with suggestions and recommendations.[373] Various follow-up measures to the consideration of reports exist, but usually they consist of the request for the provision of further information.[374] The Committee also holds 'days of discussion' to examine relevant issues[375] and issues General Comments.[376]

The Committee on the Protection of Migrant Workers[377]

The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families was adopted by the General Assembly and opened for signature in December 1990.[378] The Convention defines a migrant worker as 'a person who is to be engaged, is engaged, or has been engaged in a remunerated activity in a state of which he or she is not a national' (article 2). This includes, for example, frontier and seasonal workers, workers on offshore installations and specified-employment workers, but excludes employees of international organisations or official state employees abroad, refugees, stateless persons, students and workers on offshore installations who have not been admitted to take up residence and engage in a remunerated activity in the state of employment (article 3).

Migrant workers are entitled to equality of treatment with nationals in areas such as matters before courts and tribunals (article 18), terms of employment (article 25), freedom to join trades unions (article 26), medical treatment (article 28), access to education for their children (article 30) and respect for cultural identity (article 31). Migrant workers are protected from collective expulsion (article 22). Further provisions deal with additional rights for migrant workers and members of their families in a documented or regular situation (Part IV).

[373] See e.g. A/49/41, pp. 20 ff.; CRC/C/38, pp. 10 ff. and CRC/C/43, pp. 10 ff. See also CRC/C/121, 2002, pp. 8 ff.

[374] See e.g. CRC/C/27/Rev.3, 1995 detailing such measures up to mid-1995.

[375] See e.g. the day of discussion on 'The private sector as service provider and its role in implementing child rights' held in September 2002, CRC/C/121, p. 145.

[376] *Ibid.*, p. 159 (on 'The role of national human rights institutions in promoting and protecting children's rights'). In 2007, the Committee adopted General Comment No. 10 on the rights of children in juvenile justice.

[377] See e.g. K. Samson, 'Human Rights Co-ordination within the UN System' in Alston, *United Nations and Human Rights*, pp. 620, 641 ff.; S. Hune and J. Niessen, 'Ratifying the UN Migrant Workers Convention: Current Difficulties and Prospects', 12 NQHR, 1994, p. 393, and S. Hune and J. Niessen, 'The First UN Convention on Migrant Workers', 9 NQHR, 1991, p. 133.

[378] The necessary twenty ratifications were achieved on 10 December 2002. The Convention came into force on 1 April 2003.

The Convention provided for the creation of a Committee of fourteen independent experts (Part VII). States parties are required to provide reports on measures taken to give effect to the provisions of the Convention (article 73). An inter-state complaints procedure is provided for in article 76, on the condition that the states concerned have made a declaration expressly recognising the competence of the Committee to hear such complaints, while under article 77 an individual complaints procedure can be used with regard to states that have made a declaration recognising the competence of the Committee in this regard.[379]

The Committee on the Rights of Persons with Disabilities

The Convention on the Rights of Persons with Disabilities was adopted in December 2006 and is not yet in force. The Convention provides for the prohibition of discrimination against persons with disability and for equality of opportunity and accessibility. States parties are to undertake immediate, effective and appropriate measures to raise awareness and combat prejudices and harmful practices (articles 5–9). A twelve-person Committee is provided for to examine states' reports on measures taken to give effect to the obligations under the Convention (articles 34–6). States parties to the Optional Protocol recognise the competence of the Committee to hear individual communications alleging a violation of the Convention against them. Further, where the Committee receives reliable information indicating grave or systematic violations by a state party of Convention rights, the Committee may invite the state to co-operate in the examination of the information and submit observations. The Committee may proceed to conduct an inquiry confidentially. A state party may, however, on signature or ratification of the Optional Protocol, declare that it does not accept the inquiry competence of the Committee.

The Committee on Enforced Disappearances

The Convention for the Protection of All Persons from Enforced Disappearance was adopted in December 2006 and is not yet in force. It requires states parties to make enforced disappearance, defined as the deprivation of liberty by agents of the state or persons acting with the support or acquisition of the state coupled with the refusal to acknowledge the deprivation of liberty or concealment of the fate of the person in question (article 2), a criminal law offence (article 4). It is stated to be a crime against humanity (article 5). A ten-person Committee on Enforced Disappearances is

[379] See the Report of the Committee for 2006–7, A/62/48 (2007).

provided for to examine states' reports on measures taken to give effect to the obligations under the Convention (article 29), to hear inter-state complaints (article 32) and to hear individual communications (article 31). The Committee may also, upon receiving a request for urgent action, transmit a request to the state party concerned to take interim measures to locate and protect the person in question (article 30). Where the Committee receives reliable information indicating a serious violation, it may seek, in consultation with the state party concerned, to organise a visit (article 33). Further, where the Committee receives information appearing to contain well-founded indications that enforced disappearance is being practised on a widespread or systematic basis in the territory under the jurisdiction of a state party, it may, after seeking information from the state, urgently bring the matter to the attention of the General Assembly through the Secretary-General (article 34).

Conclusions

Most international human rights conventions obligate states parties to take certain measures with regard to the provisions contained therein, whether by domestic legislation or otherwise.[380] In addition, all nine of the treaty bodies discussed above require states parties to make periodic reports.[381] Seven have the competence to consider individual communications,[382] five may consider inter-state complaints,[383] while three may inquire into allegations of grave or systematic violations.[384]

[380] See e.g. article 2 of the Civil and Political Rights Covenant, 1966; article 1 of the European Convention on Human Rights, 1950; articles 1 and 2 of the American Convention on Human Rights, 1969; article 5 of the Genocide Convention, 1948; article 4 of the Convention on the Suppression and Punishment of the Crime of Apartheid, 1973 and article 3 of the Slavery Convention, 1926.

[381] Note that the Convention on the Rights of Persons with Disabilities and the Convention on Enforced Disappearance are not yet in force. See also article 7 of the Apartheid Convention, 1973. Several conventions provide for the communication of information to the UN Secretary-General: see e.g. article 33 of the Convention Relating to the Status of Stateless Persons, 1954 and articles 35 and 36 of the Convention Relating to the Status of Refugees, 1951.

[382] The Economic and Social Committee and the Committee on the Rights of the Child do not.

[383] The Human Rights Committee, the Committee on the Elimination of Racial Discrimination, the Committee on Migrant Workers, the Committee against Torture and the Committee on Enforced Disappearances.

[384] The Committee against Torture, the Committee on the Elimination of Discrimination against Women and the Committee on the Rights of Persons with Disabilities. Note the competence to visit under the Convention on Enforced Disappearance.

The proliferation of committees raises problems concerned both with resources and with consistency.[385] The question of resources is a serious and ongoing difficulty. The Vienna Declaration and Programme of Action, 1993 emphasised the necessity for a substantial increase in the resources for the human rights programme of the UN and particularly called for sufficient funding to be made available to the UN Centre for Human Rights, which *inter alia* provides the administrative support for the human rights organs and committees discussed in this chapter.[386] The various human rights committees themselves have pointed to the resource problem.[387] The Committee on the Elimination of Racial Discrimination and the Committee against Torture changed their financing system so that, since January 1994, they have been financed under the regular budget of the United Nations.[388] The Committee on Economic, Social and Cultural Rights sought additional resources from the Economic and Social Council.[389] Nevertheless, the fact remains that human rights activity within the UN system is seriously underfunded.

The question of consistency in view of the increasing number of human rights bodies within the UN system has been partially addressed by the establishment of an annual system of meetings between the chairpersons of the treaty bodies.[390] Issues of concern have been discussed, ranging from the need to encourage states to ratify all human rights treaties, concern about reservations made to human rights treaties,[391] attempts to establish that successor states are automatically bound by obligations under

[385] See e.g. E. Tistounet, 'The Problem of Overlapping among Different Treaty Bodies' in Alston and Crawford, *Future*, p. 383.

[386] See Part II, Section A of the Vienna Declaration and Programme of Action, 32 ILM, 1993, pp. 1674–5.

[387] See e.g. the Human Rights Committee, A/49/44, and the Committee Against Torture, A/50/44. See also the Report of the Secretary-General to the sixth meeting of chairpersons of treaty bodies, HRI/MC/1995/2, p. 13.

[388] See General Assembly resolution 47/111 and HRI/MC/1995/2, p. 14.

[389] *Ibid.*, p. 15.

[390] See General Assembly resolution 49/178, 1994, which endorsed the recommendation of the chairpersons that the meetings be held annually. The first meeting of the chairpersons of treaty bodies was held in 1984, A/39/484 and the second in 1988, A/44/98. See also e.g. A/62/224 (2007). A working group on the harmonisation of working methods of the treaty bodies has been established, see e.g. HRI/MC/2006/3 and HRI/MC/2007/2. Note also that the first inter-committee meeting of the human rights treaty bodies took place in September 2002, HRI/ICM/2002/3.

[391] See further below, chapter 16, p. 912.

international human rights treaties from the date of independence irrespective of confirmation,[392] the formulation of new norms and instruments and the promotion of human rights education, to consideration of the continuing problem of overdue reports[393] and the role of non-governmental organisations.[394] The development of early warning and preventive procedures by the committees is to be particularly noted.[395] The Committee on the Elimination of Racial Discrimination, for example, under its urgent procedures may, since 1994, review the human rights situation in states parties that give rise for especial concern,[396] while the Human Rights Committee is able to request states parties to submit special urgent reports.[397]

The UN Secretary-General in his report entitled 'In Larger Freedom' emphasised the need for streamlining procedures and called for the implementation of harmonised guidelines on reporting.[398] The UN High Commissioner for Human Rights, noting that the treaty bodies system had developed ad hoc and does not function as an integrated and indivisible framework for human rights protection, has called for a unified standing treaty body and proposed a series of models.[399] While greater harmonisation and integration is to be encouraged, as is increased training and logistical assistance for states, there may be disadvantages in one human rights body, not only in terms of locating the necessary expertise, but also in political terms by having such authority concentrated in one organ and thus being particularly susceptible to political pressure.

[392] See further below, chapter 17, p. 981.

[393] For example, the Committee on the Elimination of Racial Discrimination and the Committee on Economic, Social and Cultural Rights have established procedures enabling them to examine the situation in the state concerned: see above, pp. 311 and 308. Other Committees have sought to hold meetings with the officials of the states concerned in order to encourage submission of overdue reports, HRI/MC/1995/2, p. 7.

[394] See e.g. HRI/MC/1995.

[395] The role of the treaty bodies in seeking to prevent human rights violations has been emphasised: see e.g. A/47/628, para. 44.

[396] See above, p. 311.

[397] See above, p. 314. See also above, p. 331, with regard to the procedures of the Committee on the Rights of the Child.

[398] A/59/2005 and A/59/2005/Add.3.

[399] Concept Paper on the Proposal for a Unified Standing Treaty Body, HRI/MC/2006/2, 2006.

The specialised agencies

The International Labour Organisation[400]

The ILO was created in 1919 and expanded in 1946.[401] The Declaration of Philadelphia of 1944 (which was incorporated in the ILO constitution in 1946) reaffirmed the basic principles of the organisation. These are (a) that labour is not a commodity, (b) that freedom of expression and of association are essential to sustained progress and (c) that poverty anywhere constitutes a danger to prosperity everywhere. The ILO is composed of a unique tripartite structure involving governments, workers and employers and consists of three organs: a General Conference of representatives of member states (the International Labour Conference), the Governing Body and the International Labour Office.[402] The ILO constitution enables the organisation to examine and elaborate international labour standards, whether Conventions or Recommendations. The former are the more

[400] See e.g. Weissbrodt, Fitzpatrick and Newman, *International Human Rights*, chapter 16; L. Betten, 'At its 75th Anniversary, the International Labour Organisation Prepares Itself for an Active Future', 12 NQHR, 1994, p. 425; L. Swepston, 'Human Rights Complaints Procedures of the International Labour Organisation' in Hannum, *Guide to International Human Rights Practice*, p. 89; V. Leary, 'Lessons from the Experience of the International Labour Organisation' in Alston, *United Nations and Human Rights*, p. 580; C. W. Jenks, 'Human Rights, Social Justice and Peace' in *The International Protection of Human Rights* (eds. A. Schou and A. Eide), Stockholm, 1968, p. 227, and *Social Justice in the Law of Nations*, Oxford, 1970; E. A. Landy, *The Effectiveness of International Supervision: Thirty Years of ILO Experience*, New York, 1966, and 'The Implementation Procedures of the International Labour Organisation', 20 *Santa Clara Law Review*, 1980, p. 633; N. Valticos, 'The Role of the ILO: Present Action and Future Perspectives' in Ramcharan, *Human Rights: Thirty Years After the Universal Declaration*, p. 211, *Le Droit International du Travail*, Paris, 1980, and 'The International Labour Organisation' in *The International Dimensions of Human Rights* (eds. K. Vasak and P. Alston), Paris, 1982, vol. I, p. 363; F. Wolf, 'ILO Experience in Implementation of Human Rights', 10 *Journal of International Law and Economics*, 1975, p. 599; J. M. Servais, 'ILO Standards on Freedom of Association and Their Implementation', 123 *International Labour Review*, 1984, p. 765, and Robertson and Merrills, *Human Rights*, p. 282. See also H. K. Nielsen, 'The Concept of Discrimination in ILO Convention No. 111', 43 ICLQ, 1994, p. 827.

[401] An agreement bringing the ILO into relationship with the UN as a specialised agency under article 63 of the UN Charter came into force on 14 December 1946: see General Assembly resolution 50 (I).

[402] See *UN Action*, p. 28. The tripartite structure means that the delegation of each member state to the International Labour Conference includes two representatives of the government, one representative of workers and one representative of the employers. There are fifty-six members of the Governing Body, with twenty-eight government representatives and fourteen each from employers' and workers' organisations.

formal method of dealing with important matters, while the latter consist basically of guidelines for legislation. Between 1919 and 1994, 175 Conventions and 182 Recommendations were adopted by the ILO, all dealing basically with issues of social justice.[403] Under article 19 of the ILO constitution, all members must submit Conventions and Recommendations to their competent national authorities within twelve to eighteen months of adoption. Under article 22, states which have ratified Conventions are obligated to make annual reports on measures taken to give effect to them to the International Labour Office.[404] Under article 19, members must also submit reports regarding both unratified Conventions and Recommendations to the Director-General of the International Labour Office at appropriate intervals as requested by the Governing Body, concerning the position of their law and practice in regard to the matters dealt with in the Convention or Recommendation and showing the extent to which effect has been given or is proposed to be given to the provisions of the Convention or Recommendation, including a statement of the difficulties which prevent or delay ratification of the Convention concerned.[405] In 1926–7, a Committee of Experts on the Application of Conventions and Recommendations was established to consider reports submitted by member states. The comments of the twenty-member Committee, appointed by the Governing Body on the suggestion of the Director-General of the International Labour Office, on ratified Conventions take the form of 'observations' included in the printed report of the Committee in the case of more important issues, or 'requests' to the government concerned for information, which are not published in the report of the Committee. In the case of unratified Conventions and Recommendations, a 'general survey' of the application of the particular instrument in question is carried out.[406] A Committee on the Application of Conventions and Recommendations of the International Labour Conference is appointed at each of

[403] See Valticos, 'International Labour Organisation', p. 365, and Swepston, 'Human Rights Complaints Procedures of the International Labour Organisation', p. 100. See also E/CN.4/Sub.2/1994/5, p. 3.

[404] However, in practice the annual rule is relaxed: see Valticos, 'International Labour Organisation', p. 368. Governments are obliged by article 23(2) to communicate copies of the reports to employers' and workers' organisations.

[405] The latter provision does not, of course, apply in the case of Recommendations.

[406] Valticos, 'International Labour Organisation', pp. 369–70, and Wolf, 'ILO Experience', pp. 608–10. See e.g. *Freedom of Association and Collective Bargaining: General Survey*, Geneva, 1983.

its annual sessions, composed of tripartite representatives to discuss relevant issues based primarily upon the general report of the Committee of Experts.[407] It may also draw up a 'Special List' of cases to be drawn to the attention of the Conference.

Two types of procedure exist. Under articles 24 and 25, a representation may be made by employers' or workers' organisations to the Office to the effect that any of the members have failed to secure the effective observation of any Convention to which it is a party. If deemed receivable by the Governing Body, the matter is examined first by a committee of three of the Governing Body then by the Governing Body itself. States are invited to reply and both the original representation and the reply (if any) may be publicised by the Governing Body. There have not been many representations of this kind.[408] Under articles 26–9 and 31–3 any member may file a complaint against another member state that the effective observance of a ratified Convention has not been secured. The Governing Body may call for a reply by the object state or establish a commission of inquiry. Such a commission is normally composed of three experts and the procedure adopted is of a judicial nature. Recourse may be had by the parties to the International Court of Justice. Ultimately the Governing Body may recommend to the Conference such action as it considers wise and expedient. The complaints procedure was first used by Ghana against Portugal regarding the Abolition of Forced Labour Convention, 1957 in its African territories.[409]

A special procedure regarding freedom of association was established in 1951, with a Committee on Freedom of Association which examines a wide range of complaints. It consists of nine members (three from each of the tripartite elements in the ILO). The Committee submits detailed reports to the Governing Body with proposed conclusions and suggested recommendations to be made to the state concerned, and a considerable case-law has been built up.[410] A Fact-finding and

[407] The Committee usually consists of 200 members.

[408] But see e.g. Official Bulletin of the ILO, 1956, p. 120 (Netherlands Antilles); *ibid.*, 1967, p. 267 (Brazil) and *ibid.*, 1972, p. 125 (Italy). See also *ibid.*, 1978 (Czechoslovakia).

[409] See Official Bulletin of the ILO, 1962; *ibid.*, 1963 (Liberia) and *ibid.*, 1971 (Greece).

[410] See e.g. G. Von Potobsky, 'Protection of Trade Union Rights: Twenty Years Work of the Committee on Freedom of Association', 105 *International Labour Review*, 1972, p. 69. See also Servais, 'ILO Standards', and *Freedom of Association: Digest of Decisions of the Freedom of Association Committee of the Governing Body of the ILO*, 3rd edn, Geneva, 1985. By the end of 1991, over 1,600 cases had been considered by the Committee: see Swepston, 'Human Rights Complaints Procedures of the International Labour Organisation', p. 109.

Conciliation Commission has been created for more serious and politically delicate cases which operates with the consent of the state concerned. Accordingly, few questions have been dealt with,[411] although in 1992 a visit was made to South Africa and recommendations made to the ILO and ECOSOC. The government of that country sent a response to the Director-General of the ILO and, at the request of ECOSOC, the ILO Committee on Freedom of Association examined South Africa's report in 1994. The Committee's report, noting changes taking place in that country, was approved by the Governing Body and transmitted to ECOSOC.[412] In addition, a system of 'direct contacts' has been instituted, consisting of personal visits by ILO officials, or independent persons named by the Director-General, in order to assist in overcoming particular difficulties. These have included, for example, questions regarding freedom of association in Argentina in 1990 and the situation of Haitian workers on sugar plantations in the Dominican Republic in 1991.[413]

The United Nations Educational, Scientific and Cultural Organisation[414]

UNESCO came into being in November 1946 and was brought into relationship with the UN on 14 December that year.[415] The aim of the organisation, proclaimed in article 1 of its constitution, is to contribute to peace and security by promoting collaboration through education, science and culture 'in order to further universal respect for justice, for the rule of law and for the human rights and fundamental freedoms which are affirmed for the peoples of the world'. The organisation consists of a General

[411] See Valticos, 'International Labour Organisation', pp. 384 ff. See also Official Bulletin of the ILO, 1966 (Japan), and N. Valticos, 'Un Double Type d'Enquête de l'OIT au Chili', AFDI, 1975, p. 483.

[412] E/CN.4/Sub.2/1994/5, p. 4.

[413] See N. Valticos, 'Une Nouvelle Forme d'Action Internationale: Les "Contacts Directs"', 27 AFDI, 1981, p. 481, and V. Leary, 'Lessons from the Experience of the International Labour Organisation' in Alston, *United Nations and Human Rights*, p. 611.

[414] See e.g. S. Marks, 'The Complaints Procedure of the United Nations Educational, Scientific and Cultural Organisation' in Hannum, *Guide to International Human Rights Practice*, p. 107; D. Weissbrodt and R. Farley, 'The UNESCO Human Rights Procedure: An Evaluation', 16 HRQ, 1994, p. 391; P. Alston, 'UNESCO's Procedures for Dealing with Human Rights Violations', 20 *Santa Clara Law Review*, 1980, p. 665; H. S. Saba, 'UNESCO and Human Rights' in Vasak and Alston, *International Dimensions of Human Rights*, vol. II, p. 401; Robertson and Merrills, *Human Rights*, p. 288, and *UN Action*, pp. 308 and 321.

[415] See General Assembly resolution 50 (I).

Conference which meets every two years and in which all member states are represented, an Executive Board, elected by the conference, and a secretariat headed by a Director-General. Under article 4(4), member states undertake to submit Conventions and Resolutions to the competent national authorities within a year of adoption and may be required to submit reports on action taken.[416] Unlike the ILO, UNESCO has no constitution provision for reviewing complaints concerning the implementation of conventions procedure. However, in 1962 a Protocol instituting a Conciliation and Good Offices Commission was adopted to help resolve disputes arising between states parties to the 1960 Convention against Discrimination in Education. It entered into force in 1968 and the first meeting of the eleven-member Commission was in 1971. It aims to make available its good offices in order to reach a friendly settlement between the states parties to the convention in question. In 1978 the Executive Board of UNESCO adopted decision 104 EX/3.3, by which it established a procedure to handle individual communications alleging violations of human rights. Ten conditions for admissibility are laid down, including the requirement that the human rights violated must fall within UNESCO's competence in the fields of education, science, culture and information, and the need for the communication to be compatible with international human rights interests. The condition with regard to domestic remedies is rather different than is the case with other human rights organs, in that all the communication needs to do is to 'indicate whether an attempt has been made to exhaust domestic remedies . . . and the result of such an attempt, if any'. The investigating body is the Executive Board's Committee on Conventions and Recommendations, which is composed of twenty-four members and normally meets twice a year in private session.[417] The examination of communications is confidential. The Committee decides whether a communication is admissible and then makes a decision on the merits. The task of the Committee is to reach a 'friendly solution designed to advance the promotion of the human rights falling within UNESCO's fields of competence'.[418] Confidential reports are submitted to the Executive Board each session, which contain appropriate information

[416] See, for example, the obligation to submit reports under article 7 of the 1960 Convention against Discrimination in Education. See also *UN Action*, p. 163.

[417] Formerly the Committee on Conventions and Recommendations in Education, *ibid.*, pp. 321–2. See also A/CONF.157/PC/61/Add.6, 1993.

[418] Decision 104.EX/3.3, para. 14(k).

plus recommendations.[419] It is also to be noted that under this procedure the Director-General generally has a role in seeking to strengthen the action of UNESCO in promoting human rights and initiating consultations in confidence to help reach solutions to particular human rights problems.[420] UNESCO published a report in 1993 concerning the operations of the procedure, noting that the Committee had examined 414 cases between 1978 and 1993, of which it settled 241 individual cases.[421] It is unclear how successful the procedure has been, in view of the strict confidentiality which binds it,[422] the length of time taken to produce results and the high proportion of cases declared inadmissible.[423]

A special procedure to deal with disappeared persons has been established by the Committee. Communications dealing with such persons are placed on a Special List, if insufficient information is forthcoming from the government in question, and examined by the Committee.[424] In addition to *cases* concerning violations of human rights which are individual and specific, UNESCO may also examine *questions* of massive, systematic or flagrant violations of human rights resulting either from a policy contrary to human rights applied by a state or from an accumulation of individual cases forming a consistent pattern.[425] In the instance of such *questions*, the issue is to be discussed by the Executive Board of the General Conference in public.[426]

[419] In the April 1980 session, for example, forty-five communications were examined as to admissibility, of which five were declared inadmissible, thirteen admissible, twenty suspended and seven deleted from the agenda. Ten communications were examined on the merits, UNESCO Doc. 21 C/13, para. 65. Between 1978 and September 2003 508 communications were examined: see Marks, 'UNESCO Complaints Procedure', p. 120.

[420] *Ibid.*, paras. 8 and 9.

[421] See UNESCO Doc. 141/EX/6 and Weissbrodt and Farley, 'UNESCO Human Rights Procedure', p. 391. It was noted that during this period, 129 individuals were either released or acquitted, 20 authorised to leave and 34 to return to the state concerned, 24 were able to resume banned employment or activity, and 11 were able to resume a banned publication or broadcast, *ibid.*

[422] See G. H. Dumont, 'UNESCO's Practical Action on Human Rights', 122 *International Social Sciences Journal*, 1989, p. 585, and K. Partsch, 'La Mise en Oeuvre des Droit de l'Homme par l'UNESCO', 36 AFDI, 1990, p. 482.

[423] Weissbrodt and Farley note that of sixty-four cases studied only five were declared admissible, 'UNESCO Human Rights Procedure', p. 399. Of these, three concerned one particular country in Latin America. One case was considered over a nine-and-a-half-year period and another was considered over eight-and-a-half years.

[424] UNESCO Doc. 108 EX/CR/HR/PROC/2 Rev. (1979).

[425] Decision 104. EX/3.3, para. 10.

[426] *Ibid.*, para. 18.

Suggestions for further reading

The Future of UN Human Rights Treaty Monitoring (eds. P. Alston and J. Crawford), Cambridge, 2000

Guide to International Human Rights Practice (ed. H. Hannum), 4th edn, Ardsley, 2004

T. Meron, *The Humanization of International Law*, The Hague, 2006

J. Rehman, *International Human Rights Law*, London, 2002

A. H. Robertson and J. Merrills, *Human Rights in the World*, 4th edn, Manchester, 1996

H. Steiner, P. Alston and R. Goodman, *International Human Rights in Context*, 3rd edn, Oxford, 2008

C. Tomuschat, *Human Rights*, Oxford, 2003

7

The regional protection of human rights

Europe[1]

The Council of Europe

The Council of Europe was founded in 1949 as a European organisation for encouraging and developing intergovernmental and interparliamentary co-operation. Its aim as laid down in article 1 of the Statute is to achieve a greater unity between member states for the purpose of safeguarding and realising the ideals and principles which are their common heritage and facilitating their economic and social progress. The principles of the Council of Europe as established in article 3 of the Statute include pluralist democracy, respect for human rights and the rule of law. A Committee of Ministers, consisting of the Foreign Ministers of member states, and a Parliamentary Assembly, consisting of delegations of members of national parliaments, constitute the principal organs of the Council of Europe, together with a Secretary-General and supporting secretariat. There also exists a Standing Conference of Local and Regional Authorities of Europe, consisting of national delegations of local and regional elected representatives. The Council of Europe also maintains a number of support and assistance programmes.[2]

The demise of the Soviet Empire in Eastern and Central Europe has been the primary reason for the great increase in member states over the last few years.[3] The process of joining the Council of Europe has provided the Council with some influence over prospective members and this has led both to expert advice and assistance being proffered and to commitments being entered into in the field of human rights by applicants. For

[1] See generally *Monitoring Human Rights in Europe* (eds. A. Bloed, L. Leicht, M. Nowak and A. Rosas), Dordrecht, 1993.

[2] See e.g. A/CONF.157/PC/66/Add.2, 1993.

[3] With the entry of Montenegro in May 2007, the number of member states reached forty-seven.

example, Parliamentary Assembly Opinion No. 191 on the Application for Membership by the Former Yugoslav Republic of Macedonia[4] notes that the applicant entered into commitments relating to revision and establishment of new laws (for example, with respect to the organisation and functioning of the criminal justice system), amendment of the constitution in order to include the right to a fair trial, and agreement to sign a variety of international instruments including the European Convention on Human Rights, the European Convention on the Prevention of Torture and the Framework Convention for the Protection of National Minorities. In addition, the applicant agreed to co-operate fully in the monitoring process for implementation of Assembly Order No. 508 (1995) on the honouring of obligations and commitments by member states of the Council of Europe as well as in monitoring processes established by virtue of the Committee of Ministers Declaration of 10 November 1994. The Council of Europe has also moved beyond agreeing or noting commitments made at the time of application for membership and approval thereof to consideration of how those commitments have been honoured once an applicant has become a member state. The Committee of Ministers Declaration of 10 November 1994 provides a mechanism for examining state practice in this area and one may expect further developments in this context.[5] In 1999, the Council of Europe established the office of the Commissioner for Human Rights within the General Secretariat to promote education and awareness in the field of human rights.[6] The

[4] 16 HRLJ, 1995, p. 372. See also Parliamentary Assembly Opinion No. 190 on the Application of Ukraine for Membership, *ibid.*, p. 373, and Opinion Nos. 183 (1995) on the Application of Latvia for Membership, 188 (1995) on the Application of Moldova for Membership and 189 (1995) on the Application of Albania for Membership, H/INF (95) 3 pp. 77 ff. Note that under Recommendation 1055 (1995), the Assembly decided to suspend the procedure concerning its statutory opinion on Russia's request for membership in the light of the situation in Chechnya. However, Russia joined the Council of Europe in early 1996.

[5] See further below, p. 359. Note also Assembly Order 508 (1995). The Committee on the Honouring of Obligations and Commitments by Member States of the Council of Europe (known as the Monitoring Committee) commenced operations in April 1997 under the authorisation of Assembly resolution 1115 (1997). This Committee is responsible for verifying the fulfilment of the obligations assumed by the member states under the terms of the Council of Europe Statute, the European Convention on Human Rights and all other Council of Europe conventions to which they are parties, as well as the honouring of the commitments entered into by the authorities of member states upon their accession to the Council of Europe. It reports directly to the Assembly.

[6] Committee of Ministers resolution (99) 50. The Commissioner cannot consider individual petitions and exercises functions other than those of the supervisory bodies of Council of Europe human rights instruments. No general reporting system exists in this framework.

Commissioner may also issue opinions[7] and make recommendations[8] and undertake visits.[9]

Although a large number of treaties between member states have been signed under the auspices of the Council of Europe, undoubtedly the most important has been the European Convention on Human Rights.

The European Convention on Human Rights[10]

The Convention was signed on 4 November 1950 and entered into force in September 1953.[11] Together with thirteen Protocols, it covers a wide variety of primarily civil and political rights.[12] The preamble notes that the European states are like-minded and have a common heritage of political tradition, ideals, freedoms and the rule of law. The rights covered

[7] See e.g. CommDH(2002)7, Opinion 1/2002 on certain aspects of the United Kingdom 2001 derogation from article 5(1) of the European Convention on Human Rights.

[8] See e.g. Recommendations CommDH/Rec(2001)1 concerning the rights of aliens wishing to enter a Council of Europe member state and the enforcement of expulsion orders, and CommDH/Rec(2002)1 concerning certain rights that must be guaranteed during the arrest and detention of persons following 'cleansing' operations in the Chechen Republic of the Russian Federation.

[9] See e.g. the visit to Russia including Chechnya, Press Release 072a (2003).

[10] See e.g. *Jacobs and White: The European Convention on Human Rights* (eds. C. Ovey and R. C. A. White), 4th edn, Oxford, 2006; D. J. Harris, M. O'Boyle and C. Warbrick, *Law of the European Convention on Human Rights*, London, 1995; M. W. Janis, R. S. Kay and A. W. Bradley, *European Human Rights Law: Text and Materials*, 3rd edn, Oxford, 2008; S. Greer, *The European Convention on Human Rights: Achievements, Problems and Prospects*, Cambridge, 2006; G. Letsas, *A Theory of Interpretation of the European Convention on Human Rights*, Oxford, 2007; *La Convention Européenne des Droits de l'Homme* (eds. P. Imbert and L. Pettiti), Paris, 1995; L. J. Clements, N. Mole and A. Simmons, *European Human Rights: Taking a Case under the Convention*, 2nd edn, London, 1999; *The European System for the Protection of Human Rights* (eds. R. St J. Macdonald, F. Matscher and H. Petzold), Dordrecht, 1993; A. H. Robertson and J. G. Merrills, *Human Rights in Europe*, 4th edn, Manchester, 2001; P. Van Dijk, G. J. H. Van Hoof, A. Van Rijn and L. Zwaak, *Theory and Practice of the European Convention on Human Rights*, 4th edn, Antwerp, 2006; P. J. Velu and R. Ergel, *La Convention Européenne des Droits de l'Homme*, Brussels, 1990; G. Cohen-Jonathan, *La Convention Européenne des Droits de l'Homme*, Paris, 1989; E. Lambert, *Les Effets des Arrêts de la Cour Européenne des Droits de l'Homme*, Brussels, 1999, and K. Starmer, *European Human Rights Law*, London, 1999. See also L. G. Loucaides, *Essays on the Developing Law of Human Rights*, Dordrecht, 1995; J. G. Merrills, *The Development of International Law by the European Court of Human Rights*, 2nd edn, Manchester, 1993, and A. Drzemczewski, *The European Human Rights Convention in Domestic Law*, Oxford, 1983.

[11] All forty-seven member states of the Council of Europe have ratified the Convention.

[12] Protocol No. 14, dealing with procedural issues, is not yet in force: see below, p. 360. Economic and social rights are covered in the European Social Charter, 1961. See below, p. 360.

in the Convention itself include the right to life (article 2), prohibition of torture and slavery (articles 3 and 4), right to liberty and security of person (article 5), right to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law (article 6), prohibition of retroactive criminal legislation (article 7), right to respect for private and family life (article 8), freedom of thought, conscience and religion (article 9), freedom of expression (article 10), freedom of assembly and association (article 11), the right to marry and found a family (article 12), the right to an effective remedy before a national authority if one of the Convention rights or freedoms is violated (article 13) and a non-discrimination provision regarding the enjoyment of rights and freedoms under the Convention (article 14). In addition, several protocols have been added to the substantive rights protected under the Convention. Protocol No. 1 protects the rights of property, education and free elections by secret ballots, Protocol No. 4 prohibits imprisonment for civil debt and protects *inter alia* the rights of free movement and choice of residence and the right to enter one's own country, Protocol No. 6 provides for the abolition of the death penalty, while Protocol No. 7 provides *inter alia* that an alien lawfully resident in a state shall not be expelled therefrom except in pursuance of a decision reached in accordance with the law, that a person convicted of a criminal offence shall have the right to have that conviction or sentence reviewed by a higher tribunal and that no one may be tried or punished again in criminal proceedings for an offence for which he has already been finally acquitted or convicted. Protocol No. 12 prohibits discrimination, while Protocol No. 13 abolishes the death penalty. Like other international treaties, the European Convention imposes obligations upon states parties to respect a variety of provisions. In this instance the Convention has also been incorporated into the domestic legislation of all current states parties[13] although the Convention does not provide as to how exactly the states parties are to implement internally the relevant obligations.[14] It has been emphasised that:

> unlike international treaties of the classic kind, the Convention comprises more than mere reciprocal engagements between contracting states. It

[13] The UK incorporated the Convention in the Human Rights Act 1998. See e.g. J. Polakiewicz and V. Jacob-Foltzer, 'The European Human Rights Convention in Domestic Law', 12 HRLJ, 1991, pp. 65 and 125, and Harris *et al.*, *Law of the European Convention*, p. 24, note 2.

[14] See e.g. the *Swedish Engine Drivers' Union* case, Series A, vol. 20, 1976, p. 18; 58 ILR, pp. 19, 36. See also the *Belgian Linguistics* case, Series A, vol. 6, 1968, p. 35; 45 ILR, pp. 136, 165.

> creates, over and above a network of mutual and bilateral undertakings, objective obligations, which in the words of the preamble, benefit from a 'collective enforcement'.[15]

In addition, a more teleological and flexible approach to the interpretation of the Convention has been adopted.[16] The European Court of Human Rights has emphasised that the Convention is a living instrument to be interpreted in the light of present-day conditions and this approach applies not only to the substantive rights protected under the Convention, but also to those provisions which govern the operation of the Convention's enforcement machinery.[17] In addition, the Court has noted that the object and purpose of the Convention as an instrument for the protection of individuals requires that its provisions be interpreted and applied so as to make its safeguards practical and effective.[18] The Convention should also be interpreted as far as possible in harmony with other principles of international law.[19] It has been emphasised that the Convention constitutes a 'constitutional instrument of European public order ("ordre public")'.[20] The Convention applies, of course, within the territory of contracting states, but the issue of its extraterritorial application has been addressed. The Court has interpreted the concept of 'jurisdiction' under article 1 to include the possibility of application to extradition or expulsion of a person by a contracting state to the territory of a non-contracting state[21] and the situation where acts of the authorities of contracting states, whether performed within or outside national boundaries, produce effects outside their own territory.[22] Further, in a significant move, the Court in *Loizidou* v. *Turkey* emphasised that the responsibility of a contracting state may also arise when it exercises effective control or 'effective overall control'

[15] See article 1 and *Ireland* v. *UK*, Series A, vol. 25, 1978, pp. 90–1; 58 ILR, pp. 188, 290–1. See also *Loizidou* v. *Turkey*, Series A, vol. 310, 1995, pp. 22–3; 103 ILR, p. 622.

[16] See e.g. the *Tyrer* case, Series A, vol. 26, 1978; 58 ILR, p. 339, and see also the *Marckx* case, Series A, vol. 31, 1979; 58 ILR, p. 561, although not to the extent of adding new rights or new jurisdictions thereby, see *Johnston* v. *Ireland*, Judgment of 18 December 1986 and *Banković* v. *Belgium*, Judgment of 12 December 2001, 123 ILR, p. 94. See also below, chapter 16, p. 937.

[17] See *Loizidou* v. *Turkey*, Series A, vol. 310, 1995, p. 23; 103 ILR, p. 622.

[18] See *Soering* v. *UK*, Series A, vol. 161, 1989, p. 34; 98 ILR, p. 270; *Artico* v. *Italy*, Series A, vol. 37, p. 16 and *Loizidou* v. *Turkey*, Series A, vol. 310, p. 23; 103 ILR, p. 622.

[19] See *Al-Adsani* v. *UK*, Judgment of 21 November 2001, para. 60; 123 ILR, p. 41.

[20] *Loizidou* v. *Turkey*, Series A, vol. 310, pp. 24 and 27; 103 ILR, p. 622.

[21] See e.g. *Soering* v. *UK*, Series A, vol. 161, 1989, pp. 35–6.

[22] See e.g. *Drozd and Janousek* v. *France and Spain*, Series A, vol. 240, 1992, p. 29. See also *Issa* v. *Turkey*, Judgment of 30 May 2000, and *Öcalan* v. *Turkey*, Judgment of 14 December 2000.

of an area outside its national territory, irrespective of the lawfulness of such control, whether by the state's own agents and officials or by the acts of a subordinate local administration.[23] Despite this, the Court has stated that its recognition of the exercise of extraterritorial jurisdiction by a contracting state is exceptional and that the Convention's notion of jurisdiction is essentially territorial.[24] These principles were reaffirmed in *Ilaşcu* v. *Moldova and Russia*, where the Court, while emphasising that jurisdiction was primarily territorial, noted that in exceptional circumstances the state might not be responsible for Convention violations where it was prevented from exercising its authority in a part of its territory, whether as a result of military occupation by the armed forces of another state which effectively controls the territory concerned, acts of war or rebellion, or the acts of a foreign state supporting the installation of a separatist state within the territory of the state concerned.[25] Further, a state's responsibility will be engaged where, as a consequence of military action, whether lawful or unlawful, it exercises in practice effective control of an area situated outside its national territory. Overall control of an area would suffice and the responsibility of the state would extent not only to the acts of its own soldiers and officials, but also to acts of the local administration which survives there by virtue of its military and other support.[26]

Linked with the territorial jurisdictional issue is the question whether the Court has jurisdiction over the states in question (or jurisdiction *ratione personae*). In *Behrami* v. *France*, the Court, in an application against a number of states with regard to activities undertaken as part of the international presence in Kosovo (whether military, KFOR, or civil, UNMIK), had to decide whether the acts in question were attributable or imputable to the states concerned such as to found jurisdiction or whether the acts were imputable rather to the UN. The Court concluded that KFOR was exercising lawfully delegated Chapter VII powers of the UN Security Council

[23] Series A, vol. 310, p. 20; 103 ILR, p. 622. See also *Cyprus* v. *Turkey*, European Court of Human Rights, Judgment of 10 May 2001, paras. 75 ff.; 120 ILR, p. 10.

[24] See *Banković* v. *Belgium*, Judgment of 12 December 2001, paras. 63, 67 and 71; 123 ILR, pp. 110, 111 and 113. The Court noted that 'the Convention is a multi-lateral treaty operating ··· in an essentially regional context and notably in the legal space (*espace juridique*) of the contracting states', *ibid*., para. 80. See also *Issa* v. *Turkey*, Judgment of 16 November 2004, paras. 65 ff., where the Court held that the degree of control exercised by Turkish troops during a large-scale incursion into northern Iraq did not amount to overall control, and *Assanidze* v. *Georgia*, Judgment of 8 April 2004.

[25] Judgment of 8 July 2004 at paras. 312–13.

[26] *Ibid.*, paras. 314–19.

so that the impugned action was, in principle, 'attributable' to the UN and thus not to the states brought before the Court.[27]

The convention system

With the coming into force of Protocol 11 on 1 November 1998, a single permanent and full-time Court was established, so that the former Court and Commission ceased to exist. The new Court consists of a number of judges equal to that of the contracting parties to the Convention. Judges are elected by the Parliamentary Assembly of the Council of Europe for six-year terms.[28] To consider cases before it, the Court may sit in Committees of three judges, in Chambers of seven judges and in a Grand Chamber of seventeen judges.[29] The Rules of Court provide for the establishment of at least four Sections, the compositions of which are to be geographically and gender-balanced and reflective of the different legal systems among the contracting states.[30] The Chambers of seven judges provided for in the amended Convention are constituted from the Sections, as are the Committees of three judges.[31] The plenary Court is responsible for the election of the President and Vice-Presidents of the Court, the appointment of the Presidents of the Chambers, constituting Chambers and adopting rules of procedure.[32]

In ascertaining whether an application is admissible, the President of the Chamber to which it has been assigned will appoint a judge as Judge Rapporteur to examine the application and decide whether it should be considered by a Committee of three or a Chamber.[33] A Committee, acting unanimously, may decide to declare the application inadmissible or strike it out of the list.[34] That decision is final. In other cases, the application will be considered by a Chamber on the basis of the Judge Rapporteur's report.

[27] Judgment of 2 May 2007, paras. 141 ff.; similarly with regard to those activitites falling within the framework of the UNMIK, deemed to be a subsidiary organ of the Security Council, para. 143. But see *Bosphorus Airways* v. *Ireland*, Judgment of 30 June 2005. See, as to the situation in Kosovo, above, chapter 5, pp. 204 and 232.

[28] Articles 22 and 23. Note that there will no longer be a prohibition on two judges having the same nationality. The terms of office of the judges will end at the age of seventy.

[29] Article 27. [30] Rule 25. There are now five Sections. [31] Rules 26 and 27.

[32] Article 26. [33] Rule 49.

[34] *Ibid.* and article 28. In so doing, the Committee will take into account the report of the Judge Rapporteur, Rule 53. Note that the Court has the right to strike out an application at any stage of the proceedings where it concludes that the applicant does not intend to pursue his application or the matter has been resolved or, for any other reason established by the Court, it is no longer justified to continue the examination of the application. However, the Court shall continue the examination of an application if respect for human rights as defined in the Convention and the Protocols thereto so requires: see article 37.

The Chamber may hold oral hearings. The question of admissibility will then be decided. Once an application is declared admissible, the Chamber may invite the parties to submit further evidence and written observations and a hearing on the merits may be held if the Chamber decides or one of the parties so requests.[35] At this point the respondent government is usually contacted for written observations.[36] Where a serious question affecting the interpretation of the Convention or its Protocols is raised in a case, or where the resolution of a question might lead to a result inconsistent with earlier case-law, the Chamber may, unless one of the parties to the case objects, relinquish jurisdiction in favour of the Grand Chamber.[37]

The Court may give advisory opinions, although in very restrictive circumstances.[38] In all cases before a Chamber or the Grand Chamber, a

[35] Rule 59.

[36] In the case of inter-state cases, the respondent government will be automatically contacted: see Rule 51.

[37] Article 30. While there is no specific power in the Convention under which the Court may order interim measures of protection with binding effect, Rule 39 of the Rules of Court provides that the Chamber or, where appropriate, its President may, at the request of a party or of any other person concerned, or of its own motion, indicate to the parties any interim measure which it considers should be adopted in the interests of the parties or of the proper conduct of the proceedings before it. The Court in *Mamatkulov and Abdurasulovic* v. *Turkey*, Judgment of 6 February 2003, referring to the practice of other international organs including the International Court of Justice and the Inter-American Court and Commission of Human Rights, held that article 34 of the Convention requires that applicants are entitled to exercise their right to individual application effectively, while article 3, relevant in the context of expulsion, also necessitated an effective examination of the issues in question. The Court noting that Rule 39 indications 'permit it to carry out an effective examination of the application and to ensure that the protection afforded by the Convention is effective', concluded that 'any state party to the Convention to which interim measures have been indicated in order to avoid irreparable harm being caused to the victim of an alleged violation must comply with those measures and refrain from any act or omission that will undermine the authority and effectiveness of the final judgment', paras. 107–10.

[38] Article 47. Only the Committee of Ministers can make such a request and advisory opinions cannot deal with any question relating to the content or scope of the rights and freedoms laid down in Section 1 of the Convention and its Protocols or with any question which the Court or Committee of Ministers might have to consider during proceedings instituted in accordance with the Convention. The first request for an advisory opinion concerned the co-existence of the Convention on Human Rights of the Commonwealth of Independent States and the European Convention on Human Rights, but on 2 June 2004 the Court concluded unanimously that the request did not come within its advisory competence. The first advisory opinion was given on 12 February 2008, where the Court unanimously concluded that it was not compatible with the European Convention on Human Rights for a list of candidates for election to the post of judge at the Court to be rejected on the sole

contracting party, one of whose nationals is an applicant, shall have the right to submit written comments and to take part in hearings, while the President of the Court may, in the interest of the proper administration of justice, invite any contracting party which is not a party to the proceedings, or any person concerned who is not the applicant to submit written comments or take part in hearings.[39] Once an application has been declared admissible, the Court will pursue the examination of the case and place itself at the disposal of the parties with a view to securing a friendly settlement.[40] If a friendly settlement is reached, the Court will strike the case out of its list.[41] Hearings before the Court will be in public unless the Court in exceptional circumstances decides otherwise. The Court will be able to afford just satisfaction to the injured party if necessary, where a violation is found and the domestic law of the contracting party concerned allows only partial reparation to be made.[42] Under article 43, within a period of three months from the date of the judgment of the Chamber, any party to the case may, in exceptional cases, request that the case be referred to the Grand Chamber. A panel of five judges of the Grand Chamber will accept this request if the case raises a serious question affecting the interpretation or application of the Convention or Protocols, or a serious issue of general importance. If the panel does accept the request, the Grand Chamber will decide the case by means of a judgment. Judgments of the Grand Chamber will be final, as will those of a Chamber where the parties declare that they will not request that the case be referred to the Grand Chamber, or three months after the date of judgment if reference to the Grand Chamber has not been requested, or when the panel of the Grand Chamber rejects the request to refer. The final judgment will be published[43] and is binding upon the parties,[44] and it will be transmitted to the Committee of Ministers, which shall supervise its execution.[45]

A number of crucial changes took place as a result of the reform of the system under Protocol 11. The right of individual petition became automatic rather than dependent upon the acceptance of the state complained against,[46] the new Court became full-time, the function of the Committee of Ministers was limited to the supervision of the execution of the judgments of the Court rather than including a decision-making

ground that there was no woman included in the proposed list and called for exceptions to the principle that lists must contain a candidate of the under-represented sex to be defined as soon as possible.

[39] Article 36. [40] Article 38. Proceedings in the latter case will be confidential.
[41] Article 39. [42] Article 41. [43] Article 44. [44] Article 46(1).
[45] Article 46(2). [46] Compare former article 25 with current article 34.

function in the absence of referral of a Commission report to the Court,[47] the number of judges in a Chamber was reduced from nine to seven, the right of third-party intervention became part of the Convention itself rather than a Rule of Court and hearings became public apart from the friendly settlement process. However, under article 30, the parties to a case are able to prevent the relinquishment of jurisdiction by a Chamber in favour of the Grand Chamber. In addition, where a case is referred to the Grand Chamber under article 43, the Grand Chamber will include the President of the Chamber and the judge who sat in respect of the state party concerned, who will thus be involved in a rehearing of a case that they have already heard. This unusual procedure remains a source of some disquiet.

The Convention provides for the right of both inter-state and individual application. Under article 33, any contracting state may institute a case against another contracting state. To date applications have been lodged with the Commission by states involving seven situations.[48] The first inter-state application to reach the Court was *Ireland* v. *UK*.[49] Such applications are a means of bringing to the fore an alleged breach of the European public order, so that, for example, it is irrelevant whether the applicant state has been recognised by the respondent state.[50] Article 34 provides for the right of individual petition to the Commission and this has proved to be a crucial provision.[51] This right is now automatic.[52] The

[47] See former article 32 and e.g. P. Leuprecht, 'The Protection of Human Rights by Political Bodies: The Example of the Committee of Ministers of the Council of Europe' in *Progress in the Spirit of Human Rights: Festschrift für Felix Ermacora* (eds. M. Nowak, D. Steurer and H. Tretter), Kehl, 1988, p. 95.

[48] *Cyprus* case *(Greece* v. *UK)*, 1956 and 1957, two applications; *Austria* v. *Italy*, 1960; five applications against Greece, 1967–70; *Ireland* v. *UK*, 1971; *Cyprus* v. *Turkey*, 1974–94, four applications, and five applications against Turkey, 1982. See also the application brought by Georgia against Russia, 2007.

[49] Series A, vol. 25, 1978; 58 ILR, p. 188. Note also the Court's decision in *Cyprus* v. *Turkey*, Judgment of 10 May 2001; 120 ILR, p. 10.

[50] *Cyprus* v. *Turkey (Third Application)* 13 DR 85 (1978).

[51] The total number of new applications in 2007 was estimated at 54,000, of which 41,700 were allocated to a decision body. As at 31 December 2007, there were a total of 103,850 applications pending, of which some 79,000 were pending before a decision body: see Annual Report for 2007 (2008), p. 134.

[52] Note that the issue of reservations to former articles 25 and 46 (concerning the jurisdiction of the Court prior to Protocol XI) was discussed in the case-law. The Court noted that while temporal reservations could be valid, reservations beyond this were not: see *Loizidou* v. *Turkey (Preliminary Objections)*, Series A, vol. 310, 1995; 103 ILR, p. 622. The Court, in dismissing the territorial limitations upon the Turkish declarations under articles 25 and 46, held that such declarations therefore took effect as valid declarations without such

Convention system does not contemplate an *actio popularis*.[53] Individuals cannot raise abstract issues, but must be able to claim to be the victim of a violation of one or more of the Convention rights.[54] However, the Court has emphasised that:

> an individual may, under certain conditions, claim to be the victim of a violation occasioned by the mere existence of secret measures or of legislation permitting secret measures, without having to allege that such measures were in fact applied to him.[55]

A near relative of the victim, for example, could also raise an issue where the violation alleged was personally prejudicial or where there existed a valid personal interest.[56]

The Court may only deal with a matter once all domestic remedies have been exhausted according to the generally accepted rules of international law and within a period of six months from the date on which the final decision was taken.[57] Such remedies must be effective. Where there are no domestic remedies to exhaust, the act or decision complained against will itself normally be taken as the 'final decision' for the purposes of article 26.[58] The need to exhaust domestic remedies applies also in the

limitations, Series A, vol. 310 pp. 27–9. Turkey had argued that if the limitations were not upheld, the declarations themselves would fall. Not to adopt this approach would, the Court noted, have entailed a weakening of the Convention system for the protection of human rights, which constituted a European constitutional public order, and would run counter to the aim of greater unity in the maintenance and further realisation of human rights, *ibid*. See also the Commission Report in *Chrysostomos* v. *Turkey* 68 DR 216.

53 See e.g. *X* v. *Austria* 7 DR 87 (1976) concerning legislation on abortion.

54 See e.g. *Pine Valley* v. *Ireland*, Series A, vol. 222, 1991; *Johnston* v. *Ireland*, Series A, vol. 112, 1986; *Marckx* v. *Belgium*, Series A, vol. 31, 1979; *Campbell and Cosans* v. *UK*, Series A, vol. 48, 1982; *Eckle* v. *Federal Republic of Germany*, Series A, vol. 51, 1982 and *Vijayanathan and Pusparajah* v. *France*, Series A, vol. 241-B, 1992.

55 The *Klass* case, Series A, vol. 28, 1979, pp. 17–18; 58 ILR, pp. 423, 442. See also e.g. the *Marckx* case, Series A, vol. 31, 1979, pp. 12–14; 58 ILR, pp. 561, 576; the *Dudgeon* case, Series A, vol. 45, 1982, p. 18; 67 ILR, pp. 395, 410; the *Belgian Linguistics* case, Series A, vol. 6, 1968; 45 ILR, p. 136 and *Norris* v. *Ireland*, Series A, No. 142, 1988; 89 ILR, p. 243.

56 See e.g. Application 100/55, *X* v. *FRG*, 1 *Yearbook of the ECHR*, 1955–7, p. 162 and Application 1478/62, *Y* v. *Belgium*, *Yearbook of the ECHR*, 1963, p. 590. See also *Cyprus* v. *Turkey*, Judgment of 10 May 2001; 120 ILR, p. 10.

57 Article 35. See *Akdivar* v. *Turkey*, Judgment of 16 September 1996. As to the meaning of domestic or local remedies in international law, see below, p. 819.

58 See e.g. *X* v. *UK*, 8 DR, pp. 211, 212–13 and *Cyprus* v. *Turkey*, *Yearbook of the European Convention on Human Rights*, 1978, pp. 240–2. Where, however, there is a permanent state of affairs which is still continuing, the question of the six-month rule can only arise after the state of affairs has ceased to exist: see e.g. *De Becker* v. *Belgium*, 2 *Yearbook of the*

case of inter-state cases as does the six-month rule.[59] In addition, no petition may be dealt with which is anonymous or substantially the same as a matter already examined, and any petition which is incompatible with the Convention, manifestly ill-founded[60] or an abuse of the right of petition is to be rendered inadmissible.[61]

The Court, in an ever-increasing number of judgments,[62] has developed a jurisprudence of considerable importance.[63] It has operated on the basis of a number of evolving principles. In particular, the Court will allow states a degree of leeway in a system composed of obligations of contracting states and a European-level supervisory mechanism. The doctrine of 'the margin of appreciation' means that the Court will not interfere in certain domestic spheres while retaining a general overall supervision. For example, in *Brannigan and McBride* v. *UK*, the Court held that states benefit from a 'wide margin of appreciation' with regard to the process of determining the existence and scope of a public emergency permitting derogation from certain provisions of the Convention under article 15.[64] This margin of appreciation will vary depending upon the content of the rights in question in substantive proceedings or on the balancing of rights in contention. It will be wider with regard to issues of personal morality,[65] but narrower in other cases.[66] The essential point is, as the Court noted in *Z* v. *UK*, that: 'It is fundamental to the machinery of protection established by the Convention that the national systems themselves provide redress for breaches of its provision, the Court exercising its supervisory role subject to the principle of

European Convention on Human Rights, 1958, pp. 214, 244. The rule is strict and cannot be waived by the state concerned: see *Walker* v. *UK*, Judgment of 25 January 2000.

[59] See *Cyprus* v. *Turkey*, Judgment of 10 May 2001, paras. 82 ff. Note that the Court suggested that the remedies provided by the 'Turkish Republic of Northern Cyprus' had to be taken into account in this situation, *ibid*. See above, chapter 5, p. 235.

[60] See e.g. *Boyle and Rice* v. *UK*, Series A, vol. 131, 1988. This does not apply to inter-state cases.

[61] Article 35. See Harris *et al.*, *Law of the European Convention*, pp. 608 ff.; *Jacobs and White*, chapter 24 and e.g. the *Vagrancy* case, Series A, vol. 12, 1971; 56 ILR, p. 351.

[62] One judgment was delivered in its first year of operation in 1960; 6 in 1976; 17 in 1986; 25 in 1989; 126 in 1996; 695 in 2000; 844 in 2002 and 1,503 in 2007: see *Survey of Activities 2007* (2008).

[63] See e.g. P. Mahoney, 'Judicial Activism and Judicial Self-Restraint in the European Court of Human Rights: Two Sides of the Same Coin', 11 HRLJ, 1990, p. 57.

[64] Series A, No. 258-B, 1994, para. 43.

[65] See e.g. *Handyside* v. *UK*, Series A, vol. 24, 1981; 58 ILR, p. 150.

[66] E.g. fair trial and due process questions: see e.g. *The Sunday Times* v. *UK*, Series A, vol. 30, 1979; 58 ILR, p. 491.

subsidiarity.'[67] This also means that the Court is wary of undertaking fact-finding[68] and similarly cautious about indicating which measures a state should take in order to comply with its obligations under the Convention.[69]

The Court has dealt with a number of critical issues. In *Ireland* v. *UK*,[70] for example, the Court found that the five interrogation techniques used by the UK Forces in Northern Ireland amounted to a practice of inhuman and degrading treatment, contrary to article 3.[71] In *McCann* v. *UK*,[72] the Court narrowly held that the killing by members of the security forces of three members of an IRA unit suspected of involvement in a bombing mission in Gibraltar violated the right to life under article 2. In *Golder* v. *UK*,[73] the Court inferred from article 6(1) a fundamental right of access to the courts, and the Court has emphasised the importance of fair trial mechanisms such as the principle of contempt of court.[74] The Court has also developed a considerable jurisprudence in the field of due process[75] that is having a significant impact upon domestic law, not least in the UK. A brief reference to some further examples will suffice. In the *Marckx* case,[76] the Court emphasised that Belgian legislation discriminating against illegitimate children violated the Convention, while in the *Young, James and Webster* case[77] it was held that railway workers dismissed for refusing to join a trade union in the UK were entitled to compensation. In the *Brogan* case,[78] the Court felt that periods of detention under anti-terrorist legislation in the UK before appearance before a judge or other judicial officer of at least four days violated the Convention. This

[67] Judgment of 10 May 2001, para. 103.
[68] See e.g. the *Tanli* case, Judgment of 10 April 2001.
[69] The *Vgt Verein gegen Tierfabriken* case, Judgment of 28 June 2001, para. 78.
[70] Series A, vol. 25, 1978; 58 ILR, p. 188.
[71] See also *Cyprus* v. *Turkey*, where the Court held that the discriminatory treatment of the Greek Cypriots in the Turkish occupied north of Cyprus amounted to degrading treatment, Judgment of 10 May 2001, paras. 302–11; 120 ILR, p. 10.
[72] Series A, vol. 324, 1995. [73] Series A, vol. 18, 1975; 57 ILR, p. 200.
[74] See e.g. *Handyside* v. *UK*, Series A, vol. 24, 1981; 58 ILR, p. 150; the *Dudgeon* case, Series A, vol. 45, 1982; 67 ILR, p. 395 and the *Sunday Times* case, Series A, vol. 30, 1979; 58 ILR, p. 491.
[75] See e.g. S. Trechsel, 'Liberty and Security of Person' in Macdonald *et al.*, *European System*, p. 277; P. Van Dijk, 'Access to Court', *ibid.*, p. 345; O. Jacot-Guillarmod, 'Rights Related to Good Administration (Article 6)', *ibid.*, p. 381; Harris *et al.*, *Law of the European Convention*, chapter 6; and *Digest of Strasbourg Case-law relating to the European Convention on Human Rights*, Strasbourg, 1984, vol. II (article 6).
[76] Series A, vol. 31, 1979; 58 ILR, p. 561. [77] Series A, vol. 44, 1981; 62 ILR, p. 359.
[78] Series A, vol. 145, 1988.

decision, however, prompted a notice of derogation under article 15 of the Convention by the UK government.[79]

In the important *Soering* case,[80] the Court unanimously held that the extradition of a German national from the UK to the United States, where the applicant feared he would be sentenced to death on a charge of capital murder and be subjected to the 'death row' phenomenon, would constitute a breach of article 3 of the Convention prohibiting torture and inhuman and degrading treatment and punishment. Further, the Court has held that the deportation to Iran of a woman who in the circumstances would have been at risk of punishment by stoning would violate article 3.[81] The Court has also emphasised that national security considerations had no application where article 3 violations were in question.[82]

The Court has approached its task in a generally evolving way. For example, it has deduced from a number of substantive provisions that circumstances may arise in which a state would have a positive obligation to conduct an inquiry or effective official investigation. This would arise, for instance, where individuals have been killed as a result of the use of force by agents of the state,[83] or while in custody,[84] or 'upon proof of an arguable claim that an individual, who was last seen in the custody of agents of the state, subsequently disappeared in a context which may be considered life-threatening'.[85] Similarly, the Court has held that the right to life under article 2 entails also the obligation upon states to take appropriate steps for the safeguarding of life within the jurisdiction.[86] Linked with these provisions is article 13 which requires the state party to provide a remedy, effective in law and in practice, which is able both to deal with the substance of the applicant's complaint and to provide an appropriate legal redress.[87] The jurisprudence of the Court with regard to Article 13 demonstrates that in an increasing number of cases that provision is

[79] For the text, see e.g. 7 NQHR, 1989, p. 255. See also *Brannigan and McBride v. UK*, Series A, vol. 258-B, 1993.

[80] Series A, vol. 161, 1989. See also *Mamatkulov and Abdurasulovic* v. *Turkey*, European Court of Human Rights, Judgment of 6 February 2003, paras. 66 ff.

[81] *Jabari* v. *Turkey*, Judgment of 11 July 2000.

[82] *Chahal* v. *UK*, Judgment of 15 November 1996.

[83] See e.g. *McCann* v. *UK*, Series A, vol. 324, 1996.

[84] E.g. *Tanli*, Judgment of 10 April 2001, para. 152.

[85] *Cyprus* v. *Turkey*, Judgment of 10 May 2001, para. 132; 120 ILR, p. 10.

[86] *LCB* v. *UK*, Judgment of 9 June 1998.

[87] *Soering* v. *UK*, Judgment of 7 July 1989, at para. 120. See also *Aksoy* v. *Turkey*, Judgment of 18 December 1996, at para. 95 and *Akdeniz* v. *Turkey*, Judgment of 31 May 2005, at para. 138.

understood as requiring states to undertake an effective investigation into arguable claims of the violation of Convention rights. This has included claims of violations of Articles 2, 3, 5 and 6.[88]

Execution of Court decisions is the responsibility of the Committee of Ministers.[89] This is a political body, the executive organ of the Council of Europe,[90] and consists of the Foreign Ministers, or their deputies, of all the member states.[91] Under article 15 of the Statute of the Council of Europe, the Committee of Ministers, acting on the recommendation of the Parliamentary Assembly or on its own initiative, considers the action required to further the aims of the Council of Europe, including the conclusion of conventions or agreements, and the adoption by governments of a common policy with regard to particular matters. Under article 16 of the Statute, it decides with binding effect all matters relating to the internal organisation and arrangements of the Council of Europe. Resolutions and recommendations on a wide variety of issues are regularly adopted.[92] The Committee of Ministers performs a variety of functions with regard to the protection of human rights. For example, in its Declaration on Compliance with Commitments Accepted by Member States of the Council of Europe, adopted on 10 November 1994, the Committee decided that it would consider the question of implementation of commitments concerning the situation of democracy, human rights and the rule of law in any member state which may be referred to it by member states, the Secretary-General or on the basis of a recommendation of the Parliamentary Assembly.

Where the Court has found a violation, the matter will be placed on the agenda of the Committee of Ministers and will stay there until the respondent government has confirmed that any sum awarded in just satisfaction under article 41 has been paid and/or any required individual measure has been taken and/or any general measures have been adopted

[88] E.g. *Kaya* v. *Turkey*, Judgment of 19 February 1998, at para. 107; *Ilhan* v. *Turkey*, Judgment of 27 June 2000, at para. 97; *Kurt* v. *Turkey*, Judgment of 25 May 1998, at para. 140 and *Kudla* v. *Poland*, Judgment of 26 October 2000, at paras. 146–9. The Court has noted that 'the requirements of Article 13 are broader than a Contracting State's obligation under Article 2 to conduct an effective investigation into the disappearance of a person last seen in the hands of the authorities', *Akdeniz* v. *Turkey*, Judgment of 31 May 2005, at para. 139 and *Estamirov and Others* v. *Russia*, Judgment of 12 October 2006, at para. 118.

[89] Article 46(2). [90] Article 13 of the Statute of the Council of Europe.

[91] Article 14 of the Statute of the Council of Europe.

[92] These are non-binding. Resolutions relate to the general work of the Council as such, while recommendations concern action which it is suggested should be taken by the governments of member states.

preventing new similar violations or putting an end to continuing violation.[93] Information so provided by states is to be accessible to the public, unless the Committee decides otherwise in order to protect legitimate public or private interests.[94]

Despite the reform of the Convention system by Protocol No. 11, difficulties remain. Applications continue to increase inexorably.[95] As a consequence, Protocol No. 14 provides that a single judge will be able to declare an application inadmissible and a committee of three judges will be able to rule on repetitive cases where the underlying matter is already the subject of well-established case-law. In addition, a new admissibility requirement will be added to article 35 so that an application may be declared inadmissible where the applicant has not suffered a significant disadvantage and where an examination on the merits by the Court is not seen as necessary in terms of respect for human rights, provided that the matter has been examined by a domestic tribunal. Judges will be elected for non-renewable periods of nine years.[96]

The European Social Charter[97]

The wide social and economic differences between the European states, coupled with the fact that economic and social rights often depend for their realisation upon economic resources, has meant that this area of

[93] Rules 3 and 4. Very occasionally there have been difficulties. For example, the decision of the Court in *Loizidou* v. *Turkey* awarding the applicant compensation for deprivation of property rights remains to be implemented: see e.g. *Jacobs and White*, pp. 502 ff. See also e.g. interim Committee resolutions DH (2000) 105 and DH (2001) 80. Note that where the Court finds a systemic defect in the national legal order, which has or is likely to produce a large number of applications, a remedy may be required of the state that would apply to the class of individuals in the same category: see *Broniowski* v. *Poland*, Judgment of 22 June 2004. See also V. Colandrea, 'On the Power of the European Court of Human Rights to Order Specific Non-monetary Measures', 7 *Human Rights Law Review*, 2007, p. 396.

[94] Rule 5. [95] See above, p. 354.

[96] The Protocol was opened for signature on 30 May 2004. In order to come into force it requires all contracting states to ratify it. To date, only Russia has failed to ratify. See L. Caflisch, 'The Reform of the European Court of Human Rights: Protocol No. 14 and Beyond', 6 *Human Rights Law Review*, 2006, p. 403, and A. Mowbray, 'Faltering Steps on the Path to Reform of the Strasbourg Enforcement System', 7 *Human Rights Law Review*, 2007, p. 609. Note the Interim and Final Reports of the Group of Wise Persons to the Committee of Ministers in May and November 2006, CM (2006) 88 and CM (2006) 203.

[97] See e.g. D. J. Harris, *The European Social Charter*, 2nd edn, Charlottesville, 2000, 'A Fresh Impetus for the European Charter', 41 ICLQ, 1992, p. 659, and 'The System of Supervision of the European Social Charter – Problems and Options for the Future' in *The Future*

concern has lagged far behind that of civil and political rights. Seven years of negotiations were necessary before the Charter was signed in 1961.[98]

The Charter consists of a statement of long-term objectives coupled with a list of more restricted rights. The Charter covers labour rights and trade union rights,[99] the protection of specific groups such as children, women, disabled persons and migrant workers,[100] social security rights,[101] and protection of the family.[102] In an attempt to deal with economic disparities within Europe, the Charter provides for a system whereby only ten of the forty-five paragraphs (including five 'key articles'[103]) need to be accepted upon ratification. The Charter[104] is implemented by the European Committee of Social Rights, consisting of fifteen independent experts elected for a six-year period, renewable once. States parties submit annual reports on some of the provisions of the Charter. These provisions have been divided since 2007 into four thematic groups, each group being the subject of an annual review.[105] These reports are examined by the

of European Social Policy (ed. L. Betten), 2nd edn, Deventer, 1991, p. 1; *25 Years of the European Social Charter* (eds. A. P. C. M. Jaspers and L. Betten), 1988; H. Wiebringhaus, 'La Charte Sociale Européenne: 20 Ans Après la Conclusion du Traité', AFDI, 1982, p. 934; O. Kahn-Freund, 'The European Social Charter' in *European Law and the Individual* (ed. F. G. Jacobs), London, 1976, and 'La Charte Sociale Européenne et la Convention Européenne des Droits de l'Homme', 8 HRJ, 1975, p. 527; F. M. Van Asbeck, 'La Charte Sociale Européenne' in *Mélanges Rolin*, Paris, 1964, p. 427, and T. Novitz, 'Remedies for Violation of Social Rights Within the Council of Europe' in *The Future of Remedies in Europe* (eds. C. Kilpatrick, T. Novitz and P. Skidmore), London, 2000, p. 230.

98 As at April 2008, there were thirty-nine states parties to the Charter.

99 Articles 1–6, 9–10.

100 Articles 7–8, 15, 18–19.

101 Articles 11–14.

102 Articles 16–17. An Additional Protocol was signed in 1988 which added four more economic and social rights, guaranteeing the rights to equal opportunities in employment without discrimination based on sex; information and consultation of workers within the undertaking; participation in the determination and improvement of working conditions, and social protection of elderly persons. The Protocol entered into force on 4 September 1992.

103 Out of the following seven rights: the right to work, organise, bargain collectively, social security, social and medical assistance, and the rights of the family to special protection and of migrant workers and their families to protection and assistance: see article 20.

104 As amended by the Turin Protocol 1991 and as revised in 1996. The revised Charter came into force in 1999 and gathered together the rights contained in the 1961 instrument as amended and the 1988 Protocol and added new rights, such as the right to protection against poverty and social exclusion, the right to housing, the right to protection in cases of termination of employment and the right to protection against sexual harassment in the workplace.

105 These groups are employment, training and equal opportunities; health, social security and social protection; labour rights; and children, families and migrants respectively.

Committee and its conclusions published. If a state does not implement a Committee decision, the Committee of Ministers addresses a recommendation to the state to the same effect. A system of Collective Complaints was established by an Additional Protocol adopted in 1995. This provides that international organisations of employers and trade unions, other international non-governmental organisations with consultative status with the Council of Europe placed on a list for this purpose by the Governmental Committee, and representative national organisations of employers and trade unions within the jurisdiction of the contracting party against which they have lodged a complaint may submit complaints alleging unsatisfactory application of the Charter.[106] Contracting parties may also make a declaration recognising the right of any other representative national non-governmental organisation within their jurisdiction which has particular competence in the matters governed by the Charter to lodge complaints against them.[107] Such complaints are lodged with the European Committee of Social Rights, which makes a decision on both admissibility and on the merits. Its decision is sent to the parties concerned and to the Committee of Ministers, which adopts a resolution on the matter.

The European Convention for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment[108]

This innovative Convention was signed in 1987 and came into force on 1 February 1989.[109] The purpose of the Convention is to enable the supervision of persons deprived of their liberty and, in particular, to prevent

[106] Article 1. [107] Article 2.

[108] See e.g. M. Evans and R. Morgan, *Combating Torture in Europe – The Work and Standards of the European Committee for the Prevention of Torture*, Strasbourg, 2001; J. Murdoch, 'The Work of the Council of Europe's Torture Committee', 5 EJIL, 1994, p. 220; M. Evans and R. Morgan, 'The European Torture Committee: Membership Issues', 5 EJIL, 1994, p. 249; A. Cassese, 'A New Approach to Human Rights: The European Convention for the Prevention of Torture', 83 AJIL, 1989, p. 128, and Cassese, 'Une Nouvelle Approche des Droits de l'Homme: La Convention Européenne pour la Prévention de la Torture', 93 RGDIP, 1989, p. 6; M. Evans and R. Morgan, 'The European Convention on the Prevention of Torture: Operational Practice', 41 ICLQ, 1992, p. 590, and C. Jenkins, 'An Appraisal of the Role and Work of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment', SOAS Working Paper No. 11, 1996.

[109] All forty-seven members of the Council of Europe are parties. By Protocol No. 1 non-member states of the Council of Europe are allowed to accede to the Convention at the invitation of the Committee of Ministers, CPT/Inf (93) 17. This came into force in March 2002.

the torture or other ill-treatment of such persons.[110] The Committee for the Prevention of Torture was established under the Convention,[111] placing, as it has noted, a 'proactive non-judicial mechanism alongside the existing reactive judicial mechanisms of the European Commission and European Court of Human Rights'.[112] The Committee is given a fact-finding and reporting function. The Committee is empowered to carry out both visits of a periodic nature and ad hoc visits to places of detention in order to examine the treatment of persons deprived of their liberty with a view to strengthening, if necessary, the protection of such persons from torture and from inhuman or degrading treatment or punishment. Periodic visits are carried out to all contracting parties on a regular basis, while ad hoc visits are organised when they appear to the Committee to be required in the circumstances.[113] Thus periodic visits are planned in advance.[114] The real innovation of the Convention, however, lies in the competence of the Committee to visit places of detention when the situation so warrants.[115] When the Committee is not in session, the Bureau (i.e. the President and Vice-President of the Committee)[116] may in cases of urgency decide, on the Committee's behalf, on the carrying out of such an ad hoc visit.[117] States parties agree to permit visits to any place within their jurisdiction where persons are deprived of their liberty by a public

[110] The Committee established under the Convention described its function in terms of strengthening 'the *cordon sanitaire* that separates acceptable and unacceptable treatment or behaviour': see First General Report, CPT (91) 3, para. 3.

[111] See Resolution DH (89) 26 of the Committee of Ministers adopted on 19 September 1989 for the election of the members of the Committee. Note that under Protocol No. 2 to the Convention, the members of the Committee may be re-elected twice (rather than once as specified in article 5). The Protocol came into force in March 2002.

[112] See Fifth General Report, CPT/Inf (95) 10, 1995, p. 3.

[113] See articles 1 and 7. See also the Rules of Procedure of the Committee, 1989, CPT/Inf (89) 2, especially Rules 29–35. The Rules have been amended on a number of occasions, the most recent being 12 March 1997. See also Seventeenth General Report, 2007, CPT/Inf (2007) 39, p. 14.

[114] Note that in 2001, 17 visits took place, CPT/Inf (2002) 15. By January 2003, 146 visits had taken place, 98 periodic and 48 ad hoc: see www.cpt.coe.int/en/about.htm. In the period August 2006 to July 2007, the Committee made periodic visits to ten states and ad hoc visits to six states: see Seventeenth General Report, 2007, CPT/Inf (2007) 39, pp. 20 ff.

[115] A significant number of ad hoc visits have been made, e.g. to Turkey and Northern Ireland in the early years of operation of the Committee: see Murdoch, 'Work of the Council of Europe's Torture Committee', p. 227. In 2001, for example, ad hoc visits were made to Albania, Spain, Russia, Romania, Macedonia and Turkey, CPT/Inf (2002) 15, while in 2006–7 ad hoc visits were made to Greece, Hungary, Russia, Serbia (Kosovo), Spain and Turkey.

[116] Rule 10 of the Rules of Procedure.

[117] Rule 31 of the Rules of Procedure.

authority,[118] although in exceptional circumstances, the competent authorities of the state concerned may make representations to the Committee against a visit at the time or place proposed on grounds of national defence, public safety, serious disorder, the medical condition of a person or because an urgent interrogation relating to a serious crime is in progress.[119] The Committee may interview in private persons deprived of their liberty and may communicate freely with any person whom it believes can supply relevant information.[120]

After each visit, the Committee draws up a report for transmission to the party concerned. That report will remain confidential[121] unless and until the state party concerned decides to make it public.[122] Where a state refuses to co-operate or to improve matters in the light of recommendations made, the Committee may decide, after the state has had an opportunity to make known its views, by a two-thirds majority to issue a public statement.[123] The Committee makes an annual general report on its activities to the Committee of Ministers, which is transmitted to the Parliamentary Assembly and made public.[124] The relationship between the approach taken by the Committee as revealed in its published reports and the practice under the European Human Rights Convention is

[118] Article 2. [119] Article 9(1). [120] Article 8.

[121] As does the information gathered by the Committee in relation to a visit and its consultations with the contracting state concerned, article 11(1).

[122] See Rules 40–2. Most reports have been published together with the comments of contracting states upon them: see e.g. Report to the Government of Liechtenstein, CPT/Inf (95) 7 and the Interim Report of the Government of Liechtenstein, CPT/Inf (95) 8; Report to the Government of Italy, CPT/Inf (95) 1 and the Response of the Government of Italy, CPT/Inf (95) 2; Report to the Government of the UK, CPT/Inf (94) 17 and the Response of the Government of the UK, CPT/Inf (94) 18; Report to the Government of Greece, CPT/Inf (94) 20 and the Response of the Government of Greece, CPT/Inf (94) 21. The Fifth General Report of the Committee revealed that twenty-one of the thirty-seven visit reports had been published and that there was good reason to believe that most of the remaining sixteen would be published soon, CPT/Inf (95) 10, p. 6. According to its 12th Report covering 2001, 91 of the 129 visit reports so far drawn up had been placed in the public domain. On 6 February 2002, the Committee of Ministers of the Council of Europe 'encourage[d] all Parties to the Convention to authorise publication, at the earliest opportunity, of all CPT visit reports and of their responses', CPT/Inf (2002) 15. See also CPT/Inf (2007), Appendix 4.

[123] Article 10(2). See e.g. the public statements concerning police detention conditions in Turkey, CPT/Inf (93) 1, paras. 21 and 37. The situation concerning Chechnya, Russia, has also led to public statements being made in 2001, 2003 and 2007: see e.g. CPT/Inf (2002) 15, Appendix 6 and CPT/Inf (2007), Appendix 9.

[124] Article 12. This is subject to the rules of confidentiality in article 11. Note that the Committee reports also include general substantive sections for the general guidance of states: see, for a collection of these, *The CPT Standards*, CPT/Inf/E (2002) 1.

particularly interesting and appears to demonstrate that the Committee has adopted a more flexible attitude to issues relating to detention and ill-treatment.[125]

The Council of Europe Framework Convention for the Protection of National Minorities[126]

The question of minorities is addressed in the European Convention on Human Rights only in terms of one possible ground of prohibited discrimination stipulated in article 14. However, the Council of Europe has been dealing with the issue of minorities in a more vigorous manner in more recent years. Resolution 192 (1988) of the Standing Conference of Local and Regional Authorities of Europe proposed the text of a European Charter for Regional or Minority Languages, while Recommendation 1134 (1990) of the Parliamentary Assembly on the Rights of Minorities called for either a protocol to the European Convention or a special convention on this topic.[127] The Committee of Ministers adopted on 22 June 1992 the European Charter for Regional or Minority Languages.[128] Under this Charter, a variety of measures to promote the use of regional or minority languages is suggested, for example, in the fields of education, court proceedings, public services, media, cultural facilities, economic and social life and transfrontier exchanges. Implementation is by periodic reports to the Secretary-General of the Council of Europe in a form prescribed by the Committee of Ministers.[129] Such reports are examined by a committee of experts,[130] composed of one member per contracting party, nominated by the party concerned, appointed for a period of six years and eligible for re-appointment.[131] Bodies or associations legally established in a party may draw the attention of the committee of experts to matters relating to the undertakings entered into by that party and, on the basis of states' reports, the committee will itself report to the Committee of Ministers. The committee of experts' report may be accompanied by the comments which the parties have been requested to make and may also contain the proposals of the committee of experts to the Committee of Ministers for

[125] See e.g. Murdoch, 'Work of the Council of Europe's Torture Committee', pp. 238 ff.
[126] See generally, P. Thornberry and M. Estebanez, *The Council of Europe and Minorities*, Strasbourg, 1994, and G. Pentasugglia, *Minorities in International Law*, Strasbourg, 2002.
[127] See also Recommendations 1177 (1992) and 1201 (1993).
[128] It came into force in March 1998.
[129] Article 15. See e.g. the reports by Germany, MIN-LANG/PR (2000) 1 and by the UK, MIN-LANG/PR (2002) 5.
[130] Article 16. See e.g. the report on Germany, ECRML (2002) 1. [131] Article 17.

the preparation of such recommendations of the latter body to one or more of the parties as may be required.[132] The Secretary-General also makes a two-yearly detailed report to the Parliamentary Assembly on the application of the Charter.[133] The Committee of Ministers may invite any non-member state of the Council of Europe to accede to the Charter.[134]

At the Vienna Meeting of Heads of State and Government of the Council of Europe in October 1993, it was decided that a legal instrument would be drafted with regard to the protection of national minorities, and appendix II of the Vienna Declaration instructed the Committee of Ministers to work upon both a framework convention on national minorities and a draft protocol on cultural rights complementing the European Convention on Human Rights.[135] The Framework Convention for the Protection of National Minorities was adopted by the Committee of Ministers on 10 November 1994 and opened for signature on 1 February 1995.[136] The Framework Convention underlines the right to equality before the law of persons belonging to national minorities and prohibits discrimination based on belonging to a national minority. Contracting parties to the Framework Convention undertake to adopt, where necessary, adequate measures to promote in all areas of economic, social, political and cultural life, full and effective equality between persons belonging to a national minority and to the majority.[137] The parties agree to promote the conditions necessary for persons belonging to minorities to develop their culture and to preserve the essential elements of their identity, namely their religion, language, traditions and cultural heritage.[138] The collective expression of individual human rights of persons belonging to national minorities is to be respected,[139] while in areas inhabited by such persons traditionally

[132] See e.g. the Committee of Ministers Recommendations to the Netherlands, RecChL (2001) 1 and to Germany, RecChL (2002) 1.

[133] Article 16. See the first biennial report in 2000, Doc. 8879, and the second in 2002, Doc. 9540.

[134] Article 20.

[135] See 14 HRLJ, 1993, pp. 373 ff. See also the Explanatory Report to the Framework Convention for the Protection of National Minorities, 1995. An ad hoc Committee for the Protection of National Minorities (CAHMIN) was established. Note that in January 1996, it was decided to suspend the work of the Committee on the drafting of an Additional Protocol: see CAHMIN (95) 22 Addendum, 1996.

[136] The Convention came into force on 1 February 1998.

[137] Article 4.

[138] Article 5. The parties also agree to refrain from assimilation policies and practices where this is against the will of persons belonging to national minorities.

[139] E.g. the freedoms of peaceful assembly, association, expression and thought, conscience and religion, article 7. See also articles 8 and 9.

or in substantial numbers, the parties shall endeavour to ensure as far as possible the condition which would make it possible to use the minority languages in relations between those persons and the administrative authorities.[140] By article 15, the parties agree to refrain from measures which alter the geographic proportions of the population in areas inhabited by persons belonging to national minorities.

The implementation of this Framework Convention is monitored by the Committee of Ministers of the Council of Europe[141] with the assistance of an advisory committee of experts[142] and on the basis of periodic reports from contracting states.[143] The Committee of Ministers adopted rules on monitoring arrangements in 1997[144] and the Advisory Committee started operating in June 1998. The Committee examines state reports,[145] which are made public by the Council of Europe upon receipt from the state party, and prepares an opinion on the measures taken by that party.[146] The Committee may request additional information from a state party or other sources, including individuals and NGOs, but cannot deal with individual complaints. It may hold meetings with governments, and has to do so if the government concerned so requests, and may hold meetings with others than the governments concerned, during the course of country visits. Having received the opinion of the Advisory Committee, the Committee of Ministers will take the final decisions (called conclusions) concerning the adequacy of the measures taken by the state party. Where appropriate, it may also adopt recommendations in respect of the state party concerned. The conclusions and recommendations of the Committee of Ministers shall be made public upon their adoption, together with

[140] Upon request and where such a request corresponds to a real need, article 10(2). Similarly with regard to the display of traditional local names, street names and other topographical indications intended for the public in the minority language, article 11(3), and with regard to adequate opportunities for being taught the minority language or for receiving instruction in that language, article 14(2).

[141] Article 24. Note that parties which are not members of the Council of Europe shall participate in the implementation mechanism according to modalities to be determined. Accordingly, the Federal Republic of Yugoslavia became a party to the Convention on 11 May 2001 and its first report became due on 1 September 2002.

[142] Article 26. [143] Article 25. The first reports became due on 1 February 1999.

[144] Resolution (97) 10 and see H(1998)005 rev.11.

[145] Guidelines for such reports have been issued by the Committee: see e.g. ACFC/INF(2003)001 and ACFC/INF(1998)001.

[146] See, for a list of opinions delivered as of January 2003, ACFC(2002)Opinions bil. See also the Collection of Resolutions and Recommendations Referred to by the Advisory Committee in its Opinions, 2007 and the Activities of the Council of Europe in the Field of the Protection of National Minorities, DH-MIN (2005) 003.

any comments the state party may have submitted in respect of the opinion delivered by the Advisory Committee. The opinion of the Advisory Committee is as a rule made public together with the conclusions of the Committee of Ministers. A first cycle of monitoring began in 1998 with thirty-four opinions adopted by the Advisory Committee and twenty-nine resolutions adopted by the Committee of Ministers. A second cycle of monitoring began in February 2004.

While the range of rights accorded to members of minorities is clearly greater than that envisaged in UN instruments,[147] its ambit is narrower in being confined to 'national minorities'. The Framework Convention itself provides no definition of that term since no consensus existed as to its meaning,[148] although Recommendation 1201 (1993) adopted by the Parliamentary Assembly and reaffirmed in Recommendation 1255 (1995) suggests that it refers to persons who reside on the territory of the state concerned and are citizens of it; maintain longstanding, firm and lasting ties with that state; display distinctive ethnic, cultural, religious or linguistic characteristics; are sufficiently representative, although smaller in numbers than the rest of the population of that state or of a region of that state; and are motivated by a concern to preserve together that which constitutes their common identity, including their culture, their traditions, their religion or their language. The narrowing of regard to persons belonging to national minorities who are citizens of the state concerned is perhaps a matter of concern.[149] The issue of the protection of minority rights is the subject of continuing discussion as to both their nature and scope.[150]

The Council of Europe has adopted measures with regard to other areas of human rights activities of some relevance to the above issues.[151]

[147] See above, p. 293.

[148] See the Explanatory Report to the Convention, which states that, 'It was decided to adopt a pragmatic approach, based on the recognition that at this stage, it is impossible to arrive at a definition capable of mustering general support of all Council of Europe member States', H(1995)010, para. 12. The European Court of Human Rights has also referred to the problem of defining national minorities: see *Gorzelik* v. *Poland*, Judgment of 20 December 2001, para. 62.

[149] See e.g. R. Higgins, 'Minority Rights Discrepancies and Divergencies Between the International Covenant and the Council of Europe System' in *Liber Amicorum for Henry Schermers*, The Hague, 1994.

[150] See e.g. Parliamentary Assembly Recommendation Rec 1492 (2001) and the response of the Advisory Committee dated 14 September 2001.

[151] See e.g. the European Charter of Local Self-Government, 1985; the European Convention on the Participation of Foreigners in Public Life at Local Level, 1992; the European Outline Convention on Transfrontier Co-operation between Territorial Communities or

The European Union[152]

The Treaty of Rome, 1957 established the European Economic Community and is not of itself a human rights treaty. However, the European Court of Justice has held that subsumed within Community law are certain relevant unwritten general principles of law, emanating from several sources.[153] The Court noted in the *Internationale Handelsgesellschaft* case[154] that 'respect for fundamental rights forms an integral part of the general principles of law protected by the Court of Justice',[155] while in *Nold* v. *Commission*,[156] the Court emphasised that measures incompatible with fundamental rights recognised and protected by the constitutions of member states could not be upheld. It was also held that international treaties for the protection of human rights on which member states have collaborated, or of which they are signatories, could supply guidelines which should be followed within the framework of Community law.[157] The European Convention on Human Rights is clearly the prime example of this and it has been referred to on several occasions by

Authorities, 1980; the European Convention on the Legal Status of Migrant Workers, 1977 and the European Convention on the Exercise of Children's Rights, 1995.

[152] See e.g. D. Chalmers and A. Tomkins, *European Union Public Law*, Cambridge, 2007; *European Fundamental Rights and Freedoms* (ed. D. Ehlers), Berlin, 2007; *The European Union and Human Rights* (eds. N. Neuwahl and A. Rosas), Dordrecht, 1995; *The EU and Human Rights* (ed. P. Alston), Oxford, 1999; L. Betten and N. Grief, *EU Law and Human Rights*, London, 1998; S. Weatherill and P. Beaumont, *EU Law*, 3rd edn, London, 1999; T. C. Hartley, *The Foundations of European Community Law*, 6th edn, Oxford, 2007; L. N. Brown and T. Kennedy, *The Court of Justice of the European Communities*, 4th edn, London, 1994, chapter 15; M. Mendelson, 'The European Court of Justice and Human Rights', 1 *Yearbook of European Law*, 1981, p. 126, and H. Schermers, 'The European Communities Bound by Fundamental Human Rights', 27 *Common Market Law Review*, 1990, p. 249.

[153] See e.g. *Stauder* v. *City of Ulm* [1969] ECR 419; *Internationale Handelsgesellschaft* [1970] ECR 1125; *Nold* v. *EC Commission* [1974] ECR 491; *Kirk* [1984] ECR 2689 and *Johnston* v. *Chief Constable of the RUC* [1986] 3 CMLR 240. See also the Joint Declaration by the European Parliament, the Council and the Commission of 5 April 1979, *Official Journal*, 1977, C103/1; the Joint Declaration Against Racism and Xenophobia, 11 June 1986, *Official Journal*, 1986, C158/1 and the European Parliament's Declaration of Fundamental Rights and Freedoms, 1989, *EC Bulletin*, 4/1989.

[154] [1970] ECR 1125, 1134.

[155] See also *Re Accession of the European Community to the Convention for the Protection of Human Rights and Fundamental Freedoms* 108 ILR, p. 225 and *Kremzow* v. *Austria* [1997] ECR I-2629; 113 ILR, p. 264.

[156] [1974] ECR 491, 507.

[157] See e.g. *Hauer* v. *Land Rheinland-Pfaltz* [1979] ECR 3727 and *SPUC* v. *Grogan* [1991] ECR I-4685.

the Court.[158] Indeed the question has also been raised and considered without resolution as to whether the Community should itself accede to the European Convention on Human Rights.[159]

The Treaty on European Union (the Maastricht Treaty), 1992 amended the Treaty of Rome and established the European Union, founded on the European Communities supplemented by the policies and forms of co-operation established under the 1992 Treaty. Article F(2) of Title I noted that the Union 'shall respect fundamental rights', as guaranteed by the European Convention on Human Rights and as they result from common constitutional traditions, 'as general principles of Community law'. Under article K.1 of Title VI, the member states agreed that asylum, immigration, drug, fraud, civil and criminal judicial co-operation, customs co-operation and certain forms of police co-operation would be regarded as 'matters of common interest', which under article K.2 would be dealt with in compliance with the European Convention on Human Rights and the Convention relating to the Status of Refugees, 1951. The provisions under Title V on the Common Foreign and Security Policy may also impact upon human rights, so that, for instance, the European Union sent its own human rights observers to Rwanda within this framework.[160] From the early 1990s, the European Communities began to include human rights references in its trade and aid policies, formalised in article 177(2), and from the mid-1990s, all trade and co-operation agreements contained provisions concerning respect for human rights.[161]

The Treaty of Amsterdam, which came into force on 1 May 1999, inserted a new article 6 into the Treaty on European Union, which stated that the European Union 'is founded on the principles of liberty, democracy,

[158] See e.g. *Rutili* [1975] ECR 1219; *Valsabbia* v. *Commission* [1980] ECR 907; *Kirk* [1984] ECR 2689; *Dow Chemical Ibérica* v. *Commission* [1989] ECR 3165; *ERT* [1991] ECR I-2925 and *X* v. *Commission* [1992] ECR II-2195 and 16 HRLJ, 1995, p. 54. Note also the Joint Declaration on Human Rights, 1977, by which the three EC institutions undertook to respect the European Convention on Human Rights, OJ 1977 C103/1.

[159] See e.g. 'Accession of the Communities to the European Convention on Human Rights', *EC Bulletin*, Suppl. 2/79. Note that the President of the European Court of Human Rights suggested in January 2003 that the EU should accede to the Convention: see www.echr.coe.int/eng/Edocs/SpeechWildhaber.htm.

[160] See J. Van Der Kaauw, 'European Union', 13 NQHR, 1995, p. 173. Note, however, that the European Court of Justice held in Opinion 2/94 that the EC had no competence to accede to the European Convention as it did not have any general human rights competence, [1996] ECR I-1759.

[161] See e.g. E. Riedel and M. Will, 'Human Rights Clauses in External Agreements' in Alston, *The EU and Human Rights*, p. 723.

respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States', and provided that the Union 'shall respect fundamental rights as guaranteed by' the European Convention on Human Rights.[162] Member states violating these principles in a 'serious and persistent' manner risk the suspension of certain of their rights deriving from the application of the Union Treaty.[163] In addition, candidate countries have to respect these principles to join the Union.[164] The European Union adopted the Charter of Fundamental Rights in December 2000. This instrument, for example, notes the principle of the equality before the law of all people,[165] prohibits discrimination on any ground,[166] provides for a number of workers' rights and citizens' rights, and requests the Union to protect cultural, religious and linguistic diversity. Quite what the legal status of this Charter was[167] and how it related to the Strasbourg system were open questions.[168] However, Advocates-General of the European Court of Justice have been referring to the Charter with great frequency as part of a shared set of values within the Union,[169] as has the Court of First Instance[170] and more recently the European Court of Justice.[171] Further, the Lisbon Treaty, 2007 (which is not as yet in force) provides for article 6 to be revised so that the Charter would have legally binding force[172] and

[162] See the discussion by the European Court of Justice of these principles in the context of the European Arrest Warrant, C-303/05, *Advocaten voor de Wereld*, Judgment of 3 May 2007. See A. Hinarejos, 'Recent Human Rights Developments in the EU Courts', 7 *Human Rights Law Review*, 2007, p. 793.

[163] Article 7. See also the amendments introduced by the Nice Treaty, 2001.

[164] Article 49. See also the Copenhagen Criteria 1993, including stable institutions guaranteeing democracy, the rule of law, human rights and the protection of minorities, EC Bulletin 6-1993, I.13.

[165] Article 20. [166] Article 21.

[167] Note the official UK view that it is a political declaration and not legally binding, 365 HC Deb., col. 614W, 27 March 2001; UKMIL, 72 BYIL, 2001, p. 564.

[168] However, article 52(3) of the Charter specifies that any rights that 'correspond' to those already articulated by the Human Rights Convention shall have the same meaning and scope.

[169] See e.g. *BECTU* [2001] ECR I-4881 and *Netherlands* v. *Parliament and Council* [2001] ECR I-7079.

[170] See e.g. *Jégo-Quéré* v. *Commission* [2002] ECR II-2365.

[171] See e.g. *European Parliament* v. *Council* [2006] ECR I-5769 and C-411/04 P, *Salzgitter Mannesmann* v. *Commission*, Judgment of 25 January 2007.

[172] Although a Protocol to the treaty provides that the Charter does not extend the ability of the Court of Justice to find the law or practices of the UK and Poland to be inconsistent with the Charter and that no new justiciable rights applicable to these states have been created, and that a provision of the Charter referring to national laws and practices shall

opens the way for the accession of the EU to the European Convention on Human Rights.

The Union, more generally, seeks in some measure to pay regard to human rights as internationally defined, in its activities.[173] As noted above, there appears now to be a formal policy, for example, to include a human rights clause in co-operation agreements with third countries, which incorporates a provision for the suspension of the agreement in case of a breach of the essential elements of the agreement in question, including respect for human rights.[174] The European Parliament is also active in consideration of human rights issues.[175]

The OSCE (Organisation for Security and Co-operation in Europe)[176]

What was initially termed the 'Helsinki process', and which more formally was referred to as the Conference on Security and Co-operation in Europe, developed out of the Final Act of the Helsinki meeting, which was signed on 1 August 1975 after two years of discussions by the representatives of the then thirty-five participating states.[177] The Final Act[178] dealt primarily with questions of international security and state relations, and was seen

only apply to the UK and Poland to the extent that the rights or principles in the Charter are recognised in the laws and practices of these two states.

173 See e.g. the Commission Report on the Implementation of Actions to Promote Human Rights and Democracy, 1994, COM 9(5) 191, 1995.

174 See e.g. 13 NQHR, 1995, pp. 276 and 460.

175 See e.g. the Annual Reports of the Parliament on Respect for Human Rights in the European Community, www.europarl.europa.eu/comparl/afet/droi/annual_reports.htm.

176 See, for example, A. Bloed, 'Monitoring the CSCE Human Dimension: In Search of its Effectiveness' in *Monitoring Human Rights in Europe* (eds. Bloed *et al.*), Dordrecht, 1993, p. 45; *The CSCE* (ed. A. Bloed), Dordrecht, 1993; *Human Rights, International Law and the Helsinki Accord* (ed. T. Buergenthal), Montclair, NJ, 1977; J. Maresca, *To Helsinki – The CSCE 1973–75*, Durham, 1987; T. Buergenthal, 'The Helsinki Process: Birth of a Human Rights System' in *Human Rights in the World Community* (eds. R. Claude and B. Weston), 2nd edn, Philadelphia, 1992, p. 256; *Essays on Human Rights in the Helsinki Process* (eds. A. Bloed and P. Van Dijk), Dordrecht, 1985; A. Bloed and P. Van Dijk, *The Human Dimension of the Helsinki Process*, Dordrecht, 1991; D. McGoldrick, 'Human Rights Developments in the Helsinki Process', 39 ICLQ, 1990, p. 923, and McGoldrick, 'The Development of the Conference on Security and Co-operation in Europe – From Process to Institution' in *Legal Visions of the New Europe* (eds. B. S. Jackson and D. McGoldrick), London, 1993, p. 135. See also the *OSCE Handbook* published regularly and available at www.osce.org/publications/handbook/files/handbook.pdf.

177 I.e. all the states of Western and Eastern Europe, except Albania, plus the United States and Canada.

178 For the text, see, for example, 14 ILM, 1975, p. 1292.

as the method by which the post-war European territorial settlement would be finally accepted. In the Western view, the Final Act constituted a political statement and accordingly could not be regarded as a binding treaty. Nonetheless, the impact of the Final Act on developments in Europe has far exceeded the impact of most legally binding treaties.

The Final Act set out in 'Basket I' a list of ten fundamental principles dealing with relations between participating states, principle 7 of which refers to 'respect for human rights and fundamental freedoms, including freedom of thought, conscience, religion and belief'. 'Basket III' dealt with Co-operation in Humanitarian and Other Fields and covered family reunification, free flow of information and cultural and educational co-operation.[179]

At the third 'follow-up' meeting at Vienna in January 1989, great progress regarding human rights occurred,[180] primarily as a result of the changed attitudes in the then USSR and in Eastern Europe, especially as regards the extent of the detailed provisions and the recognition of concrete rights and duties. The part entitled 'Questions Relating to Security in Europe' contained a Principles section, in which *inter alia* the parties confirmed their respect for human rights and their determination to guarantee their effective exercise. Paragraphs 13–27 contain in a detailed and concrete manner a list of human rights principles to be respected, ranging from due process rights to equality and non-discrimination and the rights of religious communities, and from the rights of minorities to the rights of refugees. The provision in which states agree to respect the right of their citizens to contribute actively, either individually or collectively, to the promotion and protection of human rights, constitutes an important innovation of great practical significance, as does the comment that states will respect the right of persons to observe and promote the implementation of CSCE provisions.

The part entitled 'Co-operation in Humanitarian and Other Fields' included an important section on Human Contacts in which the right to leave one's country and return thereto was reaffirmed. It was decided that all outstanding human contacts applications would be resolved within six months and that thereafter there would be a series of regular reviews. Family reunion issues were to be dealt with in as short a time as possible and in normal practice within one month. The parties committed

[179] 'Basket II' covered co-operation in the fields of economics, science, technology and the environment.

[180] See the text of the Concluding Document in 10 HRLJ, 1989, p. 270.

themselves to publishing all laws and statutory regulations concerning movement by individuals within their territory and travel between states, an issue that had caused a great deal of controversy, while the right of members of religions to establish and maintain personal contacts with each other in their own and other countries, *inter alia* through travel and participation in religious events, was proclaimed.[181]

In a further significant development, the Vienna Concluding Document contained a part entitled 'Human Dimension of the CSCE' in which some implementation measures were provided for. The participating states decided to exchange information and to respond to requests for information and to representations made to them by other participating states on questions relating to the human dimension of the CSCE. Bilateral meetings would be held with other participating states that so request, in order to examine such questions, while such questions could be brought to the attention of other participating states through diplomatic channels or raised at further 'follow-up' meetings or at meetings of the Conference on the Human Dimension. The procedure is confidential.[182]

The Concluding Document of the Copenhagen meeting in 1990[183] constituted a further crucial stage in the development of the process. The participating states proclaimed support for the principles of the rule of law, free and fair elections, democracy, pluralism and due process rights. Paragraph 1 of Chapter 1 emphasised that the protection and promotion of human rights was one of the basic purposes of government. A variety of specific rights, including the freedoms of expression, assembly, association, thought, conscience and religion, and the rights to leave one's own country and return and to receive legal assistance, the rights of the child, the rights of national minorities and the prohibition of torture are proclaimed. Time-limits were imposed with regard to the Vienna Human Dimension mechanism.

[181] Paragraphs 18 and 32.

[182] The mechanism was used over 100 times between 1989 and 1992: see Bloed and Van Dijk, *Human Dimension*, p. 79, and McGoldrick, 'Development of the CSCE', p. 139. See also H. Tretter, 'Human Rights in the Concluding Document of the Vienna Follow-up Meeting of the Conference on Security and Co-operation in Europe of January 15, 1989', 10 HRLJ, 1989, p. 257; R. Brett, *The Development of the Human Dimension Machinery*, Essex University, 1992, and A. Bloed and P. Van Dijk, 'Supervisory Mechanisms for the Human Dimension of the CSCE: Its Setting-up in Vienna, its Present Functioning and its Possible Development towards a General Procedure for the Peaceful Settlement of Disputes' in Bloed and Van Dijk, *Human Dimension*, p. 74.

[183] See 8 NQHR, 1990, p. 302 and Cm 1324 (1990).

The Charter of Paris, adopted at the Summit of Heads of State and of Government in 1990,[184] called for more regular consultations at ministerial and senior official level and marked an important stage in the institutionalisation of the process, with a Council of Foreign Ministers, a Committee of Senior Officials and a secretariat being established. The section on Human Rights, Democracy and Rule of Law consisted of a list of human rights, including the right to effective remedies, full respect for which constituted 'the bedrock' for the construction of 'the new Europe'. The Moscow Human Dimension meeting of 1991[185] described the Human Dimension mechanism as an essential achievement of the CSCE process and it was strengthened. The time-limits provided for at Copenhagen were reduced[186] and a resource list of experts was to be established,[187] with three experts being appointed by each participating state in order to allow for CSCE missions to be created to assist states requesting such help in facilitating the resolution of a particular question or problem related to the human dimension of the CSCE. The observations of the missions of experts together with the comments of the state concerned were to be forwarded to CSCE states within three weeks of the submission of the observations to the state concerned and might be discussed by the Committee of Senior Officials, who could consider follow-up measures.[188]

By the time of the Helsinki Conference in 1992, the number of participating states had risen to fifty-two,[189] the political climate in Europe having changed dramatically after the establishment of democratic regimes in Eastern Europe, the ending of the Soviet Union and the rise of tensions in Yugoslavia and other parts of Eastern Europe. The participating states strongly reaffirmed that Human Dimension commitments were matters of direct and legitimate concern to all participating states and did not belong exclusively to the internal affairs of the states concerned, while

[184] See 30 ILM, 1991, p. 190. [185] See 30 ILM, 1991, p. 1670 and Cm 1771 (1991).

[186] So that, for example, the written responses to requests for information were to occur within ten days, and the bilateral meetings were to take place as a rule within one week of the date of request, Section I(1).

[187] The Council of Ministers of the CSCE subsequently decided that the Office of Democratic Institutions and Human Rights (formerly the Office for Free Elections) would be the appropriate institution establishing the resource list.

[188] A variety of missions have now been employed in, for example, Nagorno-Karabakh, Georgia, Chechnya, Moldova and Croatia. See generally *OSCE Handbook*, Vienna, 2007.

[189] There are currently fifty-six participating states. Note also the report entitled 'Common Purposes: Towards a More Effective OSCE' produced by a Panel of Eminent Persons in 2005 and the new OSCE Rules of Procedure adopted in 2006: see *OSCE Handbook*.

gross violations of such commitments posed a special threat to stability. This reference of the link between human rights and international stability was to increase in the following years. At Helsinki, the CSCE was declared to be a regional arrangement in the sense of Chapter VIII of the UN Charter.[190] The post of High Commissioner on National Minorities was established in order to provide early warning and early action where appropriate, concerning tensions relating to national minority issues that have the potential to develop into a conflict within the CSCE area affecting peace, stability or relations between participating states.[191] The High Commissioner, who acts in confidence, was also mandated to collect relevant information and make visits. Where the High Commissioner concludes that there is a *prima facie* risk of potential conflict in such situations, an early warning is to be issued, which will be promptly conveyed by the Chairman-in-Office of the CSCE to the Committee of Senior Officials. The High Commissioner is able to make recommendations to participating states regarding the treatment of national minorities.[192] In addition, a number of general recommendations have been made with regard to Roma[193] and other matters.[194]

As far as the Human Dimension mechanism was concerned, the Conference decided to permit any participating state to provide information on situations and cases that are the subject of requests for information, and it was also decided that in years in which a review conference was not being held, a three-week meeting at expert level of participating states would be organised in order to review implementation of the CSCE Human

[190] See further below, p. 1273.

[191] See Section II of the Helsinki Decisions. Note that the High Commissioner deals with situations and not with individual complaints. See also *Quiet Diplomacy in Action: The OSCE High Commissioner on National Minorities* (ed. W. A. Kemp), The Hague, 2001; K. Drzewicki, 'The OSCE High Commissioner on National Minorities – Confronting Traditional and Emerging Challenges' in *OSCE and Minorities. Assessment and Priorities* (ed. S. Parzymies), Warsaw, 2007, and J. Packer, 'The OSCE High Commissioner on National Minorities: Pyrometer, Prophylactic, Pyrosvestis' in *Minorities, Peoples and Self-Determination* (eds. N. Ghanea and A. Xanthaki), Leiden, 2005, p. 249.

[192] See generally www.osce.org/hcnm/documents.html.

[193] See www.osce.org/documents/hcnm/2000/03/241_en.pdf.

[194] See e.g. the Hague Recommendation on Education Rights of National Minorities, 1996; the Oslo Recommendations on Linguistic Rights of National Minorities, 1998; the Lund Recommendations on Effective Participation of National Minorities in Public Life, 1999; the Guidelines on the Use of Minority Languages in the Broadcast Media, 2003, and the Recommendations on Policing in Multi-Ethnic Societies, 2006: see www.osce.org/hcnm/documents.html.

Dimension commitments. In addition, it was provided that the Office of Democratic Institutions and Human Rights would begin organising Human Dimension seminars.[195]

The next major step in the process took place at Budapest at the end of 1994.[196] The CSCE, in recognition of the institutional changes underway in recent years, changed its name to the OSCE (the Organisation for Security and Co-operation in Europe) and took a number of steps in the field of security and conflict management. The Conference emphasised that human rights, the rule of law and democratic institutions represented a crucial contribution to conflict prevention and that the protection of human rights constituted an 'essential foundation of democratic civil society',[197] and it was decided that Human Dimension issues would be regularly dealt with by the Permanent Council,[198] with the Office of Democratic Institutions and Human Rights (based in Warsaw) acting as the main institution of the Human Dimension in an advisory capacity to the organisation, with enhanced roles in election monitoring and the dispatch of missions.[199] States were encouraged to use the Human Dimension mechanism (now termed the Moscow Mechanism) and the Chairman-in-Office was encouraged to inform the Permanent Council of serious cases of alleged non-implementation of Human Dimension commitments. Further, an OSCE Representative on Freedom of the Media was appointed in 1997 and the role increased in 2004 to include the task of combating the misuse of hate speech regulations in order to silence legitimate dissent and alternative opinion.[200] Thus, step by step over recent years, the Helsinki process has transformed itself into an institutional structure with a particular interest in describing and requiring the implementation of human rights.[201]

[195] Section VI of the Helsinki Decisions and www.osce.org/odihr/.

[196] See 5 HRLJ, 1994, p. 449.

[197] Section VIII of the Budapest Decisions.

[198] This group is responsible for the day-to-day operations of the OSCE and its members are the permanent representatives of the member states meeting weekly. It is based in Vienna.

[199] Note also that the Monitoring Section within the ODIHR analyses human rights developments and compliance with Human Dimension commitments by participating states and alerts the Chairman-in-Office to serious deteriorations in respect for human rights.

[200] See *OSCE Handbook*, p. 34 and the Sofia Decision 12, para. 16, 2004.

[201] An OSCE Advisory Panel for the Prevention of Torture was established in 1998: see e.g. the Final Report of the Supplementary Human Dimension Meeting on Human Rights and Inhuman Treatment and Punishment 2000, www.osce.org/documents/odihr/2000/03/1787_en.pdf, and a restructured Advisory Panel of Experts on Freedom of Religion or Belief was established in 2000. Note that as a consequence of the Dayton Peace Agreement on Bosnia, 1995, it was agreed that the OSCE would supervise elections in that country and would closely monitor human rights throughout Bosnia and would

The OSCE has also established a number of missions in order to help mitigate conflicts[202] and adopted a Treaty on Open Skies and a Convention on Conciliation and Arbitration within the OSCE in 1992. Although some overlay with the Council of Europe system does exist, the fact that a large proportion of participating states are now members of the Council of Europe obviates the most acute dangers inherent in differing human rights systems. Nevertheless, as the Council of Europe system moves beyond the strictly legal enforcement stage and as the OSCE develops and strengthens its institutional mechanisms, some overlapping is inevitable. However, in general terms, the OSCE system remains politically based and expressed, while the essence of the Council of Europe system remains juridically focused.

The CIS Convention on Human Rights and Fundamental Freedoms[203]

The Commonwealth of Independent States, which links together the former Republics of the Soviet Union (with the exception of the three Baltic states), adopted a Convention on Human Rights in May 1995. Under this Convention, a standard range of rights is included, ranging from the right to life, liberty and security of person, equality before the judicial system, respect for private and family life, to freedom of religion, expression, assembly and the right to marry. The right to work is included (article 14) as is the right to social security, the right to education and the right of every minor child to special protective measures (article 17). The right of persons belonging to national minorities to express and develop their ethnic, linguistic, religious and cultural identity is protected (article 21), while everyone has the right to take part in public affairs, including voting (article 29). It is intended that the implementation of the Convention be monitored by the Human Rights Commission of the CIS (article 34). Under Section II of the Regulations of the Human Rights Commission, adopted in September 1993, states parties may raise human rights matters falling within the

appoint an international human rights Ombudsman: see MC (5) Dec/1, 1995. The OSCE also has a role in Kosovo: see *OSCE Handbook*, p. 46.

[202] See OSCE Handbook, pp. 39 ff. Of particular importance, perhaps, is the Minsk Process, dealing with the Nagorno-Karabakh conflict, *ibid.*, p. 76.

[203] See H/INF (95) 3, pp. 195 ff. See also the essays contained in 17 HRLJ, 1996 concerning the CIS and human rights.

Convention with other states parties and, if no satisfactory response is received within six months, the matter may be referred to the Commission. Domestic remedies need to be exhausted. Under Section III of the Regulations, the Commission may examine individual and collective applications submitted by any person or non-governmental organisation. The Convention entered into force on 11 August 1998 upon the third ratification.

Concerned with the level of protection afforded under this Convention (in particular the facts that the members of the Commission are appointed representatives of member states and the Commission implements the instrument by means of recommendations) and the problems of co-existence with the Council of Europe human rights system, the Parliamentary Assembly of the Council of Europe adopted a resolution in 2001 calling upon member or applicant states which are also members of the CIS not to sign or ratify the CIS Convention. In addition, it recommended that those that already had should issue a legally binding declaration stating that the European Convention procedures would not be replaced or weakened through recourse to the CIS Convention procedures.[204]

The Human Rights Chamber of Bosnia and Herzegovina

The Chamber was established under Annex 6 of the Dayton Peace Agreement, 1995.[205] It consisted of fourteen members, eight of whom (not to be citizens of Bosnia or of any neighbouring state) were appointed by the Committee of Ministers of the Council of Europe.[206] The Chamber considered alleged or apparent violations of human rights as provided in the European Convention on Human Rights, as well as alleged or apparent discrimination on any ground. Applications could be submitted by all persons or groups of persons, including by way of referral from the Ombudsman, claiming to be a victim of a violation or acting on behalf

[204] Resolution 1249 (2001). See also recommendation 1519 (2001) stating that recourse to the CIS Commission should not be regarded as another procedure of international settlement within the meaning of article 35(2)b of the European Convention.

[205] As part of the Commission on Human Rights, the other part being the Ombudsman: see article II of Annex 6 of the Dayton Agreement.

[206] See resolutions (93)6 and (96)8. It should be noted that, at the time, Bosnia was not a member of the Council of Europe.

of victims who were deceased or missing.[207] There were a number of admissibility requirements similar to those of international human rights bodies, including the exhaustion of effective remedies and the submission of the application within six months of the date of any final decision. The Chamber normally sat in panels[208] of seven, four of whom were not to be citizens of Bosnia or a neighbouring state. In such cases, the decision could be reviewed by the full Chamber.[209] The President could refer to the plenary Chamber any application not yet placed before a panel where a serious question was raised as to the interpretation of the Agreement or any other international agreement therein referred to or it appeared that a final decision should be taken without delay or there appeared to be any other justified reason.[210] Decisions were final and binding.[211] The work of the Chamber, primarily concerning housing-related issues[212] and property rights,[213] steadily increased.[214] According to the Agreement Pursuant to Article XIV of Annex 6 of the Dayton Agreement, 2003, the mandate of the Human Rights Chamber expired on 31 December 2003. This Agreement established a five-member Human Rights Commission to operate during 2004 within the framework of the Constitutional Court of Bosnia and Herzegovina. After 1 January 2004, new cases alleging human rights violations were decided by the Constitutional Court.

[207] Article VIII.

[208] Two panels were set up under Rule 26 of the Rules of Procedure 1996, as amended in 1998 and 2001.

[209] Article X. [210] Rule 29.

[211] Article XI. The Chamber could also order provisional measures: see article X. These were made particularly in housing-related cases where eviction was threatened: see *Annual Report* 2000, p. 6.

[212] For example, the question of refugees seeking to regain possession of properties from which they had fled and which were being used to house other persons: see e.g. *Bašić et al.* v. *Republika Srpska*, Cases Nos. CH/98/752 *et al.*, *Decisions of the Human Rights Chamber August–December 1999*, 2000, pp. 149 ff.

[213] For example, the question of restriction on withdrawal of foreign currency from bank accounts: see e.g. *Poropat* v. *Bosnia*, Cases Nos. CH/97/42, 52, 105 and 108, and the question of pensions from the Yugoslav army, *Šećerbegović* v. *Bosnia*, Cases Nos. CH/98/706, 740 and 776. Note in particular, however, the case of *Boudellaa et al.* v. *Bosnia and Herzegovina and the Federation of Bosnia and Herzegovina*, Judgment of 11 October 2002, where in a case involving expulsion of Bosnian citizens of Algerian origin into the custody of the US on terrorism charges, the chamber found that the respondents had violated relevant human rights provisions.

[214] In 1996, 31 applications were received; 83 in 1997; 3,226 in 2000. By the end of 2000, a total of 6,675 applications had been registered and a total of 669 separate decisions reached: see *Annual Report 2000*, p. 3.

The Inter-American Convention on Human Rights[215]

The Inter-American Convention, which came into force in 1978, contains a range of rights to be protected by the states parties.[216] The rights are fundamentally those protected by the European Convention, but with some interesting differences.[217] For example, under article 4 the right to life is deemed to start in general as from conception,[218] while the prohibition on torture and inhuman or degrading treatment is more extensively expressed and is in the context of the right to have one's physical, mental and moral integrity respected (article 5). In addition, articles 18 and 19 of the Inter-American Convention protect the right to a name and the specific rights of the child, article 23 provides for a general right to participation in the context of public affairs and article 26 provides for the progressive achievement of the economic, social and cultural rights contained in the Charter of the Organisation of American States, 1948, as amended by the Protocol of Buenos Aires, 1967.[219]

The Inter-American Commission on Human Rights was created in 1959 and its first Statute approved by the OAS Council in 1960. In 1971, it was recognised as one of the principal organs of the OAS.[220] Under its

[215] See generally J. M. Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights*, Cambridge, 2003; H. J. Steiner, P. Alston and R. Goodman, *International Human Rights in Context*, 3rd edn, Oxford, 2008, pp. 1020 ff.; *The Inter-American System of Human Rights* (eds. D. J. Harris and S. Livingstone), Oxford, 1998; T. Buergenthal and D. Shelton, *Protecting Human Rights in the Americas*, 4th edn, Strasbourg, 1995; D. Shelton, 'The Inter-American Human Rights System' in *Guide to International Human Rights Practice* (ed. H. Hannum), 4th edn, Ardsley, 2004, p. 127, and T. Buergenthal and R. Norris, *The Inter-American System*, Dobbs Ferry, 5 vols., 1983–4. See also J. Rehman, *International Human Rights Law*, London, 2003, chapter 8; A. H. Robertson and J. G. Merrills, *Human Rights in the World*, 4th edn, London, 1996, chapter 6; S. Davidson, *The Inter-American Court of Human Rights*, Aldershot, 1992; S. Davidson, 'Remedies for Violations of the American Convention on Human Rights', 44 ICLQ, 1995, p. 405, and C. Grossman, 'Proposals to Strengthen the Inter-American System of Protection of Human Rights', 32 German YIL, 1990, p. 264.

[216] The Convention currently has twenty-four parties: see *Annual Report of the Inter-American Commission on Human Rights 2006*, Washington, 2007.

[217] See e.g. J. Frowein, 'The European and the American Conventions on Human Rights – A Comparison', 1 HRLJ, 1980, p. 44. See also the American Declaration of the Rights and Duties of Man, 1948.

[218] See e.g. 10 DR, 1977, p. 100.

[219] The Charter of the OAS has also been amended by the Protocols of Cartagena de Indias, 1985; Washington, 1992 and Managua, 1993.

[220] See e.g. C. Medina, 'The Inter-American Commission on Human Rights and the Inter-American Court of Human Rights: Reflections on a Joint Venture', 12 HRQ, 1990, p. 439.

original Statute, it had wide powers to promote the awareness and study of human rights in America and to make recommendations to member states. In 1965, the Statute was revised and the Commission's powers expanded to include *inter alia* the examination of communications. With the entry into force of the 1969 Convention in 1978, the Commission's position was further strengthened. The Commission has powers regarding all member states of the OAS, not just those that have ratified the Convention, and its Statute emphasises that the human rights protected include those enumerated in both the Convention and the American Declaration of the Rights and Duties of Man.[221] Article 44 of the Convention provides that any person or group of persons or any non-governmental entity legally recognised in one or more of the OAS states may lodge petitions with the Commission alleging a violation of the Convention by a state party.[222] Contrary to the European Convention prior to its reform in Protocol 11, this right is automatic, whereas the right of inter-state complaint, again contrary to the European Convention, is under article 45 subject to a prior declaration recognising the competence of the Commission in this regard. The admissibility requirements in articles 46 and 47 are very broadly similar to those in the European Convention, as is the procedure laid down in article 48 and the drawing-up of a report in cases in which a friendly settlement has been achieved.[223] The Commission has dealt with a number of issues in the individual application procedure. During 1994, for example, just under 300 cases were opened and the total number of cases being processed by early 1995 was 641.[224] In 2006, 1,325 complaints were received.[225]

The Commission has a wide-ranging competence to publicise human rights matters by way of reports, studies, lectures and so forth. It may also make recommendations to states on the adoption of progressive measures in favour of human rights and conduct on-site investigations with

[221] See generally the *Basic Documents Pertaining to Human Rights in the Inter-American System*, Washington, 1992. The competence of the Commission to hear petitions relates to the rights in the Convention for states parties and to rights in the American Declaration for states not parties to the Convention.

[222] Note that this is far broader than the equivalent article 34 of the European Convention, which requires that the applicant be a victim.

[223] Articles 49–51. The Secretary-General of the OAS has played the role assigned in the European Convention to the Committee of Ministers.

[224] See *Annual Report 1994*, p. 39. [225] *Annual Report 2006*, chapter III.