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Michael O’Boyle

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PRACTICE AND PROCEDURE UNDER THE
EUROPEAN CONVENTION ON HUMAN
RIGHTS

Michael O'Boyle*

INTRODUCTION

The European Convention¹ (Convention) is a multilateral, regional treaty for the protection of civil and political rights,² drafted under the auspices of the Council of Europe.³

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* Member of the legal secretariat of the European Commission of Human Rights. This article was written in the author's private capacity.


For a general overview see COUNCIL OF EUROPE, WHAT IS THE COUNCIL OF EUROPE DOING TO PROTECT HUMAN RIGHTS? (1977); R. Beddard, Human Rights and Europe (1973); G. Da Fonseca, HOW TO FILE COMPLAINTS OF HUMAN RIGHTS VIOLATIONS 84-105 (1975).

An important feature of the Convention system is its role in national law. In a number of countries (Austria, Belgium, France, Germany, Italy, and The Netherlands) the provisions of the Convention have the force of law although the legal effects vary according to the country.


2. For a consideration of widening the scope of the Convention to embrace social, economic, and cultural rights, see Jacobs, The Extension of the European Convention on Human Rights to Include Economic, Social and Cultural Rights, 3 HUMAN RIGHTS REV. 166. For a "reporting system" of protection of social, economic
It was signed in Rome on November 4, 1950, and came into effect on September 3, 1953, after deposit of the tenth instrument of ratification. It has since been ratified by all but one of the twenty-one member states of the Council of Europe.

The rights covered by the Convention system are found in Section I of the Convention and in the First and Fourth Protocols. In summary, they are as follows: the right to life, freedom from torture and from inhuman and degrading treatment, freedom from slavery and forced labor, the right to liberty and security of person, the right to a fair trial and a public hearing in civil and criminal matters, protection against retroactivity of criminal law, respect for one's private and family life and one's home and correspondence, freedom of thought, conscience, and religion, freedom of expression, freedom of assembly and association (including the right to form and join trade unions), the right to marry and have a family, the right to an effective remedy before a national authority should the rights and freedoms of the Convention be violated, prohibition of discrimination in enjoyment of the rights and freedoms of the Convention, the right to peaceful enjoyment of property, the right to education, the right to free elections,

and cultural rights, see The European Social Charter, October 18, 1961, Europ. T.S. No. 35. See also Council of Europe, supra note 1, at 49-62; K. VASAK, LES DIMENSIONS INTERNATIONALES DES DROITS DE L'HOMME 253-442 (1976).


4. The Commission became competent to receive individual applications in 1955. Statute, supra note 3, ch. V, art. 25. The Court achieved its competence on September 3, 1958. The Member States that have ratified are as follows: Austria, Belgium, Cyprus, Denmark, Federal Republic of Germany, France, Iceland, Ireland, Italy, Luxembourg, Malta, The Netherlands, Norway, Portugal, Sweden, Switzerland, Turkey, and the United Kingdom. Liechtenstein has signed the Convention. For details concerning ratification of the Protocols, see COLLECTED TEXTS, supra note 1, passim. As from January, 1979 8,448 cases have been registered of which 7,249 were declared inadmissible or struck off de plano; 190 were declared admissible and 637 were communicated to the government for observations but subsequently rejected. Fifty-nine cases have been the subject of article 31 reports. For detailed statistical information, see Council of Europe, European Commission of Human Rights Annual Review (1978).

5. Convention, supra note 1, § I, arts. 2-14.

6. Id. First Protocol, arts. 1-3.
freedom from imprisonment on the ground of inability to fulfill a contractual obligation, the right of free movement within any country and freedom to leave any country, the right of a national to enter and remain in his country, and prohibition of the collective expulsion of aliens.⁷

In ratifying the Convention, the states have assumed the obligation to secure the rights and freedoms listed above to everyone within their jurisdictions. However, the Convention provides explicitly for the limitation of specific rights when necessary to protect a superior state interest, such as national security or public health. In addition, article 15 provides for a general right of derogation in times of public emergency, where the "life of the nation" is in jeopardy. However, no derogation is permitted from the right to life, freedom from torture and inhuman and degrading treatment, freedom from slavery and forced labour, or freedom from retroactivity of criminal law. Furthermore, article 18 requires that restrictions permitted under the Convention shall not be applied for any purpose other than those for which they have been prescribed.

The second part of the Convention establishes a system of international supervision "to ensure the observance of the engagements undertaken by the High Contracting Parties."⁸ This system consists of three controlling organs: the European Commission of Human Rights (Commission), the European Court of Human Rights (Court), and the Committee of Ministers of the Council of Europe (Committee of Ministers). The latter, a political organ of the Council of Europe, has specific tasks assigned to it by the Convention, while the Commission and Court operate as specialized bodies endowed with judicial independence. The Secretary-General of the Council of Europe also has an auxiliary role regarding the operation of the Convention system.⁹

The Convention provides both for inter-state complaints

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⁷ Id. Fourth Protocol, arts. 1-4.
⁸ Id. § II.
⁹ The role of the Secretary-General is outlined in articles 15, 22, 24, 25, 30, 35, 37, 40, 57, 63, 65, and 66 of the Convention. Under article 57, he may ask states to furnish an explanation of how its internal law ensures the effective implementation of any of the provisions in the Convention. This power has been used on three occasions, most recently in 1975 in respect of articles 8-11. Article 57 is silent on what can be said about the information once it is gathered. In practice it is sent to the Committee of Ministers and the Parliamentary Assembly of the Council of Europe. It appears to be an ineffective "reporting" feature of the Convention.
and complaints brought by individuals. However, the right of individual petition can be exercised only in respect to states which have specifically accepted the competence of the Commission to hear such complaints. A declaration to this effect must be lodged with the Secretary-General.

Individual complaints under article 25 are first filed with the European Commission, which carries out a preliminary examination to see if they are admissible in accordance with the criteria set out in articles 26 and 27. These provisions require that all domestic remedies have been exhausted and that the complaint is not ill-founded or incompatible with the provisions of the Convention. They also require that it is not an abuse of the right of petition, or substantially the same as a matter which has already been examined by the Commission or that has already been submitted to another international procedure of investigation or settlement. Moreover, the complainant may not be anonymous, and he must lodge his application "within a period of six months from the date on which the final decision was taken."

If the application is held to be admissible after an examination of these criteria, the Commission then has the double role of ascertaining the facts and examining the possibility of obtaining a friendly settlement. If no settlement is reached, the Commission prepares an "article 31 report," in which it establishes the facts and states its opinion as to whether there has been a violation. The report, which at this stage is confidential, is transmitted to the Committee of Ministers and to the state concerned; then, within a three month period from the transmission of the report any of the four following parties can refer the matter for adjudication to the European Court of Human Rights: the Commission, a state whose national is alleged to be a victim, an applicant state, or the state against whom the complaint has been lodged.

The Court can hear cases involving only those states that have accepted its jurisdiction either on a compulsory or ad

10. Convention, supra note 1, § III, arts. 24-25.
11. This has been done by fourteen parties to the Convention: Austria, Belgium, Denmark, Federal Republic of Germany, Iceland, Ireland, Italy, Luxembourg, Netherlands, Norway, Portugal, Sweden, Switzerland, and the United Kingdom. See Statute, supra note 3, ch. V, art. 25.
13. Id. arts. 28 & 31; § IV, art. 48.
The Committee of Ministers is entrusted with the duty of supervising execution of the judgment of the Court, which is final and binding on the parties, and which can afford "just satisfaction" to the injured party. If the case is not referred to the Court, the Committee of Ministers shall decide, by a two-thirds majority of the members entitled to sit, whether there has been a violation. If there has, the Committee shall prescribe a period during which the High Contracting Party must take the measures required by its decision.

The Committee takes the view that it can give advice or make recommendations under this provision but that such action is not binding on the state concerned. In practice, therefore, it is left to the state to decide what corrective measures it shall adopt. If satisfactory measures are not taken within the prescribed period, the Committee decides, again by a two-thirds majority, what effect should be given its original decision, and the Committee publishes its report. Decision of the Committee of Ministers, in the exercise of these functions, are binding on State Parties.

The control machinery does not provide for an elaborate system of enforcement sanctions against non-compliant states, though in extreme cases there is the possibility of suspension or expulsion from the Council of Europe by decision of the Committee of Ministers. It should be noted that a State Party may, under article 65, "denounce" the Convention after six month's notice to the Secretary-General, thereby releasing it from its Convention obligations.

Organization and Composition of The European Commission of Human Rights

The Commission is a part-time body which meets in Strasbourg, France five times a year in sessions of two weeks duration. It consists of a number of members equal to that of the Contracting Parties, which at this time is twenty. No two

14. Id. § IV, art. 48. Sixteen parties have accepted the jurisdiction of the Court: Austria, Belgium, Denmark, Federal Republic of Germany, France, Greece, Iceland, Ireland, Italy, Luxembourg, Netherlands, Norway, Portugal, Sweden, Switzerland, and the United Kingdom.
15. Id. § IV, art. 48.
16. Id. § IV, arts. 50, 52, & 53.
17. Id. § III, art. 32(3).
members of the Commission may be nationals of the same state. Members are elected by the Committee of Ministers by an absolute majority of votes, for a period of six years. Members are elected from a list of names drawn up by the bureau of the Consultative Assembly of the Council of Europe.

In practice, national delegations to the Assembly put forward a list of their candidates, at least two of whom must be nationals. The Convention states that members of the Commission shall sit in their individual capacity, although it is silent on the qualifications that members should have. National delegations are advised, however, by the President of the Assembly, that high moral integrity, recognized competence in matters connected with human rights, and substantial legal or judicial experience are essential and desirable qualities for prospective members.

The Commission elects a President, and a first and second Vice-President. The function of the President is to preside at meetings and direct the work of the Commission. If he is unable to carry out these duties, they may be carried out by either Vice-President. No member of the Commission shall preside in any case in which the state of his nationality is a party.

The quorum of the Commission is ten members, though seven members are sufficient where an application is declared inadmissible, or struck off the list of cases, or where the Commission is merely communicating an application to a government for observations on admissibility or is requesting relevant information. The official languages of the Commission are English and French, although in certain circumstances, applications may be dealt with in another language.

18. The Fifth Protocol amended article 22 of the Convention in order to provide for a renewal of the membership of the Commission every three years. Article 22, paragraph 3 now provides that to achieve this purpose, the Committee of Ministers may decide that the terms of office of one or more members elected shall be for a period other than six years, but not more than nine and not less than three years. See Collected Texts, supra note 1, Fifth Protocol.

19. See F. Jacobs, supra note 1, at 217.


22. Id. rules 24, 27. Under rule 27, the President of the Commission has authorized the Secretariat to receive applications in the Dutch, Italian, Portuguese and Scandinavian languages. In the case of applications submitted in any other language,
Convention requires that meetings of the Commission be held in camera. Moreover, the contents of all case files, including all pleadings, are confidential, although brief press communiques concerning the work covered by the Commission are issued after each session.

The Commission is served by a Secretariat, provided by the Secretary-General of the Council of Europe. Its members are qualified lawyers from the member states, employed as international civil servants by the Council of Europe. Due to the part-time character of the Commission and the increasing flow of applications, the Secretariat plays a central role in the preparation and organization of the Commission's work. The work of the Secretariat involves extensive correspondence with potential or actual applicants, preparation of decisions and reports for the Commission in conjunction with the Rapporteur, and provision of advice and research on questions of national, international, or Convention law.

Pre-Admissibility Procedure

Representation, introduction, and registration of an application. In accordance with article 25 of the Convention, the Commission may receive applications from any person, nongovernmental organization, or any group of individuals claiming to be the victim of a violation by one of the State Parties. Since State Parties are obligated under article 1 to secure the rights and freedoms in the Convention to “everyone within the jurisdiction,” it is of no importance that an applicant is neither a national nor a resident of the respondent state. However, applications may not be anonymous.

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23. Convention, supra note 1, § III, art. 33.
24. Procedure, supra note 20, rule 17(2)-(3). The obligation of secrecy concerns only the application as such and does not prevent an applicant from giving information to the press about the factual basis of his complaint. The main purpose of the rule is to avoid abuse of the proceedings before the Commission for publicity purposes.
25. Convention, supra note 1, § III, art. 37. The Secretariat is divided into two divisions, one dealing with research and jurisprudence, the other dealing with applications and is at present composed of nineteen lawyers. See also Procedure, supra note 20, rules 11-12.
It is not necessary for applicants to be represented by a lawyer; they may present and conduct their own applications. However, in many cases, given the complexity and importance of the issue, or the disadvantageous position of the applicant (prisoners, mental patients, etc.), the Secretariat may inform an applicant that legal representation is advisable for the proper presentation of his case. If an application is presented by a lawyer or other person, a power of attorney or simple written authorization is required. Normally, representatives should be chosen from persons residing in the territory of a Convention country. The Commission reserves the right to supervise representation, and has on occasion refused further communication from individuals whose conduct was regarded as unacceptable. When the Commission is satisfied that an applicant has difficulty in presenting his complaint, it allows representation by close relatives. When an application is brought by a non-governmental organization or group of individuals, the Commission will require documentary proof that the signatories of an application are competent to act in a representative capacity, in accordance with domestic law. An applicant should submit his complaint in writing in one of the official languages, substantiating it, if possible, with reference to official documents.

The Commission has authorized the Secretariat to inform

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27. Rule 38 provides that an application under article 25 shall set out the following information:
   A. Name, age, occupation, address of applicant;
   B. Name, occupation and address of representative, if any;
   C. The name of the respondent State;
   D. Object of the application and the provision of the Convention allegedly violated;
   E. Statement of facts and arguments and any relevant documents such as court decisions;
   F. Information enabling it to be shown that all domestic remedies have been exhausted.

PROCEDURE, supra note 20. The Commission's Secretary is the channel for all communications concerning the Commission. Id. rule 12.

28. Id. rule 26(2).


30. PROCEDURE, supra note 20, rule 38(3). Times Newspapers Ltd. v. United Kingdom, 2 EUR. COMM’N OF HUMAN RIGHTS, DECISIONS AND REPORTS 90, 95-96 (1976).

31. See note 27 supra.
applicants of any obvious grounds of inadmissibility and to advise them, with reference to the Commission's case-law, that their application, as submitted, offers little prospect of success. However, the Secretariat is bound to register an application if the individual concerned insists. Registration of an application is not, therefore, automatic on receipt of a communication and is normally preceded by an exchange of correspondence. For purposes of the "six months rule," however, the application is considered "received" upon receipt from the applicant of the first communication setting out, even summarily, the object of the application.

Examination of the application by the Rapporteur and the Commission. The Secretariat normally prepares the cases in the order in which they have been registered. The applicant has a duty to provide and substantiate, where possible, the fullest information concerning his complaint, to reply to queries from the Secretariat concerning issues of admissibility, and prove compliance with the rule concerning exhaustion of domestic remedies. When the case file is thus complete, the application is examined by a member of the Commission who, as Rapporteur, is charged to submit a report to the Commission on its admissibility. Before presenting his report, the Rapporteur may decide formally to request information from either the applicant or the respondent government. Any information obtained from the government will be forwarded to the applicant for comment. The Rapporteur, with the aid of the Secretariat, will then prepare a report for the Commission, setting out the facts of the case and examining the issues which it addresses under the Convention. The report will contain a proposal recommending that the Commission adopt a

32. Procedure, supra note 20, rule 38(3). The Commission may nevertheless, for good cause, decide that a different date be considered to be the date of introduction. For a summary of pertinent case-law concerning the date of introduction see Council of Europe, supra note 26, at 14-16.

33. Procedure, supra note 20, rule 28(1).

34. Id. rule 40(1). Before the Rules of Procedure were amended in 1973, individual applications were first referred to a group of three members for a preliminary examination of admissibility. If they were unanimous an application could be "communicated" to the state for observations immediately.

35. Id. rule 40(3). The report of the Rapporteur on admissibility contains a statement of the facts, a summary of the observations of the parties, an indication of the issues arising under the Convention, a proposal on admissibility or any other action to be taken, and a proposal as to the procedure to be followed.
particular course of action.\textsuperscript{36}

At this stage of the proceedings, the Commission decides on one of the following courses: 1) declare the application inadmissible \textit{de plano} or strike it off its list of cases; 2) communicate the application to the government for observations on admissibility or request information on questions of fact; or 3) adjourn the application or communicate it to the government without asking for observations (for example, where the issues raised are already being examined in another application).\textsuperscript{37}

Where the application is communicated to the government concerned, the observations obtained are forwarded to the applicant for a reply. The Rapporteur will then present a new report to the Commission prepared in light of the parties' observations. At this point the Commission may decide either to declare the application inadmissible or to hold an oral hearing on admissibility and, possibly, the merits. It may also decide to declare the case admissible and to arrange a hearing on the merits alone.\textsuperscript{38}

It should be noted that inter-state applications are automatically communicated to the respondent government for observations on admissibility.\textsuperscript{39}

\textit{Urgent cases and interim measures: Rule 36.} As a general rule the Convention confers no power on the Commission to grant interim or interlocutory measures, such as an injunction against a national authority.\textsuperscript{40} The Commission has the power, however, to give certain urgent applications precedence.\textsuperscript{41} Cases given precedence include those involving ill-

\begin{itemize}
\item \textsuperscript{36} \textit{Id.} rule 40(3).
\item \textsuperscript{37} \textit{Id.} rule 42. Where cases are communicated, the government is allowed eight weeks to submit its observations. The President or Acting President may grant an extension. The applicant is usually granted four weeks in respect of any comments he may wish to make.
\item \textsuperscript{38} The decision depends on the facts and circumstances of the case and the view of the government. It is now the practice of the Commission, as far as possible, to reduce oral hearings. The government is asked in advance whether it would want to submit any clarifications that might be required as regards questions of admissibility in writing or at an oral hearing. If the latter, it is usual for a joint hearing on admissibility and the merits to be arranged.
\item \textsuperscript{39} \textit{Procedure, supra} note 20, rule 28(1).
\item \textsuperscript{40} \textit{See, e.g.,} Donnelly v. United Kingdom, 43 \textit{Comm'n on Human Rights, Collection of Decisions} 149 (1973). \textit{But cf.} United States Diplomatic and Consular Staff in Teheran, [1979] I.C.J. 7 (comparison of the Commission's power with that of the International Court of Justice).
\item \textsuperscript{41} \textit{Procedure, supra} note 20, rule 28(1).
\end{itemize}
treatment in detention, inordinate length of detention on re-
mand, imminent expulsion, extradition, and deportation. In
such cases, the Secretary may inform the State Party con-
cerned of the introduction of the application and of its na-
ture. Moreover, under rule 36 of the Rules of Procedure, the
Commission may indicate to the Parties "any interim measure
the adoption of which seems desirable in the interests of the
Parties or the proper conduct of the proceedings before it."

Rule 36 has mainly been applied where an applicant com-
plains to the Commission about his imminent expulsion, ex-
tradition, or deportation. Under the Commission's case-law,
issues may arise under article 3 (freedom from torture or in-
human or degrading treatment) should a person be sent to a
country where he may face political persecution or maltreat-
ment. Similarly, removal of family members from a country
may give rise to questions under article 8 (respect for family
life).

It should be noted that rule 36 is used sparingly, and only
in applications where the facts alleged appear to be well sub-
stantiated. In practice, the Secretary, especially when the
Commission is not sitting, will inform the government imme-
diately and unofficially and will ask for any available infor-
mation. This practice puts the government on notice that a com-
plaint may lead to a finding of a violation. It may be followed
up by a request under rule 36. In nearly all such cases, the
government concerned postponed the expulsion or deporta-
tion until the Commission considered the admissibility of the
application.

Legal Aid. There are no filing fees or costs to lodge an
application. Furthermore, legal aid is available, but only
from the time that the government observations have been

42. Id. rule 41. When the Commission is not in session, the President or Vice-
President may, in urgent cases, take any necessary action on behalf of the Commiss-
ion. Any action so taken will be reported when the Commission is next in session. Id.
rule 28(2).

Comm'n on Human Rights); "Amekrane" Case, [1973] Y.B. EUR. CONV. ON HUMAN

For a useful summary of extradition, expulsion, and deportation cases, see Eur.
Court of H.R., STOCK-TAKING OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 75-
82, (Council of Europe Doc. DH (79) (1979)) (a periodic note on the concrete results
achieved under the Convention) [hereinafter cited as STOCK-TAKING].

44. See EUR. COMM’N ON HUMAN RIGHTS, ADDENDUM TO RULES OF PROCEDURE
rule 1 [hereinafter cited as ADDENDUM].
obtained.\textsuperscript{46} The Commission must be satisfied, however, that the applicant does not have sufficient means to meet all or part of the costs involved.\textsuperscript{48} In order to show financial need, the applicant must complete a declaration, providing details about his income and capital assets, and this must be certified by an appropriate domestic authority.

Legal aid is granted only with respect to retention of a legal representative, such as a lawyer, solicitor, law professor, or professionally qualified person of similar status.\textsuperscript{47} Legal aid for such expenses is fixed at each stage of the procedure by agreement between the Secretary and the lawyer concerned. Aid can include traveling and subsistence allowances, as well as money for other out-of-pocket expenses. It can also cover traveling costs and subsistence for the applicant in the event of a hearing or proceeding before the Court.\textsuperscript{48}

The certified declaration of means is submitted to the government concerned for its comment, after which the Commission decides whether legal aid will be granted.\textsuperscript{49} The scale of fees paid is based on the average rates of legal aid available in member states of the Council of Europe, and is usually, therefore, significantly lower than the legal fees payable within the domestic system.

\textit{The Concept of Admissibility.} The main grounds for admissibility of individual complaints are contained in articles 26 and 27 of the Convention.\textsuperscript{50} In the recent case of \textit{Cyprus v.}

\begin{itemize}
\item \textsuperscript{45} Id.
\item \textsuperscript{46} Id. rule 47.
\item \textsuperscript{47} Id. rule 4(1); for a list of the competent national certifying authorities, see \textit{Collected Texts}, supra note 1, at 317-18.
\item \textsuperscript{48} Id. rule 4(2). Fees are fixed at each stage of the proceedings. They are paid in respect of the following items: (1) preparation of the case; (2) drafting of observations on admissibility in reply; (3) drafting of written submissions on the merits; (4) oral presentation at admissibility and/or merits before Commission; (5) written observations on the Commission's Report and/or on memorials of the government in proceedings before the Court; (6) assisting the delegates before the Court.
\item \textsuperscript{49} Id. rule 3(2).
\item \textsuperscript{50} Decisions on admissibility up to 1974 (inclusive) are to be found in \textit{Eur. Comm'n on Human Rights, Collection of Decisions} (46 vols.); after 1975 they are to be found in \textit{Eur. Comm'n on Human Rights, Decisions and Reports} (up to vol. 14 as from Jan. 1980). A more limited selection of decisions of the Commission also appears in the \textit{Y.B. Eur. Conv. on Human Rights} (Eur. Comm. on Human Rights).
\end{itemize}

For an analysis of the jurisprudence on admissibility, see \textit{F. Jacobs, supra note 1, at 218-49; Danelius, Conditions of Admissibility in the Jurisprudence of the European Commission of Human Rights, 2 Human Rights J. 284 (1969).}
Turkey, the Commission made it clear that the concepts of article 27, such as incompatibility, apply only to individual applications. In that case, the Commission left open the issue of whether an inter-state case could, as a matter of principle, be rejected as abusive. It is not appropriate here to analyze in depth the Commission's extensive jurisprudence on questions of admissibility, but some of the more important points concerning the Commission's competence and the exhaustion of domestic remedies rule may be noted.

The Commission can only examine individual complaints with respect to those states that have accepted the right of individual petition under article 25. To date, this has been done by all State Parties, except Turkey, France, Malta, Cyprus, Greece, and Spain. Some states have accepted the right indefinitely, others for a limited period. However, a special statement is required to extend the right of individual petition (and acceptance of the compulsory jurisdiction of the Court) to the rights contained in the Fourth Protocol. Accordingly, individual complaints against the states noted above would be rejected as incompatible ratione personae. A similar result would be reached regarding applications by persons or groups that cannot be considered "victims" within the meaning of article 25. The concept of "victim", however, has been interpreted in a broad sense by both the Commission and the Court. A distinction is drawn between direct and indirect victims. A direct victim is one who claims to have suffered prejudice that he considers contrary to the Convention. Indirect victims are those who can show a special and personal link between themselves and the person directly affected, such as members of a family or close relatives.

Article 25 does not permit individuals to complain against a law in abstracto merely because they feel that it contravenes the Convention. Both the Commission and the Court have held, however, that an individual may be directly affected by the provisions of a law in the absence of any specific measure.

51. 13 COMM’N ON HUMAN RIGHTS, DECISIONS AND REPORTS 85-158 (1979). This was the third Cyprus v. Turkey case. For the admissibility decisions in respect to the first two, see 2 EUR. COMM’N ON HUMAN RIGHTS, DECISIONS AND REPORTS 125 (1975).
52. See Collected Texts, supra note 1, at 602.
of implementation. Thus in the *Danish Sex Education Cases*,\(^5\) the *Bruggemann Case*,\(^6\) and the case of *X. v. United Kingdom*,\(^6\) it was accepted that legislation could "radiate" an effect without specifically being applied to the applicants. Moreover, in the *Klass Case*,\(^7\) concerning wire tapping and other surveillance activities in the Federal Republic of Germany, the Court accepted that an individual could claim to be the victim of a violation occasioned by the mere existence of secret measures (or legislation permitting secret measures), without having to show that such measures were in fact applied to him.

The Commission would reject as inadmissible *ratione loci* applications from individuals who did not suffer prejudice within the "jurisdiction" of a State Party. Article 1 of the Convention only obliges States Parties to secure the rights and freedoms of everyone "within their jurisdiction." The Commission has held that the concept of "jurisdiction" is not limited to national territory. It extends to persons under the actual authority and responsibility of the state.

Thus, as the Commission has held in *Cyprus v. Turkey*, the authorized agents of the state, including diplomatic or consular agents and armed forces, remain under the state's jurisdiction when abroad. In addition, such agents bring any other persons or property into the "jurisdiction" of that state to the extent that they exercise authority over such persons or property.\(^8\)

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56. 11 EUR. COMM'N ON HUMAN RIGHTS, DECISIONS AND REPORTS 117-32 (1978) (Concerning the criminalization of homosexual behavior in Northern Ireland).

57. "Klass" Case, supra note 53.

58. Cyprus v. Turkey (No. 3), supra note 51, at 149. Interesting questions have arisen as to whether the acts of the European Communities are within the "jurisdiction" of Member States. See Confederation Francaise Democratique du Travail v. European Communities, 13 EUR. COMM'N ON HUMAN RIGHTS, DECISIONS AND REPORTS 231-40 (1979). The "Bertrand Russel Peace Foundation" Case, 14 EUR. COMM'N ON HUMAN RIGHTS, DECISIONS AND REPORTS 117-24 (1980), raised the question as to the responsibility of the United Kingdom for failing to take sufficient measures to protect its correspondence by the Soviet authorities. The Commission held that article 1 did not secure a right to diplomatic protection and that the act forming the basis of the
In this context, article 63 of the Convention provides that a State Party may extend the application of the Convention and the right of individual petition to any or all of the territories for whose international relations the state is responsible. Such declarations have been made by the Netherlands regarding Antilles, and by the United Kingdom regarding, inter alia, Bermuda, the Channel Islands, the Isle of Man, Gibraltar, Seychelles, Gilbert, Falkland, and the Leeward Islands. Article 63 specifies, however, that the provisions of the Convention will be applied in such territories only with due regard to local requirements.

Since the Convention has no retroactive effect, the Commission will not accept an application which relates to events that occurred earlier than the entry into force of the Convention, unless the application concerns a continuing violation.

The acceptance of the right of individual petition has, in principle, retroactive effect although this is usually negated by the terms of the declaration under Article 25. In Foti, Lentini & Cenerini v. Italy, which concerned the length of criminal proceedings commencing prior to the Italian declaration, the Commission held, that for purposes of its determination, the time of the declaration must be regarded as the starting point of the Commission's competence. However, it added that it could take account of the proceedings prior to that date, in alleged violation must be one falling within the jurisdiction of the State Party. It is not sufficient that the "victim" alone be within the jurisdiction. Id. at 124. See also Hess v. United Kingdom, 2 Eur. Comm'n on Human Rights, Decisions and Reports 72, concerning the question whether the United Kingdom's participation in the quadripartite organization of Spandau prison (where Rudolf Hess is detained) involves its "jurisdiction" under the Convention; X & Y v. Switzerland, 9 Eur. Comm'n on Human Rights, Decisions and Reports 57-94; X v. United Kingdom, 12 Eur. Comm'n on Human Rights, Decisions and Reports 73-76.


order to evaluate whether the length of the proceedings subsequent to the declaration was "reasonable" under article 5(3).63

Finally, the competence of the Commission is limited *rationae materiae* to those rights which are contained in the Convention and its Protocols. In determining the rights that states have undertaken to protect, account must be given to reservations made under article 64.64

*Exhaustion of domestic remedies.*65 Article 26 states that "the Commission may only deal with the matter after all domestic remedies have been exhausted according to the generally recognized rules of international law . . . ." This rule is founded on the principle that the state involved must first have an opportunity to redress the alleged wrong.66 The court succinctly summarized this in the *Handyside Case:*67 "the machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights . . . . The Convention leaves to each contracting state, in the first place, the task of securing the rights and freedoms it enshrines." The exhaustion requirement applies to both interstate and individual applications.68 In practice, the individual is required to show that he has exhausted all available remedies and if he has not, then the Commission must examine the issue *ex officio.* Although there is nothing to prevent states from waiving the benefit of the rule,69 when the state claims the existence of remedies that were not exhausted, it bears the burden of proof for such claim. Should the state prove the


64. For reservations *see* Collected Texts, *supra* note 1, at 605. Note also article 60: "Nothing in this Convention shall be constructed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a Party." Convention, *supra* note 1, art. 60.

65. For the literature on the "exhaustion" rule *see* Council of Europe, Bibliography Relating to the European Convention on Human Rights.


existence of such a remedy, the burden shifts to the complainant. He must prove that he has exhausted the remedy or that it provides inadequate or ineffective redress. Where the state does not raise the issue of remedies before the Commission, it is estopped from raising it before the Court.  

Article 26 gives the Commission and Court a broad jurisprudence. The following points, therefore, provide only basic guidelines, and do not attempt to cover the field: First, the applicant is obliged to make "normal use" of any redress likely to be effective and adequate to remedy the matters of which he complains. This rule normally covers all courts of appeal up to the highest court, unless, on the basis of existing law, such an appeal would be ineffective or in vain. The existence of doubts as to the prospects of success does not absolve an applicant from exhausting a given remedy. Where an applicant's appeal is rejected as being untimely, unless there are special circumstances, it will be considered that domestic remedies were not exhausted.  

Second, only remedies that are capable of providing redress for their complaints need be exhausted. Thus, in the Vagrancy Cases, the Court held that the applicants were not obliged to make use of a remedy which, according to the "settled legal opinion" in Belgium would have been to no avail.  

Third, the Commission does not consider petitions to the executive to be effective remedies, since they are measures of grace.  


72. See the report of the Commission of September 30, 1975 in "Handyside" Case, supra note 67.  


75. Supra note 66.  

76. Greece v. United Kingdom, [1959] Y.B. Eur. Conv. on Human Rights 182 (Eur. Comm. on Human Rights). It had been argued that a petition to the Queen or the Governor of Cyprus for compensation in respect of maltreatment constituted a remedy. It was not possible to bring a civil action against the Crown or the Government of Cyprus.
Fourth, whether remedies are ineffective or inadequate depends on the facts of the case. A remedy may be considered ineffective if, according to legal opinion, the activity complained of could not be successfully challenged in court. Such was the situation regarding corporal punishment in Scottish schools. Alternatively, a remedy may be considered ineffective because of substantial delay, or because it is inaccessible. For example, in *Cyprus v. Turkey*, the Commission did not consider that remedies before the courts of Turkey could be effective with respect to complaints by inhabitants of Cyprus. It found that such remedies were not “practicable and normally functioning in such cases.” The Commission has held that where an individual complains of an “administrative practice,” where he can substantiate his complaint, and where official tolerance of the practice was at the highest level of the state, he is normally absolved from the exhaustion of remedies requirement.

Fifth, an applicant does not have to raise the same arguments, couched in convention language, before the national court. It is sufficient that he raise the “substance” of his complaints.

Sixth, remedies are not limited to courtroom redress. For example, in the case of complaints of maltreatment of prisoners, the Commission has held that a complaint to the Home Secretary (who has general control over prisons), or to the Prison Board of Visitors, constituted a hierarchical administrative remedy, whereby a prisoner may obtain review of the acts and decisions of the lower prison authorities. The Com-

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78. *Cyprus v. Turkey* (No. 3), *supra* note 51, at 150-51.
79. *Id.*
80. *Donnelly v. United Kingdom* (No. 2), 4 EUR. COMM’N ON HUMAN RIGHTS, DECISIONS AND REPORTS 4, 87 (1976). However, in respect of inter-state complaints, the Commission has recently re-affirmed that the “exhaustion” rule does not apply to complaints the object of which is to determine the compatibility with the Convention of legislative measures and administrative practices, except where specific and effective remedies against legislation exist. *Cyprus v. Turkey* (No. 3), *supra* note 51. For an examination of the relationship between the concept of administrative practice and the domestic remedies rule, *see* O’Boyle, *Torture and Emergency Powers under the European Convention on Human Rights: Ireland v. United Kingdom*, 71 AM. J. INT. LAW 674, 688-701 (1977).
mission added that in respect of a complaint of serious unlawful conduct by a prison officer, only a civil action for damages could be considered as an effective and sufficient remedy.82

Finally, where an applicant seeks a remedy and gains redress of his complaint, he is no longer considered a “victim” under article 25.83 An applicant may, however, lodge an application with the Commission before national proceedings are terminated.84

Post-Admissibility Procedure

Examination of the merits. Once the Commission holds a case to be admissible it must examine the petition and ascertain the facts. The Commission must also place itself at the disposal of the parties, and attempt to secure a friendly settlement of the matter. Finally, if no solution is possible, the Commission must make a report of the facts, and give an opinion as to whether or not there has been a violation of the Convention.

Establishment of the facts. Initially, the parties may be asked to submit a memorial, stating their respective arguments as to questions of fact and law. They may be asked to take part in an oral hearing on the merits before the Commission, in order to make further submissions. However, in a significantly growing number of cases, the Commission has arranged a combined hearing on both admissibility and merits in order to expedite the proceedings.

Although procedurally the establishment of the facts takes place after the case has been declared admissible, the process of fact-gathering and fact-proving often begins on initial receipt of the first letter of complaint from an applicant. This may involve affidavits, official documents, the hearing of expert witnesses by the Commission, observations from the parties, investigations by Commission delegations, and questioning of the parties by the Commission members in the course of a hearing.

Under rule 30(1) of the Rules of Procedure, the “Commission may, proprio motu or at the request of a party, take any

82. See Campbell v. United Kingdom, 14 EUR. COMM’N ON HUMAN RIGHTS, DECISIONS AND REPORTS 186 (1979) (entire decision not published).
83. See Donnelly v. United Kingdom (No. 2), supra note 71, at 64.
84. Ventura v. Italy, supra note 63.
action which it considers expedient or necessary for the proper performance of its duties under the Convention." Rule 30(2) states that "the Commission may delegate one or more of its members to take any such action in its name and in particular to hear witnesses or experts, to examine documents or to visit any locality. Such member or members shall duly report to the Commission."86

These powers of investigation are most frequently used in inter-state cases, although they have been used in numerous individual applications particularly concerning treatment in prison. Examples of the latter include Hilton v. United Kingdom,86 Baader v. Federal Republic of Germany,87 and Donnelly v. United Kingdom.88 On the spot investigations were also conducted by delegates in the First Cyprus Case,89 The Greek Case,90 the case of Ireland v. the United Kingdom,91 and the case of Cyprus v. Turkey.92

The Rules of Procedure are silent on how the Commission's delegation should take evidence from witnesses. In the Irish Case,83 the procedures were formal, with witnesses being examined and cross-examined by the lawyers from both sides, and with proofs of witness statements being submitted in advance. The delegates then analyzed the evidence and presented their conclusions for scrutiny before the plenary Commission. Numerous procedural evidentiary problems

85. Procedure, supra note 20, rules 30(1) & (2).
88. Donnelly v. United Kingdom (No. 2), supra note 71.
89. See Greece v. United Kingdom, supra note 76.
92. Cyprus v. Turkey (No. 3), supra note 51. In the "Greek" Case, supra note 90, a sub-committee heard 87 witnesses in five sessions between 1967-1969. The sub-committee visited Athens, but returned after hearing 50 witnesses, and after it had been prevented by the Greek Government from hearing other witnesses and visiting detention camps. In the "Irish" Case, supra note 91, more than 100 witnesses were heard by a delegation from the Commission in Strasbourg and, for security reasons, at the Sola Air Base, Stavanger, Norway. Finally, in Cyprus v. Turkey a delegation from the Commission took evidence in Cyprus hearing witnesses and visiting refugee camps.
93. Ireland v. United Kingdom, supra note 91.
arose in the course of these hearings, such as whether the identity of certain witnesses could remain secret for security reasons, and the significance of an instruction by the British side to their witnesses not to answer questions concerning interrogation techniques.\textsuperscript{94}

The Commission does not have pre-established rules of evidence as in the Anglo-American system. Thus there are no fixed rules dealing with the perennial problems of burden of proof, illegally obtained evidence, privileged documents, or perjury. The Commission's approach to these questions can best be described as flexible and \textit{ad hoc}, with due regard to its accumulated case experience. The Commission has indicated, however, in the \textit{Greek Case} and the \textit{Irish Case} that the allegations must be proved beyond a reasonable doubt, and this means "not a doubt based on a merely theoretical possibility or raised in order to avoid a disagreeable conclusion, but a doubt for which reasons can be given, drawn from the facts presented."\textsuperscript{95}

This emphasis on objectivity is further reflected in the approach adopted by the Commission in its appreciation of the evidence presented in the \textit{Irish Case}. For example, recognizing that both the security forces and the alleged victims of maltreatment were not independent witnesses (most had a clear personal interest in the outcome of the case), the Commission stressed the probative value of medical testimony, albeit with certain necessary qualifications. Further, the Commission adopted the rule that the burden of proof shifted to the respondent government where the alleged victims were in the custody of the security forces at the relevant times.\textsuperscript{96}

Although article 28 obliges states to "furnish all necessary facilities" for the "effective conduct"\textsuperscript{97} of an investigation, the Convention does not specifically confer the power on the Commission to compel the compulsory attendance of witnesses and the production of documents. The drawbacks of the Convention's lack of specificity on these points, and the delicacy of the situation created by noncompliant behavior on

\textsuperscript{94} Id.

\textsuperscript{95} "Greek" Case, \textit{ supra} note 90, at 196; Report of the Commission of Jan. 25, 1976, \textit{ supra} note 91, at 404.

\textsuperscript{96} Report of the Commission, \textit{ supra} note 91, at 404-05.

\textsuperscript{97} Convention, \textit{ supra} note 1, § III, art. 28.
the part of a state, are vividly depicted in the Irish Case.98

Finally, where the Commission, in the course of establishing the facts after an individual case has been declared admissible, finds that one of the grounds of inadmissibility provided for in article 27 has been established, the Commission can reject the petition.99 However, because such action can only be taken by a unanimous vote, requests by states for the Commission to review its decision of admissibility rarely succeed.

Formal and Informal Friendly Settlements.100 While the Commission is ascertaining the facts, it also attempts to secure a "friendly settlement of the matter."101 In practice, the Secretary to the Commission is entrusted with friendly settlement negotiations after the Commission has first had an opportunity to deliberate upon whether or not a violation exists. Normally, the Secretary will indicate to the parties the Commission's tentative opinion at this stage of the procedure. He has discussions with each party in order to be informed as to their position and he then reports back to the Commission.

It does not automatically follow that a settlement will be achieved to the mutual agreement of the parties. The Commission, acting as guardian of the general interest, must first satisfy itself that the terms of the settlement are consistent with the principles of respect for human rights. Thus, if an individual complains of a legislative provision or an administrative practice that also affects others similarly situated, the general interest can be served only if the law or practice were changed. In a typical settlement, an applicant might be awarded compensation and might secure a change in the law in return for withdrawal of the complaint and an agreement not to institute further proceedings before national or international tribunals. The Commission's insistence on taking account of the general interest not only maintains the integrity of the rights in the Convention, but makes it in the best interests of the parties to enter into a settlement, thus avoiding a

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98. For an analysis of the Commission's approach to establishing the facts, see Trechsel, l'Etablissement des Preuves devant la Commission Europeenne des Droits de l'Homme, 1977 TROISIEME COLLOQUE 121-43.

99. This provision was introduced by Protocol No. 3 which came into force on Sept. 21, 1970; it has been used in only eight cases.


101. Convention, supra note 1, § III, art. 28(b).
prolongation of the dispute.

The relatively small number of friendly settlements reached does not convey an accurate picture of the role of conciliation under the Convention. Several factors must be borne in mind. First, there are a growing number of cases where in some form of unofficial arrangement has taken place, leading the applicants to withdraw their application. For example, in Karnell & Hardt v. Sweden, the applicants, who were members of the Evangelical-Lutheran Church of Sweden, objected to compulsory religious education for their children. Their complaint was brought under article 2 of the First Protocol, whereby "the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions." The parties eventually agreed that pupils belonging to the sect could, if their parents so requested, be exempt from such compulsory religious instruction, and that an exempted pupil would not suffer any disadvantage as a result. The applicants subsequently withdrew their complaint.

Second, the basis of a complaint is removed without either formal consultation between the parties or overt recognition that such action is related to proceedings in Strasbourg. Although such informal settlements cannot be directly attributed to the lodging of an application, it is legitimate to take them into account as a dark figure in the operation of the Convention.

One possible explanation for the different kinds of settlements outlined above perhaps lies in the role of the Commission. The Commission does not take the initiative by proposing terms and actively mediating between the parties. Rather, it acts as a cautious go-between, informing the parties of their respective positions and indicating whether or not the proposed terms of settlement would satisfy the general interest.

102. Friendly settlements have been reached in 13 cases (as of Jan. 1980). For details concerning the solutions reached see STOCK-TAKING, supra note 43, at 34-44.

103. Id. at 46-56.


105. Convention, supra note 1, First Protocol, art. 2.

106. See, e.g., Application No. 7861/77 (unpublished) concerning an individual who complained of his imminent deportation from the United Kingdom to Syria where he feared persecution. He was eventually allowed to stay in the United Kingdom on certain conditions.
Finally, if the Commission succeeds in effecting a friendly settlement, an article 30 report is drawn up and sent to the states concerned, the Committee of Ministers, and the Secretary-General of the Council of Europe for publication. The report is confined to a brief statement of the facts and the solution reached.107

Article 31 Report.108 If no settlement is reached, article 31 requires the Commission to draw up a report on the facts, stating its opinion as to whether there is a breach of the Convention. The report may contain dissenting or separate opinions. Although based on law and fact, it is not a "decision" or "judgment," since it does not bind the parties. Binding decisions can be made only by the Committee of Ministers or the Court.

The report is transmitted to the respondent state, which is not free to publish it. It is also formally transmitted to the Committee of Ministers. Since at this stage, the report is still regarded as a confidential document, it is not sent to the individual in the case of an article 25 complaint. However, in an inter-state case, it would be forwarded to both of the states concerned. Once the case (either individual or inter-state) is forwarded to the Court, the report usually becomes a public document.109

When transmitting its report to the Committee of Ministers, the Commission may, under article 31, make such proposals as it sees fit. The Committee of Ministers, however, has decided that where the Commission does not find a violation of the Convention, it is not entitled to make such proposals.110 In practice, the report rarely contains any proposals, and it is open to question whether the Commission would consider itself bound by the view of the Committee on this issue.

Discontinuance of Proceedings: Withdrawal and Strike Off. The Commission may strike an application off its list of cases in two situations: first, where the applicant states that he wishes to withdraw his application, and second, where the

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107. See Procedure, supra note 20, rule 50.
108. For cases which have been the subject of an article 31 Report, see Stock-Taking, supra note 43, passim.
109. EUR. COMM'N OF HUMAN RIGHTS, RULES OF COURT 29(3) [hereinafter cited as EUR. COURT] Collected Texts, supra note 1, at 401-25.
110. COLLECTED TEXTS, supra note 1, at 501-06. See F. Jacobs, supra note 1, at 252.
circumstances, particularly the applicant's failure to provide information requested or to observe time limits set, leads to the conclusion that he does not intend to pursue his application.\textsuperscript{111} As with the Commission's approach to friendly settlement, before it accedes to a strike-off, it must consider whether there is any general interest policy that justifies further examination of the application.

Thus, for example, in \textit{Tyrer v. United Kingdom}, where the applicant complained of the use of the birch-switching as a form of judicial corporal punishment on the Isle of Man, the Commission decided that it could not grant the applicant's request for withdrawal, since the case raised important questions of general interest.\textsuperscript{112} A different result was reached in \textit{Greece v. United Kingdom}. There, pursuant to the Zurich and London Agreements (which brought about a political settlement of the Cyprus question), both the Greek and United Kingdom governments requested the Commission to close the case without deciding on the merits. The Commission agreed to the request, stating that "the withdrawal of the application was a matter which concerned the Commission as well as the Parties and the Commission must satisfy itself that the termination of the proceedings was calculated to serve, and not to defeat the purposes of the Convention."\textsuperscript{113}

The Commission can also strike from its list an application which has resulted in remedial action, even though the applicant may wish to continue his application to seek judicial vindication.\textsuperscript{114} However, the death of an applicant does not automatically lead to a "strike-off" if his relatives or the administrators of his estate express a desire to continue the application.\textsuperscript{115}

\textbf{Organization of the European Court of Human Rights}\textsuperscript{116}

A case may be referred to the Court by either the Commission or one of the High Contracting Parties within three

\begin{itemize}
  \item \textsuperscript{111} \textit{Procedure}, \textit{supra} note 20, rule 44(1).
  \item \textsuperscript{112} "Tyrer" Case, \textit{supra} note 59.
  \item \textsuperscript{113} \textit{Greece v. United Kingdom}, \textit{supra} note 76, at 188.
  \item \textsuperscript{114} See, e.g., Nielsen \& Holgersen v. Denmark, 15 EUR. COMM'N ON HUMAN RIGHTS, DECISIONS AND REPORTS 128 (1979).
  \item \textsuperscript{115} See Ensslin, Baader, Raspe v. Federal Republic of Germany, \textit{supra} note 87.
  \item \textsuperscript{116} See A. H. \textit{Robertson, supra} note 1, at 193-226; K. \textit{Vasak, supra} note 2.
\end{itemize}
months after the transmission of the Commission’s report to
the Committee of Ministers. The individual complainant
cannot refer a case to the Court, for he has no *locus standi*
before it.

The Court, like the Commission, sits in Strasbourg. The
judges of the Court (currently twenty in number) are elected
to a nine-year term by the Consultative Assembly from a list
of persons nominated by the Member States of the Council of
Europe. The Court consists of a number of judges equal to
that of Member States of the Council of Europe, and not, as
in the case of the Commission, to the number of State Parties.
No two judges may be nationals of the same state. In prac-
tice, the judges are nationals of the state from which they are
elected. However, in theory, a judge may be the national of a
state that is not a Council of Europe member.

The Convention does not specify that the judges sit in
their individual capacity, but this has been recognized by the
Committee of Ministers as being an essential ingredient of
their judicial function. Candidates are required to be of high
moral character, and must either possess the qualification re-
quired for appointment to high judicial office or be “juriscon-
sults” of recognized competence. It is expressly stipulated
in the Rules of Court (drawn up by the Court in accordance
with article 55), that “a judge may not exercise his functions
while he is a member of a Government or while he holds a
post or exercises a profession which is likely to affect confi-
dence in his independence.”

The Court elects its president and Vice-President for
three year terms, and meets as cases are brought before
it. The quorum of the plenary Court is eleven judges. The

117. Convention, *supra* note 1, § III, art. 32.
118. *Id.* § IV, art. 39.
119. *Id.* art. 38.
120. *Id.*
121. *Id.* art. 39(2).
122. *Id.* art. 39(3).
123. *PROCEDURE, supra* note 20, rule 4.
124. Convention, *supra* note 1, § IV, art. 41.
125. The Court, which was set up in 1959, dealt with only two cases in the first
seven years of its existence. Recently there has been a substantial increase in the
number of cases referred to it. For example, since 1976 fifteen cases have come before
it, including: “Kjeldsen, Busk Madsen and Pedersen” Case, *supra* note 54 (compul-
sory sex-education in state primary schools); “Handyside” Case, *supra* note 67 (con-
viction of a publisher, seizure and forfeiture of material under an English act on ob-
hearings of the Court, unlike those of the Commission, are public, unless the Court, because of exceptional circumstances, decides otherwise. Moreover, the decision of the Court is delivered at a public hearing.\textsuperscript{128}

The Convention provides that for the consideration of each case brought before it the Court shall consist of a Chamber of seven judges. However, the Rules of Court authorize the Chamber to relinquish jurisdiction in favor of the Plenary Court when the case raises a serious question affecting the interpretation of the Convention. Reference to the Plenary Court becomes obligatory whenever the decision which the
Chamber could render might have a result inconsistent with a judgment previously delivered by a Chamber or by the Plenary Court.127 When a case is brought to the Court, the Chamber is constituted by a drawing of lots, with the President of the Court and the judge of the same nationality as the State Party, sitting ex officio. Upon the constitution of the Chamber, the Commission’s report is usually made public through the Registrar.128

Jurisdiction of the Court

The Court may deal with a case only after the Commission has acknowledge failure of a friendly settlement. Furthermore, the Court has jurisdiction only over states that have lodged a special declaration to this effect with the Secretary-General of the Council of Europe. Such a declaration, recognizing the Court’s compulsory jurisdiction, may be made “unconditionally or on condition of reciprocity on the part of several or other High Contracting Parties or for a specific period.”129 To date, sixteen states have accepted the Court’s compulsory jurisdiction.

The jurisdiction of the Court extends to all cases concerning the interpretation and application of the Convention.130 In response to a preliminary objection to its jurisdiction ratione materiae, the Court held in the Belgian Linguistic Case131 that once a case raised a question concerning the interpretation and application of the Convention, it had jurisdiction. Moreover, the Court has held that “once a case is duly referred to it, the Court is endowed with full jurisdiction and may take cognizance of all questions of fact or of law arising in the course of proceedings, including questions which may have been raised before the Commission under the head of

127. Id. rule 48(1). This occurred in the “Handyside”, “Irish”, and “Klass” cases. See note 125 supra.
128. See EUR. COURT, supra note 109, rules 21, 29(3).
129. Convention, supra note 1, § IV, art. 46.
130. Id. art. 45.
However, it has been clearly established that the decision of the Commission to reject an application as inadmissible cannot be raised before the Court. The Court has recently characterized its assumption of jurisdiction regarding questions of admissibility as "simply ascertaining whether the conditions allowing it to deal with the merits of the case are satisfied." Thus, in the Vagrancy Cases, the Court held that it had jurisdiction to deal with questions of non-exhaustion of domestic remedies. However, in the Airey Case, it refused to consider whether an application was manifestly ill-founded, since this was a question which concerned the merits directly.

As previously mentioned, an individual has no locus standi before the Court. This paradoxical position, in a Convention concerned with individual rights has been partially rectified by Court case-law. In the Lawless Case, the Court initially established the principle that the Commission is entitled to make known to the Court the applicant's views as a means of throwing light on the points in the issue. This is done by submitting the Commission's report to the applicant or to his legal representative and seeking their comments once a case has been referred to the Court.

Further, it is provided in rule 29 of the Rules of Court that "the Commission shall delegate one or more of its members to take part in the consideration of a case before Court. The delegates may, if they so desire, have the assistance of any person of their choice." In practice, the Commission seeks the assistance of the applicant's legal representative. Such representative is normally permitted to address the Court and answer questions as if he were a party.

134. "Vagrancy" Cases, supra note 66.
136. The explanation lies in the assertion of the traditional doctrine of sovereignty whereby individuals were not recognized as subjects of international law. See A. H. Robertson, supra note 1, at 193-97, 212-21.
138. EUR. Court, supra note 109, rule 29.
Proceedings before the Court are based on the Commission's report, as well as on written and oral pleadings by the Commission and the state or states concerned. Once the Chamber has been constituted, the President of the Chamber, after consulting with the parties and the delegates of the Commission, determines whether memorials are to be filed and fixes the future procedure in the case. When the case is ready for hearing, he fixes the date for oral proceedings. Furthermore, he directs the hearing and determines the order in which the advocates of the parties and the delegates of the Commission shall be heard.\(^{139}\)

As with proceedings before the Commission, the Convention is silent on the question of provisional measures. However, the Court has a rule of procedure similar to the Commission's rule 36, providing that the President of the Plenary Court may bring to the attention of the Parties any desirable interim measure.\(^{140}\)

Although the Commission's report is valuable to the Court because of its conclusions of fact, the Court is not bound by it. The rules provide that the Chamber may decide, at the request of a party or \emph{proprio motu}, to hear witnesses or experts. Moreover, it may depute some of its members to conduct an inquiry or to carry out an on-the-spot investigation.\(^{141}\) In practice these provisions are rarely used, and substantial weight is attached to the report regarding the establishment of the facts. It is implicitly recognized that the Commission, in the course of its procedures, has been closer to the facts which may have occurred many years previously.

Although the Commission's delegates appear before the Court, the Commission itself does not act as a party to the proceedings. As was recognized in the \emph{Lawless Case}, its function is to assist the Court.\(^{142}\) Some commentators have likened the delegates' role to that of the Advocate-General in the EEC's European Court of Justice.\(^{143}\) The Commission's delegates, who are frequently accompanied by the applicant's law-

\(^{139}\) Id. rules 35, 36, & 37.
\(^{140}\) Id. rule 34.
\(^{141}\) Id. rule 38.
\(^{142}\) "Lawless" Case, supra note 137.
\(^{143}\) See F. Jacobs, supra note 1, at 264.
yer, do not necessarily plead the applicant's case. They give their opinion on the interpretation of the Convention independently. Where the Commission has been divided on an issue, the delegates will usually be chosen to reflect both the majority and the minority views.

The judgment of the Court is final, and after being read by the President at the public hearing, it is transmitted by him to the Committee of Ministers, who are charged to supervise its execution. Unlike judgments of the EEC's Court of Justice, this judgment is not generally enforceable within Member States. Where the Court finds a violation of the Convention, it has a qualified power to award "just satisfaction to the injured party." If the question of "just satisfaction" cannot be decided at the time of judgment, the Court will reserve the question and fix the further procedure. If an agreement is reached between the "parties," the Court shall verify the "equitable nature" of the settlement. If no settlement is forthcoming, further proceedings on the question of "just satisfaction" may be held.

**THE COMMITTEE OF MINISTERS: A POLITICAL ORGAN ACTING IN A QUASI-JUDICIAL CAPACITY**

The Committee of Ministers, composed of the Foreign Ministers of Member States, is the executive decision-making body of the Council of Europe. In practice, the Foreign Ministers meet only twice a year. In other regular sessions, they are represented by their deputies. The machinery established under the Convention is, in many respects, linked to and dependent on the Committee of Ministers. For example, the

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144. Eur. Court, supra note 109, rules 51(2) & (3); Convention, supra note 1, § IV, art. 54.
145. For cases where just satisfaction has been awarded, see A. H. Robertson, supra note 1, at 209-11.
146. Eur. Court, supra note 109, rule 50(3), (5).
147. Under the Second Protocol the Court has a very narrowly-drawn power to give advisory opinions. See A. H. Robertson, supra note 1, at 221-226. See also rule 53 whereby a party or the Commission may request the interpretation of a judgment, and rule 54 whereby in the event of the discovery of a new, potentially decisive fact after delivery of the judgment, a party or the Commission may request the revision of a judgment. Procedure, supra note 20. For a discussion of the potential value of this procedure, see A. H. Robertson, supra note 1, at 226.
148. See generally A. H. Robertson, supra note 1, at 237-58, but see text accompanying notes 150-166 infra.
Committee is responsible for the election of members of the Commission. The expenses of the Commission and the Court are borne by the Council of Europe, whose budget is determined by the Committee. The remuneration of members of the Court is also determined by the Committee. The Secretariat of the Commission is provided by the Secretary-General of the Council of Europe, who is responsible to the Committee. In practice it is the Committee of Ministers which submits names to the Consultative Committee for purposes of election to the Court.  

The Convention confers two important decision-making and supervisory functions on the Committee. Under article 32 of the Convention, it is charged with making the decision as to whether or not there has been a violation. Secondly, under article 54, it is responsible for supervising the execution of the judgment of the Court.

Article 32 Procedure

Article 32 of the Convention Provides: "If the question is not referred to the Court in accordance with Article 48 of this Convention within a period of three months from the date of the transmission of the Report to the Committee of Ministers, the Committee of Ministers shall decide by a majority of two-thirds of the members entitled to sit on the Committee whether there has been a violation of the Convention."  

This provision reflects the political reality that existed during the drafting of the Convention. States were simply not prepared to accept compulsory judicial decisions by the Commission or the Court. In the Committee's Rules of Procedure, it is provided that even a state that has not yet ratified the Convention may take part in an article 32 decision. Where there is a finding of a violation, the Committee may make suggestions and recommendations to the state concerned. It shall prescribe a period during which the state must follow the measures required in the decision. The Committee has made it clear that any suggestions or recommendations (which

149. Convention, supra note 1, § III, art. 37; § IV, art. 42; § V, art. 58. See id. First Protocol, arts. 1-3.
150. Id. § III, art. 32(1).
151. COLLECTED TEXTS, supra note 1, at 501.
152. Convention, supra note 1, § III, art. 32(2).
also require a two-third majority) are not binding on the state. Thus, the underlying policy of supervision is that the Committee leaves it to the state to draw legal consequences from its decision.

The Rules provide that the committee can discuss the substance of any case for which the Commission has submitted a report, and may even consider written or oral statements of the parties, and hear witnesses. In practice the Committee is not equipped to carry out such a role, and in most cases, it follows the majority opinion in the Commission. Moreover, the Committee has decided that the individual applicant has no standing before it. Neither has the individual the right to be heard, nor the right to have any written communication considered on any other matter.

If the state fails to take satisfactory measures, the Committee decides, again by a two-thirds majority, what effect should be given its original decision. That report is then published, publication being the only sanction specifically provided for in the Convention. However, article 8 of the statute of the Council of Europe empowers the Committee to suspend or expel any state which has seriously violated article 3 of the statute, whereby every Member State of the Council must, as a condition of membership, accept the principles and rules of law regarding the protection of human rights. This provision has only been considered on one occasion, in connection with the first Greek Case, where Greek withdrawal from the Council rendered a decision unnecessary.

Reports are usually published in cases where the decision

153. Collected Texts, supra note 1, at 501.
154. Id.
155. Id. at 504.
156. See A. H. Robertson, supra note 1, at 243:
This is perhaps a more powerful sanction than is generally believed, because no responsible government can view with complacency the prospect of the publication by the Foreign Ministers of eighteen States of a report indicating that it has violated its international obligations regarding respect for human rights. Moreover in a democratic country—and all Contracting Parties are democratic States ex hypothesi—the publication of such a report would put powerful ammunition in the hands of a parliamentary opposition.
The report, in an appropriate case, could be used to put pressure on the State concerned by the new directly elected European Parliament of the EEC, All nine members of the EEC are state parties. Among them only France has not accepted the right of individual petition.
157. "Greek" Case, supra note 90.
is one of non-violation. All decisions made by the Committee under article 32 are binding. It should be noted that in certain cases where the Commission has found a violation, the Committee has been unable to attain a two-thirds majority, and had to decide that no further action was called for without publishing the reports.\textsuperscript{158} In the case of Cyprus v. Turkey, the report of the Commission, transmitted on August 20, 1976, was frozen by the Committee pending the possibility of a political settlement. It was eventually “declassified” on August 31, 1979. A “non-specific” decision of the Committee ruled that events that had occurred in Cyprus constituted violations of the Convention and the Parties were strongly urged to resume inter-communal talks.\textsuperscript{159} Finally, while the early case of Greece v. United Kingdom was before the Committee for decision, a political settlement was reached, enabling it to find that no further action was called for. A similar solution was reached in several individual cases where appropriate remedial action was taken while the report was before the Committee.\textsuperscript{160}

\textit{Supervising the Execution of the Court’s Judgment}\textsuperscript{161}

In accordance with article 54, “the judgment of the Court shall be transmitted to the Committee of Ministers which shall supervise its execution.” As mentioned previously, decisions of the Court are binding on State Parties. It should be noted that the role of the Committee is to “supervise” the execution of the Court’s judgment, and not to “execute” it. The Rules of Procedure provide the following steps:

1) The case is included on the agenda of the Committee without delay, and the state is invited to inform the Committee of the measures it has taken following the judgment.

2) If the state concerned informs the Committee that it

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{159} Cyprus v. Turkey (No. 3), supra note 51.
\item \textsuperscript{160} See: “Collection of Resolutions adopted by the Committee of Ministers in application of Article 32 of [E.C.H.R.]” 1959-1979, Council of Europe document H (79) 7, for the practice of the Committee in each individual case and inter-State cases.
\item \textsuperscript{161} See \textit{Collected Texts}, supra note 1, at 507.
\end{enumerate}
\end{footnotesize}
is not yet in a position to inform it of the measures taken, the case shall be included on the Committee’s agenda six months later.

3) The Committee shall not regard its function under article 54 as having been exercised until it has taken note of the information supplied under 1), and, where just satisfaction has been afforded by the Court, until it is satisfied that an award has been made to the injured party.\(^{163}\)

Where the state concerned does amend its legislation, as in the *Golder* case,\(^{163}\) a difficult legal question arises as to the conformity of the amendment with the Convention.

Commentators have remarked that the Committee, which is essentially a political body, is not qualified or equipped to make such an appreciation. In addition, in certain situations it may not be well placed to require legislative change even though this may follow logically from the decision of the Court. For example, in the *Tyrer Case*,\(^{164}\) where the Court found judicial corporal punishment to be a breach of article 3, the Committee seemed to be sensitive to the United Kingdom’s constitutional difficulties in imposing legislative change on the Isle of Man. It simply took note of information provided by the government of the United Kingdom to the effect that the judicial authorities in the Isle of Man were informed that such punishment would be in breach of the Convention.\(^{165}\) In other cases, the Committee has been able to “take

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162. *Id.*


Golder was accused by a prison official of having assaulted him during disturbances in Parkhurst prison, but was not allowed by the Home Secretary to correspond with a solicitor in order to bring a civil action against the officer for defamation. The Court found a breach of article 6(1) which was held by the Court to embody the “right to a court” of which the right of access was an important constituent element; the result of the Court’s decision was a change in the prison rules. The prisoner, on request, would be allowed to consult a solicitor provided that where the proposed proceedings were against the Home Office and were connected with the person’s imprisonment, facilities would not be granted until he had ventilated his complaint through the normal internal channels. In Resolution (76)35 the Committee took note of the above change in the Prison Rules and declared that it had exercised its functions under article 54.

The compatibility of this amendment with the requirements of article 6(1) is at present being examined by the Commission in the *Prisoner’s Correspondence Cases*. See *Stock-Taking*, supra note 33, at 114-15.

164. “*Tyrer*” Case, supra note 59.

165. See Resolution 78(39) [to appear in Yearbook 21].
CONCLUSION

Although the procedures described above are cumbrous and give rise to delay, it must be recognized that the Commission and the Court develop fundamental principles of law extending beyond the confines of the particular case-principles which must be taken into account by Member States in their domestic law and practice. It is this effect that constitutes the real achievement of the Convention, rather than the concrete results which are brought about in the context of particular cases.

There can be little doubt that this process, which increases the level of protection available in national systems, is aided by statements of the Court to the effect that the Convention must be interpreted in the light of prevailing social and economic conditions. However, there are limits to the progress that can be brought about by a flexible approach to interpretation. What is now required is a flexible political approach toward structural reform of the Convention.

166. See A.H. Robertson, supra note 1, at 258-65 for an analytical breakdown of article 54 decisions.

167. See, e.g., "Tyrer" Case, supra note 59; "Airey" Case, supra note 133.

168. Structural changes currently under consideration are (1) the question of extending the scope of the Convention to include social, economic and cultural rights; (2) accession of the European Communities to the Convention; and (3) the possibility of national courts seeking a preliminary ruling from the Court on questions of interpretation of the Convention. See A.H. Robertson, supra note 1, at 1-17, 221 and A.H. Robertson, supra note 3.