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# The European Human Rights System

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## The European Human Rights System\*

James W. Hart\*\*

*This article presents the historical, organizational, and bibliographic information needed to research the Council of Europe's regulation of human rights. It begins with an explanation of the reasons for the organization's founding and then describes its statute, its structure, the Convention for the Protection of Human Rights and Fundamental Freedoms, the history of the changes in the treaty's procedures, and its enforcement mechanisms. The final section provides similar treatment for another, less well known, of the Council's human rights treaties, the European Social Charter.*

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¶1 This article presents historical, organizational, and bibliographic information for researching the Council of Europe's regulation of human rights within its region. It is intended for librarians who need an understanding of the bibliographic structure of Council of Europe documents. It was written from a historical perspective for two reasons: First, bibliographic items are situated in a matrix of politics, law, economics, and culture. Second, librarians may need to know how to retrieve all kinds of documents relevant to this subject from any time period. Indeed, one cannot fully understand the Council of Europe, the changes it has been through since its inception, or its literature, without understanding the forces that

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spawned it and have influenced it. The article describes the history that led to the Council of Europe's founding and later to its expansion, its primary political and legal organs, the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), principles of the Convention's interpretation, the procedures of the European Court of Human Rights, compliance with the court's judgments, and the expansion of the idea of human rights in other treaties.

### The Context

¶2 In 1945, Europe was economically, spiritually, and physically devastated. Nearly all of its countries had recently been or currently were occupied by foreign armies. Thirty-six and a half million Europeans had died in the war.<sup>1</sup> The Soviet Union lost 16 million civilians and 8.6 million military men and women.<sup>2</sup> The Germans had sent special troops, called *Einsatzgruppen*, into the Soviet Union behind the regular army, whose special task was to murder as many civilians as they could in order to make room for future German settlers.<sup>3</sup> "It is now clear that the army was closely involved in implementing the Holocaust in the USSR . . ."<sup>4</sup> There were thirteen million displaced persons in Europe in the summer of 1945.<sup>5</sup> Germany, for example, contained over ten million people who were imported from conquered nations and forced to work there.<sup>6</sup> Three and a half million homes in greater London, ninety percent of homes in Warsaw, and twenty percent of homes in France had been destroyed.<sup>7</sup> In 1946, the total steel output of Europe was only fifty-five percent of that of 1937.<sup>8</sup> At the end of the war, the railroads in some countries were half the size they had been at its inception.<sup>9</sup> "Production of wheat and other bread-grains was down by a third."<sup>10</sup> In the American-occupied zone of Germany, the food ration was 860 calories per day.<sup>11</sup>

¶3 Gradually, however, another conflict emerged between the Western allies and the Soviet Union. A line that ran roughly southeast from the Baltic Sea in the north to the Adriatic in the south divided the continent. To the north and east of the line were the armed forces of the Soviet Union and Yugoslavia. To the west were the armed forces of the United States and Great Britain. This division was more the result of geography and military strength than agreements made among Roosevelt, Churchill, and Stalin.<sup>12</sup> As Stalin said, "This war is not as in the past; whoever occupies a territory also imposes upon it his own social system."<sup>13</sup> The war with

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1. TONY JUDT, *POSTWAR: A HISTORY OF EUROPE SINCE 1945*, at 17 (2005).

2. *Id.* at 18.

3. LEE BAKER, *THE SECOND WORLD WAR ON THE EASTERN FRONT* 7, 48–50 (2009).

4. *Id.* at 19.

5. WILLIAM I. HITCHCOCK, *THE STRUGGLE FOR EUROPE* 16 (2002).

6. *Id.*

7. JUDT, *supra* note 1, at 82.

8. ANDREW & FRANCES BOYD, *WESTERN UNION: A STUDY OF THE TREND TOWARD EUROPEAN UNITY* 11 (1949).

9. *Id.*

10. *Id.*

11. JUDT, *supra* note 1, at 21.

12. HITCHCOCK, *supra* note 5, at 23.

13. MILOVAN DJILAS, *CONVERSATIONS WITH STALIN* 114 (1962).

Germany had merely forced a temporary alliance of necessity on nations that had a long history of mutual suspicion.

¶4 The countries of Eastern Europe, however, were caught in the middle. Great Britain and the United States had agreed to allow Stalin to dominate that region to keep him from making an early peace with Hitler and pulling out of the war early.<sup>14</sup> The countries of Eastern Europe had traditionally been wary of their gigantic eastern neighbor and decidedly noncommunist.<sup>15</sup> So, during the war and its immediate aftermath, Stalin walked a fine line between appeasing the United States and Great Britain to keep them in the war<sup>16</sup> and plotting the Communist takeover of the governments of the countries of Eastern Europe.<sup>17</sup> Under Stalin's direction, the native Communist parties allied with socialist parties to get a place in the government. Once taken into the government, the communists then had fellow communists appointed to head the ministries of the army, the police, and the judiciary. In the final stage the communists arrested the leaders of their putative political allies, closed their newspapers, outlawed them entirely, executed the leaders, and took the government by force.<sup>18</sup> The process was a long one. As early as 1941, the Soviet Union trained and planted a number of native Polish communists in Poland to fight both the Nazis and the large, anti-communist resistance movement called the Home Army.<sup>19</sup> The last nation to fall to communist intrigues was Hungary, where the Workers' Party decisively won the election in May of 1949.<sup>20</sup>

¶5 The Western European countries had to stand alone with the horrors of war behind them and the horrors of Stalin in front of them. History was pushing them toward cooperation. Each of them had its own idea of the kind and manner of cooperation that would benefit Western Europe the most.<sup>21</sup> A plethora of organizations supporting the idea of cooperation grew up in response to these forces, e.g., the European Union of Federalists, the United Europe Movement, and the Independent League for European Cooperation.<sup>22</sup> Several of the most important of these organizations held a "Congress of Europe" in The Hague in May of 1948.<sup>23</sup> Churchill, who in September 1946 called for "a kind of United States of Europe,"<sup>24</sup> was honorary president.<sup>25</sup> It was at this conference that ideas such as a parliamentary assembly, a court of human rights, and the right of individual petition were first proposed.<sup>26</sup>

14. JUDT, *supra* note 1, at 100–01.

15. *Id.* at 130.

16. REMI NADEAU, STALIN, CHURCHILL, AND ROOSEVELT DIVIDE EUROPE 10, 29–38 (1990); AMOS PERLMUTTER, FDR AND STALIN: A NOT SO GRAND ALLIANCE, 1943–1945, at 101–02, 108–12 (1993).

17. HITCHCOCK, *supra* note 5, at 99.

18. *See id.* (discussing the theory of English historian Hugh Seton-Watson).

19. *Id.* at 102.

20. *See id.* at 110.

21. *See* BOYD, *supra* note 8, at 71–94 (outlining the views of the various organizations for European unity).

22. *Id.* at 73.

23. *Id.*

24. *Id.*

25. A.W. BRIAN SIMPSON, HUMAN RIGHTS AND THE END OF EMPIRE 604 (2001).

26. *Id.* at 607–08.

## The Council of Europe

¶6 The Council of Europe emerged from the Congress of Europe on May 5, 1949. The founding document of the Council is its Statute. The preamble reaffirms the contracting states' "devotion to the spiritual and moral values which are the common heritage of their peoples and the true source of individual freedom, political liberty and the rule of law, principles which form the basis of all genuine democracy . . . ."<sup>27</sup> Article 1 states that the Council's purposes are "to achieve a greater unity between its Members for the purpose of safeguarding and realising the ideals and principles which are their common heritage and facilitating their economic and social progress."<sup>28</sup>

¶7 The organization is governed primarily by the Committee of Ministers, which consists of the foreign ministers of the contracting states or their designated substitutes.<sup>29</sup> Article 14 gives each contracting state one representative, and each representative has one vote. Article 15 gives the Committee the authority to conclude conventions or agreements and make recommendations to governments, and article 16 allows it to make decisions "relating to the internal organisation and arrangements of the Council of Europe." It has an executive function similar to that of a prime minister or president. The Committee's meetings are held in private in Strasbourg "before and during the beginning of every session of the Consultative Assembly and at such other times as it may decide."<sup>30</sup> It is supported in its work by the Secretariat. The Committee makes the decisions and the Secretariat carries them out.<sup>31</sup>

¶8 The second organ was originally named the Consultative Assembly, but since February 1994 has been referred to in all Council documents as the Parliamentary Assembly.<sup>32</sup> It is composed of representatives selected by or appointed from the legislatures of the contracting states. The number of representatives accorded to each country is determined by a formula that is loosely based on population, giving the largest states the same number and the smallest states the same number.<sup>33</sup> Article 26 of the Statute assigns France, Germany, Italy, Russia, and the United Kingdom eighteen representatives apiece. Austria has six, Estonia three, Liechtenstein two, Poland twelve, and Moldova five. Article 22 describes the Assembly as "the deliberative organ of the Council of Europe." Its purpose is to debate issues and make recommendations to the Committee of Ministers. Its power resides in its ability to represent the views of the citizens of the

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27. Statute of the Council of Europe, pmbl., May 5, 1949, 87 U.N.T.S. 103, E.T.S. Nos. 1, 6, 7, 8, 11 (updated version available at [http://www.ifa.de/pdf/abk/inter/ec\\_ets001\\_en.pdf](http://www.ifa.de/pdf/abk/inter/ec_ets001_en.pdf) (last visited July 27, 2010)) [hereinafter Statute].

28. *Id.* art. 1.

29. *Id.* arts. 13, 14.

30. *Id.* art. 21.

31. *Id.* arts. 10, 37.

32. Comm. of Ministers, Council of Eur., Decisions Adopted, app. 8: Denomination of the Parliamentary Assembly, Doc. No. CM/Del/Dec(94)508, at a27 (Feb. 23, 1994), available at <https://wcd.coe.int/ViewDoc.jsp?id=518505&Site=CM&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383>.

33. A.H. ROBERTSON, THE COUNCIL OF EUROPE: ITS STRUCTURE, FUNCTIONS AND ACHIEVEMENTS 41 (2d ed. 1961).

contracting states, not in its authority to decide anything. It appears to have the debating function of a legislature and the advisory function of a cabinet.

### **The Convention for the Protection of Human Rights and Fundamental Freedoms**

¶9 The first major treaty the Council produced after the Statute and the General Agreement on Privileges and Immunities of the Council of Europe was the [European] Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).<sup>34</sup> The convention was signed on November 4, 1950, and came into force on September 3, 1953.<sup>35</sup> It was the first real human rights treaty. The U.N.'s Universal Declaration of Human Rights<sup>36</sup> was proclaimed during the Convention's drafting process, but that was a proclamation, not a treaty. It bound no one. The ECHR had a preamble, laid out ten fundamental rights, and established two enforcement bodies—a European Commission of Human Rights and a European Court of Human Rights.

¶10 The original convention can be found in the United Nations Treaty Series in both of the Council of Europe's official languages, English and French.<sup>37</sup> The latest version incorporates Protocols 11 and 14, both of which made substantial changes to the Convention.<sup>38</sup> The web site of the COE's Treaty Office includes a list of all the organization's treaties.<sup>39</sup> Entries in the list link to the text of the treaty in both Word and HTML format; a summary of the treaty; a chart of signatures and ratifications; the list of declarations, reservations, and other communications;<sup>40</sup> and an explanatory report if there is one. The explanatory reports are wonderful aids to understanding the treaties. The Treaty Office explains their authority as follows:

The[] [reports] are prepared by the committee of experts instructed to draft the convention in question and are published when the convention is adopted by the Committee of Ministers. These explanatory reports might facilitate the implementation of the provisions of the conventions, although they do not constitute instruments which provide an authoritative interpretation of them.<sup>41</sup>

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34. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter Convention].

35. *Id.*

36. G.A. Res. 217A, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 10, 1948), available at <http://www.un.org/Overview/rights.html>.

37. Convention, *supra* note 34.

38. [European] Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols No. 11 and No. 14, entered into force June 1, 2010, E.T.S. No. 5, available at <http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=005&CM=8&DF=01/08/2010&CL=ENG> [hereinafter ECHR].

39. Council of Eur., Complete List of the Council of Europe's Treaties, <http://conventions.coe.int/Treaty/Commun/ListeTraites.asp?CM=8&CL=ENG> (last visited July 27, 2010).

40. For information on ways that states can condition their acceptance of treaties, see MARK W. JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 23–26 (4th ed. 2003); 1 OPPENHEIM'S INTERNATIONAL LAW 1188–92, 1240–47 (Robert Jennings & Arthur Watts eds., 9th ed. 1992).

41. Council of Eur., About Conventions in the Council of Europe Treaty Series, <http://conventions.coe.int/general/v3IntroConvENG.asp> (last visited July 27, 2010).

¶11 The ECHR's preamble states clearly that the purpose of the ECHR was "to take the first steps for the collective enforcement of certain of the Rights stated in the Universal Declaration . . ." While the Universal Declaration was intended to be universal and a declaration of ideals, the ECHR was intended to be a regional, binding agreement. The ECHR bound the contracting members to live by the rights enumerated in it. The Preamble's reference to "European countries which . . . have a common heritage of political traditions, ideals, freedom and the rule of law . . ." indicates that one of the ECHR's intentions is to delineate and embody the political and ethical culture of Western Europe.<sup>42</sup>

¶12 The first section of the Convention sets out the particular human rights and fundamental freedoms that were to be protected.<sup>43</sup> The first thirteen items, which appear in the original ECHR, were intended to restrain governments from tyrannizing the people. This was the result of the experience of occupation during the war on the continent. "[O]utside the actual zones of combat the worst brutali-

42. Convention, *supra* note 34, pmbl.

43. The following is a list of the general topics as amended up through the current version of the ECHR:

1. The right to life
2. The prohibition of torture or inhuman or degrading treatment or punishment
3. The prohibition of slavery and forced labor
4. The right to liberty and security
5. The right to a fair and public hearing within a reasonable time by an independent and impartial tribunal
6. The prohibition of ex post facto criminal laws
7. The right to respect for private and family life
8. The right to freedom of thought, conscience, and religion
9. The right to freedom of expression
10. The right to freedom of assembly and association
11. The right to marry and found a family
12. The right to an effective remedy before a national authority for violations of the rights and freedoms enumerated in the Convention
13. The prohibition of discrimination on grounds such as sex, race, color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth, or other status
14. Free elections, property, and education (First Protocol)
15. Freedom from imprisonment for the nonfulfillment of a contractual obligation (Fourth Protocol)
16. Freedom of movement within a state and freedom to leave its territory (Fourth Protocol)
17. Right of a national not to be expelled from and to enter a state's territory (Fourth Protocol)
18. Freedom of aliens from collective expulsion (Fourth Protocol)
19. Abolition of the death penalty (Sixth & Thirteenth Protocols)
20. Freedom from expulsion of individual aliens (Seventh Protocol)
21. The right to review in criminal cases (Seventh Protocol)
22. Right to compensation for miscarriages of justice (Seventh Protocol)
23. Abolition of double jeopardy (*Ne bis in idem*) (Seventh Protocol)
24. Equality of rights of spouses (Seventh Protocol)
25. Restriction of the scope of derogation from these rights and freedoms to the extent strictly required

See DAVID HARRIS ET AL., *LAW OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 655–755 (2d ed. 2009) for an excellent explanation of the rights provided for in the protocols to the Convention.

ties inflicted on individuals were likely to be inflicted by their own government, operating through fellow citizens.”<sup>44</sup>

¶13 Finally, articles 15, 17, and 18 restrict the scope of the contracting parties’ ability to derogate from the ECHR in times of emergency beyond the “extent strictly required by the exigencies of the situation.”<sup>45</sup> Although these articles allow some leeway to contracting states during “war or other public emergency,”<sup>46</sup> they prohibit contracting parties from using derogation to limit the Convention’s rights.<sup>47</sup>

### The Period of the Commission, 1953–1998

¶14 The structure of the Council’s institutions of enforcement has changed twice since they were created in 1953.<sup>48</sup> The size, composition, function, and operation of the original institutions, the European Commission of Human Rights and the European Court of Human Rights, are described in the second and third sections of the Convention.

¶15 The Commission’s purposes were to investigate conflicts and to mediate friendly settlements.<sup>49</sup> Under article 20 of the Convention, the Commission had the same number of members as there were member states. Article 23 required the members of the Commission to act in their own capacities, not as representatives of their governments. The Commission was discontinued and its functions given to the court in 1998 by Protocol 11.<sup>50</sup>

¶16 One of the great innovations of the Convention was article 25, which allowed “any person, non-governmental organization, or group of individuals” to file a complaint with the Commission.<sup>51</sup> Until the end of World War II, international law did not restrict the way a sovereign state could treat its own citizens. This has changed substantially. “The message of international human rights law is that how a state treats individuals subject to its jurisdiction is . . . a matter of international concern.”<sup>52</sup> Article 25 required that governments allow their own citizens to file complaints against them in the Council of Europe’s Human Rights Commission.<sup>53</sup> Each member state had to file a declaration of agreement to article 25 with the Council’s Secretary-General, and the provision did not come into effect until six contracting states agreed to it.<sup>54</sup> There was great disagreement within the Council

44. SIMPSON, *supra* note 25, at 601–02.

45. ECHR, *supra* note 38, art. 15(1).

46. *Id.*

47. *Id.* art. 17.

48. Figures 1–3 *infra* detail these structures.

49. See ROBERTSON, *supra* note 33, at 164.

50. Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms art. 27(1), May 11, 1994, E.T.S. No. 155, available at <http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=155&CM=8&DF=01/08/2010&CL=ENG> [hereinafter Protocol 11].

51. Convention, *supra* note 34, art. 25(1).

52. STEPHEN C. McCAFFREY, UNDERSTANDING INTERNATIONAL LAW 252 (2006).

53. MARK W. JANIS ET AL., EUROPEAN HUMAN RIGHTS LAW 26 (3d ed. 2008).

54. Convention, *supra* note 34, art. 25.

over the inclusion of this provision in the Convention.<sup>55</sup> It took five years for six contracting parties to agree to it, but it finally came into force in 1955.<sup>56</sup> As we will see, it turned out to be a great success.

¶17 The process through which complaints traveled from application to judgment is pictured in figure 1. Both states and individuals could file applications: interstate applications were allowed by article 24, which became article 33 under Protocol 11 in 1998; individual applications were allowed by article 25 (now article 34). The interstate case mechanism has been used only rarely.<sup>57</sup>

¶18 Complaints had to meet certain requirements in order to be considered.<sup>58</sup> Article 27 of the original Convention (now article 35) indicates that the following kinds of complaints were inadmissible:

1. Anonymous complaints;
2. Matters that had already been examined by the Commission or the court;
3. Those previously submitted to another international organization for investigation that contain no new information;
4. Those that had not exhausted all domestic remedies and had been filed six months after the last decision of the relevant domestic institution; and
5. Those “incompatible with the . . . Convention, manifestly ill-founded, or an abuse of the right of petition.”

The jurisprudence on admissibility is still an important shield against inappropriate applications.<sup>59</sup> Between 1955 and 2000, 180,319 applications were filed, and 6736 (3.7%) were found to be admissible.<sup>60</sup>

¶19 If a settlement was reached in a case, article 30 provided that the Commission would write a report consisting of a summary of the facts and a description of the settlement and send the report to the states involved, the Committee of Ministers, and the Secretary-General of the Council. The case would then be removed from the list. If no settlement was reached, however, article 31(1) provided that the Commission write a report that included the opinion of the Commission on whether or not the Convention had been violated. The report was sent to the Committee of Ministers and the states involved in the dispute.<sup>61</sup> If neither party appealed the decision to the European Court of Human Rights (ECtHR) within three months, article 32(1) provided that the Committee of Ministers decide whether or not there had been a violation.

55. JANIS ET AL., *supra* note 53, at 15–19.

56. *Id.* at 21.

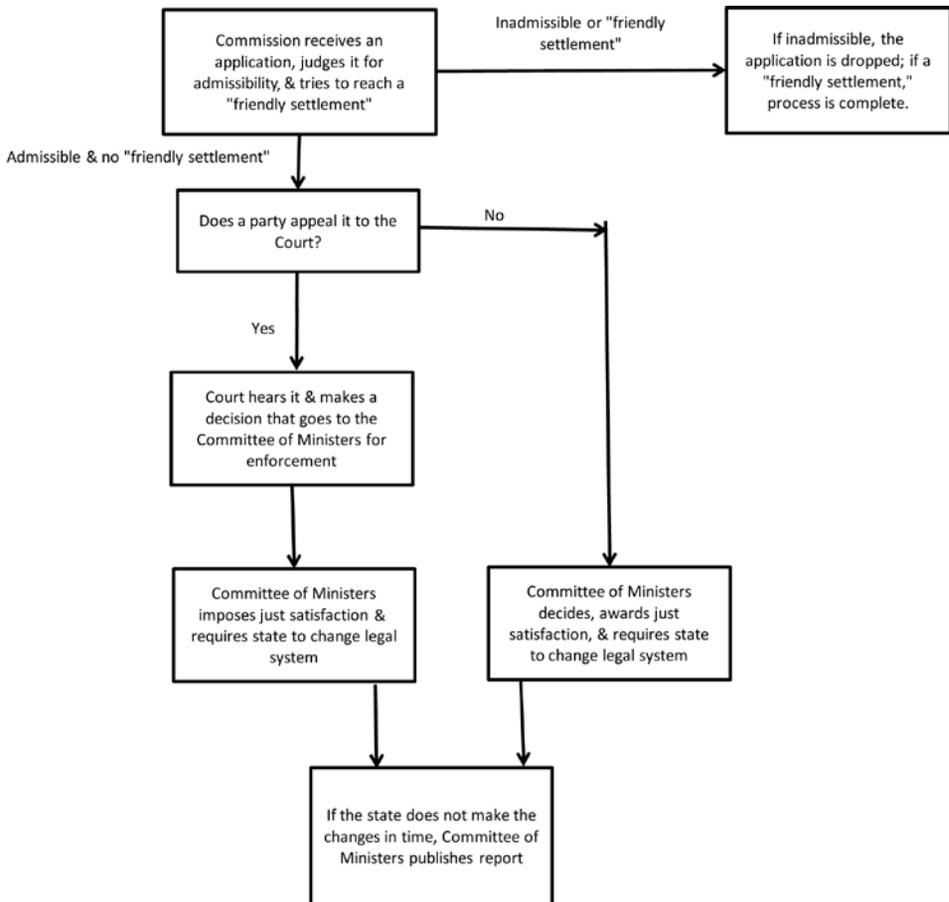
57. See Eur. Court of Human Rights., Inter-States Applications, available at [http://www.echr.coe.int/NR/rdonlyres/5D5BA416-1FE0-4414-95A1-AD6C1D77CB90/0/Requ%C3%AAtes\\_inter%C3%A9tatiques\\_EN.pdf](http://www.echr.coe.int/NR/rdonlyres/5D5BA416-1FE0-4414-95A1-AD6C1D77CB90/0/Requ%C3%AAtes_inter%C3%A9tatiques_EN.pdf).

58. Convention, *supra* note 34, arts. 26, 27.

59. See generally HARRIS ET AL., *supra* note 43, at 757–810; and JANIS ET AL., *supra* note 53, at 27–49 for more detailed explanations of admissibility.

60. EUR. COURT OF HUMAN RIGHTS, SURVEY OF ACTIVITIES 70 (2000), available at <http://www.echr.coe.int/NR/rdonlyres/501D81E2-C4D9-4EAD-990E-AC27448F60E1/0/SurveyofActivities2000.pdf>.

61. Convention, *supra* note 34, art. 31(2).



**Figure 1.** Process under the Commission

¶20 The Committee might also require the violating state to compensate the victim for the violation and to correct, within a certain period, that aspect of its legal system that had led to the violation.<sup>62</sup> If the violating state did not take the prescribed action in time, the Committee decided “what effect [should] be given to its original decision” and published its report.<sup>63</sup> Under article 32(4), all the contracting parties to the treaty were bound to abide by the Committee’s decisions. The Commission’s friendly settlements, decisions on admissibility, and judgments were published in its *Decisions and Reports*<sup>64</sup> and selectively in the *Yearbook of the European Convention on Human Rights*.<sup>65</sup>

¶21 The Committee’s jurisdiction was the default; the ECtHR’s jurisdiction was optional. Agreement to the court’s jurisdiction could be accepted “unconditionally

62. *Id.* art. 32(2).

63. *Id.* art. 32(3).

64. EUR. COMM’N OF HUMAN RIGHTS, DECISIONS AND REPORTS (1975–1998).

65. YEARBOOK OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS (1959–present) [hereinafter YEARBOOK]. The European Law Centre also publishes the decisions of the Commission in *European Human Rights Reports* (1979–present).

or on condition of reciprocity on the part of several or certain other High Contracting Parties or for a specified period.”<sup>66</sup> Countries could accept the court’s jurisdiction by filing a declaration with the Secretary-General.<sup>67</sup> And article 46(1) limited jurisdiction to the interpretation and application of the Convention, which is still the case today.<sup>68</sup>

¶22 Article 38 assigned the ECtHR the same number of judges as there are member states, and this rule still applies.<sup>69</sup> Under article 42 they were to be paid by the day, because it was not expected that the caseload would be heavy enough to justify payment on a longer basis.<sup>70</sup> A chamber of seven judges would sit, including one sitting *ex officio* who was a “national of any State party concerned . . .” for each case.<sup>71</sup> Only the Commission or a contracting state could bring a case before the court.<sup>72</sup> Article 51 required the court to write an opinion for each case, and article 52 made that opinion final. Article 54 gave the Committee of Ministers the responsibility to supervise the execution of the judgment.

¶23 The court published its *Judgments and Decisions* from 1961 to 1996 as Series A and its *Pleadings, Oral Arguments, and Documents* from 1961 to 1988 as Series B. In 1996, the ECtHR changed the title and format of series A to the *Reports of Judgments and Decisions*.<sup>73</sup> The court provides a wide variety of texts on its web site. The search system that provides access to the HUDOC database<sup>74</sup> includes all the following documents beginning with 1960:

- Decisions, judgments, and advisory opinions of the court
- Reports of the Commission
- Resolutions of the Committee of Ministers

The database provides a template with blanks for the following search criteria: document fields, language, importance, title, respondent state, application number, Convention article number, keyword, Strasbourg case law, conclusion, case number, and date. It also provides its own list of keywords to choose from and searches for cases decided under previous cases, like a citator. The court also provides *Monthly Information Notes*, which summarizes cases of particular interest and includes annual indexes to the cases. One can also find “communicated” cases—

66. Convention, *supra* note 34, art. 46(2).

67. *Id.* art. 46(3).

68. ECHR, *supra* note 38, art. 32(1).

69. *Id.* art. 20.

70. ROBERTSON, *supra* note 33, at 168.

71. Convention, *supra* note 34, art. 43. See also Luzius Wildhaber, An Insider’s View of the European Court of Human Rights: An Address to the Inner Temple (Oct. 20, 2003) (unpublished speech, on file with author).

72. Convention, *supra* note 34, art. 48.

73. The opinions themselves can be found in the EUR. COURT OF HUMAN RIGHTS, PUBLICATIONS OF THE EUROPEAN COURT OF HUMAN RIGHTS, SERIES A: JUDGMENTS AND DECISIONS (1961–1996) and EUROPEAN COURT OF HUMAN RIGHTS, REPORTS OF JUDGMENTS AND DECISIONS (1996–present). The YEARBOOK, *supra* note 65, publishes summaries of the decisions and judgments. Pleadings, transcripts, and other documents filed with the court can be found in PUBLICATIONS OF THE EUROPEAN COURT OF HUMAN RIGHTS, SERIES B: PLEADINGS, ORAL ARGUMENTS, AND DOCUMENTS (1961–1988).

74. Eur. Court of Human Rights, HUDOC Database, <http://www.echr.coe.int/ECHR/EN/Header/Case-Law/HUDOC/HUDOC+database> (last visited Aug. 1, 2010).

complaints that have been communicated to the countries against which they have been filed.

### Changes to the ECHR

¶24 Over time, the Convention changed. Indeed, the First Protocol (E.T.S. No. 9) was opened for signature before the Convention even came into force. It added rights to property, education, and free elections. Protocol 2, which came into force in 1970, conferred advisory jurisdiction on the court. Only the Committee of Ministers can request advisory opinions, and those opinions may not address

any question relating to the content or scope of the rights or freedoms defined in Section 1 of the Convention . . . , or . . . any other question which the Commission, the Court or the Committee of Ministers might have to consider in consequence of any such proceedings as could be instituted in accordance with the Convention.<sup>75</sup>

Protocol 2 was later integrated into the Convention in its present form as articles 47, 48, and 49. Protocol 4 (E.T.S. No. 46) prohibited imprisonment for debt and guaranteed freedom of movement. Protocol 6 (E.T.S. No. 114) limited the death penalty to wartime. It was signed in 1983 and has been ratified or acceded to by all contracting parties except Russia.<sup>76</sup> The death penalty was finally abolished entirely by Protocol 13 (E.T.S. No. 187) on July 1, 2003. Protocol 7 (E.T.S. No. 117) added a right to appeal in criminal matters, compensation for wrongful conviction, the prohibition against double jeopardy, and equality of spouses.

¶25 In the beginning, the Commission followed a conservative line on the admissibility of applications, in order to build the trust of the governments, which were suspicious of the institutions of enforcement and the right of individual application in particular.<sup>77</sup> Indeed, the number of applications submitted declined in the first few years. In 1955, there were 138 applications; in 1956, 104; in 1957, 101; and in 1958 they reached a low of 96.<sup>78</sup> The culture of the Commission changed in the 1970s, and as the Commission admitted more applications, its credibility grew and the number of applications grew apace.<sup>79</sup>

### The Period of Protocol 11, 1998–2009

¶26 Two factors led to the immense increase in individual applications: the Commission's cultural change and the breakup of the Soviet Union and its satellites in Eastern Europe. As early as the mid-1970s, it was becoming clear that the Soviet

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75. Protocol No. 2 to the Convention for the Protection of Human Rights and Fundamental Freedoms, May 6, 1963, E.T.S. No. 44, art. 1(2), *available at* <http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=044&CM=8&DF=01/08/2010&CL=ENG>.

76. KAREN REID, A PRACTITIONER'S GUIDE TO THE EUROPEAN CONVENTION ON HUMAN RIGHTS 679 (3d ed. 2008).

77. See Erik Fribergh & Mark E. Villiger, *The European Commission of Human Rights*, in THE EUROPEAN SYSTEM FOR THE PROTECTION OF HUMAN RIGHTS 605, 619 (R. St. J. Macdonald et al. eds., 1993); Christian Tomuschat, *The European Court of Human Rights Overwhelmed by Applications: Problems and Possible Solutions*, in THE EUROPEAN COURT OF HUMAN RIGHTS OVERWHELMED BY APPLICATIONS 1, 6–7 (Rüdiger Wolfrum & Ulricke Deutsch eds., 2009).

78. See 41 YEARBOOK, *supra* note 65, at 18.

79. Tomuschat, *supra* note 77, at 7.

and Eastern European economies were falling behind the capitalist countries of the West.<sup>80</sup> Thus the famous Russian joke: “We pretend to work, they pretend to pay us.”<sup>81</sup> The Soviet per capita gross national product grew at a rate of 2% between 1950 and 1953, rose to a rate of 3.9% between 1953 and 1960, but declined to negative 2.1% between 1985 and 1991.<sup>82</sup> Although the Soviet Union had once exported grain, during the 1970s it had to import ten million tons a year to feed its population.<sup>83</sup>

¶27 The reasons for these problems included government bureaucrats’ fear of exposing the truth,<sup>84</sup> the government’s bailing out of industrial and agricultural failures,<sup>85</sup> an excessive emphasis on heavy industry,<sup>86</sup> a lack of consumer goods,<sup>87</sup> as well as the weakness of the command economy.<sup>88</sup> When Gorbachev was appointed General Secretary in 1985, he set out to reform the system.<sup>89</sup> He recognized that the Soviet Union did not have the resources to accomplish the necessary domestic reforms and at the same time continue to compete with the United States on military spending.<sup>90</sup> In addition, the domestic reforms required changing the culture of the government to one of openness, genuine democracy, and the rule of law.<sup>91</sup> The Soviet Union was thus no longer able or willing to prop up the post-Stalinist totalitarian regimes of Eastern Europe.<sup>92</sup>

¶28 As a result, for different reasons and in different ways, one communist government after another collapsed and was replaced by a Western-style democracy. On August 24, 1989, a noncommunist government was installed in Poland;<sup>93</sup> on November 9 and 10 the Berlin Wall was demolished;<sup>94</sup> on December 29, Vaclav Havel, the leader of Czechoslovakia’s opposition, was elected president;<sup>95</sup> Hungary held free elections in the spring of 1990;<sup>96</sup> and on October 3, 1990, the two Germanys were reunited.<sup>97</sup>

¶29 The newly free nations, including Russia itself, sought membership in the Council of Europe and, after some discussion and requests for further reform, the Council admitted them. The standard for admission was article 3 of the Statute:

80. JUDT, *supra* note 1, at 577.

81. John Kampfner, *Russia 2: We Pretend to Vote; They Pretend to Notice*, NEW STATESMAN, Dec. 1, 2003, <http://www.newstatesman.com/200312010017>.

82. PHILIP HANSON, *THE RISE AND FALL OF THE SOVIET ECONOMY* 243 tbl.9.2 (2003).

83. HITCHCOCK, *supra* note 5, at 351.

84. *See id.* at 353–54.

85. *Id.* at 351–52.

86. JUDT, *supra* note 1, at 578; VICTOR SEBESTYEN, *REVOLUTION 1989: THE FALL OF THE SOVIET EMPIRE* 77–78 (2009).

87. HITCHCOCK, *supra* note 5, at 351.

88. JUDT, *supra* note 1, at 578.

89. HITCHCOCK, *supra* note 5, at 354–58.

90. *See* JUDT, *supra* note 1, at 592.

91. *Id.* at 597–600.

92. SEBESTYEN, *supra* note 86, at 195.

93. HITCHCOCK, *supra* note 5, at 362.

94. *Id.* at 366.

95. *Id.* at 367.

96. *Id.* at 360.

97. *Id.* at 369.

“Every member of the Council of Europe must accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms . . . .”<sup>98</sup> The method was to provide “awareness-raising, . . . assistance and cooperation, [and] integration” on subjects such as drafting constitutions and election laws, creating and operating constitutional courts, and other matters concerning democracy, human rights, and the rule of law. This work led to the founding of the Venice Commission, which is an arm of the Council and continues to give assistance to nations that request it.<sup>99</sup> The enlargement included states as far east as Bulgaria (admitted 1992), Georgia (admitted 1999), and Moldova (admitted 1995).<sup>100</sup> Between 1989 and 1996, eighteen countries joined.<sup>101</sup> The addition of so many states in so short a time exacerbated the flood of cases facing the ECtHR.<sup>102</sup> Indeed, at one point cases had to wait five years for adjudication.<sup>103</sup>

¶30 In response, the Council adopted Protocol 11 (E.T.S. No. 155) in 1998. It remained in force until June 1, 2010, the date on which Protocol 14 (C.E.T.S. No. 194) came into force. The first article of Protocol 11 replaced old articles 19–56 of the Convention. It wrote the Human Rights Commission out of the Convention entirely; made the ECtHR permanent; gave the court the responsibility for pursuing friendly settlements; abolished the appeal of individual cases to the Committee of Ministers; made the judgments of the court final; restructured the court into committees and chambers, including grand chambers; established a registry for the court; and inserted headings into the text of the Convention.

¶31 The process through which complaints traveled from application to judgment under Protocol 11 is pictured in figure 2. A judge rapporteur, who is “charged with presenting the case to the Court . . . ,”<sup>104</sup> is assigned to each case. The rapporteur makes a recommendation on admissibility to a committee of three judges, who in turn make the initial decision on admissibility.<sup>105</sup> Only cases that are unanimously considered admissible are referred to a chamber. Chambers have seven judges and review individual cases for admissibility again. They may rule only on admissibility or on both admissibility and the merits of a case.<sup>106</sup> If they rule only on admissibility, the case can be referred to a grand chamber, which consists of seventeen judges.<sup>107</sup> In

98. Tomas Niklasson & Anders Sannerstedt, *Europe Safe for Democracy? The Council of Europe and Democratization in Central and Eastern Europe*, 96 *STATSVETENSKAPLIG TIDSKRIFT* 69, 70 (1993).

99. *Id.* at 72–76.

100. Council of Eur., 47 Countries, One Europe, <http://www.coe.int/aboutCoe/index.asp?page=47pays1europe&l=en> (click on “Display the List of Countries”).

101. *Id.*

102. Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms: Explanatory Report, May 1, 2004, ¶¶ 5–6, available at <http://conventions.coe.int/Treaty/EN/Reports/Html/194.htm> (last visited Aug. 24, 2010) [hereinafter Protocol 14 Explanatory Report].

103. See DAVID S. WEISSBRODT & CONNIE DE LA VEGA, *INTERNATIONAL HUMAN RIGHTS LAW* 314 (2007).

104. REID, *supra* note 76, at 11.

105. *Id.*

106. *Id.*; Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms: Explanatory Report ¶ 44, available at <http://conventions.coe.int/Treaty/en/Reports/Html/155.htm> (last visited Aug. 24, 2010) [hereinafter Protocol 11 Explanatory Report].

107. Protocol 11, *supra* note 50, art. 27(1).

rare cases, at the request of one party, a grand chamber may examine a case on which a chamber has already ruled on the merits. These cases must

raise[] serious questions concerning the interpretation or application of the Convention or its protocols, or . . . an issue of general importance. The purpose is to ensure the quality and consistency of the Court's case-law by allowing for a re-examination of the most important cases if the above-mentioned conditions are met.<sup>108</sup>

Decisions on admissibility must be taken separately from those on the merits and must be reasoned.<sup>109</sup>

¶32 Although Protocol 11 ameliorated the delays to some degree, the number of applications continued to grow and soon outstripped the ability of the new institutions to cope.<sup>110</sup> The Council wrote Protocol 14 to further reform the system, but it could only come into force if all the contracting parties ratified or acceded to it, and Russia did not do so for several years.<sup>111</sup>

### The Period of Protocol 14, 2010–

¶33 The original purpose of Protocol 14 was to equip the ECtHR to deal with the landslide of cases that threatened to crush it. The court's annual report for 2003 notes that 27,281 applications were allocated to a decision body, 16,724 applications were declared inadmissible, and 548 judgments on the merits were rendered that year.<sup>112</sup> With forty-seven judges on the court, that equates to more than one hundred judgments per judge. Since at that time admissibility decisions were made by three-judge committees, one can see that the caseload was enormous. The situation continued to deteriorate: by 2008, the court had started counting pending cases, of which there were 97,300.<sup>113</sup>

¶34 To bring some temporary improvement to the situation, the Council adopted Protocol 14bis, which came into force on October 1, 2009.<sup>114</sup> The Council set the number of signatories required for it to come into force at only three, so that it would come into force quickly.<sup>115</sup> Unfortunately it was never very effective, entering into force for only nine countries before it was supplanted by Protocol 14.<sup>116</sup>

108. Protocol 11 Explanatory Report, *supra* note 106, at ¶ 47.

109. *Id.* at ¶ 78.

110. Protocol 14 Explanatory Report, *supra* note 102, at ¶ 5.

111. HARRIS ET AL., *supra* note 43, at 863–67.

112. EUR. COURT OF HUMAN RIGHTS, ANNUAL REPORT 2003, at 103–05 (2004).

113. EUR. COURT OF HUMAN RIGHTS, ANNUAL REPORT 2008, at 129 (2009).

114. Protocol No. 14bis to the Convention for the Protection of Human Rights and Fundamental Freedoms, May 27, 2009, C.E.T.S. No. 204, available at <http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=204&CM=8&DF=01/08/2010&CL=ENG>.

115. Protocol No. 14bis to the Convention for the Protection of Human Rights and Fundamental Freedoms: Explanatory Report ¶ 22, <http://conventions.coe.int/Treaty/EN/Reports/Html/204.htm> (last visited July 27, 2010).

116. Protocol No. 14bis to the Convention for the Protection of Human Rights and Fundamental Freedoms, Chart of Signatures and Ratifications, <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=204&CM=8&DF=21/04/2010&CL=ENG> (last visited July 27, 2010).

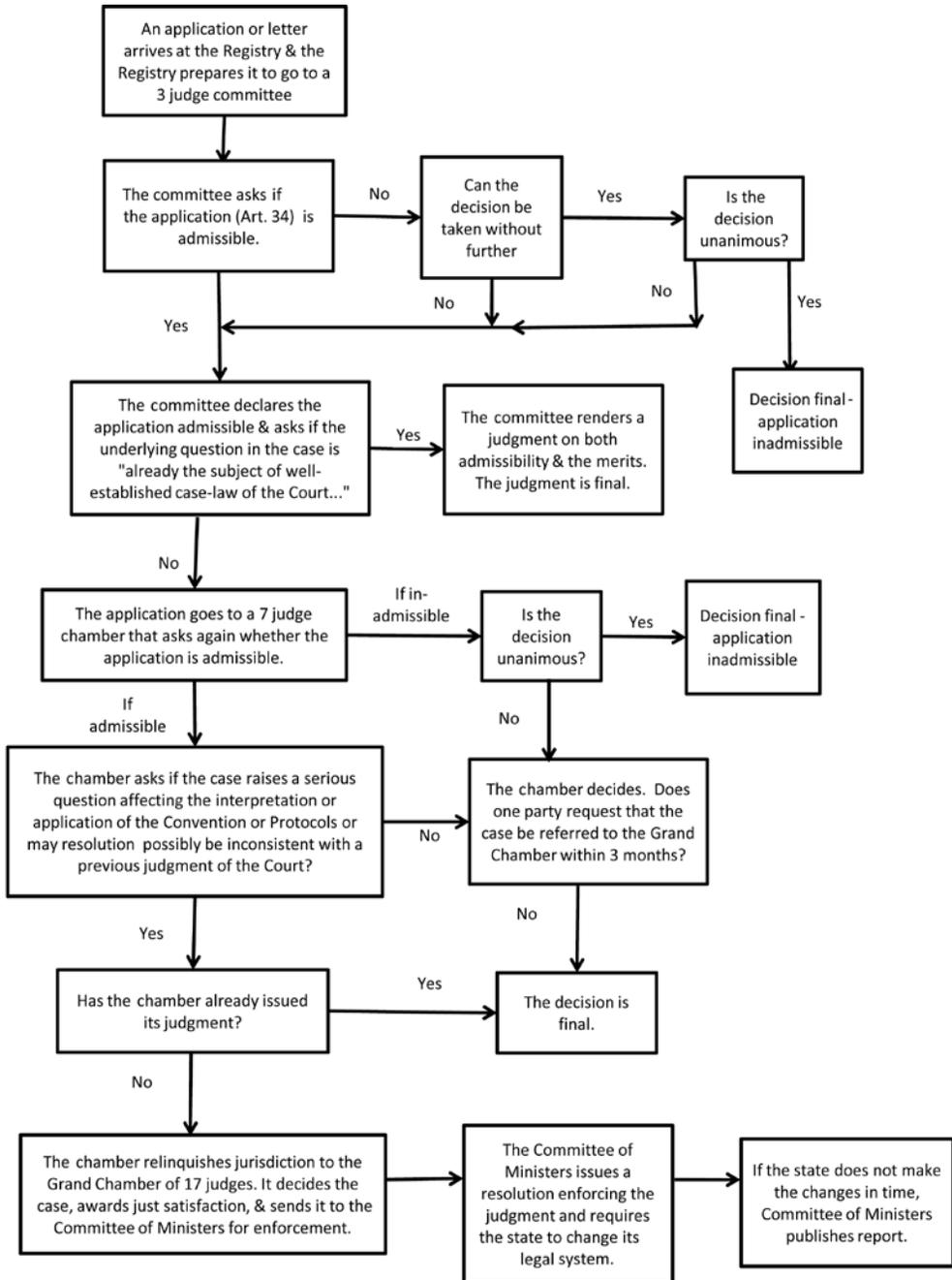


Figure 2. Process under Protocol 11

¶35 After high-level negotiations,<sup>117</sup> Russia finally ratified Protocol 14 on February 18, 2010, and it came into force on June 1, 2010.<sup>118</sup> The process for human rights cases under Protocol 14 is pictured in figure 3. Initial admissibility decisions in individual cases are made by a single judge and are final.<sup>119</sup> This is intended to release the manpower that is currently tied up by having committees of three judges examine applications for admissibility.<sup>120</sup> If the case is admissible, it is forwarded to a committee of three judges or a chamber of seven judges.<sup>121</sup> Committees may decide on admissibility. If the decision on admissibility is positive, the committee may render a decision on both admissibility and the merits, but the latter only in cases that concern subjects that are “already the subject of well-established case-law of the Court.”<sup>122</sup> Committee decisions must be unanimous to be final.<sup>123</sup> Applications that are admissible, but not “already the subject of well-established case-law of the Court,” go to a chamber.<sup>124</sup> Chambers’ decisions on individual applications will cover both admissibility and merits. Chambers make the initial decision on the admissibility of interstate cases and may make decisions in those cases on both admissibility and merits. But the two types of decision in interstate cases must be made separately.<sup>125</sup>

¶36 Protocol 14 added one more hurdle to admissibility: In the future, applications may be found to be inadmissible if

the applicant has not suffered a significant disadvantage unless respect for human rights as defined in the Convention and the Protocols thereto requires an examination of the application on the merits and provided that no case may be rejected on this ground which has not been duly considered by a domestic tribunal.<sup>126</sup>

This criterion appears to give the court a lot of wiggle room in determining what is a “significant disadvantage.” The court is restrained from abusing this criterion by the requirement that it examine cases that affect the application or interpretation of the Convention or national law even though their facts may seem trivial.

¶37 Protocol 14 also allows the Commissioner for Human Rights to participate in hearings.<sup>127</sup> The Commissioner for Human Rights is not a leftover from the

117. See Council of Eur., *Press Release: Secretary General Welcomes Forthcoming Entry into Force of Protocol No. 14* (Feb. 18, 2010) available at [https://wcd.coe.int/ViewDoc.jsp?id=1585729&Site=DC&ShowBanner=no&Target=\\_self&BackColorInternet=F5CA75&BackColorIntranet=F5CA75&BackColorLogged=A9BACE#](https://wcd.coe.int/ViewDoc.jsp?id=1585729&Site=DC&ShowBanner=no&Target=_self&BackColorInternet=F5CA75&BackColorIntranet=F5CA75&BackColorLogged=A9BACE#).

118. Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Chart of Signatures and Ratifications, <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=194&CM=8&DF=27/07/2010&CL=ENG> (last visited July 27, 2010).

119. ECHR, *supra* note 38, art. 27 (1).

120. Protocol 14 Explanatory Report, *supra* note 102, at ¶ 38; Paul L. McKaskle, *The European Court of Human Rights: What It Is, How It Works, and Its Future*, 40 U.S.F. L. REV. 1, 62 (2005).

121. ECHR, *supra* note 38, art. 27(3).

122. *Id.* art. 28(2).

123. *Id.* art. 28.

124. *Id.* art. 29(1).

125. *Id.* art. 29(2).

126. Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms art. 12, May 13, 2004, E.T.S. No. 194, available at <http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=194&CM=8&DF=01/08/2010&CL=ENG>. This is part of article 35 of the current ECHR.

127. *Id.* art. 13 (amending art. 36 of the ECHR).

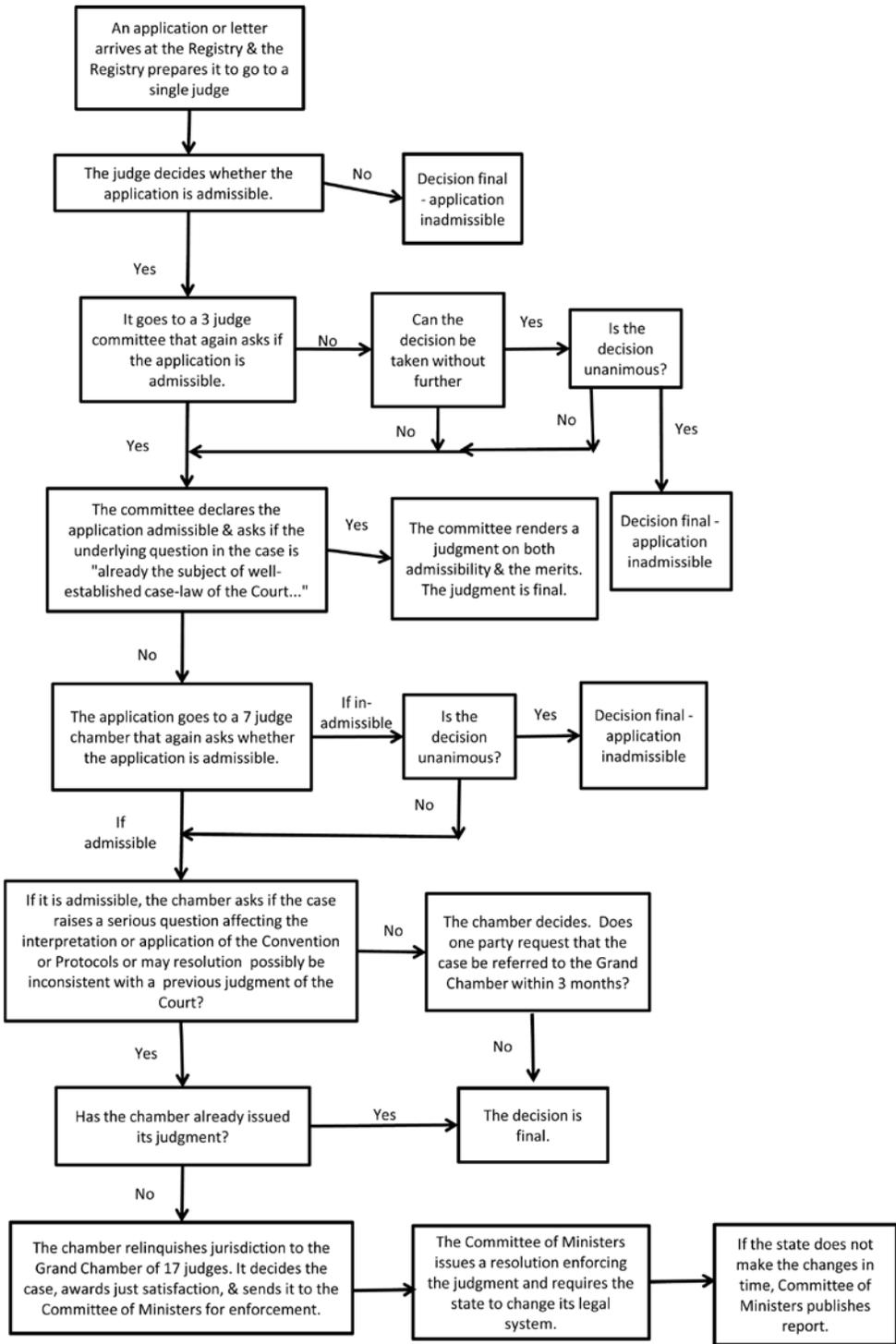


Figure 3. Process under Protocol 14

earlier Commission; it is a new position whose primary responsibilities are the promotion of human rights in Europe and the provision of support for national governments that wish to strengthen the protection of human rights by their courts or other institutions. The Commissioner's participation has the potential to add an objective and knowledgeable voice to the procedure.

¶38 Perhaps the most momentous change of all was the granting of permission to the European Union (EU) to accede to the ECHR. When the European Coal and Steel Community (ECSC) was founded in 1951, its goals were restricted to the economic sphere: "[T]he treaty is concerned with the establishment of a common market for coal and steel, managed by joint institutions on the basis of agreed policies."<sup>128</sup> Unlike the Council of Europe, the ECSC was to have its own power to put into effect the policies on which the members agreed. In other words, it was to have the power to act under the direction of, but independently of, the individual members.<sup>129</sup>

¶39 Eventually issues related to human rights began to appear in cases that came before the European Court of Justice (ECJ), which is the judicial arm of the EU. It was found that the fundamental freedoms of human rights are inextricably bound to the freedom to act as a player in a free market system. Because there was nothing explicit in the ECSC treaty or its progeny about human rights, the ECJ began to take inspiration from sources outside the EU treaties, principally the ECHR. It did not cite the ECHR as authority—it merely derived general principles of law from it. In other words, it took the ECHR as a source of customary law. As the importance of human rights to the EU increased, the EU gradually took steps to recognize and then adopt these as general principles of law. The Treaty on European Union of 1992 recognized the ECHR as general principles of law,<sup>130</sup> and the EU approved its own Charter of Fundamental Rights in 2000.<sup>131</sup> The Charter did not create new rights, but enshrined the rights that the ECJ had found to be "general principles of law."

¶40 Although it would seem natural for the EU to become a party to the ECHR, there are some potential consequences that might not be immediately apparent. Indeed, the explanatory report to Protocol 14 says that many of these consequences will have to be worked out and put into another protocol or an accession treaty.<sup>132</sup> Nevertheless it would seem that some are foreseeable.<sup>133</sup>

¶41 A 2002 report of the Steering Committee on Human Rights addresses very briefly and superficially the question of the "means to avoid any contradiction between the legal system of the European Communities/Union and the system of

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128. STANLEY HENIG, *THE UNITING OF EUROPE* 27 (2d ed. 2002).

129. *Id.* at 13.

130. Treaty on European Union, art. F(2), July 29, 1992, 1757 U.N.T.S. 3, 12.

131. Charter of Fundamental Rights of the European Union, Dec. 18, 2000, 2000 O.J. (C364) 1.

132. See Protocol 14 Explanatory Report, *supra* note 102, ¶ 101.

133. See generally HARRIS ET AL., *supra* note 43, at 28–30; Hans Christian Krüger, *Reflections Concerning Accession of the European Communities to the European Convention on Human Rights* 21 PENN ST. INT'L L. REV. 89 (2002).

the European Convention on Human Rights.”<sup>134</sup> Such treatment implies that the relationship between the two courts and the choice of law between the EU Charter and the ECHR is unclear and would need to be clarified in any accession instruments. Indeed, one of the court’s current and most important concerns is keeping its jurisprudence consistent.<sup>135</sup> This leads to further questions about the consistency of law among the Council of Europe, the EU, and individual states, which is a topic of great complexity. Although EU accession was certainly proposed in order to simplify the situation, it can only do so by a thoughtful, even prescient, plan for bringing the two institutions and their law together.

¶42 It is clear that the EU would be subject to the jurisdiction of the ECtHR, just as the state parties are.<sup>136</sup> A citizen, or even a state member of the EU, could file an application against it, although the latter situation would probably be addressed within the EU.<sup>137</sup> Complaints against the EU would be subject to the ECtHR admissibility criteria, including the exhaustion of domestic remedies.<sup>138</sup> Domestic remedies in this case, however, would be those of the EU, perhaps the ECJ. ECJ procedures would not be considered to be “another procedure of international investigation or settlement” as required for state parties by article 35(2)(b).<sup>139</sup> The EU might be brought into a case as a third party under article 36(1) in which one of its citizens is the applicant. This could lead to an enormous number of such interventions by the EU, since its state members are such a large part of the Council of Europe.<sup>140</sup>

¶43 Another possibility is that the EU might want to be a co-defendant when its law is at issue or it might be brought in to ensure the proper administration of justice.<sup>141</sup> The EU would, of course, participate in the Committee of Ministers’ enforcement proceedings.<sup>142</sup> It is not clear, however, whether it would vote on all cases or only on those that concerned EU law.<sup>143</sup> If the EU lost a case, the Committee of Ministers could issue a resolution directing it to provide just satisfaction to a successful complainant or to make changes to its legal system, as it does to individual states.

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134. COUNCIL OF EUR., STUDY OF TECHNICAL AND LEGAL ISSUES OF A POSSIBLE EC/EU ACCESSION TO THE EUROPEAN CONVENTION ON HUMAN RIGHTS 17 (June 28, 2002), available at [http://www.coe.int/t/e/human\\_rights/cddh/2.\\_activities/StudAccessionEU\\_en.pdf](http://www.coe.int/t/e/human_rights/cddh/2._activities/StudAccessionEU_en.pdf).

135. JANIS ET AL., *supra* note 53, at 878–85; Council of Eur., High Level Conference on the Future of the European Court of Human Rights, Interlaken Declaration PP 8, PP 10(4) (Feb. 19, 2010), available at [http://www.eda.admin.ch/etc/medialib/downloads/edazen/topics/europa/euroc.Par.0133.File.tmp/final\\_en.pdf](http://www.eda.admin.ch/etc/medialib/downloads/edazen/topics/europa/euroc.Par.0133.File.tmp/final_en.pdf).

136. Israel de Jesús Butler & Olivier De Schutter, *Binding the EU to International Human Rights Law*, 27 Y.B. EUR. L. 277, 301 (2008).

137. See COUNCIL OF EUR., *supra* note 134, at 12–14.

138. *Id.* at 12.

139. *Id.* at 11.

140. *Id.* at 12.

141. *Id.* at 13.

142. *Id.* at 9–10.

143. *Id.* at 10.

## Resolution of Cases Before the European Court of Human Rights

### Principles Guiding Decisions<sup>144</sup>

¶44 There are several principles that are not explicitly discussed by the ECtHR, but that nevertheless influence it. The first is subsidiarity, which means that any task that an organization undertakes should be done at the lowest level possible. It could be expressed conversely: the only tasks that should be done at a higher level are those that only the higher level is capable of doing. Thus the court and the Convention are considered to be safety nets under the national legal systems that assure the people of those nations that they have recourse should their legal systems fail to afford them the rights of the ECHR. Although the terms “subsidiary” or “subsidiarity” are not used in the ECHR, the principle is inherent in particular parts of it. Article 53, for example, guarantees that the Convention does not limit or derogate from rights in domestic law. Article 1 gives responsibility to the contracting parties to “secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.” Article 13 puts the burden on the contracting states to provide domestic remedies to citizens whose rights under the Convention have been violated “notwithstanding that the violation has been committed by persons acting in an official capacity.”

¶45 The second principle is the “margin of appreciation.” It is essentially the deference the court shows contracting states’ interpretations of the particularities of their own legal systems. This principle has been “used to decide whether or not a state’s interference with a protected right is ‘necessary in a democratic society’ to achieve certain interests.”<sup>145</sup> It has been applied to a number of rights under the Convention.<sup>146</sup> It is particularly difficult for the court to apply this principle consistently across legal systems that seem to defy comparison.<sup>147</sup>

¶46 A related principle is that of proportionality. When the ECHR allows states to restrict a right, the state must restrict that right only insofar as is necessary to achieve a legitimate goal. In some cases the Convention explicitly allows such restrictions; in others the ECtHR has inferred them even though they are not in the text.<sup>148</sup> As mentioned earlier, article 15 allows states to limit the rights in the Convention “[i]n time of war or other public emergency threatening the life of the nation . . . .” The second paragraph of articles 8 through 11 all allow some restrictions. For example, the right to respect for private and family life applies

except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well being of the country, for

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144. The principles described in this section do not come from the ECHR, but are widely noted in the literature. See generally F. Matscher, *Methods of Interpretation of the Convention*, in THE EUROPEAN SYSTEM FOR THE PROTECTION OF HUMAN RIGHTS, *supra* note 77, at 63.

145. JANIS ET AL., *supra* note 53, at 242 (quoting *Frette v. France*, 2002-I Eur. H.R. Rep. 351).

146. *Id.*

147. See *id.* at 107; R. St. J. Macdonald, *The Margin of Appreciation*, in THE EUROPEAN SYSTEM FOR THE PROTECTION OF HUMAN RIGHTS, *supra* note 77, at 83, 83.

148. See Marc-André Eissen, *The Principle of Proportionality in the Case-Law of the European Court of Human Rights*, in THE EUROPEAN SYSTEM FOR THE PROTECTION OF HUMAN RIGHTS, *supra* note 77, at 125, 131–37.

the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.<sup>149</sup>

In the most general terms, the purpose of proportionality is to protect individual rights from limitation by states when such limitation exceeds what is necessary to accomplish some public good, such as the exercise of the Convention's rights, the protection of democracy, or the suppression of crime.

¶47 Under the principle of "Fourth Instance," the ECtHR is not an appellate court and applications to it are not appeals "from the decisions of national courts applying national law."<sup>150</sup> The court will not second guess "errors of fact or law allegedly committed by a national court unless or insofar as they may have infringed rights and freedoms protected by the Convention."<sup>151</sup> The article 6 guarantee of a fair trial is procedural; it does not guarantee a fair outcome.

### "Just Satisfaction" and Enforcement

¶48 The court may award "just satisfaction" to the parties "if the internal law of the High Contracting Party concerned allows only partial reparation to be made."<sup>152</sup> This is supported by article 46, which says: "The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties." In other words, ratification of the Convention constitutes agreement to put the court's judgments into effect. "Thus assumption of responsibility entails three obligations: the obligation to put an end to the violation, the obligation to make reparation . . . , and, finally, the obligation to avoid similar violations."<sup>153</sup> "Just satisfaction" may be merely the judgment of the court; a finding against a government may be enough to vindicate the applicant. On the other hand, the court may also award monetary damages. It did so for the first time in 1974 in *Neumeister v. Austria*.<sup>154</sup> Since then it has increased this practice to the point that one could now say that it is not uncommon.<sup>155</sup> Monetary awards are made for both pecuniary and nonpecuniary loss and may include the expenses of bringing the application and back interest when a government delays payment.<sup>156</sup>

¶49 Article 46(2) of the Convention gives the Committee of Ministers the responsibility for enforcing the court's judgments. If the government fulfills the requirements of the court's judgments or the parties come to a friendly settlement, the Committee adopts a resolution accepting the government's actions or the friendly settlement and stating that no further action is necessary.<sup>157</sup> Otherwise, the Committee asks the government to submit information on the progress toward

149. ECHR, *supra* note 38, art. 8.

150. HARRIS ET AL., *supra* note 43, at 14.

151. *Id.* (quoting *Garcia Ruiz v. Spain*, 1999-I Eur. Ct. H.R. 87 ¶ 28).

152. ECHR, *supra* note 38, art. 41.

153. ELISABETH LAMBERT ABDELGAWAD, *THE EXECUTION OF JUDGMENTS OF THE EUROPEAN COURT OF HUMAN RIGHTS* 10 (Human Rights Files, No. 19, 2d ed. 2008).

154. *Neumeister v. Austria*, 17 Eur. Ct. H.R. (ser. A) (1974).

155. See REID, *supra* note 76, at 608–56 for a list of monetary awards in individual cases.

156. HARRIS ET AL., *supra* note 43, at 857–58.

157. Council of Eur., Rules of the Committee of Ministers for the Supervision of the Execution of Judgments and of the Terms of Friendly Settlements (May 10, 2006), available at [http://www.coe.int/t/dghl/monitoring/execution/Documents/CMrules2006\\_en.asp](http://www.coe.int/t/dghl/monitoring/execution/Documents/CMrules2006_en.asp).

fulfillment and puts the issue on the agenda of its next human rights meeting.<sup>158</sup> Although the documents submitted to the Committee are public, its deliberations are confidential. It may take any of the following actions: (1) attempt to bring the parties to a friendly settlement, (2) adopt an interim resolution of concern, or (3) threaten to take action under article 8 of the Statute, which allows the Committee of Ministers to end the government's membership in the Council. No contracting party has yet been excluded from the Council.

### Compliance

¶50 Although there have been a number of partial or impressionistic attempts to assess the contracting parties' compliance with the court's judgments, there has been no comprehensive and reliable study. Certainly it varies. Sometimes governments comply with a judgment quickly and completely; other times belatedly, incompletely, or not at all.<sup>159</sup>

¶51 Indeed there are deep, inherent difficulties to any such assessment. There is an enormous variation in the cultures of the forty-seven members of the Council, and it is difficult for outsiders to assess how deeply those cultures have assimilated the values of the ECHR.<sup>160</sup> The same could be said of the structure and operation of the member states' governments and legal systems. Finally, it is unclear what the most reliable or appropriate basis of any such comparison would be. Should the comparison be made to compliance with rulings of domestic courts; or the compliance of nations with the decisions of other international bodies; or the extent of the adoption of the ECHR into the legal system of the members?<sup>161</sup> Success could also be measured by the number of applications received, the extent to which the members have ratified or acceded to the Convention, the jurisdiction of the court, and the right of individual petition.<sup>162</sup>

¶52 There are, however, some good reasons for concluding that compliance is high. Although states have obvious, material interests in international economic, trade, and travel agreements, human rights agreements require governments to accept an obligation with no corresponding benefit to them. Indeed, agreement to the ECHR opens a government to potential complaints, embarrassment, and the payment of damages. The wonder is that they would agree to it in the first place. In addition, although the contracting states are not required to incorporate the Convention into their national law, they have all done so.<sup>163</sup> The efficacy of the court is, therefore, often hidden in the guise of the ordinary workings of the contracting states' legal systems.<sup>164</sup> This reasoning leads most commentators to con-

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158. ABDELGAWAD, *supra* note 153, at 33.

159. JANIS ET AL., *supra* note 53, at 105 n.90, 109.

160. *Id.* at 107.

161. *Id.* at 108.

162. *Id.*

163. HARRIS ET AL., *supra* note 43, at 23.

164. Janis makes the point that most of the enforcement of international law in general occurs within national legal systems: "When a treaty provision or a customary international law or any other international law norm is used as a rule of decision by a municipal court or administrative agency, international law has all the efficacy that a municipal legal system can muster." JANIS ET AL., *supra* note 53, at 112.

clude that compliance is high. A review of states' compliance to the court's judgments gives one the impression that they behave a lot like teenagers. They may not do exactly what you want them to do when you want them to do it, but, after some admonishment, they often do more or less what you want sooner or later.

### Pilot Judgments

¶53 In yet another change to try to improve its efficiency, the ECtHR has begun to use what is called the pilot judgment procedure. The court explains it as follows:

The central idea behind the pilot judgment procedure is that where there are a large number of applications concerning the same problem, applicants will obtain redress more speedily if an effective remedy is established at national level than if their cases are processed on an individual basis in Strasbourg.<sup>165</sup>

Pilot judgments are used in the case of repetitive applications that share a common, root cause. The court selects a particular case that appears to be reasonably representative of the entire group. It may adjourn the case during the adjudicatory process to give the contracting state time to remedy the situation. Although the duration of the adjournment may be prescribed at its beginning, the court may restart the case at any time "if this is what the interests of justice require . . ."<sup>166</sup> The ECtHR used the pilot judgment procedure for the first time in 2004.<sup>167</sup>

### The Social Charter and the Expansion of Rights

¶54 Although commentators regard the ECHR as the crowning achievement of the Council of Europe, the Council has adopted many other treaties that have developed human rights beyond their traditional core. First among these is the European Social Charter (ESC).<sup>168</sup> The Charter was opened for signature on October 18, 1961. A major Additional Protocol was added in 1988 and other lesser amendments were added at various other times. The whole Charter was revised and reissued as an autonomous treaty in 1996.<sup>169</sup> The new treaty incorporated the Additional Protocol of 1988, other amendments to the Charter, principles of other international social and economic treaties, and the principles of members' domes-

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165. Eur. Court of Human Rights, *The Pilot-Judgment Procedure* ¶ 6 (2009), [http://www.echr.coe.int/NR/rdonlyres/DF4E8456-77B3-4E67-8944-B908143A7E2C/0/Information\\_Note\\_on\\_the\\_PJP\\_for\\_Website.pdf](http://www.echr.coe.int/NR/rdonlyres/DF4E8456-77B3-4E67-8944-B908143A7E2C/0/Information_Note_on_the_PJP_for_Website.pdf).

166. *Id.* ¶ 5.

167. *Id.* ¶ 8 (citing *Broniowski v. Poland*, 2004-V Eur. Ct. H.R. 1).

168. European Social Charter, Oct. 18, 1961, 529 U.N.T.S. 89, E.T.S. No. 35, available at <http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=035&CM=8&DF=27/07/2010&CL=ENG>.

169. European Social Charter (revised), July 3, 1996, E.T.S. No. 163, available at <http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=163&CM=8&DF=28/07/2010&CL=ENG>. This does not replace the original Charter, but complements it. *Id.* art. B; European Social Charter (revised): Explanatory Report ¶ 10, <http://conventions.coe.int/Treaty/en/Reports/Html/163.htm>.

tic social and economic legislation.<sup>170</sup> The Council of Europe devotes part of its web site to the ESC, and this is an excellent place to find many of the documents that this section of the article describes.<sup>171</sup>

¶55 The ESC has a preamble, six parts, and an appendix. The preamble makes clear that the Charter is an extension of the ECHR and that its purpose is to improve the “standard of living and . . . social well-being” of members’ populations. The ESC deals with economic and social policies that apply to groups of people within members’ societies, whereas the ECHR enumerates individual rights. The first part of the ESC consists of thirty-one brief policy statements that members pledge to pursue.<sup>172</sup> They cover principles such as the right to work; the right of both labor and employers to organize; the right to the protection of health; the right of the family to social, legal, and economic protection; the right of elderly persons to social protection; and the right to housing. Although at first glance most of them appear to have to do with conditions of work, many deal with protecting the disadvantaged of all kinds. The second part amplifies the meaning of each of the policies stated in part I. Members are required to consider themselves bound to implement

- six items of their choice from a list of nine from part I;
- at least sixteen other articles or sixty-three numbered paragraphs of their choice from part II; and
- to adopt “a system of labour inspection appropriate to national conditions.”<sup>173</sup>

¶56 The ESC establishes a two-part system of supervision consisting of regular reports and collective complaints. The reports are submitted to the European Committee of Social Rights (ECSR), which consists of fifteen members elected from five regions of Europe; before 1998 this was known as the Committee of Independent Experts.<sup>174</sup> Governments submit two types of reports on the ESC articles in part II: one on those they have ratified and another on those they have not ratified.<sup>175</sup> The process for submitting reports on ratified articles began as a fairly simple process, but has become rather complex over time. An excellent explanation of the past calendars and future schedules through 2011 can be found in Świątkowski’s *Charter of Social Rights of the Council of Europe*.<sup>176</sup>

¶57 After a thorough, substantive examination of these reports, which may include face-to-face meetings with representatives of the government concerned, the Committee issues its report on whether or not the country submitting the report is in compliance with the articles that it has ratified.<sup>177</sup> This function of the

170. European Social Charter (revised): Explanatory Report, *supra* note 169, ¶¶ 7, 8.

171. Council of Eur., European Social Charter, <http://www.coe.int/T/DGHL/Monitoring/SocialCharter> (last updated June 9, 2010).

172. European Social Charter (revised), *supra* note 169, pt. I.

173. *Id.* pt. III, art. A(1), (4).

174. See ANDRZEJ MARIAN ŚWIĄTKOWSKI, CHARTER OF SOCIAL RIGHTS OF THE COUNCIL OF EUROPE 377–78 (2007).

175. European Social Charter, *supra* note 168, arts. 21, 22.

176. ŚWIĄTKOWSKI, *supra* note 174, at 379–82.

177. *Id.* at 381–83.

ECSR is quasi-judicial insofar as its reports have a particularly strong influence on subsequent actions taken.<sup>178</sup> They are nevertheless not binding.<sup>179</sup> The Committee can also send a copy of the report to the International Labour Organization (ILO). The *Conclusions of the European Committee of Social Rights* has published its reports since 1969.<sup>180</sup>

¶58 As part of the article 22 process, the ECSR commonly meets with representatives of the country concerned and often gives the government advice on how to meet the challenges preventing further implementation of the unratified articles. In a sense the Committee acts as technical advisors.<sup>181</sup> The report is then sent to the “national organizations of workers and employers,”<sup>182</sup> and relevant nongovernmental organizations.<sup>183</sup> The report and the responses thereto are then forwarded to the Governmental Committee, which is “the political consultative body to the Committee of Ministers.”<sup>184</sup>

¶59 The ECSR makes recommendations on the basis of a substantive examination of the content submitted by the government.<sup>185</sup> The Governmental Committee re-examines the content, considers political factors, and then selects the cases that will be referred to the Committee of Ministers.<sup>186</sup> Although the Committee of Ministers usually adopts the recommendations of the Governmental Committee, in a few cases it has adopted the recommendations of the ECSR instead. While the Committee of Ministers’ resolutions are not binding, they do express weighty substantive and political opinions.<sup>187</sup>

¶60 The system of collective complaints was created by the Additional Protocol to the European Social Charter Providing for a System of Collective Complaints, which was opened for signature on November 9, 1995. The Protocol allows the following kinds of organizations to bring complaints against a state that has ratified, acceded to, or accepted it:

- a. International organisations of employers and trade unions referred to in paragraph 2 of Article 27 of the Charter;
- b. Other international non-governmental organisations which have consultative status with the Council of Europe and have been put on a list established for this purpose by the Governmental Committee;

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178. *See id.* at 378.

179. *Id.* at 383.

180. These are available for 2003–present at Council of Eur., *Conclusions of the European Committee of Social Rights*, [http://www.coe.int/t/dghl/monitoring/socialcharter/conclusions/ConclusionsYear\\_en.asp](http://www.coe.int/t/dghl/monitoring/socialcharter/conclusions/ConclusionsYear_en.asp) (last visited July 28, 2010). Earlier years can be found by searching the European Social Charter database at <http://hudoc.esc.coe.int/esc2008/query.asp?language=en> (last visited July 28, 2010).

181. ŚWIĄTKOWSKI, *supra* note 174, at 383–84.

182. *Id.* at 384.

183. There are two types: national nongovernmental organizations and specialized international nongovernmental organizations that have consultative status to the Council of Europe.

184. ŚWIĄTKOWSKI, *supra* note 174, at 385; Council of Eur., *Governmental Committee: Follow-Up of Conclusions*, [http://www.coe.int/t/dghl/monitoring/socialcharter/GovernmentalCommittee/GCdefault\\_en.asp](http://www.coe.int/t/dghl/monitoring/socialcharter/GovernmentalCommittee/GCdefault_en.asp) (last visited July 28, 2010).

185. ŚWIĄTKOWSKI, *supra* note 174, at 383–84.

186. *Id.* at 386.

187. *Id.* at 388.

- c. Representative national organisations of employers and trade unions within the jurisdiction of the Contracting Party against which they have lodged a complaint.<sup>188</sup>

¶61 There is a fourth kind of organization that can file a collective complaint: a representative national organization that has particular competence in the matters covered by the Charter and that the state has declared may file such complaints against it. The Subcommittee of the Governmental Social Committee (the Governmental Committee) to which section (a) refers may invite two employers' organizations and two trade union organizations as observers with consultative status. The employers' organizations must be representative; an individual employer such as a corporation cannot bring a collective complaint. The complaint must refer to the specific article and paragraph of the Charter that it alleges the state has not satisfactorily applied and indicate in what respect the application has not been satisfactory.<sup>189</sup> The complaint is transmitted to the ECSR, which may ask both the contracting party and the organization that has filed the complaint to submit information on its admissibility.<sup>190</sup> If it is admissible, the Committee asks the parties to submit written information relevant to the complaint and the other contracting parties to submit any comments they may wish. The ECSR also notifies international organizations of employers and trade unions referred to in paragraph 2 of article 27 of the complaint and invites them to submit observations. The Charter allows the Committee to hold a hearing after reviewing the documents.<sup>191</sup>

¶62 The ECSR then writes a report that describes its investigation and presents its conclusion. That report is sent to the party that made the complaint, the Committee of Ministers, and all contracting parties of the ESC.<sup>192</sup> The Committee of Ministers then votes on whether or not the state against whom the complaint was lodged applied the ESC satisfactorily. If the vote is against the party, the Committee of Ministers votes on a resolution that recommends the actions the defendant party must take to improve its application of the ESC. Only contracting parties to the ESC can vote and the resolution must pass by a two-thirds majority.<sup>193</sup> If the report raises new issues, the contracting party may request that the Committee of Ministers consult its Governmental Committee on those issues.<sup>194</sup> Only contracting parties may vote, and the resolution must pass by a two-thirds majority.<sup>195</sup> The contracting party must include in its next regular report a description of the measures it has taken to improve its application of the ESC.<sup>196</sup>

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188. Additional Protocol to the European Social Charter Providing for a System of Collective Complaints, Nov. 9, 1995, 2045 U.N.T.S. 224, art. 1.

189. *Id.* art. 4.

190. *Id.* arts. 5, 6.

191. *Id.* art. 7.

192. *Id.* art. 8.

193. *Id.* art. 9(1).

194. *Id.* art. 9(2).

195. *Id.*

196. *Id.* art. 10.

## Conclusion

¶63 The Council of Europe is sixty-one years old. It has seen the reconstruction of Europe following World War II; the boom of the 1950s and '60s; the bust of the 1970s; the Cold War and its end; the emergence of nations formerly dominated by or a part of the Soviet Union; and the recent worldwide recession. During its existence, the Council has been in the forefront of the establishment of human rights norms through binding treaties. Although the treaties described above have been its most important and influential, it has enacted more than two hundred others.<sup>197</sup> These treaties cover an enormous array of topics such as the prevention of torture; the suppression of terrorism; child custody and visitation; the sexual exploitation and abuse of children; trafficking in human beings; the protection of the human being with regard to the application of biology and medicine; the protection of the European archaeological heritage; the laundering, search, seizure, and confiscation of the proceeds from crime; the elaboration of a European pharmacopeia; and the compensation of victims of violent crime. These treaties have contributed to the legal cohesion of the states of Europe and have made that continent the most advanced in the world with respect to the protection of human rights and fundamental freedoms.

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197. See Council of Eur., *supra*, note 39.