Articles

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

*By Andrew Tickell**

A. Introduction

Over the last decade, the admissibility decision-making of the European Court of Human Rights[1] has been the focus of considerable attention in the analysis of the "mounting pressure on the Convention system,"[2] but has enjoyed little critical analysis in legal, sociological or socio-legal literatures.[3] This paper will argue that this combination of intense attention and critical neglect is paradoxical, and has produced fascinating and hitherto largely unnoticed discontinuities and incompatibilities between the rhetorical representation of the Court's admissibility decision-making in ongoing Convention reform debates and the published jurisprudence of the Court on those standards of admissibility.

This paper will offer an account of the dominant discursive construction of the Court's admissibility decision-making and argue that this understanding of admissibility is identifiable with a "bureaucratic rational" model of administrative justice, developed by the socio-legal scholar, Jerry Mashaw. Having outlined the features of Mashaw's model, and justified its applicability to the dominant understanding of the Court's admissibility decision-making, the plausibility of this dominant discursive construction will be interrogated by comparing this construction with a detailed legal analysis of two key grounds of admissibility, asking, *is the dominant image of admissibility decision-making as*

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[1] Hereinafter, "the Court."

[2] *See* for example, EUROPEAN COURT OF HUMAN RIGHTS OVERWHELMED BY APPLICATIONS: PROBLEMS AND SOLUTIONS (Rüdiger Wolfrum & Ulrike Deutsch eds., 2009).

[3] With some notable exceptions, *see* MARIE-BENEDICTE DEMBOUR, WHO BELIEVES IN HUMAN RIGHTS? (2006); STEVEN GREER, THE EUROPEAN CONVENTION ON HUMAN RIGHTS: ACHIEVEMENTS, PROBLEMS AND PROSPECTS (2006).

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formal, technical, rule-governed and bureaucratic supported by the jurisprudence of the Court on these two grounds?

Having analyzed the Court's admissibility jurisprudence on "anonymity" and aspects of the "six-month" time-bar, this paper will argue that a legal analysis cannot support this "bureaucratic rational" image of admissibility decision-making. The Court's jurisprudence on these two admissibility grounds discloses a starkly inconsistent case law that relies to a very significant extent on "nonreplicable, nonreviewable judgment or intuition,"[4] an approach which is totally inimical to the "bureaucratic rational" model of administrative justice. Fascinatingly, despite the indeterminacy and inconsistency of the *legal standards* which emerge from an analysis of its cases, the Court conspicuously continues to employ the *language of rules*, even *as* its jurisprudence does not disclose the *substance* of clear, inflexible legal admissibility standards. In terms of the discursive construction of admissibility decision-making, this suggests that "what may be discretionary from an external, legal point of view, may be anything but discretionary from the internal point of view of officials within the system."[5]

This analysis of the jurisprudence of the Court both challenges the assumptions underpinning this dominant image of admissibility decision-making, and generates a series of significant empirical questions. This paper will not make great claims to present findings about those questions. Rather, its purpose is only to *begin* to demonstrate the extent to which the dominant "problematization" of admissibility decision-making rests on highly questionable assumptions, which can be fruitfully examined by a critical analysis of the discontinuities between the *representation* of admissibility decision-making in key Convention reform debates and a *legal analysis* of the Court's admissibility criteria. The purpose of this paper is not, therefore, exhaustively to examine the extent to which a "bureaucratic rational" account of admissibility decision-making is or is not able to explain the whole admissibility jurisprudence of the Court. Similarly, this paper will not attempt fully to substantiate, with reference to the available data, how admissibility decision-making has been "problematized" in Convention reform discourses. This paper only sketches this terrain, noting its hitherto neglected features. Its full mapping is a labor for another day.

B. The Dominant "Problematization" of the Court's Admissibility Decision-Making

Whether they are states' representatives, Council of Europe officials, judges of the Court, interested scholarly observers or human rights advocates associated with NGOs, it is a commonplace amongst those involved in ongoing Convention reform debates that

[4] JERRY MASHAW, BUREAUCRATIC JUSTICE: MANAGING SOCIAL SECURITY DISABILITY CLAIMS 26 (1983).

[5] DENIS GALLIGAN, DISCRETIONARY POWERS: A LEGAL STUDY OF OFFICIAL DISCRETION 13 (1983).

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admissibility decision-making represents a pre-eminent "problem" for the Court, whose backlog of pending cases now stands at around 140,000. Between 1959 and 2008, 97% of applications made against the United Kingdom were declared inadmissible or struck from the Court's list,[6] with only 3%[7] of cases brought against the United Kingdom being "examined on their merits" in a judgment of the Court. These percentages are not unusual. 16,049 (or 99%) of applications lodged against Germany were dismissed as inadmissible during the same period, as were 96% (17,064) of complaints lodged against France. Even those respondent states which have constituted the majority of the Court's caseload in recent years, Russia and Turkey, follow a similar pattern. By 1 January 2009, 88% of cases against Turkey (14,145 cases) and 98% of applications lodged against Russia (numbering 29,122) had been declared inadmissible or struck out. [8]

An orthodox understanding of this overwhelmingly negative admissibility decision-making sees the Court as the "victim of its own success."[9] A half "asphyxiated"[10] Sisyphean figure, "bombarded by useless"[11] inadmissible applications, "swamped by unmeritorious cases"[12] and subjected to the "tedious drudgery"[13] of their administration, which preys upon the "sanity"[14] of the Court's judges and lawyers and diverts their "time, attention and resources away from more important and deserving cases."[15] Mechanical factory metaphors and unsentimental descriptions of the mass-production of negative admissibility decisions abound.[16] Sympathy is solicited for the judges of the Court and its

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[6] Totaling 12,090 applications in absolute terms.

[7] 404 judgments against the United Kingdom.

[8] European Court of Human Rights, Country Statistics on 1 January 2009, (2009) available at http://www.echr.coe.int/NR/rdonlyres/B21D260B-3559-4FB2-A629-881C66DC3B2F/0/CountryStatistics01012009.pdf (last accessed: 27 September 2011).

[9] European Court of Human Rights, *FAQ: The ECHR in 50 Questions*, Question 45 (2010), available at http://www.echr.coe.int/NR/rdonlyres/5C53ADA4-80F8-42CB-B8BD-CBBB781F42C8/0/FAQ_ENG_A4.pdf (last accessed: 27 September 2011).

[10] The metaphor deployed by President Costa to describe the Court's institutional predicament in his remarks to the Interlaken Conference, 18 and 19 February 2010.

[11] Michael O'Boyle, Question and Answer Session at University College Dublin after His Keynote Address, The Legacy and Future of the European Court of Human Rights (Apr. 1, 2011).

[12] A phrase used by the Court's former Irish judge, John Hedigan in his paper. *See* John Hedigan, Lecture at University College Dublin, The European Court of Human Rights, Yesterday, Today and Tomorrow (Apr. 2, 2011).

[13] *Id.*

[14] *Id*.

[15] LORD WOOLF OF BARNES, REPORT ON THE WORKING PRACTICES OF THE EUROPEAN COURT OF HUMAN RIGHTS 25 (2005).

[16] Former Registrar of the Court, Paul Mahoney has described the Registry as "a kind of factory with production lines to process the mass of committee cases through standardized procedures and standardized solutions,"

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Registry lawyers, oppressed by the hopelessness and boredom of this arid administrative work, while applicants who send inadmissible complaints are generally constructed as ignorant, vexatious and unimportant. Solutions are envisaged in terms of strategies to "stem the tide"[17] of new applications, focusing on encouraging Member States to improve the domestic remedies available in national judicial proceedings and furnishing potential applicants with "comprehensive and objective information on the application procedure and admissibility criteria,"[18] thereby encouraging them not to submit their concerns to Strasbourg at all and quietly to keep their miseries to themselves.

The conspicuously passive figure here is the Court itself. If this dominant account of admissibility is to believed, we need not examine the Court's admissibility decision-making too closely. Determination of the admissibility of applications is conceived as the self-evident administration of clear rules, operating without flexibility and without discretion. Case "filtering" under the Convention's admissibility criteria is envisaged as a solid "iron cage" of weary but dogged administration, its clear rules gating the legally, politically and ethically laden work of *adjudication* which admissible, "meritorious" cases are subjected to. This distinction is neatly captured by the official terminology. The admissibility of an application is determined by a "decision", while the merits of a case are assessed in a "judgment." Admissibility decision-making is not a "judgment" in institutional terms, but in the orthodox understanding, it is also assumed to involve no *judgment* on the part of judges and Registry lawyers.[19] The category of "clearly inadmissible" cases is taken to be stable, self-evident and unproblematic.

While the ever-increasing number of new applications submitted to the Court has prompted a range of reports on and internal reforms to the Court's working practices,[20]

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continuing "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." *See* EUROPEAN COURT OF HUMAN RIGHTS OVERWHELMED BY APPLICATIONS, *supra* note 2, at 48.

[17] Philip Leech, *On Reform of the European Court of Human Rights,* 6 EUROPEAN HUMAN RIGHTS LAW REVIEW (EHRLR) 725, 726 (2009).

[18] European Court of Human Rights, *Practical Guide on Admissibility Criteria* 7 (2010), available at http://www.echr.coe.int/NR/rdonlyres/91AEEEBC-B90F-4913-ABCC-E181A44B75AD/0/Practical_Guide_on_Admissibility_Criteria.pdf (last accessed: 27 September 2011).

[19] Assumptions made by the construction of the 'problem' of admissibility decision-making are reflected in solutions proposed. For example, during Protocol No. 14's formulation, it was suggested that Registry personnel or a new category of "quasi-judicial" figure could make admissibility decisions. The legitimacy of transferring these decisions from judges to officials in the Court's bureau was premised on assumptions that admissibility decision-making is mechanical, affording decision-makers no discretion to admit or exclude cases and hence, fit work for a bureaucrat.

[20] Pre-eminently, see the following three: Council of Europe, *Three Years' Work for the Future* (2002); Woolf, *supra* note 15; Group of Wise Persons, *Report of The Group of Wise Persons to the Committee of Ministers* (2006).

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their overwhelming emphasis has been on improving "efficiency" and seeking to identify ways to increase the institution's capacity to absorb, process and (eventually) decide applications. These reports, with their emphases on "streamlining case management," "rationalization" and technical adjustments to decision-making structures *envisaged as formal*, have left this image of admissibility decision-making as "straightforward"[21] and "bland administrative work"[22] not only uncontested but significantly reinforced.

This dominant understanding of admissibility decision-making has also been sustained by the neglect of the Court's admissibility jurisprudence in recent Convention scholarship. The most recent English-language monograph on the admissibility criteria was published in 1994.[23] This jurisprudential neglect has proved particularly problematic, legal textbooks' too often too cursory and uncritical treatment of the Court's admissibility jurisprudence has contributed significantly to the dominant conception of admissibility decision-making as a plain body of essentially determinate rules and standards. Despite admissibility decisions constituting the overwhelming majority of determinations generated by the institution, it is often regarded as an unimportant and uninteresting subject for students and scholars of the Court's decision-making. As a consequence, while admissibility decision-making is widely recognized as a key "problem" for the Court, a detailed examination of the Court's decision-making practices, a critical analysis of its admissibility jurisprudence – and the compatibility of either of these with the dominant representation of admissibility decision-making in Convention reform debates – has not materialized.

C. Admissibility Criteria and Procedure

Under Article 34 of the Convention, the Court is empowered to receive applications, "…. [F]rom any person, non-governmental organization 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."[24]

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[21] Adam Tomkins, *Civil liberties in the Council of Europe: A critical survey, in* EUROPEAN CIVIL LIBERTIES AND THE EUROPEAN CONVENTION ON HUMAN RIGHTS: A COMPARATIVE STUDY 1, 14 (Conor Gearty ed., 1999).

[22] *Id.*

[23] TOM ZWART, THE ADMISSIBILITY OF HUMAN RIGHTS PETITIONS: THE CASE LAW OF THE EUROPEAN COMMISSION OF HUMAN RIGHTS AND THE HUMAN RIGHTS COMMITTEE (1994), and earlier, LAURIDS MIKAELSEN, EUROPEAN PROTECTION OF HUMAN RIGHTS: THE PRACTICE AND PROCEDURES OF THE EUROPEAN COMMISSION OF HUMAN RIGHTS ON THE ADMISSIBILITY OF APPLICATIONS FROM INDIVIDUALS AND STATES (1980).

[24] The Convention for the Protection of Human Rights and Fundamental Freedoms, art. 34, Sept. 3, 1953, 213 U.N.T.S. 221 [hereinafter "the ECHR"], as amended by Protocol No. 14.

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While the Court may also competently adjudicate on inter-state complaints,[25] individual petitions constitute almost all of the institution's caseload. The conditions of their admissibility are set out in Article 35 of the Convention, which provides that, "the Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognized rules of international law, and within a period of six months from the date on which the final decision was taken."[26]

The Convention also provides that the Court shall not deal with "anonymous"[27] applications, or petitions that are "substantially the same as a matter that has already been examined by the Court or has already been submitted to another procedure of international investigation or settlement,"[28] if it considers that an application "is incompatible with the provisions of the Convention or the Protocols,"[29] is "manifestly ill-founded"[30] or an "abuse of the right of individual application."[31] These admissibility grounds were supplemented by a new criterion in Protocol No. 14, which empowered the Court to declare inadmissible individual applications if it considers that:

> [T]he 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.[32]

Under Protocol No. 14, which came into force on the 1 June 2010,[33] the Court can competently declare applications inadmissible in "single-judge formations"[34] "where such

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[25] *Id.*, art. 33.

[26] *Id.*, art. 35(1).

[27] *Id.*, art. 35(2)(a).

[28] *Id.*, art. 35(2)(b).

[29] *Id.*, art. 35(3)(a).

[30] *Id.*

[31] *Id.*

[32] *Id.*, art. 35(3)(b).

[33] With Protocol No. 14's long-delayed ratification by the Russian Federation.

[34] Discursively speaking, this is a decidedly strange phrase, originating in Protocol No. 14 to the Convention. A single judge, you might think, is a single judge. A "formation" implies the absent presence of their colleagues,

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a decision can be taken without further examination,"[35] by unanimous Committees of three judges,[36] or by Chambers[37] of seven judges, who may in turn relinquish jurisdiction to the Grand Chamber[38] of 17 judges. Admissibility decisions are unreviewable once made[39] and the Court may reject petitions as inadmissible at any stage of the proceedings.[40]

It is immediately worth emphasizing that a *range* of "formations" of the Court make admissibility decisions, although the vast majority are declared inadmissible by single judges without being communicated to governments, and without any adversarial, albeit written, proceedings. No admissibility decisions made by three-judge Committees or single judges are published in the Court's case law database.[41] Albeit rarely, the determination of the admissibility of a complaint can be practically indistinguishable from adversarial proceedings "on the merits," only resolved after lengthy proceedings, one of the Court's exceedingly rare oral hearings,[42] and hundreds of sections of legal argument and analysis. This fact alone is suggestive of why some of the basic assumptions made by the orthodox understanding of the Court's admissibility decision-making should be questioned. If the Court's admissibility standards are "clear cut" and rule bound, why would an admissibility case *not* be clear and call for such an elaborated analysis? If the admissibility standards *sometimes* call for such extended examination, and are therefore not capable of being

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implying, however implausibly, some sort of collegiate judicial atmosphere, invisibly hovering around the single judge, doggedly disposing of inadmissible applications.

[35] *See* the ECHR, *supra* note 24, art. 27(1).

[36] *Id.*, art. 28(1)(a).

[37] *Id.*, art. 29(1).

[38] *Id.*, art. 30.

[39] With respect to the "single judge formation," *see* the ECHR, *supra* note 24, art. 27(2); with respect to Committees, *see* the ECHR, *supra* note 24, art. 28(2).

[40] *See* the ECHR, *supra* note 24, art. 35(4).

[41] "[T]here is no separate paper decision for each application, merely a minute of a packet of decisions taken by a Committee at one meeting and an individual letter of notification to each applicant;" *See* the Steering Committee for Human Rights (CDDH), *Impact Assessment of Some of the Reform Proposals under Consideration*, CDDH-GDR 17 (2003). Lester has argued: "Even though 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. The applicant is informed of the decision by a peremptory letter 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." *See* Anthony Lester, *The European Court of Human Rights after 50 years*, EHRLR 462, 470 (2009).

[42] Typically fewer than 30 oral hearings are heard in the examination of any case, in any year. In 2010, the Court held only 26 hearings in total. European Court of Human Rights, *Annual Report of the European Court of Human Rights*, 53 – 5 (2011).

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simply "applied" in a "*uniform* and *rigorous*"[43] manner across all cases, what makes the "clearly inadmissible" cases that have dominated debates on admissibility decision-making so "clear"? The orthodox account insists that admissibility decision-making is simple, bureaucratic decision-production, without any exercise of discretion or judgment in "filtering" cases. How can that account for judicial reflections on admissibility that seem so fraught, extended and deliberative?

D. Socio-Legal Perspectives on Administrative Justice

The "administrative justice" models, introduced by American scholar Jerry Mashaw in *Bureaucratic Justice*[44], have been influential in the field of socio-legal research on "administrative justice." These models furnish a useful conceptual framework to import into our understandings of how the Court's admissibility decision-making has been discursively constructed in Convention reform debates. This branch of socio-legal scholarship has been acutely interested in illuminating legal decision-making by employing sociological methods to develop rich, socially situated understandings of how legal regimes actually operate in concrete decision-generating environments. In the UK, research in this area has focused primarily on the legal decision-making of public administrative agencies and how decision-makers and whole institutions structure their discretion. A key research interest has been the extent to which official legal standards are observed in these sites and the degree to which decision-makers "transgress" legal authority, structuring their decision-making in ways that ignore, are ignorant of, or are even consciously incompatible with the legal standards which theoretically constrain and delimit the legitimate compass of their decision-making.[45]

Increasingly, these researchers have been interested in blurring the distinctions between organizations traditionally conceived as "administrative" in character, and those which are

[43] *See* the Interlaken Declaration of 19 February 2010, at para. 4, available at: http://www.eda.admin.ch/etc/medialib/downloads/edazen/topics/europa/euroc.Par.0133.File.tmp/final_en.pdf (last accessed: 27 September 2011).

[44] MASHAW, *supra* note 4.

[45] *See generally* Keith Hawkins, *Using legal discretion: Perspectives from Law and Social Science, in* THE USES OF DISCRETION 11 (Keith Hawkins ed., 1992); GALLIGAN, *supra* note 5; JUDICIAL REVIEW AND BUREAUCRATIC IMPACT (Marc Hertogh & Simon Halliday eds., 2004). Particular studies include: SIMON HALLIDAY, JUDICIAL REVIEW AND COMPLIANCE WITH ADMINISTRATIVE LAW (2004); DAVID COWAN, HOMELESSNESS: THE (IN)APPROPRIATE APPLICANT (1997); DAVID COWAN & SIMON HALLIDAY, THE APPEAL OF INTERNAL REVIEW: LAW, ADMINISTRATIVE JUSTICE AND THE (NON-) EMERGENCE OF DISPUTES (2003); Genevra Richardson & David Machin, *Judicial review and Tribunal Decision-Making: A Study of the Mental Health Review Tribunal*, *in* PUBLIC LAW (PL) 736 (2000); Maurice Sunkin and Andrew Le Sueur, *The Changing Impact of Judicial Review: The Independent Review Service of the Social Fund*, *in* PL 736 (2001).

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"adjudicative."[46] Their research findings have tended to highlight the limits of law as an explanatory framework, rebutting legalistic assumptions that the social practice of legal decision-making is immediately "predictable from scrutiny of legal rules themselves."[47] While there are exceptions, and secondary policy prescriptions from empirical research findings are common, this socio-legal scholarship is not primarily normative, but attempts inductively to generate a "rich description" of a given decision-making environment and explore how values, apart from the law, interact with and even subvert legal prescriptions.

I. Mashaw's "Administrative Justice" Models

In this scholarly tradition, Mashaw's "administrative justice models" were an attempt to map competing "justificatory" claims about how social security benefits for disabled Americans should be administered. These included the models of "bureaucratic rationality," "professional treatment" and "moral judgment." Critically, Mashaw was not attempting to advocate, elaborate or defend a *particular* normative account of the "just" administration of disabled Americans' social security entitlements. Rather, he sought to employ these models *analytically*, to understand competing justificatory claims about how the administration of American disability claims *should be shaped*, recognizing that to adopt different models of administrative justice is to "shape" your administrative practice in very different ways. In terms of the conceptual approach adopted in this paper, it can be said that Mashaw distinguishes different potential "problematizations" of American social security administration, and maps the discursive "effects" of adopting one model instead of another, in terms of the practical "solutions" different models generate. For our purposes, only his first and third typologies need detain us: the "bureaucratic rationality" and "moral judgment" models.[48] In Mashaw's terms, a "bureaucratic rational" conception of administrative justice, "…. is *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 *preestablished goals* in some particular domain while conserving social resources for the pursuit of other valuable ends." [49]

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[46] *See in particular*, Genevra Richardson & David Machin, *Judicial review and Tribunal Decision-Making: A Study of the Mental Health Review Tribunal*, *in* PL 736 (2000).

[47] *See* Hawkins, *supra* note 45, at 11 and GALLIGAN, *supra* note 5, at 13.

[48] Mashaw's third administrative justice model, "professional treatment," is strongly situated in the empirical field of his study: the administration of disability social security rights, and associated therapeutic medical knowledge-claims. It is thus not immediately applicable to understandings of the Court's admissibility decision-making.

[49] MASHAW, *supra* note 4, at 26 (emphasis added).

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For Mashaw, an administrative body governed by norms of bureaucratic rationality, "defines the questions presented to it by implementing decisions in essentially factual or technocratic terms"[50] and its "general decisional technique is information retrieval and processing."[51] Importantly, for the model of "bureaucratic rationality," flexibility in applying standards to individual cases is a clear example of administrative *injustice*. Mashaw notes, "reliance on nonreplicable, nonreviewable *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."[52]

By contrast, Mashaw distinguishes administrative justice conceived as "moral judgment." Potentially a confusing phrase, this model, "derives from traditional notions of court-centered *adjudication*. The function of such adjudication is not just to resolve disputes about facts, but is also to decide between the competing interests of litigants." [53]

As Halliday notes, "Issues such as reasonableness, deservingness and responsibility are not questions of fact, but rather are matters of judgment,"[54] and are thus characteristic of the "moral judgment" model. By contrast, for "bureaucratic rationality," *judgment* should be anterior to the work of the bureau, which simply carries out those pre-established social goals. For Mashaw, administration on a "moral judgment" model will conceive of decision-making as *value defining*, rather than the *application* of previously settled *values* to particular instances. This has procedural implications. For Mashaw, "the important point is that the "justice" of [the moral judgment] model inheres in its promise of a full and equal opportunity to obtain one's entitlements."[55] Concretely, this entails that litigants must be afforded procedural protections in the dispute so that they can have an equal opportunity to present their case, rebut allegations against them, and argue for their interests to be privileged.[56]

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[50] *Id.* at 25.

[51] *Id.* at 26.

[52] *Id.* at 26.

[53] HALLIDAY, *supra* note 45, at 118 (emphasis added).

[54] *Id*. at 118.

[55] MASHAW, *supra* note 4, at 31.

[56] HALLIDAY, *supra* note 45, at 118.

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II. "Bureaucratic Rationality" and the Discursive Construction of the Court's Admissibility Decision-Making

When these two models are compared to the dominant discursive construction of the Court's admissibility decision-making, it is clear that a strongly "bureaucratic rational" account has predominated, sharing with that administrative justice model a sense that *value judgments* are anterior to the *application* of the Convention admissibility jurisprudence, which is simply the mechanical imposition of pre-established rules to instant cases. Given the Court's "caseload crisis", and this "problematization" of admissibility decision-making, the leading public policy question for Convention reformers becomes simply one of identifying the most "efficient" and "effective" mechanisms for speedily, accurately and economically "filtering out" inadmissible cases.

The Council of Europe's Steering Committee (*Comite Directeur Pour Les Droits de l'Homme, hereinafter CDDH*) coordinated an extensive discussion on how the Court's caseload was best "filtered," mooting alternative proposals and ultimately resulting in Protocol No. 11 in 1994 and later, Protocol No. 14 to the Convention in 2004. An in-depth and critical analysis of these Convention reform discourses and their discursive "problematizations" of admissibility decision-making falls outwith the ambit of this paper. However, two dominant discourses can be distinguished from a preliminary examination of these debates.

Firstly, the Court's admissibility "case-filtering" was primarily constructed as a mechanism to "focus on serious, important cases" and "weed out" those applications which are "unmeritorious." While the language of "seriousness" and "importance" dominated the Convention reform debate, few attempts were made to give these concepts more definite shape, nor to concede that determining the "seriousness" of applications might be the subject of disagreement and contestation. Critically, no explanations were offered about how assessments of "seriousness" relate in practice to the Court's admissibility decision-making or its jurisprudence on the Convention's different grounds of admissibility.

The second discourse strongly to emerge from the CDDH reform processes, again without specific reference to the Court's admissibility jurisprudence, constructed admissibility decision-making in a profoundly "bureaucratic rational" manner, conceiving it as involving a formal application of clear rules to delimited facts. Lord Woolf's *Report on the Working Practices of the European Court of Human Rights* furnishes a stark example of this bureaucratically rational construction of the Court's "case load crisis," precipitated by its admissibility decision-making:

> [….] a major problem facing the Court is that of how to process (or filter out) inadmissible cases. *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

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> system, and divert time, attention and resources away from *more important and deserving cases*.[57]

Woolf conceives of the Court's admissibility decision-making as more or less formal and uninteresting administrative "gating" of "adjudication on the merits." The preponderance of "clearly inadmissible cases" is taken to imply a decision-making mode that is technical, rule-bound and administrative in character; certainly not one that is adjudicative or suggests the exercise of legal discretion. The Interlaken Declaration, delivered after a High Level ministerial meeting on the future of the Court and Convention, strongly reinforced this vision of admissibility jurisprudence, emphasizing familiar bureaucratic values of technical accuracy, calling for "a *uniform* and *rigorous application* of the criteria concerning admissibility."[58] Speakers in Convention reform debates generally have not attempted to explain how they envisage this "bureaucratic rational" construction connects with the idea that the admissibility standards allow the Court to focus on "serious and deserving cases." However, as the foregoing quote from Lord Woolf suggests, most appear to regard the two discourses and accounts of admissibility decision-making as perfectly (and unproblematically) compatible.

E. Does the Jurisprudence Bear Out This Bureaucratic Rational Construction?

Taking these discursive constructions of admissibility decision-making and administrative justice typologies as its starting point, the final section of this paper will critically engage with selections from the Court's admissibility jurisprudence and ask what explanatory power, if any, the dominant, bureaucratically rational construction of admissibility decision-making has to explain the Court's admissibility jurisprudence. The Court's case law on two specific grounds of admissibility shall be analyzed in detail: (a) the Court's jurisprudence on "reconsidering the date of introduction" of an application under the "six month" rule and (b) its case law on the admissibility of "anonymous" applications.

This dominant construction of admissibility decision-making relies on the conception of admissibility decisions as rational bureaucratic disposals of "clearly inadmissible cases,"[59] meticulously and unvaryingly. If this construction is to be a plausible *legal* account of decision-making, we would expect to be able to identify a straightforward, rule-governed admissibility jurisprudence, fit for such bureaucratic rational "implementation." We would certainly not expect to find an admissibility jurisprudence that relied to a significant extent

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[57] WOOLF, *supra* note 15, at 25 (emphasis added).

[58] See the Interlaken Declaration, *supra* note 43, at para 4.

[59] WOOLF, *supra* note 15, at 25 (emphasis added).

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on "nonreplicable, nonreviewable judgment or intuition."[60] As Mashaw has identified, and as the Interlaken Declaration's language of *rigor* and *uniformity* confirms, from the perspective of a bureaucratic rational account of administrative justice, a flexible admissibility jurisprudence would represent an unjust and "singularly unattractive methodology for decision."[61] Further, if this bureaucratic rational model offered an accurate account of admissibility decision-making, we can *also* expect to discover legal evidence of admissibility standards unaffected by the substantial "merits" of the application. Whether a complaint alleges a very minor infringement of property rights or a gruesome violation of an individual's right to life, if admissibility decision-making is bureaucratic rational in character, we would expect to find formal standards of anonymity and clear-cut time-limits for lodging an application. Under a bureaucratic rational administration, these strict "technical" rules would affect both cases equally.

I. *Why "Anonymity" and "Reconsidering the Date of Introduction"?*

Why examine these two particular admissibility grounds? Firstly, they are superficially the most "formal"[62] grounds of admissibility under the Convention. If the Convention's admissibility grounds are conceived as a spectrum of standards more and less bureaucratic in form, both anonymity and the six-month time limit sit on the extreme bureaucratic end of the spectrum. Generally being conceived as "technical" in character, and treated cursorily in existing legal studies, "anonymity" and the six-month rule buttress the image of admissibility decision-making as being a purely administrative, "technical" matter, involving no prior estimation of the merits of a case.

At the other end of that spectrum, there are other admissibility grounds which on their face seem much more immediately challenging for the dominant, bureaucratic rational image of admissibility decision-making. For example, Keller, Fischer and Kuhne, have described the "manifestly ill-founded" ground as resembling an "empty black box" of such "conceptual indeterminacy" that leaves the Court "a wide measure of discretion in giving substance to it."[63] Similarly, the Court's own *Practical Guide* to its admissibility criteria offers just as little succor to a formal rational vision, suggesting that the concept of "manifestly ill-founded" can "be broken down almost *ad infinitum*."[64] Similarly, the new admissibility criteria introduced by Protocol No. 14, which permits the Court to declare

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[60] MASHAW, *supra* note 4, at 26.

[61] *Id.*

[62] GREER, *supra* note 3, at 144-5.

[63] Helen Keller, Andreas Fischer & Daniela Kuhne, *Debating the future of the European Court of Human Rights after the Interlaken Conference: Two Innovative Proposals*, 21 EUROPEAN JOURNAL OF INTERNATIONAL LAW 1025, 1046 (2011).

[64] Practical Guide on Admissibility Criteria, *supra* note 18, at 7.

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inadmissible applications where the "applicant has not suffered a significant disadvantage", was described as a "rather vague, even potentially arbitrary condition" by non-governmental organizations (NGOs) when it was introduced[65] and criticized as "vague, subjective and liable to do the applicant a serious injustice"[66] by the Parliamentary Assembly of the Council of Europe. The Court's small number of published decisions under the new criterion[67] are not cast in the shape of generally applicable rules, emphasizing that determining the presence of a "significant disadvantage" is "relative and depends on all the circumstances of the case."[68] The vagueness of the concept of "manifestly ill-founded," and this adjudicative, casuistic language on "significant disadvantage," are clearly intensely challenging for the dominant bureaucratically rational representation of admissibility.[69]

Dembour has been critical of the orthodox understanding of the Court's admissibility decision-making, which she suggests "denies that inadmissible decisions have legal and political value."[70] She suggests that while "this may be true 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."[71] However, as the subsequent section hopes to demonstrate, when the jurisprudence is analyzed in detail, the bare "technical" admissibility standards of Article 35 *also* pose a number of questions of interpretation and afford much more potential for discretion in their application than has generally been acknowledged.[72] By focusing on the two apparently "formal" grounds

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[65] Updated Joint Response to Proposals to Ensure the Future Effectiveness of the European Court of Human Rights, 28 March 2003, Signed by 114 NGOs. Available at: http://www.amnesty.org/en/library/asset/IOR61/008/2003/en/26340e19-d656-11dd-ab95-a13b602c0642/ior610082003en.pdf (last accessed: 27 September 2011).

[66] Parliamentary Assembly of the Council of Europe, 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, at para. 11 (2004).

[67] *See* for example, Ionescu v. Romania, Eur. Ct. H. R., 51 E.H.R.R. SE7 (2010); Korolev v. Russia, Eur. Ct. H. R., 51 E.H.R.R. SE15 (2010); Zátkové v. Czech Republic, Eur. Ct. H. R. (2011); Holub v. Czech Republic, Eur. Ct. H.R. (2010); Dudek v. Germany, Eur. Ct. H. R. (2010); Fedotov v. Moldova, Eur. Ct. H. R.(2011); Burov v. Moldova, Eur. Ct. H. R. (2011); Gaftoniuc v. Romania, Eur. Ct. H. R. (2011).

[68] *Korolev*, *supra* note 67.

[69] Xavier-Baptiste Ruedin, *De minimis non curat the European Court of Human Rights: the introduction of a new admissibility criterion (Article 12 of Protocol No. 14)*, EHRLR 80, 105 (2008).

[70] Marie-Benedicte Dembour, *"Finishing off" cases: the radical solution to the problem of the expanding ECtHR caseload*, EHRLR 604, 613 (2002).

[71] *Id.*

[72] While Simor and Emmerson note that the Court has some discretion about the six-month rule, they simply note that this is rather exercised in the applicant's favor, and do not examine the jurisprudence of the Court in detail. *See* HUMAN RIGHTS PRACTICE (Ben Emmerson & Jessica Simor eds., 2000).

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of "anonymity" and "the six-month" time bar, this paper will demonstrate that the inadequacies of this dominant problematization of admissibility are not limited to the apparently less bureaucratic, outwardly more adjudicative admissibility grounds. If the bureaucratic rational image of admissibility decision-making *cannot* account for the jurisprudence of the Court on these two "formal" grounds of admissibility, the prevailing representation of admissibility in Convention reform debates become an even *less* satisfactory account of admissibility decision-making, when applied *across* the spectrum from the most to the least "bureaucratic" criteria. In supplement to Dembour, this suggests that the denial of the political and legal value of inadmissible cases is potentially problematic *across* the more and less technical-seeming admissibility standards, and not simply with respect to those that are *prima facie* more discretionary.

II. A Methodological Caveat: the Court's "Iceberg" Jurisprudence

One important methodological caveat is that it is exceedingly difficult to reconstruct a properly representative account of the totality of the Court's admissibility jurisprudence, as the vast majority of its admissibility determinations go unpublished and are inaccessible. One commentator has described the workload of the Court as "an iceberg, only a little tip is visible to the outside world; the great mass remains hidden under water."[73] In 2009, 33,067 applications were declared inadmissible or struck from the Court's list.[74] In the same year, 983 "decisions" were published online in the Court's HUDOC case-law database.[75] These were almost all Chamber decisions, while the vast majority of admissibility decisions are made by Committees, and increasingly, by single judges. After an internal report on its working practices in 2002,[76] the Court decided to minimize correspondence with applicants in "unmeritorious" and inadmissible cases. Owing to this policy of minimizing the admissibility reason-giving of Committees, and the extension of this practice to admissibility decisions made by single judges, over 90% of the Court's admissibility decisions in any year are only composed in minute form, and as a result, go unpublished.

Moreover, under the Court's case-file retention policies, where an application has been deemed inadmissible, "the file will be destroyed one year after the date of the decision."[77]

[73] Henry Schermers, *The Eleventh Protocol to the ECHR*, 19 EUROPEAN LAW REVIEW 367, 370 (1994).

[74] Council of Europe, *Annual Report 2010 of the European Court of Human Rights* 11, 136 (2011).

[75] Based on a HUDOC database search for 'decisions' delivered between 01.01.09 and 31.12.09, available at: http://www.echr.coe.int/echr/en/header/case-law/hudoc/hudoc+database/ (last accessed: 27 September 2011).

[76] THREE YEARS' WORK FOR THE FUTURE, *supra* note 20.

[77] Decision letter in Sukharev v. Georgia, Eur. Ct. H. R. (2010). Unpublished, on file with the author.

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As a consequence, documentary reconstruction of the Court's past jurisprudence in the field of admissibility, outside of a rolling 12-month destruction schedule, is also impossible. The analysis which follows is therefore the best possible understanding afforded by the published jurisprudence of the Court, given these limitations.

III. The "Six Month Rule": Introduction and 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."[78] The Court has explained the six-month rule in the following often-repeated formulation, contending that it reflects:

> [T]he 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.[79]

Implicit in this characterization of the application of the six-month rule is that it affords legal stability and a *definite* period of time in which actions must be brought against States. By contrast, in *Sapeyan v. Armenia* the Court explicitly recognized the potential for a flexible and discretionary application of the rule, stating that it considers that "the six month rule is autonomous and must be construed and applied according to the facts of each individual case, to ensure the effective exercise of the right to individual application"[80] and applied "with some flexibility."[81] This avowed flexibility clearly sits highly uncomfortably beside the bureaucratic rational model of admissibility decision-making, not least because in its interventions in ongoing Convention reform debates, the Court *itself* has strongly encouraged this representation of its admissibility work. In contrast with this

[78] *See* the ECHR, *supra* note 24, art. 35(1)(1).

[79] Otto v. Germany, Eur. Ct. H. R. (2009).

[80] Sapeyan v. Armenia, 41 Eur. Ct. H. R., at para. 26 (2009).

[81] *Id.* at para. 27.

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flexible construction, the Court has also held that the six-month rule "is a mandatory one which the Court has jurisdiction to apply of its own motion."[82]

The six-month rule has a number of specialties, 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. A full exegesis of the whole jurisprudence is beyond the scope of the present paper. Instead, it shall 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.

IV. Case Law: "Reconsidering" the Date of Introduction

The Court has explained the rationale for "reconsidering the date of introduction" thus: "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." [83]

In these circumstances, it has been the "established practice of the Convention organs,"[84] 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 nevertheless decide that a different date shall be considered to be the date of introduction.[85]

[82] Assanidze v. Georgia, Eur. Ct. H. R. ,39 E.H.R.R. 32 (2004); Kadiķis v. Latvia (No 2.), Eur. Ct. H. R. (2003).

[83] Garnham v. the United Kingdom*,* Eur. Comm'n H. R. (1991).

[84] P.M. v the United Kingdom*,* Eur. Ct. H. R., 39 E.H.R.R. SE21 (2004).

[85] *See* the European Court of Human Rights, *Rules of Court*, Rule 47(5) (2009).

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Under the Rules, applicants are afforded period of eight weeks to return the completed form.[86] While Rule 47(5) emphasizes 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.[87]

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,[88] two years[89] and one year.[90] However, the Court's published jurisprudence on this ground shows that the Court is willing to apply the rule flexibly in certain cases, while in others disposing of cases with the inflexibility and formalism which the Registry implies. In *P.M. v. the United Kingdom,*[91] a fourteen-week gap separated the applicant's initial introductory letter of complaint and completion of the Court's official application form. While the introductory correspondence was lodged *within* six months of the final decision of the domestic tribunal, the completed application form was not. In their preliminary objections, the Government sought to persuade the Court that it should "consider" the date of receipt of the application form to be the "date of introduction" of the application. To do so would rule the complaint "out of time." The Court reiterated the general rule, reflected in its Rules,[92] emphasizing the casuistry of assessing how the six-month rule is applied:

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[86] European Court of Human Rights*, Rules of Court: Practice Direction, Institution of Proceedings* at para. 4(2009). The European Commission on Human Rights afforded a shorter period of six weeks. Nee v. Ireland*,* Eur. Ct. H. R. (2004).

[87] Registry letter to the representative of the applicant, quoted in Kemevuako v. the Netherlands*,* Eur. Ct. H. R., 51 E.H.R.R. SE8 (2010). (Emphasis added).

[88] *Garnham*, *supra* note 83.

[89] De Bono v. Malta*,* Eur. Comm'n H. R. (1992). Unpublished.

[90] G.H. v. the United Kingdom, Eur. Comm'n H. R. (1992). Unpublished.

[91] *P.M.*, *supra* note 84.

[92] *Id.*, citing Kirk v. the United Kingdom*,* Eur. Comm'n H. R. (1986).

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> [….] 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.[93]

In *P.M. v. the United Kingdom,* the Court rejected the Government's invitation to alter the date of introduction with respect to the six-month rule, noting that the applicants had:

> [K]ept the Registry apprised 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.[94]

As a result, the introductory letter continued to be taken to be the day of introduction and could not be rejected for failure to comply with the six month rule.[95]

By contrast, in *Nee v. Ireland,*[96] a thirteen-month delay separated receipt of the applicant's initial letter from the final lodging of an application form. The applicant'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 involving the applicant that furnished the basis of his application to the Court. 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,"[97] despite a warning letter from the Court which emphasized the

[93] *P.M., supra* note 84 (emphasis added).

[94] *Id.*

[95] As a consequence of which, the case resulted in a judgment on the merits in favor of the applicant and finding a violation of Article 14 of the Convention in P.M. v. the United Kingdom*,* Judgment of 19 July 2005, 42 E.H.R.R. 45 (2006).

[96] *Nee*, *supra* note 86.

[97] *Id.*

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potential consequences of delayed submission of an application form. The Court pronounced itself unconvinced by these explanations for the delay and "re-considered" 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* is in stark contrast with its assessment of the admissibility in *Chalkley v. the United Kingdom*.[98] A case concerned with police use of listening devices which the applicant alleged violated Articles 6, 8 and 13 Convention,[99] the applicant's representatives, Liberty, submitted a brief description of the complaint on 8 December 1998. Further submissions did not follow until 29 November 2000, almost two years after the first letter of introduction. A completed application form did not reach the Court until 27 April 2001. Unlike Nee's representatives, who were informed of implications of delay only once, Liberty received such warnings "on a number of occasions."[100] 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 judgment of the Court on a similar case."[101] Despite the warnings, the lapse of almost two years separating the first correspondence and submission of a completed form, the Court held that the date of introduction of the 8 December 1998 should not be "reconsidered," and consequently, the application was not held to be inadmissibly 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."[102]

In stark contrast with this generosity, in the recent case of *Kemevuako v. the Netherlands,*[103] the Court stringently and formalistically enforced the eight-week rule set out in the Rules. The applicant's final appeal against the refusal to grant him a Dutch residential permit was rejected on 15 June 2009. His representative sent a fax to the Court on 14 December 2009, initiating proceedings in the final days of the six-month period. By letter of 7 January 2010, the Registry informed his lawyer that a completed application

[98] Chalkley v. the United Kingdom*,* Eur. Ct. H. R. (2002) [hereinafter "Chalkley (I)].

[99] And subsequently found to violate Article 8 and 13 in Chalkley v. the United Kingdom*,* 37 E.H.R.R. 30 (2003) [hereinafter "Chalkley (II)"].

[100] *Chalkley I*, *supra* note 98.

[101] *Chalkley I*, *supra* note 98.

[102] *Id.*

[103] *Kemevuako*, *supra* note 87.

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form should be returned not later than 4 March 2010. On 4 March 2010 the applicant's representative faxed the Registry a covering letter, a completed form and an authority form signed by applicant and lawyer. All documents were dated for 4 March 2010. Paper copies of these documents, dated 4 but postmarked for the 10, was received by post on 12 March 2010. The Court held that the faxed documentation was "irrelevant as long as the original form was not dispatched within the eight-week period,"[104] 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." [105]

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 10 March 2010.[106] 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.

V. Analysis: "Reconsidering the Date of Introduction"

The foregoing cases clearly demonstrate, contrary to the general "technical" impression many have about the six month admissibility rule, that the Court can and will apply the rule in a number of creative ways, bearing out Hawkins' observation that discretion is "heavily implicated in making sense of rules and in making choices about the relevance and use of rules,"[107] even those rules which seem superficially clear on their own terms. 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" discretion was exercised in others.

Given the immense pressures of the Court's caseload, it seems highly probable that in practice, the Court makes extensive practical 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* and inadmissible, despite the applicant's initial correspondence having been submitted *in time*. However, as *Chalkley* makes clear, such an approach can be resisted in a given case. If the

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[104] *Id.* at para 23.

[105] *Id*. at para 22.

[106] *Id*. at para 24, citing Arslan v. Turkey, 2002-X Eur. Ct. H. R. (2002).

[107] Hawkins, *supra* note 45, at 13.

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Court decides to be benevolent, despite a long 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 summary finding of inadmissibility.

Critically, and fatally 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 time limits. In *Chalkley*, the delay in submitting a completed 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. 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 respect, *except* the one which the admissibility criteria is theoretically being applied to, yet generate two diametrically opposed outcomes, one application being summarily rejected as "clearly inadmissible," another leading to examination on the merits, judgment, a finding of violation – and an award of damages. The jurisprudential instability of the category of the "clearly inadmissible" case under this head of admissibility is striking.

Quite apart from 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, nonreviewable judgment or intuition"[108] which for Mashaw, is totally incompatible with a bureaucratic rational conception of administrative justice. Paradoxically, despite its case-by-case inconsistency, and failure of the bureaucratic rational model to account for its admissibility decisions, the Court's jurisprudence does *not* relinquish the rule-governed language of bureaucratic rationality. For example, in *Nee*, declaring the application inadmissible, the Court strongly emphasized that the applicant's representatives had received a single article of correspondence, warning them about the risks of delay in submitting their full legal materials. 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 rational 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

[108] MASHAW, *supra* note 4, at 26.

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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*).

VI. Anonymity: the Convention and General Jurisprudence

A similar, paradoxical combination of the invocation of mandatory rules *and* the flexible and *ad hoc* suspension of their demands can be identified in the second, ostensibly "technical" admissibility ground to be examined in this paper, "anonymity." Article 35 § (2)(a) of the Convention provides that "the Court shall not deal with any application submitted under Article 34 that …. (a) is anonymous."[109]

There is comparatively little case law on this ground of inadmissibility. For example, in *X v. Ireland,* the applicant styled him/herself the "lover of tranquility." The supporting documentation contained "no single clue as to the identity of the applicant,"[110] and no further information being forthcoming, the Commission rejected the application as inadmissible. More generally, anonymity is treated as rectifiable within the 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.[111] The practical exclusionary effect of this provision is moderated by the Rules of Court.[112] which attempt to answer concerns applicants may have about their identities being exposed by proceedings.[113] As a result, those who have concerns about their identities being disclosed have little excuse not to inform the Court of their "real" identities.

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[109] *See* the ECHR, supra note 24, art. 35 § (2)(a)

[110] X v. Ireland, Eur. Comm'n H. R, App. no. 361/58, (1958) quoted in PIETER VAN DIJK & FREID VAN HOOF, THEORY AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 109 (1998).

[111] Kuznetsova v. Russia, Eur. Ct. H. R. (2006).

[112] Last amended in July 2009.

[113] Rule 47 § 3 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 authorize anonymity or grant it of his or her own motion."

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VII. The Court's Inconsistent Jurisprudence on Anonymity and Pseudonymity

However, the authorities are strikingly inconsistent 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 and Twelve Others v. Georgia and Russia,*[114] the Court dealt with the admissibility of a case arising in the context of armed conflict in the Chechen Republic. 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 those surnames 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, the applicants argued that their continuing 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"[115] and that there existed a "sufficiently close link between the applicants and the events in question,"[116] the Court decided that the applications were not "anonymous" under Article 35.

In *Shamayev*, the Court found that a surfeit of names, and in some cases, *no* verified name, did *not* constitute inadmissible "anonymity." Contrast this with the Court's decision six years later, in *"Blondje" v. the Netherlands.*[117] The applicant had refused to identify himself in Dutch domestic proceedings, which were concerned with the legality of his presence in the Netherlands. His application form identified him as "Blondje alias NN cel 07 alias Nn.PI09.m.20081101.1100."[118] 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".[119] His lawyer was unable to produce such a document. In a brief decision, the Court placed firm emphasis on the absence of a name,

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[114] Shamayev and Others v. Georgia and Russia*,* Eur. Ct. H. R. (2003) [hereinafter "Shamayev (I)"]; upheld in Shamayev and Others v. Georgia and Russia*,* Eur. Ct. H. R. (2005) [hereinafter "Shamayev (II)" at para 275.

[115] *See Shamayev* (I) and (II), *supra* note 114, the latter albeit subject to a dissenting judgment by Judge Kovler, who argued that the case was inadmissible under Article 35.

[116] *Shamayev* (I), *supra* note 114.

[117] Blondje v. the Netherlands*,* Eur. Ct. H. R. (2009).

[118] *Id.*

[119] *Id.*

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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 and as such, inadmissible under Article 35 § (2)(a).

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. As such, it seems likely, had the case been communicated to the Government, that this evidence could have gone substantially 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"[120] and that there existed a "sufficiently close link between" him and the complained of legal "events in question."[121] 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 on 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 concerning his detention by the Dutch aliens' police *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. While adopting such a flexible approach may appear unproblematic if admissibility decision-making is conceived of as an *adjudicative* enterprise – the dominant discourse insists admissibility decision-making is unsentimental, unadjudicative, "accurate" implementation of settled values along bureaucratic rational lines. In clear contrast with this dominant discourse, the case law on anonymity starkly reveals the extent to which a formalistic standard – applicants must provide their real names or have their applications declared inadmissible – *co-exists* with interpretative flexibility, allowing the Court to

[120] *Shamayev* (I) *supra* note 114.

[121] *Id.*

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reason its way out of its own strictures, if it wishes to make the effort to "save" a case from inadmissibility.

The clear 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," *extraneous to the admissibility standard itself*, results in that application being accepted, and the other rejected. In contrast with discourses constructing admissibility decision-making as bureaucratic, rational and mechanical, an amoralistic 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 "merits" and substance of applications than has generally been supposed.

F. Conclusion: the Legal Failure and Discursive Persistence of the Bureaucratic Rational Model

This analysis of the Court's "anonymity" and "six month" jurisprudence clearly demonstrates the inadequacies of the discursive construction of admissibility decision-making as formally rational in character. A detailed legal analysis of the Court's jurisprudence on these two grounds discloses an admissibility jurisprudence that relies to a very significant extent on "nonreplicable, nonreviewable judgment or intuition:"[122] an approach inimical to the bureaucratic rational model of administrative justice. As *Shamayev* and *"Blondje",* and *Chalkley* and *Kemevuako*, clearly demonstrate, even on these two "technical," "formal" grounds of admissibility, the *same* feature of two cases can lead to *opposite* admissibility outcomes. In one case, the Court holds that non-disclosure of the applicant's real name renders his petition inadmissible, in the other the failure to disclose a name is not held to be fatal. One applicant may delay submission of their application form by a few days and their application is rejected as "out of time," another may delay for almost two years, and his application is held to be admissible. Critically, these inconsistent outcomes *cannot* be explained in terms of the two admissibility rules having a settled "core of *legal* meaning" and a fringe "penumbra of doubt." In both *Shamayev* and *"Blondje*," and *Chalkley* and *Kemevuako,* the "clearly inadmissible" applications are practically indistinguishable from the admissible.

From the perspective of *discursive constructions* of admissibility decision-making, it is striking that the Court's jurisprudence continues to employ the *language of rules*, even if its jurisprudence do not disclose the *substance* of clear, inflexible legal admissibility

[122] MASHAW, *supra* note 4, at 26.

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standards. While this is certainly jurisprudentially inconsistent and good grounds to reject the dominant conception of admissibility decision-making as simply bureaucratic rational in character, *discursively*, the persistence of the bureaucratic rational account of admissibility is highly significant. This data suggests that the Court is comfortable with apparently inconsistent vacillation between administrative and adjudicative accounts of its admissibility decision-making, which allows an inflexible interpretation of the "rules" to obtain in the vast majority of cases, but which retains a latent discretion to be flexible and selectively disapply those "rules" in particular cases, without undermining the general validity of the merely "administrative" disposal of the rest. Critically, this suggests that the Court's jurisprudential inconsistency, and shifting and selective evocation of a bureaucratic or adjudicative voice, is not conceived as transgressive or inconsistent with a commitment to values of legality, the rule of law and compliance with the Convention.

This conundrum raises a number of fascinating empirical questions, which can only be sketched here. For example, given the latent flexibility of the admissibility criteria disclosed by this close examination of a section of the Court's admissibility jurisprudence, why do judges of the court construct and seem to experience so much of their decision-making as "tedious drudgery"[123] and the simple processing of "clearly inadmissible cases"? What keeps them quiescent? As Galligan has noted of other decision-making contexts, this might suggest that "what may be discretionary from an external, legal point of view, may be anything but discretionary from the internal point of view of officials within the system."[124] This is not to say that in terms of its *practice*, the Court's admissibility decision-making is fickle, arbitrary or radically disordered by open-ended legal principles. It does suggest, however, that the dominant concept of the "clearly inadmissible case" is *not* a creation of the legal determinacy of strict admissibility standards, but is instead sustained by the social practice of admissibility decision-making, which comes to be perceived and socially constructed by those involved in it as rule-governed and bureaucratic in character. To investigate this phenomenon further, however, we must move beyond legal doctrine, and examine the Court's admissibility decision-making using qualitative empirical methods.

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[123] Hedigan, *supra* note 12.

[124] GALLIGAN, *supra* note 5, at 13.

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