficient reasons for admissibility decisions remains embedded in Article 43 of the Convention. The introduction of the "significant disadvantage" admissibility criterion, while an unwelcome development for most proponents of individual justice, was nevertheless glossed in the explanatory materials to the Protocol in bureaucratic terms, comfortable to the individual justice demand that the Court's filtering of its docket should

[748]. L Wildhaber quoted in R Wolfrum and U Deutsch (eds) (2009) *The European Court of Human Rights Overwhelmed by Applications: Problems and Possible Solutions* (Heidelberg, Springer), 19.
[749] *Ibid*, 19 – 20.

be conducted according to rigorous, uniform and foreseeable criteria. While chapter 6 suggests that the promise of this 'rigorous and uniform' admissibility jurisprudence has not been realised in the Court's jurisprudence on the scope of the new criterion, in policy terms, the manner in which the *Explanatory Report* cast the new criteria represented important concessions to the individual justice project.

Attempts by some State delegations to impose additional qualifications on the exercise of the right of individual petition have also been largely unsuccessful. While the 2012 Brighton Conference unanimously accepted the deletion of one of the safeguard clauses limiting the Court's ability to declare cases inadmissible on grounds of a lack of "significant disadvantage", and endorsed the reduction in the time-limit for lodging an application from six months to four, other proposals to curb the number of individual petitions considered by the Court met with less success. Citing bureaucratic expediency and, to a lesser extent, the 'cornerstone' principle of the right of individual application, in the recent Interlaken-Izmir-Brighton process culminating in the adoption of Protocol No. 15, States rejected proposals to (a) require applicants to be legally represented before lodging their cases with Strasbourg (b) requiring petitioners to pay a court fee, or to lodge a caution with the Court, to be forfeit if the case was declared inadmissible and (c) requiring applicants to lodge cases in English or French.

The proponents of an individual justice approach, while not victorious on all points, have ostensibly managed to resist most of the innovations demanded by the constitutional justice agenda. Drawing on the empirical data and jurisprudential analysis set out in chapters 4 to 6, however, it is clear that these victories are largely hollow. While individual justice theorists have been able to preserve the *appearance* of a reasoned, judicial, uniform and rigorous admissibility regime providing individual justice to every applicant in the *text* of the Convention, and have ensured that these principles have dominated the treaty reform debate, in practice, there is persuasive evidence that all four of these key pillars of the case for individual justice are now largely mythological. Each dimension of the myth will be considered, and dismantled, in turn.

The myths of reasoned, uniform and rigorous individual justice

As chapter 5 shows, the Court's reason-giving for findings of inadmissibility is limited in most cases to a decision-letter, invoking a particular admissibility ground and notifying the applicant that their case has been declared inadmissible, without reference to any detailed reasons why the Convention's requirements were not satisfied. The evidence also suggests that, in some cases, the Court has still further truncated its already very sparse reasoning, eliminating any reference to any particular ground of inadmissibility. Although proponents of an individual justice approach characteristically favour reasoned admissibility decisions, they are to some extent divided on the question of whether the Court should be regarded as *currently* affording applicants sufficient reasons for its decisions.

Lester recognises, for example, that although 'the giving of reasons is an important safeguard encouraging a rational and fair process of decision-making, there is no duty for the three-judge committee to give reasons for rejecting an application without communicating it to the government.'[750] Legally, this is not strictly accurate. Under the Convention, the Court *is* obliged to give sufficient reasons for its decisions, a term it has interpreted to encompass its *pro-forma* decision-letters.[751] Keller, Fischer and Kuhne concede that this 'practice of rejecting them without giving reasons leads the Court into a legitimacy problem.'[752]

Other individual justice theorists adopt a different approach, mobilising the myth of reasoned justice to criticise a constitutional justice inspired filtering regime. In what has become a seasoned rhetorical move by individual justice scholars, critiquing Wildhaber and Greer's justification for empowering the Court to select which cases it subjects to full review, Dzehtsiarou and Greene represent themselves conservatively, as defenders of an imagined *status quo*:

[750] A Lester (2009) 'The European Court of Human Rights after 50 years' *European Human Rights Law Review* 462, 470.
[751] ECHR (2012), Article 43.
[752] H Keller, A Fischer and D Kuhne (2011) 'Debating the future of the European Court of Human Rights after the Interlaken Conference: Two Innovative Proposals' 21 *European Journal of International Law* 1025 – 1048, 1043.

> the rejection of thousands of applications without even minimal explanation would not enhance legitimacy of the ECtHR either. At least under the status quo, when rejecting a complaint the Court states that it did not fulfil admissibility criteria which are known and accessible. If the Court only adjudicates vaguely defined important cases this might put the trust of stakeholders in the ECtHR at risk.[753]

They argue that ''from a rule of law perspective, the admissibility or grounds for each petitioner should remain the same, with such grounds articulated clearly beforehand in order to maximise clarity and certainty of the legal norms involved.' [754] This contention was also echoed by NGOs in their *Joint Response* to the introduction of the significant disadvantage admissibility ground in 2004, suggesting that it would:

> give the ECtHR too wide a discretion to reject otherwise meritorious cases, and will also *create* real uncertainty amongst applicants and their advisors as to the prospects of the success of their applications to the ECtHR.[755]

In his discussion of introducing a discretionary test for accepting or rejecting applications for full review in 2009, Bernhard echoes this claim, suggesting:

> an admission procedure which enables the Court to select, without giving reasons, the cases to be decided on the merits, is incompatible with the European traditions and proper function of a Court of law.[756]

And:

> it *would* be extremely deplorable and unsatisfactory if the Court were to decide many cases without giving convincing reasons and guidelines for national judges and the legal community in general.[757]

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[753] K Dehztsairou and A Greene, (2013), 661.
[754] *Ibid.*
[755] (2004) *Updated Joint Response to Proposals to Ensure the Future Effectiveness of the European Court of Human Rights, signed by 114 NGOs* (my emphasis).
[756] R Bernhard (2009) 'The Admissibility Stage: The Pros and Cons of a *Certiorari* Procedure for Individual Applications' in R Wolfrum and U Deutsch (eds) (2009) *The European Court of Human Rights Overwhelmed by Applications: Problems and Possible Solutions*, 30.
[757] *Ibid*, 33 (my emphasis).

Proponents of the individual justice model further argue that any attempt by the Court to restrict its caseload – either by way of the "significant disadvantage" criterion or through the adoption of a more robust US-style *certiorari* mechanism – would seriously risk compromising its legitimacy. Here, they argue that the diversity of the Convention community would not allow for the easy or readily accepted operation of a *certiorari* procedure, while also pointing to the attendant problems of real or perceived "fairness" likely to arrive in a scenario where the Court would be seen as "picking and choosing" those matters which it thought worthy to pursue.[758]

Other individual justice theorists make similar points. Tomuschat suggests that 'we need indeed a filtering system. But we should avoid the concept of "discretion" in that regard. Decisions should be based on reliable criteria.'[759] Considered in the light of the evidence marshalled in chapter 6, the distinction which Dzehtsiarou, Greene, Bernhard and the NGOs draw between Greer's constitutional justice model and the dual functionality they defend is impossible to maintain.

Firstly, as chapter 5's analysis of the Court's decision-letters substantiates, 'the rejection of thousands of applications without even minimal explanation' describes admissibility decision-making *as it is currently practised by the Court*, and not a radical *departure* from those practices as Dzehtsariou, Greene and Bernhard imply.[760] Secondly, in terms of the *foreseeability* of the filtering criteria, while the general criteria for the admissibility of petitions are set out in the Convention, and may be said to be "known and accessible" in a very minimal sense, in practice, all four of the admissibility grounds analysed in chapter 6 are 'vaguely defined,' unpredictable in their application, and require the Court to exercise its judgment in determining whether or not a given case is to be admitted.[761] 'Real uncertainty amongst applicants and their advisors' about the prospect of an application's success is not just a feature of a Court designed according to the constitutional justice

[758] R Harmsen (2011), 129.
[759] C Tomuschat quoted in R Wolfrum and U Deutsch (eds) (2009) *The European Court of Human Rights Overwhelmed by Applications: Problems and Possible Solutions*, 48.
[760] S Greer and L Wildhaber (2012), 661.
[761] K Dehztsairou and A Greene, (2013), 661.

model, but characterises the *status quo* individual justice theorists imagine they defend by these interventions.[762]

Other legal scholars have echoed this assessment of the rigor and uniformity of the Court's admissibility jurisprudence, though characteristically offer only narrower critiques of the 'empty "black box"' and 'conceptual indeterminacy' of the manifest ill-foundedness ground.[763] Greer and Wildhaber also advance this argument, though without detailed analysis of the Court's admissibility jurisprudence, writing that 'it is naïve to regard the manifestly ill-founded criterion as an "objective test."'[764] This argument is prayed in aid of the constitutional justice project:

> for the ECtHR to select cases for adjudication on the basis of a seriousness criterion is no less predictable, unprincipled or discretionary than the "manifestly ill-founded" test which it would replace.[765]

Chapter 6's analysis of the Court's jurisprudence on the six-month rule, the anonymity ground, and "significant disadvantage" demonstrate that the 'conceptual indeterminacy' identified by Keller, Fischer and Kuhne is by no means limited to manifest ill-foundedness, characterising even those admissibility criteria which are typically understood as 'purely formal non-discretionary' tests, and those which the Court reform debate envisaged would be applied according to 'clear-cut jurisprudential criteria of an objective character capable of straightforward application.'[766]

In an attempt to answer Wildhaber and Greer's objection to the predictability and regularity of the manifest ill-foundedness ground, Dzehtsiarou and Greene supplement their defence with the quantitative argument that:

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[762] (2004) *Updated Joint Response to Proposals to Ensure the Future Effectiveness of the European Court of Human Rights, signed by 114 NGOs*.
[763] H Keller, A Fischer and D Kuhne (2011), 1046.
[764] S Greer and L Wildhaber (2012), 665.
[765] *Ibid*, 676.
[766] S Greer (2005) 'Protocol 14 and the Future of the European Court of Human Rights' *Public Law* 83, 106; Council of Europe (2004) *Explanatory Report to Protocol No. 14,* para 79.

> if the constitutional model is accepted, rejection of justice will be conducted on a much bigger scale. Currently only some applications are declared inadmissible based on the manifestly ill-founded criterion. If the constitutional model is accepted, only a fraction of applications will be dealt with because they pose a question of constitutional significance.[767]

Because the lack of rigour and uniformity is not limited to the "manifest ill-foundedness" ground, even if this argument was accepted, it would not fully answer the charge that admissibility decision-making *already*, to some extent, involves the Court picking and choosing which cases fully to examine. But this defence of individual justice also rests on a series of empirical misapprehensions. While it may be the case that a more explicitly discretionary filtering criteria might further decrease the number of applications subject to full review and a judgment of the Court, "only a fraction of applications" are *currently* subject to full review by the Court, with more than 95% of cases being rejected as inadmissible every year. At most, only a relatively modest difference of scale distinguishes the *status quo* from the constitutional justice proposals Dzehtsiarou and Greene criticise.

Secondly, in the absence of official statistics breaking down the Court's inadmissible caseload, Dzehtsiarou and Greene imply that the Court applies the concept of manifest ill-foundedness sparingly, to 'only some cases'. This claim find an echo in the work of Laurence Helfer who, characterising the Court's inadmissible caseload, refers only to the 'thousands of individuals' who 'file complaints with the Court too early (before exhausting domestic remedies) or too late (beyond the Convention's six-month limitations period)' a statistic which he suggests:

> illustrates the widespread lack of knowledge about the Strasbourg system and the large pool of applicants whose possibly meritorious claims are beyond the ECtHR's review.[768]

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[767] K Dehztsairou and A Greene, 661.
[768] L Helfer *European Journal of International Law,* 133.

Helfer makes an important point about the temporal limits of the Court's jurisdiction here, and the challenges this can pose to some applicants.[769] However, the clear implication of this analysis is that the admissibility phase is dominated by applying formal grounds of admissibility, while the more problematic disposals under the head of "manifest ill-foundedness" are in the minority.[770] The evidence rebuts this claim. The criterion was recorded as the principle ground for inadmissibility in 60% of cases rejected in 2011. Although the Court does not publish detailed statistics on its inadmissible caseload, personal correspondence with the Registry suggests that around 73% of the 89,737 cases were rejected as inadmissible in 2013 on grounds of manifest ill-foundedness, compared to 8% rejected as out of time, and 13% where domestic remedies has not been exhausted.[771] On the basis of these official estimates, around 65,508 cases would have been rejected as manifestly ill-founded in 2016. This represents just over 70% of *all* of the judgments and decisions adopted by the Court over twelve months, going some way beyond manifest ill-foundedness accounting for "only some cases."[772] If Greer's claim about the unpredictability and uncertainty of the manifest ill-foundedness ground is conceded, Dzehtsiarou and Greene's individual justice argument collapses into yet another modest difference of degree, in an admission system which already makes very extensive use of a mercurial and unpredictable concept of admissibility decision-making 'on the merits'.

The myth of individual "fully judicial" justice

The third key pillar of the individual justice story is the myth of Strasbourg's "fully judicial" justice. As the data set out in chapter 4 exemplifies, for most participants in the Convention reform debate it is axiomatic that the Court gives effect to and ought to deliver "fully judicial" justice for applicants. Insisting on the importance of a judicial decision, and of effective judicial responsibility for decision-making, has become a cardinal feature both of the official reform debate and of individual justice theory. However, chapter 5's analysis

[769] An issue I have discussed elsewhere: A Tickell (2015) 'More "efficient" justice at the European Court of Human Rights: but at whose expense?' *Public Law* 206 – 214.
[770] S Greer (2005) 'Protocol 14 and the Future of the European Court of Human Rights' *Public Law* 83, 106.
[771] European Court of Human Rights (2014) *Analysis of Statistics 2013* (Strasbourg, Council of Europe), 4
[772] A total of 93,396 applications were decided by decision or judgment in 2013. *Ibid*.

of the Court's increasingly bureaucratised working practices establishes that the idea of "fully judicial" admissibility decision-making is also, now, largely a theoretical and illusory commitment.

As chapter 3 outlined, under the Convention, only judges of the Court have legal authority to take decisions about the admissibility of petitions. As chapter 5 shows, however, almost a quarter of all of the cases closed by the Court in any given year are subject to "administrative disposal" without any judicial review. While a substantial number of these applications will be not be pursued by applicants beyond an initial letter, under the Court's secretive Rule 47 project, we now know that at least a percentage of the cases disposed of administratively by the Registry cannot be understood as litigation which the applicant has 'abandoned.'[773] The 2014 Analysis of Statistics quietly dropped this characterisation of cases 'disposed of administratively.'[774] The 2014 reforms to the Rules of Court expand the opportunities for Registry staff to refuse to register cases which are pursued, disposing of cases without reference to judges of the Court. Because of the Court's limited reporting practices, and the lack of granularity in the official statistics it does publish, it is impossible so say how many of the 19,000 cases closed on administrative grounds by the Court in 2012 fit this description. In 2014, however, the 21,950 applications were disposed of administratively: a remarkably 84% increase on 2013, of which half were 'disposed of' under Rule 47.[775] What is clear, however, is that under the *status quo* the Court is not upholding 'right of *every* individual to have his or her complaint scrutinized by a judge elected by the Parliamentary Assembly, if only to declare it inadmissible.'[776]

The idea of a "*fully* judicial" decision-making process also suggests a qualitative assessment of the whole character of the procedure adopted to decide cases, rather than the formalistic idea that the character of the decision should be understood from the perspective of the last (judicial) employee whose hands it passed through. As Halliday notes in his study of the administration of homelessness relief in the UK, 'decisions have histories' and

[773] European Court of Human Rights (2013) *Annual Report 2012*.
[774] European Court of Human Rights (2015) *Analysis of Statistics 2014* (Council of Europe, Strasbourg), 4.
[775] *Ibid.*
[776] P Mahoney (2002). 113 – 4 (My emphasis).

instead of focussing exclusively on the formal decision-taking stage, the exercise of discretion 'should be viewed in social perspective,':

> the decision-making process is better conceived as a network of bureaucrats exercising discretion, culminating in a final outcome which is highly contingent on the discretion of multiple actors.[777]

Viewing the formal decision-taking phase through this lens, as a *culmination* of a process rather than the *only* significant part of the process for understanding the Court's admissibility decision-making, casts critical light on the idea that, as currently practised, admissibility decision-making represents a "fully judicial process". Triage means that it is Registry staff, not judges, who take decisions at critical junctures about how an application will be decided. Where the file is marked for disposal on grounds of inadmissibility, Registry staff, not judges, analyse the applicant's legal submissions and evidential claims. Registry staff, not judges, formulate a notionally provisional, but almost invariably final, decision-note on the case, identifying grounds of inadmissibility. The judicial role in processing almost all decisions taken on admissibility grounds is limited to surveying bundles of these notes, validating the Registry's reasoning by ticking the case off on a list, and producing no reasoning to justify the disposal of an individual case.

It is questionable to what extent judicial "agreement" with the Registry's designation of cases as inadmissible represents an independent weighing up of the arguments before the Court, meaningfully judicialising the pre-eminently bureaucratic procedure adopted to decide the overwhelming majority of cases. The single judge does not generally have access to or have an opportunity to review the case-file, while the Registry notes are not balanced disquisitions on the arguability of the issues raised by the case, but a short page of text, contending that the petition is clearly inadmissible, with sparse reasoning to justify this conclusion. The judicial role in the Court's admissibility decision-making, although formally retained, legally required and politically important, has been hollowed out in substance to a very significant extent since 1998. This is difficult to reconcile with the claim, dominant both in Convention policy debates and in scholarship promoting the

[777] S Halliday (2004), 41.

individual justice approach, that the Court reaches all of its decisions according to a fully judicial protocol.

Again, proponents of individual justice seem reluctant to recognise just how far the Court's working practices have evolved away from the legal balance of responsibilities envisaged in the text of the Convention. At an academic seminar held on the Court's caseload crisis in 2009, one German academic contended, against the idea of transferring decision-making power to Registry staff, that:

> personal responsibility of the judges *must remain* the key element of the adjudicatory process. It would be unacceptable – and even immoral – to transfer the assessment to be carried out almost in its entirety to the staff people in the service of the Court. Judges must have time to familiarize themselves with the cases placed before them. It would be unacceptable to see their role confined to signing a product ready-made by their support services. The judges are elected by the Parliamentary Assembly. They are the people in whom trust resides, not the bureaucrats in the Registry, no matter how able and zealous they are.[778]

Characteristically, Tomuschat frames this critique of bureaucratic decision-making as a comment on a *prospective* filtering regime, not as a comment on the Court's current working practices. However, as chapter 5 shows, the judicial role in admissibility decision-making is already almost always 'confined to signing a product ready-made' by Registry lawyers, with judges having no time to 'familiarize themselves with the cases brought before them,' beyond the Registry note summarising reasons for a finding of inadmissibility. Their 'personal responsibility' is nugatory. One Committee of the Council of Europe's Parliamentary Assembly has described Protocol No. 14 *rapporteur* and single judge regime as 'a "fig-leaf" that maintains the legal fiction of a judicial determination of

[778] C Tomuschat (2009) 'The European Court of Human Rights Overwhelmed by Applications: Problems and Possible Solutions' in R Wolfrum & U Deutsch (eds) (2009) *The European Court of Human Rights Overwhelmed by Applications: Problems and Possible Solutions*, 11 (my emphasis).

all applications.'[779] A recent research report produced by the European Law Institute tentatively endorsed a similar analysis, suggesting:

> It may be that at some point in the future the distribution of actual responsibility between the rapporteur and the single judge can be seen to have resulted in the legal fiction of inadmissibility decisions being "taken" in the judicial sense by the single judge.[780]

It is not clear why that judgement should be deferred. Fully "judicial justice" in the overwhelming majority of cases decided by the Court is already theoretical and illusory. The substance of the individual 'right to a judicial decision' has already been hollowed out.[781] While some contributors to the academic debate on Court reform recognise this fact ('the idea of a decision by a Judge in all cases is a bit theoretical already now'[782]) individual justice theorists' purportedly conservative defence of the "fully judicial" *status quo* is quite radically misconceived, reflecting only the "law on the books" and entirely ignoring the evidence from the "law in practice". This undermines a third key tenet of the individual justice approach, illuminating the now familiar and generally overlooked gap separating how individual justice theorists think the Court functions and what the evidence tells us about its working practices. This mismatch is particularly problematic, given the marked tendency of supporters of the individual justice approach to understand and depict themselves as the 'conservative' guardians of the Court's *acquis* of principles and practices.[783] Reluctant as its proponents have been to recognise the fact, the individual justice approach does not accurately represent the *status quo*. For the Court to deliver

[779] Committee on Legal Affairs and Human Rights, Parliamentary Assembly of the Council of Europe 'The future of the Strasbourg Court and enforcements of ECHR standards: reflections on the Interlaken process' in Council of Europe (2010) *Preparatory contributions to the Interlaken conference* (Strasbourg, Council of Europe), 52.
[780] European Law Institute (2012) *Statement on case-overload at the European Court of Human Rights* (Vienna, European Law Institute), 27.
[781] P Leach (2014) *Submission to the CDDH on future directions in Court reform* http://www.coe.int/t/dghl/standardsetting/cddh/reformechr/GT-GDR-F/Leach.pdf last accessed 05.12.2014.
[782] J Meyer-Ladewig in R Wolfrum and U Deutsch (eds) (2009) *The European Court of Human Rights Overwhelmed by Applications: Problems and Possible Solutions*, 38.
[783] B Goronwska (2013) 'The Strasbourg Court – Between Individual or General Justice' *Comparative Law Review* 15 103 – 121, 105.

individual justice to applicants systematically, the institution and its work would have to be quite radically redesigned.

The myth of individual "justice"

The final pillar of the individual justice myth is more impressionistic than the practical issues of decision-making style examined thus far. In Court reform debates and the institution's publicity materials, it is a commonplace for diplomats, and the Court's defenders and advocates, to offer what Dembour has described as a 'self-congratulatory' 'plethora of commentaries which praise the unique success of the Convention.'[784] These commentaries go some way beyond consequentialist paeans to the positive impact which the Court's jurisprudence is alleged to have had on the protection of human rights in Europe. In its publicity materials, the Court regularly appeals to an ethically-charged account of the institution. Commemorating 50 years of its jurisdiction, the Court suggested that 'more than ever the Court today is the guarantor of human rights in Europe – the very conscience of Europe.'[785]

As chapter 4 argues, on the whole, applicants have been negatively represented in the Convention reform debate, their motives questioned, their ignorance emphasised, accused of triviality, frivolity, selfishness and greed in submitting complaints to Strasbourg. This co-exists with a sentimental account of the powerless applicant, which serves as a powerful rhetorical resource, justifying the existence of the Court and the exercise of its jurisdiction. In a ministerial conference in Rome in 2000, the Norwegian Minister of Justice observed that 'one of the extraordinary qualities of the Court, and one of the aspects that surely has contributed to its importance, is that the Court deals directly with individuals.'[786] At the same conference, Walter Schwimmer, former Secretary General of the Council of Europe, offered this sentimental defence of the institution, recalling how 'every week, hundreds of

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[784] M B Dembour (2006) *Who Believes in Human Rights?* 13, 126.
[785] http://www.echr.coe.int/50/en/#fiftieth-anniversary last accessed 31.04.10.
[786] H Harlem – Minister of Justice – Norway (2002) in (2002) *Proceedings: European Ministerial Conference on Human Rights and Commemorative Ceremony of the 50th anniversary of the European Convention on Human Rights Rome, 3 – 4 November 2000* (Strasbourg, Council of Europe), 99.

individuals from all parts of the Continent turn their hopes to the Strasbourg Court.'[787] Awarding the Court the International Franklin D Roosevelt Four Freedoms in 2010, the Dutch Prime Minister of the day did not spare his enthusiastic assessment of the impact which the Court has had on European life, and those who have petitioned if for aid. Balkenende summarised the Court's contributions:

> Over the last 50 years, the European Court of Human Rights has ruled on thousands of cases. It has ensured access to justice for every person in our vast and ancient continent.[788]

"Access to justice" is a slippery phrase. For some, the concept will connote the ability of applicants to achieve desired outcomes through litigation. Others may prefer a "thinner" conception of access to justice, focussed not on outcomes, but on the accessibility of legal *procedures* through which their complaints will be considered and responded to. Proponents of the systematic delivery of individual justice have offered various conceptions. A joint NGO statement of 2006 argued that:

> the essence of this right is the right of individuals to receive a binding determination from the European Court of Human Rights of whether the facts presented constitute a violation of rights secured in the ECHR.[789]

Patricia Egli has argued that the *raison d'etre* of the Convention 'control mechanism' is to give:

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[787] W Schwimmer (2002) *Proceedings: European Ministerial Conference on Human Rights and Commemorative Ceremony of the 50th anniversary of the European Convention on Human Rights Rome, 3 – 4 November 2000* (Strasbourg, Council of Europe), 146

[788] J P Balkenende (2010) 'Toespraak bij de uitreiking van de Four Freedoms Award' 29th May 2010 www.rijksoverheid.nl/documenten-en-publicaties/toespraken/2010/05/29/four-freedoms-award.html last accessed 01.12.2012.

[789] Amnesty International et al (2006) *European Court of Human Rights: NGO Comments on the Group of Wise Persons' Interim Report*, July 2006, para 3.

> every victim of an alleged violation of the European Convention the right to seek and obtain vindication both for his or her infringed rights, and where appropriate, for financial compensation of the harm suffered.[790]

For Beernaert:

> the Convention system has been able to fulfil two key roles: to provide an avenue for redress for every individual with human rights complaints and to function as a (quasi) constitutional instrument of European public order.[791]

The mythology of "obtaining vindication" was substantiated by one German scholar, who may be identified with the individual justice approach. Tomuschat argued:

> Everyone who feels aggrieved by a decision or some factual conduct of public authorities can bring the relevant dispute before the Strasbourg judges after having exhausted domestic remedies. Invariably, the case will be heard. The Strasbourg Court has no discretion to accept or reject a case *a limine*.[792]

Continuing:

> the court has become a symbol of hope. Justice they could not get from their own courts because of systematic disturbances within the judicial system of their home country they hope to get from Strasbourg. And in fact, Strasbourg has not disillusioned them.[793]

While the status of the Convention as a quasi-constitutional instrument of European public order seems beyond dispute, to what extent has the Convention system really been able to provide an avenue of redress for every individual with human rights complaints? To what extent has the Court avoided disappointing its applicants? The claim that Strasbourg actually delivers substantive justice on an individual basis has been central to the appeal of

[790] P Egli (2007) 'Protocol No. 14 to the European Convention for the Protection of Human Rights and Fundamental Freedoms: Towards a more effective control mechanism?' *Journal of Transnational Law and Policy* 17(1) 1 – 34, 2.
[791] M A Beernaert (2004), 556.
[792] C Tomuschat (2009), 1.
[793] *Ibid*, 12.

the individual justice approach, and a key critique of any constitutional justice departure. As the Court's Deputy Registrar Michael O'Boyle has argued, individual petition:

> has an almost poetic attraction, conjuring up the image of the aggrieved individual being in a position to resist the might of the State by having recourse to a legal system beyond national boundaries.[794]

Compelling as this poetic vision may seem, one must have serious doubts about the extent to which Strasbourg's overwhelmingly adverse, unreasoned, bureaucratic admissibility decision-making 'has not disillusioned' most of its applicants. It is beyond the scope of this thesis to explore fully applicants' experiences of lodging complaints with the Court. That would be worthwhile and potentially radical work. It is striking, however, that the only substantial study which attempts to mine the rich body of European human rights cases for 'human stories' focuses exclusively on the Court's 'landmark judgments' in which states were defeated by plucky (and often desperate and courageous) individual petitioners.[795] But most applicants do not receive a hearing from Strasbourg on the merits of their cases, or benefit from a judgment of the Court. As a consequence, the overwhelming majority of individual petitioners, and their experiences, are entirely missing from Goldhaber's 'people's history' of the Court. Only a handful of further socio-legal studies have explored applicants' understandings and experiences of Strasbourg litigation, and how they perceive the justice the Court dispensed.[796] In contrast with Goldhaber's triumphant affirmation of the Court's jurisdiction, however, even these few accounts offer a much more ambivalent sense of applicants' experiences of European human rights law than the paeans to the 'Conscience of Europe' allow.

Evidence from the Court's own archive substantiates the point. The limited scope of the individual justice dispensed in Strasbourg to most of its applicants, and the challenges this poses for the empirical claims of individual justice theorists that Strasbourg's *status quo*

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[794] M O'Boyle (2012) *The Conscience of Europe*, 194.
[795] M D Goldhaber (2007) *A People's History of the European Court of Human Rights* (Rutgers, London), 11.
[796] M B Dembour (2006), 129 – 130; S Buckler (2007) 'Same old story? Gypsy understandings of the injustices of non-gypsy justice' and F M Zerilli & M Dembour (2007) 'The House of Ghosts: Post-Socialist Property Restitution and the European Court's rendition of human rights in *Brumarescu v. Romania*' in M Dembour & T Kelly (eds) (2007) *Paths to International Justice* 189 – 215.

"has not disillusioned them", are neatly captured by Milan Řehák's litigation during the early 2000s. Mr Řehák's experience was in many ways characteristic of the majority of Strasbourg applicants: his application was declared inadmissible *de plano* by a summary formation of the Court without detailed reasons. In other respects, *Řehák v. Czech Republic* is an unusual case.[797] It is one of the few admissibility decisions made by a divided chamber of seven judges in a reasoned decision, propelling the case from beneath the more characteristic permafrost of the Court's archive, onto HUDOC's record of the Court's jurisprudence. Across three letters, parts of which are preserved in the admissibility decision, Řehák impugned the integrity of Registry staff, judges and indicted the practice of barely reasoned 'decision-letters' in inadmissible cases. His grievances were threefold. Řehák had complained to the Court that his domestic judicial proceedings in the Czech Republic, an action for damages, had lasted an unreasonably long time, violating his right to a fair trial under Article 6 § 1 of the Convention. The case originated in criminal proceedings taken against the applicant, described by the Court as an 'anti-communist dissident', during Communist Party rule in Czechoslovakia in 1980.[798] Řehák had lodged an earlier application with the Court in 2000, details of which are not disclosed in the decision, beyond the fact that the case was rejected *de plano* by a Committee of three judges in 2002 on the basis of a decision-letter likely to be more or less identical to that one analysed in chapter 5. On the 17th March 2003, he sent the following correspondence to the Court, summarised in the published decision:

> the applicant alleged that he and certain lawyers had agreed that "the genocide of fundamental human rights in the Czech Republic is so vast that it extends to the Czech Registry of the European Court". He asked the Court to send its decision, which he expected to be negative given his view as to the partiality of Czech Court staff, in a registered letter. He insisted that the decision be fully reasoned.[799]

Řehák's letter continued:

[797] *Rehak v. Czech Republic* App no 67208/01 (ECtHR, 18th May 2004) (dec.)
[798] *Ibid.*
[799] *Ibid.*

> not even criminal communist tribunals sent their decisions without reasoning … What you have done is tantamount to approval of theft and therefore, amounts to a crime from the position of a sort of "Terrestrial God". The proof of this is not only the Czech [part of the Registry's] ignorant reaction to my justified request to be provided with the 'preparatory' materials on the basis of which 'decision was taken'. I do not consider the decision of a sort of section, assisted by your Bulgarian colleagues, to be a decision of the Court as such.[800]

In a further letter of the 3rd March 2004, he accused Czech staff in the Registry of having 'successfully "disguised" the applications of democratically orientated citizens with a view to depriving them of human rights "once and for all", and of having accomplices in the form of Romanian, Bulgarian or other left-leaning – and therefore partial – judges and administrators of the Court',[801] continuing:

> Your Court, with the great help of and thanks to the Czech Registry … liquidates fundamental human rights! … I have my own former experience when the Court prevented me from freely using [my] property and left it at the mercy and for the benefit of the communist thieves, without any reasoning whatsoever! (see my application no 55376/00). In doing so, your glorious Court consecrated crimes of the communist regime and communist tribunals. Thank you![802]

The Court held that Řehák's correspondence made 'serious defamatory and groundless accusations about the integrity of certain judges of the Court and members of its Registry', that these 'allegations are intolerable, exceeding the bounds of normal criticism, albeit misplaced, and amount to contempt of court' and that 'in seeking to ensure the widest possible circulation of his accusations and insults, the applicant has evidenced his determination to harm and tarnish the reputation of the very institution of the ECtHR, its members and staff.'[803]

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[800] *Ibid*
[801] *Ibid*
[802] *Ibid*
[803] *Ibid*

There is no evidence to support Řehák's specific allegations of impropriety or partiality in the Registry's dealing with his case, but as chapters 5 and 6 detail, his broader procedural objections to the way his case was handled reflects an accurate understanding of the Court's working practices. There was a substantially unreasoned, summary dismissal of his case in a decision-making process dominated not by international judges, but by Registry lawyers drawn from his own jurisdiction. Given the features of the Court's decision-making process, and its almost invariably negative outcomes, Řehák's anger, disappointment, and sense of injustice is intuitively more credible than the idea that 'in fact, Strasbourg has not disillusioned' most of the applicants who interact with it.[804]

Due to the *pro forma* style of the Court's decision-letters, it is possible to find other applicants expressing similar frustrations on personal websites and blogs, often detailing their Strasbourg litigation in considerable, even monomaniacal, detail. They share Mr Řehák's sense of anger and injustice about the way Strasbourg decided their cases and justified its decisions. One writes of the abrupt decision-letter they had received from the Court:

> This has disgusted me. Without knowing the litigious details of the decision it is perfectly obvious that my human rights have been seriously abused. Had the court honestly stated that they did not have evidence enough to secure a conviction I would have accepted it, but I cannot accept this.[805]

Another applicant picked up the Court on its compliance with the Convention itself:

> WHY has my Application been declared "*inadmissible*"? NO REASON given.
>
> FAILURE to state the reason/s amounts to a BREACH of Article 45 of the Convention: "*Reasons shall be given for judgments as well as for decisions declaring applications admissible or inadmissible*".

[804] C Tomuschat (2009), 12.
[805] For example, G Abbott (2013) 'Victory of Evil over Good' accessible at www.geee.net/176.htm last accessed 05.01.2015.

> It is certainly the minimum a complainant is entitled to expect from a Body, there to ensure compliance with the Convention's rights – including treating individuals with dignity (Article 3).[806]

Řehák's indictment of the Court and his suspicions about the reasons for the rejection of his decisions may be misplaced, but his anger, and the Court's evident discomfort at being confronted with it, represents an important and largely missing perspective from the official and academic analysis of the Convention and its impact. Unlike most applicants whose dissatisfaction with this outcome and the process by which it was reached goes unrecorded, the acidity of Mr Řehák's response ensured it a place in the Court's annals. *Řehák* is one of the handful of published cases declaring an application inadmissible on basis that the 'offensive language' used by the applicant amounted to an 'abuse of the right of individual application.'[807] Due to the centrality of the applicant's comments to the disposal of the case, *Řehák* also incorporates and preserves something of the applicant's emotions and consciousness, which are general missing from the Court's official records of its proceedings.

As chapter 4 identifies, the image of the "victim Court" is an insistent feature of the Convention reform debate, accompanied by negative representations of the motives of applicants and of the importance of their cases. By focussing on the *Court's* undoubted predicament, the reform debate, and individual justice theorists who echo its terms, elide the extent to which the Court's "procedural efficiencies" and "streamlining" generate their own "victims" in the applicants whose cases are summarily rejected, without recourse, and without adequate explanation. Due to the privileged access of state representatives to Convention reform debates, the critical voices of these people – and their dissatisfaction – is missing.

As *Řehák* and the other responses quoted indicate, the idea that Strasbourg 'has not disappointed' the overwhelming majority of applicants whose cases it has summarily rejected, without reasons, is fanciful. These scattered fragments of applicants' experiences

806 For example, N Rawé (2012) 'European Court of Human Rights' accessible at www.leasehold-outrage.com/pg_lso/Other_courts.htm#ECtHR last accessed 22.01.2014.
807 ECHR (2012), Article 35 § (3)(a).

and responses to the quotidian realities of the Court's overwhelmingly negative, minimally-reasoned admissibility decision-making throw sentimental and self-regarding accounts of the Court as 'a beacon to the peoples', 'a glowing bright beacon of hope for millions', or the 'conscience of Europe' into sharp relief.[808]

Dembour has argued that 'human rights as practised by Strasbourg are for the very rich, the naïve, the intrepid, or those who have nothing to lose.'[809] Writing in 2002, criticising Strasbourg's drift towards bureaucratisation – 'a big and fast-processing judicial factory line' generating negative decisions – Dembour quotes 'an approving insider who wishes to remain anonymous', who hoped that Strasbourg would retain its '"*acquis*"' of 'being a "street-corner court"' and reject further constraints on the admissibility criteria.'[810] While it is not entirely clear what institutional characteristics this judge had in mind, it is broadly clear that she was defending the idea of the Court's informality and accessibility to applicants: what I have characterised elsewhere in this thesis as the *Strasbourg-as-tribunal* model. While this model may be normatively compelling, on the evidence, the idea that Strasbourg actually *operates* an informal, accessible "street corner Court" for applicants lacks credibility, at best a sustaining fiction for the overladen jurist, committed to the ideal of the judicial enforcement of human rights, who must nevertheless rationalise the 'tedious drudgery' of admissibility decision-making, and the tens of thousands of applicants it disappoints every year.[811] In this respect, it is far from clear that the movement towards a substantially unreasoned, discretionary admissions regime would be any less satisfactory in this respect than the *status quo*. The harder truth is that the 'access to justice' which the Court has ensured is very thin. Wildhaber has referred to this as the Court's 'wailing wall'

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[808] Leader article (2009) 'Comment & Debate: European court of human rights: Courting disaster' *Guardian* April 11 2009; J Hedigan (2011) 'The European Court of Human Rights: Yesterday, Today and Tomorrow' 12 *German Law Journal* 1716 – 1729, 1726; European Court of Human Rights (2012) *The Conscience of Europe* (Strasbourg).
[809] M B Dembour (2006), 129.
[810] M B Dembour (2002) '"Finishing off" cases: the radical solution to the problem of the expanding ECtHR caseload' *European Human Rights Law Review*, 604 – 623, 613, 621.
[811] A phrase used by the Court's former Irish judge, John Hedigan, in a paper 'The European Court of Human Rights, Yesterday, Today and Tomorrow', delivered at University College Dublin, 2nd April 2011.

function.[812] But a wailing wall is not a conscience. And the wall, like Strasbourg is characteristically unresponsive.

The "doomed quest" for individual justice

Greer and Williams have described aspirations towards the 'systematic delivery of individual justice' as a 'doomed quest.'[813] This quest has *already* failed. However attractive or defensible the idea of the provision of individual, judicial human rights adjudication may be in theory, the Court's working practices have evolved away from all four of these individual justice values over the last decade and a half. By depicting their arguments as conservative in character, proponents of individual justice have both misunderstood the institution they imagine they defend, and have overlooked the radicalism of the project they endorse.[814] Taken solely at the *normative* level, individual justice may still be conceived as a conservative restatement of the orthodox understanding of what the Court's role should be, emphasising the importance of judicial decision-making, maintaining the right of individual petition and an understanding that the admissibility criteria should be rigorous and uniform in application. Considered empirically, however, it is clear that to enshrine these ideals *in practice*, an individual justice approach would *also* require the Court's radical reform, reversing the very policies which have been broadly welcomed by Member States and almost all academic observers of the Court, under the imprecise headings of "streamlining" and "efficiency". While constitutional justice theorists have generally (but not consistently) embraced an attitude of reforming zeal, individual justice theorists simply do not recognise how far the Court's working practices have already departed from their values.

[812] L Wildhaber (2011) 'Rethinking the European Court of Human Rights' in J Christoffersen and M R Madsen (eds) (2011) *The European Court of Human Rights between Law and Politics* (Oxford, OUP), 209.
[813] S Greer and A Williams (2009) ', 468 - 9.
[814] B Goronwska (2013) 'The Strasbourg Court – Between Individual or General Justice' *Comparative Law Review* 15 103 – 121, 105.

Debunking constitutional justice: "more about consolidation than transformation"?

The unreality of the case for individual justice may appear to substantiate a point made by leading proponents of constitutional justice. While individual justice theorists have generally conceived of embracing a constitutional justice project as a 'painful transition' away from the Court's current commitments,[815] by contrast, Wildhaber and Greer argue that:

> the case for constitutional justice does not advocate that the Court should *become* a "constitutional court". It maintains, rather, that the Court *is* effectively one already and that this is a role that should be more formally acknowledged and more consistently performed. The case for constitutional justice is, therefore, much more about consolidation than it is about transformation.[816]

For some theorists, the collapse in the tenability of an individual justice approach entails an inevitable movement towards Strasbourg's more constitutional future. For Greer and Williams, constitutional justice 'now provides the only viable way forward.'[817] De Londras concludes that:

> any attempt to maintain a full commitment to the European Court of Human Rights acting as both a constitutionalist and an adjudicatory tribunal has only a limited prospect of success in securing the Court's future.[818]

For Goronwska, embracing discretionary docket-filtering represents 'an unavoidable consequence of present day realities.'[819] Guiggisberg argues:

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[815] B Bowring (2010) 'The Russian Federation, Protocol No. 14 (and 14*bis*), and the Battle for the Soul of the ECHR' *Gottingen Journal of International Law* 2 589 – 617, 592.
[816] S Greer and L Wildhaber (2012), 674
[817] S Greer and A Williams (2009), 466.
[818] F De Londras (2013), 39.
[819] B Goronwska (2013), 103.

> the reality of the Court nowadays leaves little option but to choose constitutional justice – The ECtHR simply cannot handle the quantity of cases received. Even if an individual justice based system was desirable, it is not realistic.[820]

It is a claim echoed by Christoffersen, who also endorses the principle of case-selection, arguing that:

> The Crown jewel of the Convention is the right of individual petition, but the jewel does not shine as brightly as it used to. The Court simply has neither the capacity nor the power to provide individual relief to the extent needed in the present day Council of Europe.[821]

In many respects, this vision of consolidation appears plausible. The constitutional justice approach shares many features with the *status quo*, indulging in few of the myths which characterise the argument for individual justice. It would not require the Court to give detailed reasons for declining to accept a case for full review. The docket-filtering standard of "seriousness" it promotes is explicitly adjudicative in character, rather than privileging bureaucratic rational values of consistency, predictability and the uniform treatment of applications. While this represents a sharp departure from the terms in which the Convention reform debate on admissibility has been transacted for almost three decades, it sits more comfortably alongside my findings about the open-ended, or lightly-defined, judgement which characterises the Court's admissibility jurisprudence.

Unlike individual justice, by dispensing with the idea that Strasbourg does not disappoint its applicants, advocates of constitutional justice recognise the limited justice which the Court is able to dispense for individuals. At most, under a constitutional justice regime, we might conceive of Strasbourg as a wailing wall for applicants, but we are unlikely to mistake it for Europe's juridical conscience. As we will shortly see, however, while key empirical claims about the Court's working practices relied on by individual justice theorists have been revealed as myths, this lack of empirical foundation may be less

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[820] S Guiggisberg (2012) 'The European Court of Human Rights: A Constitutional Court Endangering State Sovereignty?' *Cork Online Law Review* 11 98 – 106, 106.
[821] J Christoffersen (2011), 182.

beneficial to the constitutional justice approach than it appears at first blush. In the following section I argue, against its main proponents, that the solutions offered by constitutional justice theorists are themselves susceptible to critique on both pragmatic and theoretical grounds, as distinct from the traditional arguments advanced by individual justice theorists.

Criticisms of the case for constitutional justice have taken two main forms. The first, exemplified by Dzehtsiarou and Greene's work, is primarily normative, arguing that discretionary case-selection undermines important values associated with the right of individual petition, including reasoned judicial decision-making, equal treatment of all petitioners fundamental to the rule of law. A second tranche of arguments against the model are rooted not in principled objections to the changes it would affect, but in claims that that their introduction would undermine perceptions of Strasbourg's legitimacy, exposing the already controversial tribunal to additional political pressures, potentially threatening the already 'fragile' institution's continuing existence.[822] This section takes a different tack, focussing on the empirical credibility of the constitutional justice theorists' position. This element of Dzehtsiarou and Greene's critique is underdeveloped, attributable in great part to their neglect of the very socio-legal data which undermines their own claims.

Constitutional justice theory's limited pragmatic thinking

Constitutional justice theorists have made much of their pragmatic credentials. Wildhaber argues that:

> 'individual justice' has now been thoroughly discredited as a model for case selection. It simply expects more than can possibly be delivered. This leaves 'constitutional justice' as the only realistic alternative both for admissibility and for adjudication.[823]

[822] F De Londras (2013).
[823] L Wildhaber (2010) quoted at http://www.bris.ac.uk/news/2010/6915.html last accessed 01.12.13.

The case for constitutional justice is predicated on the empirical claim that such a reform is the only mechanism capable of creating 'more time for the ECtHR to spend on issues of the greatest significance' ensuring that its 'judges are left with sufficient time to devote to what have been called "constitutional judgments."'[824] It contends not only that case-selection is legitimate and defensible, but that it represents the only effective means by which the Court may deal with its caseload in the longer term. This may be broken down into two distinct claims: (1) that constitutional justice theory offers a normative justifiable approach to Strasbourg's docket-filtering, and (2) that adopting that approach will allow Strasbourg to dispose of more cases, more rapidly, thereby writing the last chapter in the institution's three-decade long struggle with its caseload.

The admissibility *standard* which constitutional justice theorists promote is easily stated in the abstract. For Greer and Wildhaber, the Convention should 'be amended to replace all the current substantive admissibility tests with a single test based on seriousness.'[825] For Mahoney, embracing constitutional justice would 'invest the Court with a power of selection over what cases it will look into' from case-files submitted to it.[826] For Bernhard, it would involve a 'discretionary admission procedure' to parallel the docket-filtering of the Supreme Court of the United States, described by one commentator as the exercise of an 'absolute and arbitrary discretion' over whether a particular case will be entertained on appeal.[827] Uniting all of these definitions is a strong emphasis on the role which *judgement* would play in the filtering regime envisaged.

Curiously, none of the main academic proponents of the constitutional justice model have gone beyond this, exploring *how* their proposal that the Court select its caseload could and should operate in practice, and the extent to which it would represent a departure, radical or otherwise, from the *status quo*. At the very least, it is clear that constitutional justice

[824] S Greer and L Wildhaber (2012), 676; Evaluation Group (2003), para 98.
[825] S Greer and L Wildhaber (2012), 686.
[826] P Mahoney (2003) 'New Challenges for the European Court of Human Rights Resulting from the Expanding Case Load and Membership' 21 *Penn State International Law Review* 101 – 114, 112 – 3.
[827] R Bernhard (2009) 'The Admissibility Stage: The Pros and Cons of a *Certiorari* Procedure for Individual Applications' in R Wolfrum and U Deutsch (eds) (2009) *The European Court of Human Rights Overwhelmed by Applications: Problems and Possible Solutions* (Heidelberg, Springer), 33; E A Hartnett (2000) 'Questioning certiorari: some reflections seventy-five years after the Judges' Bill' *Colombia Law Review* 100(7) 1,643 – 1,738, 1705.

theorists envisage judicial responsibility for case-selection. But judicial responsibility, in and of itself, leaves several important questions unanswered. Decisions by how many judges? Employing what procedures? Taking decisions on the basis of what materials? With what implications for the Court's resources? And how would the criterion, or a test, of 'seriousness' be formulated?

White and Boussiakou and Bernhard are isolated voices among constitutional justice theorists, envisaging, even sketchily, how admissibility decision-making using a discretionary admissibility test might work in practice. White and Boussiakou suggest that 'something akin to one or more Grand Chambers could be responsible for the final determination of which cases would be admitted for hearing under a discretionary system.'[828] On this model, seventeen judges of the Court would take a view on the "importance" of every application. Bernhard was concerned about the possibility that decision-making might diverge in approach across the Court's forty-seven judges.[829] He envisaged that admissibility decision-making under a new, discretionary dispensation could be undertaken by seven-judge chambers of the Court, concluding:

> if you have a discretionary admission procedure, the danger exists that five sections with chambers of seven judges are developing in different directions in respect of the admission of applications. My proposal is to have a panel which is responsible for developing more or less uniform practices of the different sections of the Court. This could be a panel with 11 persons, comprising the President of the Court and the presidents and vice-presidents of the different sections.[830]

Missing from the case for constitutional justice is any recognition of the myth of "fully judicial decision-making", the decades-long bureaucratisation of Strasbourg's admissibility procedures, the marginalisation of the judicial role, and the extent to which the Court's current level of output depends on both innovations. As chapter 5 shows, since the Court began operating full time in 1998, its efficiency measures and streamlining

[828] R C A White and I Boussiakou (2009) 'Voices from the European Court of Human Rights' *Netherlands Quarterly of Human Rights* 27 167, 187 – 8.
[829] R Bernhard (2009), 33.
[830] *Ibid*, 35.

strategies have all relied on minimising judicial involvement in admissibility decision-making. Habitually involving seven or seventeen judges of the Court in assessing the merits of petitions would not represent modest tinkering with the system, but a substantial *revision* of the Court's current practices, reversing fifteen years of diminishing judicial participation in the filtering process. Yet, nowhere in their arguments in defence of constitutional justice do these theorists ever engage with these concerns, reckon with the resource implications of delivering constitutional justice systematically. And is this, in any event, a practical possibility?

Greer and Wildhaber defend the idea of judicial case-selection by, gesturing vaguely to the practices of 'every constitutional or supreme court in every member state of the Council of Europe' and to the example of the United States.[831] The Court 'deserves to be evaluated comparatively, with reference to how other systems of constitutional justice operate', Stone Sweet suggests.[832] For Wildhaber and Greer, an examination of the operating practices of other courts undermines the case for individual justice, and promotes constitutionalism:

> there are good reasons for believing that the Court should have much more control over its own docket, not least because all modern legal systems are based on an increasingly restricted selection of cases, usually on the basis of a judicial assessment of their seriousness or significance, as litigation moves from higher to lower levels. It is difficult, therefore, to see how, and why, the ECtHR could and should be more generous.[833]

This makes a number of important assumptions. It presupposes an identity (or at least a close resemblance) between Strasbourg's docket-filtering and decision-making on granting leave to appeal in national apex courts, suggesting that analogous procedures, and normative justifications, are involved. Secondly, it also supposes that the European Court's activities *should* be understood and modelled in terms of those national constitutional and supreme courts, and that the institution does not and should not serve distinct goals and

[831] Greer and Wildhaber (2012).
[832] A Stone Sweet (2009) 'On the Constitutionalisation of the Convention: The European Court of Human Rights as a Constitutional Court', 3.
[833] Greer and Wildhaber (2013), 655 – 687, 685 – 6.

values (such as the subaltern *Strasbourg-as-tribunal* model running through the empirical data which chapters 4 to 6 analyse). Proponents of the constitutional justice model regularly suggest a comparative analysis between Strasbourg and other national apex courts, but they rarely perform one, taking it as axiomatic that Strasbourg's working practices broadly approximate to those employed in apex tribunals elsewhere. This identification of Strasbourg with national constitutional courts appears superficially plausible. As Stone Sweet suggests:

> judges in Strasbourg confront the same kinds of problems that their counterparts on national constitutional courts do; and they use similar techniques and methodologies to address these problems.[834]

Examining its published jurisprudence on the Convention's substantive rights, a doctrinal scholar will find that its decision-making looks similar to that undertaken by domestic courts. If states are willing to trust their senior domestic judges to set the agenda of constitutional and supreme courts in the exercise of discretionary review, why not invest those states' nominees to the Strasbourg Court with the same authority to govern their docket? But their underlying assumptions are problematic. Drawing out the procedural contrasts between Strasbourg and the United States, Canadian and UK supreme courts illustrates the overlooked radicalism of the constitutional justice model more clearly, undermining Greer's argument that judicial case-selection may be expected to expedite proceedings before the Court and resolve the institution's case-load crisis.

A tale of four petitions: permission, leave, certiorari and admissibility decision-making contrasted

Examining the international comparisons, it appears that two basic principles characterise the work of constitutional and supreme courts whose jurisdiction is not accessed of right: (1) effective judicial responsibility for docket-filtering decision-making and (2) collegiate deliberation on whether leave should be granted or refused. These principles are reflected

[834] A Stone Sweet (2009), 1.

in the ways in which the UK, US and Canadian supreme courts organise their work. Litigants may not appeal to the United States Supreme Court as of right, but must instead be granted a writ of *certiorari* by the Court if their case is to be admitted for full review. Petitioners must exhaust other avenues of appeal before their case will be considered. Whether or not the Court grants *certiorari* is a matter of unfettered 'judicial discretion'.[835] Although 'neither controlling nor fully measuring the Court's discretion', the Court's rules state that *certiorari* will only be granted 'for compelling reasons'.[836] Such reasons can include conflicting decisions in lower federal courts or state courts of last resort on an 'important question of federal law'.[837] Similar systems of leave obtain in the UK and Canadian Supreme Courts. Under the 1975 Canadian Supreme Court Act, leave must be granted to cases raising 'issues of public importance', while in the United Kingdom, leave to appeal may be granted where a case raises 'an arguable point of law of general public importance.'[838] All three of these filtering criteria, like those promoted by constitutional justice theorists, necessitate the exercise of open-ended judgement on whether to accept or refuse a particular case.

In practice, the US Court grants only a tiny minority of writs sought. The second half of the 20th century saw an exponential expansion in the number of petitioners seeking to have their cases reviewed by the Supreme Court. Petitions for *certiorari* increased from around 1,450 in 1945 to roughly 10,000 per year today.[839] Although a smaller docket than the European Court, petitioners' rates of success are broadly similar. *Certiorari* is granted in around 1% of cases.[840] The Canadian Court grants leave in around 15% of cases, while in the UK, around 26% of permission applications are granted.[841] Detailed reasons are not generally given by any of these courts for granting or refusing leave to appeal or *certiorari*.

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835 United States Supreme Court (2010) *Rules of the Supreme Court of the United States,* Rule 10.
836 *Ibid*
837 *Ibid.*
838 *Perera (Appellant) v Grunwick Processing Laboratories Limited (t/a Bonus Print) (in administration) (Respondent)* UKSC 2012/0241 refused leave to appeal, 8 March 2013.
839 United States Supreme Court (2012) 'The Justices' Caseload' www.supremecourt.gov/about/justicecaseload.pdf last accessed 30.11.12. No more granular year to year data on the US Court's docket is available.
840 *Ibid.*
841 R B Flemming (2004) *Tournament of Appeals: Granting Judicial Review in Canada* (Vancouver, University of British Columbia), 14. UK Supreme Court (2013) www.supremecourt.uk/news/permission-to-appeal.html last accessed 01.12.2013.

In the UK Court, the Justices' eight judicial assistants compose 'petition memos' on applications.[842] One former assistant has written:

> a well-written petition memo should save the Justices time and be used as a route map through the often voluminous appeal papers. Part of the task of writing a petition memo includes checking that the appeal papers contain all the information that would be required by the Justices. Each petition memo is three to four pages long (rarely longer) and follows the same structure. The first page sets out the facts, the issues raised by the appeal and the history of the proceedings. The remainder of the memo contains a summary of the lower courts' findings, of the issues raised in the appeal notice, and of any notice of objection. Any unusual applications and the existence of third-party interveners would also be highlighted. The memo specifically does not contain any advice on the merits of the application: its aim is to summarise the case objectively without advocating a particular answer.[843]

These summaries are communicated to three-justice panels, along with copies of the leave application and decisions by the courts below. These panels meet in private hearings to discuss whether leave should be granted. Anxieties about the potential influence of assistants on the outcomes of cases are controlled by institutional taboos, prohibiting assistants from offering an opinion on whether leave should be granted to a particular appeal until 'after the Justices have spoken.'[844] Similar protocols obtain in the Canadian court. Decision-making is by three-justice panels, who do not meet but vote by written memorandum on leave applications, with a majority of two of three being sufficient to grant leave.[845] Practically, the Canadian Court uses its staff to promote collegiate deliberation beyond this, affording its nine justices opportunities to intervene in the filtering process. The staff lawyers of the Court's Law Branch 'prepare objective

[842] T Nesterchuk (2013) 'The View from Behind the Bench: The Role of Judicial Assistants in the UK Supreme Court' in A Burrows D Johnston and R Zimmerman (eds) *Judge and Jurist: Essays in Memory of Lord Rodger of Earlsferry* (Oxford, OUP), 104.
[843] *Ibid*, 105.
[844] *Ibid*, 106.
[845] D R Songer (2010) *The Transformation of the Supreme Court of Canada: An Empirical Examination* (Toronto, Toronto University Press), 48.

summaries of the applications that outline the facts of the case, describe the legal history, and describe the legal issues raised by the case.'[846]

Since 1994/1995, these memos 'include the staff attorney's recommendations on whether leave should be granted or denied.'[847] Before three-justice panels consider cases, each leave petition is despatched to a clerk who composes a 'memorandum of law' which is communicated to all of the Court's justices, including the panel. This document 'typically runs to about fifteen pages.'[848] Canadian justices vote on the basis of the record of proceedings, the application for leave and these summaries.

The approach of the United States Court has several similarities, and key differences. US Justices are much more reliant on the note produced by their clerks than their Canadian and UK counterparts. US Supreme Court clerks undertake a number of tasks, including drafting opinions, and composition of "bench notes" to assist justices in oral argument, perhaps their most substantial contribution to the Court's work is their 'filtering' role, analysing incoming petitions for *certiorari*. As one American legal analyst summarised:

> Throughout the latter part of the twentieth century, law clerks have reviewed petitions of *certiorari* and prepared memoranda summarizing the factual record, the lower courts' rulings, and the relevant legal argument – often concluding with a recommendation whether to grant or deny *certiorari*.[849]

These summaries incorporate a "discussion" section, in which clerks are expected to offer arguments both for and against granting *certiorari*. The completed memos are circulated to each of the Court's nine justices. The evidence suggests that some justices instruct their own clerks to perform an independent review of the case, writing a shadow memo to sit alongside that composed by their colleague. Participation in this filtering mechanism is not mandatory, though with the retirement of Justice Stephens in 2010, all nine of the Court's

[846] R B Flemming (2004), 14.
[847] *Ibid*, 15.
[848] D R Songer (2010), 48.
[849] T C Peppers (2006) *Courtiers of the Marble Palace: The Rise and Influence of the Supreme Court Law Clerk* (Stanford University Press), 14.

justices now add their clerks to the "pool" generating memos.[850] As the Court's former Chief Justice observed in 1989, the theory behind this approach:

> is that the pool memos will save the time of the Justices because in many cases the Justices, after reading the pool memo, will not find it necessary to read the underlying petition and response.[851]

One senior former Justice estimated that he did 'not even look at the papers in over eighty percent of the cases that are filed.'[852] While clerks play an important and controversial role in the process of analysing petitions for *certiorari*, furnishing in their memos the primary material used by Justices to select which cases to examine, decision-making about the fate of petitions – summary rejection, or substantial scrutiny – lies practically as well as formally with the agenda-setting conference of Justices of the Court.[853] A recent socio-legal study has summarised how the Supreme Court's decision-making operates in practice. After the circulation of the memo, the:

> process first starts with the creation of a "discuss list". The discuss list is drafted by the Chief Justice, who identifies petitions he thinks deserve discussion and a formal vote. The Chief circulates the list to the associate justices, who can each add (but not subtract) petitions to it. Those petitions not making the discuss list are summarily denied review.[854]

Four votes of nine to grant *certiorari* are sufficient to bring the case before the Court for oral argument and judgment.[855] The term 'discuss list' may give a misleading impression of the extent to which Justices' decisions on whether or not to grant *certiorari* ordinarily prompts discussion in the Court's conference. The evidence suggests that decisions on

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[850] B Palmer (2001) 'The "Bermuda Triangle?" The Cert Pool and Its Influence over the Supreme Court's Agenda' *Constitutional Commentary* 18 105 – 120.
[851] Quoted in A Ward (2006), 126.
[852] *Ibid.*
[853] W H Rehnquist (2001) *The Supreme Court* (New York, Vintage Books).
[854] R C Black and C L Boyd (2012) 'US Supreme Court Agenda Setting and the Role of Litigant Status' *Journal of Law, Economics and Organization* 28(2), 286 – 312, 289.
[855] K H Smith (1999) 'Justice for all? The Supreme Court's denial of *pro se* petitions for *certiorari*' *Albany Law* Review 63, 318 – 332; K H Smith (2001) 'Certiorari and the Supreme Court Agenda: An Empirical Analysis' *Oklahoma Law Review* 54 727.

whether to vote to grant or refuse *certiorari* are primarily made in private by justices in chamber, on the papers, according to their own undeclared criteria, and without reasons being given by Justices to justify their votes.[856]

Constitutionalising Strasbourg

The practices of these three courts have similarities and differences. All three employ staff to assist judicial decision-making on granting leave, but judges' independent scrutiny of the judgments of the court below, the facts and the legal issues ranges from the non-existent to the detailed. Staff recommendations are anxiously prohibited in one court, common practice in the other two. In all three courts, staff memos may be of considerable length and detail. In approach, all three reflect the lightly-defined norms being applied by the court, advancing arguments in favour and against granting leave. Across all three, decision-making is collegiate to a greater and lesser extent. Two communicate relevant information to every member of the court for viva.

Comparing this with chapters 5 and 6's accounts of the Strasbourg filtering system flags up significant differences in the European Court's approach to admissibility decision-making, which is neither collegiate, nor effectively judicial in character, with the analysis and management of cases being dominated by Registry staff. For constitutional justice theorists, it is axiomatic that Strasbourg has engaged in a process of consolidation and moved towards the status of a constitutional court. This ignores the fact that the institution's approach towards filtering its docket has drawn primarily on the values of bureaucratic rationality and the bureaucratisation of the admissibility process to drive its efficiency and accelerate its decision-making. The stated case for Protocol No 14's *rapporteur* and single judge filtering system relies entirely on the idea that this 'formation' of the Court would dispose of 'clearly inadmissible' cases identified according to 'rigorous and uniform criteria'. Similarly, in Strasbourg, the Registry triage and domination of the admissibility phase relies for its legitimacy to a significant extent on the idea that the admissibility phase

[856] S Brenner (2000) 'Granting Certiorari by the United States Supreme Court: An Overview of the Social Science Studies' *Law Library Journal* 92, 193; E Natan Sommer (2007) *A Supreme Discretion and a Passivity Conundrum: Strategic agenda-setting on the US Supreme Court* (Ann Arbor, UMI).

represents a technical, rule-bound process, insulated from judgements on the merits, which are reserved to judges.

Departing from that has implications for the legitimacy of the institution's practices, but also for the work of judges and Registry staff. If Convention reformers accepted Greer and Wildhaber's prescription for constitutionalisation, and took the international comparisons they appeal to seriously, single judge formations would have to be replaced by more populous judicial panels. It is difficult to see how such panels could possibly hasten Strasbourg's filtering decision-making, as proponents of constitutional justice characteristically assume. Moreover, the Registry "triage" function currently propels applications towards particular formations of the Court on the basis of a provisional but practically almost always decisive, negative view about their admissibility. There is no equivalent layer of decision-making to the 'discuss list', where European judges collectively, or some smaller section of the full bench, come to a view about whether a given application should be allocated to single-judges for summary disposal as inadmissible, or to seven-judge Chambers for more sustained examination, or three-judge panel consider the merits one way or the other. Deciding which cases to add to a "discuss list" is radically different from ticking off cases bundled as presumptively inadmissible.

While Supreme Court memos and Registry notes are both of limited compass, they contribute to radically different *forms* of "docket-filtering" decision-making. Registry notes are normally limited to furnishing 'one page' detailing the reasons for the *inadmissibility* of the petition. As one judge of the Court noted, currently, 'everything must turn around the ground of inadmissibility, explanations on the merits of the case are unnecessary'. Clerks' memos to United States Justices, by contrast, aim to summarise the factual and legal issues for Justices for their collective judgment on the "importance" of the issues raised by the case. That is a radically different (and arguably more onerous) task for Registry lawyers to undertake.

The false choice between constitutional and individual justice

Since the middle of the 2000s, constitutional justice scholars have promoted the idea that constitutionalisation represents the only practical solution to the Court's caseload crisis. Increasingly, its proponents are constructing constitutional justice, not as a transformation in the Court's functions and approach, but as an explicit and more transparent codification and consolidation of already-existing tendencies towards constitutionalisation. For Greer and Wildhaber, the Court is bowing to the inevitable movement towards case-selection on a more discretionary basis. While this argument appears superficially compelling, particularly in the light of the collapse of the individual justice model as a credible description of the Court's work, it is troubled by the discrepancy between its aspirations and the Court's working practices, incorporating its own evasions, all the more effectively because it is done under the mantle of practicality and addressing hard truths. If individual justice theorists have overlooked (or refused to recognise) how far the Court has already evolved away from their values, Greer and Wildhaber's defence of constitutional justice is also problematically selective in its treatment of the Court's evolution since 1998, and the extent to which the institution is now comparable with the sorts of supreme courts and constitutional tribunals which constitutional justice theory prays in aid.

Constitutional justice scholars have canvassed a very limited range of ideas about how the Court might apply an explicitly discretionary admissibility criterion in practice. Echoing the comparisons made with domestic apex courts, all envisage that judges would be responsible. Considered in the light of chapter 5 and 6's data about the current state of the Court's working practices, and the limited extent to which judges are involved in the admissibility process, Greer's 'consolidation' narrative collapses. Constitutional justice theory is revealed as only selectively practical. While it recognises that the current admissibility criteria are not, as the reform debate and individual justice theorists contend, credibly rigorous and uniform or meaningfully subjected to reasoned disposal in a manner which dispenses particularly valuable individual or satisfactory disposals for applicants, they neglect the third limb of the argument against individual justice: the myth of fully judicial justice.

While judicial case-selection may seem like a viable alternative to the current admissibility rules, this is largely attributable to the assumption that the decision-making mode would not be disrupted by the introduction of a new, more explicitly discretionary filtering standard. However, this is implausible. Firstly, the idea that single judges should be empowered to select which cases are subjected to full review by the Court is likely to be controversial in a way that the current filtering regime is not, precipitating demands to reintroduce collegial judicial review in the filtering process. The international comparisons to which Wildhaber and Greer habitually appeal all deploy multi-judge panels to select cases for review. If the principle of collegiality is restored at the filtering stage, this has obvious implications for judicial time and resources. The argument can be expected to be even more firmly put, given the Court's international character, considering the diversity in the personnel represented on the bench, and the diverse legal and political traditions they hail from. However, even if reformers unexpectedly embraced the idea of discretionary admissions decisions being taken by single judges, applying a discretionary admissions regime is likely to change the approach to decision-making in important ways.

An indispensable precondition for the growth in the bureaucratic role in admissibility decision-making is the idea that the admissibility criteria are capable of uniform and rigorous application. As chapter 4 discusses, this understanding, combined with traditional conceptions of the limits of bureaucratic competency and legitimate authority, lie behind the idea that Registry lawyers should be invested with power to decide on the admissibility of petitions themselves. While this proposal proved controversial and was rejected, the same logic undergirds the idea that Registry *rapporteurs* can take effective control of the practical analysis of filtering applications against the admissibility criteria. While a jurisprudential analysis of the Court's interpretation of the admissibility criteria renders claims about the rigour and uniformity of the admissibility criteria questionable, the dominance of this bureaucratic picture of admissibility decision-making in the Convention reform debate provides a powerful justification for the role currently played by the Registry. A shift towards an explicitly adjudicative admissibility rule deprives the bureaucrats of this route to justification.

The idea that Registry lawyers take the lead in applying formalistic admissibility criteria is considerably less controversial than the idea that bureaucrats should be empowered to take the primary decisions in cases involving the discretionary selection of cases. Chapter 7 suggests that the gap between the criteria applied by a constitutional filtering regime, and the Court's use of its admissibility criteria at present is significantly narrower than individual justice theorists realise. Crucially, however, the ambivalence of the current regime, and its exaggerated disavowal of discretion, serves a useful institutional function which would be lost by the (perhaps more honest) movement towards an explicitly selective filtering process. By constructing the admissibility criteria in bureaucratic terms, the extensive involvement of bureaucrats in the process is justified. This involvement has been indispensable to the efficiency gains necessary to keep the Court afloat. By knocking out the justification for their role in decision-making, embracing a constitutional justice approach is likely to seek to generate demands for increased judicial participation in case-processing, or supplant one hypocrisy with another, rather than marking the decisive movement towards a more transparent decision-making regime, as Greer has argued.

The only way that embracing constitutional justice could increase the Court's "efficiency" is if it were pursued less than systematically, preserving the gains made by the Court's fifteen years of bureaucratisation. Normatively, this "rejudicialising" of the docket-filtering process may be entirely appropriate and could correct what some would regard as the improper expansion of the bureaucratic involvement in the Court's case-processing in the light of Protocol No. 11. It is unlikely, however, to meet much favour in a Convention reform debate, which as chapter 4 has described, has proved generally uninterested in subjecting reform measures and case outcomes to qualitative analysis, beyond the idea that any mechanism by which the Court rejects more cases more quickly is to be welcomed. Given this impoverished understanding of efficiency, any measure decreasing the speed and scale of admissibility decision-making is unlikely to represent an attractive reform proposal for States bent on shrinking the Court's docket without increasing its budget.

Although constitutional justice theorists generally insist that embracing constitutional justice is the only practical way out of the Court's capacity troubles, this claim does not bear scrutiny. Perversely, perhaps, the *status quo* offers significant practical advantages unavailable, or likely to pose serious conceptual problems for the Court, were discretionary case-filtering to be explicitly embraced. By constructing the norms of admissibility as amendable to bureaucratic implementation, Court reformers have justified the marginalisation of judges in the process, and the correlative expansion of the bureaucratic role. By constructing all inadmissible cases as "unserious" and "unimportant", but rejected against rigorous, uniform and foreseeable criteria, the extent to which the Court's docket-filtering is already selective has largely been elided in the official and in parts of the academic debate on Court reform. This deprives (or at the very least, inhibits) arguments by States that their actions and policies are arbitrarily being singled out by the Court for excessive scrutiny, insulating the Court to some extent from the allegations of politicisation which are likely to fly, were the tribunal to be invested with an explicitly discretionary power to pick-and-choose its cases. In parallel, due to the Court's fast-and-loose approach to the interpretation of the Convention's admissibility criteria, in practice, the filtering grounds impose only relatively modest limits on the Court's ability to declare 'cases inadmissible in order to cut down on its caseload', or for that matter, to save a particular case from the rigour of summary disposal on admissibility grounds.[857]

The *status quo* thus benefits from a measure of protection from politicisation, without imposing significant inhibitions on the Court's use of the filtering stage of proceedings to set its substantive agenda. Constitutional justice would allow the Court to go further than at present, relieving the institution of its "repetitive", well-founded applications. But if, as Wildhaber and Greer suggest, constitutional justice now represents consolidation rather than transformation, they propose to transform the Court into an institution which could be much more readily accused of being driven by political agendas. Given the nature of the current reform discourse, and the image of admissibility decision-making it relies on, moving towards a Court which explicitly sets its own agenda is also likely to alter the terms in which that Court's decisions are critiqued and the way its legitimacy is asserted and challenged.

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[857] B Çalı, A Koch and N Bruch (2011) *The Legitimacy of the European Court of Human Rights: The View from the Ground* (UCL, London), 36.

Projecting a judicial image, however little the Court's practices conform to traditional conceptions of the role of judges and courts, gives the institution access to a powerful, legitimating discourse. In the absence of an influential public critique of those assumptions, this discourse also encourages legal commentators and scholars to incorporate and propound a range of empirically problematic assumptions about the institution and its working practices. To revive Schermer's metaphor of the iceberg, at present the Court is able to rely on judicial appearances above the waterline, with the work of its bureaucracy and much of its admissibility decision-making, sunk inscrutably below. It is able to make effective use of bureaucratic working practices and resources to address its gargantuan caseload, while appealing simultaneously to its judicial authority to justify its disposals. However incredible the idea that these determinations are reached after a fully judicial process may appear, the combination of a fig leaf of judicial decision-making and the brute reality of bureaucratic case-processing does a great deal of work for the institution, both in terms of its decision-making capacity, and in maintaining its symbolic prestige.

By undermining the legitimacy of bureaucratic involvement in case-processing, constitutional justice theorists lay bare the Court's most basic and uncomfortable contradictions. By contrast, by disavowing the extent of bureaucratic involvement, and exaggeratedly disavowing discretion operating at the filtering stage, the *status quo* defers any reckoning with these contradictions. The factory line grinds on, the judges – very occasionally – don their robes, and a fragile institution is held together. These are advantages which, because of their consequentialist logic, are only likely to appeal to those who have departed from an attempt to justify the Court's existence and practices in traditional deontological terms and are willing to embrace the Noble Lie of judicial justice in hopes of ensuring the institution's survival. Although this rendering of the argument may appear extreme, it is not as fanciful or remote as it may appear on its face. Given the difficulty of further amending the Convention in the current environment, given the requirements of unanimity between states in treaty renegotiations and the strength of the individual justice approach in those negotiations, the Court has *de facto* run ahead of those official debates, embracing measures which a sympathetic state party could well struggle to convince States to adopt *de jure* in public Convention renegotiations.

There are shades of Jekyll and Hyde about this twin-track reform process. Reformers celebrate the survival of the fully judicial European human rights system, while judges absent themselves from most of the Court's decision-making processes. Official declarations assert the 'rigorous and uniform' character of the norms of admissibility, while the Court's long-standing jurisprudence emphasises that the admissibility criteria 'must be applied with some degree of flexibility and without excessive formalism,' are 'neither absolute not capable of being applied automatically' and 'for the purposes of reviewing whether it has been observed, it is essential to have regard to the circumstances of the individual case.'[858] Empowering the Court to filter its caseload on an explicitly discretionary basis is rejected as 'alien to the philosophy of the European human rights protection system' and criticised as leading 'to inconsistencies and might even be considered arbitrary,' while the Court's jurisprudence illustrates that its approach to applying the current admissibility criteria is often inconsistent and unpredictable.[859]

Wildhaber is correct to this extent: individual justice theorists have done a great deal to limit the *conceptual* scope of diplomatic debates on Convention reform. They have been less successful at preventing the Court from adopting measures which materially hollow out the significance of those diplomatic victories. There is no evidence of conscious disingenuity on reformers' part, but these artificialities are of considerable utility, relieving the difficult work of diplomatic consensus of the responsibility for making many of the difficult choices about the Court's working practices, without preventing those streamlining decisions from being made, quietly, by the Court itself. Re-evaluated in the light of socio-legal evidence, embracing constitutional justice comes at a price its proponents have – hitherto – failed to recognise. Both individual and constitutional justice represent normatively defensible visions of how the Court should operate. The idea that Court reform inevitably represents a choice between these two visions, however, is a false choice.

[858] *Khashiyev and Akayeva v. Russia* Apps no 57942/00 and 57945/00 (ECtHR, 24th February 2005) (judg.), para 117.
[859] Group of Wise Persons (2006) Report of the Group of Wise Persons to the Committee of Ministers, para 42.

9. The bureaucratic Court? ECHR reform in the light of the socio-legal data

Concern for Strasbourg's admissibility decision-making reflects classical socio-legal pre-occupations. These are the European Court's routine cases. Mostly unpublished, generally omitted or marginalised in doctrinal legal studies, negative admissibility decisions are most applicants' only experience of the European Court of Human Rights. Any picture of how the Court works, and the justice it dispenses, is inadequate without taking these cases into account. By overlooking admissibility decision-making, the *Daily Mail* transformed the Court into a straw warrior, waging war on British justice. By sinking its unedifying, frequently disappointing, administrative work blandly beneath the institutional permafrost, Strasbourg transforms itself into the Conscience of Europe. Both stories, the good and the bad, are incomplete.

A governing preoccupation of the Court reform debate has been the question: how can the Court be reformed to master its caseload, to survive? This thesis suggests another, equally important question: can the institution which has survived really be characterised as a court? In some of its operations, certainly. Some applicants have their disputes resolved in adversarial proceedings, after oral hearings and effective judicial analysis and decision-making on the legal issues. For the overwhelming majority of litigants, however, Strasbourg is an abrupt, adverse and frequently capricious justice factory. In principle, every individual petitioner has access to a judicial decision, subject to the same standards of admissibility. On paper, the Court's interpretation of the admissibility criteria is liberal and accommodating. In practice, most of the time, and increasingly, it is inflexible, bureaucratic and unbending. The same criteria are applied in different ways to different cases. Strasbourg has embraced twin-track justice. Most applications are constructed as fit for bureaucratic disposal. Some few are saved for meaningful judicial analysis. Cases are not subject to a rigorous and uniform filtering process. All of this is concealed, unpublished, beneath the iceberg of the Strasbourg bureaucracy, while judicial images continue to be circulated to legitimate the Court's activities. The ideal of judicial decision-making in every case is increasingly hollow propaganda. There is no evidence of effective judicial control of most of the Court's docket-filtering. Decision-making for the majority of applicants is dominated by very junior bureaucrats, incentivised to dismiss as many applications as possible, in an increasingly formalistic decision-making environment.

Despite the warm words and the benevolent statements of aspiration in the Convention reform debate, these reforms are likely only to make it more difficult for indigent and legally-unadvised applicants effectively to exercise their right of individual petition. The vast majority of cases go unreasoned, unpublished; unrepresentative, reasoned cases are published and indirectly help cultivate misleading impressions of how the Court functions. Quiet, backroom reforms have given the Strasbourg level bureaucrats significant power to define the fate of cases, as the public-facing reform debate rejects such innovations as incompatible with the Court's judicial character. In the Convention reform debate, guided by the principle of unanimity between Council of Europe states, vague statements of principle and policy preferences proliferate.

This thesis helps reboot the flagging admissibility debate. By embracing the nuance of administrative justice, and jettisoning the tired and binary framework of "individual vs constitutional justice," it provides a framework for understanding and reconciling the Court's work, and the discrepancies which separate the text of the Convention, treaty reform debates, the Court's working practices and its jurisprudence. The administrative justice approach adopted in this thesis foregrounds the complexity and inconsistency of the legitimating discourses available and used by the Court to explain its compromised work. It treats the reform debate, not as an arid technocratic exercise, but as the bearer of important and informative administrative justice values. It also better illuminates realities which Convention reformers and scholars of the Court have been too slow to recognise. Its analysis maps onto the choices of the reform debate, and the values reflected in the Court's working practices, far more precisely than the approaches adopted in the literature hitherto. It throws light onto controversies which for too long have been missing and marginalised in the debate on institutional design.

The European Court of Human Rights is not unique amongst public institutions in being simultaneously subject to a range of incompatible and incoherent political demands in the discharge of its responsibilities and the allocation of its limited resources. In the field of administrative justice, the work of Halliday and others has depicted the "soup of normative influences" which shape the practice of legal decision-making in public bureaucracies. This study shows this conceptual approach may usefully be extended to judicial institutions which, intuitively, might be thought distinct from the bureau, or the social security office. Strasbourg is revealed as the jack of all trades and the master of none: now a court, now a constitutional court, here a tribunal, here a bureaucracy. Mashaw's analysis would suggest that the presence of any one of these legitimating discourses would tend to drive the other discourses from the administrative field. This thesis suggests an alternative insight. Artfully deployed, each vision of administrative justice can act like the strand of a rope. Woven together, these disparate threads strengthen the cable by – to some extent – satisfying everybody's demands. Mashaw talks of the normative competition between different models. In Strasbourg, we see the force of normative cooperation between distinct and incompatible administrative justice ideals. While individual and constitutional justice theorists have demanded purity, Strasbourg has arguably benefited from maintaining a hamper of different administrative justice costumes, donning one and shedding another as circumstances dictate. The shapeshifting skills of the court have, arguably, been essential to this fragile tribunal's survival. It is a public relations apparatus, which exploits its silences as effectively as its representations, in order to maintain its embattled legitimacy and authority.

This thesis has shown these normative tensions are particularly pronounced in Strasbourg's bureaucratic court. They are not, however, unique to it. As Moorhead's work demonstrates, cuts to civil legal aid budgets and entitlements place considerable pressure on a judiciary, more used to passive, adversarial adjudication, to embrace enabling, proactive approaches identifiable with the tribunal model of administrative justice sketched here.[860] Along with the rest of the public sector, the judicial managers of the national judiciaries in the United Kingdom are being invited by the government to "do more with less." The slippery

[860] R Moorhead & M Sefton (2005) *Litigants in person: Unrepresented litigants in first instance proceedings* (London, Department of Constitutional Affairs); S L Buhai (2009) 'Access to Justice for Unrepresented Litigants: A Comparative Perspective' *Loyola Law Review* 42, 979; R Moorhead (2007) 'The passive arbiter: Litigants in person and the challenge to neutrality' *Social and Legal Studies* 16(3), 405 - 424.

discourses of streamlining and efficiency only seem likely to become more relevant to national judiciaries in coming years.

The history of the reform of the European Court has been a history of state irresponsibility, of unwillingness or inability to take critical decisions about institutional design and to face up to the logical and logistical consequences of favouring one conception of the justice the Court should dispense over another. The Convention reform debate has not been unprincipled, but it has been unwilling to adjudicate decisively between different and incompatible conceptions of how the Court should filter its docket. The Court has made a virtue of this necessity. It has had little other option. By partaking a little in all of these diverse ambitions to some extent, this incoherent Court has arguably only reflected the incoherence of the policy debate undergirding its work, here resisting, here conforming, and here innovating on the big, vague, compromised exchanges which have predominated in the Council of Europe's reforming conferences. While the "individual vs constitutional" justice debate has failed fully to illuminate these tensions, by teasing out four distinct administrative justice strands in the Convention debate, this thesis has been able to train a starker spotlight on the real choices faced by the Court and its reformers.

Any credible reform plan must engage seriously with the role which bureaucrats have come to occupy in the Court's work and the extensive responsibility they now exercise. Cherishing the illusion of full judicial responsibility will not make Strasbourg's work any more judicial than it has now become. The issue of practical and effective access to the Court also risks becoming submerged in the Council of Europe's woolly Court reform analysis. Proponents of individual justice that admissibility decision-making should be inflexible, rule-bound and deterministic: foreseeable, bare minimum standards which all applications should be obliged to meet.[861] One irony of this debate is that it is proponents of individual justice which represent themselves as being on the side of disaffected and marginalised applicants, characteristically constructing the case for constitutional justice as an 'unprincipled' betrayal of the Convention's founding principles of accessibility in the

[861] K Dzehtsiarou and A Greene (2013) 'Restructuring the European Court of Human Rights: preserving individual petition and promoting constitutionalism' *Public Law* 710 – 719.

name of administrative expediency.[862] This thesis' analysis suggests that this taken-for-granted opposition needs revised.

With the Court increasingly indulging in hyperbureaucratisation, it is critical to re-emphasise the importance of the values expressed by the Strasbourg-as-tribunal model, and the effective access of unprivileged, poor and unadvised applicants to the Court. As this thesis has shown, these values risk being seriously compromised by unpublished Court reforms and the Council of Europe's dominant policy discourse. Socio-legal studies of more informal modes of delivering judicial justice – including the tribunal system, small claims courts, and enabling, inquisitorial modes of procedure – show that flexibility and informalism can benefit ordinary litigants, liable to find themselves disadvantaged by complex and technical court processes. For many of the Court's most vulnerable applicants, only an accommodating interpretation of the admissibility criteria, willing to waive procedural demands if the circumstances appear to warrant it, will allow their cases to be heard, violations to be denounced and just satisfaction to be awarded. The applicants likely to be worst affected by shifts towards more unstinting formality are the vulnerable and the legally unadvised, struggling to put together a coherent Strasbourg case without help, specialist knowledge of the Court's jurisprudence – and now, increasingly struggling to navigate the obstacle course of admissibility in good time. Unstinting formalism is incompatible with this vision. These values are competitive. You cannot consistently pursue one without undermining the other. The failure to face up to this tension, and these choices, has become a defining feature of recent Court reform.

The scholarly debate on individual and constitutional visions of the Court has focussed on the question, what is the Court for? What functions can it serve, given the limits of its resources, the extent of its jurisdiction, and the weight of its caseload? Recent reforms suggest another, equally pertinent question: *who* is the Court for and how can it be reformed, best to facilitate their effective access to justice, mindful of applicants' objective circumstances and the challenges they face in presenting cases to Strasbourg? UK Conservative politicians argue that the Court has lost its way, corrupting the laudable

[862] P Mahoney (2003) 'New Challenges for the European Court of Human Rights Resulting from the Expanding Case Load and Membership' *Penn State International Law Review* 21, 101 – 114, 112 – 3.

vocation established for it by the Convention's framers during the 1940s. Embracing formalism to power Strasbourg's docket-filtering raises similar concerns. The Lord Chancellor, Chris Grayling, critically contrasts the Strasbourg of today with the historical context from which the Convention sprung: Buchenwald, Dachau, Russian gulags, the arbitrary deprivation of life, liberty and property.[863] The Court too seeks to project an image of itself as "the Conscience of Europe," accessible, sympathetic and transparent.[864] A vision of conscientiousness which, for administrative convenience, peremptorily dismisses the complaints of indigent applicants is theoretical and illusory, not practical and effective. The Court cannot be allowed withdraw its jurisdiction, in the name of "efficiency," from the very people most exposed to maltreatment by state authorities. Couched in technocratic language, overlooked as mere administrative tinkering, recent technical reforms to the Court's docket-filtering risk doing precisely that.

John Paul Costa has argued that '*le recevabilité, comme les droits de l'homme, c'est l'affaire de tous.*'[865] He is right. If nothing else, this thesis shines a harsh light on the contradictions and hypocrisies which have characterised the Court's battle with its caseload. It demands a more honest, and more hard-headed, debate about what the Court can and cannot, and does and does not, achieve. It demands a more candid analysis of the Court's achievements and the Court's limitations. It stands rebuke to what Dembour has described as the 'self-congratulatory plethora of commentaries which praise the unique success of the Convention.'[866] Strasbourg is not a conscience. It is not transparent. It is not a "street corner court." It is not a constitutional court – or not exclusively. The applications it rejects as inadmissible are not uniformly unimportant, or motivated by greed, or ignorance. The justice it dispenses to the overwhelming majority of its applicants is thin, unsatisfactory, cold, bureaucratic and unsympathetic. Most of the time, this justice is not even recognisably judicial in procedure and form.

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863 R Mason (2013) 'Grayling says European court of human rights has lost legitimacy' *Guardian* 30th December 2013.

864 European Court of Human Rights (2010) *The Conscience of Europe: 50 Years of the European Court of Human Rights* (Strasbourg, Council of Europe).

865 J P Costa (2011) in P Dourneau-Josette and E L Abdelgawad (eds) (2011) *Quel filtrage des requetes par La Cour européenne des droits de l'homme?* (Council of Europe, Strasbourg), 7.

866 M B Dembour (2006) *Who Believes in Human Rights?* 13, 126.

In this, the Court is a victim of its circumstances, of the extravagant demands made of it, and of the illusions about its work which it has felt it necessary to cultivate and maintain. But ultimately, it is applicants who experience the delays, the denial of justice, the unreasoned, peremptory replies. It is applicants who are gulled. Its supporters contend Strasbourg is 'a glowing bright beacon of hope for millions.'[867] This thesis has shown that most of the time, that hope is a will-o'-the-wisp. It is time for the Court's critical friends to recognise that it is no beacon, but a flickering candle, only a little light, buffeted by storms, which can illuminate only a tiny corner of Europe's evils and ills.

[867] J Hedigan (2011) 'The European Court of Human Rights: Yesterday, Today and Tomorrow' *German Law Journal* 12 1716 – 1729, 1726.

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