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THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS[1]

INTRODUCTION

> All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis.[2]

The Vienna Declaration and Programme of Action (1993) clearly recognises the interrelationship and interdependence of civil and political rights and the social, economic and cultural rights. This recognition is present in varying degrees in all the major human rights instruments. As we have already noted

[1] H.J. Steiner and P. Alston, *International Human Rights in Context: Law, Politics, Morals: Text and Materials*, 2nd edn (Oxford: Clarendon Press) 2000, pp. 237–320; M. Craven, *The International Covenant on Economic, Social and Cultural Rights: A Perspective on its Development* (Oxford: Clarendon Press) 1995; D.J. Harris, *Cases and Materials on International Law*, 5th edn (London: Sweet and Maxwell) 1998, pp. 689-699; G. Peces-Barba, 'Reflections on Economic, Social and Cultural Rights' 2 *HRLJ* (1981) 281; D. Beetham, 'What Future for Economic and Social Rights?' 53 *Political Studies* (1995) 41 at p. 51; A. Eide, 'The Realisation of Social and Economic Rights and the Minimum Threshold Approach' 10 *HRLJ* (1989) 35; D.M. Trubeck, 'Economic, Social and Cultural Rights in the third World' in T. Meron (ed.), *Human Rights in International Law: Legal and Policy Issues* (Oxford: Clarendon Press) 1984, pp. 205–271.

[2] Vienna Declaration and Programme of Action (New York: United Nations Department of Public Information) 1993 para 5 (pt 1). Adopted by the United Nations World Conference on Human Rights, 25 June, 1993. Also see C. Scott, 'Reaching Beyond (without Abandoning) the Category of "Economic, Social and Cultural Rights"' 21 *HRQ* (1999) 633.

the UDHR[3] affirms the existence of the three generations of rights.[4] The ICCPR also retains as its primary Article the right to self-determination, which is a collective right, the right of peoples.[5] It also contains articles on equal protection of the law (Article 26), right to freedom of association (Article 22(1)), right to life (Article 6(1)) and rights of minorities including their cultural rights (Article 27). Similarly other international and regional human rights instruments reiterate the overlap between social, economic and cultural rights, and civil and political rights. Regional human rights treaties primarily represented by the ECHR,[6] the American Convention on Human Rights (ACHR),[7] and the AFCHPR[8] indulge in various ways to protect social, economic and cultural rights, while retaining a focus on civil and political rights.

ARGUMENTS OVER THE SUPERIORITY OF RIGHTS

Notwithstanding this interaction, there have been divisions over the status of economic, social and cultural rights. A variety of arguments continue to be put forward asserting the superiority of civil and political rights. Civil and political rights are advocated as being more important since they arguably form a critical basis for protecting human rights.[9] This assumption of the superiority of civil and political rights has, as Leckie notes, led to gross violations and neglect of economic and social rights. He notes:

> when people die of hunger or thirst, or when thousands of urban poor and rural dwellers are evicted from their homes, the world still tends to blame nameless economic or 'developmental' forces, or the simple inevitability of human deprivation, before placing liability at the doorstep of the state. Worse yet, societies increasingly blame victims of such violations for creating their own dismal fates, and in some countries, they are even characterized as criminals on this basis alone.[10]

Attached to the assumption of the superiority of civil and political rights is the claim that these rights establish immediate binding obligations, whereas

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[3] 10 December, 1948, UN GA Res. 217 A(III), UN Doc. A/810 at 71 (1948).

[4] See above Chapter 3.

[5] Adopted at New York, 16 December, 1966. Entered into force 23 March 1976. GA Res. 2200A (XXI) UN Doc. A/6316 (1966) 999 U.N.T.S. 171; 6 I.L.M. (1967) 368.

[6] Signed at Rome, 4 November 1950. Entered into force 3 September 1953. 213 U.N.T.S. 221; E.T.S. 5.

[7] Signed at San Jose, 22 November 1969. Entered into force 18 July 1978. 1144 U.N.T.S 123; O.A.S.T.S. No.36, O.A.S. Off. Rec. OEA/Ser.L/V/11.23, doc. rev, (1979); 9 I.L.M. (1970) 673.

[8] Adopted on 27 June 1981. Entered into force 21 October 1986. OAU Doc. CAB/LEG/67/3 Rev. 5, 21 I.L.M. (1982) 58.

[9] S. Leckie. 'Another Step Towards Indivisibility: Identifying the Key Features of Violations of Economic, Social and Cultural Rights' 20 *HRQ* (1998) 81 at p. 82.

[10] Ibid.

the language of social and economic rights largely represents undertakings of a progressive nature.[11] 'Progressive achievement' is thus described as the linchpin of ICESCR.[12]

A view very commonly held by commentators and State representatives is that in order to ensure civil and political rights, governments are required to abstain from certain activities (for example not to conduct torture or to deprive people of their liberty). In comparison, economic, social and cultural rights are believed to require a State's intervention and are therefore seen as positive rights. While in some instances this distinction can be made out, in other cases of protecting civil and political rights, active State action is definitely required.[13] Associated with this point is the claim that civil and political rights are easier to enforce and implement since the cost implications are not so significant. Furthermore, it is argued that economic, social and cultural rights obligations are much more difficult to implement since they remain dependent on the economic strength of the State in question. While it is true that some economic and social obligations (for example, to provide everyone with a decent standard of living, to ensure that no one is hungry or unemployed) represent substantial commitments, fulfilling many of the civil and political rights can be equally onerous. Thus, for example, satisfying all the various aspects of the right to fair trial can be very demanding financially.

Those advocating superiority of civil and political rights point to the differences in approach within the substantive provisions as well as in the measures of implementation. We have already noted the approach adopted in ICCPR while dealing with civil and political rights. Contrast these provisions with those of ICESCR. Whereas the ICCPR relies on an authoritative terminology such as 'everyone has the right', 'no one shall be', and has provided definitive rights, the ICESCR relies on imprecise terminology; the usage of such terms as 'recognition' arguably makes it more difficult to regard the rights as legally enforceable. The ICESCR has also been criticised for advancing relatively

[11] See Harris, above n. 1, at p. 695; D.M. Trubeck, 'Economic, Social and Cultural Rights in the Third World' in T. Meron (ed.), above n. 1, at pp. 210–212.

[12] P. Alston and G. Quinn, 'The Nature and Scope of State Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights' 9 *HRQ* (1987) 156 at p. 172; According to Robertson and Merrills, 'It is thus quite clear that this is what is known as a promotional convention, that is to say, it does not set out rights which the parties are required to implement immediately, but rather lists standards which they undertake to promote and which they pledge to secure progressively, to the greatest extent possible, having regard to their resources' A.H. Robertson and J.G. Merrills, *Human Rights in the World: An Introduction to the Study of International Protection of Human Rights*, 4th edn (Manchester: Manchester University Press) 1996, at p. 276; also see D. McGoldrick, *The Human Rights Committee: Its Role in the Development of the International Covenant on Civil and Political Rights* (Oxford: Clarendon Press) 1991, pp. 11–13. G. Van Bueren, 'Combating Child Poverty – Human Rights Approaches' 21 *HRQ* (1999) 680 at p. 684.

[13] Beetham, above n. 1, at p. 51.

novel claims as 'rights'. Commentators have doubted the existence of such economic 'rights' as the 'right to food'.[14]

The apparently weak and vague nature of the provisions contained within the ICESCR has led some critics to question whether the treaty provides for legally binding and enforceable rights. Although not completely accurate, there is a measure of truth in the views of these critics. As we shall analyse in the course of this chapter, the implementation mechanisms applicable to the ICESCR are much weaker than those of the ICCPR and the system, unlike that of the ICCPR, does not have an inter-State or individual's complaints procedure.

GENERAL NATURE OF OBLIGATIONS: PROGRESSIVE REALISATION OF RIGHTS

In Article 2 of the Covenant, the nature of the obligations undertaken by States parties is spelled out. According to Article 2 (1):

> Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognised in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

Some commentators doubt whether the Covenant imposes obligations carrying immediate legal affect. The matter has been controversial, although the correct view appears to be that the Article imposes legal obligations that are required to be given immediate legal affect by the State party concerned. Thus according to the Limburg Principles:[15]

> [t]he obligation 'to achieve progressively the full realisation of the rights' requires States parties to move as expeditiously as possible towards the realisation of the rights. Under no circumstances shall this be interpreted as implying for States the right to defer indefinitely efforts to ensure full realisation. On the contrary all States parties have the obligation to begin immediately to take steps to fulfil their obligations under the Covenant.[16]

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[14] R.L. Brad, 'The Right to Food' 70 *Iowa Law Review* (1985) 1279. C.f. G.J.H. Van Hoof, 'The Legal Nature of Economic, Social and Cultural Rights: A Rebuttal of Some Traditional Views' in P. Alston and K. Tomasevski (eds), *The Right to Food* (Boston: Martinus Nijhoff Publishers) 1990, pp. 97–110.

[15] These principles represent guidelines on the implementation of the Covenant. *The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights*, UN ECCOR. Res. Commission on Human Rights, 43rd Sess., Agenda Item 8, UN Doc. E/CN. 4/1987/17Annex (1987), reprinted as 'The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights' 9 *HRQ* (1987) 122.

[16] Limburg Principles, principle 21. See also *the Statement to the Committee on Economic, Social and Cultural Rights* by B.G. Ramcharan, Deputy High Commissioners, ICESCR, 25th Sess., 23 April 2001.

These obligations, however, are limited to 'taking steps' with a view to 'achieving progressively the full realisation of the rights' that are recognised in the treaty. It is interesting to note the contrasting provisions of ICCPR which impose an obligation on States to 'respect and to ensure'. The provisions of Article 2(1) have been further explored by the Committee's General Comment on the Nature of State Parties Obligation (Article 2, para 1) where the Committee notes 'while the Covenant provides for progressive realisation and acknowledges the constraints due to the limits of available resources, it also imposes various obligations which are of immediate effect'.[17] The Committee has emphasised that even in situations where there are inadequate resources, the obligation remains on the State party to try to ensure the enjoyment of rights.[18]

While legislative means are required, they do not represent the only means of ensuring implementation and it is a matter for the State concerned to determine whatever means (legislative or otherwise) would be required to provide the rights contained within the Covenant. In its third General Comment, the Committee observed that the phrase

> 'by all appropriate means' must be given its full and natural meaning which each State party must decide for itself which means are the most appropriate under the circumstances with respect to each of the rights, the 'appropriateness' of the means chosen will not always be self-evident. It is therefore desirable that States parties reports should indicate not only the measures that have been taken but considered to be most 'appropriate' under the circumstances. However the ultimate determination as to whether all appropriate measures have been taken remains for the Committee to make.[19]

Article 2(2) represents the crucial non-discriminatory provision within the Covenant. According to this provision the rights contained within the treaty are to be provided without 'any discrimination on the basis of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'. As we shall be analysing in the course of this study, the norm of non-discrimination informs the entirety of human rights law. The effective application of a regime of equality and non-discrimination is particularly important in the context of ensuring economic, social and cultural rights. The significance of this principle is underlined by Craven when he notes:

> It is very much apparent that a notion of equality runs through the heart of the Covenant. The Covenant assumes the creation or maintenance of state welfare

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[17] ICESCR General Comment 3, *The Nature of States Parties Obligations* (Article 2, para 1) General Comment No. 3 (14/12/90). UN Doc. E/1991/23, Annex III UN ESCOR, Supp. (No. 3). 84, para 1.

[18] UN Doc. E/1991/23, para 11.

[19] ICESCR General Comment 3, above n. 17, para 4.

institutions and social safety nets (for example the provision of housing, food, clothing and social security) and as such is openly redistributionist.[20]

States are required not only to provide *de jure* equality, but are allowed to introduce distinctions among various sections of the community in order to ensure de facto equality. According to one commentator the policy of affirmative action has been sanctioned by the terminology of Article 2(1) itself.[21] Article 3 restates the fundamental requirement for equality of provision of the rights contained in the Covenant. Commenting on this article, Principle 45 of the Limburg Principle observes that '[I]n the application of article 3 due regard should be paid to the Declaration and Convention on the Elimination of All Forms of Discrimination against Women and other relevant instruments and the activities of (CEDAW) under the said Convention'.[22] Article 4 provides for a general limitation clause which is applicable to the substantive rights contained in Part III of the treaty. Article 5 contains what can be termed as a 'saving clause' which in effect states that treaty provisions cannot be used as a justification for the violation of the rights either contained therein or already established elsewhere.[23]

SELF-DETERMINATION AND ECONOMIC AND SOCIAL RIGHTS

Article 1 of the Covenant deals with the important right of self-determination. As noted earlier, the provisions within the Article are identical to those of Article 1 in the ICCPR.[24] The analysis here will focus on those aspects of self-determination which are directly relevant to economic and social rights. The right to self-determination, which includes economic self-determination, has been clearly established as a right in international law and forms a part of the norms of *jus cogens*.[25] In conceptualising the economic and social dimensions of this right, it is important to mention that the impetus for the development of a legally binding right of self-determination has come from the developing and the socialist worlds. The *travaux préparatoires* of the human rights covenants confirm that a number of developing States were at the forefront of incorporating the right to economic self-determination. For these States, a cardinal aspect of self-determination was the right to permanent sovereignty over natural wealth and resources along with a right to the nationalisation of property.[26]

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[20] Craven, above n. 1, at p. 161.

[21] Ibid. pp. 157–158.

[22] Limburg Principles, principle 45.

[23] Alston and Quinn, above n. 12, at p. 192.

[24] See above Chapter 4.

[25] On *jus cogens* see above Chapter 1. For further discussion on the relationship of self-determination with *jus cogens* see below Chapter 12.

[26] See M.N. Shaw, *International Law*, 4th edn (Cambridge: Grotius Publication) 1997, p. 34.

In so far as economic self-determination is concerned, this position is established within Article 1 of the Covenant. According to Article 1(1):

> All Peoples have the right of self-determination. By virtue of that right they freely … pursue their economic … development. All Peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

Article 1(3) goes on to assert the point that

> Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognised in the present Covenant to non-nationals.

The ideal of permanent sovereignty and the right to exploit nationally based resources has led to substantial controversies over the issue of expropriation and nationalisation of foreign property. Developed States have insisted that any expropriation of foreign property needs to comply with 'minimum international standards'[27] and be based on compensation that is 'prompt, adequate and effective'.[28] In contrast the developing countries advanced the so-called 'New International Economic Order', which authorised an unfettered discretion over natural resources including a right to nationalisation.[29] This vision of permanent sovereignty over natural resources was evidenced in the Charter of Economic Rights and Duties of States[30] and the Declaration on the Establishment of a New Economic Order.[31] The Declaration on the Establishment of a New Economic Order contains provisions asserting permanent sovereignty over natural resources. Para 4(2)(e) asserts the right to:

> full permanent sovereignty of every State over its natural resources and economic activities. In order to safeguard these resources, each State is entitled to exercise effective control over them and their exploitation with means suitable to its own situation, including the right to nationalisation or transfer of ownership to its nationals, this right being an expression of the full permanent sovereignty of the State. No State may be subjected to economic, political or any other type of coercion to prevent the free and full exercise of this inalienable right.

[27] See D.J. Harris, *Cases and Materials on International Law*, 5th edn (London: Sweet and Maxwell) 1998, p. 548.
[28] Derived from a formula devised by a former United States Secretary of State, Cordell Hull, and known generally as the Hull formula (1938), according to which 'no government is entitled to expropriate private property, for whatever purpose, without provision for prompt, adequate and effective payment therefore'. Text in 32 *AJIL* (1938), Supp., 192.
[29] See R. Jennings and A. Watts, *Oppenheim's International Law*, 9th edn (Harlow: Longman) 1992, Vol. 1, p. 17.
[30] GA Res. 3281(XXIX) 14 I.L.M. (1975) 251.
[31] GA Res. 3201 (S–VI) 13 I.L.M. (1974) 715.

Article 25 of ICESCR, alongside the above mentioned provisions of Article 1, was deployed by the developing world to advance claims of economic sovereignty and self-determination. According to Article 25, nothing in the ICESCR shall be interpreted to impair 'the inherent right of all people to enjoy and utilise fully and freely their natural wealth and resources'.[32] While substantial differences exist regarding a suitable agenda for economic reform, in so far as the issues of expropriation are concerned the last two decades have seen the traditional distinctions appear to blur. The developing States have become more conscious of the value of foreign investment and have come round to the idea of providing guarantees of adequate compensation so as to attract foreign investors. This eagerness to attract foreign investment has also been influenced by the collapse of socialist planned economies, accompanied by a growing recognition that expropriation and nationalisation of foreign property is damaging for a continuing flow of foreign capital investments. Having said that, the exact position on expropriation within *lex lata* is not fully established[33] and the modern jurisprudence on arbitration awards for nationalisation and expropriation of foreign property does not eradicate the uncertainties.[34]

ANALYSIS OF THE STRUCTURE AND SUBSTANTIVE RIGHTS

The ICESCR was adopted at the same time as the ICCPR and entered into force on 3 January 1976.[35] Attempts to establish a complaints procedure based on an optional protocol (similar to ICCPR's first Optional Protocol) have, thus far, been unsuccessful. The ICESCR is divided into five parts. Part I (Article 1) deals with the right to self-determination. Part II (Articles 2–5) provides *inter alia* for the general nature of States parties obligations; Part III (Articles 6–15) provides for specific substantive rights; Part IV provides for implementation; Part V provides general provisions of a legal nature. As we shall see, the Covenant is supplied with an implementation mechanism. The body in charge of implementation is called the Committee on the International Covenant on Economic, Social and

32 See Article 25.

33 See A.H. Qureshi, *International Economic Law* (London: Sweet and Maxwell) 1999, 376; cf. P. Malanczuk, *Akehurst's Modern Introduction to International Law*, 7th edn (London: Routledge) 1997, p. 237. Also see J. Rehman, 'Islamic Perspectives on International Economic Law' in A.H. Qureshi (ed.), *Perspectives on International Economic Law* (The Hague: Kluwer Law International) 2002, pp. 235–258.

34 See in particular the jurisprudence of the Iran–United States Tribunal, M. Fitzmaurice and M. Pellonpää, 'Taking property in the Practice of Iran-United States Claim Tribunal' 19 *NYIL* (1988) 53; A. Mouri, *The International Law of Expropriation as Reflected in the Work of the Iran–United States Claims Tribunal* (Dordrecht: Martinus Nijhoff Publishers) 1994.

35 Adopted at New York, 16 December 1966. Entered into force 3 January 1976. GA Res. 2200A (XXI) UN Doc. A/6316 (1966) 993 U.N.T.S. 3; 6 I.L.M. (1967) 360.

Cultural Rights (the Committee). In addition to the work of the Committee, the jurisprudence on the subject has been enhanced by a number of sources including the Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights[36] and the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights.[37] As their respective titles indicate, these documents articulate principles and guidelines on the Convention rights and violations of these rights.

The Covenant sets out the following substantive rights:

Article 1	The right to self-determination
Article 6	The right to work
Article 7	The right to just and favourable conditions of work
Article 8	The right to form trade unions and the right to strike
Article 9	The right to social security, including social insurance
Article 10	The right to protection and assistance to the family, including special assistance for mothers and children
Article 11	The right to an adequate standard of living including adequate food, clothing and housing, and continuous improvement of living conditions
Article 12	The right to the enjoyment of the highest attainable standard of physical and mental health
Article 13	The right to education, primary education being compulsory and available to all, and secondary and higher education being generally available. Adult education to be encouraged and improvements to be made to the system of schooling
Article 14	Compulsory (free of charge) primary education to be introduced within two years of acceptance of the treaty
Article 15	The right to take part in cultural life and to enjoy the benefits of scientific progress

The right to work and rights of workers

Article 6 provides for the right to work which includes 'the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts' and also states that the State 'will take appropriate steps to safeguard this right'.[38] The right to work is a very significant right as, in the words of Seighart, work represents 'an essential condition of human survival'.[39] It is also protected

[36] The text of the Limburg Principles published in UN Doc.E/CN.4/1987/17, Annex. Reprinted in 9 *HRQ* (1987) 122.

[37] See 20 *HRQ* (1998) 691; V. Dankwa, C. Flinterman and S. Leckie, 'Commentary to the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights' 20 *HRQ* (1998) 705.

[38] Article 6(1).

[39] P. Sieghart, *The Lawful Rights of Mankind: An Introduction to the International Legal Code of Human Rights* (Oxford: Clarendon Press) 1985, p. 123.

by other international human rights instruments including the UDHR,[40] the American Declaration of the Rights and Duties of Man (ADHR)[41] and the European Social Charter (ESC).[42] Craven rightly observes that:

> not only is [work] crucial to the enjoyment of 'survival rights' such as food, clothing or housing it affects the level of sophistication of many other human rights such as the right to education, culture and health.[43]

The phenomenon of arbitrary discrimination and denial of the right to work has been deployed to victimise individuals and groups in many parts of the world. Ethnic minorities and women in a number of States are deprived of equal opportunities or free choices in employment.[44] The Committee has criticised violations of the Convention provisions whereby women require permission from their husbands before being able to work outside their homes,[45] or there are racial or ethnic motivations behind discrimination in granting employment.[46]

According to Article 6(2) steps are to be taken by State parties to the present Covenant to achieve the full realisation of this right. The steps shall include technical and vocational guidance and training programmes, policies and techniques to achieve steady economic, social and cultural development, and full and productive employment under conditions safeguarding fundamental political and economic freedoms to the individual. Article 7 expands on the subject of working conditions and remuneration and provides for a recognition of the right to:

> enjoyment of just and favourable conditions of work which ensure, in particular:
>
> (a) Remuneration which provides all workers, as a minimum, with:
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> (i) Fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work;
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> (ii) A decent living for themselves and their families in accordance with the provisions of the present Covenant;

[40] 10 December 1948, UN GA Res. 217 A(III), UN Doc. A/810 at 71 (1948).

[41] Resolution XXX, Final Act of the Ninth International Conference of American States, Bogota, Colombia, 30 March–2 May 1948, 48. O.A.S Res. XXX. O.A.S. Off. Rec. OEA/Ser. L/V/1.4 Rev. (1965). See below Chapter 8.

[42] Adopted at Turin 18 October 1961. Entered into force, 26 February 1965. 529 U.N.T.S 89; ETS 35. See below Chapter 7.

[43] Craven, above n. 1, at p. 194.

[44] See e.g. Discrimination against religious and ethnic groups in States. Minority Rights Group (ed.), *World Directory of Minorities* (London: Minority Rights Group) 1997.

[45] See the Concluding Observations on report of Iran E/C.12/1993/7 at 3, para 6.

[46] See the Summary Records on the Part of the thirtieth meeting on Report by Dominican Republic (06/03/1996) E/C.12/1996/SR.30 para 17.

Article 7 emphasises fairness in remuneration for work which is of equal value. In order to satisfy the requirement of fair wages, the Committee has advocated a system of minimum wages conforming largely to the ILO Minimum Wage-Fixing Convention of 1970.[47] It lays stress upon an equitable system based on fairness in remuneration between men and women.[48] Article 7(a) is also concerned with the adequacy of rights to allow a decent living for individuals and their families.[49] The various elements of the right to just and favourable conditions of work include equal remuneration between men and women,[50] a decent living for workers and their families,[51] safe and healthy conditions of work,[52] equal opportunities in employment including merit-based opportunities for promotion,[53] rest, leisure and reasonable limitation of hours of work along with paid periodic holidays.[54] The review of these rights by the Committee has raised a number of concerns. In its analysis of State reports, the Committee has expressed unhappiness and dissatisfaction over the employment of people it has termed as 'irregular workers'. These are workers who perform the same tasks as other employees, but their employment is not officially recognised; they are on a lower wage and they do not have any health or unemployment benefits.[55]

A related concern has been the treatment of migrant workers in labour markets as well as in societies in general. In a recent report prepared by the Secretary-General, several States acknowledged the maltreatment of migrants and particularly migrant women:

> Mexico noted that women migrant workers were vulnerable to physical and/or psychological violence, racism, xenophobia and other forms of discrimination. Mexico also reported that women migrant workers were subjected to violations of their rights by border-patrol officials, including battering, rape and kidnapping. Costa Rica indicated that the fact that many women migrant workers were undocumented made them vulnerable to abuse, including sexual harassment and sexual violence. Kuwait acknowledged that there might be rare cases of violence against women ...[56]

Article 8 affords the right to form and join trade unions to everyone. The Article also states that no restrictions should be placed on the exercise of this

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[47] ILO Minimum Wage-Fixing Convention 1970 (No. 131) 825 U.N.T.S. 77 c. 234.

[48] Article 7(a)(i).

[49] Article 7(a)(ii).

[50] Ibid.

[51] Ibid.

[52] Article 7(b)

[53] Article 7(c).

[54] Ibid.

[55] See Concluding Observations of the Committee on Economic, Social and Cultural Rights: Japan. 31/08/2001. E/C.12/1/Add.67. (Concluding Observations/Comments), para 61.

[56] See Report prepared by the Secretary-General, *Violence against Women Migrant Workers*, A/56/329.

right other than those that are necessary for national security, public order or for protecting the rights of others.[57] The right to strike, although controversial, was incorporated by the Third Committee as the majority considered that it was indispensable for the protection of the interests and rights of workers, up to a point whereby the absence of this right would render meaningless any guarantee of trade union rights.[58] This right to strike is subject to limitations laid down in Article 8(1)(a), that is rights may be limited in the interests of national security, public order or the rights and freedoms of others. The right to strike provisions stand out in human rights treaties as only the European Social Charter has similar explicit provisions.[59] The Committee has suggested that the right to strike should be incorporated as part of the contract of employment.[60]

Article 8 can be regarded as an extension of the right to Freedom of Association and it also overlaps with Civil and Political Rights; the terminology of the Article is reminiscent of the obligations within civil and political rights. The wording of the Article emphasises that the rights need to be given immediate effect. According to Article 8(2) this article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces or of the police or of the administration of the State. Article 8(2) restricts members of armed forces, following the lead by the ECHR which also has similar restrictions.[61]

Social security and family rights

According to Article 9, the States parties recognise the right of everyone to security, which includes social insurance. Article 10 deals with the important subject of promoting and protecting the family. In encouraging States parties to provide all possible assistance to families, the Article treats family as 'the natural and fundamental group unit of society', a terminology applied in other international and regional human rights treaties.[62] The Article notes the value of family in the education and upbringing of children. A corollary to the family unit is the institution of marriage, which, according to the Article, must be entered into with the free consent of the intending spouses.[63]

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Article 10(2) states that special protection should be accorded to mothers during a reasonable period before and after childbirth. During such period,

[57] Article 8(2).

[58] See Mosorov (USSR) E/CN.4/SR.298 at p. 8 (1952); Bracco (Uruguay) E/CN.4/SR.229 at 3 (1952); Brena (Uruguay) A/C.3/SR. 719.

[59] See below Chapter 7.

[60] See Konate on the Report from Jamaica E/C.12/1990/SR.15 at p. 6, para 25.

[61] ECHR Article 11(2).

[62] See Article 23(1) ICCPR; Article 18 AFCHPR; Article 17 ACHR.

[63] Article 10(1).

working mothers should be given paid leave or leave with adequate social security benefits. According to 10(3) special measures of protection and assistance need to be taken on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions. Children and young persons are to be protected from economic and social exploitation. Their employment in work harmful to their morals or health, dangerous to life, or likely to hamper their normal development should be punishable by law. States are also required to set age limits below which the paid employment of child labour should be prohibited and punishable by law.]PR

In the light of the frequent abuse which women and children suffer, the protection of their rights has become a special concern for human rights law. In contemporary societies the exploitation of children is conducted through such abominable practices as prostitution, sexual slavery, labour and servitude. Child labour and exploitation is an institutionalised practice in many parts of the world. According to conservative estimates, between 50–100 million, 10-to 14-year-old children are currently in full-time employment. The actual figures are likely to be much higher.[64] The prostitution and sale of children (especially young girls) and their sexual abuse is also a deplorable but not uncommon occurrence. The provisions of Article 10(3) have been further reinforced by a number of recent initiatives. Notable among these are the enforcement of the Convention on the Rights of the Child,[65] and the more recent Protocol on the Sale of Children, Child Pornography and Child Prostitution.[66]

Adequate standard of living and mental and physical health

Article 11 provides for the right to an adequate standard of living. According PR to [Article 11(1) States parties recognise the

> right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions.

The important provisions of this Article have been the subject of a General Comment as well as a thorough investigation by the Committee.[67] In its obser-

[64] G. Van Bueren, *The International Law on the Rights of the Child* (Dordrecht: Martinus Nijhoff Publishers) 1995, p. 263; also see D.E. Ehrenberg, 'The Labor Link: Applying the International Trading System to Enforce Violations of Forced and Child Labour' 20 *YJIL* (1995) 361.

[65] Adopted at New York, 20 November 1989. Entered into force 2 September, 1990. UN GA Res. 44/25 Annex (XLIV), 44 UN GAOR Supp. (No. 49) 167, UN Doc. A/44/49 (1989) at 166; 1577 U.N.T.S. 3. 28 I.L.M. (1989) 1448.

[66] Adopted by the General Assembly 25 May, 2000. GA. Res. 263, UN GAOR, 54 Sess., Supp. 49; UN Doc. A/Res/54/263. See M. J. Dennis, 'Newly Adopted Protocols to the Convention on the Rights of the Child' 94 *AJIL* (2000) 789.

[67] CESCR General Comment 7, *The Right to Adequate Housing: Forced Evictions* (Article 11(1)) General Comment No. 7 (20/05/97).

vations the Committee points to the importance of adequate housing as a fundamental human right and has treated forced eviction as a violation of the Article. In reviewing the report from the Dominican Republic the Committee asserted:

> The information that had reached members of the committee concerning massive expulsion of nearly 15,000 families in the course of the last five years, the deplorable conditions in which the families had to live, and the condition in which the expulsions had taken place were sufficiently serious for it to be considered that the guarantees in Article 11 of the Covenant had not been respected.[68]

In its sixth session, the Committee found that evictions of large numbers of people had led Panama 'not only [to infringe] upon the right to adequate housing but also on the inhabitants' right to privacy and security of the home'.[69] The Committee's members have criticised States for reduction in low-cost housing or for shortage of low-income housing.[70] Article 11(2) details certain provisions to advance the right of individuals to freedom from hunger. The article has been the subject of a General Comment where the Committee notes:[71]

> The right to adequate food, like any other human right, imposes three types or levels of obligations on States parties: the obligations to *respect*, to *protect* and to *fulfil*. In turn, the obligation to *fulfil* incorporates both an obligation to facilitate and an obligation to provide. The obligation to *respect* existing access to adequate food requires States parties not to take any measures that result in preventing such access. The obligation to *protect* requires measures by the State to ensure that enterprises or individuals do not deprive individuals of their access to adequate food. The obligation to *fulfil* (facilitate) means the State must pro-actively engage in activities intended to strengthen people's access to and utilisation of resources and means to ensure their livelihood, including food security. Finally, whenever an individual or group is unable, for reasons beyond their control, to enjoy the right to adequate food by the means at their disposal, States have the obligation to *fulfil* (provide) that right directly. This obligation also applies for persons who are victims of natural or other disasters.[72]

The obligation which the Committee has termed 'the obligation to fulfil' represents a substantial commitment. This particular obligation to fulfil the

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[68] UN Doc E/C.12/1990/8, para 249.

[69] UN Doc E/C.12/1991/4, para 135.

[70] See e.g. Romero E/C.12/1988/SR.12 at 10–11, para 52 and Concluding Observations on report of Italy E/1993/22 at 50, para 192.

[71] CESCR General Comment 12, *The Right to Adequate Food* (Article 11) General Comment No. 12 E/C.12/1999/5 (12/05/99).

[72] (Emphasis provided.) *The Right to Adequate Food* (Art. 11) 12/05/99. E/C.12/1999/5, ICESCR General Comment 12. (General Comments), para 15. See also Brad, above n. 14.

right to food has not been the subject of extensive investigation on the part of the international community. Were such an investigation conducted, many States would find themselves breaching fundamental norms of human rights law. In a recent study conducted by Dr Boulesbaa, after having reviewed a whole host of international instruments and case law, the author regards a failure or deliberate omission in providing for the right to food as akin to the violation of the provisions of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.[73]

Article 12 provides for the right to the highest attainable standard of physical and mental health. The steps required for the realisation of these rights include formulating adequate provisions for the reduction of the stillbirth rate and of infant mortality, for the healthy development of children,[74] the improvement of industrial and environmental hygiene for everyone,[75] preventative measures and treatment of epidemic, endemic and other diseases,[76] and making available the required medical care to everyone.[77]

The right to health has been the object of General Comment by the Committee on the International Covenant on Economic, Social and Cultural Rights.[78] The Committee's views are extremely pertinent when it notes:

> Health is a fundamental human right indispensable for the exercise of other human rights. Every human being is entitled to the enjoyment of the highest attainable standard of health conducive to living a life in dignity. The realisation of the right to health may be pursued through numerous, complementary approaches, such as the formulation of health policies, or the implementation of health programmes developed by the World Health Organisation (WHO), or the adoption of specific legal instruments. Moreover, the right to health includes certain components which are legally enforceable.[79]

Elaborating on Article 12(1) which provides a definition of the right to health the committee observes:

> The right to health is not to be understood as a right to be healthy. The right to health contains both freedoms and entitlements. The freedoms include the right to control one's health and body, including sexual and reproductive freedom, and the right to be free from interference, such as the right to be free from torture, non-consensual medical treatment and experimentation. By contrast, the entitlements

73 A. Boulesbaa, *The UN Convention on Torture and Prospects for Enforcement* (The Hague: Martinus Nijhoff Publishers) 1999, pp. 9–15. Provisions of the Convention discussed below Chapter 15.

74 Article 12(a).

75 Article 12(b).

76 Article 12(c).

77 Article 12(d).

78 ICESCR General Comment 14, *The Right to Highest Attainable Standard of Health* (Article 12) General Comment No. 14 (11/08/00) (E/C.12/200/4).

79 Ibid. para 1.

include the right to a system of health protection which provides equality of opportunity for people to enjoy the highest attainable level of health.[80]

In its General Comment the Committee emphasises the availability and accessibility of health care for all individuals, a provision which should also be sensitive to medical ethics and distinct cultures.[81] The Committee then considers specialist topics relating to the health care of groups such as women, children, the disabled, the elderly and indigenous peoples.[82]

Education rights

Article 13 provides for the right of everyone to education. This is an Article which, in the words of the Committee, 'is the most wide-ranging and comprehensive article on the right to education in international human rights law'.[83] Article 13, in reinforcing the value of education in the advancement of human rights, forms part of a substantial jurisprudence which international and regional organisations have accumulated on this subject. In addition to the UDHR, there are specific provisions in the International Convention on the Elimination of All Forms of Racial Discrimination,[84] the Convention on the Elimination of All forms of Discrimination against Women,[85] the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,[86] the Convention on the Rights of the Child[87] and the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families.[88] In 1945 the United Nations Educational, Scientific and Cultural Organisation (UNESCO), a specialised agency of the United Nations, was established with the purpose of contributing 'to peace and security by collaborating among the nations through

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80 Ibid. para 8.

81 Ibid. para 12.

82 Ibid. para 21–27; also see P. Graham, 'The Child's Right to Health' in M. Freeman and P. Veerman, (eds), *Ideologies of Children's Rights* (Dordrecht: Martinus Nijhoff Publishers) 1992, pp. 203–211.

83 ICESCR General Comment 13, *The Right to Education* (Article 13) General Comment No. 13 (8/12/99) (E/C.12/1999/10) para. 2.

84 Adopted 21 December 1965. Entered into force, 4 January 1969. 660 U.N.T.S. 195, 5 I.L.M. (1966) 352.

85 Adopted at New York, 18 December 1979. Entered into force 3 September 1981. UN GA Res. 34/180(XXXIV), GA. Res. 34/180, 34 GAOR, Supp. (No. 46) 194, UN Doc. A/34/46, at 193 (1979), 2 U.K.T.S. (1989); 19 I.L.M. (1980) 33.

86 Adopted and opened for signature, ratification and accession on 10 December 1984 by GA Res. 39/46, 39 UN GAOR, Supp. No. 51, UN Doc. A/39/51, at 197 (1984). Entry into force 26 June 1987. 1465 U.N.T.S. 85; 23 I.L.M. (1984) 1027.

87 See Articles 19(1), 23(2) and 28.

88 Adopted 18 December 1990. GA Res. 45/158 reprinted 30 I.L.M. (1991) 517. See Articles 30 and 43.

education, science and culture'.[89] The Convention against Discrimination in Education was adopted by the General Conference of UNESCO in December, 1960.[90] The value of education in human development and the contribution which it makes in the advancement of human rights is a feature given credence by the Council of Europe,[91] the European Union,[92] the Organisation of American States[93] and the Organisation of African Unity.[94] More recently, on 23 December 1994 the United Nations General Assembly adopted a resolution proclaiming 'the United Nations Decade for Human Rights Education (1 January 1995–31 Decemer 2004)'. In this resolution, the Assembly welcomed a plan of action for the decade with a request to the

[89] See the UNESCO Constitution 1945 Article 1(1).

[90] Adopted 14 December 1960. Entered into force 22 May 1962. 429 U.N.T.S. 93.

[91] See e.g. Resolution (78)41 on the Teaching of Human Rights (adopted by the Committee of Ministers, November 1978); The Declaration Regarding Intolerance – A Threat to Democracy (adopted by the Committee of Ministers, April 1982); Declaration on the Freedom of Expression and Information (adopted by the Committee of Ministers, 29 April 1982); Recommendation R(81) 17 to Member States on Adult Education Policy (adopted by the Committee of Ministers, November 1981); Recommendation R(79)16 to Member States on the Promotion of Human Rights Research in the Member States of the Council of Europe (adopted by the Committee of Ministers, September 1979); Recommendation R(83)13 to Member States on the Role of Secondary School in Preparing Young People for Life (adopted by the Committee of Ministers, September 1983).

[92] See e.g. the Resolution of the European Parliament on Freedom of Education in the European Community (March 1984); Resolution of the Council and the Representatives of the Governments of the Member States meeting within the Council on the fight against racism and xenophobia (May 1990); Decision of the European Parliament and of the Council adopting the third phase of the 'Youth for Europe' programme (818/95/EC, March 1995); Resolution of the Council and of the Representatives of Member States' Governments meeting within the Council on the response of educational systems to the problems of racism and xenophobia (95/C/312/01, October 1995).

[93] See the 'Pact of San José', Charter of the O.A.S. (as amended). Signed 1948. Entered into force 13 December 1951. For integrated text 33 ILM (1994) 981. See the American Declaration of the Rights and Duties of Man O.A.S. Res. XXX, adopted by the Ninth International Conference of American States (1948), reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1, 17 (1992) (Article 12); American Convention on Human Rights (ACHR) Signed November 1969. Entered into force 18 July 1978. O.A.S.T.S. Off. Rec. OEA/Ser.L/V/11.23, doc.21, rev. (1979). I.L.M. (1970) 673 (Article 26); the Additional Protocol to American Convention in the Area of Economic, Social and Cultural Rights 'Protocol of San Salvador' O.A.S. Treaty Series No. 69 (1988), entered into force November 16 1999, reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 67 (1992) (Article 13) and the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women, signed on 9 June 1994. Entered into force 3 March 1995. Reprinted in 33 I.L.M (1994) 1534 (Article 8). For further consideration of these treaties see below Chapter 8.

[94] See the African Charter on Human and Peoples' Rights (AFCHPR) (Article 25 O.A.U. Doc. CAB/LEG/67/3 Rev. 5. Reprinted 21 I.L.M. (1982) 58; 7 *HRLJ* (1986) 403. The African Charter on the Rights and Welfare of the Child adopted July 1990, entered into force 29 October 1999, O.A.U Doc. CAB/LEG/TSG/Rev.1. Article 11(2) and the Resolution on Human and Peoples' Education (CM/Res. 1420 (LVI), adopted by the Council of Ministers of the Organisation of African Unity, 56th Ordinary Session, Dakar, Senegal, 22–28 June 1992).

High Commission on Human Rights to ensure facilitation of the implementation of this plan.[95]

As the most comprehensive statement on the subject, Article 13 represents a synthesis of the right to education. In accordance with the provisions for the thorough realisation of this right, States parties are committed to ensuring free, compulsory primary education – and education in a range of forms including technical and vocational secondary education, higher education which is accessible to everyone on the basis of capacity and merit, and adequate provisions for adult education. The aim is a system of schooling operating at all levels. Article 13(3) provides autonomy to parents (or the legal guardians) to select private schooling for their children. The provisions of Article 13 are further reinforced by Article 14. According to Article 14 all States parties undertake to adopt a detailed plan of action for the implementation of compulsory free education for everyone within two years (from the time of the ratification and acceptance of the treaty) if it does not already have such a system in place.

Both Articles 13 and 14 have been the subject of General Comments.[96] In its General Comment No. 13, the Committee strongly supports the value of this right. It notes:

> Education is both a human right in itself and an indispensable means of realising other human rights. As an empowerment right, education is the primary vehicle by which economically and socially marginalised adults and children can lift themselves out of poverty and obtain the means to participate fully in their communities. Education has a vital role in empowering women, safeguarding children from exploitative and hazardous labour and sexual exploitation, promoting human rights and democracy, protecting the environment, and controlling population growth. Increasingly, education is recognised as one of the best financial investments States can make. But the importance of education is not just practical: a well-educated, enlightened and active mind, able to wander freely and widely, is one of the joys and rewards of human existence.[97]

The Committee then goes on to expand on the various facets of this right. In relation to the provisions of this right, the Committee observes that, although variable, education should be made available to all without discrimination. Educational institutions should be physically and economically accessible to everyone. The remainder of General Comment No. 13 is dedicated to

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[95] For a detailed consideration see United Nations, *The Right to Human Rights Education: The United Nations Decade for Human Rights Education (1995–2004)* (New York and Geneva: United Nations) 1999.

[96] ICESCR General Comment 11, *Plans of Action for Primary Education* (Article 14) General Comment No. 11 (10/05/99) (E/C.12/1999/4); CESCR General Comment 13, *The Right to Education* (Article 13) General Comment No. 13 (8/12/99) (E/C.12/1999/10).

[97] ICESCR General Comment 13, *The Right to Education* (Article 13) General Comment No. 13 (8/12/99) (E/C.12/1999/10) para 1.

expanding further on various levels of education (for example secondary, technical, higher education). General Comment No. 11, on Plans of Action for Primary Education, represents a very useful guide to Article 14's provisions.[98] The Committee in this comment analyses the meaning of various terms and elaborates on the obligations undertaken by the States parties under this Article. According to the Committee, the term 'compulsory' is meant

> to highlight the fact that neither parents, nor guardians, nor the State are entitled to treat as optional the decision as to whether the child should have access to primary education. Similarly, the prohibition of gender discrimination in access to education, required also by articles 2 and 3 of the Covenant, is further underlined by this requirement. It should be emphasised, however, that the education offered must be adequate in quality, relevant to the child and must promote the realisation of the child's other rights.[99]

It also goes on to note that 'free of charge' is meant to ensure that education is free, without any costs falling on the child, the parents or the guardians.[100] The Committee elaborates upon the State's obligations by noting that the States are required to formulate a plan of action covering all the requisite action necessary for the comprehensive realisation of this right within two years of their becoming a party to the treaty.[101] Furthermore a State cannot avoid obligations on the grounds of lack of necessary resources. In situations where a State party lacks the necessary resources, there is also an obligation on the international community to provide support.[102]

Cultural rights

The rubric of the treaty accords great prominence to culture; the treaty is entitled the International Covenant on Social, Economic and Cultural Rights. However, in reality it is not until Article 15 that cultural life is addressed directly. According to Article 15, States parties recognise the right of everyone to take part in cultural life. There is also a recognition on the part of States to allow the individual the benefit of scientific progress and its applications[103] and to allow him to benefit from 'the protection of the moral and material interests from any scientific, literary or artistic production of which he is author'.[104] Steps undertaken by States to realise this right include 'those

[98] ICESCR General Comment 11, *Plans of Action for Primary Education* (Article 14) General Comment No. 11 (10/05/99) (E/C.12/1999/4).
[99] Ibid. para 6.
[100] Ibid. para 7.
[101] Ibid. para 8.
[102] Ibid. para 9.
[103] Article 15(1)(b).
[104] Article 15(1)(c).

necessary for the conservation, the development and the diffusion of science and culture'.[105]

Culture represents a quintessential part of human existence; the absence of a cultural association makes it difficult to forge common identities and establish social values. While a number of references could be found to cultural rights within human rights treaties, international law has remained deficient in according recognition to cultural rights as collective group rights; the comments noted earlier in relation to minority rights are pertinent here.[106] For many States the fear is that in the name of culture, minority groups would campaign for autonomy, leading to secession and the break-up of existing State structures. In the context of the individualistic human rights law, it is thus no surprise that cultural rights within the Covenant fail to receive pre-eminence.

IMPLEMENTATION MACHINERY[107]

Apart from the difficulties in the substantive nature of the rights, the mechanisms to implement economic, social and cultural rights have not proved satisfactory. Under Articles 16–25 States parties are under an obligation to provide periodic reports. This reporting procedure is the only mechanism for the implementation of the Covenant.[108] In accordance with Article 16, the State parties are under an obligation to submit reports to ECOSOC via the Secretary-General of the United Nations[109] on the measures they have adopted to give effect to the rights in the Covenant.[110] The reports need to be informative of the progress made in achieving the observance of the rights within the treaty.[111] The United Nations Secretary-General is also required to

[105] Article 15(2).

[106] See above Chapter 4.

[107] See *The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights*; P. Alston, 'The Committee on Economic, Social and Cultural Rights' in P. Alston (ed.), *The United Nations and Human Rights: A Critical Appraisal* (Oxford: Clarendon Press) 1992, pp. 473–507; M. O'Flaherty, *Human Rights and the UN: Practice before the Treaty Bodies* (London: Sweet and Maxwell) 1996, pp. 53–82; S. Leckie, 'The Committee on Economic, Social and Cultural Rights: Catalyst for Change in a System Needing Reform' in P. Alston and J. Crawford (eds), *The Future of UN Human Rights Treaty Monitoring* (Cambridge: Cambridge University Press) 2000, pp. 129–144.

[108] Proposals for having a complaints procedure have thus far been unsuccessful. See P. Alston, *Establishing a right to petition under the Covenant on Economic. Social and Cultural Rights*, Collected Courses of the Academy of European Law: The Protection of Human Rights in Europe (Florence: European University Institute), vol. IV, book 2 (1993) p. 115.

[109] Article 16(2)(a).

[110] Article 16(1).

[111] Ibid.

transmit copies of these reports to the relevant specialised agencies.[112] According to Article 17, States may indicate factors and difficulties affecting the degree of fulfilment of the obligations. Initial reports must be submitted within two years of the Covenant coming into operation for the State, thereafter every five years.[113]

The Covenant as such does not provide for the creation of a treaty body, and the responsibility for the implementation has been assigned to ECOSOC.[114] In order to perform its task of implementing the Covenant, ECOSOC set up a fifteen-member sessional working group initially consisting of governmental representatives and subsequently of experts appointed by governments. The working group was not able to perform effectively, its track record being termed as 'disappointing'.[115] Among the many criticisms made of the working group, the foremost ones were that its examination of reports was inadequate, superficial and politicised. It was claimed that the working group's conclusions lacked substance and failed to inform the States of the extent to which they were complying with their obligations in terms of the Covenant. Furthermore, the attendance of members was irregular and members were not fully involved in the proceedings of the working-group sessions.[116] Specialised agencies were also critical of the working group, claiming that they were not adequately involved in the work of the group; the reports failed to provide a summary or to provide any recommendations on substantive issues.[117]

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[112] Article 16(2)(b). The implementation mechanism instituted by ECOSOC and Article 18 of the ICESCR allow specialised agencies to arrange with ECOSOC to submit reports which 'may include particulars of decisions and recommendations on such implementation adopted by [the specialised agencies] competent organs'. In pursuance of this mandate, the ILO has submitted a series of papers and reports see e.g. 26th report of the ILO (11/11/99), Implementation of ICESCR E/C.12/1999/SA/1; Report of the ILO (18/05/98 E/1998/17) (Report of the UN Agencies/Organs); Background paper submitted by the ILO (21/04/98; E/C.12/1998/8); 18th Session, Day of General Discussion: Globalisation and its Impact on the Enjoyment of Economic and Social Rights (11 May 1998).

[113] ECOSOC Res. 1988/4. UN Doc. E/C/12/1989/4. When the Covenant came into effect, States parties were required to present initial reports every three years dealing with only a third of the rights recognised in Part III of the Covenant (i.e. Articles 6–9, 10–12 and 13–15). A cycle of reporting for the States parties thus took 9 years, denying any updated analysis of a States' obligation of all the rights contained in the Covenant. However the change to submission of the complete initial State report after 2 years of the enforcement of the Covenant and thereafter every 5 years was brought into operation in order to enhance the effectiveness of the reporting procedures.

[114] See O'Flaherty, above n. 107, at p. 62.

[115] P. Alston, 'Out of the Abyss: The Challenges Confronting the New UN Committee on Economic, Social and Cultural Rights' 9 *HRQ* (1987) 332 at p. 333.

[116] See the International Commission of Jurists, *Commentary: Implementation of the International Covenant on Economic, Social and Cultural Rights – ECOSOC Working Group*, ICJ Review No. 27, December 1981, 28; Westerveen, 'Towards a System for Supervising States' Compliance with the Right to Food' in P. Alston and K. Tomasevski (eds), *The Right to Food* (Boston: Martinus Nijhoff Publishers) 1990, p. 119.

[117] See P. Alston, 'The Committee on Economic, Social and Cultural Rights' in Alston (ed.), above n. 107, 473, at pp. 480–481.

As a response to these criticisms, in 1985, ECOSOC established the Committee on Economic, Social and Cultural Rights.[118] The Committee held its first session in March 1987,[119] and has to date held twenty-seven sessions.[120] The Committee consists of eighteen members elected by ECOSOC from a list submitted by State parties for a term of four years. Elections of half of the Committee take place every two years, with members being entitled to be re-elected. Only States parties are entitled to nominate persons for election to the Committee.[121] The members of the Committee serve in their personal capacity and (unlike the members of the sessional working group) not as State representatives.[122] The representation of the Committee is based on the criterion of equitable geographical distribution.

Aims and objectives of the state reporting system

In order to counter the deficiencies in the State reporting the Committee has elaborated on the aim of reporting, a task undertaken by the Committee in its first General Comment.[123] In its General Comment, the Committee considered

> that it would be incorrect to assume that reporting is essentially a procedural matter designed solely to satisfy each State party's formal obligation to report to the appropriate international monitoring body. On the contrary, in accordance with the letter and spirit of the Covenant the process of preparation and submission of reports by States can, and indeed should, serve to achieve a variety of objectives.[124]

The Committee articulated the following objectives:

- (particularly in relation to the initial reports) to ensure that a comprehensive review is undertaken with respect to national legislation, administrative rules and procedures, and practices in an effort to ensure the fullest possible conformity with the Covenant.
- to ensure that the State party monitors the actual situation with respect to each of the rights on a regular basis and is thus aware of the extent to which the various rights are, or are not, being enjoyed by all individuals within its territory or under its jurisdiction.
- to enable the Government to demonstrate that such principled policy making has in fact been undertaken.

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118 ECOSOC Resolution 1985/17 (1985).

119 P. Alston and B. Simma, 'First Session of the UN Committee on Economic, Social and Cultural Rights' 81 *AJIL* (1987) 747.

120 See the twenty-seventh session of the Committee, held during 12–30 May 2002.

121 ESC Res. 1985/17, para c.

122 ESC Res. 1985/17, para b.

123 CESCR General Comment 1, *Reporting by States Parties* General Comment No. 1 (24/02/89).

124 Ibid, para 1.

- to facilitate public scrutiny of government policies with respect to economic, social and cultural rights and to encourage the involvement of the various economic, social and cultural sectors of society in the formulation, implementation and review of the relevant policies.
- to provide a basis on which the State party itself, as well as the Committee, can effectively evaluate the extent to which progress has been made towards the realisation of the obligations contained in the Covenant. For this purpose, it may be useful for States to identify specific benchmarks or goals against which their performance in a given area can be assessed.
- to enable the State party itself to develop a better understanding of the problems and shortcomings encountered in efforts to realise progressively the full range of economic, social and cultural rights.
- to enable the Committee, and the States parties as a whole, to facilitate the exchange of information among States and to develop a better understanding of the common problems faced by States and to reach a fuller appreciation of the type of measures which might be taken to promote effective realisation of each of the rights contained in the Covenant.[125]

Procedure

The Committee meets twice annually for three-week sessions, its primary task being to examine State reports.[126] The meetings are held in Geneva during April–May and November–December of each year. In one session the Committee normally considers up to six reports. Once a report is submitted, the Committee makes a decision about the session in which consideration shall take place. After the submission of the report, it is likely to take 12–18 months for the report to be considered. The reports which the Committee has agreed should be reviewed are passed on to a five-member working group of the Committee. The working group holds closed meetings at the end of each session, making an initial consideration of the reports due for full consideration at the next session.

In its consideration, the working group draws up a list of issues with the information before it, utilising information acquired from various intergovernmental and non-governmental sources. The rationale behind this list is to

> identify in advance the questions which might most usefully be discussed with the representative of the reporting States. The aim is to improve the efficiency of the system and to facilitate the task of States' representatives by providing advance notice of many of the principal issues which will arise in the examination of the reports.[127]

125 Ibid. paras 2–9.
126 The Committee has had a number of additional extraordinary sessions.
127 UN Doc. E/1995/22, Chap. III, para 23.

State parties are required to respond in writing to these questions prior to the consideration of the report. The reports are reviewed in a public session with the consideration of a single State report normally spreading over two days. Reports are normally introduced by the State representative. The discussion by the Committee is based around the list of questions previously prepared by its working group and issues arising therefrom. During the session, the State representative is given the opportunity to respond to the questions on the list. After their consideration, the Committee members summarise their views and make suggestions and recommendations. The consideration normally lasts for around three meetings, each three hours long. Following consideration of a State's report, the Committee produces its Concluding Observations, a practice it has followed since its second session.[128] Concluding Observations are issued as a public document in which various aspects of the report are analysed and these usually consist of positive features in the report, the identification of difficulties and the concerns of the Committee. Suggestions and Recommendations are also made within the Concluding Observations. The Committee may include requests for the provision of additional information which had been made to the State representatives during the consideration of the report. Concluding Observations are issued at the end of each session and are included in the annual report of the Committee to ECOSOC. Since 1993 NGOs have been allowed by the Committee to make oral presentations at the start of each session. This provides the NGOs with an opportunity to comment on the reports which are due to be considered by the Committee. The NGOs have often produced alternative reports which represent a different and more accurate picture. It is not surprising that the Committee has benefited enormously from these alternative reports and other sources of information emanating from the NGOs. According to Leckie, the merits of alternative reports include:

> [drawing] attention to inaccuracies and distortions in a governmental report; they can provide new information and offer ideas for more appropriate policies and legislation. The preparation of alternative reports can also act as a catalyst in the emergence of new coalition and movements between previously unconnected groups.[129]

In many respects the Committee's nature and role appears similar to those of the Human Rights Committee. However, unlike the Human Rights Committee, this Committee is not responsible to States parties but to ECOSOC, a main organ of the United Nations.[130] The primary difficulty in the implementation of the Covenant stems from the parties' reluctance to

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[128] Craven, above n. 1, at p. 87.

[129] S. Leckie, 'The Committee on Economic, Social and Cultural Rights: Catalyst for Change in a System Needing Reform' in P. Alston and J. Crawford (eds), above n. 107, at p. 134.

[130] For consideration of ECOSOC see Chapter 2 above.

comply with their reporting obligations. Reports submitted by the States are often significantly overdue and have the characteristic of being excessively brief, incomplete or outdated. The other difficulties of implementation include the vast scope and indeed the vagueness that characterises the rights themselves.[131] An associated issue is the ambivalence of many States towards economic, social and cultural rights of this nature. The relative lack of jurisprudence and case law from international and domestic tribunals has not been helpful,[132] and there has been the added problem of obtaining adequate and relevant information from States parties. There has been reluctance in developing the jurisprudence related to economic, social and cultural rights in comparison to civil and political rights; the breadth of the Convention rights makes the Committee's analysis more difficult. Many of the economic and social rights concepts have not been considered in any depth at the domestic or international level. The development of such a jurisprudence has been one of the primary preoccupations of the Committee, a practice which, as we shall consider, is conducted in a variety of ways.

INNOVATIVE PROCEDURES

To make its work more effective the Committee has adopted a number of innovative procedures. The original provision in Article 17 required States parties to submit an initial report within one year of the Covenant's entering into force. However the Committee, adopting a realist approach, devised rules to extend the date of submission to two years and thereafter every five years. Furthermore, in order to deal with inordinate delays with the submission of reports, in its sixth session the Committee appealed to the Council to allow it to list those States which had failed to submit their initial reports despite the passage of ten years. This, in effect, was an attempt to embarrass or blacklist certain States. In addition, the Committee also adopted procedures of streamlining for consideration notwithstanding substantial delay on the part of some states in submitting initial or periodic reports.[133] Although it is anticipated that the State representative would be present at the time of consideration of the reports, the inability of States to send representatives has been rejected by the Committee as an invalid ground to delay consideration of the State reports.

NGOs play an important role in the promotion and protection of human rights. Considering their potential value in promoting economic, social and cultural rights, it is disappointing to note that no specific provision had been made

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[131] P. Alston and B. Simma, 'Second Session of the UN Committee on Economic, Social and Cultural Rights' 82 *AJIL* (1988) 603 at p. 606.

[132] See Alston, above n. 115, at 351.

[133] UN Doc. E/1992/23, 99 para 245.

for the NGOs to make a contribution to the Covenant's reporting and supervisory procedures.[134] The Committee, however, has made attempts to overcome this limitation. In recognition of the usefulness of the NGOs' work – especially the production of alternative reports – the Committee has invited 'all concerned bodies and individuals to submit relevant and appropriate documentation to it'.[135] The Committee has also established procedures to invite the governments to provide additional information and to engage in dialogue on particular issues. 1994 saw the Committee seeking additional information from Panama, the Dominican Republic and the Philippines on the subject of forced eviction.[136] Similarly, additional information has been sought from a number of other States, including the UK.

As from its third session, on the invitation of ECOSOC, the Committee has begun to prepare General Comments on various articles and provisions of the Covenant. We have already noted the reasoning and rationale behind formulating General Comments for the ICCPR.[137] The Committee's decision to adopt General Comments has been based on the same rationale. The primary objective of the General Comments, according to the Committee, is to assist State parties to fulfil their obligations;[138] in particular:

> to make the experience gained so far through the examination of these reports available for the benefit of all States parties in order to assist and promote their further implementation of the Covenant; to draw the attention of the States parties to insufficiencies disclosed by a large number of reports; to suggest improvements in the reporting procedures and to stimulate activities of the States parties, the international organisations and specialised agencies concerned in achieving progressively and effectively the full realisation of the rights recognised in the Covenant.[139]

A number of significant Comments have been adopted by the Committee. These include, General Comment No. 1 (1989) on Reporting by States Parties,[140] General Comment No. 2 (1990) on International Technical Assistance Measures (Article 22),[141] General Comment No. 3 (1990) on the Nature of States Parties' Obligations (Article 2, paragraph 1 of the Covenant),[142] General Comment No. 7 (1997) on the Right to Adequate Housing: Forced Evictions (Article 11, paragraph 1, of the Covenant),[143]

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134 See Alston, above n. 115, at p. 367.

135 E/1992/23 at 100 para 386 (Report of the Committee, sixth session).

136 Robertson and Merrills, above n. 12, at p. 281.

137 See above Chapter 4.

138 E/1998/14 Committee's Second Session, 63 para 367.

139 E/1993/22 Report of the Committee's Seventh Session UN Doc. E/1993/22. 19, para 49.

140 Third Session 1989, UN Doc. E/1989/22.

141 Fourth Session, 1991, UN Doc. E/1990/23 (adopted February 1990).

142 Fifth Session, 1990, UN Doc. E/1991/23 (adopted December 1990).

143 Sixteenth Session, 1997 UN Doc. E/1998/22, annex I, adopted November, 1997.

General Comment No. 5 (1994) on Persons with Disabilities;[144] and General Comment No. 6 (1995) on the Economic, Social and Cultural Rights of Older Persons.[145]

In addition, the Committee has set aside one day in every session for a general discussion on a specific issue or issues, which allows specialised agencies and NGOs to contribute more effectively to the work of the Committee.[146] This reserved day is usually the Monday of the Committee's final week.[147] According to the Committee the function of this day is twofold: 'the day assists the Committee in developing in greater depth its understanding of the issues; and it enables the Committee to encourage inputs into its work from all interested parties'.[148] The 'specific issue' agenda item for the proceedings of this day was established as early as the third session when the Committee considered the issue of the right to food. In the fourth session the day of general discussion was devoted to the right of housing. In 1994 the Committee discussed the role of social security measures, with particular reference to transition to a market economy and human rights education. In 1998 the one day of general discussion was dedicated to globalisation and its impact on the enjoyment of economic and social rights.[149] The exercise has been productive. Commenting on some of these positive aspects Alston notes:

> The discussions have provided an invaluable means by which the Committee has been able to open up its dialogue and has given it the opportunity to invite a much wider range of inputs from individuals or groups that feel they have something to offer to the Committee. The general discussion also enables the Committee to discuss broader, sometimes more theoretical issues which are directly relevant to its role of examining State reports and especially to the task of elaborating General Comments.[150]

One of the most positive achievements of the Committee's work has been its close association and coordination with UN agencies and the Special Rapporteurs. The Committee was addressed in 1993 by the Special Rapporteur on the Issue of Impunity, from the Sub-Commission on Prevention of Discrimination and Protection of Minorities, and in 1994 by a delegate from the World Health Organisation (WHO) in the context of human rights and HIV/AIDS. In 2001 the Committee was addressed by the Deputy High Commissioner, Dr Bertrand Ramcharan. The Committee has also initiated the

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[144] Eleventh Session 1994 UN Doc. E/C.12/1994/13 (1994) adopted November, 1994.
[145] Thirteenth Session 1995 UN Doc. E/C.12/1995/16/ Rev. 1 (1995) adopted 24 November, 1995.
[146] Alston and Simma, above n. 131 at p. 608.
[147] See O'Flaherty, above n. 107, at p. 79.
[148] UN Doc. E/1995/22, para 44.
[149] See Background paper submitted by ILO 21/04/98; E/C.12/1998/8.
[150] P. Alston, 'The Committee on Economic, Social and Cultural Rights' in P. Alston (ed.), above n. 107, pp. 493–494.

concept of fact-finding missions for its members to visit States and assess for themselves situations involving violations of economic and social rights. In further investigations of the issue of forced eviction in 1995, the Committee sent a fact-finding mission (which thus far remains the only mission) to Panama which reported back to the Committee during the same year.[151]

CONCLUSIONS

The analysis of economic, social and cultural rights contained in the ICESCR reveals many limitations and shortcomings. A particularly disturbing aspect has been the debate about the nature of many of the rights contained in the Covenant; whether they create immediate binding obligations or a mere programme of action. Through a consideration of the provisions of the ICESCR, the Committee's Observations and General Comments, this chapter has established that economic, social and cultural rights retain the same legal value and binding effect as civil and political rights. At the same time, on a pragmatic level, it has to be conceded that the implementation of economic and social rights thus far has not been straightforward. The implementation mechanisms themselves have had to be revised and we are still awaiting the adoption of an individuals' complaints procedure.

The Committee, since its establishment in 1985, has done a commendable job in monitoring the Covenant. Of particular value have been its views emerging from its analysis of State reports and General Comments. In its consideration of State reports, the Committee has taken a broad approach which encompasses human rights obligations incurred through the acceptance of ICESCR. Thus:

> in addition to asking questions on the status of ethnic minorities, natural children, women and men or discrimination on the basis of religion, alternative political philosophies and class bias [the Committee] has directed itself to the situation of those in particular regional areas, aliens (including the stateless, migrant workers and refugees) unmarried couples, and parents, people with AIDS, or physical and mental disabilities, homosexuals, the poor and the elderly.[152]

In particular the Committee has stressed the need for comprehensive reviews of national legislation and administrative rules regarding the rights contained in the Covenant and of adequate scrutiny of governmental policies. The Committee has also highlighted the need for greater coordination in policy making which would provide a basis for effective evaluation of the progress made in achieving the rights. Through its work the Committee has facilitated a better understanding of the problems and issues involved in the implementation of the

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[151] See United Nations. *The Committee on Economic, Social and Cultural Rights*, Fact Sheet No. 16, Rev.1, (Geneva: United Nations) 1991.

[152] Craven, above n. 1. at pp. 169–170. (footnotes omitted).

Covenant as well as promoting the exchange of information among States. Changes have also been introduced which have improved the work of the Committee. As noted earlier, the system of presenting initial reports at three-year intervals, each dealing with one-third of the rights, was changed by the Committee to a single comprehensive report to be submitted every five years.

With regard to the role and position of NGOs in the present context, NGOs have been the principal advocates of the vindication of individual human rights. Although, over the years, their contribution (again largely through positive actions undertaken by the Committee) has become more effective in the implementation of the ICESCR, there continues to be some reluctance on the part of many NGOs to engage themselves in promoting economic, social and cultural rights. A predisposition in favour of civil and political rights is perhaps to be attributed to the origins and issues addressed by many of the NGOs. NGOs based in the developing world, in particular, have often treated violations of economic and social rights as ancillary to the breaches of civil and political rights.[153] This bias in the work of the NGOs needs to be removed.

The focus of the present chapter has been on ICESCR. Subsequent chapters of this book establish that economic, social and cultural rights have blended into civil and political rights, a feature particularly evident from a survey of the jurisprudence of the regional treaties of Europe, the Americas and Africa. The regional human rights systems have also accorded a degree of prominence to economic and social rights through the adoption of such treaties as the European Social Charter,[154] the additional Protocol to European Social Charter (1996)[155] and the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (1988).[156]

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[153] According to Alston 'for a variety of historical, ideological, pragmatic and other reasons, there remains a considerable reluctance on the part of many, if not most, human rights NGOs to become involved in this field. This is particularly the case with respect to those NGOs based in the West that do not have significant constituencies in the Third World. In the case of limited mandate organisations such as Amnesty International or Index on Censorship, the justification is the desire to maintain a narrow and precise focus. Other NGOs that purport to be concerned with either "the rights contained in the Universal Declaration" or "internationally recognised human rights" face a much more difficult task to justify their neglect of economic, social, and cultural rights. The situation in Central America today, for example, cannot be adequately or productively analysed without taking full account of both sides of the human rights equation. In this sense, the much vaunted interdependence of the two sets of rights is not simply a hollow UN slogan designed to conceal an ideological split, but is an accurate reflection of the realities of the situation'. Alston, above n. 115, at p. 372 (footnotes omitted).

[154] Adopted at Turin 18 October 1961. Entered into force, 26 February 1965. 529 U.N.T.S 89; ETS 35. See below Chapter 7.

[155] Adopted 3 May 1996. Entered into force, 3 July 1999. ETS No. 163. See below Chapter 7.

[156] Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, 'Protocol of San Salvador' O.A.S. Treaty Series No. 69 (1988), entered into force 16 November 1999; 28 I.L.M. (1989) 156. See below Chapter 8.

III

REGIONAL PROTECTION OF HUMAN RIGHTS

6

EUROPEAN HUMAN RIGHTS – I[1]

INTRODUCTION

European human rights law is not the product of a single monolithic mechanism. Instead there are several institutions which have established mechanisms for protecting human rights.[2] The role of at least three organisations is worthy of consideration: the Council of Europe, the European Union (EU) and the Organisation for Security and Cooperation in Europe (OCSE). The Council of Europe, the oldest of these institutions, has also had the most significant role in promoting human rights at the European level. The European Union, which remains politically the most viable and influential body, has had only an indirect part to play in protecting human rights. However, increasingly

[1] See R. Clayton et al., *The Law of Human Rights* (Oxford: Clarendon Press) 2000; D.J. Harris, M. O'Boyle and C. Warbrick, *Law of the European Convention on Human Rights* (London: Butterworths) 1995; A. Mowbray and D.J. Harris, *Cases and Materials on the European Convention on Human Rights* (London: Butterworths) 2001; M.W. Janis, R.S. Kay and A.W. Bradley, *European Human Rights Law: Text and Materials*, 2nd edn (Oxford: Clarendon Press) 2000; R. Blackburn and J. Polakiewicz. (eds), *The European Convention on Human Rights: The Influence of ECHR on the Legal and Political Systems of Member States 1950–2000* (Oxford: Oxford University Press) 2001; Lord Lester and D. Pannick, *Human Rights: Law and Practice* (London: Butterworths) 1999; A. Loux and W. Finnie, *Human Rights and Scots Law: Comparative Perspectives on the Incorporation of the ECHR* (Oxford: Hart) 1999; L.J. Clements, N. Mole and A. Simmons, *European Human Rights: Taking a case under the Convention*, 2nd edn (London: Sweet and Maxwell) 1999; T. Barkhuysen, M.L. Van Emmerik and P.H.P.H.M.C. Van Kempen, *The Execution of Strasbourg and Geneva Human Rights Decisions in the National Legal Order* (The Hague: Martinus Nijhoff Publishers) 1999; P. van Dijk (ed.), *Theory and Practice of the European Convention on Human Rights*, 3rd edn (The Hague: Kluwer Law International) 1998.

[2] These institutions sometimes act in parallel, while at other times they overlap with one another.

human rights issues are being absorbed into the programmes of the rapidly expanding EU. Although having largely operated as an organisation aimed at promoting security and peace within Europe, the OSCE has taken a number of valuable human rights initiatives which are worthy of consideration.

Limitations of space make it impossible to study the work of each of the aforementioned organisations in great detail. Two chapters of this book are nevertheless dedicated to the study of European human rights law. The present chapter focuses on the position of the Council of Europe's European Convention on Human Rights (ECHR), an instrument which focuses largely on the provisions of civil and political rights. The next chapter, Chapter 7, considers the Council of Europe's European Social Charter (ESC). It then goes on to analyse the position and role of the EU and the OSCE in the protection of human rights.

THE COUNCIL OF EUROPE AND PROTECTION OF CIVIL AND POLITICAL RIGHTS

The Council of Europe is an intergovernmental organisation established in 1949 with the objective, *inter alia*, of strengthening democracy, human rights and the rule of law.[3] In its initial years, the membership of the Council of Europe was confined to the western democratic European countries. It excluded Spain and Portugal until the mid-1970s. However, with the collapse of communism, several members of central and eastern Europe have joined the Council. The current membership of the Council of Europe is forty-three, including all EU member States. The Council of Europe has produced various important regional human rights treaties, the most prominent one being the ECHR.[4] The ECHR was adopted in 1950 and came into operation in 1953; it currently provides protection to well over 800 million people. The institutions of the ECHR, the Court and the Committee of Ministers are based in Strasbourg, France.

During the Second World War (1939–1945) Europe had been the scene of the most serious human rights violations. At the end of the War, it had become a major objective of the allied powers to punish those who had been involved in crimes against humanity during the War and to uphold human rights in the region. A regional human rights treaty protecting the fundamental civil and political rights was meant to act as a bulwark against the recurrence of the worst forms of human rights violations. Those signing the treaty also aimed to encourage the extension of democracy in communist Europe and to suppress the spread of dictatorships and totalitarian ideologies in other parts of Europe.

[3] According to Article 3 of the Statute each member State 'must accept the principles of rule of law and the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms'. See Statute of the Council of Europe, adopted 5 May 1949. Entered into force August 1949. E.T.S. 1.

[4] Signed at Rome, 4 November 1950. Entered into force 3 September 1953. 213 U.N.T.S. 221; E.T.S. 5. The Convention has over years been amended through 12 additional protocols.

As we have already noted, the UDHR was adopted in December 1948 by the United Nations General Assembly.[5] A natural progression from the Declaration on Human Rights was the formulation of a binding treaty with measures of implementation. Although it was not until 1966 that the International Covenants were adopted, consensus was easier to attain among the western liberal States to draft a regional human rights treaty. The ECHR, despite being a regional convention, reflects the influence of and similarities with the principles contained in the Universal Declaration. The preamble of the ECHR, for example, refers to the Universal Declaration. Fundamental rights in the ECHR such as the prohibition of torture, the right to liberty and security and the right to a fair trial draw inspiration from similar provisions of the Declaration. However, there are also significant differences in the substantive provisions of the articles. Whereas the Universal Declaration considers civil, political, social, economic and cultural rights, the ECHR predominantly promotes and protects the civil and political rights.[6] This difference reflects the diversity of Constitutions adopted in Europe at the time – see for example the French Constitution of 1946, the Italian Constitution of 1948 and the German Basic Law of 1949.

The ECHR is divided into three sections. Section I provides a description and definition of the rights and fundamental freedoms provided in the treaty. Section II provides for the establishment of a court of human rights and explains the procedures, while Section III considers miscellaneous provisions such as reservations, denunciation, signature and ratification.[7] The substantive guarantees provided in the Convention are expanded by a number of additional Protocols.

The ECHR and its Protocols do not cover several important rights. The Convention, unlike the ICCPR, does not provide for the right to self-determination, which is recognised as one of the principal rights in international human rights instruments.[8] The coverage of the ECHR on minority or group rights is particularly thin.[9] There is also the failure to provide for economic, social and cultural rights. Despite these omissions in the protection of rights, over the past fifty years the rights contained in the

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[5] See above Chapter 3.

[6] The Counterpart of the ECHR is the European Social Charter which is considered in Chapter 7.

[7] K. Starmer, *European Human Rights Law: The Human Rights Act 1998 and the European Convention on Human Rights* (London: Legal Action Group) 1999, lxxi.

[8] See below Chapter 12.

[9] The ECHR (or its Protocols) does not contain particular provisions protecting the rights of minorities. Some remedial action was taken by the Council of Europe to adopt a Framework Convention for the Protection of National Minorities; opened for signature 1 February 1995, entered into force 1 February 1998. E.T.S. 157; 34 I.L.M. (1995) 351. See G. Gilbert, 'The Council of Europe and Minority Rights' 18 *HRQ* (1996) 160. For consideration of these treaties see below Chapter 11.

Convention have been utilised to protect individual rights. The Convention had been treated as a living instrument and has been interpreted in keeping with the changing values and traditions of European society.[10] The ECHR, although a regional instrument, has also had an enormous impact upon the development of norms in general international law.[11]

Rights contained in the Convention

Article 2	Right to life
Article 3	Prohibition of torture
Article 4	Prohibition of slavery and forced labour
Article 5	Right to liberty and security
Article 6	Right to a fair trial
Article 7	No punishment without law
Article 8	Right to respect private and family life
Article 9	Freedom of thought, conscience and religion
Article 10	Freedom of expression
Article 11	Freedom of assembly and association
Article 12	Right to marry
Article 13	Right to an effective remedy
Article 14	Prohibition of discrimination
Article 15	Derogation in time of emergency
Article 16	Restrictions on political activities of aliens
Article 17	Prohibition of abuse of the rights
Article 18	Limitation on use of restrictions on rights

Protocol No. 1[12]

Article 1	Protection of property
Article 2	Right to education
Article 3	Free elections

Protocol No. 4[13]

Article 1	Prohibition of imprisonment for debt
Article 2	Freedom of movement
Article 3	Prohibition of expulsion of nationals
Article 4	Prohibition of collective expulsion

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10 See on issues of corporal punishment, *Tyrer v. United Kingdom*, Judgment of 25 April 1978, Series A, No. 26; homosexuality, *Dudgeon v. United Kingdom*, Judgment of 22 October 1981, Series A. No. 45.

11 Thus e.g. Privy Council in *Pratt v. Attorney General of Jamaica* (PC (Jam)) Privy Council (Jamaica), 2 November 1993 [1994] AC 1 at 35 approved the European Court of Human Rights view expressed on the 'death-row' phenomenon.

12 ETS No. 9, 213 U.N.T.S. 262. Entered into force May 18 1954.

13 ETS 46. Entered into force May 2 1968.

Protocol No. 6

Article 1 Abolition of death penalty[14]

Protocol No. 7

Article 1 Expulsion of aliens[15]
Article 2 The right to review by a higher tribunal
Article 3 Compensation for miscarriage of justice
Article 4 *Ne bis in idem*
Article 5 Equality of rights and responsibilities between spouses during and after their marriage

Protocol No. 12

General prohibition of discrimination[16]

ANALYSIS OF SUBSTANTIVE RIGHTS

The right to life and the prohibition of torture, cruel, inhuman, degrading treatment or punishment[17]

As we have already considered, the right to life is peremptory, and the most fundamental of all human rights.[18] Within the Convention, the right to life is protected by Article 2, a right which is non-derogable even in times of war and public emergency.[19] The taking of life is prohibited save in the limited circumstances provided within the article, a subject which we shall consider shortly. In relation to the substance of the right to life, the State is under two kinds of obligations. First, there is a negative obligation not to take life and not to deprive an individual of his life save in limited circumstances which must be strictly in accordance with law. The second obligation is of a positive nature which entails taking effective steps to protect the life of the individual concerned. Positive obligations include protecting individuals from agents of the State such as the police and security forces as well as non-State actors

[14] ETS 114. Entered into force March 1 1985.
[15] ETS 117. Entered into force Nov. 1 1988.
[16] Adopted 26 June 2000. Opened for Signature 4 November 2000.
[17] See D.J. Harris, 'The Right to Life Under the European Convention on Human Rights' 1 *Maastricht Journal of European Comparative Law* (1994) 122; F. Ni Aolain, 'The Evolving Jurisprudence of the European Convention Concerning the Right to Life' 19(1) *NQHR* (2001) 21; see also N.S. Rodley, *The Treatment of Prisoners in International Law*, 2nd edn (Oxford: Clarendon Press) 1999.
[18] See above Chapter 4.
[19] Harris, O'Boyle and Warbrick, above n. 1, at p. 37. Derogations are permissible in circumstances provided by Article 15(2). Article 15(2) provides that derogations from the Article are permissible 'in respect of deaths resulting from lawful acts of war'.

including terrorist organisations and other private individuals. The duty to take reasonable measures to protect life includes a duty to put in place 'effective criminal law provisions to deter the commission of offences against the person backed up by law-enforcement machinery for the prevention, suppression and sanctioning of breaches of such provisions'.[20] It also means requiring the proper investigation of all suspicious deaths.[21]

While these two components are firmly established the remit of the obligation is not very clear. Thus while the positive obligation includes taking reasonable steps to enforce the law to protect the citizens, the State cannot be expected to protect individuals from every attack.[22] Similarly, the breadth of obligations which might affect the right to life is uncertain. For instance, a question mark remains over the issue of State liability with regard to poor housing, lack of food, lack of medical attention, environmental pollution, road worthiness and workplace safety. This issue was considered but left unanswered in a case in which the parents of a seriously disabled child claimed that their daughter had not been allowed free medical treatment.[23]

In the context of Article 2, the meaning of the term 'life' has been the subject of considerable debate, especially regarding the point at which life begins and ends. There is, for instance, substantial controversy regarding the rights of an unborn child.[24] In *Paton* v. *UK*,[25] the European Commission held that the abortion of a ten-week old foetus under British law to protect the physical and mental health of the mother was not in breach of Article 2. In *H* v. *Norway*,[26] the Commission took the view that the abortion of a fourteen-week old foetus

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20 *Osman* v. *United Kingdom*, Judgment of 28 October 1998, 1998-VIII RJD 3124, para 115. See also *Velasquez Rodriguez Case*, Judgment of July 29, 1988, Inter-Am.Ct.H.R. (Ser. C) No. 4 (1988), paras 170–172.

21 *McCann and Others* v. *United Kingdom*, Judgment of 27 September 1995, Series A, No. 324; *Kaya* v. *Turkey*, Judgment of 19 February 1998, 1998-I RJD 297.

22 *W* v. *United Kingdom*, App. No. 9348/81, 32 DR 190 (1983).

23 On the facts of the case, the child had been provided adequate treatment *X* v. *Ireland*, App. No. 6839/74, 7 DR 78 (1976); in another case, which concerned the operation of a public vaccination scheme leading to the death of some young children, the Commission held the possibility of liability when a State undertakes involvement in a public vaccination scheme. On facts, the application was held inadmissible as 'appropriate steps' had been taken for safe administration of the scheme; *X* v. *United Kingdom*, App. No. 7154/75, 14 DR 31 (1978).

24 *Open Door Counselling* v. *Ireland*, Judgment of 29 October 1992, Series A, No. 246, 142 NLJ (1696); also see *Brugggemann and Scheuten* v. *FRG*, App. No. 6959/75, 10 DR 100 (1977). L.A. Rehof, 'Article 3' in G. Alfredsson and A. Eide (eds). *The Universal Declaration of Human Rights: A Common Standard of Achievement* (The Hague: Martinus Nijhoff Publishers) 1999, 89–101 at p. 97; for a consideration at the international level see P. Alston, 'The Unborn Child and Abortion under the Draft Convention on the Rights of the Child' 12 *HRQ* (1990) 156. D. Shelton, 'Abortion and the Right to Life in the Inter-American System: The Case of "Baby Boy"' 2 *HRLJ* (1981) 309; also see below Chapter 14.

25 *Paton* v. *United Kingdom*, App. No. 8416/79 19 DR 244 (1980).

26 *H* v. *Norway*, App No. 17004/90 (1992) unreported.

was not contrary to Article 2 on the grounds that 'pregnancy, birth or care for the child may place the woman in a difficult situation of life'. The Commission considered the wide differences on the issue of abortion and allowed for a certain margin of appreciation. The decision is broader than *Paton* because abortion was later in time and the reasons given were social and did not relate to health or medical condition. From the cases mentioned above, the Commission appears to have taken the view that Article 2 is applicable only to persons who are already born.[27] In *H* v. *Norway*, however, the Commission did note that in certain circumstances Article 2 does offer protection to the unborn child, without indicating what those circumstances were. As it stands, currently the grounds for abortion are very wide and, in *Open Door Counselling* v. *Ireland*, the Human Rights Court itself left open the possibility of Article 2's placing restrictions on abortion.[28] Controversy arises in relation to the point when a person dies and the rights of individuals who are dying. Article 2 has also raised complexities in relation to euthanasia.[29]

The general exceptions to the Article are provided in Article 2(2). These are exhaustive and must be narrowly construed. Article 2(2)(a) provides for death occurring as a result of self-defence. *McCann and Others* v. *UK*[30] was the first case dealt with by the Court concerning Article 2.[31] In this case three members of the provisional IRA were shot dead by British soldiers in Gibraltar. It was suspected that these IRA activists had remote control devices for a bomb to be detonated in a public place. The resulting damage, it was feared, would cause serious loss of life. The Commission, by 11 to 6 votes, held that shooting was justified under Article 2(2). The Court, however, disagreed. According to the Court the exception covers, but is not limited to, intentional taking of life. The question was the extent to which the State's response was proportionate to perceived threats posed by IRA members. In all the circumstances of the case (including the planning and conduct of the operations by the British Security forces and the decision to let the IRA members enter Gibraltar from Spain) it held that the UK had sanctioned

[27] H. Fenwick, *Civil Liberties*, 2nd edn (London: Cavendish Publishing Ltd) 1998, p. 37.

[28] *Open Door Counselling* v. *Ireland*, Judgment of 29 October 1992, Series A, No. 246.

[29] In *Widner* v. *Switzerland*, the Commission held Article 2 does not require passive euthanasia (by which a person is allowed to die by not being given treatment) to be a crime. App. No. 120527/92 (1993) unreported. A similar situation would appear to prevail in other human rights systems. On the position of euthanasia in the Inter-American Human Rights System, see S. Davidson, 'The Civil and Political Rights Protected in the Inter-American Human Rights System' in D.J. Harris and S. Livingstone (eds), *The Inter-American System of Human Rights* (Oxford: Clarendon Press) 1998, 213–288 at p. 218.

[30] *McCann and Others* v. *United Kingdom*, Judgment of 27 September 1995, Series A, No. 324.

[31] Aolain, above n. 17, at pp. 28–31; see S. Joseph, 'Denouncement of the Death on the Rock: The Right to Life of Terrorists' 14 *NQHR* (1996) 5.

killing by its agents in circumstances giving rise to a breach of Article 2. The Court noted:

> In sum, having regard to the decision not to prevent the suspects from travelling into Gibraltar, to the failure of the authorities to make sufficient allowances for the possibility that their intelligence assessments might, in some respects at least, be erroneous, and to the automatic recourse to lethal force when the soldiers opened fire, the Court is not persuaded that the killing of the three terrorists constituted the use of force which was no more than absolutely necessary in defence of person from unlawful violence within the meaning of Article 2(2)(a) of the Convention.[32]

The case emphasises a strict proportionality test under Article 2(2). Therefore the use of deadly force to effect an arrest would never be justified except in circumstances where there was no uncertainty that the suspects would kill if allowed to escape. The other exceptions provided in Article 2(2) are quelling a riot[33] and to effect an arrest or prevent an escape.[34] It also needs to be emphasised that Article 2 does not prohibit capital punishment. In 1983 Protocol 6, which prohibits the death penalty, was adopted. The Protocol came into force in 1985 and is ratified by a majority of member States.

According to Article 3 'No one shall be subjected to torture or to inhuman or degrading treatment or punishment'.[35] The rights contained in Article 3 are of a non-derogable nature even in times of war and public emergencies.[36] The prohibition of torture and inhuman or degrading treatment or punishment is expressed in a very strong language and no exceptions as such are attached to it. In *Chahal* v. *UK*,[37] the European Court of Human Rights addressed this subject in clear and unambiguous language noting:

> The Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the victim's conduct ... Article 3 makes no provision for exceptions and no derogation from it is permissible under Article 15 even in the event of a public emergency to the life of the nation.[38]

The concept of torture was originally envisaged in narrow terms, but has gradually been extended as society's tolerance of official brutality has changed. In addition, the abolition of the death penalty in most countries within Europe has reduced tolerance to State violence. The various cat-

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[32] Para 213.
[33] *Stewart* v. *United Kingdom*, App. No. 10044/82, 39 DR 162 (1984).
[34] *Farrell* v. *United Kingdom*, App. No. 9013/30, 30 DR 96 (1982).
[35] The Article draws its inspiration from Article 5 of the Universal Declaration on Human Rights (1948) and the American Declaration of Human Rights (1948). It also has close associations with Article 7 of the ICCPR and Articles 5 of the ACHR (1969) and AFCHPR (1981).
[36] Harris, O'Boyle and Warbrick, above n. 1, at p. 55.
[37] *Chahal* v. *United Kingdom*, Judgment of 15 November 1996, 1996-V RJD 1831.
[38] Ibid. para 79.

egories of prohibition have different applications and the Article has been used in a variety of circumstances. In the case of *Ireland v. United Kingdom*,[39] the Court provided some useful guidelines regarding the provisions of Article 3. The Court, in formulating a narrow approach, took the view that 'torture' means deliberate inhuman treatment causing very serious and cruel suffering, whereas 'inhuman treatment or punishment', meant treatment or punishment that causes intense physical and mental suffering. In the Court's analysis, degrading treatment or punishment was treatment or punishment that arouses in a victim a feeling of fear or anguish and inferiority capable of humiliating and debasing the victim, possibly breaking his or her physical or moral resistance. The meaning and scope of the Article can be illustrated through the facts of the *Ireland* v. *UK* case. The case is particularly useful in distinguishing torture from inhuman and degrading treatment or punishment.[40]

In this case the Irish Government had brought proceedings against the UK alleging that persons taken into custody pursuant to the Civil Authorities (Special Powers) Act, Northern Ireland, 1922 were subjected to a treatment which in Convention terms amounted to torture, inhuman and degrading treatment contrary to Article 3. The Irish government also alleged that internment without trial amounted to a violation of the right to liberty and security of the person as provided in Article 5, and the right to fair trial accorded in Article 6 of the Convention. In addition there was a claim of a violation of Article 14 (that is, that the powers of detention and internment were exercised in a discriminatory manner). A particular source of concern were the methods of interrogation used by the British Security forces in Northern Ireland. They were engaged in the so-called 'interrogation in depth', that is the use of five techniques which included: 'wall-standing' long periods of standing in a stressed position; 'hooding', placing black hoods on the prisoners' heads; subjecting to noise; deprivation of sleep; and deprivation of food and drink.

The European Commission in its report delivered to the Committee of Ministers in February 1976 took the view that measures of detention without trial were not in violation of Article 5. According to the Commission, the measures undertaken by the British Government complied with the derogation entered under Article 15, which were not applied in a discriminatory manner. The Commission did not find violations of Article 14 but it did find that the use of the five techniques of interrogation constituted 'torture and

[39] *Ireland v. United Kingdom*, Judgment of 28 January 1978, Series A, No. 25.

[40] A.H. Robertson and J.G. Merrills, *Human Rights in the World: An Introduction to the Study of International Protection of Human Rights*, 4th edn (Manchester: Manchester University Press) 1996, at pp. 139–140.

inhuman treatment' contrary to Article 3.[41] The Commission's view, however, was not endorsed by the European Court of Human Rights. When the case, after being referred by the Irish Government was considered by the Court, the Court drew a distinction between the various facets of Article 3, that is, between 'torture' on the one hand and 'inhuman' and 'degrading' treatment on the other. Torture as defined by the Court meant 'deliberate' inhuman treatment causing very serious and cruel suffering. Applying this test, it held that the use of the 'five techniques' and physical assault did not amount to torture, although it constituted 'inhuman and degrading treatment'.[42] In concurrence with the Commission, the Court found that the measures of detention and internment without trial were covered by the Article 15 derogation made by the United Kingdom, and that their application was not in contravention of non-discriminatory provisions of Article 14.

While a treatment needs to reach a minimum threshold before being designated as inhuman, the crucial factor which distinguishes it from torture is the absence of a deliberate intent to cause suffering. Inhuman treatment could be the result of conditions or treatment in a place of detention[43], withholding of food, water and medical treatment, rapes and assault[44] preventative detention, failure to provide medical treatment,[45] extradition or deportation,[46] mental torture and solitary confinement. In assessing whether punishment is inhuman, subjective consideration needs to be given to various factors including the physical and mental suffering, the applicant's sex, age, health and sensibilities etc. Degrading treatment arises from an ordinary everyday meaning and would include gross humiliation through racial discrimination.[47] In order to constitute degrading punishment, the humiliation and debasement involved must attain a particular level depending on, *inter alia*, the circumstances of the

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[41] According to the Commission 'the systematic application of techniques for the purpose of inducing a person to give information shows a clear resemblance to those methods of systematic torture which have been known over the ages ... [T]he Commission sees in them a modern system of torture falling in the same category as those systems which have been applied in previous times as a means of obtaining information and confession'. *Ireland* v. *United Kingdom*, Series B, No. 23-I Com Rep (1971), para 794.

[42] The restrictive views adopted by the Court in relation to the meaning of torture have been criticised heavily. See R.J. Spjut, 'Torture under the European Convention on Human Rights' 73 *AJIL* (1979) 267; AI News Release (AI Index02/04/78) 19 January.

[43] *Denmark, Norway, Sweden* v. *Greece*, 12 YB 1 (1969). Overcrowding and inadequate heating, toilets, sleeping arrangements, food, recreation.

[44] *Ireland* v. *United Kingdom*, Judgment of 28 January 1978, Series A, No. 25. *Cyprus* v. *Turkey*, App. No. 8007/77, 13 DR 85 (1978).

[45] *Guzzardi* v. *Italy*, Judgment of 6 November 1980, Series A. No. 39; *Hurtado* v. *Switzerland*, Judgment of 28 January 1994, Series A, No. 280-A.

[46] *Soering* v. *United Kingdom*, Judgment of 7 July 1989, Series A, No. 161; *Chahal* v. *United Kingdom*, Judgment of 15 November 1996, 1996-V RJD 1831

[47] *Abdulaziz, Cabales and Balkandali* v. *United Kingdom*, Judgment of 28 May 1985, Series A. No. 94.

case, such as the nature and context of the punishment itself and the manner and methods of its execution.[48]

Article 3 has been applied in a range of circumstances. Indeed, in many instances its provisions have been invoked to accord rights otherwise not contained in the Convention. While the Convention does not provide for a right not to be extradited, not to be deported, to a nationality, to political asylum or a right of aboard (for a non-national), the various facets of this Article have been used to assist applicants claiming some of these rights. Instances of violation of Article 3 may be deportation of a person who would be deprived of proper medical treatment,[49] or would be likely to suffer from cruel or degrading punishment or be separated from his family as a result of extradition.[50]

A striking example of the wide ambit of Article 3 to cover rights not expressly provided for in the Convention is illustrated through the *Soering case*. In *Soering* v. *UK*[51] the applicant, who was a West German national, murdered his girlfriends' parents, with the complicity of his girlfriend. These offences were committed in the US State of Virginia, where he and his girlfriend were students. After having committed these offences they fled to the United Kingdom. The United States Government, under the terms of the Extradition Treaty of 1972 between the United States and the United Kingdom, applied for the applicant and his girlfriend to be extradited to the United States. The girlfriend was extradited and, having pleaded guilty as an accessory to the murder, was sentenced to 90 years' imprisonment. In the case of the applicant, the United Kingdom, while agreeing to extradite him, had sought assurances that if convicted he would not be given the death penalty. The applicant however appealed to the Strasbourg institutions. The death penalty *per se* is not prohibited by the Convention and the UK by extraditing Mr Soering to the USA was not breaching any provisions of the Convention or general international law. The applicant's primary claim was based on the prospect of his suffering from inhuman or degrading treatment under Article 3 while waiting for his execution in the state of Virginia.

The European Court of Human Rights, in upholding Soering's claim, took the view that if he was extradited to Virginia there would be a real risk of his being placed on death row, which would constitute a violation of Article 3. The Court acknowledged that the imposition of death penalty *per se* is not in

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[48] *Tyrer* v. *United Kingdom*, Judgment of 25 April 1978, Series A, No. 26; cf. *Campbell and Cosans* v. *United Kingdom*, Judgment of 25 February 1982, Series A, No. 48.

[49] *D* v. *United Kingdom*, Judgment of 2 May 1997, 1997-III RJD 777.

[50] See *Chahal* v. *United Kingdom*, Judgment of 15 November 1996, 1996-V RJD 1831.

[51] (1989) 11 EHRR 439. See C. Van Den Wyngaert, 'Applying the European Convention on Human Rights to Extradition: Opening Pandora's Box' 39 *ICLQ* (1990) 757; R.B. Lillich, 'The Soering Case' 85 *AJIL* (1991) 128.

breach of Article 3. However, Article 3 prohibition could be breached in conditions where the death penalty was imposed only after a 6–8 years' waiting period (the so called 'death row' phenomenon). That he was 18 when the offences were committed and there was psychiatric evidence of his mental instability were mitigating factors in favour of the applicant. Thus, in the words of the Court:

> having regard to the very long period of time spent on death row in such extreme conditions, with ever present and mounting anguish of awaiting execution of the death penalty, and to the personal circumstance of the applicant, especially his age and mental state at the time of the offence, the applicant's extradition to the United States would expose him to a real risk of treatment going beyond the threshold set by Article 3.[52]

As in the case of *Soering*, there must exist a real risk as opposed to a mere possibility of facing inhuman or degrading treatment. The Court in *Soering* attempted to narrow down the ambit of its decision with the proviso that such a ruling would be only made in view of 'the serious and irreparable nature of the alleged suffering risked'.[53] The narrow dicta has been followed in *Cruz Varas and others* v. *Sweden*[54] and *Vilvarajah and others* v. *UK*.[55]

The right to liberty and security

Article 5 of the Convention deals with the right to Liberty and to Security of the Person. This provision is designed to control the exercise of powers of arrest and detention, and is something which liberal constitutions have sought to achieve for several centuries.[56] It protects liberty as well as security of the person. Articles 5(2)–(5) set out the procedures for such protection. According to Article 5(1) no deprivation of liberty is acceptable save in accordance with a procedure prescribed by law.[57] In *Winterwerp* v.

[52] Ibid. p. 111. Soering, as a remarkable decision was followed in *Pratt* v. *Attorney General of Jamaica* (PC (Jam)) Privy Council (Jamaica), 2 November 1993, [1994] AC 1, where the Privy Council in approving the European Court's approach held 'in any case in which execution is to take place more than five years after sentence there will be strong grounds for believing that the delay is such as to constitute "inhuman or degrading punishment or treatment"'. As we have noted, the Human Rights Committee under the first Optional Protocol has held that death row, *per se* does not amount to cruel, inhuman or degrading treatment or punishment. (See *NG* v. *Canada* discussed in Chapter 4) *Chitat Ng* v. *Canada*, Communication No. 469/1991 (7 January 1994), UN Doc. CCPR/C/49/D/469/1991 (1994) para 8.4; also see *Barret and Sutcliffe* v. *Jamaica*, HRC Report GAOR, 47th Session, Supp. 40, p. 246 at p. 250.

[53] Judgment 7 July, Series A. No. 161 para 90.

[54] *Cruz Varas and others* v. *Sweden*, Judgment of 20 March 1991, Series A, No. 201.

[55] *Vilvarajah and others* v. *United Kingdom*, Judgment of 30 October 1991, Series A. No. 215.

[56] See e.g. the Magna Carta 1215 c. 29.

[57] Cf. the *lettres de cachet* under the Ancien Regime in France.

The Netherlands,[58] the Court held that this meant that procedures must be, first, in accordance with national and conventional law including 'general principles contained in the Convention' and, second, they must not be 'arbitrary'. Article 5 applies even where the detention period is very short.

According to Article 5(1)(a) detention after conviction must be in accordance with applicable municipal law and with the Convention. This provision means that there must be a court judgment that justifies it and that the procedure that is followed to effect the detention is lawful.[59] Article 5 does not require 'lawful conviction' but 'lawful detention'. The Conviction in para 5(1)(a) means, 'finding of guilt' and is taken to be a conviction by a trial court.

Article 5(1)(b) means arrest or detention for non-compliance with lawful orders of a court or such arrest or detention in order to secure fulfilment of any obligation prescribed by law.[60] According to Article 5(1)(c) lawful arrest or detention of a person is effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or where it is considered reasonably necessary to prevent him committing an offence or fleeing after having done so. In cases of detention after arrest but before conviction, it is imperative that the arrested person be brought promptly to trial and that the trial takes place in reasonable time. For an arrest to be lawful there must be reasonable suspicion on the part of the person conducting the arrest that the person being arrested has committed or is likely to commit an offence. At the same time an 'honest belief' alone without an objective basis justifying arrest and detention is insufficient.[61] Article 5(1)(d) deals with the detention of minors. The term 'minor' has an autonomous Convention meaning, although it is generally taken to mean a person below the age of 18. Detention must also be for a lawful purpose. Article 5(1)(e) aims to protect society from vagrants, alcoholics, drug addicts and persons carrying infectious diseases. They may be restrained as a matter of social control (or even for their own protection), rather than because they have committed a criminal offence. Article 5(1)(f) allows the arrest or detention of a person to prevent his unauthorised entry into a country or the arrest and detention of a person against whom action is being taken with a view to extradition and deportation. However, these individuals are given the right to have their detention or arrest reviewed in accordance with national laws.

The safeguards for the arrested persons are contained in Article 5(2). Reasons for arrest (in a language which the arrested person understands) need

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58 *Winterwerp v. the Netherlands*, Judgment of 24 October 1979, Series A, No. 33.

59 Harris, O'Boyle and Warbrick, above n. 1, at p. 107.

60 *Engel v. The Netherlands*, Judgment of 8 June 1976, Series A, No. 22, para. 69.

61 *Fox, Campbell and Hartley v. United Kingdom*, Judgment of 30 August 1990, Series A, No. 182, para 32.

to be given promptly but not immediately.[62] Article 5(3) provides for the right to be brought promptly before judicial authorities. An arrested person is entitled to trial within a reasonable time or release pending trial.[63]

The right to a fair trial

The right to a fair trial deals with the most significant right of any criminal justice system. In the light of the significance of Article 6, which provides the right to fair trial, it is not surprising that more applications have been received relating to Article 6 than to any other provision of the Convention. The primary issue relates to the extent to which Strasbourg institutions should monitor national judicial systems to ensure the right to fair trial. There is also the question of the margin of appreciation in view of the substantial variations of criminal justice proceedings. Significant differences exist between common law and civil law systems reflecting adversarial and inquisitorial systems of justice. Within common law systems (that is, England and Ireland) criminal investigation is conducted entirely by the police.[64] In some civil law countries, the first investigation is conducted by the police, although after the identification of the suspect the case is handed over to an investigating judge who then decides whether a prosecution should be brought.[65]

From an analysis of the jurisprudence of the Convention, a number of significant principles have emerged relating to the right to fair trial. First, the scope of Article 6(1) extends not only to guarantees of fair trial but also to access to the Courts themselves.[66] Second, this access to the Court must be 'effective'.[67] Third, the right to a fair hearing, in criminal proceedings, includes a right to be present during hearings and there is equality of opportunity to present one's case in accordance with established principles of natural justice. A significant feature of natural justice is that justice must not only be done, it must also be seen to be done. In *Piersack* v. *Belgium*[68] it was held that a breach of Article 6(1) had taken place with the appointment of a presiding trial judge who had earlier been the head of the section of the public prosecutor's depart-

[62] Ibid. para 32 (1990); *Murray* v. *United Kingdom*, Judgment of 28 October 1994, Series A, No. 300-A. Given social mobility, especially under the provisions of the European Union, this provision is of importance and requires the State to make available translators where possible.

[63] *Brogan and others* v. *United Kingdom*, Judgment of 29 November 1988, Series A, No. 145-B.

[64] See J. Sprack, *Emmins on Criminal Procedure*, 8th edn (London: Blackstones Press) 2000.

[65] For the French Pre-trial System see J. Bell, 'The French Pre-trial System' in C. Walker and K. Starmer (eds), *Miscarriages of Justice: A Review of Justice in Error* (London: Blackstones Press) 1999, pp. 354–376. Cf. in Germany, there is no investigating Judge.

[66] *Golder* v. *United Kingdom*, Judgment of 21 February 1975, Series A, No. 18.

[67] *Airey* v. *Ireland*, Judgment of 9 October 1979, Series A, No. 32; P. Thornberry, 'Poverty, Litigation and Fundamental Rights–A European Perspective' 29 *ICLQ* (1980) 250.

[68] *Piersack* v. *Belgium*, Judgment of 1 October 1982, Series A, No. 53.

ment, and had investigated the applicant's case and instituted proceedings against him. Although there was no evidence that as a judge he had acted with bias, his position was still unacceptable and regarded as a violation of Article 6.

Fourth, in accordance with Article 6(2), there is a right to be presumed innocent until proven guilty. This presumption was breached in *Allenet de Ribemont* v. *France*,[69] when a senior politician (Minister of Interior) made comments at a press conference to the effect that the applicant was one of the instigators of the murder. The Court held that Article 6(2) applied and the provisions of the Article had been breached. Although not yet charged, the applicant had been arrested and the statement was akin to a declaration of guilt which, first, encouraged the public to believe that the applicant was guilty and, secondly, prejudiced the assessment of the facts by the court. The provisions here concern the actions of the State and do not, as such, affect the way in which allegations of criminal wrongdoing are reported in the media.

Fifth, regard must be had to Article 6(3) which provides further guarantees of rights in criminal cases. Sixth, the person charged with criminal offences must have 'adequate time and facilities for the preparation of his defence'. This provision pre-empts hasty trials. The term 'adequate facilities' means 'that the defendant had opportunity to organise his defence in an appropriate way and without restriction as to the possibility to put all relevant defence arguments before the trial court'. The provision also entails the person's right to be informed promptly, in a language which he understands and in detail, of the nature and cause of the action against him. He should also have adequate time and facilities to prepare his defence, to defend himself in person or through legal assistance of his own choosing; or if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require.

Seventh, the right to a fair hearing needs to analysed as a whole. In *Barbera Messegue and Jabardo* v. *Spain*,[70] a culmination of factors such as the accused being driven over 300 miles the night before trial, and unexpected changes in the constitution and brevity of the trial led the Court to find breach of Article 6(1).[71] Eighth, fair trial also includes the right to trial within a reasonable time; excessive delay in holding trial or being kept in detention would be a violation of that Article. The hearing should be in public and neither of the

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[69] *Allenet de Ribemont* v. *France*, Judgment of 10 February 1995, Series A, No. 308.

[70] *Barbera Messegue and Jabardo* v. *Spain*, Judgment of 6 December 1988, Series A, No. 146.

[71] Cf. in *Standford* v. *United Kingdom*, Judgment of 25 January 1994, Series A, No. 182-A, para 24. It was disputed that the accused was not able effectively to participate in the proceedings because he had not been able to hear witnesses. However, when proceedings were looked into their entirety, including the fact that the accused had an experienced counsel and with whom he had been able to communicate and who had defended him well, it was held that the accused had had a fair trial.

parties should be placed at a disadvantage.[72] There should also be fairness in the provisions of evidence (for example, the exclusion of illegally obtained evidence, the exclusion of hearsay evidence, to allow the defence's access to evidence, the freedom from self-incrimination).[73] The Article also provides for a right to be able to cross-examine, to have a reasoned judgment, and in criminal cases a right to be legally represented and have access to legal aid.

Privacy, family life, home and correspondence

Article 8 protects an interesting set of rights. According to Article 8(1), everyone has the right to respect for his private and family life, his home and his correspondence. The jurisprudence of the Convention confirms that 'private life', 'family life', 'home' and 'correspondence' are distinct though often overlapping interests. 'Private life' covers a wide range of issues, for example identity, moral and physical integrity, personal relationships and sexual relations.[74] In *Dudgeon* v. *UK*, a homosexual relationship between adult men was regarded as a 'most intimate aspect' of 'private life'.[75] In the category of personal and physical identity we can include cases concerning transsexuals, or those concerning changes of names, appearances and birth certificates. 'Private life', however, has been accorded a wide meaning. The collection and usage of information, census details, photographs, medical data, fingerprinting and telephone tapping are all potential intrusions into private life.

According to the provisions of this Article, 'home' has a broad meaning and has sometimes been taken to cover residence and business premises. Once the existence of a 'home' is established then the applicant is entitled to certain rights, for example the right to access and occupation, not to be expelled or evicted. Interests in the 'home' include the right to a peaceful enjoyment of residence, freedom or relief from noise, pollution etc.[76] In *Lopes Ostra* v. *Spain*[77] the applicant was successful in claiming that failure by the State to act to prevent or to protect him from serious pollution (fumes from waste disposal plant dealing with waste from a tannery) constituted a failure to respect his home and private life. A failure to provide information about the risks inherent in

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[72] *Borgers* v. *Belgium*, Judgment of 30 October 1991, Series A, No. 214-B.

[73] *Funke and others* v. *France*, Judgment of 25 February 1993, Series A, No. 256-A; *Saunders* v. *United Kingdom*, Judgment of 17 December 1996, 1996-VI RJD 2044.

[74] See I. Karstan, 'Atypical Families and the Human Rights Act: The Rights of Unmarried Fathers, Same Sex Couples and Transsexuals' 3 *EHRLR* (1999) 195.

[75] *Dudgeon* v. *United Kingdom*, Judgment of 22 October 1981, Series A, No. 45.

[76] See *Rees* v. *United Kingdom*, Judgment of 17 October 1986, Series A, No. 106, paras 42–46; cf. *B* v. *France*, Judgment of 25 March 1992, Series A, No. 232-C, paras 49–62.

[77] *Lopes Ostra* v. *Spain*, Judgment of 9 December 1994, Series A, No. 303-C. See R. Desgagné, 'Integrating Environmental Values into the European Convention on Human Rights' 89 *AJIL* (1995) 263.

residing at a hazardous and unsafe place would result in breaching the provisions of Article 8. In *Guerra* v. *Italy*,[78] a group of individuals from an Italian village successfully brought a claim for violation of Article 8. They complained of local government's maladministration in failing to provide essential information about the risks contained in a nearby chemicals factory. The chemicals factory was high risk and had a history of accidents. Although on a previous occasion an explosion in the factory had led to the hospitalisation of 150 people with arsenic poisoning, none of the applicants in the present case had suffered a direct injury. The Court held that there was a violation of the Article, adjudicating that once the authorities became aware of the essential information and the risks and dangers involved in running the factory, they had delayed informing the applicants, thereby depriving them of the opportunity to assess the risks they and their families ran by continuing to live in the vicinity of the factory.[79]

'Correspondence' could be of a sensitive nature which needs to be protected (lawyer–client, lawyer–prisoner correspondence).[80] In *Malone* v. *UK*,[81] Mr Malone, an antique dealer had been tried and acquitted of charges of dishonesty. In 1978 he brought proceedings against the police alleging that since 1971 he had been under police surveillance, which included having his telephone tapped and his telephone calls metered. Mr Malone also claimed that his correspondence had been intercepted and tampered with and sought a declaration from the English High Court. He argued, *inter alia*, that the interception, monitoring or recording of conversations during his telephone calls without his consent was unlawful, and violated Article 8 of the Convention. His claim in the English High Court was dismissed. He then went to the European Court of Human Rights, which upheld his claim that there had been a violation of Article 8. According to the Court:

> In view of the attendant obscurity and uncertainty as to the state of the law in this essential respect, the Court cannot but reach a similar conclusion to that of the Commission. In the opinion of the Court, the law of England and Wales does not indicate with reasonable clarity the scope and manner of exercise of the relevant discretion conferred on the public authorities. To that extent, the minimum degree

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[78] *Guerra and others* v. *Italy*, Judgment of 19 February 1998, (1998) 26 EHRR 357.

[79] See *McGinley and Egan* v. *United Kingdom*, Judgment of 9 June 1998, 1998-III RJD 1334; *L.C.B* v. *United Kingdom*, Judgment of 9 June 1998, 1998-III RJD 1390. (1998) 26 EHRR 212. For a survey of literature see D. Hart, 'Environmental Rights' in R. English and P. Havers (eds), *An Introduction to Human Rights and the Common Law* (Oxford: Hart Publishers) 2000, pp. 159–183; R. Churchill, 'Environmental Rights in Existing Human Rights Treaties' in A. Boyle and M Anderson (eds), *Human Rights Approaches to Environmental Protection* (Oxford: Clarendon Press) 1996, pp. 89–108.

[80] See *Silver and others* v. *United Kingdom*, Judgment of 25 March 1983, Series A, No. 61, paras 91, 93–95; *Campbell* v. *United Kingdom*, Judgment of 25 March 1992, Series A, No. 223.

[81] *Malone* v. *United Kingdom*, Judgment of 2 August 1984, Series A. No. 82; see N. Taylor and C.P. Walker, 'Bugs in the System', 1(2) *Journal of Civil Liberties* (1996) 105.

of legal protection to which citizens are entitled under the rule of law in a democratic society is lacking.

The Article places wide and far-reaching obligations on States parties in safeguarding respect for family life. The obligations are of a positive nature, an important illustration of which is provided by the case of *X and Y* v. *The Netherlands*.[82] In this case, there had been a sexual assault on a 16-year-old mentally handicapped girl by an adult male of sound mind. It had not been possible to bring a criminal charge against the accused because of a procedural gap in Dutch law. In the absence of criminal prosecution, the Dutch government had pointed to the possibility of civil remedies available to the girl. The European Court acknowledged the margin of appreciation which the State had and the difficulties which resulted as a consequence of actions by a private individual as opposed to public bodies. However, according to the Court, civil remedies were inadequate and the absence of effective criminal sanctions in these circumstances constituted a breach by the Dutch government of the obligation to respect the girl's right to private life. Thus, according to the Court, positive obligations under Article 8 included ensuring the existence of civil remedies as well as criminal law provisions against sexual attacks.

Family life has also been given an extensive meaning. In *Marckx* v. *Belgium*[83] it was held that Belgium had a positive obligation to make legislative provisions which safeguarded an illegitimate child's integration into the family, a failure of which led to the violation of Articles 8 and 14. Violations under Article 14 took place because of discrimination between legitimate and illegitimate children. Violation of Article 8 occurred as the discriminatory treatment was inconsistent with Belgium's duty to respect the mother's right to family life.

The Convention does not provide and protect the right to enter and stay in a member State. However, if the deportation of a family member makes it impossible to maintain the family, then the concerned State is under an obligation not to exclude that particular member. In *Berrehab* v. *The Netherlands*,[84] the applicant was a Moroccan national whose right to stay in the Netherlands was dependent on remaining married to a Dutch national. It was held that a violation of Article 8 had taken place when, after his divorce, his residence permit was not renewed. The violation had taken place because his removal from the Netherlands would make it impossible for him to maintain family ties with his daughter. In *Moustaquim* v. *Belgium*,[85] a deportation

[82] *X and Y* v. *The Netherlands*, Judgment of 26 March 1985, Series A, No. 91. See G. Van Bueren, 'Protecting Children's Rights in Europe–A Test Case Strategy' 1 *EHRLR* (1996) 171.

[83] *Marckx* v. *Belgium*, Judgment of 13 June 1979, Series A, No. 31.

[84] *Berrehab* v. *The Netherlands*, Judgment of 21 June 1988, Series A, No. 138.

[85] *Moustaquim* v. *Belgium*, Judgment of 18 February 1991, Series A, No. 193.

order served on a young Moroccan national (second-generation immigrant in Belgium) violated Article 8(1). The applicant had been brought to Belgium as an infant and spent his childhood in his new country alongside seven of his brothers and sisters. He had strong families ties in Belgium and those ties could be enjoyed only while he remained in Belgium. This wide interpretation has led to changes in the immigration laws of several signatory States.

Freedoms of religion, expression, assembly and association

Article 9 provides for freedom of thought, conscience and religion. As we analyse in a subsequent chapter, this is a difficult right to provide and protect within general international law.[86] In so far as the Convention is concerned, the phrases 'thought, conscience and religion' as used in the Article were initially difficult to define. In *X and Church of Scientology* v. *Sweden*[87] the European Commission was faced with the question as to whether advertisement by the Church was to be attributed a commercial or religious purpose. After deciding that this advertisement was for commercial purposes, and therefore not a manifestation of religion protected by article, the Commission did not find it necessary to discuss whether scientology is a religion. As a substantive right the Commission and Court have insisted that freedom of religion occupies the position of a fundamental right. At the same time it has been difficult to balance this right when in conflict with other human rights such as the right to freedom of expression[88] or the right to private and family life.

Article 10 contains the very important right to the freedom of expression. Article 10(1) provides that:

> Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.

However, the right is not unlimited and the State has a wide margin of appreciation to restrict expression, as illustrated in *Handyside* v. *UK*.[89] In *Handyside*, the applicant had published a book called *The Little Red Schoolbook*, intended for school children aged 12 years and above. The book was meant to be for reference on issues such as education, learning, teachers and pupils, and contained a section on sex with subheadings such as pornography, contraceptives, and some other sexually intimate exercises. The applicant was convicted of having committed offences contrary to the Obscene

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[86] See below Chapter 10.

[87] *X and Church of Scientology* v. *Sweden*. App. No. 7805/77, 16 DR 68 (1979), at 72.

[88] *Otto-Preminger Institute* v. *Austria*, Judgment of 20 September 1994, Series A, No. 295-A, paras 47, 49.

[89] *Handyside* v. *United Kingdom*, Judgment of 7 December 1976, Series A, No. 24.

Publications Act 1964. When the case came up before the European Court of Human Rights, the Court took into account the variety of views that prevailed among the countries of the Council of Europe and, in particular, the importance of allowing domestic institutions the powers to decide in accordance with their moral and ethical values. Having regard to this margin of appreciation, the Court decided that there had been no violation of Article 10.[90]

Despite the existence of a margin of appreciation, it is not in every case that the Strasbourg institutions have allowed the domestic authorities to determine the rights and freedoms of individuals. In the *Sunday Times* v. *UK* cases,[91] the applicants claimed that a court order prohibiting the publication of an article concerning 'thalidomide children' (that is, children who were born deformed by reason of their mothers having taken thalidomide as a tranquilliser during pregnancy) constituted a violation of their right as guaranteed by Article 10 of the Convention. The order had been made on the ground that the relevant article might prejudice the proceedings which were pending before the English Courts. The European Court of Human Rights held that the United Kingdom had violated the provisions of the Convention and ordered payment of a significant amount to the applicants for their costs.

Article 11 provides for freedom of assembly and association as related freedoms. Peaceful assembly includes public meetings, demonstrations, marches, picketing and processions. Assembly needs to be peaceful, although any incidental breaches of peace would not render the assembly unlawful. The requirement of notification and permission is not normally regarded as interference, but bans, because of the seriousness of the interference, require justification under Article 11(2). The interference under Article 11(2) must be 'in accordance with the law'. Freedom of association means that individuals are not to be compelled to become members of particular associations and there should be no discrimination against individuals who join specific organisations. Under the Convention, individuals have the freedom to form trade unions, and the State remains under an obligation to allow the establishment of trade unions. The State cannot make membership of a particular trade union compulsory. Breaches of the Convention law would be conducted through restrictive policies, or using public powers of interference.

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90 The same approach characterised the Court's position in *Muller and others* v. *Switzerland*, Judgment of 24 May 1988, Series A. No. 133 (which concerned an artistic work) and *Otto-Preminger Institute* v. *Austria*, Judgment of 20 September 1994, Series A., No. 295-A (which related to the display of a film).

91 *Sunday Times* v. *United Kingdom*, Judgment of 26 April 1979, Series A, No. 30; *Sunday Times* v. *United Kingdom* (No. 2), Judgment of 26 November 1991, Series A, No. 217. (1979) 2 *EHRR* 245.

Non-discrimination issues under the Convention

Article 14 provides for the universally recognised norm of non-discrimination.[92] Unlike Article 26 of the ICCPR, however, Article 14 has been restricted to protecting persons against discrimination only in respect of rights contained within the Convention. In the sense of not being an independent article, it is called a 'parasitic article'. These limitations of Article 14 have now been redressed by the adoption of Protocol 12, which extends beyond the rights provided in the Convention to 'any right set forth by law'.[93] Protocol 12 removes the precondition that the rights affected must be contained within the Convention or one of the Protocols ratified by the State party. Article 14 protects against discrimination, instead of promoting equality, although it would appear that different treatment of people in similar circumstances may be justified under Article 14.[94]

INSTITUTIONAL MECHANISMS AND IMPLEMENTATION MACHINERY

At the time of the enforcement of the ECHR, the institutional bodies comprised the European Commission of Human Rights, the European Court of Human Rights and the Committee of Ministers. On 1 November 1998, when Protocol 11 came into operation, the Commission was abolished and the functions of the Commission were merged into those of a permanent and full-time Court. The decision-making powers of the Committee of Ministers were also abolished by the eleventh Protocol and the role of the Committee is now limited to supervising the executions of judgments.[95] The new Court of Human Rights performs the functions, both of the previously existent Commission and its own function, thereby deciding upon both issues of admissibility and merits of the cases. The Court sits in Committees of 3 Judges, Chambers of 7 Judges and a Grand Chamber of 17 Judges. In a particular case, the judge of the respondent State will sit *ex officio* as part of the Chamber or the Grand Chamber. If the judge is unable to sit, the Court will choose someone from that State to sit in the capacity of judge.[96] The ECHR also makes provisions for the

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[92] See Harris, O'Boyle and Warbrick, above n. 1, at pp. 462–487; J.A. Goldston, 'Race Discrimination in Europe: Problems and Prospects' 4 *EHRLR* (1999) 462.

[93] Article 1, Protocol 12 provides as follows: 'The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status'.

[94] *Rasmussen* v. *Denmark*, Judgment of 28 November 1984, Series A. No. 87.

[95] ECHR Article 46(2). For a useful comparison with the Inter-American human rights system see D. Harris, 'Regional Protection of Human Rights: The Inter-American Achievement' D. Harris and S. Livingstone (eds), above n. 29, at pp. 1–29.

[96] Article 27(2).

possibilities of third-party intervention by a State or another interested party with the request, or with leave, of the president of the Chamber.[97]

COMPLAINTS PROCEDURE UNDER PROTOCOL 11

Preliminary procedures

The appropriate language for initiating proceedings is French or English. The President of the Court, however, has a discretion to allow parties to use any language in the preliminary stage of a case. Individual petitioners can lodge complaints of their own accord since lawyers are not required for proceedings before the Court. The Rules of the Court also make provision for legal aid for individual applicants. The funding is based on the financial assistance provided by the Council of Europe. Requests for legal aid should be made to the Court and decisions are based on the test of whether a particular individual would be eligible to obtain legal aid in his or her State. The financial assistance provided is not extensive but does allow for essential expenses including travel and living expenses in pursuit of a claim before the Court.[98]

Complaints procedure

The complaints procedure under the amended Convention is as follows.[99] The application should be addressed to the Registrar of the European Court of Human Rights, with whom all subsequent correspondence should be conducted. Once an application is registered with the secretariat, a Judge Rapporteur is assigned by a Chamber. The Judge Rapporteur makes a request for factual or other additional information and prepares a report on admissibility. The Judge Rapporteur may refer the case to the committee of three judges, proposing dismissal. Alternatively, if he considers that the application raises a significant issue, he may then refer it directly to the Chamber. After a consideration of the application, the committee of three judges may by a unanimous vote declare the application inadmissible or strike it off the list. A unanimous decision of inadmissibility means the end of the case as no appeals

[97] ECHR Article 36 and Rule 61. *Amicus curiae* had previously been submitted in a number of occasions, e.g. *Chahal v. United Kingdom*, Judgment of 15 November 1996, 1996-V RJD 1831; *Chahal v. UK* (1997) 23 *EHRR* 413.

[98] K. Boyle, 'Europe: The Council of Europe, the OSCE, and the European Union' in H. Hannum (ed.), *Guide to International Human Rights Practice*, 3rd edn (New York: Transnational Publishers) 1999, 135–161 at p. 146.

[99] These changes were introduced through Protocol 11 (in effect 1 November 1998). Protocol 11 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, adopted 11 May 1994. Entered into force 1 November 1998. E.T.S. 35; 33 I.L.M. (1994) 960; 15 *HRLJ* (1984) 86.

can be made against the committee's decision.[100] The unsuccessful applicant would then be sent a short note informing him of the decision of the committee. However, if no such decision is taken then the application is to be referred to a Chamber which has the task of deciding upon the admissibility as well as the merits of the case.[101] The government is informed and invited to present its observations on admissibility, which may lead to a friendly settlement. The government normally has six weeks to make comments or observations and to answer any pertinent questions. The latter may involve issues surrounding, for example, the exhaustion of domestic remedies etc. The applicant is forwarded copies of the government's responses. A report is formulated which forms the basis of subsequent action. The applicant and the government may also make oral submissions before the chamber at the admissibility stage. The chamber, whose deliberations are in private, then formulates (and communicates) its views on admissibility. It needs to be noted that all inter-State cases are to be decided by a Chamber.[102]

Post-admissibility procedures

Once an application is declared admissible there are two possible courses of action which can be pursued simultaneously – attempts to reach a friendly settlement and decision on the merits of the case. As under the previous procedure, once an application has been declared admissible, attempts are to be made to reach a friendly settlement.[103] On the instructions of the Chamber, the Registrar of the Court contacts the parties to see if there are possibilities of a friendly settlement. With this objective in mind, separate or joint meetings could be organised. In the meantime, the Chamber continues to examine the merits of the case. It may invite the parties to furnish additional information and evidence. The Chamber may ask for additional evidence or written observations. It can also hold additional hearings of the case in order to decide upon its merits. Prior to giving a judgment, the Chamber may in certain circumstances relinquish its jurisdiction to the Grand Chamber. Such a relinquishment of jurisdiction takes place where a case raises serious questions regarding the interpretation of the Convention or where resolution of a question before the Chamber might have a result inconsistent with a previous judgment.[104] However, relinquishment is not possible if one party to the case objects.

The judgment by the Chamber becomes final in three circumstances: First, where the Parties declare non-intention in referring the case to the Grand

[100] ECHR Article 28.
[101] ECHR Article 29(1).
[102] ECHR Article 29(2).
[103] ECHR Articles 38 and 39.
[104] ECHR Article 30.

Chamber,[105] secondly, where three months have elapsed since the Chamber has given its judgment,[106] and finally where a referral request has been turned down by a panel of Judges.[107] Within three months of the decision any party may, in 'exceptional cases', request a referral to the Grand Chamber. The application is to be heard by a panel of five Judges and accepted if 'the case raises a serious question affecting the interpretation or application of the Convention or a serious issue of general importance'.[108] The judgments of the Grand Chamber are final.[109]

INTER-STATE APPLICATIONS

The ECHR does not have a State reporting procedure (similar in nature to international human rights treaty based bodies)[110] but has inter-State and individual complaints procedures for redress of grievances. The inter-State procedure allows a contracting State party to refer alleged breaches by another State party of the rights contained in the Convention (or the Protocols) to the Court.[111] In inter-State cases the only applicable admissibility requirements are *ratione materiae*, *ratione personae*, *ratione loci*, *ratione temporis*, exhaustion of domestic remedies and the six months rule.[112] There is no limitation of the rule that 'substantially the same matter has already been examined'[113]and 'contains no new relevant information'.[114] Nor is there the application of the rule of 'manifestly ill-founded'[115] or 'abusive' or 'politically motivated' or 'abuse of the right of petition'.[116]

There is no requirement of nationality or whether particular interests are at stake.[117] Unlike the ICCPR, there is not the requirement of making an additional declaration for the system to be operative; the right to complain

105 ECHR Article 44(2)(a).
106 ECHR Article 44(2)(b).
107 ECHR Article 44(2)(c).
108 ECHR Article 43(2).
109 ECHR Article 44(1).
110 See however ECHR Article 52 on reporting. Also see A.A.C. Trindade, 'Reporting in the Inter-American System of Human Rights Protection' in P. Alston and J. Crawford (eds), *The Future of UN Human Rights Treaty Monitoring* (Cambridge: Cambridge University Press) 2000, 333–346 at p. 334.
111 ECHR Article 33.
112 Harris, O'Boyle and Warbrick, above n. 1, at p. 604.
113 Article 35(1) and (2).
114 *Cyprus v. Turkey*, App. No. 8007/77, 13 DR 85 (1978), at 154–155 (1978); *Ireland v. United Kingdom*, Series B, No. 23-I Com Rep (1971), p. 670.
115 *France, Norway, Denmark, Sweden, the Netherlands v. Turkey*, App. Nos. 9940–9944/82, 35 DR 143 at 160–162 (1983).
116 *Cyprus v. Turkey*, App. No. 8007/77, 13 DR 85 at 154–155 (1978).
117 *Austria v. Italy*, App. No 788/60, 4 YB 140 (1961).

flows directly from ratification of the Convention.[118] A State may refer any alleged breach of the Convention. On the other hand, as we consider shortly, the individual can only claim breaches of the 'rights' contained in the Convention.[119] It also appears to be the case that in inter-State cases the principle of reciprocity does not apply. Therefore a State would not be barred from complaining under an article because it has entered into a reservation to the provision or has not ratified the (allegedly broken) provision of a Protocol.[120]

It is equally irrelevant whether one state (or its government) has not been recognised by the other. Other differences from individual applications are that a State could challenge legislative measures in *abstracto*.[121] On the other hand, individuals must satisfy the victim requirement. In inter-State cases, applications are communicated automatically to the respondent government after the admissibility stage and there are separate proceedings on questions of admissibility and merits. Like other comparable treaty-based inter-State procedures, this procedure has not been used extensively, although there has been some jurisprudence. A number of reasons can be advanced for the lack of popularity of the inter-State procedures. It is often seen as politically motivated and tends to strain relations (or is a product of strained relations) among States. Furthermore, it is not perceived as the most efficient method of resolving a dispute.[122]

INDIVIDUAL COMPLAINTS

In contrast to the inter-State procedure, the individual complaints procedure has provided a significant amount of jurisprudence. As of 1 November 1998 when the Protocol 11 came into operation the individual complaints procedure has become automatic and a compulsory procedure for all States parties. According to Article 34:

> The Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right.

[118] Ibid.
[119] P.R. Ghandhi, *The Human Rights Committee and the Right of Individual Communication: Law and Practice* (Aldershot: Ashgate Publishing Ltd) 1998, p. 27.
[120] *France, Norway, Denmark, Sweden, the Netherlands* v. *Turkey*, No 9940-9944/82, 35 DR 143 at 168–169 (1983) where France was not barred from bringing a case against Turkey which concerned issues that were covered by the French reservation.
[121] Harris, O'Boyle and Warbrick, above n. 1, at p. 607.
[122] See e.g. *Ireland* v. *United Kingdom*, Judgment of 18 January 1978, Series A. No. 25. Case discussed below.

Complaints under Article 34 may be brought only by a person, a non-governmental organisation or group of individuals. This would include companies, minority shareholders, trusts, professional associations, trade unions, etc. Non-governmental organisations or groups of individuals are broad categories but they do not cover, for example, municipalities or local government organisation. In relation to individual complaints, over 90 per cent of the complaints are declared inadmissible and thus it is imperative to understand and comply with the admissibility requirements.

Ratione personae

Complaints may be brought by only a person, a non-governmental organisation or groups of individuals claiming to be victims of the violation of a Convention right.

Complaints against whom?

Complaints may be brought only against a State or State bodies. This would cover the activities of such public bodies as the courts, the security forces, or local or provincial governments.[123] A complaint could not be brought against the actions of private persons or private bodies, for example a newspaper. It is sometimes difficult to identify whether a particular body is a private organisation or a State body. Complex issues of State responsibility can arise in relation to the liability of such organisations as railway or broadcasting corporations. In these situations, factors such as autonomy, financial independence and control over recruitment may determine the extent to which the organisation is acting as a non-State actor.

Actions by private individuals or private bodies may give rise to State responsibility in circumstances where the State is required to secure particular rights, for example, the right to freedom of expression, to association, the right to form and join trade unions, the right to education and the prohibition of inhuman or degrading treatment. In *Costello-Roberts* v. *UK*,[124] the issue before the European Court of Human Rights was whether the State was responsible for corporal punishment in private schools, allegedly in breach of Article 3 and 8. In answering positively, the Court noted three points. First, the State has an obligation to secure for children their right to education under Article 2 of the 1st Protocol and that a school's disciplinary system fell within the ambit of the right to education. Secondly, in the UK, the right to education was ensured and guaranteed equally to pupils studying both at private

123 Harris, O'Boyle and Warbrick, above n. 1, at p. 630.

124 *Costello-Roberts v. United Kingdom*, Judgment of 25 March 1993, Series A, No. 247-C.

and public schools, and thirdly, the State cannot be absolved of the obligations imposed on it by delegating them to private organisations or individuals.[125]

An even more radical case of imposition of State liability for actions of private individuals is exemplified through *A v. UK*.[126]. In this case a stepfather who had engaged in activities of beating his 9 year-old step-son was charged with occasioning actual bodily harm in the English Courts. The stepfather had successfully relied on the defence of reasonable chastisement and was acquitted. The European Court of Human Rights, however, rejected this defence and held that a breach of Article 3 had been committed. The Court held the United Kingdom Government responsible because children and other vulnerable people were entitled to protection even from private individuals and the State was under an obligation to provide this protection.

It is also important to recognise that individuals cannot bring actions against those States that have not ratified the Convention or the relevant Protocol. Furthermore, the defendant must be a State party, and not an international agency, an international or regional organisation such as the United Nations or the European Union.[127] In inter-State cases both States parties must have ratified the Convention.

Requirement of victim

The petitioner under Article 34 must claim to be directly affected or there must be a significant risk of being directly affected.[128] It is insufficient to establish a mere possibility, suspicion, or conjuncture of future risk.[129] In *Open Door Counselling and Dublin Well Women* v. *Ireland*,[130] which concerned a Supreme Court injunction against the provision of information by applicant companies concerning abortion facilities outside Ireland, the Commission and the Court were of the view that women of child-bearing age could be regarded as victims as they belonged to a class of women which may be directly affected. In *Times Newspaper Ltd* v. *UK*,[131] the view was taken

[125] Ibid. para 30.

[126] Judgment of 23 September 1998, 1998-VI RJD 2692; *The Times*, 1 October 1998. In the context of the Human Rights Act see J. Cooper, 'Horizonatility: The Application of Human Rights Standards in Private Disputes' in R. English and P. Havers (eds), above n. 79, at pp. 53–69; M. Hunt, 'The "Horizontal Effect" of the Human Rights Act' *Public Law* (1998) 423.

[127] *CFDT* v. *European Communities*, App. No. 8030/77, 13 DR 231 (1978).

[128] See *Klass and others* v. *Germany*, Judgment of 6 September 1978, Series A, No. 28, where it was held by the Court that all users and potential users of telecommunication and postal services were 'directly affected' by legislation providing for secret surveillance. They thereby satisfied the victim requirement, despite the fact that they had not been subjected to such surveillance. Also consider *Norris* v. *Ireland*, Judgment of 26 October 1988, Series A, No. 142.

[129] *Tauria* v. *France*, App. No. 28204/95, DR 83-A 113 (1995).

[130] *Open Door Counselling* v. *Ireland*, Judgment of 29 October 1992, Series A, No. 246.

[131] *Times Newspaper* v. *United Kingdom*, App. No. 14631/89, 65 DR 307(1990).

that a newspaper publisher could be regarded as a victim of Article 10 violation (even without proceedings having been taken against him) where the law was not clear enough to be able to predict the risk of prosecution. In subsequent case law, the requirement of victim has been more narrowly construed.

There also remains the possibility of being classed as an indirect victim, for example the widow of a person killed by terrorists and close family members or friends. This is applicable particularly in relation to serious violations of rights, for example those under Articles 2 or 3. The meaning of indirect victim has been taken to mean those who are prejudiced by violations or have personal interests, for examples parents, guardians, etc.

Competence *ratione materiae*

Under the competence *ratione materiae*, the individual cannot complain of breach of rights not contained in the Convention. Regardless of the extreme desirability in a particular instance or regardless of the serious nature of human rights violations, individuals cannot rely on those rights which are not contained in the Convention or the Protocols. Thus, for example, individuals are not able to complain of the violation of such rights as those to pensions, social security, nationality or political asylum. However, as noted above, the Convention rights have sometimes been given a very broad meaning and applied in a range of circumstances. Thus, for example, while there is no right of political asylum and freedom from expulsion or extradition, applicants have been able to rely on Article 3.

A distinction between individual and inter-State petitions is also worthy of note. In inter-State complaints a State can complain about any violation of the provisions of the Convention, whereas individuals can complain only about the rights contained within the Convention.

Competence *ratione loci*

Competence *ratione loci* limits the competence of the Court to analysing those alleged breaches that take place within the 'jurisdiction' of a particular state. Having said that, 'jurisdiction' is not necessarily synonymous with territory, for example it would include State responsibility for acts conducted by agents outside their territory. This issue was considered in *Cyprus* v. *Turkey*.[132] In this case, the Turkish Government argued for the application to be declared inadmissible *ratione loci*. The Turkish Government's argument was that it could not be held responsible for acts outside its national territory. The European Commission in rejecting the Turkish Governments argument took

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132 *Cyprus* v. *Turkey*, App. No. 8007/77, 13 DR 85 (1978).

the view that the term 'jurisdiction' was not synonymous with territory. The real question related to authority and control of the State wherever exercised. Since the Turkish forces had landed in Cyprus and operated under the direction of the Turkish State, their actions extended the de facto jurisdiction of the Turkish State. The concept of jurisdiction was further highlighted in *Loizidou v. Turkey*, where the Court noted:

> Although article 1 set limits on the reach of the Convention, the concept of 'jurisdiction' under this provision is not restricted to the national territory of the High Contracting Parties. According to its established case law, for example, the Court has held that extradition or expulsion of a person by a contracting State may give rise to an issue under article 3, and hence engage the responsibility of the State under the Convention (see, the *Soering* v. *U.K.* judgment of 7 July 1989, Series A, no. 161, pp. 35–36, para 91; the *Cruz Varas* v. *Sweden* judgment of 20 March 1991, Series A, no. 201, p. 28, paras. 69 and 70; and the *Vilvarajah and Other* v. *U.K.* judgment of 30 December 1991, Series A, no. 215, p. 34, para 103). In addition, the responsibility of Contracting Parties can be involved because of acts of their authorities, whether performed within or outside national boundaries, which produce effects outside their territory (see the *Drozd and Janousek* v. *France and Spain* judgment of 26 June 1992, Series A, No. 240, p. 29, para 9.1).[133]

Exhaustion of domestic remedies

Once the initial requirements are satisfied the Court has to ascertain whether the particular application satisfies the criterion of admissibility in the light of Article 35 of the Convention. Article 35 provides as follows:

> (1) The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of six months from the date on which the final decision was taken.

As we already noted, the Article 35(1) rule on the exhaustion of domestic remedies is based on the rule of general international law that the State must have the opportunity to redress the alleged wrong. The task of ensuring that there are available 'adequate' and 'effective' remedies is an important requirement falling upon all contracting States parties. This requirement is intended to reduce the mass of complaints. It is more appropriate that, in the first instance, the domestic courts be given the opportunity to provide remedies to the alleged wrongs.

Thus the complainant is required to take actions to redress his grievances at the national level. The applicant must pursue all possible and available remedies that are likely to be adequate and effective. The meaning of remedies 'likely to be adequate and effective' would depend on the breach in question

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[133] *Loizidou* v. *Turkey* (Preliminary Objections), Judgment of 23 March 1995, Series A, No. 310, para 62.

and on the State jurisdiction. In principle, the applicant must appeal to the highest court of appeal against an unfavourable decision. In States where there is a written constitution, the applicant should take his case through to the constitutional court – to the highest court of appeal. Mere doubt as to the prospect of failure is inadequate, although at the same time he need not go against settled and established legal opinion. The applicant need not pursue his case in the domestic forum if it is clear from established case law that pursuing a particular remedy would be ineffective.[134]

Six months rule

The six months rule means that the application must be submitted to the Court within six months of the exhaustion of domestic remedies. Accordingly, the Court is restricted to dealing with cases only within a period of six months from the date when the final decision was taken at the domestic level. The rule is intended to prevent old cases reappearing before the admissibility institutions. The six months will start running from the date of the final decision marking the exhaustion of all domestic remedies. The court may refuse to accept the petition under this heading if after the initial letter to pursue the action there is a substantial period of inaction before the applicant submits further information.

Other restrictions

(2) The Court shall not deal with any application submitted under Article 34 that
(a) is anonymous; or
(b) is substantially the same as a matter that has already been examined by the Court or has already been submitted to another procedure of international investigation or settlement and contains no relevant new information
(3) The Court shall declare inadmissible any individual application submitted under Article 34 which it considers incompatible with the provisions of the Convention or the protocols thereto, manifestly ill-founded, or an abuse of the right of application.
(4) The Court shall reject any application which it considers inadmissible under this Article. It may do so at any stage of the proceedings.

The applicant is required to disclose his or her identity but could request that that identity not be disclosed to the public.[135] Also the application must not represent substantially the same matter as an earlier application; the Court will reject the application if the factual basis of the new application is the same

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[134] *Johnston and others v. Ireland*, Judgment of 18 December 1986, Series A, No. 112, and *Open Door Counselling v. Ireland*, Judgment of 29 October 1992, Series A, No. 246.
[135] Rule 47(3).

as the previous one[136] or it is under consideration by another body. It does not matter if there are new legal arguments involved. The purpose of this rule is to prevent duplication of examination by international bodies. The term 'international investigation' has been taken to mean such bodies as the Human Rights Committee, other enforcement bodies (for example, ILO) and the European Court of Justice. It is equally irrelevant whether a particular body can render binding decisions. The application will be rejected if it is manifestly ill-founded or abuses the right of application.[137] The application will be held to be manifestly ill-founded if it discloses no breach of the rights contained in the Convention or if the complainant fails to substantiate his application or has ceased to be the victim. The application would also be rejected if it is an abuse of the right of petition such as being insulting, using provocative language, derogatory, or being mere political propaganda. However, even though there is substance in the complaint, the mere fact that it is initiated to gain political ground renders it manifestly ill-founded. This provision is intended to prevent situations where attempts are being made to mislead the Court, or there is a deliberate refusal to cooperate with the Court.

REMEDIES BEFORE THE COURT

The European Court of Human Rights judgments are of a declaratory nature and cannot of themselves repeal inconsistent national law or judgment.[138] Equally the State is not obliged to give direct effect to the decisions of the Court in their national laws. The defendant State therefore remains free to implement them in accordance with the rules of its national legal system.[139] The one case where a State has patently refused to accept or comply with the European Court's Judgment is *Brogan* v. *UK*.[140] In this case the United Kingdom informed the Committee of Ministers that it could not repeal its legislation on prevention of terrorism. The United Kingdom then made a derogation provision under Article 15, which was subsequently upheld by the Committee of Ministers.[141] In relation to the provision of remedies Article 41 provides as follows:

> If the Court finds that there has been a violation of the Convention or the protocols thereto, and if the internal law of the High Contracting Party concerned

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[136] See *X* v. *United Kingdom*, App. No. 8206/78 25 DR 147 (1981).

[137] Article 34(3).

[138] *Marckx* v. *Belgium*, Judgment of 13 June 1979, Series A, No. 31, para 58 cited in Harris, O'Boyle and Warbrick, above n. 1, at p. 26.

[139] Sometimes it is unclear whether steps (e.g. the legislation) goes far enough. See R.R. Churchill and J.R. Young, 'Compliance with Judgments of the European Court of Human Rights and Decisions of the Committee of Ministers: The Experience of the UK' 62 *BYIL* (1991) 283.

[140] *Brogan and others* v. *United Kingdom*, Judgment of 29 November 1988, Series A, No. 145–B.

[141] *Brannigan and McBride* v. *United Kingdom*, Judgment of 26 May 1993, Series A, No. 258-B, para 5. See Harris, O'Boyle and Warbrick, above n. 1, at p. 31.

allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.

On the finding of a breach, the Court's powers are limited to the awarding of compensation and the granting of legal costs. As regards the award of compensation, the Court has made awards under two heads: pecuniary and non-pecuniary damage (for example loss of past and future earnings, loss to property, loss of opportunity) and costs and expenses. In proceedings before the Court it is not possible to obtain specific relief. In *Selcuk and Asker v. Turkey*[142] applicants asked to be re-established in the village, a request that was turned down by the Court.[143]

SIGNIFICANT PRINCIPLES EMERGENT FROM THE ECHR

Reservations: Article 57

In accordance with general international law, the ECHR allows States parties to make reservations to treaty provisions. Article 57 of ECHR provides:

> (1) Any State may, when signing this Convention or when depositing its instrument of ratification, make a reservation in respect of any particular provision of the Convention to the extent that any law then in force in its territory is not in conformity with the provision. Reservations of a general character shall not be permitted under this article.
>
> (2) Any reservation made under this article shall contain a brief statement of the law concerned.

Derogation in time of emergency: Article 15

In exceptional circumstances States parties are permitted to take certain measures which interfere with or restrict the enjoyment of the rights provided in the Convention and the Protocols. In legal terms such restrictions and interference are termed as derogations. The permissibility of such restrictions is authorised by Article 15(1) of the Convention which provides:

> In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations ...

[142] *Selcuk and Asker v. Turkey*, Judgment of 24 April 1998, 1998-II RJD 891.

[143] D. Shelton, *Remedies in International Human Rights Law* (Oxford: Oxford University Press) 1999, p. 203.

However these derogation provisions are subject to a number of conditions. These include, first, that these provisions have to be narrowly construed and are legitimate only to the extent that they are required by the exigencies of the situation. Second, that they are not inconsistent with other obligations of international law. Article 15(2) provides that it is not permissible to derogate from the provisions relating to the right to life (except in respect of deaths resulting from lawful acts of war), from the right not to be tortured etc., the right not to be enslaved, and the right not to be subjected to retrospective criminal penalties. Third, the Secretary-General of the Council of Europe is to be informed of the measures which are taken with a detailed explanation of the reasons that led to such derogations.

Margin of appreciation

The Convention has been reliant on a concept which is termed as the margin of appreciation. In essence it grants the domestic courts and institutions a measure of discretion to deal with a particular issue in accordance with their own moral, political, ideological and legal viewpoint. The notion of the margin of appreciation could best be illustrated by the dicta of the Court in the *Handyside v. UK case*.[144] The Court noted:

> 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 institutions created by it make their own contribution to this task but they become involved only through contentious proceedings and once all domestic remedies have been exhausted ... It is not possible to find in the domestic law of the various Contracting States a uniform European conception of morals. The view taken by their respective laws of the requirements of morals varies from time to time and from place to place, especially in our era which is characterised by rapid and far-reaching evolution of opinions on the subject ... By reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements as well as on the necessity of a 'restriction' or 'penalty' intended to meet them.[145]

CONCLUSIONS

The ECHR remains the most valuable treaty adopted by the Council of Europe. After fifty years of existence the ECHR has firmly established itself as

[144] *Handyside v. United Kingdom*, Judgment of 7 December 1976, Series A, No. 24.

[145] Ibid. para 48.

the leading human rights treaty. During the course of this chapter we have surveyed a range of rights that are protected by the ECHR. A number of modifications and advancements have been made by subsequent Protocols to the substantive protection of rights. A significant addition to the protection of human rights would be through the application of the most recent protocol, Protocol 12. The case law of the Convention is also impressive in the sense that the judgments of the European Court of Human Rights have influenced many States to change their laws or reformulate their administrative policies. Such a situation compares favourably with other systems protecting human rights, where the system of implementation is hampered by absence of bodies with the authority to deliver binding judgments. However, the success of the Convention and the ever expanding number of States parties to the treaty exacerbated the difficulties in dealing with the cases. The induction of Protocol 11 aimed to simplify the institutional mechanisms. It was also designed to allow individuals within member States access to the European Court of Human Rights, and to curtail the functions of the Committee of Ministers. The reformed system, thus far, appears to be producing its intended results.

While the Convention has been hugely successful in the past fifty years, a number of challenges are presented. First, there has been a significant change in the social, ideological and political values within Europe; the question arises as to the extent the text of the Convention could be used to interpret these rapidly changing values. The second and more significant issue relates to the position and nature of obligations that are undertaken by the States which were formerly part of the communist or socialist bloc. A number of these States have faced difficulties in complying with the standards of protecting civil and political rights accepted within the western States. In the light of their endemic political and economic problems there is almost an acceptance of their inability to match objective standards on protecting civil and political rights; such an approach, however, is a dangerous one since it may lead to different standards even with the context of a regional treaty.

7

EUROPE AND HUMAN RIGHTS – II[1]

INTRODUCTION

At the end of the Second World War, Europe needed an institutional framework to protect individual rights. At the same time the shattered infrastructure was in urgent need of redevelopment. Thus, in addition to the protection of civil and political rights, there was also a desire for economic stability and prosperity.[2] Post-war Europe, however, was soon to be engulfed into an ideological and political conflict, and security considerations necessitated the establishment of a strong military alliance. In the light of these security considerations, the Conference on Security and Cooperation in Europe (CSCE) was developed. The CSCE, as we shall consider in due course, has expanded into an active organisation, the Organisation for Security and Cooperation in Europe (OSCE). At the time of its inception in 1949, the Council of Europe's membership was largely drawn from western liberal States. The aims of the organisation were directed towards acting as a bulwark against the spread of communism and totalitarianism and to protect largely well-established civil and political rights. It did not take long, however, to recognise that civil and

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[1] See L. Betten and N. Grief, *EU Law and Human Rights* (London: Longman) 1998; L. Betten and D. Mac Devitt, *The Protection of Fundamental Social Rights in the European Union* (The Hague: Kluwer Law International) 1996; D. Gomien, D. Harris and L. Zwaak, *Law and Practice of the European Convention on Human Rights and the European Social Charter* (Strasbourg: Council of Europe Pub) 1996; A.H. Robertson and J.G. Merrills, *Human Rights in the World: An Introduction to the Study of International Protection of Human Rights*, 4th edn (Manchester: Manchester University Press) 1996, pp. 160–196. H.J. Steiner and P. Alston, *International Human Rights in Context: Law, Politics, Morals: Text and Materials*, 2nd edn (Oxford: Clarendon Press) 2000, pp. 789–797.

[2] See A. Cassese, *International Law* (Oxford: Oxford University Press) 2001, p. 398.

political rights could not be protected without the promotion of economic and social rights. With the objective of promoting economic and social rights, the Council of Europe undertook to establish a regional treaty. The process of drafting took seven years and resulted in the adoption of the European Social Charter (ESC) (1961).[3] The Charter, as we shall consider in this chapter, has been criticised for its limited vision in according adequate substantive rights. More significantly, there were substantial shortcomings in the implementation procedures, which necessitated a thorough revision. The amended and revised Charter was adopted in 1996.[4]

Parallel to these moves in the Council of Europe, the project of economic integration took shape with the signature of the ECSC Treaty of Paris and, more importantly, the 1957 Treaty of Rome establishing the European Economic Community.[5] It must be emphasised that the Treaty of Rome envisaged an economic, rather than a political union and any rights conferred on individuals were incidental to that project. Over the years, however, the European Economic Community (or European Union as it is now known) has moved towards creating and protecting more explicit rights of citizenship and to a lesser extent what it terms as 'fundamental' rights. It has a direct role to play in relation to discrimination on grounds of nationality and gender-based discrimination.

In the light of the broad nature of organisations such as the EU and OSCE, the present chapter will concentrate on elucidating their role in relation to the protection of human rights. This chapter has been divided into five sections. After these introductory comments, the next section considers the Council of Europe's European Social Charter. The third section analyses the role and protection of human rights within the framework of the European Union, while the penultimate section considers the OSCE and its contribution to the promotion of human rights. The chapter ends with some concluding observations.

EUROPEAN SOCIAL CHARTER 1961[6]

A major criticism of the European Convention on Human Rights has been its almost exclusive focus on the protection of civil and political rights. As has

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[3] Adopted at Turin 18 October 1961. Entered into force, 26 February 1965. 529 U.N.T.S 89; ETS 35.

[4] Adopted 3 May 1996. Entered into force, 3 July 1999. ETS 163. See below this chapter.

[5] See the Consolidated version of the treaty establishing the European Economic Community, signed at Rome, 25 March 1957, as amended by subsequent treaties through to the Treaty of Amsterdam (1997), effective 1 May 1999. 1997 O.J. (C 340) 3. Reprinted in 37 I.L.M 79 May (1998).

[6] D.J. Harris, *The European Social Charter* (Charlottesville: University Press of Virginia) 1984; D.J. Harris, 'A Fresh Impetus for the European Social Charter' 41 *ICLQ* (1992) 659; D.J. Harris, 'The System of Supervision of the European Social Charter–Problems and Options for the Future' in L. Betten (ed.), *The Future of European Social Policy*, 2nd edn (Deventer: Kluwer Law and Taxation Publishers) 1991, pp. 1–34.

been noted, over the years this criticism has been addressed, albeit to a limited extent, through two key processes. First, a number of rights have been added through additional Protocols to the ECHR which have a strong economic and social dimension.[7] Secondly, the broad interpretation accorded to many of the civil and political rights has highlighted the strong inter-linkage between these rights and economic, social and cultural rights.[8] Notwithstanding this indirect involvement, there has been a growing demand to have an effective regional treaty providing a more direct focus on social and economic rights.

The European Social Charter was adopted in Turin in 1961 by eleven Council of Europe member States. The substantive rights and implementation mechanisms of the Charter have been modified through a series of amendments. The ESC consists of a preamble, five parts and an appendix. The first additional Protocol, adopted in 1988, added several rights to the treaty. Further additions and amendments have been conducted to the implementation machinery through the Amending Protocols of 1991 and 1995. Part I of the Charter establishes a number of principles, which contracting parties accept as policy aims. It does not establish specific legal obligations and includes such aims as the opportunity for everyone to earn his living in an occupation freely entered into, the right to just conditions of work, the right to safe and healthy working conditions, fair remuneration, children and young persons having the right to special protection, and employed women, in case of maternity, having the right to special protection.

Part II of the Charter lists a number of substantive rights. These substantive provisions are a consolidation and extension of the policy aim. The Charter is unique in the sense that it provides States with the discretion of not accepting all the provisions of the treaty. According to Part III (Article A) of the revised Charter, a State party undertakes *inter alia*:

> (b) to consider itself bound by at least six of the following nine articles of Part II of this Charter: Articles 1, 5, 6, 7, 12, 13, 16, 19 and 20;
>
> (c) to consider itself bound by an additional number of articles or numbered paragraphs of Part II of the Charter which it may select, provided that the total number of articles or numbered paragraphs by which it is bound is not less than sixteen articles or sixty-three numbered paragraphs.

Rights contained within the ESC

Article 1 The right to work
Article 2 The right to just conditions of work
Article 3 The right to safe and healthy working conditions

[7] See e.g. the Right to Property and the Right to education (Protocol 1, Articles 1 and 2) Protocol 12, etc.

[8] See above Chapter 6.

Article 4	The right to a fair remuneration
Article 5	The right to organise
Article 6	The right to bargain collectively
Article 7	The right of children and young persons to protection
Article 8	The right of employed women to protection of maternity
Article 9	The right to vocational guidance
Article 10	The right to vocational training
Article 11	The right to protection of health
Article 12	The right to social security
Article 13	The right to social and medical assistance
Article 14	The right to benefit from social welfare services
Article 15	The right of physically or mentally disabled persons to vocational training, rehabilitation and social resettlement
Article 16	The right of the family to social, legal and economic protection
Article 17	The right of children and young persons to social and economic protection
Article 18	The right to engage in a gainful occupation in the territory of other Contracting Parties
Article 19	The right of migrant workers and their families to protection and assistance
Article 20	The right to equal opportunities and equal treatment in matters of employment and occupation without discrimination on the grounds of sex
Article 21	The right to information and consultation
Article 22	The right to take part in the determination and improvement of the working conditions and working environment
Article 23	The right of elderly persons to social protection
Article 24	The right to protection in cases of termination of employment.
Article 25	The right of workers to protection of claims in the event of the insolvency of their employer
Article 26	The right of all workers to dignity at work
Article 27	The right of all persons with family responsibilities and who are engaged or wish to engage in employment to do so without being subject to discrimination and as far as possible without conflict between their employment and family responsibilities
Article 28	The right of workers' representatives to protection in the undertaking and facilities to be accorded to them
Article 29	The right to be informed and consulted in collective redundancy procedures
Article 30	The right to protection against poverty and social exclusion
Article 31	The right to housing

The ESC contains a number of rights which are valuable to workers and employees. The right to just conditions of work,[9] for example, provides an

[9] Article 2.

undertaking from the States parties *inter alia* to allow individual employees reasonable daily and weekly working hours.[10] It also allows for public holidays with pay, and a minimum of four weeks' annual holiday with pay.[11] Through the right to safe and healthy working conditions States parties undertake to:

> formulate, implement and periodically review a coherent national policy on occupational safety, occupational health and the working environment. The primary aim of this policy shall be to improve occupational safety and health and to prevent accidents and injury to health arising out of, linked with or occurring in the course of work, particularly by minimising the causes of hazards inherent in the working environment.[12]

An interesting and positive feature of the Charter is its protection of children and young persons at work.[13] In accordance with Article 7, States parties undertake to set a minimum age of 15 for allowing employment, subject to exceptions of light work, which does not affect their health, moral or education.[14] States also agree that persons in compulsory education are not to be employed in such a manner as would deprive them of the full benefit of their education.[15] In providing the right of employed women to maternity protection, States undertake to:

> provide either by paid leave, by adequate social security benefits or by benefits from public funds for employed women to take leave before and after childbirth up to a total of at least fourteen weeks.[16]

Other useful Articles secure the right to social security,[17] the right to social and medical assistance[18] and the right to social welfare services.[19] In the light of a substantial elderly population of Europe, it is important to have provisions protecting their rights.[20] While the Charter provides some protection to migrant workers and their families,[21] one of its disappointing features is its approach which limits the provision of rights to nationals of contracting parties only.[22]

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10 Article 2(1).
11 Article 2(2).
12 Article 3(1).
13 Article 7.
14 Article 7(1).
15 Article 7(2).
16 Article 8(1).
17 Article 12.
18 Article 13.
19 Article 14.
20 Article 15.
21 Article 19.
22 See Appendix to the Revised European Social Charter; Scope of the Revised European Social Charter in terms of persons protected.

Implementation mechanism[23]

The ESC as a regional treaty dealing with economic and social rights parallels the ICESCR,[24] which, as we have considered, operates at the international level.[25] The ESC mirrors similar weaknesses of implementation. The implementation mechanism of the ESC has recently been revised and now provides for a complaints procedure in addition to the reporting system. Primary monitoring of the treaty is conducted by a system of regular reports submitted by the State parties. State parties are required to submit reports on the implementation of the Charter every two years.[26] It needs to be noted that while the ESC requirement is for biannual reports of Articles which States parties have accepted, the Committee of Ministers and the Council of Europe have decided on the reporting of all 'non-core' articles every four years.

There also remains the possibility of occasional reports on unaccepted provisions.[27] These reports allow the Committee of Independent Experts (CIE) to clarify the meaning of particular provisions and to comment on the problems that a State envisions in accepting those provisions.[28] Requests for such reports have been rare, and there have thus far been only four occasions when States have been called upon to submit such reports.

Two bodies are primarily involved in the monitoring of State reports: The Committee of Independent Experts (CIE)[29] and the Governmental Committee. CIE is elected by the Committee of Ministers for a term of six years.[30] It consists of:

> at least nine members elected by the Parliamentary Assembly by a majority of votes cast from a list of experts of the highest integrity and of recognised competence in national and international social questions, nominated by the Contracting Parties.[31]

Members of the Committee sit in their individual capacity and are required not to perform any functions incompatible with the requirements of independence, impartiality and availability inherent in their office.[32] The other body, the

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[23] D.J. Harris, 'Lessons from the Reporting System of the European Social Charter' in P. Alston and J. Crawford (eds), *The Future of UN Human Rights Treaty Monitoring* (Cambridge: Cambridge University Press) 2000, pp. 347–360; D.J. Harris, 'The System of Supervision of the European Social Charter–Problems and Options for the Future' in L. Betten (ed.), above n. 6, pp. 1–34.

[24] Adopted at New York, 16 December 1966. Entered into force 3 January 1976. GA Res. 2200A (XXI) UN Doc. A/6316 (1966) 993 U.N.T.S. 3, 6 I.L.M. (1967) 360.

[25] See above Chapter 5.

[26] Article 21.

[27] Article 22.

[28] D.J. Harris, 'Lessons from the Reporting System of the European Social Charter' in P. Alston and J. Crawford (eds), above n. 23, at p. 350.

[29] In 1999, CIE changed its name to the European Committee of Social Rights. The Committee, however, is still generally known as CIE, a title which is used for the purposes of the present chapter.

[30] Article 25(2).

[31] Article 25(1).

[32] Article 25(4).

Governmental Committee, consists of one representative of each of the Contracting parties.[33] Members of the Governmental Committee are usually civil servants, in charge of the national ministry responsible for implementing the ESC.[34] The Committee is authorised to allow no more than two international organisations of employers and no more than two international trade union organisations to send observers in a consultative capacity to its meetings.[35] It may also, at its discretion, consult those representatives of non-governmental organisations with consultative status with the Council of Europe and having a particular competence in matters relating to the Charter.[36]

The process is initiated through submission of the report to the Secretary General for its examination by CIE. At the time of sending the report to the Secretary General, the relevant State party is required to forward copies of this report to 'such of its national organisations as are members of the inter-national organisations of employers and trade unions invited ... to be represented at the meetings of the Governmental Committee'.[37] Any comments, formulated by these organisations and sent to the Secretary General are made available to the State party concerned for its response.[38] The CIE may ask for additional information or clarification from the States parties.[39]

The CIE provides a legal assessment of a State's compliance with the provisions which it has accepted.[40] The conclusions made by the Committee are made available as a public document, and are communicated to the Parliamentary Assembly of the Council of Europe and to any other relevant organisations. Once this stage is over, State reports, and the assessment made by the CIE on these reports, are transmitted to the Governmental Committee. The Governmental Committee examines those assessments where there are indications of non-compliance with the provisions of the Charter and, on the basis of social, economic and other policy considerations, prepares recommendations for the Committee of Ministers to adopt. The recommendations prepared by Governmental Experts are also passed on to the Parliamentary Assembly of the Council of Europe, which transmits its views to the Council of Ministers. In the light of comments made by Governmental Experts and the Parliamentary Assembly, the Committee of Ministers issues recommendations to States which fail to comply with the Charter.

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33 Article 27(2).

34 D.J. Harris, 'Lessons from the Reporting System of the European Social Charter' in P. Alston and J. Crawford (eds), above n. 23, at p. 355.

35 Ibid.

36 Ibid.

37 Article 23(1).

38 Article 23(1).

39 Article 24(3).

40 Article 24(2).

The Committee of Ministers adopts, by a majority of two-thirds of those voting, with entitlement to voting limited to the Contracting Parties, on the basis of the report of the Governmental Committee, a resolution covering the entire supervision cycle and containing individual recommendations to the Contracting Parties concerned.[41] The Secretary General of the Council of Europe transmits to the Parliamentary Assembly, with a view to the holding of periodical plenary debates, the reports of the Committee of Independent Experts and of the Governmental Committee, as well as the resolutions of the Committee of Ministers.[42]

From the above description, the implementation mechanism might appear to be a straightforward one. However, in practice substantial difficulties arise because of a weak and cumbersome system of monitoring the treaty. Many reasons can be advanced for the weaknesses in implementing the ESC. Giving the mandate to the Committee of Ministers was inappropriate because of the political nature of the body. Politicians have been reluctant to criticise States for fear of generating political tensions. Under the provisions of the original Charter, the Committee has to adopt recommendations by a two-thirds majority of its members. In the light of the limited membership of this Charter, for many years the Charter's Contracting Parties represented only around one-third of the Council of Europe's membership. This resulted in non-State parties criticising practices in a State which had committed itself to fulfilling the Charter's obligations. There were other problems, generated by the antagonism between the CIE and the Governmental Experts. A confrontation took place in the very first cycle of reporting, when the CIE found 57 breaches from the seven States involved. In reaction to this, the Governmental Committee produced its own less demanding interpretation of the Charter.[43]

National trade unions and employers' organisations are given the right to comment on national reports. However, their role was limited in that they may only sit as observers at the meetings of the Committee of Governmental representatives. There are also no explicit provisions to the effect that their comments shall be taken into account by the supervisory bodies. This minor role for the employers' and workers' representatives is another reason for the Charter's lack of popularity.

In response to these problems and in the context of the decision taken in November 1990 to revise the Charter, a number of improvements were made in the supervisory system, as well as an extension in the range and content of the rights. The 1991 Amending Protocol changed the voting requirements in the Committee of Ministers from a two-thirds majority of member States to a two-

[41] Article 28(1).

[42] Article 29.

[43] D.J. Harris, 'Lessons from the Reporting System of the European Social Charter' in P. Alston and J. Crawford (eds), above n. 23, at p. 353.

thirds majority of Contracting Parties, strengthening the role of the Committee of Independent Experts and improving the consultation procedures with employers' and trade unions' representatives as well as with NGOs.[44] In addition, the 1991 Protocol enables the Committee of Experts to make direct contact with contracting parties in order to request clarification and additional information concerning their reports. Under the original provisions, the Experts could only conclude that certain situations were unclear and therefore that they were not sure whether the Charter had been infringed. They would have to wait two years to get the relevant information, which might still be inconclusive.

The second major improvement is a better definition of the Governmental Committee. The aim of this is to avoid what used to happen previously, namely that the Governmental representatives more or less repeated the work of the experts and usually came to different conclusions. This offered the Committee of Ministers an opportunity to abstain from any further actions, as there was no clear indication of a breach of the Charter. The amendment provides that in the light of the reports of experts of the contracting parties, the Governmental Committee shall select the situations which should, in its view, be the subject of recommendations by the Committee of Ministers. In addition to a better description of the role of the Governmental Committee, there has been a shift in the hitherto confrontational position adopted by the CIE towards the Governmental Committee. The CIE has also, in the words of Professor Harris, 'adopted a somewhat more measured approach. It is much slower to find a new party in breach of its obligations in its early reports. It has also moderated its approach to the application of some particularly delicate provisions or issues'.[45]

A recent reform is the addition of a collective complaints procedure to the present control mechanism which came into effect after ratification by five Contracting Parties to the Charter. The procedure does not allow individuals to make complaints. However, complaints can be lodged by management, labour and non-governmental organisations (NGOs) against Contracting Parties allegedly failing to comply with their obligations under the Charter. Complaints can be made regarding general situations and not about particular or individual cases. The Revised European Social Charter adopted by the Committee of Ministers and opened for signature on 3 May 1996 came into force in July 1998. The complaints procedure adds a new dimension and importance to the Social Charter; its impact is likely to be a beneficial one in generating greater interest in the Charter.

Many of the rights contained in the ESC have been addressed at various levels, and in some cases much more strongly at the European level through the

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[44] See Article 28(1)

[45] D.J. Harris, 'The System of Supervision of the European Social Charter–Problems and Options for the Future' in L. Betten (ed.), above n. 6, 1–34, at p. 10.

European Union. This statement can be tested by contrasting Articles 2, 3, 7, 8, 20, 21, 25 and 29 of the ESC to comparable European Council Directives.[46] In a few instances, even the ECHR jurisprudence has been of greater assistance to disgruntled workers or employees. Despite the shortcomings in the Charter, there are a number of positive features. Although reports are usually delayed (not an unusual feature of international reporting procedure), the States parties to ESC have made a point of making a definitive submission.[47] This action represents a major contrast with the situation at the international level, in particular in economic and social rights reporting. It is also to the credit of the CIE that they review each of the State reports completely objectively and independently.

THE EUROPEAN UNION[48]

While the Council of Europe was focused on maintaining peace within Europe by means of cooperation in the field of human rights, the European Economic

[46] Compare the following: Article 2 ESC with Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organisation of working time; Article 3 ESC with Article 137 TEC creating a legal basis for health and safety legislation, and there are too many subsequent Directives to number Article 7 ESC with Council Directive 94/33/EC of 22 June 1994 on the protection of young people at work; Article 8 ESC with Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding; Article 20 ESC with Article 141 TEC; Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women; Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions; Council Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex (also a couple of Directives on discrimination in social security); Article 21 ESC with Council Directive 91/533/EEC of 14 October 1991 on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship; Council Directive 94/45/EC of 22 September 1994 on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees; Article 25 ESC with Council Directive 80/987/EEC of 20 October 1980 on the approximation of the laws of the Member States relating to the protection of employees in the event of the insolvency of their employer and Article 29 ESC with Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies.

[47] D.J. Harris, 'Lessons from the Reporting System of the European Social Charter' in P. Alston and J. Crawford (eds), above n. 23, at p. 353.

[48] P. Alston (ed.), *EU and Human Rights* (Oxford: Oxford University Press) 1999; J. Shaw, *Law of the European Union* (Basingstoke: Palgrave) 2000, pp. 331–369; T.C. Hartley, 'The Constitutional Foundations of the European Union' 117 *LQR* (2001) 225; F. Jacobs, 'The Protection of Human Rights in the Members States of the EC: The Impact of Case-Law' in J. O'Reilley (ed.), *Human Rights and Constitutional Law* (Dublin: Round Hall Press) 1992, pp. 243–250; A. Clapham, 'A Human Rights Policy for the European Community' 10 *YEL* (1990) 309; M.H. Mendelson, 'The European Court of Justice and Human Rights' 1 *YEL* (1981) 125; M.H. Mendelson, 'The Impact of European Community Law on the Implementation of European Convention on Human Rights' 3 *YEL* (1983) 99; J. McBride and L. Neville Brown, 'The United Kingdom, the European Community and the European Convention on Human Rights' 1 *YEL* (1981) 167.

Community (which later became part of the EU) was founded in order to unite Europe economically. The Treaty of Rome only indirectly concerned itself with human rights.[49] Among the few related provisions was Article 48 of the Treaty, which provided for the right of freedom of movement for community workers and Article 119 that established equal pay for equal work for men and women. The different approaches taken by the COE and the EC meant that, historically, the protection afforded under Community law was different from the rights afforded under the ECHR. Within the Community sphere, rights and protection were accorded to the individual not 'by virtue of his or her humanity, but [by reason of] one's status as a community national.'[50] Furthermore it was argued that:

> the essentially economic character of the Communities ... [made] the possibility of their encroaching upon fundamental human values, such as life, personal liberty, freedom of opinion, conscience etc, very unlikely.[51]

Given this apathy towards human rights, the contemporary interest in the subject in so far as the Union is concerned calls for an explanation. A cumulation of internal and external factors has elevated human rights into a major issue. In the last quarter of the twentieth century, the community perceptions broadened and the protection of fundamental rights is now a significant concern. Since its establishment, the membership and influence of the European Community (now the European Union) has expanded and the Union is now actively engaged in taking initiatives for human rights protection. As an acknowledgement of their human rights commitments, all EU member States have become parties to the ECHR, ESC and the OSCE. The promotion and protection of human rights, not only within the EU but elsewhere too, features prominently in meetings of the EU foreign ministers.

In the last decade, the Union itself has been directly affected by serious concerns, such as an influx of refugees and threats to the territorial integrity of some of its Member States. Equally, the acts of genocide, ethnic cleansing and substantial violations of fundamental rights in central and eastern Europe, particularly in the former Yugoslavia and in the Balkans, have been particularly disturbing for the EU. Such distressing activities on the doorstep of the Union have raised substantial concerns regarding the effectiveness of the organisation in protecting human rights. The escalation of violence in the

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[49] See the Consolidated version of the treaty establishing the European Economic Community, signed at Rome, 25 March 1957, as amended by subsequent treaties through the Treaty of Amsterdam (1997), effective 1 May 1999. 1997 O.J. (C 340) 3. Reprinted in 37 I.L.M 79 May (1998).

[50] P. Twomey, 'The European Union: Three Pillars without a Human Rights Foundation' in D. O'Keeffe and P. Twomey (eds), *Legal issues of the Maastricht Treaty* (London: Wiley) 1994, 121–131 at p. 122.

[51] A.G. Toth, 'The Individual and European Law' 24 *ICLQ* (1975) 659 at p. 667.

Balkans has, from time to time, also threatened to engulf Member States.[52] Constitutional reform within Member States, particularly the United Kingdom, also provided an impetus to revisiting the subject at EU level.[53]

The Union's expanding influence and interference with individual rights led to demands for greater accountability. The human rights debate has become entwined with the problems of the perceived democratic deficit within an increasingly powerful and bureaucratic Union. The concerns regarding the ineffectiveness of the apparatus to protect fundamental human rights have been addressed by Union institutions, albeit partially, through a variety of methods. The issues of redress are analysed in greater detail in the following pages.

Institutional structures and protection of human rights

The legal and institutional structure of the EU is relatively complex and beyond the scope of this book. However, a basic grasp of the relevant institutions and legal instruments is necessary in order to understand what follows. This outline is intended for those who have never studied EU law; the need for a concise treatment means that this account is necessarily simplified and many subtleties are ignored.

EU law, at first sight, appears to be just another branch of international law, in that it is based on a series of treaties, starting with the Treaty of Rome in 1957 and ending with the recently signed (but not, at the time of writing, ratified) Treaty of Nice 2000. These treaties provide the foundation for all EU law making. The nature and composition of the institutions, the legislative procedures, and, importantly, the substantive areas in which the EU is competent to act, are all laid down in the Treaties. This means that the EU can do nothing if not authorised to do so by the founding Treaties, or by secondary legislation which is ultimately derived from the founding Treaties.

In general terms, the Treaties have been consolidated into two Treaties: the Treaty establishing the European Community (abbreviated to TEC) and the Treaty establishing the European Union (abbreviated to TEU). The difference between the EC and the EU was laid down in the Treaty of European Union, signed at Maastricht in 1992.[54] This Treaty created the European Union, an entity made up of three pillars. The first and most important pillar is the

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[52] D. McGoldrick, 'The Tale of Yugoslavia: Lessons for Accommodating National Identity in National and International Law' in S. Tierney (ed.), *Accommodating National Identity: New Approaches in International and Domestic Law* (The Hague: Kluwer Law International) 2000, pp. 13–63.

[53] See e.g. the position in the UK with the Human Rights Act (1998), and also in other States such as Spain, Belgium and the Netherlands.

[54] See the Consolidated version of the Treaty on European Union (1992), as amended by the Treaty of Amsterdam (1997), effective 1 May 1999. 1997 O.J (C 340) 1. Reprinted in 37 I.L.M (1998) 56.

European Community, the successor to the European Economic Community created in Rome in 1957 and focused upon the creation of an internal market. The second pillar concerns cooperation in foreign and security policy, and the third concerns cooperation in police and criminal matters. The distinction between the first pillar and the other two pillars is important, because the law-making procedures and the way in which the law operates differ considerably. Human rights issues arise in the context of all three pillars.

While the EU may appear to be another branch of international law, in fact – at least when it comes to the first pillar – the reality is more complex. Two doctrines, developed by the Court of Justice, combine to give EC law its particular force within national legal systems. The doctrine of the supremacy of EC law, first declared in *Costa* v. *ENEL*,[55] states that EC law should take priority over any domestic law, even domestic constitutional law. The doctrine of direct effect of EC law, first expressed in *Van Gend en Loos*,[56] states that EC law, if it fulfils certain conditions relating to clarity and unconditionality, can take effect within domestic legal systems even if national governments and legislatures have not properly transposed it into national legislation. Together, these doctrines give EC law a supreme role in national legal systems, even if national governments or legislatures oppose aspects of that law.

A number of institutions are involved in the EU legislative and policy-making procedures. The three main legislative institutions are the Commission, the Council of Ministers and the European Parliament. The Commission is made up of 20 independent Commissioners, nominated by Member States and approved by the European Parliament, but who are supposed to act independently of their State of origin, in the interests of the Union. The Commission has significant policy-making and law enforcement functions, and its role in the legislative process is that of making legislative proposals. The main legislative body is the Council of Ministers. It is made up of ministerial representatives from all Member State governments, and has the biggest role in legislating. It often has to do this in cooperation with the European Parliament, whose role in the legislative procedure has increased considerably during the past ten years. Members of the European Parliament are directly elected by European citizens and represent their interests.

The most important non-legislative institution, whose role has been crucial in the development of human rights competence in the EU, is the Court of Justice. The Court is made up of judges drawn from the Member States. Their jurisdiction is limited, in that individuals generally do not have the right to bring cases directly before the Court of Justice. The exception to this is staff cases, where the staff of the Community institutions can bring cases against

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[55] Case 6/64 [1964] ECR 585.

[56] *Van Gend en Loos v. Nederlandse Tariefcommissie*, Case 26/62 [1963] ECR 3.

their employers. Other than this, the Court hears cases in a number of different situations. It hears cases brought by the Commission against Member States, accusing them of failing to implement Community law.[57] National courts may refer questions of Community law to the Court in order to help them decide cases.[58] The Court also has the power, if asked to do so by one of the institutions or another interested party, to judicially review acts of the Community institutions.[59] Human rights issues are most usually raised in the context of these last two types of action. As well as the Court of Justice, there exists a Court of First Instance. This Court hears staff cases and judicial review cases in the first instance. The parties can then appeal to the Court of Justice. The scope of the Court of First Instance's competence is set to be broadened if the Treaty of Nice is ratified.

European Court of Justice and human rights

The inadequate recognition given to fundamental rights in the founding treaty of the European Economic Community and a lack of interest in human rights was mirrored in the earlier jurisprudence of the European Court of Justice. During the early years of the Community the Court was evasive and refused to rule on human rights issues, on the grounds that human rights were not included in the Treaty of Rome.[60] Over the years, however, the Court of Justice has undergone a significant change in its attitude towards human rights protection, largely prompted by its dialogues with national constitutional courts. This shift is evident in its case law. In 1960, in a case concerning the German constitutional protection of the right to private property and the right to pursue a business activity, the Court took the view that Community law: 'does not contain any general principles, express or otherwise, guaranteeing the maintenance of vested rights.'[61] Fifteen years later, in the groundbreaking *Nold* judgment, the Court, dealing with a very similar situation involving one of the parties in the 1960 litigation, stated that 'fundamental rights form an integral part of the general principles of law, the observance of which it ensures'[62] and that '... it cannot therefore uphold measures which are incompatible with fundamental rights recognised and protected by the constitutions of (Member) States.'[63]

[57] Article 226 TEC.
[58] Article 234 TEC.
[59] Article 230 TEC.
[60] Betten and Grief, above n. 1, at p. 54.
[61] Joined Cases 36–38 and 40/59 *Geitling and Nold* [1960] ECR 423 at p. 439.
[62] Case 4/73 *Nold v. Commission of European Communities* [1974] ECR 491, para 13.
[63] Ibid. para 14.

In the *Nold* case the European Court of Justice took the position that:

> international treaties for the protection of human rights on which the Member States have collaborated, or of which they are signatories, can supply guidelines which should be followed within the framework of community law.[64]

In another German case, *Hauer v. Land Rheinland-Pfalz*,[65] the applicant challenged a decision of the German authorities refusing her permission to plant vines on her land. The question referred by the German authorities to the ECJ led the Court to consider whether a council regulation which prohibited the new planting of vines for a period of three years infringed the right to property guaranteed by Article 1 of the 1st Protocol of the ECHR. The Court held that although the Protocol declares that every person is entitled to the peaceful enjoyment of their possession, it allows restrictions upon the use of property provided they are deemed necessary for the protection of general interests. After considering the constitutional rules of the Member States, the Court held the applicant's rights to property had not been infringed since the planting restrictions in question were justified by objectives of general interest pursued by the Community – the immediate elimination of production surpluses and the long-term restructuring of the European wine industry.

The fact that these cases concerned the German constitution should not be seen as coincidental. At the time of the *Nold* judgment, the Court of Justice and the German constitutional court were engaged in a debate (which continues to this day) concerning the reluctance of the German constitutional court to accept the supremacy of a body whose acts cannot be reviewed for violation of the wide-ranging fundamental rights contained within the German Basic Law. In the *Internationale Handesgesellschaft* case, the Court of Justice accepted explicitly that the German constitution court could review Community acts for violations of fundamental rights, but made it clear that it, rather than national constitutional courts, maintained that competence.[66]

A further step was taken in *Rutili v. Minister for the Interior*.[67] In *Rutili*, French authorities prohibited an Italian national involved in political activities from residing in certain *départments* (regions). The ECJ held that limitations cannot be imposed on the right of a national of any Member State to enter the territory of another Member State, to stay there and to move freely within it

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64 Ibid. para 14.

65 *Hauer v. Land Rheinland-Pfalz*, Case 44/79 [1979] ECR 3727.

66 *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle fur Getreide und Futtermittel*, Case 11/70 [1970] ECR 1125. In this case the Court of Justice acknowledged (at p. 1134) that the 'protection of (human rights), whilst inspired by the constitutional traditions common to Member States, must be ensured within the framework of the structure and objectives of the Community.'

67 *Rutili (Roland), Gennevilliers (France) v. Ministry of the Interior of the France*, Case 36/75 [1975] ECR 1219

unless his presence or conduct constitutes a genuine and sufficiently serious threat to public policy, concluding that:

> these limitations are a specific manifestation of the more general principle, enshrined in Articles 8, 9, 10 and 11 of ECHR ... which provide that no restrictions in the interests of national security or public safety shall be placed on the rights secured by the above quoted articles other than such as are necessary for the protection of those interests 'in a democratic society'.

The Court of Justice made it clear that provisions of Community law must be construed and applied by Member States with reference to principles of fundamental rights. Besides highlighting the Convention as a source of general principles to which it will have recourse, the ECJ's ruling suggested that provisions of Community law must be construed and applied by Member States with reference to those principles.

In a series of subsequent cases the ECJ went further in applying substantive principles of international human rights law. In *R v. Kirk (Kent)*[68] the Court applied the principles of non-retroactivity of penal provisions (as in Article 7 ECHR) in the context of disputes concerning the validity of the British regulations prohibiting Danish vessels from fishing within the UK's twelve-miles fishery zone. In *Johnston v. CCRUC* which concerned the legality of the policy of not issuing firearms to female members of the RUC, one question involved the applicant's right to effective judicial remedy. The ECJ ruled that Article 6 of the Equal Treatment Directive had to be interpreted in the light of the principle of judicial control, which reflects a general principle of law underlying the constitutional traditions common to Member States and is laid down in Articles 6 & 13 of ECHR. The Court was of the view that:

> By virtue of Article 6 [of the Directive], interpreted in the light of the general principles stated above, all persons have the right to obtain an effective remedy in a competent court against measures which they consider to be contrary to the principle of equal treatment for men and women.[69]

It followed that Article 53(2) of the Sex Discrimination (NI) order 1976, according to which a certificate issued by the Secretary of State was conclusive evidence that derogation from the equality principle was justified, was contrary to the principle of effective judicial control. It has increasingly been acknowledged by the Court of Justice that, when acting within the framework of Community law, authorities within the domestic sphere are obliged to follow human rights principles. This view was taken a step further by Advocate General Jacobs in *Konstantinidis v. Stadt Altensteig-Standesamt*[70] when he

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68 *R. v. Kirk (Kent)*, Case 63/83 [1984] ECR 2689.

69 *Johnston v. Chief Constable of the Royal Ulster Constabulary*, Case 222/84 [1986] ECR 1651, para. 19.

70 *Konstantinidis v. Stadt Altensteig-Standesamt*, Case 168/91 [1993] ECR-I 1191.

noted that a person relying upon Articles 48, 52 or 59 TEC in relation to employment in another Member State is

> entitled to assume that, where ever he goes to earn his living in the European Community, he will be treated in accordance with a common code of fundamental values, in particular those laid down in the European Convention on Human Rights.[71]

Despite this positive movement, one significant gap in human rights protection remains. The EU cannot be held accountable for human rights violations before the European Court of Human Rights, because the Union is not a party to the Convention.[72] It was hugely disappointing for human rights advocates when the Court of Justice ruled out the possibility of accession of the EU to the Convention, on the grounds that the Treaties did not give the Union competence to do so.[73]

Human rights and the EU treaties

The role of the Court of Justice in developing a human rights competence can be understood as a defensive tactic to bolster its argument that Community law is supreme throughout the Member States. Nevertheless, for many years it remained the only Community level forum in which human rights issues were discussed. It was not until the Maastricht Treaty of European Union (TEU) in 1992 that human rights were formally placed on the institutional agenda.[74] In many ways, Maastricht was to prove a significant watershed in the development of human rights protection within what was thenceforth to be known as the EU. Most symbolically, the obligation to protect human rights was inserted into the preamble of the founding Treaty. This had no legal effect whatsoever, but it represented a first step towards the inclusion of some sort of human rights dimension into an apparently solely economic entity. This obligation was to be played out in two contexts: the EU's Foreign and Development Policy and the development of citizenship of the Union.

The TEU introduced, under what is known as the Second Pillar, a Common Foreign and Security Policy (CFSP). This policy allows for Member States,

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[71] Ibid. p. 1211.

[72] *CFDT v. European Communities*, App. No. 8030/77, 13 DR 231 (1978). See D.J. Harris, M. O'Boyle, C. Warbrick, *Law of the European Convention on Human Rights* (London: Butterworths) 1995, at p. 27.

[73] Opinion 2/94 ECJ OJ 1994 NOC 174/8; CELS, Occasional Paper, *The Human Rights Opinion of the ECJ and its Constitutional Implications*, 1996; K. Economides and J.H.H. Weiler, 'Accession of the European Communities to the European Convention on Human Rights: Commission Memorandum' 42 *MLR* (1979) 683; D. McGoldrick, *International Relations Law of the European Union* (London: Longman) 1997, pp. 174–180.

[74] For a general discussion see P. Twomey, 'The European Union: Three Pillars without a Human Rights Foundation' in D. O'Keeffe and P. Twomey (eds), above n. 50, pp. 121–131

acting intergovernmentally, to take common action in the face of world events. One of the objectives of this Policy is, under Article 11 TEU, stated to be the development and consolidation of democracy, the rule of law and respect for human rights and fundamental freedoms. Thus the TEU gives Member States the power to act internationally in order to secure the respect of human rights.

This power, however, is limited by the weaknesses and difficulties which have plagued the CFSP itself. While the CFSP is perhaps more effective than is sometimes acknowledged, its human rights dimension has been accused of lacking in consistency.[75] More hopeful was the inclusion within development cooperation policy of human rights conditionality, whereby Community aid or trade agreements are made conditional on the achievement of certain levels of human rights protection. This policy was institutionalised at Maastricht but had been incorporated into the Lomé Convention in 1990 and generalised by means of the Council Resolution of 28 November 1991 on human rights clauses in cooperation agreements. This resolution requires a carrot and stick approach to be taken. Financial resources are to be made available to beneficiary states to enable them to promote democracy and human rights. However, if human rights violations are identified, the EU has the power to withdraw aid until the problems are rectified.

One important criticism that has been made of the emphasis on human rights in external relations, however, is the fact that standards of protection are required of third countries nationals which the EU itself does not grant to its own citizens. This potential hypocrisy is starkly illustrated within the Maastricht Treaty itself. In this treaty, the EU took an irreversible step towards the protection of individual rights by creating the concept of Citizenship of the Union. While this concept is an important symbol of the aspirations of the Union beyond the economic dimension, the citizenship provisions have been seen as somewhat hollow.[76] One important gap in the provisions is that no reference is made to the fundamental rights of those citizens, despite proposals from the European Parliament and the Spanish government that citizenship should incorporate a fundamental rights dimension. It would appear that giving EU citizens fundamental rights which could, potentially, be different from those granted by the Member States was a loss of sovereignty too far.

Further, the development of the Third Pillar, known as Justice and Home Affairs, gave powers to the Union which it could be argued cried out for some sort of human rights dimension. These provisions related in the main

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[75] A. Clapham, 'Human Rights in the Common Foreign Policy' in P. Alston (ed.), above n. 48, pp. 627–683.

[76] H.U. Jesserun d'Oliveira, 'Union Citizenship: Pie in the Sky?' in R. Dehousse (ed.), *Europe After Maastricht: An Ever Closer Union?* (Munchen: Law Books in Europe) 1994, pp. 58–84.

to agreements surrounding issues of immigration, asylum and free movement within the territory of the Union, including police cooperation and the Schengen Information System – a data-sharing system operated by the police and immigration services of the various Member States. The Member States are not limited in these actions by human rights considerations. Under Article 35 TEU, the jurisdiction of the Court of Justice was excluded from all questions as to the validity of operations carried out by Member States with regard to the maintenance of law and order and the safeguarding of internal security, including all operations carried out by the police or other law enforcement services. This means that the review power developed by the Court of Justice and outlined in the previous section did not apply here.[77]

While the Maastricht Treaty was of fundamental importance, there remained significant problems with its provisions. The modifications made by the Amsterdam Treaty, signed in 1997, in the main addressed the more symbolic issues of protection.[78] As well as the mention of human rights within the preamble of the Treaty, human rights and fundamental freedoms, as guaranteed by the ECHR and the constitutional traditions of the Member States, were recognised under Article 6(2) TEU as being one of the foundations of the Union. The Court of Justice, under Article 46(d) TEU, can in the context of its existing powers of judicial review (which, in the main, are focused on First Pillar activity) review acts of the institutions against the principles contained in Article 6(2). Moreover, the obligation on Member States to comply with human rights standards gained a very few teeth: Article 7 provided that Member States who persistently violated human rights standards could have their rights of membership suspended. Further, Article 49 TEU made respect of human rights standards a condition of entry for new States applying to join the EU.

Aside from the explicitly human-rights-based dimension, other important steps were taken at Amsterdam. The Social Chapter of the Treaty, first inserted at Maastricht but weakened by the opt-out of the UK, was strengthened at Amsterdam. A new Article 13 TEC was added, giving the Community the power to legislate against discrimination on a wide range of grounds. With a burst of unprecedented speed, perhaps spurred to action by the worrying gains of the Far Right in Austria, two Directives and an Action Plan were passed under Article 13, prohibiting racial

[77] T. Eicke, 'European Charter of Fundamental Rights–Unique Opportunity or Unwelcome Distraction' 3 *EHRLR* (2000) 280.

[78] For a general discussion of the contribution of the Amsterdam Treaty to human rights in the EU, see D. McGoldrick, 'The European Union after Amsterdam: An Organisation with General Human Rights Competence' in D. O'Keeffe and P. Twomey (ed.), *Legal Issues of the Amsterdam Treaty* (Oxford: Hart Pub.) 1999, pp. 249–270.

discrimination in all circumstances, and discrimination in the workplace on the grounds of sex, race, age, disability, religion and, to a limited extent, sexual orientation.[79]

Nevertheless, the limitations of EU human rights protection continue to be visible. Two major issues are indicated below. First, Article 6(2) TEU states that the rights to be protected are those contained within the ECHR and the constitutional traditions of the Member States. This vague formula allows the Court of Justice to maintain a significant level of power as to the rights which it will protect. The fact that the rights protected extend beyond those contained within the ECHR is a recognition of the limited nature of the Convention and the changing perceptions of fundamental rights. To that extent, the flexible approach which this represents is to be commended. However, the problem of distilling rights from constitutional traditions is significant. In some cases, the Court has adopted an almost mathematical approach. In others, however, clashes become apparent: what, for example, of the Irish constitutional protection of the right to life of the unborn child in conjunction with the, usually implicit and limited, freedom to choose to have an abortion which exists in many other Member States.[80]

In other cases the question is whether a fundamental right is in fact violated. Mention should be made here of the ongoing Banana Saga, where the German constitutional court required that the application of Regulation 404/93 on trade preferences should be modified in order to take account of the right of protection of private property, despite a finding by the Court of Justice that the Regulation did not violate fundamental rights.[81] This decision, taken in conjunction with the German Constitutional Court's earlier decision about the Maastricht Treaty,[82] demonstrates that the German court remains determined to have the last word on whether rights protected in the Basic Law are violated. Therefore, some sort of clarity is required as to the specific fundamental rights protected, as well as the jurisdiction of the various courts, in order that the power of the Court of Justice does not remain untrammelled.

Second, the extent of the protection that can be provided is limited. The Court of Justice's power of review extends to Community acts and (under its

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[79] Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (OJ L 180 19/7/2000, p. 22); Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ L 303 2/12/2000, p. 16); Council Decision 2000/750/EC of 27 November 2000 establishing a Community action programme to combat discrimination (2001 to 2006) (OJ L 303 2/12/2000, p. 23).

[80] Difficulties have already been encountered on this issue – see *Society for the Protection of Unborn Children (Ireland)(SPUC) v. Grogan*, Case-159/90 [1991] ECR I-4685 and *Open Door Counselling v. Ireland*, Judgment of 29 October 1992, Series A, No. 246.

[81] *Federal Republic of Germany v. Council of the European Union*, Case 280/93 [1994] ECR I-4973.

[82] *Brunner v. European Union Treaty* (2 Bv R 2134/92 & 2159/92) [1994] 1 CMLR 57.

own case law) to acts of the Member States when they are acting within an area of Community competence. The Court has no power to act against Member States violating the rights of Union citizens or residents in areas where the Community has no competence. Further, the power is very limited when it comes to Second and Third Pillar issues. Under the Treaty of Amsterdam, immigration, asylum and free movement matters were moved to the First Pillar, under Title IV TEC. However, Article 68 TEC limits the scope of action of the Court of Justice, in that requests for preliminary rulings may be made only by the national court of last resort (rather than by any court) and the Court of Justice is given no jurisdiction in areas relating to the maintenance of law and order and the safeguarding of internal security.[83] The fundamental rights protected by the Court are thus perhaps better understood as obligations on the Community and on States in certain circumstances, rather than as clear rights possessed by individuals.

In other areas, while the rhetoric of human rights can be found in abundance, the enforcement of their positive inclusion within the full range of Community policy remains impossible. The acquisition of a full set of fundamental rights for Community citizens and residents, enforceable by the Court of Justice and national courts against both Community institutions and Member States, would appear to be the next obvious step.

The Charter of Fundamental Rights

To take the next step towards a full set of fundamental rights was, however, fraught with difficulty. The concern about State sovereignty which prevented the inclusion of a human rights dimension in the Maastricht citizenship provisions persists, and has in many ways intensified. A number of Member States, while prepared to countenance the preparation of a declaration of rights, would not accept a binding Charter. Further, the divergences between national constitutional traditions which gave the Court so much discretion, in turn made the task of agreeing on an acceptable text all the more difficult. However, in June 1999, at the European Council in Cologne, EU heads of state committed themselves to the establishment of a Charter.[84] A body (confusingly known as the Convention) was set up, under the presidency of the former German President Roman Herzog, and included representatives from Member State governments, the Commission, the European Parliament and national Parliaments, and that body produced a draft Chapter in October 2000. That draft was adopted by all fifteen Member States at Nice in December 2000.

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83 Ibid.

84 Conclusions of the European Council in Cologne, 3 and 4 June 1999, Annex IV.

A striking aspect of the Charter is its scope. By focusing on fundamental rights rather than on the traditional, liberal democratic view of human rights, social and economic rights were included. The Convention had made it clear that they intended not to create new rights but to make explicit those rights which already exist, whether within the ECHR, other European or international agreements, or within the constitutions of Member States.

The 54 Articles of the Charter are divided into 6 chapters: dignity, freedoms, equality, solidarity, citizens' rights and justice. Chapter One, on dignity, covers the uncontroversial areas of the right to life, prohibition of torture, and prohibition of slavery and forced labour. These rights are covered by the International Covenant on Civil and Political Rights and by all regional human rights treaties. Article 3, however, introduces a number of rights, hitherto unestablished within the traditional framework of human rights. Article 3(2) provides:

> In the fields of medicine and biology, the following must be respected in particular:
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> –the free and informed consent of the person concerned, according to the procedures laid down by law,
> –the prohibition of eugenic practices, in particular those aiming at the selection of persons,
> –the prohibition on making the human body and its parts as such a source of financial gain,
> –the prohibition of the reproductive cloning of human beings.

While clearly influenced by the Council of Europe's Convention on Human Rights and Bio-Medicine,[85] the extent to which these provisions would influence developments in the European Union with regard to the field of medicine and biotechnology remains uncertain. The Charter prohibits only reproductive cloning. However, there is neither an authorisation nor prohibition of any other forms of cloning.

Chapter Two, on freedoms, is generally unproblematic. The rights to liberty and security, to privacy, the right to marry, and freedom of conscience, expression and assembly are familiar from international treaties including the ECHR. The social and economic rights included here involve the right to education, the right to work, the freedom to conduct a business and the right to property. We have already highlighted the distinctions which have traditionally been placed between civil and political rights and social and economic rights. Thus, for example, the right to education, often considered as an economic and social right, is provided in the UDHR (Article 26) and the International Covenant on Economic, Social and Cultural Rights (Article 13). It is not provided for in the

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[85] ETS 164 and Additional Protocol ETS 168; See L.A. Rehof, 'Article 3' in G. Alfredsson and A. Eide (eds), *The Universal Declaration of Human Rights: A Common Standard of Achievement* (The Hague: Kluwer Law International) 1999, 89–101 at p. 98

International Covenant on Civil and Political Rights. Similarly, the right to education could not be established in the ECHR, although it was subsequently grafted on to it by the first Protocol to the treaty.[86] It is, therefore, positive to note the inclusion of civil, political, economic, social and cultural rights under the umbrella of one human rights document.

The idea of freedom also incorporates the right to asylum and protection against removal, expulsion and extradition in certain circumstances. The right to seek asylum has generated difficulties in international and domestic laws.[87] Although incorporated into Article 14 of the Universal Declaration of Human Rights, its subsequent affirmation within human rights treaties has been problematic. International law has similarly shown great weakness in forbidding expulsions and providing protection to individuals from extradition to States where they are likely to face serious risks. Although the ECHR (Protocol 4, Article 4) prohibits the collective expulsion of aliens, traditionally there has been a reluctance to condemn expulsions. Two recent and useful standard-setting norms aim to establish a more comprehensive regime protecting non-nationals against arbitrary expulsions. First, the African Charter on Human and Peoples' Rights (AFCHPR).[88] provides, in Article 12(5), that:

> The mass expulsion of non-nationals shall be prohibited. Mass expulsion shall be that which is aimed at national, racial, ethnic or religious groups.

The other provision, which has an application at the international level, is incorporated in the Statute of the International Criminal Court,[89] which, in its definition of crimes against humanity includes deportation or the forcible transfer of population.[90] The Extradition and deportation of an individual has already raised complex issues of cultural relativism, and the European Court of Human Rights has had to deal with them in cases such as *Soering* v. *UK*[91] and *Chahal* v. *UK*.[92] Given that, under Title IV TEC, the Community is required to agree joint asylum and immigration policies, the inclusion of the right to asylum and protection against expulsion within the Charter could prove significant. It might equally dilute some of the insensitivity shown by the provisions of the recent European Union directive on the mutual recognition of decisions

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[86] See Protocol 1 of ECHR, Article 2. See above Chapter 5.

[87] For an analysis by the International Court of Justice see the *Asylum Case (Columbia* v. *Peru)* ICJ Reports 1950, p. 266.

[88] Adopted on 27 June 1981. Entered into force 21 October 1986. OAU Doc. CAB/LEG/67/3 Rev. 5, 21 I.L.M (1982) 58. See below Chapter 9.

[89] Statute of the International Criminal Court, Rome, July 17 1998, A/CONF.183/9; 37 ILM (1998) 999.

[90] See Article 7(2)(d) Statute of the International Criminal Court also see J.-M. Henckaerts, *Mass Expulsion in Modern International Law and Practice* (The Hague: Martinus Nijhoff Publishers) 1995.

[91] *Soering* v. *United Kingdom*, Judgment of 7 July 1989, Series A, No. 161.

[92] *Chahal* v. *United Kingdom*, Judgment of 15 November 1996, 1996-V RJD 1831.

on the expulsions of third country nationals; without substantial procedural human rights scrutiny, this Directive is likely to prejudice the position of third country nationals residing within the Union.[93] Finally, within the section on freedoms, the freedom of the arts and sciences, including academic freedom, and the much-needed but much-disputed right to the protection of personal data is incorporated under this heading.

Chapter Three is shorter and concerns equality. Article 21 prohibits discrimination on a wide range of grounds in an explicitly non-exclusive list. Further articles make more specific statements about cultural, religious and linguistic diversity, and the cases of men and women, children, the elderly and persons with disabilities. These articles generally cover the ground of already existing binding legislation, particularly the new Framework Directive discussed earlier, although the extension of the rights beyond the workplace is significant. It is noticeable, however, that while discrimination on grounds of sexual orientation is prohibited under the general Article 21, no more specific provisions on sexual orientation or transgendered people are included. Equally, no provisions making a direct reference to minorities or minority rights can be found. Given the recent upsurge in the issue of minority rights, it is disappointing not to have a detailed article on the rights of ethnic and religious minorities resident within the European Union.[94]

Chapter Four marks the point where more controversial material was included. Rights relating to solidarity, which are in the main social rights, were not accepted as fundamental rights by all Member States. The ambitions that some parties had for this chapter have not been realised, and the rights contained within it are somewhat limited. Essentially, they cover workers' rights, such as collective bargaining, health and safety and the right not to be unfairly dismissed, which are already contained within Community law. A number of the provisions contain references to the legal regimes of Member States, and the principle of subsidiarity appears to have been firmly in the forefront of the drafters' minds. The rights to social security, health care and consumer protection are couched in particularly broad terms. The extent to which the jurisprudence of relevant provisions of the European Social Charter and the ECHR will influence the developments of the rights contained within this Chapter remains uncertain.

Chapter Five, on citizens' rights, might again have been hoped to be significant, given the criticisms that have been made of the existing concept of Citizenship of the Union. However, it remains limited. The majority of the rights in Chapter Five are already contained within binding Community law:

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[93] See Council Directive 2001/40/EC of 28 May 2001 on the Mutual Recognition of Decisions on the Expulsions of Third Country Nationals (OJL149/34 28/05/2001).

[94] See below Chapter 11.

the citizenship rights of Articles 17–22 TEC (which, it is made clear, apply only to citizens of the Union) and the provisions concerning the right of access to documents.

Finally, in Chapter Six, the rights to justice bring us back to familiar territory. Here we can find the right to a fair trial, the right to a defence, the right to a proportionate penalty and the right not to be tried twice for the same offence. The rights contained in this Chapter are already a firmly established part of the International Criminal justice system. The ECHR covers such rights as the right to fair trial in considerable detail and the European Commission and Court on Human Rights have built substantial jurisprudence on the subject over the last five decades.

Chapter Seven represents a very important part of the Charter. It not only provides the level of protection but also explains the scope of the Charter rights. According to Article 51(1):

> The provisions of this Charter are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers.

In relation to the level and sphere of protection it is reassuring that the Charter adopts a wider and all-embracing approach. Thus, according to Article 53:

> Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union, the Community or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions.

The question of the enforceability or otherwise of the Charter was a particular subject of discussion. Given the fact that the Court of Justice maintains a power to enforce human rights against Member States and institutions, it might be thought that a non-binding Charter would be impracticable.[95] However, a number of Member States (notably, but not exclusively, the UK) objected to the Charter having any binding status at all, despite the limited scope of Article 51. More fundamental, however, was the concern as to the symbolic power which a binding Charter would have as a part of a putative EU constitution and as a claim to EU sovereignty. At the Nice Conference, where concerns of national interest and political horse-trading reigned

[95] S. Fredman, C. McCrudden and M. Freedland, 'An EU Charter of Fundamental Rights' *Public Law* (2000) 178 at p. 185.

supreme, anything having the potential to decrease the power of Member States was not likely to meet with much success.

The Charter, therefore, remains purely declaratory and, in theory at least, of purely political import. It was, however, drafted with the idea in mind that it could, at some point in the future, become binding.[96] Further, despite the intentions of the Member States, the existing competence of the Union and of the Court of Justice raises the possibility that the provisions will have some legal impact. That possibility looked very real when, in his opinion in Case 173/99 *BECTU v. Secretary of State for Trade and Industry*,[97] Advocate-General Tizzano made explicit reference to Article 31(2) of the Charter, which states that workers have the right to paid annual leave. He further argued that, while the Charter is not itself binding, the statement of existing rights which it constitutes cannot be ignored in cases concerned with the nature and sco, of a fundamental right elaborated in other, binding Community legislation. In cases such as the *BECTU case*, where the precise scope and application of the right is in dispute, the Charter is intended to serve as a substantive point of reference. This wide-ranging approach was, however, rejected by the Court of Justice. In its decision of 26 June 2001, the Court referred only to the 1989 Community Charter of the Fundamental Social Rights of Workers, and stated that the right to paid annual leave was 'a particularly important principle of Community social law' rather than, as Tizzano A-G had argued, a fundamental social right.[98] In a second case concerning the interpretation of the Working Time Directive, the same Advocate-General suggested that it was possible that that Directive itself could be challenged for infringing a fundamental social right.[99] It may, however, be significant that he argued that such a challenge would fail, and, in the light of the Court's decision in the *BECTU case*, it is unlikely that such an argument would succeed at present.

This role of the Charter is likely to be extended. In its human rights jurisdiction, while the Court of Justice may continue to claim the right to search national constitutional traditions for specific rights, the Charter may supersede the ECHR as the principal point of reference for deciding what rights are to be protected. In this context, the weakness of a non-binding Charter can be seen. The Court of Justice maintains its right to review on human rights

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[96] See, in particular, the speech of Roman Herzog, annexed to the report of the first meeting of the Convention held on 17/12/1999 (CHARTRE 4105/00), where he stated that 'we should constantly keep the objective in mind that the Charter which we are drafting must one day, in the not too distant future, become legally binding'.

[97] *Broadcasting, Entertainment, Cinematographic and Theatre Union (BECTU) v. Secretary of State for Trade and Industry*, Case C-173/99, Preliminary Ruling, 8 February 2001.

[98] *R. (on the application of Broadcasting, Entertainment, Cinematographic and Theatre Union) v. Secretary of State for Trade and Industry*, Case C-173/99 [2001] 3 C.M.L.R. 7.

[99] *R. Bowden and Others v. Tuffnells Parcels Express Ltd*, Case C-133/00, opinion delivered on 8 May 2001.

grounds, and will make use of the Charter in doing that, but it also maintains the right to depart from the Charter if it so chooses. In a similar vein, while the Charter can be referred to in the context of the broader human rights dimension referred to above,[100] it does not bind the Union, which can either ignore rights contained within the Charter or enforce rights not contained therein.

Critical comments

The non-binding and unenforceable nature of the Charter is one aspect which has given rise to criticism. Weiler calls a non-binding Charter 'a symbol of European impotence and refusal to take rights seriously.'[101] The existence of a non-binding Charter does not add significantly to existing protection (apart, perhaps, from those substantive rights which are recognised within the Charter but not within the ECHR and which may be used by the Court of Justice in the exercise of its power of review). It may also be taken by critics as yet another vacuous declaration of enumerated rights. While the Convention claimed that the Charter was drafted in the hope that it would become binding, much of it is drafted in grand, abstract and general terms (this is particularly noticeable in the solidarity provisions). Weiler argues that a commitment to human rights protection within the EU requires not yet another Declaration of Fundamental Rights, but the elaboration of a human rights policy, complete with a Commissioner, a staff and a budget, which is committed to searching out and facilitating the punishment of human rights violations.

These criticisms have to be taken on board. The non-binding nature of the Charter suggests that it is intended to be nothing more than a statement of principle, albeit the first statement of principle on human rights made by EU Member States in that capacity. Having said that, there are nevertheless positive features in the Charter. The breadth of the rights in the document and the inclusion of social and economic as well as civil and political rights is to be applauded. It is extremely encouraging to note the inclusion of a number of novel rights, which presumably have been incorporated as a response to new challenges from globalisation and more technology. The Charter also covers some of the more difficult areas. The inclusion of, for example, a right to asylum is also potentially helpful. However, a number of nettles have not been grasped, and some significant omissions have already been alluded to.

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[100] Indeed, even before the Charter was officially adopted by the Convention, its provisions were referred to in the report of the 'Three Wise Men' on the EU's sanctions against Austria (September 2001).

[101] J. Weiler, 'Does the European Union Truly Need a Charter of Rights' 6 *European Law Journal* (2000) 96.

It is to be hoped that the Court of Justice will take the opportunity to make full use of the Charter within its existing jurisdiction. Nevertheless, the failure of the Member States to extend the scope of human rights protection within, and by, the EU is regrettable. Whether the hope of the Convention, that the Charter will at some point in the not too distant future become binding, will be realised remains to be seen. The Charter may yet prove to be the first step along the long road towards really effective human rights protection within Europe, or it may remain an interesting but ultimately toothless document.

THE OSCE[102]

The Organisation for Security and Cooperation in Europe (OSCE) is similar in nature to the European Union in the sense that both intergovernmental organisations, while not designed for promoting human rights *per se*, have nevertheless become involved with the subject at the European level. There are, however, significant differences between the OSCE and both the EU and Council of Europe. The OSCE is not a legal body and, unlike the EU and the Council of Europe, its foundations have not been laid on legally binding treaties.[103] The principles that emerge from the OSCE process are commitments as opposed to legal rights and obligations. This means that unlike treaties these commitments cannot, as such, be incorporated into domestic law and national courts are unable to rely upon these principles. Despite the absence of a legally binding regime, the OSCE has been highly successful; it is arguably the non-binding character of the regime which encouraged States such the former Soviet Union to accept the fundamental principles of the organisation.[104]

The OSCE, which prior to 1 January 1995 was known as the Conference on the Security and Cooperation in Europe (CSCE), represents the largest regional security organisation in the world. It has 55 participating States from Europe, Central Asia and North America and is engaged *inter alia* in early

[102] R. Brett, 'Human Rights and the OSCE' 18 *HRQ* (1996) 668; Robertson and Merrills, above n. 1, at pp. 179–190; P. Sands and P. Klein, *Bowett's Law of International Institutions*, 5th edn (London: Sweet and Maxwell) 2001, pp. 199–201; Van Dijk, 'The Final Act of Helsinki–Basis for a Pan-European System' 11 *NYIL* (1980) 97; A. Bloed (ed.), *From Helsinki to Vienna: Basic Documents of the Helsinki Process* (Dordrecht: Martinus Nijhoff Publishers in cooperation with the Europa Instituut, Utrecht) 1990; http://www.osce.org.

[103] Brett, above n. 102, at p. 671.

[104] Brett correctly makes the point that '[I]t should not be forgotten that the Helsinki Final Act rather than the International Covenant on Civil and Political Rights (to which the Soviet Union was also a party and which came into force at about the same time) was the basis for the human rights groups that sprang up in the USSR itself as well as in Central Europe. Participating States were able to reach agreement on the Helsinki Final Act precisely because it would not be a legally binding document. The pursuit of legal rigour may sometimes be less useful to the cause of human rights in practice than political compromise'. Brett, above n. 102, at pp. 676–677.

warnings, the prevention of conflicts and rehabilitation after a conflict has taken place. The development of the organisation can be broken down into two phases. The first period corresponds roughly to 1973–1990 which reflected tensions – through to increasing détente between the West and Eastern Europe. The second phase, since 1990, has witnessed the breakdown of the Soviet Union and the Warsaw Pact and considerable institutional development of the organisation.

The initial developments of the organisation are rooted in the Conference on Security and Cooperation in Helsinki. The Conference, which began in 1973 with 33 participant States, including the United States and Canada, concluded in 1975 with the adoption of the Helsinki Final Act[105] and comprises four parts often referred to as 'baskets'. 'Basket I' relates to questions concerning security in Europe; 'Basket II' is concerned with economic issues; 'Basket III' addresses humanitarian and other issues; and 'Basket IV' deals with the follow-up process after the Conference. The Final Act as such is not a document dedicated to human rights, although 'Basket I' does contain important references to human rights. Principle VII 'Basket I' is entitled 'Respect for human rights and fundamental freedoms, including freedom of thought, conscience, religion or belief'. This principle represents a commitment by the participating States to respect human rights, which include freedom of religion without distinctions as to race, sex, language etc. Principle VII also contains an understanding that the participatory States

> will promote and encourage the effective exercise of civil, political, economic, social, cultural and other rights and freedoms all of which derive from the inherent dignity of the human person and are essential for his free and full development.[106]

According to Principle VIII, participating States are committed to respecting equal rights of peoples and their right to self-determination. 'Basket III', entitled 'Cooperation in humanitarian and other fields', is of considerable relevance.[107] It considers such issues as reunification of families[108] and marriages between citizens of different States,[109] travel for personal and professional reasons,[110] transfrontier information[111] and flows and cooperation in

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[105] Conference and Security and Cooperation in Europe: Final Act (Helsinki Accord) 1 August, 1975, 14 ILM (1975) 1292. The agreement is often referred to as the Helsinki Accords. See Russell (1976) AJIL 242; A. Bloed and P. Van Dijk (eds), *Essays on Human Rights in the Helsinki Process* (Dordrecht: Martinus Nijhoff Publishers) 1985; T. Buergenthal, 'The CSCE Rights System' 25 *George Washington Journal of International Law and Economics* (1991–1992) 333.

[106] Principle VII.

[107] Basket III. For the text see I. Brownlie (ed.), *Basic Documents on Human Rights*, 3rd edn (Oxford: Clarendon Press) 1992, pp. 428–447.

[108] Para 1(b).

[109] Para 1(c).

[110] Para 1(e).

[111] Para 2(a)–(c).

culture and education.[112] The Helsinki Conference was followed by a number of follow-up intergovernmental Conferences. These were held in Belgrade (1977–78),[113] Madrid (1980–1983),[114] Vienna (1986–1989)[115] and Helsinki (1992).[116]

The second, more vibrant phase began with the conclusion of the Vienna meeting of the CSCE conference. The Vienna Meeting, which had started in November 1986 concluded in January 1989. The Concluding Document of the Vienna Meeting represents a considerable advance on human rights issues. Such developments can be seen in the light of easing tensions between the western and eastern European States and a willingness to address the subject of human rights within the Communist regimes.

The Concluding Document deals with a range of issues including security, culture, trade, education and the environment. In relation to human rights, the participating States agree to provide effective exercise of human rights guarantees and to establish provisions for effective remedies. The Concluding Document also aims to protect the freedom of religion, freedom of movement and the rights of national minorities. The Vienna Meeting added a significant dimension to the human rights protection. It provided for a four-stage monitoring process, for which it considers questions relating to the 'human dimension'. The four-stage monitoring procedure is initiated by an exchange of information on matters relating to human rights through diplomatic channels. The second stage is conducted by holding bilateral meetings with other participating States and requesting them to exchange questions on human rights. In the third stage, any State may bring relevant cases to the attention of other participating States. In the final stage participating States may broach the relevant issues at the Conference of Human Dimension as well as at the CSCE follow-up meetings.

Further improvements (both in the substantive recognition of rights and the procedures to implement these rights) were to take place in subsequent Documents, in particular the Copenhagen Document.[117] Within the Document, participating States show a range of commitments which include

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112 Paras 3 and 4.

113 See Conference on Security and Cooperation in Europe: Concluding Document on the Belgrade Meeting in Follow-up to the Conference 8 March 1977. Reprinted 17 I.L.M (1978) 414.

114 See Conference on Security and Cooperation in Europe: Concluding Document of the Madrid Session Meeting 9 September 1983. Reprinted 22 I.L.M. (1983) 1395.

115 See Conference on Security and Cooperation in Europe: Concluding Document of the Vienna Meeting 15 January 1989. Reprinted 28 I.L.M. (1989) 531.

116 See Conference on Security and Cooperation in Europe: Declaration and Decisions from Helsinki Summit, 10 July 1992. Reprinted 31 I.L.M. (1992) 1385.

117 See Document of the Copenhagen Meeting of the Conference on the Human Dimension of the Conference for Security and Cooperation in Europe. Adopted by the CSCE at Copenhagen 29 June 1990. Reprinted 29 I.L.M. (1990) 1305.

respect for the rule of law, justice and democracy.[118] There is an affirmation of fundamental rights and freedoms, freedom of expression,[119] right to association,[120] right of everyone to leave any country[121] and the right to peacefully enjoy his property.[122] A number of civil and political rights (for example, the prohibition of torture and capital punishment) are also reaffirmed. The Copenhagen Document shows a particular interest in the position of national minorities. Although the document is reluctant to define minorities it nevertheless emphasises linguistic, cultural and religious rights. In relation to implementation, the Copenhagen Document tightens up the mechanism by providing specific deadlines within which participating States are to act. In addition the participating States:

> Examined practical proposals for new measures aimed at improving the implementation of the commitments relating to the human dimension of the CSCE. In this regard, they considered proposals related to the sending of observers to examine situations and specific cases, the appointment of rapporteurs to investigate and suggest appropriate solutions ...[123]

A number of these proposals (such as the provisions for on-site investigations by independent experts) have been given effect.[124] The use of independent experts was the first step towards involvement of what was previously a purely intergovernmental procedure. The procedure was invoked by the United Kingdom on behalf of the '"12" European Community States' and the United States in support of investigating attacks on unarmed civilians in Croatia and Bosnia and has also been used by several eastern European. States.[125] Other procedures have also been introduced such as the biennial review meeting with the authority to draw attention to violations of human rights.

The Copenhagen Document was followed by the Paris Charter for a New Europe (the Paris Charter) in 1990.[126] The adoption of the Charter was also accompanied by a number of institutional and structural changes. The Paris Charter has led to the creation of the posts of Secretary General and the High Commissioner for National Minorities. It also set up a schedule of meetings, which have led to further developments in the field of human rights. In

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118 See I(1)(2)(5.1).

119 See II(9.1).

120 See II(9.3).

121 See II(9.5).

122 See II (9.6).

123 Copenhagen Document para 43.

124 See Conference on Security and Cooperation in Europe: Document of the Moscow Meeting on the Human Dimension, Emphasizing Respect for Human Rights, Pluralistic Democracy, the Rule of Law, and Procedures for Fact-Finding, 3 October 1991 (reprinted 30 ILM (1991)1670).

125 See Brett, above n. 102, at p. 682.

126 See Conference on Security and Cooperation in Europe adopted at Paris, 21 November 1990. Reprinted 30 ILM (1991)190.

subsequent years further institutional and procedural developments have taken place. The Office for Democratic Institutions of Human Rights (ODIHR), established initially to monitor elections, was given the mandate to provide information on the implementation of human rights within the participating States. ODIHR also maintains a list of experts who can be used for mediation, fact-finding and conciliation purposes. An individual/group complaints mechanism has also been initiated through the contact point in the ODIHR for issues concerning, for example the Roma or the Sinti.

The fourth follow-up meeting was held in 1992 in Helsinki, in a politically transformed environment. The break-up of the Soviet Union and the civil war in Yugoslavia had raised increasing concerns not only over security issues but also on the human rights front. These issues were addressed in the concluding Document. In this Document minority and groups rights are given a distinct recognition and the scope of domestic jurisdiction further curtailed in so far as the protection of human rights is concerned. The Helsinki Document also established the post of High Commissioner on National Minorities with the primary objective of bringing pressure on States to improve their individual and collective group rights record.[127] As we have already noted, at the beginning of 1995 the Conference, in the light of its achievement, reformed itself to be recognised as an Organisation. Subsequent summits in Lisbon (December 1996) and Istanbul (November 1999) have led to the adoption of Declarations and Charters on the Security in Europe.

Human rights involvement through visits

As noted above, human rights protection was not envisaged as a primary function of the work of the CSCE. The past decade has seen a remarkable transformation in the role of the organisation. In this regard a number of procedures have already been referred to, although some mechanisms need a further brief survey. These include the short and long-term visits. In relation to the short-term visits, the OSCE sends a mission to a country to conduct a survey and to report back to the OSCE. Long-term visits are intended to monitor the human rights situation in a country over a period of time. These visits are conducted by around eight individuals nominated by the OSCE and the visit lasts for up to six months. A number of missions have been conducted including those in Georgia, Estonia, Moldova, Latvia, Tajikistan, Ukraine and Chechnya.

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127 See CSCE Helsinki Decisions 35 I.L.M. (1992) 1385; A. de Zayas, 'The International Judicial Protection of Peoples and Minorities' in C. Brölmann, R. Lefeber and M. Zieck, (eds), *Peoples and Minorities in International Law* (Dordrecht: Martinus Nijhoff Publishers) 1993, 253–287 at p. 282; A. Bloed, 'The OSCE and the Issue of National Minorities' in A. Phillips and A. Rosas (eds), *Universal Minority Rights* (Turku/Åbo, London: Åbo Akademi University Institute for Human Rights, Minority Rights Group (International)) 1995, pp. 77–86.

High Commissioner for National Minorities

One of the most complex problems confronting the CSCE was the subject of minority rights, particularly within Central and Eastern Europe. The difficulties in addressing the issue of group rights are dealt with in subsequent chapters. Suffice it to note that within the United Nations and European human rights system collective group rights are accorded only very limited recognition. The disintegration of the Soviet Union, and the escalation of civil wars in many parts of central and eastern Europe, reinvigorated the subject. In order to deal with the situation in 1992, the CSCE established the High Commissioner for National Minorities (HCNM). The primary responsibility of the HCNM is conflict prevention. The HCNM is a person of 'eminent international personality ... from whom an impartial performance of the function may be expected'.[128] The HCNM is appointed for a three-year term which is renewable once.[129] Since his appointment, the HCNM has done a commendable task not only in attempting to resolve disputes but has also been instrumental in easing ethnic, racial and religious tensions in many parts of central and eastern Europe. With the involvement of American and British forces in Afghanistan, and highly volatile situation developing in States bordering Afghanistan, it would appear that the HCNM's role may well remain critical in the near future.

CONCLUSIONS

This chapter has analysed the position of three different institutions, all operating in the field of human rights. The comparisons between the work of the ESC and the EU produce interesting results. Since its establishment, the ESC has been operational with an insufficiently effective system of implementation. Two proposals have been put forward to make the system more effective. First, to establish a European Court of Social Rights (along similar lines to the European Court of Human Rights) and, second, to add the rights of the ESC in the form of an additional protocol to the ECHR. Both these proposals have failed to command serious consideration by the Council of Europe. Over the years some positive developments have taken place to improve the implementation mechanism of the ESC through the introduction of a collective complaints procedure. However, judging from the record of the past forty years, it remains clear that much needs to be done. A more serious threat to the ESC is that it remains undervalued and largely unknown even among European lawyers. By way of contrast to the ESC, the EU represents a well established and effective organisation. The growth and expansion of the sphere of the

[128] See Helsinki Summit, July 1992 above n. 127 (Helsinki) Decision 8.
[129] Ibid. Decision 9.

Union in areas affecting economic, social and cultural rights is making it difficult to sustain a largely benign human rights treaty such as the ESC.

The development of the OSCE from a purely security organisation to an entity which is actively engaged in the promotion and protection of human rights has to be welcomed. The OSCE has set up a number of institutions, which have, in a short time proved their worth. A key institution is the HCNM who has raised major security concerns and has engaged in dispute resolution and highlighted major problems faced by minority groups of the region. Given recent political events at the turn of the century, the HCNM will continue to have an important role. The lawlessness in some of the territories of eastern Europe provides a safe-haven for terrorist organisations to operate from; in the twenty-first century, the HCNM as well as the OSCE will have to confront the issue of terrorism directly.[130]

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[130] For further consideration of the subject of terrorism in international human rights law, see below Chapter 16.