Note the flexibility of conceptions of the term 'region'. For a range of purposes, such as caucuses among state representatives in the UN Commission on Human Rights, the UN divides the world into five geo-political regions: Asia, Africa, Eastern Europe, Latin America and Western Europe and Others (including the United States). That classification need bear no relation whatsoever to appropriate definition of regions for purposes of a human rights regime. For example, the Pacific region (with or excluding Australia and New Zealand), South Asia, West Asia, Southeast Asia and possibly other groupings of states might all be considered appropriate units for the creation of a given type of joint human rights mechanism.

QUESTIONS

1. Consider the observation that 'regional' and sub-regional blocs and groupings, whatever their purpose, are by their very nature inward-looking and designed to serve specific interests and objectives. Comment on this, and consider whether these blocs and groupings are more concerned with the expansion of immediate advantages than with long-term world peace.

2. What is the merit of the argument that national legal orders are the most appropriate units for the protection of human rights and that sub-regional arrangements are of little value?

3. To what extent have the regional blocs and groupings actually expanded the protection of human rights?

4. How might the conflict between the protection of human rights and the national interest be resolved? What lessons are to be learned from the experiences of the European Convention and the UN

5. In what ways have regional and sub-regional groupings failed to live up to the expectations that were pinned on them, and what lessons can be drawn from the failure?

ADDITIONAL READING


B. THE EUROPEAN CONVENTION SYSTEM

1. INTRODUCTION AND OVERVIEW

The European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) was signed in 1950 and entered into force in 1953. The ECHR is of particular importance within the context of international human rights for several reasons: it was the first comprehensive treaty in the world in this field; it established the first international complaints procedure and the first international court for the determination of human rights matters; it remains the most judicially developed of all the human rights systems; it has generated a more extensive jurisprudence than any other part of the international system; and it now applies to some 30% of the nations in the world. Our principal concern in this selective examination of the European Convention is with its evolving institutional architecture, particularly with the European Court of Human Rights and the manner in which it has performed the judicial function.

The impetus for the adoption of a European Convention came from three factors. It was first a regional response to the atrocities committed in Europe during the Second World War and an affirmation of the belief that governments respecting human rights are less likely to wage war on their neighbours. Secondly, both the Council of Europe, which was set up in 1949 (and under whose auspices the Convention was adopted), and the European Union (previously the European Community or Communities, the first of which was established in 1952) were partly based on the assumption that the best way to ensure that Germany would be a force for peace, in partnership with France, the United Kingdom and other Western European states, was through regional integration and the institutionalization of common values. This strategy contrasted strongly with the punitive, reparations-based, approach embodied in the 1919 Versailles Treaty after the First World War.

Thus, the Preamble to the European Convention refers (perhaps somewhat optimistically at the time) to the 'European countries which are like-minded and have a common heritage of political traditions, ideals, freedom and the rule of law...'. But this statement also points to the third major impetus towards a Convention - the desire to bring the non-Communist countries of Europe together within a common ideological framework and to consolidate their unity in the face of the Communist threat. 'Genuine democracy' (to which the Statute of the Council of Europe commits its members) or the effective political democracy to which the Preamble of the Convention refers, had to be clearly distinguished from the 'people's democracy' which was promoted by the Soviet Union and its allies.

The European Convention's transformation of abstract human rights ideals into a concrete legal framework followed a path which has characterized virtually all
subsequent attempts. The initial enthusiasm was soon tempered by concerns over sovereignty and a reluctance to take the concept of a state’s accountability too far. Thus a call by the Congress of Europe in 1948 for the adoption of a Charter of Human Rights to be enforced by a Court of Justice ‘with adequate sanctions for the implementation of this Charter’ went further than Western European governments were prepared to go. Instead, the final version of the Convention acknowledges in the Preamble that it constitutes only ‘the first steps for the collective enforcement of certain of the Rights stated in the Universal Declaration’.

Both during the drafting of the Convention and in the years after its adoption there was considerable reluctance on the part of key states in relation to many of its key provisions. In this regard the most detailed historical analyses have been undertaken in relation to the United Kingdom and it is an instructive example. During the Second World War, Prime Minister Churchill often returned to the theme that the war was being fought to establish, on impregnable rocks, the rights of the individual; and commentators such as Hersh Lauterpacht insisted that the war was, in large part, about the enthronement of the rights of man and the correlative limitation of state sovereignty. But when victory brought the opportunity to draft a human rights treaty, British diplomats and politicians raised a host of objections, as the following excerpt shows.

ANDREW MORAVCSIK, THE ORIGINS OF HUMAN RIGHTS REGIMES: DEMOCRATIC DELEGATION IN POSTWAR EUROPE

54 Int. Org. 217 (2000), at 238

The British ... supported international declaratory norms but firmly opposed any attempt to establish binding legal obligations, centralized institutions, individual petition, or compulsory jurisdiction. As W. E. Beckett, legal advisor to the Foreign Office and the initiator of the British government’s participation [in the drafting of the ECHR], put it, “We attach the greatest importance to a well-drafted Convention of Human Rights but we are dead against anything like an international court to which individuals think they are aggrieved in this way could go.” ... What issues were raised in confidential British deliberations? The secondary literature on British human rights policy makes much of two British concerns: the fear that residents of British colonies and dependencies might invoke the ECHR, and aversion to European federalism. To judge from confidential discussions, however, neither appears to have been a dominant concern. ...

... Instead British officials and politicians—most notably in Cabinet discussions—dwelled primarily on the fear that the convention would threaten idiosyncratic (but not unambiguously undemocratic) political practices and institutions in the United Kingdom. ...

... The defense of British institutional idiosyncrasy elicited the most violent rhetoric from British politicians and officials. Lord Chancellor Jowitt’s official paper criticized the draft convention ... as:

... so vague and woolly that it may mean almost anything. Our unhappy legal experts ... have had to take their share in drawing up a code compared to which ... the Ten Commandments ... are comparatively insignificant. ... It completely passes the wit of man to guess what results would be arrived at by a tribunal composed of elected persons who need not even be lawyers, drawn from various European states possessing completely different systems of law, and whose deliberations take place behind closed doors. ... Any student of our legal institutions must recoil from this document with a feeling of horror.

... A common complaint was that judicial review would undermine parliamentary sovereignty. Beckett wrote: “It seems inconceivable that any Government, when faced with the realities of this proposal, would take the risk of entrusting these unprecedented powers to an international court, legislative powers which Parliament would never agree to entrust to the courts of this country which are known and which command the confidence and admiration of the world.” “Our whole constitution,” a government document intoned, “is based on the principle that it is for the Parliament to enact the laws and for the judges to interpret the laws.” ...

The specific issue cited most often by the government’s legal authorities was the British policy toward political extremists. A ministerial brief referred to a “blank cheque” that would “allow the Governments to become the object of such potentially vague charges by individuals as to invite Communists, crooks, and crooks of every type to bring actions.” ... Lord Chancellor Jowitt’s complaint was that “the Convention would prevent a future British government from detaining people without trial during a period of emergency ... or judges sending litigants to prison for throwing eggs at them; or the Home Secretary from banning Communist or Fascist demonstrations.” ...

... What blunted British opposition to any postwar European human rights regime was, above all, the fear of resurgent totalitarianism abroad that might pose an eventual military threat to the United Kingdom—precisely as republican liberal theory predicts. This fear reflected not just a concern with a resurgence of Fascism, but also a turnaround in British foreign policy in 1948 in response to the perceived rise of the Communist threat in Western Europe. The West, the government argued, needed not only to maintain the military balance but also to strengthen continental democracies. ... In the minds of British officials, however, the primacy of domestic sovereignty over collective defense of the democratic peace remained unchallenged. The Cabinet mandated efforts to water down the force of any agreement in Britain. British representatives sought to limit the potential risk of open-ended jurisprudence by calling...
for the careful enumeration and definition of human rights before agreeing on any enforcement mechanism. The expectation was that governments would not be able to agree on a list both extensive and precise. Acting on Prime Minister Clement Attlee's direct instruction, the British delegation successfully pressed to place the right of individual petition and the jurisdiction of the court into optional clauses. Foreign Minister Ernest Bevin himself instructed British negotiators to veto any mandatory right of individual petition “even if it [meant] being in a minority of one.”

Having secured these concessions, which essentially rendered the convention unenforceable in Britain, the cabinet unanimously accepted the desirability of signing it.

COMMENT ON ADMISSION TO MEMBERSHIP AND CONTENT OF RIGHTS

This historical review seems a long way from the world of the twenty-first century in which the UK Human Rights Act 1998, however distinctly formulated, made all of the rights recognized in the Convention an integral part of domestic law. More generally, major reforms of institutional provisions of the Convention have helped to move the system closer to that envisaged by the maximalists of the early 1950s. As with many systems for the protection of human rights, progress has required the gradual growth of popular expectations and an accumulation of experience in the functioning of the procedures that has served to assuage the worst fears of governments.

An Overview of the ECHR System

The Council of Europe was established in 1949 by a group of ten states, primarily to promote democracy, the rule of law, and greater unity among the nations of Western Europe. It represented both a principled commitment of its members to these values and an ideological stance against Communism. Over the years its activities have included the promotion of cooperation in relation to social, cultural, sporting and a range of other matters. Until 1990, the Council had 23 members, all from Western Europe. Post-Cold War developments, however, made a major impact upon the Council and by 2007 it had doubled that number.

The conditions for the admission of a state to the Council of Europe are laid down in Article 3 of its Statute. The state must be a genuine democracy that respects the rule of law and human rights and must collaborate sincerely and effectively with the Council in these domains. In practice, such collaboration involves becoming a party to the European Convention on Human Rights. An applicant state must satisfy the Council’s Committee of Ministers that its legal order conforms with the requirements of Article 3. The opinion of the Parliamentary Assembly is sought and the Assembly in turn will appoint an expert group to advise it.

The opinion of the experts is based upon an on-site visit. For example, a 1994 report on the situation in Russia concluded that the requirements were not met. The report noted “important shortcomings with regard to the rights to liberty and security of person and to fair trial” as well as the absence of the rule of law in view of the fact that “activities of public authorities are mainly decided upon according to general policy choices, personal allegiance and the effective power structure.” Russia was admitted, nevertheless, in 1996. This decision by the Council’s Parliamentary Assembly, and another to admit Croatia, were strongly criticized at the time by some human rights advocates.

Since that time the Parliamentary Assembly of the Council of Europe has adopted its own procedure, and established a specialist committee, to monitor the honouring of obligations and commitments by all member states. The committee continues to report regularly on progress in all states, including for example its visit to Russia in 2006.

The importance attached by the states of Central and Eastern Europe to membership of the Council reflected not only a commitment to human rights but a determination to gain respectability within Europe and, perhaps most importantly, to qualify for certain membership benefits as well as for admission to the European Union. Although the process of becoming a party to the Convention is not required to be completed prior to obtaining membership in the Council, it is generally assumed that the domestic legislative and other measures required to enable the state to ratify or accede will be completed within a period of two years.

The rights recognized in the ECHR

Although the initial moves to create a European Convention pre-dated the UN’s adoption of the Universal Declaration, the text of the latter was available to those responsible for the final drafting of the Convention. Eventually the drafters defined rights in terms similar to the early version of the draft Covenant on Civil and Political Rights. (You should now read Articles 2-12 and 14 of the Convention.) Since the Covenant went through numerous changes before adoption, the formulations used in the two treaties sometimes differ significantly. Several weighty provisions appear in only one or the other. For example, the European Convention contains no provision relating to self-determination or to the rights of members of minority groups (Articles 1 and 27 of the ICCPR). Each treaty limits freedoms of expression, association and religion in similar ways (criteria of public safety or
national security, for example), but the European Convention consistently requires that a limitation be 'necessary in a democratic society' (Articles 8–11). The derogation clauses (Article 4 of the ICCPR, Article 15 of the Convention) differ with respect to the list of non-derogable provisions.

Article 1 requires the Parties to 'secure [these rights] to everyone within their jurisdiction', while Article 13 requires the state to provide an 'effective remedy before a national authority' for everyone whose rights are violated. Compare the more demanding Article 2 of the ICCPR, which refers to states' duty to adopt legislative and other measures to give effect to the recognized rights and to 'develop the possibilities of judicial remedy'.

When the Convention was adopted in 1950, there were several outstanding proposals on which final agreement could not be reached. It was therefore agreed to adopt Protocols containing additional provisions. Since 1952, eleven protocols have been adopted. While the majority are devoted to procedural matters, others have recognized the following additional rights: the right to property ('the peaceful enjoyment of [one's] possessions'), the right to education, and the obligation to hold free elections (Protocol 1 of 1952); freedom from imprisonment for civil debts, freedom of movement and residence, freedom to leave any country, freedom from exile, the right to enter the country of which one is a national, and no collective expulsion of aliens (Protocol 4 of 1963); abolition of the death penalty (Protocol 6 of 1983); the right of an alien not to be expelled without due process; the right to appeal in criminal cases, the right to compensation for a miscarriage of justice, immunity of double prosecution for the same offence, and equality of rights and responsibility of spouses (Protocol 7 of 1984); the general prohibition of discrimination (Protocol 12 of 2000); and abolition of the death penalty, in all circumstances (Protocol 13 of 2002). Acceptance of each of the Protocols is optional.

By March 2007, all 46 member states of the Council of Europe were parties to the European Convention, and to Protocol Nos. 2, 3, 5, 8 and 11. Ratifications for the other Protocols were: No. 1–43; No. 4–40; No. 6–45; No. 7–39; No. 9–24; No. 10–25; No. 12–14; No. 13–38; and No. 14–45.

2. THE EUROPEAN COURT AND ITS PROCEDURES

The ECHR provides for both individual petitions (Art. 34) and interstate complaints (Art. 33). The latter are rare, but the opportunity continues to be significant. In contrast, the former, which may be brought by individuals, legal persons (such as corporations), groups of individuals, or non-governmental organisations, have grown exponentially in numerical terms.

The Convention makes clear that the primary responsibility for implementation rests with the member states themselves. The implementation machinery of the Convention comes into play only after domestic remedies are considered to have been exhausted. The great majority of complaints submitted are deemed inadmissible, frequently on the grounds that domestic law provides an effective remedy for any violation that may have taken place. Recall the obligations of member states under Articles 1 and 13 of the Convention to 'secure to everyone' the Convention's rights and to provide 'an effective remedy before a national authority' for violations of those rights. This preference for domestic resolution is also reinforced by the requirement to seek a 'friendly settlement' wherever possible and by the procedures for full government consultation in the examination of complaints.

The remedy given by a domestic court may be pursuant to provisions of domestic law that stand relatively independently of the Convention, although perhaps influenced by it, such as a human rights act, a code of criminal procedure or a constitutional provision that are consistent with the Convention. Or a remedy may be given as a result of the incorporation of the Convention into domestic law, which may be achieved as an automatic consequence of ratification or through the adoption of special legislation. See generally pp. 1087–1099, infra.

COMMENT ON THE DRAMATIC EVOLUTION OF THE ECHR SYSTEM

The system of considering individual complaints is the hallmark of the ECHR regime. Its evolution from a tentative and optional procedure which was used relatively sparingly to one which is now compulsory and extremely widely used has compelled the Contracting States (or states parties, to use UN terminology) to undertake a series of fundamental reforms. Driven by a flood of applications and the ever-present risk that the system will collapse from overload, the Court has been forced to consider very far-reaching and controversial changes and, in the process, to reflect carefully on what exactly it aspires to achieve. Much of the latter debate has taken place under the rubric of whether the ECHR is, or should be, a 'constitutional court'.

When originally devised in the 1950s, and for several decades thereafter, the petition procedure was optional. Only three of the original ten members accepted it from the outset, while many of the rest made clear that they wanted no part of it. For example, it was not until 1981 that France accepted the right of individual complaint for its citizens. And during the 1970s the British Government regularly raised the prospect that it might withdraw its acceptance of the procedure. Until the late 1990s the procedures used were much less 'judicial' than they are today, and were surrounded by safeguards aimed at providing reassurances to governments that they need not fear too much encroachment on their national sovereignty.

In terms of institutions, all complaints were first considered by the European Commission on Human Rights (the Commission). It initially considered whether a complaint was admissible. If it was, an effort was made to broker a 'friendly settlement', as provided for in the Convention. In the absence of such a settlement the Commission reported on the facts and expressed its opinion on the merits of the case. That report went to the Committee of Ministers, a political body, which could endorse or reject it. In instances where the state concerned had opted to accept the compulsory jurisdiction of the Court, either the Commission or that state could refer the case to the Court for a final, binding adjudication including, where appropriate, an award of compensation. The Court was thus dependent on the Commission or the state concerned in order to be able to consider a case. When cases did not go to the
Court but to the Committee of Ministers, which found there had been a violation of the Convention, it might award 'just satisfaction' to the victim.

Over time, more and more states accepted the compulsory jurisdiction of the Court and acceptance of the complaints procedure itself had become unanimous by 1990. A major reform introduced in 1994 (when Protocol No. 9 entered into force) allowed applicants to submit their case to a screening panel composed of three judges, which decided whether the Court should take it up. As the Court’s workload grew, and an increasing number of states from eastern and central Europe joined the ECHR, the need for even more major reforms became irresistible.

There have since been three waves of reform, resulting in Protocol No. 11 of 1994 which took effect in 1998, Protocol No. 14, adopted in 2004 but not yet in force as of May 2007, and a series of subsequent reform proposals that remain the subject of debate. The debate over Protocol No. 14 and subsequent proposals are considered below at p. 1007.

The entire system was streamlined by Protocol No. 11. The right of individual petition became compulsory, the Commission ceased to exist (as of October 1999), the Court became full-time and assumed all of the relevant functions of the Commission, individuals gained direct access to the Court, and the political (and often problematic) role played by the Committee of Ministers is now limited to matters of enforcement.

The System

Proceedings under the individual petitions procedure of Article 34 begin with a complaint by an individual, group or NGO against a state party. To be declared admissible a petition must not be anonymous, manifestly ill-founded, or constitute an abuse of the right of petition. Domestic remedies must have been exhausted; it must be presented within six months of the final decision in the domestic forum and it must not concern a matter which is substantially the same as one which has already been examined under the ECHR or submitted to another procedure of international investigation or settlement. As a result of the Protocol No. 11 reforms, the organisation of the Court is rather complicated. It has been described as follows:

...The Court is composed of a number of judges equal to that of the Contracting States (currently forty-six). Judges are elected by the Parliamentary Assembly of the Council of Europe, which votes on a shortlist of three candidates put forward by Governments. The term of office is six years, and judges may be re-elected. Their terms of office expire when they reach the age of seventy, although they continue to deal with cases already under their consideration.

Judges sit on the Court in their individual capacity and do not represent any State. They cannot engage in any activity which is incompatible with their independence or impartiality or with the demands of full-time office.

The Plenary Court has a number of functions that are stipulated in the Convention. It elects the office holders of the Court, i.e. the President, the two Vice-Presidents (who also preside over a section) and the three other Section Presidents. In each case, the term of office is three years. The Plenary Court also elects the Registrar and Deputy Registrar. The Rules of Court are adopted and amended by the Plenary Court. It also determines the composition of the Sections.

Under the Rules of Court, every judge is assigned to one of the five Sections, whose composition is geographically and gender balanced and takes account of the different legal systems of the Contracting States. The composition of the Sections is varied every three years. The great majority of the judgments of the Court are given by Chambers. These comprise seven judges and are constituted within each Section. The Section President and the judge elected in respect of the State concerned sit in each case. Where the latter is not a member of the Section, he or she sits as an ex officio member of the Chamber. If the respondent State in a case is that of the Section President, the Vice-President of the Section will preside. In every case that is decided by a Chamber, the remaining members of the Section who are not full members of that Chamber sit as substitute members.

Committees of three judges are set up within each Section for twelve-month periods. Their function is to dispose of applications that are clearly inadmissible.

The Grand Chamber of the Court is composed of seventeen judges, who include, as ex officio members, the President, Vice-Presidents and Section Presidents. The Grand Chamber deals with cases that raise a serious question of interpretation or application of the Convention, or a serious issue of general importance. A Chamber may relinquish jurisdiction in a case to the Grand Chamber at any stage in the procedure before judgment, as long as both parties consent. Where judgment has been delivered in a case, either party may, within a period of three months, request referral of the case to the Grand Chamber. Where a request is granted, the whole case is reheard.14

The election of judges

A major challenge facing all international human rights bodies is how to come up with a procedure that ensures that the highest quality judges or committee members are chosen as members of bodies such as the European Court of Human Rights (ECtHR). The Council of Europe has gone further than most other international bodies in an effort to ensure the objectivity of the process and the likelihood that highly qualified candidates will be chosen. The main safeguards are to require each state to nominate three candidates for each vacancy, and to provide the Human Rights Directorate of the Council, as well as the Committee of Ministers, with an opportunity to evaluate candidates. In addition, candidates are interviewed by a sub-committee of the Parliamentary Assembly, which then makes recommendations to the Assembly before it votes. However, this relatively elaborate procedure appears, in practice, to be rather flawed. After carefully examining its functioning a leading European non-governmental group, Interights, identified the following list of key problems:

1. States have absolute discretion with respect to the nomination system they adopt. Governments are not given guidelines on procedures, nor are they required to report on or account for their national nomination processes. In practice, even in the most established democracies, nomination often involves a 'tap on the shoulder'.

from the Minister of Justice or Foreign Affairs, and frequently rewards political loyalty more than merit. Nominees often lack the necessary experience and even fail to meet the very general criteria set out in the Convention.

2. The Committee of Ministers, while on paper the body that should be empowered to engage with governments on their nomination procedures and reject unacceptable lists, is concerned more with safeguarding State sovereignty than with ensuring the quality of nominated candidates. Accordingly it fails to engage in meaningful dialogue with States on their internal nomination procedures and to evaluate the quality of candidates submitted.

3. The only safeguard in the procedure lies at the Sub-Committee level. Regrettably, this mechanism is at best limited and at worst is fundamentally flawed. The Sub-Committee consists of parliamentarians, most of whom lack human rights or international law expertise. The Sub-Committee ranks candidates after a cursory 15-minute interview. Its deliberations are secret and it does not give reasons for its ranking of candidates. There have been cases where its ranking of candidates has appeared to be based on or influenced by party politics rather than the merits of the prospective judges.

4. At the final stage, the Parliamentary Assembly is provided with limited information on candidates and the five political groups appear to dictate voting patterns. Lobbying by States, and occasionally by judicial candidates, jeopardizes the future independence (actual and apparent) of judges.

5. The current possibility of re-appointing sitting judges renders them particularly susceptible to unacceptable interference from their governments and risks obedience to their governments.

6. The result is a Court less qualified and less able to discharge its crucial mandate than it might otherwise be. The Court also suffers from gender imbalance, at least in part due to the opaque and politicized nature of the nomination and election procedure.

In 2006, a Group of Wise Persons appointed by the Council made the following policy recommendations:

The professional qualifications and knowledge of languages of candidates for the post of judge should be carefully examined during the election procedure. For this purpose, before the Parliamentary Assembly considers the candidates, an opinion on the suitability of the candidates could be given by a committee of prominent personalities possibly chosen from among former members of the Court, current and former members of national supreme or constitutional courts and lawyers with acknowledged competence. As regards the members of the proposed Judicial Committee, the prior opinion should be given by the Court.

The Group also looked at the particularly sensitive issue of the number of judges. In the Group’s opinion, the logic underlying the new role proposed for the Court [see p. 1013 infra] and the setting up of the Judicial Committee should lead in due course to a reduction in the number of judges.\(^\text{14}\)

\(^{11}\) Jutta Lieberk€h et al., Judicial Independence, Law and Practice of Appointment to the European Court of Human Rights (Ireland), 2003/3, 11


**NOTE**

The procedures followed by the ECHR are, especially since the entry into force of Protocol No. 11 and in response to its very heavy workload, complex and not easy to follow. The rather dry description that follows illustrates both the key rules and the resulting complexity. The flowchart then seeks to capture the key points from filing an application all the way through the execution of judgment phase.

**EUROPEAN COURT OF HUMAN RIGHTS, SURVEY OF ACTIVITIES 2006 (2007), at 5**

1. General

Any Contracting State (State application) or individual claiming to be a victim of a violation of the Convention (individual application) may lodge directly with the Court in Strasbourg an application alleging a breach by a Contracting State of one of the Convention rights. A notice for the guidance of applicants and the official application form are available on the Court’s Internet site. They may also be obtained directly from the Registry.

The procedure before the European Court of Human Rights is adversarial and public. It is largely a written procedure. Hearings, which are held only in a very small minority of cases, are public, unless the Chamber/Grand Chamber decides otherwise on account of exceptional circumstances. Memorials and other documents filed with the Court's Registry by the parties are, in principle, accessible to the public.

Individual applicants may present their own cases, but they should be legally represented once the application has been communicated to the respondent Government [see flowchart at p. 945, infra]. The Council of Europe has set up a legal aid scheme for applicants who do not have sufficient means.

The official languages of the Court are English and French, but applications may be submitted in one of the official languages of the Contracting States. Once the application has been declared admissible, one of the Court’s official languages must be used, unless the President of the Chamber/Grand Chamber authorises the continued use of the language of the application.

2. The handling of applications

Each application is assigned to a Section, where it will be dealt with by a Committee or a Chamber.

An individual application that clearly fails to meet one of the admissibility criteria will be referred to a Committee, which will declare it inadmissible or strike it off. A unanimous vote is required, and the Committee’s decision is final. All other individual applications, as well as inter-State applications are referred to a Chamber. One member of the Chamber will be designated to act as rapporteur for the case.
The identity of the rapporteur is not divulged to the parties. The application will be communicated to the respondent State, which will be asked to address the issues of admissibility and merits that arise, as well as the applicant's claims for just satisfaction. The parties will also be invited to consider whether a friendly settlement is possible. The Registrar facilitates friendly settlement negotiations, which are confidential and without prejudice to the parties' positions.

The Chamber will determine both admissibility and merits. As a rule, both aspects are taken together in a single judgment, although the Chamber may take a separate decision on admissibility, where appropriate. Such decisions, which are taken by majority vote, must contain reasons and be made public.

The President of the Chamber may, in the interests of the proper administration of justice, invite or grant leave to any Contracting State which is not party to the proceedings, or any person concerned who is not the applicant, to submit written comments, and, in exceptional circumstances, to make representations at the hearing. A Contracting State whose national is an applicant in the case is entitled to intervene as of right.

Chambers decide by a majority vote. Any judge who has taken part in the consideration of the case is entitled to append to the judgment a separate opinion, either concurring or dissenting, or a bare statement of dissent.

A Chamber judgment becomes final three months after its delivery. Within that time, any party may request that the case be referred to the Grand Chamber if it raises a serious question of interpretation or application or a serious issue of general importance. If the parties declare that they will not make such a request, the judgment will become final immediately. Where a request for referral is made, it is examined by a panel of five judges composed of the President of the Court, two Section Presidents designated by rotation, and two more judges also designated by rotation. No judge who has considered the admissibility and/or merits of the case may be part of the panel that considers the request. If the panel rejects the request, the Chamber judgment becomes final immediately. A case that is accepted will be re-heard by the Grand Chamber. Its judgment is final.

All final judgments of the Court are binding on the respondent States concerned.

Responsibility for supervising the execution of judgments lies with the Committee of Ministers of the Council of Europe. The Committee of Ministers verifies whether the State in respect of which a violation of the Convention is found has taken adequate remedial measures, which may be specific and/or general, to comply with the Court's judgment.

Note that footnotes and most internal citations and cross-references have been removed in the excerpts from judgments in this Chapter.

The following flowchart, produced by the Court's Registry, provides a visual representation of the main features of the system described above. As the authors note, it indicates the progress of a case through the different judicial formations. In the interests of readability, it does not include certain stages in the procedure — such as communication of an application to the respondent State, consideration of a re-hearing request by the Panel of the Grand Chamber and friendly settlement negotiations.
11. Regional Arrangements

be suspended. The EU procedure is both a more immediate one and one with more serious consequences. But the ECtHR interstate procedure will continue to be the only option in relation to disputes between non-EU member states.

In general states are reluctant to set in motion a formal condemnation procedure when they do not have a direct stake in the matter or when they perceive a serious risk of antagonizing the target state through what will be seen as a hostile act. One predictable result of such litigation would be the filing of a counter-suit. The reluctance to use the ECtHR's interstate procedure is consistent with the fact that a comparable procedure involving the Human Rights Committee under Articles 41–43 of the ICCPR has also never been invoked.

Between 1956 and 1999, the former Commission considered 17 interstate applications, the most significant of which addressed only seven different situations: (i) Greece v. United Kingdom (1956 and 1957) relating to the declaration of a state of exception in Cyprus (then a British colony); (ii) Austria v. Italy (1960) concerning the murder trial of six members of the German-speaking minority in the South Tyrol; (iii) Denmark, Netherlands, Norway and Sweden v. Greece (1967, 1970) relating to the coup d'état carried out by the Greek colonels in 1967. The Commission's response in that case has been described as a model for demonstrating both the possibilities and the political limitations of the international protection of human rights. The case also provided an early illustration of a model of international fact-finding, undertaken by a sub-committee of the former Commission, which was path-breaking at the time, although it has since become common practice; (iv) Ireland v. the United Kingdom (1971 and 1972) relating to the state of emergency in Northern Ireland; (v) Cyprus v. Turkey (1974, 1975, 1977 and 1996) cases arising out of the Turkish armed intervention in Cyprus; (vi) Denmark, France, the Netherlands, Norway and Sweden v. Turkey (1982), alleging violations, including torture, by the military government. Under the settlement approved by the Commission, the Turkish Government gave a number of vague undertakings such as a commitment to instruct the State Supervisory Council to have special regard to the observance by all public authorities of the Convention's prohibition against torture. The settlement was widely criticized on the ground that it was not based on the respect for human rights required of the Convention; and (vii) Denmark v. Turkey in 1997, alleging torture of a Danish citizen during detention by Turkish authorities, and resulting in a friendly settlement.

Since 1959, the Court has delivered judgment in only three interstate cases — Ireland v. the United Kingdom (1978); Denmark v. Turkey (2000) and Cyprus v. Turkey (2001) — but a fourth application was lodged in March 2007 by Georgia against Russia. The first of these cases was examined in Chapter 3 (p. 231, supra) in relation to the characterization of certain interrogation techniques as amounting to 'inhuman and degrading treatment', but not torture. It was also noteworthy for the fact that the Court rejected a British submission that the case should effectively be considered moot on the grounds that the UK had not contested the finding by the Commission of a violation of Article 3, that the practices in question had been renounced and a solemn undertaking not to reintroduce them had been given, and

ADDITIONAL READING


3. THE INTERSTATE PROCEDURE: ARTICLE 33

Article 33 of the revised Convention contains a procedure by which one or more states may allege breaches of the Convention by another state party. Unlike the traditional approach to such cases under the international law of state responsibility for injuries in the international law, it is not necessary for an applicant state to allege that the rights of its own nationals have been violated. Although one interstate complaint was brought to the Court in 2007, the procedure has generally been used very sparingly. In relation to the member states of the European Union this sparing use is likely to be reinforced by Article 7 of the EU Treaty which provides for a suspension procedure whereby the voting and other rights of any of its currently 27 member states (almost 60% of the states parties to the ECtHR) accused of a serious and persistent violation of fundamental rights may
that individuals had been punished for the acts in question. The Court held, however, that:

[T]he responsibilities assigned to it within the framework of the system under the Convention extend to pronouncing on the non-contradictory allegations of violation of Article 3. The Court's judgments in fact serve not only to decide those cases brought before the Court but, more generally, to elucidate, safeguard and develop the rules instituted by the Convention, thereby contributing to the observance by the States of the engagements undertaken by them as Contracting Parties.17

In the case that was lodged on 26 March 2007, Georgia accused the Russian Federation of a wide range of ECHR violations in the context of its response to an incident in September 2006 in which four Russian officers were arrested in Tbilisi, Georgia, on spying charges. Subsequently Russia deported hundreds of Georgians, cut off mail and transport links with Tbilisi, and cracked down on Georgian businesses alleged to have been operating illegally in Russia. Georgia argues that the resulting harassment of the Georgian immigrant population in the Russian Federation led to interferences with the respect for private and family life, home and correspondence, the peaceful enjoyment of possessions and the right to education together with widespread arrests and detention generating a generalized threat to security of the person and multiple interferences with the right to liberty on arbitrary ground. The Georgian Government also complained of the conditions in which 'at least 2,380 Georgians' had been detained. According to the Georgians:

[T]he collective expulsion of Georgians from the Russian Federation involved systematic and arbitrary interference with documents evidencing a legitimate right to remain, due process requirements and the statutory appeal process. In addition, closing the land, air and maritime border between the Russian Federation and Georgia, thereby interrupting postal communication, frustrated access to remedies for the persons affected.18

The case will be heard by a Chamber of seven judges, including both the Georgian and Russian judges.

Finally, we turn to the case of Cyprus v. Turkey which illustrates the potentially very complex nature of interstate cases.

FRANK HOFFMEISTER, CASE NOTE: CYPRUS V. TURKEY19

In the first interstate case after the reform of 1998, the European Court of Human Rights, sitting as a grand chamber of seventeen judges, rendered the longest judgment in its history. It ruled... that Turkey was responsible for various breaches of the [ECHR] in the ‘Turkish Republic of Northern Cyprus’ (TRNC)...

... Cyprus alleged that, with respect to the situation that had existed in Cyprus since the start of Turkey's military operations in northern Cyprus in July 1974, Turkey was in breach of the entire set of human rights guaranteed by the Convention (Articles 1–13, 14, and 17). With the exception of the right to marry (Article 12),...

... [T]he Court rejected Turkey's contention that only the TRNC had jurisdiction in northern Cyprus. The Court concluded that "having effective overall control over northern Cyprus, Turkey's responsibility cannot be confined to the acts of its own soldiers or officials in northern Cyprus but must also be engaged by virtue of the acts of the local administration which survives by virtue of Turkish military and other support." It would frustrate the purpose of the Convention as an instrument of European public order if Turkey's continuing inability to exercise its Convention obligations in northern Cyprus was allowed to result in a vacuum in human rights protection in that territory; now under the effective control of Turkey.

With respect to the requirement of exhaustion of local remedies... Cyprus argued that local judicial authorities of the TRNC could not be expected to "issue effective decisions against persons exercising authority with the backing of the [Turkish] army in order to remedy violations of human rights committed in furtherance of the general policies of the regime." Turkey maintained, however, that the local judiciary was fully developed and independent... Referring to the need to avoid a vacuum in the protection of human rights in northern Cyprus, the European Court thus found that the absence of TRNC courts would work to the detriment of the people living there. Therefore, the judicial organs of the TRNC could not be simply disregarded. The Court concluded that the inhabitants of the territory were required to exhaust local remedies unless the absence or ineffectiveness of such remedies can be proved — a question that needs to be settled on a case-by-case basis.

Turning to the merits, the Court first examined the matter of Greek Cypriot missing persons. It noted that there was no proof that any of the missing persons had been unlawfully killed by Turkish troops in 1974. In any case, the six-month period for bringing a claim under the Convention was long past, and the relevant events did not come within the scope ratione temporis of the application. Nevertheless, the Court also determined that it could examine the matter of the missing persons from the perspective of a contracting state's procedural obligation under Article 2 to protect the right to life — an obligation that arises upon "proof of an arguable claim" that a person, last seen in the custody of state agents, subsequently disappeared in a context that could be considered life-threatening.

In addressing this question, the Court observed that many persons now missing were detained either by Turkish or Turkish-Cypriot forces at a time when the conduct of military operations was accompanied by arrests and killings on a large scale. The Court rejected the Turkish government's claim that its cooperation with the UN Committee on Missing Persons (CMP) satisfied the need to inquire into the whereabouts of the missing persons. As the Court noted, the CMP's task was to determine only whether any of the missing persons on the list were dead or alive; it was not empowered to...
make findings either on the cause of death or on the issue of responsibility for any deaths. The Court therefore concluded that the CEP’s investigations could not be regarded as effective. It found, moreover, a continuing violation of the right to life because no effective investigation has ever been undertaken into the whereabouts and fate of Greek Cypriot missing persons who disappeared in 1974 under life-threatening circumstances. The Court added that it was incumbent on the authorities to account for the whereabouts of given individuals after they had assumed control over them. By virtue of the failure of Turkish authorities to do so, there was also, according to the Court, a continuing violation of the right to liberty under Article 5 of the Convention. The Court held, moreover, that the silence of the Turkish authorities in the face of the legitimate concerns of the missing persons’ relatives was inhumane treatment within the meaning of Article 3 of the Convention.

The second substantive matter addressed by the Court related to the rights of displaced persons with respect to their homes and property. As regards property rights, the Court repeated its finding in the Loizidou judgment that Article 1 of the 1985 TRNC Constitution, which provides that abandoned property devolves to the TRNC, is deemed to be invalid for the purposes of the Convention. Hence, the Greek Cypriots remained the owners of their property lying in the north.

The third substantive matter addressed by the Court concerned the living conditions of the remaining 429 Greek Cypriots in the Karpas region of northern Cyprus. It found that their freedom of religion was infringed since TRNC authorities prevented them from traveling outside their villages to attend religious ceremonies. Furthermore, the censorship regime imposed upon Greek-language schoolbooks violated the freedom of expression (Article 10 of the Convention), and the absence of appropriate secondary school facilities for Greek Cypriots violated the right to education (Article 2 of Protocol No. 1).

Finally, the Court decided that the question of the possible application of Article 41 of the Convention — under which it can grant just satisfaction if the internal law of the respondent state allows only partial reparation to be made for the consequences of the violations found — was "not ready for decision"; the Court therefore adjudged consideration of the Article 41 request.

4. THE COURT’S JURISDICTION

The ECtHR cannot consider an application unless it ascertains that it has jurisdiction over the case. If an event occurred prior to the state becoming a party to the ECtHR and has no continuing dimension, if the state whose conduct is complained about is not a party to the Convention, and so on, the Court will have no jurisdiction. One of the most controversial and complex issues currently giving cause for concern is the extent to which the Court has jurisdiction over events which occur beyond the territory of a Contracting Party. The issue of extraterritorial jurisdiction arises in connection with situations which have become increasingly common. They include, to take the examples dealt with below, situations in which a military strike is launched from within the legal space (l'espace juridique) of the Council of Europe but results in damage outside that area, actions taken by armed forces of one state operating in the territory of another which may or may not be a member of the Council of Europe, and the responsibility of a state contributing troops to a United Nations or other multinational peace-keeping force under the auspices of the UN Security Council.

These issues highlight the challenge of evolving approaches in response to challenges that were not foreseen at the time of drafting of the ECHR. The Court has often affirmed the importance of a dynamic, evolutive or teleological approach to interpretation, but in relation to territorial jurisdiction it seems surprisingly reticent to adopt such an approach. The challenges discussed below also underscore the impact of globalization and the extent to which it remains possible to defend the notion that the Convention is essentially designed to uphold the human rights of those within the espace juridique. As boundaries become ever more porous and European states deepen their involvement in complex ways in neighbouring countries and beyond, such a restrictive notion will be increasingly challenged.

The most contentious of the cases below is Bankov, in which forces operating under the control of the North Atlantic Treaty Organization (NATO) fired a missile which killed and injured civilians in the course of an air strike on a television station. The Court’s rejection of jurisdiction in that case seems to have been qualified in the Issa case which follows, which concerns the acts of Turkish Government troops in neighbouring Iraq which resulted in the killing of a number of individuals. Finally, the British Court of Appeals in Al-Skeini explored what it would mean, in terms of the applicability of the ECtHR, to say that British troops had been in ‘effective control’ of an area near Basrah in Iraq in which civilians had been shot and killed.