BILKENT UNIVERSITY
INSTITUTE OF ECONOMICS AND SOCIAL SCIENCES

THE CONTROL MECHANISM OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS (INDIVIDUAL APPLICATION)

BY
NURCAN ATLI

A THESIS SUBMITTED TO THE DEPARTMENT OF INTERNATIONAL RELATIONS IN PARTIAL FULFILLMENT OF THE REQUIREMENTS FOR THE DEGREE OF MASTER OF INTERNATIONAL RELATIONS

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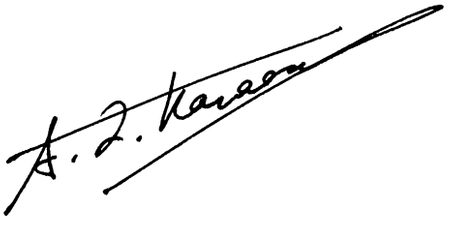
Approved by the Institute of Economics and Social Sciences.



I certify that I have read this thesis and in my opinion it is fully adequate, in scope and quality, as a thesis for the degree on Master of International Relations.

Prof. Dr. İlhan Akipek

I certify that I have read this thesis and in my opinion it is fully adequate, in scope and quality, as a thesis for the degree on Master of International Relations.

Assist. Prof. Gülgün Tuna

I certify that I have read this thesis and in my opinion it is fully adequate, in scope and quality, as a thesis for the degree on Master of International Relations.

Prof. Dr. Yüksel İnan

ABSTRACT

In the second half of the 20th century, which might be properly dubbed the "era of the human rights", all endeavours are aimed at promoting human rights from a purely theoretical realm to the status of implementation and procuring an effective control mechanism. The most sophisticated expression of the improvement and systemisation of the international protection of the human rights can be found in the European Convention on Human Rights. The significance of the Convention lies in not only the rights and freedoms it has procured but in its international judicial control mechanism which is based on individual application. This thesis aimed to review of the practical implementation of the individual application mechanism of the European Convention on Human Rights which has been regarded as the most sophisticated system ever developed, due to the fact that it has rendered the right of individual application to the international organisations and also it confers responsibility to the states violating the rights of individuals by disregarding the international law.

ÖZET

XX. yüzyılın ikinci yarısını "İnsan Hakları Çağı" olarak nitelemek abartılı bir yaklaşım sayılmaz. Bu dönemde tüm çabalar, insan hakları ve özgürlüklerin kuramsal alandan çıkıp uygulama alanına girmesi, etkili bir güvence sistemine kavuşturulması yönünde olmuştur. İnsan haklarının uluslararası alanda korunmasına ilişkin hukuk kurallarının geliştirip sistemleştirilmesinin en ileri ifadesini Avrupa İnsan Hakları Sözleşmesi'nde bulduğu belirtilmektedir. Sözleşmenin önemi, güvence altına aldığı temel hak ve özgürlüklerden değil, bireysel başvuruya dayanan uluslararası yargısal bir denetim mekanizması kurmasından kaynaklanır. Bu tezde bireylere uluslararası organlara başvurma hakkı verilmesi ve devletlere de bireyler zararına uluslararası hukukun çiğnenmesinden dolayı sorumluluk yüklenmesi açısından bugüne dek geliştirilmiş en mükemmel sistem sayılan Avrupa İnsan Hakları Sözleşmesi'nin bireysel başvuru mekanizmasının, pratikteki görünümüyle incelenmesi amaçlanmaktadır.

ACKNOWLEDGEMENTS

This dissertation owes its greatest debt to Assist. Prof. Gülgün Tuna for her encouragement and guidance as my supervisor. I also thanks to my friend Asuman Dayıcan for her encouragement and to my husband for his patience and support and the lack of complaint for too many weekends away from home and family chores. Last but not least, I would like to express my gratitude to my father, my first instructor in life.

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PREFACE

From the depths of the Holocaust and the devastation of the Second World War, Europe has emerged as the region with the most successful and sophisticated system of human rights protection. Although not without flaws and imperfections, it does stand as an example and model to other regions of the world, not least because of the extensive and developing case law generated under the European Convention on Human Rights systems.

The European Convention on Human Rights, which was signed by the member states of the Council of Europe on November 4, 1950, has developed into the premier regional human rights treaty in the world, a prototype which has had a dramatic effect on the evolution of the human rights protections throughout the world. The Convention's importance lies not only in the breadth of the rights included but also in the protection machinery set up in Strasbourg to decide an alleged violation and ensure the compliance of states with their obligations under the Convention.

The European Convention on Human Rights has the most effective protection mechanism in the world. The right of individual application is no doubt the main reason why the European System of protecting human rights has become and continues to be an effective one. It is the merit of the European Convention on Human Rights that it institutes a procedure which permits an individual to lodge an application with the European Commission on Human Rights against a State, even his own Government. The key to the effectiveness of the Convention at the international level lies in individual applications. With this Convention individuals became subjects of international law for the first time and discussions about the place of the individual in international law started.

In this thesis, I aimed to examine the individual application mechanism of the European Convention Human Rights with its practical appearance. I tried to look with magnifying glasses to this most important and effective system of human rights and made an assessment of this mechanism with all its defects and advantages.

The main problem I faced in writing this thesis is the renewals and changes made in the Convention system while I was writing it. On 1 November 1998, the Eleventh Protocol entered into force. The Eleventh Protocol brings significant changes to the Convention system, as well as to the individual application mechanism. It brings most of the changes that I had foreseen. Therefore, I allocated a chapter to the Eleventh Protocol in this thesis.

In the first chapter, I will begin with the origins of the Convention. Special emphasis will be laid on this part because the atmosphere in the end of the 1940s affected the Convention greatly and also the mechanism established by the Convention. Then, I will dwell on the main characteristics of this system and its organisational structure. As the Eleventh Protocol changes the organisational structure of the Convention system , I will dwell very shortly on this part.

The second Chapter aims to examine analytically the individual application mechanism in details, and will be strengthened with the cases dealt with in the Commission and in the Court. I will especially give examples from the case-law of the Commission and the Court to show how the admissibility conditions are applied, their limits and difficulties.

In the third Chapter, I will make a critique of the Convention mechanism, and dwell on the reform needs, also with the reforms made by the Eleventh Protocol.

Lastly, I will make an assessment of the Eleventh Protocol and conclude with a discussion of the future threats to the Convention system.

CHAPTER I: THE EUROPEAN CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS

1.1. THE ORIGIN AND HISTORY OF THE CONVENTION

The European Convention for the Protection of Human Rights and Fundamental Freedoms is a product of the period shortly after the second World War, when the issue of international protection of human rights attracted a great deal of attention. The factors which led the United States to concern itself with the protection of human rights had a similar effect in Europe. Generally the Convention was a response to current and past events in Europe:

Firstly, the Convention was a natural reaction against the Nazi and Fascist systems which had provoked the Second World War. The denial of human rights was not only the result of these systems; these dictatorships also built their systems by suppressing individual freedoms. Therefore, an effective system for the protection of human rights, would not only protect human rights but also be a bulwark against dictatorships[1].

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[1] This point was well put by M. Pierre-Henri Teitgen in a speech to the Consultative Assembly of Council of Europe in August 1949:

> Many of our colleagues have pointed out that our countries are democratic and are deeply impregnated with a sense of freedom; they believe in morality and in natural law...Why is it necessary to build such a system?
> Democracies do not become Nazi countries in one day. Evil progresses cunningly, with a minority operating, as it were, to remove the levers of control. One by one, freedoms are suppressed, in one after another. Public opinion and the entire national conscience are asphyxiated. And then, when everything is in order, the "Führer" is installed and the evolution continues even to the oven of the crematorium.
> It is necessary to intervene before it is too late. A conscience must exist somewhere which will sound the alarm to the minds of a nation menaced by these progressive corruptions, to warn them of the peril and to show them that they are progressing down a long road which leads far, sometimes even to Buchenwald or to Dachau.
> An International Court, within the Council of Europe, and a system of supervision and guarantees could be the conscience of which we all have need, and of which other countries have perhaps a special need. (Consultative Assembly , Official Reports, August 1949, p. 1158).

Secondly, there was another threat for the states of Europe. The states of Europe needed to be protected not only against dictatorships but also against another kind of regime which had already captured half of the continent: Communism[2].

Thus, after the Second World War, as a reaction to the grave and large scale violations of basic human rights during the war, the promotion of respect for human rights and fundamental freedoms become one of the aims of the United Nations[3]. This is almost the first reference to human rights in an international treaty[4]. Within that framework the Universal Declaration of Human Rights was, which was adopted on 10 December 1948 by the General Assembly of the United Nations, became a significant milestone. However the Universal Declaration of Human Rights was not a legally binding document. Other declarations and binding treaty obligations were later adopted at the universal level, e.g. the Convention against Racial Discrimination and the two United Nations Human Rights Covenants on Economic, Social and Cultural Rights which were adopted in 1966 and came into force ten years later[5].

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[2] This led M. Paul-Henri Spaak to remark that the man who did most for the Union of Western Europe was Josef Stalin for it was when the European countries were acutely aware of the challenge of Communism that they felt the need to reaffirm the principles of their own political faith (A.H. Robertson and J.G. Merrils, Human Rights in Europe, Manchester: Manchester University Press, 1993, p. 4).

[3] Ibid., p.2. In the second paragraph of the Preamble to the Charter of the UN, which expresses the determination of the peoples of the United Nations, it says:

> "... to reaffirm in fundamental human rights, in the dignity and worth of the person , in the equal rights of men and women and of nations large and small...".

[4] The treaties for the protection of minorities concluded after the First World War concerned the rights of particular groups and not human rights in general. However , the German- Polish Convention on Upper Silesia (1922) provided for the international protection of the rights of the individual even against a state of which he or she was a national. See: A.H. Robertson and J. G. Merrils, Human Rights in the World, third edition, Manchester: Manchester University Press, 1989, pp. 19-21.

[5] Documents of the 1993 World Conference on Human Rights speak of "six core UN treaties" on human rights; in addition to the three Conventions mentioned above, the following Conventions belong to this core: The Convention on the Elimination of all forms of Discrimination against Women; the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; the Convention on the Rights of the Child. See U.N. Doc. A/ CONF. 157/TBB/4, 16 June 1993.

Meanwhile Preliminary steps were also taken at the European level. In May 1948 the International Committee of the Movements for European Unity organised a "Congress of the Europe" in the Hague. At the Congress a resolution was adopted, the introductory part of which reads as follows:

> The Congress
>
> > Considers that the resultant union or federation should be open to all European nations democratically governed and which undertake to respect a Charter of human rights resolves that a commission should be set up to undertake immediately the double task of drafting such a charter and of laying down standards to which a state must conform if it is to deserve the name of democracy[6].

A further variant was set out in the council of Europe, which was signed at St James's Palace in May 1949. In the Preamble the Contracting Parties declare that they are:

> Reaffirming their 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;[7]

However Article 3 of the statue goes on to provide:

> 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 , and collaborate sincerely and effectively in the realisation of the aim of the Council as specified in Chapter I[8].

From this article it is obvious that the maintenance of human rights and respect for the rule of law are therefore not just objectives of the Council of Europe, they are actually made a condition of membership[9].

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[6] See P. Van Dijk and G. J. H. van Hoof, Theory and Practice of the European Convention on Human Rights, 2nd ed., The Netherlands: Kluwer Law and Taxation Publishers, 1990, p. 1.

[7] Robertson & Merrils, op. cit. note 2, p. 3.

[8] Ibid., p. 3.

[9] Here the Statue went much further than any earlier treaty.

From that moment onwards the Convention was drafted in a relatively short time. In September of the same year the Assembly adopted the Committee's report, in which ten rights were included that were to be the subjects of a collective guarantee, and the establishment of a European Commission of Human Rights and a European Court of Justice was proposed. In November of that year the Committee of Ministers of the Council of Europe decided to appoint a Committee of Government Experts, which was entrusted with the task of preparing a draft text on the basis of this report.

This Committee completed its work in the spring of 1950. It had made considerable headway, but it failed to find a solution to a number of political problems. The subsequently appointed Committee of Senior Officials was also forced to leave the ultimate decision on a number of matters to the Committee of Ministers, even though it reached agreement about the greater part of the Committee of Experts[10].

On 7 August 1950 the Committee of Ministers approved a revised draft text, which went considerably less than the original proposals on a number of points. For example, the system of individual applications and the jurisdiction of the Court were made optional. This draft text was not substantially altered afterwards.

Long discussions were made especially on the scope of the rights, the right of individual petition and on establishing a Court. In view of these difficulties it is not altogether surprising that when the Committee of Ministers came to consider the proposals of the Assembly on the three rights of property, education and free elections in November 1950, it decided to refer them to their legal experts for further study. They were then faced with the choice of deferring signature of the Convention, until these proposals had been more carefully examined or, alternatively, signing the Convention without them. They chose the second

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[10] For detailed information about the discussions made in these Committees; see P .H. Teitgen, "*Introduction to the European Convention on Human Rights*", The European System for the. Protection of Human Rights, ed. R. St. J. Macdonald, F. Matscher and H. Petzold, Netherlands: Martinus Nijhoff Publishers, 1993, pp. 3-15.

way, and on 4 November 1950 the Convention, which according to its preamble was framed "to take the first steps for collective enforcement of certain rights stated in the Universal Declaration", was signed in Rome[11, 12]. It entered into force on 3 September 1953 and today the Convention has been ratified by 40 member states of the Council of Europe[13].

Protocol No. 1 covering the three further rights of property, education and free elections was eventually concluded and was opened for signature on 22 March 1952[14]. Once the Convention and Protocol No. 1 had entered into force the next task was to secure acceptance of the optional provisions: the right of individual petition to the Commission and the compulsory jurisdiction of the Court. Six acceptances were needed for the individual petition procedure to become operative, but there was some delay. In September 1953 the Consultative Assembly adopted a Recommendation urging all member states to ratify the Convention and Protocol No. 1 and to make the various optional declarations[15, 16]. Acceptance of the compulsory jurisdiction of the Court took longer. It took until September 1958 to obtain eight acceptances and so the Court was inaugurated in January 1959. As with

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[11] Ibid., p. 2.

[12] The preparation of the Convention involved a new technique in the drafting of treaties, stemming from the dual nature of the Council of Europe. It was the parliamentary organ of the Council, the Consultative Assembly, which proposed the conclusion of the Convention and it was the governmental organ, the Committee of Ministers ,which acted on that proposal. Each organ was assisted by a specialised committee which was responsible for the detailed work and a dialogue took place between them. As we have seen, the aim was to co-ordinate the views of two sides and produce a final text which would be acceptable both to the governments and to the national parliaments. The Council of Europe's technique of treaty-making, which the Convention exemplifies, has been one of its great success and has resulted in the conclusion of many other conventions and agreements (Robertson & Merrils ,op. cit. note 2, p. 12).

[13] These 40 members are Albania, Andorra, Austria, Belgium, Bulgaria. Croatia, Cyprus, Czech Republic,Denmark,Estonia,Finland,France,Germany,Greece,Hungary,Iceland,Ireland,Italy,Latvia,Linchestein,Lithuania,Luxemburg,Malta,Moldova,The Netherlands, Norway, Poland, Portugal, Romania, San Marino, Slovak Republic, Slovenia, Sweden, Switzerland, the former Yugoslav Republic of Macedonia, Turkey, Ukraine and the United Kingdom. For more information about the member states, their date of signature and ratifications, date of entry into force and their reservations, see: Council of Europe web site, www.coe.tr/eng/legaltxt/abstracts.

[14] Turkey ratified Protocol No. 1 on 18 May 1954.

[15] Sweden was the first country to accept the right of individual petition in February 1952, followed by Ireland and Denmark a year later.

[16] Today all the members of the Council of Europe have accepted the right of individual petition.

the right of individual petition, despite the initial hesitation , the jurisdiction of the Court has been progressively extended and now is generally accepted.

The substantive guarantee in the Convention has been supplemented by the addition of further rights by the First[17], Fourth[18], Sixth[19] and Seventh[20] Protocols to the Convention that are binding upon those states that have ratified them. There have also been other protocols that have amended the enforcement machinery[21] and provided the Court with a limited power to give advisory opinions[22]. However, the Protocols referred to in the last sentence (but not those adding to the substantive guarantee) were all replaced when the 1994 Eleventh Protocol[23], which provides for a fundamental reform of the enforcement machinery of the Convention, entered into force.

1.2. THE MAIN CHARACTERISTICS OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS

The European Convention on Human Rights (hereafter: ECHR) is a unique convention in its area. It is a convention that leads new ways in international law. From the

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[17] Adopted 1952. In force 1954. Twenty- eight parties. It protects the rights of property, education and free elections. (DJ. Harris, M. O'Boyle and C. Warbrick, Law of the European Convention on Human Rights, London: Butterworths, 1995, p.2).

[18] Ibid. Adopted 1963. In force 1968. Twenty-three states are parties. It prohibits imprisonment for civil debt and protects *inter alia* the rights of free movement and choice of residence and the right to enter one's own country.

[19] Ibid. Adopted 1983. In force 1985. Twenty-three states are parties. It provides for the abolition of the death penalty.

[20] Ibid. Adopted 1984. In force 1988. Eighteen states are parties. It provides that *inter alia* an alien lawfully resident in a contracting state shall not be expelled therefrom except in pursuance of a decision reached in accordance with the law, that a person convicted of a criminal offence shall have the right to have that conviction or sentence reviewed by a higher tribunal and that no-one may be tried or punished again in criminal proceedings for an offence for which he has already been finally acquitted or convicted.

[21] Ibid. Third Protocol 1963, Fifth Protocol 1966, Eighth Protocol 1985, Ninth Protocol 1990, and the Tenth Protocol 1992. The first three of these entered into force for all Convention parties in 1970, 1971 and 1990 respectively. The Ninth Protocol, which allows individuals to refer a case to the Court, is optional. In force in 1994. Eighteen parties.

[22] Second Protocol 1963. In force 1970. Ratified by all Convention parties.

[23] Date of entry into force 1 November 1998. For more information about the Eleventh Protocol see: Chapter III.

point of law technique it is an international treaty. The contracting states of the Convention have some responsibilities under the Convention. In terms of international law, the Convention was an important landmark in the development of the international law of human rights[24]. For the first time, sovereign states accepted legally binding obligation to secure the classical human rights for all persons within their jurisdiction and to allow all individuals, including their nationals, to bring claim against them leading to a binding judgement by an international court finding them in breach. This was a revolutionary step in a law of nations that had been based for centuries on such deeply entrenched foundations as the idea that the treatment of nationals was within the domestic jurisdiction of states and that individuals were not the subject of rights in international law[25].

The most unique feature of the Convention is the individual application mechanism. This is the most important part of the control mechanism of the Convention. It is the merit of the ECHR that it institutes a procedure which permits an individual to lodge an application with the European Commission of Human Rights against a State, even his own Government. This was, beyond doubt, a remarkable innovation in international law; so much so that some governments hesitate to accept it. The right of individual petition, like the jurisdiction of the Court, was made optional, and thus the system may only be applied against States Parties which have accepted it. It has proved a model for other treaties establishing international human rights machinery, such as the American Convention on Human Rights and the

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[24] For Juan Antonio Carrillo Salcedo ,the ECHR introduced three important innovations in international law . The first was the system of collective guarantee provided for in Article 24 of the Convention; the second was the right of individual petition to the European Commission of Human Rights on the part of persons within the jurisdiction of states Parties accepting that right(Article 25), and the third was the provision for a mechanism to resolve complaints, by settlement if possible, but, if necessary, through their adjudication by the European Court or Human Rights or Human Rights or, if the case is not referred to the Court, by the Committee of Ministers of the Council of Europe. (Juan Antonio Carrillo Salcedo, *"The Place of the European Convention in International Law"* , The European System for the Protection of Human Rights, ed. R. St .J. Macdonald, F. Matscher and H. Petzold, Netherlands: Martinus Nijhoff Publishers, 1993, pp. 16).

[25] DJ. Harris, M. O'Boyle and C. Warbrick, op. cit. note 17, p. 29.

Optional Protocol to the Covenant on Civil and Political Rights[26]. The individual petition is the essence of the Strasbourg experience. In practical terms, individual petition is compulsory in all but name. It represents the mainstay of activity and provides the operative route whereby controversies surrounding the application of the European Convention can reach the consideration of the European Court of Human Rights[27].

One of the other basic characteristics of the Convention, is the system of collective guarantee, in other terms the state application mechanism. All the contracting states are responsible one by one from the protection of rights guaranteed by the Convention. Every state is obliged to control the respect of the other contracting states to the Convention [28]. The Convention represents, therefore, a collective guarantee in the European context of a number of principles set out in the Universal Declaration of human rights[29]. As mentioned before, the mechanism for collective enforcement through the Convention organs is, one of the unique features of the European Convention. As early as 1962, the Commission recognised that an application by one State against another State under Article 24 is predicated upon a violation of the "public order of Europe" in the case of *Austria v. Italy*[30]. In the same line of thought, the Court held in its judgement of 18 January 1978, in the case of *Ireland v. United Kingdom*, that the Convention "creates, over and above a network of mutual, bilateral undertakings,

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[26] Kevin Boyle, *"Practice and Procedure on Individual Applications under the European Convention on Human Rights"* ,Guide to International Human Rights Practice, ed. Hurst Hannum, London: Macmillian Press, 1984, p.134).

[27] See: Liz Heffernnan, *"A Comparative View of Individual Petition Procedures under the European Convention on Human Rights and International Covenant on Civil and Political Rights"* , Human Rights Quarterly, Vol. 19, 1997, pp. 78-112.

[28] A. Feyyaz Gölcüklü and A .Şeref Gözübüyük, Avrupa İnsan Hakları Sözleşmesi ve Uygulaması, 2nd. ed., Ankara, Turhan Publishers, 1996, p. 12.

[29] The ECHR is clearly influenced by the Universal Declaration of Human Rights , adopted by the UN General Assembly on 10 December 1948 . It is in this spirit that its Preamble should be read when it states that the Governments are resolved "to take the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration" (Salcedo, op. cit .note 24, p.16).

[30] For more details see: ibid., p. 20.

objective obligations which, in the words of the Preamble, benefit from a collective enforcement"[31]. Therefore, with the Convention a European public order has been formed. This control mechanism does not depend on the mutuality principle[32, 33]. From some other decisions of the Court it is seen that the Convention constitutes a public order of Europe. The criteria of interpretation have been clearly established by the Court, as maintained in its judgement of 7 July 1989 in the *Soering* case:

> In interpreting the Convention regard must be had to its special character as a treaty for the collective enforcement of human rights and fundamental freedom. Thus the object and the purpose of the Convention as an instrument for the protection of individual human beings require that its provisions be interpreted and applied so as to make its safeguards practical and effective. In addition, any interpretation of the rights and freedoms guaranteed has to be consisted with the "general spirit of the Convention, an instrument designed to maintain and promote the ideals and values of a democratic society" (Series A no 161 , paragraph 87, with reference to judgements of the Court in *Ireland v. United Kingdom case, Artico case ,and Kjelden, Busk Madsen and Pedersen case*)[34].

The guarantee ensured by the Convention is a secondary guarantee. For the Convention, the main protection for human rights is national laws of the contracting states. The international protection is secondary. To benefit from the mechanism of the Convention, the individual firstly has to exhaust the domestic law procedures. The guarantee given by the Convention is a complementary guarantee[35]. As it is seen, compared to most other international human rights treaties the Convention has very strong enforcement mechanisms.

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[31] Ibid.

[32] This situation can be seen in lots of decisions of Commission and Court related with state applications. (Commission Decision, Austria/Italy, 11.1.1961, No. 788/60, Rec 7, p. 23, 41, Ann. 4, p.116, 140; Cyprus/Turkey, 10.7.1978, No. 8007/77, D.R. 13, p.85,147, Ann. 21, p.226,228. *France, Norway, Denmark, Sweden, Holland/ Turkey*, 6.12.1983, No.9940-9944/82, DR.35, p.143, 169. Court Decision, *Ireland/England*, 18.1.1978.A 25,p.239) (Gölcüklü &Gözübüyük, op. cit .note 28,p.13).

[33] As the lawful situation is this , in application states use this as a press tool. Probably the aim of state applications is political (Ibid., p.13).

[34] Salcedo, op. cit. note 28, p.12.

[35] See: Gölcüklü & Gözübüyük, op. cit. note 28, p.12.

It provides for both state and individual applications[36]. When compared with other regional and universal treaty-based guarantees of human rights, the Convention remains the most advanced instrument of this kind.

Article 1 of the ECHR introduces another important new element into international human rights law, by providing that the High Contracting Parties shall secure the rights and freedoms defined by the Convention to "everyone within their jurisdiction"[37]. The expression "everyone", like similar expressions to be found in other relevant international texts, emphasises the universal nature of the human rights recognised by the Convention: the Convention protects not just the rights of citizens, but also those of aliens, stateless persons and persons lacking legal capacity, such as children or the severely disabled. The expression "within their jurisdiction" seems to limit the number of people covered by the Convention, but in fact it only serves to establish a necessary link between "everyone " and the member State. In other words, in order for the Convention to be applicable, it must be physically possible for the State to secure the rights proclaimed. It is not necessary for a stable legal relationship to be established, such as "national", "residence" or "domicile" , it is sufficient for the State to be able to exercise a certain power in respect of the individual. "Within their jurisdiction" means, according to general international law[38], a convention is applicable to the whole territory of the contracting State, including those territories for whose international relations the State in question is responsible[39]. The fact that the Convention is applicable only

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[36] There is also provision for occasional reports by states on their compliance with the Convention (see Article 57) , but the procedure has seldom been used.

[37] See Article 1 (Convention for the Protection of Human Rights and Fundamental Freedoms with Protocols Nos. 1,4,6,7 and 9 and selected reservations and declarations, Council of Europe, Secretariat to the European Commission of Human Rights, Strasbourg, December 1996).

[38] See Article 29 of the Vienna Convention on the Law of Treaties of 1969 (A. Gündüz Ökçün and Ahmet A. Ökçün, Türk Antlaşmaları Rehberi (1920-1973), Ankara, 1974 or H. Pazarcı and Gökçen Alpkaya, Türk Antlaşmaları ve Uluslar arası Belgeleri Kılavuzu (1974-1988), Ankara, 1990).

[39] This is different only when a reservation has been made for one or more of those territories in the treaty itself, or at the time of its ratification. Under Article 63(1), however, the European Convention extends to the latter territories only when the contracting State concerned has agreed to this via a declaration to that effect addressed

to the territory of the contracting States, with the qualification of Article 63[40], does not imply that a contracting State cannot be responsible under the Convention for acts of its organs that have been committed outside its territory[41]. Although there are forty High Contracting Parties to the European Convention, there have to date been nationals from over eighty countries filing petitions with the European Commission of Human Rights [42].

The Convention gives the juridical organs the task to protect the Convention. To ensure the respect of contracting states to the Convention, the Convention established two supervision organs, the European Commission of Human Rights, and the European Court of Human Rights and also it gives some tasks to Ministry Commission for the cases which do not go to the Court[43].

Another characteristic of the Convention is that the Convention effects the national laws of the contracting states. For some states the Convention is equal to the Constitution; in some states it is equal to law[44]. It is primarily the task of the national authorities of the contracting states to secure the rights and freedoms set forth in the Convention. To what extend the national courts can play apart in securing the rights and freedoms set forth in the

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to the Secretary General of the Council of Europe. Such declarations were made in the course of time by Denmark with respect to Greenland, by the Netherlands with respect to Surinam and the Netherlands Antilles and by the United Kingdom with respect to most of the non-self-governing territories belonging to the Commonwealth (P. Van Dijk and G. J. H. van Hoof, op .cit. note 6, p.7).

[40] See Article 63 (Convention for the Protection of Human Rights and Fundamental Freedoms with Protocols Nos. 1,4,6,7 and 9 and selected reservations and declarations, op. cit .note 37).

[41] Thus the Commission decided that in principle the acts of functionaries of the German Embassy in Morocco might involve the responsibility of the Federal Republic of Germany, and similarly, Switzerland was deemed responsible for acts committed under a treaty of 1923 concerning the incorporation of Liechtenstein into the Swiss customs area. The Commission held that acts of Swiss authorities having effect in Liechtenstein place all those to whom these acts are applicable, under Swiss jurisdiction in the sense of Article 1 of the Convention (P. Van Dijk and G. J. H. van Hoof, op .cit. note 6, p.8).

[42]See: Donna Gomien, Short Guide to the European Convention on Human Rights, the Netherlands, Strasbourg: Council of Europe Publishing and Documentation Service, 2nd. ed. 1995, p.15.

[43] See: Gölcüklü & Gözübüyük, op. cit. note 28, p.14.

[44] In Turkey it is a law that cannot be claimed to be contrary to Constitution. In Article 90 of the Constitution of the Republic of Turkey it writes: " . . . International agreements duly put into effect carry the force of law. No

Convention, by reviewing the acts and omissions of those national authorities, depends mainly on the question of whether the provisions of the Convention are directly applicable in the proceedings before those national courts. The answer to this question depends in turn on the effect of international law within the nation legal system[45]. In fact, the Convention effects the national laws, and it is a Convention that put common law principles[46].

One more important feature of the European Convention is its restriction to the classical civil rights and some political rights. The major provision with respect to political rights, article 3 of the First Additional Protocol, is phrased in a very cautious language allowing for all kinds of electoral systems[47]. Economic, social and cultural rights are missing altogether[48]. Thus, the Convention set out only the basic civil and political rights, though others were to be added later. European Cultural Agreement was signed in 19 December

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appeal to the Constitutional Court can be made with regard to these agreements, on the ground that they are unconstitutional".

[45] In this respect there are two contrasting views. In the so-called *dualistic* view the international and the national legal system form two separate legal spheres, and international law has effect within the national legal system only after it has been "transformed" within the latter into national law via the required procedure. The legal subjects depend on this transformation for their protection; their rights and duties exist only under national law. In the so-called *monistic* view, on the other hand, the various legal systems are viewed as elements of the all embracing international legal system, in which the national authorities are bound by international law have been transformed in national law (P. Van Dijk and G. J. H. van Hoof, op. cit. note 6, p. 11).

[46] For detailed information on the status of the Convention in the legal systems of the contracting States , there are many publications. See Documentation Sources in Human Rights, Council of Europe Human Rights Information Centre, Strasbourg, 1994.

[47] See: Manfred Nowak, "*The European Convention on Human Rights and its Control System*" , NQHR, Vol. 7, No. 3, 1989, pp. 98-105.

[48] This point was considered by M. Teitgen when he presented his proposals in September 1949. He said on that occasion:

> The Committee on Legal and Administrative questions had first to draw up a list of freedoms which are to be guaranteed. It considered that, for the moment, it i s preferable to limit the collective guarantee to those rights and essential freedoms which are practised, after long usage and experience, in all the democratic countries. While they are the first triumph of democratic regimes, they are also necessary condition under which they operate.
>
> Certainly, professional freedoms and social rights, which have themselves an intrinsic value, must also in the future be defined and protected. Everyone will, however, understand that it is necessary to begin at the beginning and to guarantee political democracy in the European Union and then to co-ordinate our economies , before undertaking the generalisation of social democracy (Robertson & Merrils, op. cit. note 4, p. 106).

1954, and later in 1961 the European Social Charter[49] which consist of social and economic rights entered into force[50]. The rights protected by ECHR may be derogated from if there is war or other major emergency, but the measures of derogation must be limited to those strictly necessary to meet the situation[51]. The European Convention case law – especially the *"Lawless" Case* and *Ireland v. United Kingdom* - is illuminating on this point[52].

Lastly, the Convention does not give permission to the State parties to make a general reservation to the Convention. Article 64 of the Convention allows a party on signature or ratification" to make a reservation in respect of any particular provision of the Convention to the extent that any law then in force in its territory is not in conformity with the provision"[53]. Reservations have been made by most of the parties to the Convention[54]. The only limitation to the power to make a reservation to the Convention indicated in Article 64 is that it be not "of a general character".

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[49] Turkey ratified the Social Charter in 1989 (RG. 14 October 1989 No. 20312).

[50] See: Gölcüklü & Gözübüyük, op. cit. note 28, p. 183.

[51] Necessarily a discussion of derogation will focus on Article 15 of the European Convention. Article 15 provides:

(1) In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation , provided that such measures are not inconsistent with its other obligations under international law.
(2) No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from articles 3,4 (paragraph 1) and 7 shall be made under this provision.
(3) Any High Contracting Party availing itself on this right of derogation shall keep the Secretary General of the Council of Europe fully informed of the measures which it has taken ant the reasons therefore. It shall also inform the Secretary- General of the Council of Europe when such reasons have ceased to operate and the provisions of the Convention are again being fully executed (Tekin Akıllıoğlu , Anayasa ve Avrupa İnsan Hakları Sözleşmesi, A. Ü. SBF. İnsan Hakları Merkezi Yayını , Ankara, 1996).

[52] For detailed information about these cases , see . Rosalyn Higgins, "*The European Convention on Human Rights*" ,Human Rights in International Law Legal and Policy Issues, ed. Theodor Meron , Oxford: Clarendon Press , 1984, p. 502.

[53] See Article 64. (Convention for the Protection of Human Rights and Fundamental Freedoms with Protocols Nos. 1,4,6,7 and 9 and selected reservations and declarations, op. cit. note 37).

[54] For the text of reservations and declarations , see the Yearbooks of the ECHR ; Collected texts and the Human Rights Information Sheets , published regularly by the Council of Europe . For Turkish reservation see: pp. 32-33.

1.3. THE ORGANS OF THE CONVENTION

1.3.1 The European Commission on Human Rights

Under Article 19 of the Convention, the European Commission on Human Rights (hereafter: the Commission) is one of the two organs whose purpose is to "ensure the observance of the engagements undertaken by the High Contracting Parties". The Commission first met in 1954 and has since evolved into one of the first world's busiest and most important international human rights tribunals[55]. All individual and inter-state complaints are filed with the Commission which is the Convention's obligatory pathway to those cases which satisfy the admissibility criteria set out in Articles 25-27 of the Convention, it is also the Convention's main fact-finding organ.

The tasks of the Commission are exhaustively listed in the subsequent provisions of the Convention. These tasks are, briefly, as follows:

a. to examine the admissibility of applications by individuals (Article 25) or States (Article 24).

b. where the Commission finds an application admissible, it is required by Article 28 to establish the facts of the case and, at the same time, to place itself at the disposal of the parties with a view to securing a "friendly settlement" of the case.

c. if no settlement is reached the Commission draws up a report on the facts and states its opinion as to whether there has been a breach of the Convention (Article 31)[56].

As shall be seen below, the Commission's multi-faceted role under the Convention marks it out as being not only complementary to the role of the European Court of Human Rights but in many respects a quite distinct and unique legal forum in its own right.

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[55]DJ. Harris, M. O'Boyle and C. Warbrick, op. cit. note 17, p. 571.

[56] See: Francis G. Jacobs, The European Convention on Human Rights, Oxford: Clarendon Press, 1975, p. 5-6.

1.3.1.1. Composition of the Commission

According to the Article 20 of the Convention, the Commission is composed of as many members as there are contracting parties. No two members may be nationals of the same state. There is, however, no rule limiting membership to nationals of contracting states although this has usually been the case up until now. These members are elected by the Committee of Ministers from a list of names drawn up by the Bureau of the Consultative Assembly[57]. Commission members must be persons of high moral character and should either possess the qualification required for appointment to high judicial office or be persons of recognised competence in national or international law[58]. They serve for a period of six years in an individual capacity and may not during their period of office hold a position which is incompatible with their independence and impartiality. Membership of the Commission ends automatically when the contracting party either denounces the Commission (Article 65(1))[59] or ceases to be a member of the Council of Europe which has the effect of disengaging the state from the Convention (Article 65(3)). During their term of office members of the Commission, like members of the Court, cannot be removed against their will.

1.3.1.2. Organisation and Functioning of the Commission

The Commission has its seat in Strasbourg[60]. It meets at least 16 weeks a year, currently in eight two-week sessions. A quorum of the Commission is ten members out of the twenty who currently constitute the Commission. However, seven members may constitute a

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[57] Malcolm N. Shaw, "*Protecting Human Rights in Europe-Ways Ahead*", Essays on International Human Rights, ed. Abdulrahim P. Vijapur, India, Aligarh University, Aligarh 1991, p. 52.

[58] Originally , the Convention contained no provision concerning the qualifications of Commission members. This lacuna was remedied by the Eighth Protocol which entered into force on I January 1990. Article 21(3) now provides that" candidates shall be of high moral character and must possess the qualifications required for appointment either to high judicial officer or be persons of recognised competence in national or international law" . Members are either law professors, judges or practising lawyers. (Scott Davidson, Human Rights, Buckingham: Open University Press, 1993, p.102).

[59] As was the case with Greece: 13 YB 33 (1970). The denunciation took effect on 13 June 1990 (Ibid.).

[60] Although the Commission may decide that an investigation be carried out elsewhere (Rule 15) (DJ. Harris, M. O'Boyle and C. Warbrick, op. cit. note 17, p. 575.

quorum, in particular in the case of an individual application not communicated to the State against which it is brought[61]. The Commission can examine applications in three different compositions: Plenary Commission, Chamber or Committee.

i. Plenary Commission

The Plenary Commission is composed of all members of the Commission. It has a quorum of at least the number of the members equal to the majority of members of the Commission. Decisions are taken by majority vote. The President has a casting vote if the voting is equal. The Plenary Commission is competent to decide in all cases. Solely the Plenary Commission may examine inter - State applications, decide on whether a case shall be referred to the Court, or adopt the Rules of Procedure. The Plenary Commission can furthermore decide to refer a case which is before a Chamber or a Committee back to the Plenary[62].

ii. Chambers

The Commission is empowered to set up " Chambers", each composed of at least seven members[63]. Now, there are two Chambers. The composition of the Chamber is determined by the Commission. The member who is a national of the respondent State in a case has a right to sit in the Chamber to which that case has been referred. A case may be referred to a Chamber if it can be decided on the basis of established case- law or does not give rise to any serious question affecting the interpretation or application of the Convention.

iii. Committees

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[61] See Karel Vasak, "*The Council of Europe*" The International Dimensions of Human Rights, ed. Karel Vasak, Vol. 2, UNESCO, Paris, Greenwood Press, 1982, p. 462.

[62] Eric Friberg and Mark E. Villiger, "*The European Commission of Human Rights*", The European System for the. Protection of Human Rights, ed R. StJ. Macdonald, F. Matscher and H. Petzold, Netherlands: Martinus Nijhoff Publishers, 1993, p. 607.

[63] See Article 20(2). (Convention for the Protection of Human Rights and Fundamental Freedoms with Protocols Nos. 1,4,6,7 and 9 and selected reservations and declarations, op. cit. note 37).

Article 20(3) provides that the Commission may set up Committees of three members, with the power, exercisable by unanimous vote, to reject or strike a case from its list[64]. Therefore, a Committee is only competent to examine simple cases, and it can only reject or strike a case of its list of cases.

iv. The Presidency and the Secretariat

The Commission elects its President following the periodical elections of members. The term of office is three years. Elections are by secret ballot and by an absolute majority.

The Commission is assisted by a Secretariat composed of lawyers and administrative assistants. They are recruited from different states in Europe. The Secretariat is headed by the Secretary and the Deputy Secretary, both elected by the Commission.

1.3.2. The European Court of Human Rights

The European Court of Human Rights (hereafter: the Court) is the judicial organ of the Convention system. It was set up together with the Commission under Article 19 of the Convention to "ensure the observance of the engagements undertaken by the High Contracting Parties"[65]. Its jurisdiction has now been accepted by all current contracting Parties of the Convention.

The Convention has wisely left it to the Court to organise its own working[66]. Questions of procedure and organisation of the Court's business are thus governed by the Rules of the Court. Unlike the Commission, the number of members of the Court is not related to the number of the contracting States, but to the number of member States of the Council of Europe[67]. In Article 38, the Convention provides for the Court that no two

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[64] DJ. Harris, M. O'Boyle and C. Warbrick, op. cit. note 17, p. 577.

[65] See Article 19. (Convention for the Protection of Human Rights and Fundamental Freedoms with Protocols Nos. 1,4,6,7, and 9 and selected reservations and declarations, op. cit. note 37).

[66] See Article 55. Ibid.

[67] So, at present the Court consist of 40 members.

members may be nationals of the same State[68]. Judges are elected by the Parliamentary Assembly of the Council of Europe from a list of candidates nominated by member states[69]. Judges are elected for nine year terms, with the possibility to renew one-third of the Court every three years. As with members of the Commission judges of the Court may be re - elected[70]. Rule 4 of the Court's Rules of Procedure prohibits a judge from exercising his functions while he is a member of Government or while he holds a post or exercises a profession which is likely to affect confidence in his independence.

Unlike the Commission the Court is a judicial body and it produces final and binding decisions. The jurisdiction of the Court extends to all cases involving the interpretation and application of the Convention; but the jurisdiction of the Court under the Convention is neither automatic nor compulsory. The parties to the ECHR must declare that they accept the Court's jurisdiction to interpret and apply the Convention[71]. The Court may only deal with a case where a friendly settlement has not been reached and within three months of the Commission's Report going to the Committee of Ministers. However, until very recently, only the Commission or a relevant state party had right to bring a case before the Court[72].

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[68] Here again the possibility is left open that a national of a state which is not a member of the Council of Europe may be a member of the Court. This occurred for the first time in 1980, when the Canadian Professor Macdonald was elected in the Court after being nominated by Liechtenstein. (DJ. Harris, M. O'Boyle and C. Warbrick, op. cit. note 17, p.26)

[69] To avoid the terms of the first judges that were elected to the Court ending at the same time, Article 40 provided that four judges be elected for three-year terms and four more for six-year terms. Article 40 was subsequently amended by the Fifth Protocol to provide for an orderly three-year rotation of judges. Article 40(3) provides as follows:" In order to ensure that, as far as possible, one third of the membership of the Court shall be renewed every three years, the Consultative Assembly may decide ,before proceeding to any subsequent election, that the term or terms of office of one or more members to be elected shall be for a period other than nine years but not more than twelve and not less than six years".

[70] Donna Gomien, op. cit. note 41, p.143.

[71] This system totally changed with the 11th Protocol. See: Chapter III.

[72] This also changed with the 11th Protocol. This Protocol provides an individual to bring a case to the Court See: Chapter III.

The hearings of the Court are public, unless the Court decides otherwise in exceptional circumstances. The deliberations, on the other hand, are in private[73]. The Court takes its decisions by a majority of votes of the judges present. If the voting is equal, the President has a casting vote. All the judgements of the Court are published, too.

1.3.3. The Committee of Ministers

Unlike the Commission and the Court, the Committee of Ministers has not been set up by the Convention, but here a function has been entrusted to an already existing body of the Council of Europe. Accordingly, the composition, organisation, and general functions and powers of the Committee of Ministers are not regulated in the Convention, but in the Statue of the Council of Europe[74].

The Convention gives three tasks to the Committee of Ministers in the protection mechanism of human rights[75]. These are:

a. to elect the members of the Commission (Article 21 of the Convention).
b. to decide on the question whether there has been a violation of the Convention when a case has not been referred to the Court(Article 32 of the Convention); and
c. to supervise the execution of the judgements of the Court (Article 54 of the Convention).

As mentioned before the Committee of Ministers is a political body. It is the executive organ of the Council of Europe and consists of the Foreign Ministers, or their deputies, of the member states. The Committee of Ministers, in addition to its delegated functions under the

[73] DJ. Harris, M. O' Boyle and C. Warbrick, op. cit. note 17, p. 24.

[74] See Articles 13-21 of the Statue of the Council of Europe.

[75] The Eleventh Protocol limits the role of the Committee of Ministers to supervising the execution of the judgements of the Court. See Chapter III.

European convention , also possesses a general competence in human rights matters as a body of the Council of Europe[76].

1.3.4 The Secretary General of the Council of Europe

Besides the Committee of Ministers, yet another organ of the Council of Europe, the Secretary General, also plays a part in the Convention. The Secretary General acts as the depository for the ECHR[77]. The Secretary General also is required to transmit copies of State declarations under Article 25 (acceptances of the right of individual petition) and article 46 (acceptances of the jurisdiction of the European Court of Human Rights) to all High Contracting Parties, and to inform them of any state's denunciation of the ECHR under Article 65 [78,79]. Under Article 15 of the European Convention, any State derogating from its obligations under the Convention must keep the Secretary General fully informed of the measures taken and the reasons for so doing. The most important function assigned to the Secretary General in the Convention, however, is of quite a different nature. Under Article 57 he has the duty to supervise the effective implementation by the contracting States of the provisions of the Convention[80].

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[76] Exercising these powers, the Committee has adopted a variety of resolutions on human rights topics, including asylum and freedom of expression , though it has not yet spoken in such a general fashion on states of emergency (Joan Fitzpatrick, Human Rights in Crisis , Procedural Aspects of International Law Series, Philadelphia: University of Pennsylvania Press, 1994, p. 204).

[77] This is the case for all other conventions concluded by the Council of Europe.

[78] See Article 65. (Convention for the Protection of Human Rights and Fundamental Freedoms with Protocols Nos. 1,4,6,7 and 9 and selected reservations and declarations, op. cit. note 37).

[79] In the Eleventh Protocol it is compulsory for states to accept the right of individual application and the jurisdiction of the Court. So there is no need for the states to make an Article 25 and 46 declarations in the new system. See Chapter III.

[80] See Article 57. (Convention for the Protection of Human Rights and Fundamental Freedoms with Protocols Nos. 1.4.6.7. and 9 and selected reservations and declarations, op. cit. note 37).

CHAPTER II : INDIVIDUAL APPLICATION MECHANISM

2.1. THE RIGHT OF APPLICATION

One of the most important features of the European Convention on Human Rights is its international control mechanism by which "the observance of the engagements undertaken by the High Contracting Parties" in the Convention is ensured[81]. The "application" is the means by which the international control mechanism is set in motion, and therefore the key to the success of the Convention system.

What is called here the "right of complaint" under the Convention is in fact the right to take the initiative for the supervisory procedure provided for in the Convention on the ground that the Convention has allegedly been violated by one of the contracting States. The Convention differentiates between the right of complaint for states on the one hand and that for individuals on the other hand. As the main subject of this work is individual applications, I find it useful to give a brief explanatory passage about inter-state applications as well.

2.1.1. Inter-State Applications[82]

Article 24 of the Convention provides that any contracting party may refer to the Commission any alleged breach of the Convention by another contracting party. The right to bring a case flows directly from the ratification of the Convention and is not subject to any

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[81] See Article 19 (Tekin Akıllıoğlu, İnsan Haklarının Korunması Alanında Temel Belgeler, 3rd. ed., Bilgi Yayınevi ve SBF İnsan Hakları Merkezi Ortak Yayını, Ankara, March 1995.

[82] Protocol No. 11 retains the option of submitting interstate applications. See: Article 33 of the ECHR [Text as amended by Protocol no. 11].

other condition[83]. As the Commission stated in the decision on the admissibility of the inter-State application of *Austria* against *Italy*,

> The obligations undertaken by the High Contracting Parties in the Convention are essentially of an objective character, being designed rather to protect the fundamental rights of individual human beings from infringement by any of the High Contracting Parties than to create subjective and reciprocal rights for the High Contracting Parties themselves[84].

In the particular case referred to above, the Commission concluded that Austria could file a complaint against Italy with regard to matters arising before Austria became a Party to the Convention[85]. From this characterisation of the nature of the Convention, the Commission deduced that a contracting party could refer to the Commission any alleged breach of the Convention, regardless of whether the victims were its nationals or whether its own interests were at stake. It is not exercising a right of action for the purpose of enforcing its own rights but rather to bring before the Commission an alleged violation of the public order of Europe[86]. Consequently, in bringing an application the state is fulfilling its role as one of the collective guarantors of Convention rights.

Inter-state complaints under Article 24 differ from individual complaints in the following respects:

a. Under Article 24, states may refer "any alleged" breach of the Convention to the Commission while individual applicants can only complain of a violation of the rights and freedoms in the Convention.

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[83] D. J. Harris, M. O'Boyle and C. Warbrick, op. cit. note 17, p. 585.

[84] H. C. Krüger and C. A. Norgoard, "*The Right of Application*" , The European System for the Protection of Human Rights, ed. R. St. J. Macdonald, F. Matscher and H. Etzold, Netherlands: Martinus Nijhoff Publishers, 1993, p. 659

[85] Application no. 788/60 Dec. 11 January 1961, Yearbook 4 , p.140.

[86] See also *Cyprus v. Turkey* No. 8007/77, 13 DR 85 (1978), e.s. 660.

b. The state can challenge a legislative measure in *abstracto* where the law is couched in terms sufficiently clear and precise to make the breach apparent or with reference to the manner in which it is interpreted and applied in *concreto*[87]. The individual must show that he is a "victim" of the measure complained of.

c. The only formal admissibility requirements are the local remedies and the six-month rule[88]. The rules contained in Article 27 apply to individual complaints only[89].

d. An inter-state application is automatically communicated to the respondent government for observations on admissibility. The Commission has no discretion in this respect. Moreover, unlike the procedure in individual cases, there are separate proceedings on questions of admissibility and the merits[90].

In practice there have been a few inter-state complaints[91]. In most of the cases that have been brought, the applicant state has had a political interest to assert in the proceedings[92]. Often they have concerned allegations of violations of human rights on a large scale. The reality is that European States will be reluctant to have recourse to legal action under the Convention to resolve their disputes. In the close-knit community of like-minded

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[87] *Ireland* v. *UK* A 25 paras. 239-240 (1978) and *Denmark , Norway, Sweden and Netherlands v. Greece* , 12 YB (the Greek case) 134 (1969) .

[88] See Article 26. Akıllıoğlu, op. cit. note 80, p. 86.

[89] See below , p. 48.

[90] See Rule 45 of the Rules of Procedure. (Temel Belgelerde İnsan Hakları Usul Hukuku 1, ed. Semih Gemalmaz, İnsan Hakları Derneği Yayını, İstanbul: Kavram Yayınları, May 1995, p.243).

[91] In the fifties, Greece complained twice about the conduct of the United Kingdom in Cyprus, Austria filed a complaint in 1960 about the course of events during proceedings against South Tyrolean activists in Italy, the five applications of the Scandinavian countries and the Netherlands concerned the situation in Greece during the military regime, Ireland lodged two applications against the United Kingdom about the activities of the military and the police in Ulster, all three applications of Cyprus were connected with the Turkish forces in the island, while the five applications of 1982 all relate to the situation of Turkey under the military regime (Van Dijk and G. J. H. van Hoof, op. cit. note 6, p. 36) .

[92] As Polak , a one-time member of the Commission , stated lodging such an application acts as a weapon which often will not contribute to the solution of the underlying political dispute (ibid.).

states in the Council of Europe, contracting parties will be reluctant to jeopardise their good diplomatic relationships with other parties and undoubtedly prefer negotiation to a legal process which may be lengthy, counter-productive and ultimately ineffective[93].

2.1.2. Individual Application Mechanism

2.1.2.1. Its characteristics and its place in the system

> "The Commission may receive petitions addressed to the Secretary General of the Council of Europe from any person, non-governmental organisation or group of individuals claiming to be victim of a violation by one of the High Contracting Parties of the rights set forth in this Convention, provided that the High Contracting Party against which the complaint has been lodged has declared that it recognises the competence of the Commission to receive such petitions"[94].

The right of individual application under Article 25 of the Convention, is considered a very significant innovation, and a revolution by most international law authors[95]. Leaving aside the notion of revolution, it is difficult to call it an innovation. There are some other examples in the world that provide the right of complaint to individuals. The Middle America Justice Court (established before the First World War) and Upper–Silezia Court and Commissions (established after the Second World War) are only two examples[96]. Therefore, from this point it is not an innovation. But certainly, it is the first time that the right of individual application is accepted by an international organisation at this range. Also ECHR is a normal and continuos system. It is a system that covers an important and a big area. From these points it may be a revolution. Most international law authors describe the right of

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[93] D. J. Harris, M. O'Boyle and C. Warbrick, op. cit. note 17, p. 587.

[94] Gölcüklü & Gözübüyük, op. cit. note 28.

[95] Ömer Madra, Avrupa İnsan Hakları Sözleşmesi ve Bireysel Başvuru Hakkı, Ankara: SBF Basın ve Yayın Yüksek Okulu Basımevi, 1981, p. 127.

[96] Ibid.

individual application as the victory of lawful humanism[97]. Below, the origins and development of this system is described in detail.

2.1.2.2. How was the Right of Individual Complaint formed? Doubts and Measures

The individual right of complaint was not accepted without dispute during the drafting of the Convention. Initially there were great differences of opinion between the Consultative Assembly and the Committee of Ministers. The Assembly wanted an individual right of complaint which could be exercised in all cases, whereas in the view of the Ministers such a right ought to be exercised only under the supervision and with the consent of the government concerned. Some less far-reaching constructions were also found to be unacceptable to the Committee of Ministers. It was proposed, for instance, to incorporate the individual right of complaint into the Convention on the condition that a State might veto the examination by the Commission on particular applications. This right of veto in turn would be subject to the collective supervision of the other States in order to prevent its abuse[98]. The Consultative Assembly also proposed the formula according to which the individual right of complaint was to be incorporated into the Convention, but the States could exclude this right with respect to applications directed against them[99]. Finally, agreement was reached on the compromise as now laid down in the Convention: the Commission may receive an application from an individual only if the state against which such an application has been lodged has expressly recognised the competence of the Commission to receive such applications. States which, via the so-called "colonial clause", have declared the Convention to be applicable to one or more of the territories under their responsibility may recognise also for those territories the competence of the Commission to receive applications of individuals[100].

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[97] Ibid.

[98] Van Dijk and G. J. H. van Hoof, op. cit. note 6, p. 37.

[99] For a more detailed discussion, see: Madra , op. cit. note 95, p.128.

[100] See Article 63(4), Akılhoğlu, op. cit. note 81, p.86.

Although it was not easy to put this right into the Convention, the delegations from England, the Netherlands and Greece opposed this by claiming that "the right of individual application can be easily abused, and can serve the destructive propagandas[101]. Also, some governments insistently stated that the communists in their countries can use the right of individual application to destroy democratic systems in their countries[102]. Because of these doubts some measures were put in the Convention:

The first measure is the rule in the Article 17 of the Convention. According to Article 17:

> Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention[103].

By relying on Article 17, the Commission did not find admissible the application of the pre-admissibility staff of the German Communist Party because of the closure of the Party by the German Constitution Court, by claiming that to establish a dictatorship does not conform with the Convention, and moreover it will abolish most of the rights and freedoms given with the Convention[104, 105].

The Commission followed a similar way about the subject of the Fascist Party in Italy. In 1952 the Fascist Party was prohibited in Italy, and the man who established this party was sentenced. The application to the Commission on this subject was rejected. The

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[101] A. Şeref Gözübüyük, *"Arupa İnsan Hakları Sözleşmesi ve Bireysel Başvuru Hakkı"*, İnsan Hakları Yıllığı, TODAİ İnsan Hakları Araştırma ve Derleme Merkezi, Ankara, vol. 9, 1987, p.19

[102] Ibid.

[103] Akıllıoğlu, op. cit. note 81, p. 81.

[104] Gölcüklü & Gözübüyük, op. cit. note 28, p. 39.

[105] Com. De. ,German Communist Party / Federal Germany, 20.7.1957, No. 250/57, Document et Decisions, 1955-1957, p. 222.

Commission found Italy right in prohibiting this party for the protection of democratic institutions[106, 107].

The second measure is the rule in Article 27 of the Convention:

> The Commission shall consider inadmissible any petition submitted under Article 25 which it considers incompatible with the provisions of the present Convention, manifestly ill-founded, or an abuse of the right of petition[108].

As it is seen from Article 27, if a person uses the right of individual application for deliberate aims like political propaganda or as a political pressure; this is in controversy with the aim and the spirit of the Convention[109].

The case – law of the Commission shows that the aim pursued by the applicant can turn an application into an abuse of the right of petition[110]. The Commission has rejected applications which were designed only to evade obligations under domestic law or the consequences of a conviction[111].

The third measure is the rule in the Article 15 of the Convention. Under Article 15 "In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law".

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[106] Commission decision ,21.5. 1976, No. 6741/74, DR. 5/83.

[107] Gözübüyük, op. cit. note 101, p. 20.

[108] Tekin Akıllıoğlu, op. cit. note 51, p. 153.

[109] Commission Decision ,11.5.1978 ,No. 7604, 7719/76, 7781/77, DR. 14/133, 137.

[110] The English version of Article 25 speaks of "petition" .In the practice of the Commission this term has been replaced by "application" , a term which comes nearer to the French "requete" . Indeed, the meaning of the term "petition" in continental and international legal usage is somewhat different from its meaning within the common-law systems. In the former meaning, the aim of the right of petition is mainly to inform the relevant authorities of a certain problem or situation, and does not lead automatically to subsequent proceedings. The application of an individual under the European Convention, on the contrary ,means the start of proceedings (Van Dijk and G. J. H. van Hoof, op. cit. note 6, p. 389)

[111] For a detailed information about the abuse of the right of individual application, see below p. 50-51.

There is no derogation from Article 2, except in respect of deaths resulting from lawful acts of war or from Articles 3, 4 and 7 shall be made under this provision. As is appropriate to such a serious matter as derogation from a human rights treaty, Article 15 prescribes a very strict standard for states that wish to derogate the ECHR. In the case of *Lawless v. Ireland* (1961), a member of the Irish Republic Army claimed that the procedures and conditions of his detention by the Irish Government constituted a violation of Article 5 of the European Convention. The European Court of Human Rights set forth the criteria for evaluating the existence of the conditions dictated by Article 15, according to "the natural and customary meaning of the words" :

> The existence . . . of a "public emergency threatening the life of the nation", [can be derived] from a combination of several factors ,namely: in the first place ,the existence in the territory of the Republic of Ireland of a secret army engaged in unconstitutional activities and using violence to attain its purposes; secondly, the fact that this army was also operating outside the territory of the State, thus seriously jeopardising the relations of the Republic of Ireland with its neighbour; thirdly the steady and alarming increase in terrorist activities[112].

In the *Greek case* (1969), the Commission clarified that the term "public emergency" contained the notion of imminent danger and that therefore the following elements were required to meet the standard established by Article 15:

a. It must be actual or imminent.
b. Its effects must involve the whole nation.
c. The continuance of the organised life of the community must be threatened.
d. The crisis or danger must be exceptional, in that the normal measures or restrictions, permitted by the Convention for the maintenance of public safety, health and order, are plainly inadequate[113].

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[112] See Donna Gomien, op. cit. note 42, p. 118.

[113] Ibid., 120.

Fourth measure is that recognition of the right of individual application is optional for states. At present all the contracting parties recognised this right, but it was not an easy process. Some states waited many years for recognising this right. For example, Turkey recognised the right of individual application after 33 years the Convention entered in force, in 1987 [114].

Except these limitations, the right of individual application constitutes the most progressive provision of the European Convention. It removes the principal limitation by which the position of the individual in international law is generally characterised. One improvement in that respect is the elimination of the condition of the link of nationality in the case of a complaint by a State. Especially, however, the individual right of complaint, despite its limitations, constitutes a considerable improvement over the classic system. Precisely because States are generally reluctant to submit an application against another State, the individual right of complaint constitutes a necessary expedient for achieving the aim of the Convention to secure the rights and freedoms of individuals against States.

2.1.2.3. Acceptance of the Commission's Competence

Under Article 25 of the Convention the Commission may receive petitions from any person, non-governmental organisation or group of individuals claiming to be a victim of a violation of the Convention "provided that the High Contracting Party against which the complaints lodged has declared that it recognises the competence of the Commission to receive such petitions"[115]. The Commission's competence was thus not an automatic consequence of ratification but depended on a further declaration by the state concerned. Several of the original Contracting states did not immediately make declarations under Article

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[114] Gölcüklü &Gözübüyük, op. cit. note 28, 40.

[115] Convention for the Protection of Human Rights and Fundamental Freedoms with Protocols Nos. 1, 4, 6, 7 and 9 and selected reservations and declarations, op. cit. note 37.

25. This explains the time-lag between the entry into force of the Convention after ten ratifications (3 September 1953) and the moment when the individual complaints system became operative (5 July 1955). For this to happen, at least six declarations were required (Article 25 para. 4). At present all contracting states accepted the right of individual petition. Some states have accepted the right of individual petition indefinitely, others for a fixed period subject to express or tacit renewal[116]. It is common for the state expressly to limit its acceptance to acts or events which occur subsequent to the date of deposit of the instrument of acceptance[117].

There are some arguments on the limitations to Article 25 declarations. Some argue that states cannot attach conditions when they are recognising the competence of the Commission. The other side claims that a state can attach conditions when recognising the competence of the Commission[118]. In recent years, some questions have arisen as to the scope of the State's obligation "not to hinder in any way the effective exercise" of the right to individual petition under Article 25. In 1987, for example, Turkey declared its recognition of the competence of the Commission to examine individual applications in accordance with Article 25. At the same time, however, it subjected its acceptance of the Commission' s competence to a number of limitations. For example, the Turkish Government stated that[119]:

> (iii) the competence attributed to the Commission under this declaration shall not comprise matters regarding the legal status of military personnel and in particular, the system of discipline in the armed

[116] With 11th. Protocol , it is an obligation to recognise the right of individual petition indefinitely. See Chapter III.

[117] The declaration under Article 25 also extends to the substantive provision of the First and Sixth Protocols (Articles 5 and 6 of the First and Sixth Protocols respectively).The Fourth and Seventh Protocols , however, require separate declarations (Articles 6 and 7 of the Protocols respectively).The Fourth and Seventh Protocols enable the state to limit the declaration to certain provisions (Krüger and Norgoard, op. cit. note 84, p. 662).

[118] For detailed information about these arguments see Gölcüklü &Gözübüyük, op. cit. note 28, p. 42; Gözübüyük, op. cit. note 101, p. 22.

[119] For the full text of Turkey's declaration see: Süheyl Batum, Avrupa İnsan Hakları Mahkemesi ve Türkiye, İstanbul: Kavram Publishers, August 1996, p.25. For the reservations of all contracting states see: Convention for the Protection of Human Rights and Fundamental Freedoms with Protocols Nos. 1, 4, 6, 7 and 9 and selected reservations and declarations, op. cit. note 37.

forces;

(iv) for the purpose of the competence attributed to the Commission under this declaration, the notion of "a democratic society" in paragraphs 2 of Articles 8,9,10, and 11 of the Convention must be understood in conformity with the principles laid down in the Turkish Constitution and in particular its Preamble and its Article 13;

(v) for the purpose of the competence attributed to the Commission under the present declaration, Articles 33,52 and 135 of the Constitution must be understood as being in conformity with Article 10 and 11 of the Convention.(Annex to letter addressed to the Secretary General dated 29 January 1987)[120].

In the case *Chrysostomos v. Turkey*[121], which concerned complaints arising out of the arrest and detention of the applicants by Turkish military forces in the northern part of Cyprus, the Commission found that, apart from the temporal limitation, the limitations were invalid[122]. This view was ratified by the Court in *Loizidou v. Turkey*[123] where it held that neither Articles 25 nor 46 permitted restrictions other than of a temporal nature[124]. The Court held specifically that the restriction *ratione loci*[125] attached to Turkey's Article 25 and 46 declarations was invalid[126].

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[120] Donna Gomien, op. cit. note 42, p. 129.

[121] 68 Decision and Reports of the European Commission on Human Rights 216 (1991).

[122] D. J. Harris, M. O'Boyle and C. Warbrick, op. cit. note 17, p. 581.

[123] This case is very important for Turkey from many aspects. For a detailed information about this case see Süheyl Batum, op. cit. note 119, pp. 97-127.

[124] About the cases of *Cyprus v. Turkey* see: Van Coufoudakis, *"Cyprus and the European Convention on Human Rights: The Law and Politics of Cyprus v. Turkey, Applications 6780/74 and 6950/75"*, Human Rights Quarterly, 1982, pp. 450-473.

[125] The limitation ratione loci reads as follows: "The recognition of the right of petition extends only to allegations concerning acts and omissions of public authorities in Turkey performed within the boundaries of the territory to which the constitution of the Republic of Turkey is applicable". For the full text of the declaration, see *Chrysostomos v. Turkey* Nos 15299/89, 15300/89 and 15318/89, 68 DR 216 It 228-229(1991). The restrictions were rejected by Greece, Belgium, Denmark, Luxemburg, Norway; Sweden and the CE Secretary General, as depository , reserved their positions (D. J. Harris, M. O'Boyle and C. Warbrick, op. cit. note 17, p. 581).

[126] In reaching this view it noted that "if substantive or territorial restrictions were permissible under Articles 25 and 46, contracting parties would be free to subscribe to separate regimes of enforcement of Conventions obligations depending on the scope of their acceptances. Such a system would enable states to qualify their consent under the optional clauses and would seriously weaken the role of the Commission and Court in the

2.1.2.4. Applying to the Commission

i. Who can apply?

The right to apply to the Commission is given to the contracting states and to the individuals, non-governmental organisations and group of individuals by the Convention[127]. With respect to the last-mentioned category the Commission decided during its first session that these must be groups which have been established in a regular way according to the law of one of the contracting states. If that is not the case, the application must have been signed by all the persons belonging to the group[128]. As to the category of non-governmental organisations, the Commission decided that they must be private organisations, and that municipalities, for instance, cannot be considered as such[129].

Everyone cannot apply to the Commission. Only applicants who can "claim to be the victim of a violation" of their Convention rights can exercise the right of individual petition[130]. This victim requirement[131], laid down in Article 25 of the European Convention is the most important standing obstacle of the complaint procedure[132]. The basic principle which has emerged from this jurisprudence is that a petitioner may claim to be a victim only if he is *personally affected* by the act or omission which is at issue. He is therefore not allowed

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discharge of their functions. It would also diminish the effectiveness of the Convention as a constitutional instrument of European public order" (D. J. Harris, M. O'Boyle and C. Warbrick, op. cit. note 17, p. 581).

[127] Akıllıoğlu , op. cit. note 51, p.153.

[128] Van Dijk and G. J. H. van Hoof, op. cit. note 6, p. 39.

[129] See e.g. the joined App's 5767/72, 59922/72, 5929-5931/72, 5953-5957/72, 5984-5988/73 and 6011/73, Austrian municipalities v. Austria, Yearbook XVII (1974), p..338.

[130] See Article 25(1), above p. 26.

[131] For detailed "victim" concept see: Gözübüyük, *"Avrupa İnsan Hakları Komisyonuna Kimler Kime Karşı Başvurabilir?"*, İnsan Hakları Yıllığı, Cilt 13, TODAİ, 1991, pp. 1-17.

[132] There is victim requirement also in the complaint procedure of UN. For a detailed information about UN System see: The High Commissioner for Human Rights: An Introduction, UN High Commissioner, Geneva, Switzerland 1996.

to pose an abstract challenge to a law or practice allegedly contrary to the treaty[133]. Accordingly cases in which the injury to society is so general as to present only an abstract grievance will not be accepted. In *Case No. 10983/84*, two French medical trade unions complained that the Taxation Code obliged doctors and nurses to reveal the identity of their patients to the tax authorities[134]. According to the Unions this obligation violated the patients' right to privacy. The Commission considered the application to be an *actio popularis*, since they were complaining about the effects of the legislation on unspecified third parties. In another case, he Commission made it clear that merely the fact that trade unions consider themselves as guardians of the collective interests of their members does not suffice to make them victims, within the meaning, of article 25, of measures affecting those members[135].

In the cases of *Van den Brink* and those of *Zuiderveld and Klappe* the responded government contended before the Court that the applicants could not claim to be victims of a breach of Article 5(3) as the time each one spent in custody on remand was deducted in its entirety from the sentence ultimately imposed on them. According to the Court the relevant deduction from sentence does not *per se* deprive the individual concerned of his status as an alleged victim within the meaning of Article 25 of a breach of Article 5(3). The Court added: "The position might be otherwise if the deduction from sentence had been based upon an acknowledgement by the national courts of a violation of the Convention"[136].

The next question that has to be addressed is whether an individual may claim to be a victim when the law or practice has not yet been applied to him, but will be applied in the

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[133] Tom Zwart, The Admissibility of Human Rights Petitions, The Netherlands: Martinus Nijhoff Publishers, 1994, p.50.

[134] Application No. 10983/84, D. R. 47, p. 229.

[135] Zwart, op. cit. note 133, pp. 50-51.

[136] Van Dijk and G. J. H. van Hoof, op. cit. note 6, p. 40.

parents objected on behalf of their daughter, to legislative and administrative measures which would make sex education a compulsory part of the curriculum in Danish state schools. Although the measures had not yet been applied in the girl's case, the Commission found the application admissible. It did not elaborate on the victim-requirement, but seemed satisfied that this requirement had been met, because there was no doubt whatsoever that the measures would be applied to the girl in the near future. In general, however, the European organs are not prepared to act in advance of events[138].

In *Case No. 100/55*, the Commission introduced the indirect victim-concept. According to the Commission the word "victim" in Article 25 of the European Convention means not only the direct victim of the alleged violation but also any *indirect* victim who could suffer damage as a result of such violation or who could have a valid personal interest in securing the cessation of such violation[139]. Over the years the indirect victim - concept has been transformed into a means of third party involvement. Indirect victims have been allowed to act on behalf of direct victims who were themselves unable to present their cases[140].

ii. Against whom can an application be brought?

Under Article 25 the applicants to the Commission have to claim "to be the victim of a violation by one of the High Contracting Parties of the rights set forth in this

[137] App. No. 5095/71, Yearbook 15, pp. 482-508.

[138] Cf. Soering case, Judgement of 7 July 1989, Publ. ECHR, Series A, vol. 161, p.35; Application No. 7945/77, DR 14, p.230.

[139] Zwart, op. cit. note 133, p. 70.

[140] For cases about indirect victims see: ibid, pp. 70-71.

Convention"[141]. Therefore, it is obvious that an application can only be brought in respect of acts imputable to the respondent state.

This does not, however, mean that disputes between private individuals can never be the subject of an application. The Commission deals with disputes of this kind where they are the result of actions or omissions attributable to the State[142]. Finally, it must be underlined that States are responsible under the Convention for acts of all State organs, be they legislative, judicial or executive, on all levels of State activity (including Federal States or other decentralised bodies of State administration)[143].

2.1 PROCEDURE BEFORE THE COMMISSION

2.2.1. The Examination of Admissibility

The European Convention for the Protection of Human Rights and Fundamental Freedoms contains provisions regarding the grounds on which the European Commission of Human Rights must declare an application inadmissible. The importance of these provisions appears from the fact that more than 95% of the applications lodged with the Commission are declared inadmissible[144]. The examination of admissibility has been therefore regarded as the core of the procedure before the Commission[145].

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[141] Gözübüyük, op. cit. note 131, p. 13.

[142] For these cases see: Zwart op. cit .note 133, pp. 100-101-102-103.

[143] Krüger and Norgoard, op. cit. note 84, p. 674.

[144] Hans Danelius, *"Conditions of Admissibility in the Jurisprudence of the European Commission of Human Rights"*, Human Rights Journal VII., no. 2 , 1968, p. 284.

[145] For detailed information about all the applications against Turkey that were declared admissible see: Semih Gemalmaz, Avrupa İnsan Hakları Komisyon Kararları 2 , İnsan Hakları Derneği , Kavram Publishers, İstanbul, February 1996. The claims in the applications against Turkey are about the following rights in the below articles: 1. Article 2 (right to life) 2. Article 3 (freedom from torture and other inhuman or degrading treatment or punishment) 3. Article 4 (freedom from slavery, servitude, and forced or compulsory labour) 4. Article 5 (right to liberty and security of person) 5. Article 6 (right to a fair and public hearing) 6. Article 7 (freedom from retrospective effect of penal legislation) 7. Article 8 (right to respect for privacy) 8. Article 9 (freedom of thought, conscience and religion) 9. Article 10 (freedom of expression) 10. Article 11(freedom of association and assembly) 11. Article 13 (right to an effective remedy before a national authority) 12. Article 14 (prohibition of discrimination) 13. Article 18 (prohibition of misuse of power in restricting the rights and freedoms) 14. Article 1 of Protocol no. 1 (right to the peaceful enjoyment of one's possessions) 15. Article 2 of Protocol no. 1 (right to education) 16. Article 3 of Protocol no. 1 (free elections by secret ballot), (ibid).

The procedure before the Commission in the examination of admissibility is primarily in writing. Article 25(1), which refers to petitions addressed to the Secretary General of the Council of Europe, clearly envisages that the application which instates proceeding before the Commission should be made in writing[146]. Most applications originate in a letter to the Commission's Secretary[147] setting out the complaint, and there are no special requirements as to form.

Applications may be made either by the applicant in person, or by a lawyer acting under a power of attorney. An applicant may be assisted or represented by a barrister, solicitor, professor of law, or any other lawyer approved by the Commission.[148]. While the official languages of the Commission are English and French, applicants are regularly allowed to use certain other languages[149].

An application should state the applicant's name and that of the respondent government, the object of the claim ,as far as possible the provision of the Convention alleged to have been violated and a statement of the facts and arguments on which the applicant relies (Rule 41(1)). In particular, the application should include information showing that it satisfies the conditions laid down in Article 26 regarding exhaustion of domestic remedies and observance of the six months rule (Rule 41(2)). To facilitate the applicant's task, he is normally sent an application form by the Secretariat of the Commission, but he may submit other documents instead or in addition[150]. If the application appeared to be admissible, it was communicated directly to the respondent government for written observations on

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[146] Jacobs, op. cit. note 56, p.219.

[147] The Secretary is the channel for all communications concerning the Commission: Rule 12(b) of the Commission's Rules of Procedure. On the role of the Secretariat , see above Chapter I, p. 23.

[148] Rule 36(2) of the Commission's Rules of Procedure; Gemalmaz, op. cit. note 90, p. 272.

[149] Rules 35(1) and 37. In practice Dutch, German, Italian and the Scandinavian languages are also accepted (ibid.).

admissibility. Before deciding upon the admissibility of the application the Commission may invite the parties to submit further observations either in writing or at an oral hearing (Rule 46(2)).

The decision of the Commission on the admissibility of an application is normally final and there is no possibility of appeal[151]. If the application is referred to the Court, it is possible that the Court may take a different view on the question of admissibility[152].

2.2.2. The Conditions of Admissibility

The conditions of admissibility of an application to the Commission are governed by Articles 26 and 27 of the Convention. The remedies in Article 26 is the general remedies governing both state and individual applications. However, the remedies in Article 26 are the most important grounds in practice for rejection of individual applications. Therefore, these grounds will be considered separately below in a detail. Subsequently, the remedies in Article 27 that are required for only individual applications will be shortly examined.

2.2.2.1. Exhaustion of Local Remedies

Article 26 of the Convention provides that the Commission may not deal with a matter until all local remedies have been exhausted according to the general principles of international law[153]. It follows from Article 27, paragraph 3, that any application which does not satisfy this condition is to be declared inadmissible. This is the so-called rule of the "exhaustion of local remedies" which is to be regarded as a general rule of international

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[150] Jacobs, op. cit. note 56, p. 219.

[151] For detailed information for the procedure at this stage see: Van Dijk and G. J. H. van Hoof, op. cit. note 6 , pp. 61-66.

[152] See: Rudolf Bernhard, *"Human Rights and Judicial Review: The European Court of Human Rights"*, Human Rights and Judicial Review(A Comparative Perspective, ed. David M. Beatty, London, Martinus Nijhoff Publishers, 1994, pp. 297-319.

[153] See Article 26: Convention for the Protection of Human Rights and Fundamental Freedoms with Protocols Nos. 1, 4, 6, 7 and 9 and selected reservations and declarations,op.cit.note 37.

procedural law[154]. In its case-law the Commission is indeed frequently guided by international judicial and arbitral decisions with respect to this rule. The Commission referred expressly, for instance, to the judgement of the International Court of Justice in the *Interhande* Case concerning the rationale of the local remedies[155]. In the *Nielsen* Case the Commission formulated this rationale as follows:

> The Respondent State must first have an opportunity to redress by its own means within the framework of its own domestic legal system the wrong alleged to have been done to the individual[156].

As it is seen, the rationale of the local remedies rule is that before proceedings are brought to an international body, the State concerned must have had the opportunity to remedy matters through its own legal system[157].

The domestic remedies rule applies also to inter-state applications under Article 24, unlike the other grounds of inadmissibility specified in Article 27. However, the Commission has recognised that the rule has only a limited application in inter-State cases. It applies where the case is concerned, as were the cases just mentioned, with violations of the rights of particular individuals. Indeed it would be unreasonable to suggest that, if an individual has not exhausted the domestic remedies, the Commission can deal with the case if it is brought not by the alleged victim but by a state[158]. But the rule does not apply where the scope of the application is to determine the compatibility with the Convention of legislative measures and

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[154] For detailed discussion of the nature, substance and rationale of this rule, see Gözübüyük, *"Bireysel Başvuru ve İç Hukuk Yollarının Tüketilmesi"*, İnsan Hakları Yıllığı, TODAI, Cilt 10-11, 1988-89, pp. 3-15.

[155] I. C. J. Reports 1959, p. 6, Van Dijk and G. J. H. van Hoof, op. cit. note 6, p. 81.

[156] Ibid.

[157] Both the Commission and the Court fully accepted the basis of the rule. In *Application 343*, the Commission stated that the rule is "founded upon the principle that the Respondent State must first have an opportunity to redress by its own means within the framework of its own domestic legal system the wrong alleged to have been done to the individual", and in *De Wilde, Oons and Versyp (Vagrancy Cases)* the Court held that the rule "dispenses states from answering before an individual body for their acts before they have had an opportunity to put matters right through their own legal system" (Scott Davidson ,op. cit. note 58, p. 106).

[158] Jacobs, op. cit .note 56, p 237.

administrative practices in general[159]. Here it would be unreasonable to apply the rule, as there is no requirement in such cases that there should be a victim at all[160].

In the case of individual applicants, the applicant must submit that he is the victim of the alleged violation, so that he is at the same time the person who must have exhausted all available local remedies[161]. When an applicant submitted that no local remedy had been available to him, because his complaint concerned the compatibility of the Belgian divorce legislation with the Convention, the Commission decided that nothing had prevented him from submitting this question to the Belgian Court of Cassation[162]. And in the case of an application against the Netherlands concerning the fiscal legislation relating to married women, the Commission pointed out that the applicant could have submitted the question of the compatibility of the challenged provisions with the Convention under the Article 66 of the Dutch Constitution, to the Dutch courts[163]. Both applications were declared inadmissible under Article 26[164].

The domestic remedies rule requires that the complaint should have been brought before the appropriate judicial or administrative authorities, and should have been taken to the highest instance available. This requirement may raise difficulties where there are doubts whether a particular course of action would constitute an effective remedy. For example, in

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[159] First Cyprus case, Yearbook 2, 182 at 184; the Greek case, Yearbook 11, 690 at 726.

[160] Jacobs, op. cit. .note 56, p 237.

[161] According to Tom Zwart, three major criteria can be deduced from the practice of the Commission and the Court. Thus the local remedies rule requires the exhaustion of remedies which are: available ,effective and sufficient. A remedy is considered available if it can be pursued by the petitioner without impediment, it is deemed effective if it offers a prospect of success ,and it is found sufficient if it is capable of redressing the complaint (Zwart, op. cit. note 133, pp. 187-188).

[162] Application 1488/62,X v. Belgium, Coll. 13 (1964), p.93(96).

[163] Application 2780/66, X v. .the Netherlands (not published). Van Dijk and G. J. H. van Hoof, op. cit. note 6, p. 84.

[164] The two applications mentioned were rejected on the ground of Article 26 ,but might also have been declared inadmissible on the grounds of Article 27(2). In both cases the applicants had not submitted that they were victims of the alleged violation so that these cases concerned in reality completely abstract complaints, which the Commission usually rejects on account of incompatibility with the provisions of the Convention (ibid.).

the Italian legal system, an individual is not entitled to apply directly to the Constitutional Court for a review of the constitutionality of a law. According to the Court, in these circumstances this does not constitute a remedy which an applicant is obliged to exhaust under Article 26 of the Convention[165]. This is because only a court which is hearing the merits of a case can make a reference to the Constitutional Court, either at the request of a party or of its own motion[166].

The most important question in connection with Article 26 is what legal remedies must have been pursued. Here, a good deal depends on the relevant national law, and the answer to this question can only be given on a case-by-case basis[167]. No definition of the term "remedy" is to be found in the case-law of the Commission. In various places it does give some indications as to its meaning. In the *Nielsen Case* the Commission submitted quite generally that:

> The rules governing the exhaustion of the local remedies, as they are generally recognised today, in principle require that recourse should be had to all legal remedies available under the local law which are in principle capable of providing an effective and sufficient means of redressing the wrongs for which, on the international plane, the Respondent State is alleged to be responsible[168].

The applicant in *Case No 7511/76*, alleged that corporal punishment administered in schools in Scotland contravened article 3 of the Convention[169]. She complained that she had not been able to obtain a guarantee that corporal punishment would not be administered to her

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[165] *Brozicek case* ,Judgement of 19 Dec. 1989, Publ. E.C.H.R , Series A, vol. 167, p. 17; Padovani case, Judgement of 28 January 1993, Publ. E.C.H.R., Series A, vol. 257-B, p. 20.

[166] Davidson, op. cit. note 58, p. 238.

[167] This standpoint was already taken expressly by the Commission at a very early date : see Application 343 157, *Schouw Nielsen v. Denmark*, Yearbook II (1958-59), P. 412: "the competence which the Commission has in every case to appreciate in the light of its particular facts whether any given remedy at any given date appeared to offer the Applicant the possibility of an effective and sufficient remedy" .

[168] Van Dijk and G. J. H. van Hoof, op. cit. note 6, p. 88.

[169] Application No. 7511/76, D. R. 12, pp. 58-59.

seven year old son by his school teachers. The State party submitted that the applicant might have been able to obtain a court declaration or a court injunction to prevent any immediate threat of corporal punishment of her son. The Commission, however, noted that moderate corporal punishment by school teachers was accepted in domestic law and was not, as such, justicible in the courts. The Commission therefore concluded that seizing the national courts could not in these circumstances, be considered an effective remedy under the generally recognised principles of international law [170].

The Commission has accepted the possibility that according to the generally recognised rules of international law there may be special circumstances in which even effective and adequate remedies may be left unutilised[171]. The following examples of special circumstances have been dealt with in the Commission's case-law: doubt as to the effectiveness of the relevant remedy[172]; lack of knowledge on the part of the applicant as to (the existence of) a particular remedy[173]; the poor health of the applicant[174]; the poor financial position of the applicant or the high cost of the procedure[175]; lack of free legal aid[176]; fair of repercussions[177]; errors or wrong advice by a counsel or by the authorities[178]; two applicants filing the same complaint, while only one applicant has exhausted the domestic remedies[179].

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[170] Zwart , op. cit. note 131, p.192.

[171] Appl. 2257/64, Soltikow v. Federal Republic of Germany, Yearbook XI (1968), p.180.

[172] Appl. 3651/68, X v. United Kingdom, Yearbook XIII (1970), p. 476.

[173] Appl. 5006/71, X v. United Kingdom, Coll. 39 (1972), p. .91.

[174] Appl. 3788/68, X V. Sweden, Yearbook XIII (1970), p.548.

[175] Appl. 568/59, X v. Federal Republic of Germany, Coll. 2 (1960), p.1.

[176] Appl. 181/56, X v. Federal Republic of Germany, Yearbook I (1955-57), p.139.

[177] Appl. 1295/61, X v. Federal Republic of Germany (not published) ,T-P. 94.

[178] Appl. 2257/64, Soltikow v. Federal Republic of Germany, Yearbook XI (1968), p. 180.

[179] Appl. 818/60, X v. Belgium (not published). See, however, the Court's judgement of 13 May 1980, Artico, A .37 (1980), p.18. In appl. 10000/82,H. V. United Kingdom, D&R 33(1983),p.247, the Commission accepted that

So far, the existence of such special circumstances has been recognised by the Commission only in a few cases. In applying this rule the Commission behaves too rigid and formal and sometimes this creates unjustable results for individuals[180]. The Commission uses this rule for decreasing the number of individual applications. It is better for the Commission to pass a more flexible way[181].

2.2.2.2. Six months rule[182]

Under Article 26 the Commission may only receive a complaint "within a period of six months from the date on which the final national decision was taken". There is an obvious link between this rule and that of the prior exhaustion of all domestic remedies rule[183]. This link was also stated by the Commission in the *De Becker* case:

> The two rules contained in Article 26... are closely interrelated, since not only are they combined in the same Article, but they are also expressed in a single sentence whose grammatical construction implies such correlation;... the term "final decision", therefore, in Article 26 refers exclusively to the final decision concerned in the exhaustion of all domestic remedies . . . so that the six months period is operative only in this context[184].

This interpretation, while plainly correct, may appear to confront the applicant with a dilemma, if he is in doubt whether a particular remedy is effective. If he does exhaust it, and the Commission holds that it was not a remedy to be exhausted, his application may be too late[185]. If on the other hand he does not exhaust it, the application might be declared

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all domestic remedies were exhausted, since the applicant had received counsel's advice that a domestic remedy would have no prospects of success.

[180] Madra, op. cit. note 95, p. 190.

[181] For the ways of domestic remedies for all contracting states see: Semih Gemalmaz, Avrupa İnsan Hakları Komisyon Kararları 3, İnsan Hakları Derneği , Kavram Publishers , İstanbul, April 1996.

[182] For detailed information about six months rule see Gözübüyük, *"Avrupa İnsan Hakları Komisyonuna Başvuru Süresi"*, İnsan Hakları Yıllığı, TODAI, vol. 12, 1990, pp.1-12.

[183] Vasak, op. cit. note 61, p. 470.

[184] Jacobs, op. cit. note 56, p. 242.

[185] Madra, op. cit. note 95, p. 192

inadmissible on that ground[186]. In matters like these the Commission takes a flexible attitude. An Italian applicant contacted the Commission for the first time on 21 July 1978 setting out in his letter the substance of his complaints. Subsequently he sought reopening of proceedings in Italy, possibly as a result of the information provided by the Commission's Secretariat. The applicant did not contact the Commission again until 17 February 1981, at the end of the reopening procedure. The Commission nevertheless considered his application to have been introduced on 21 July 1978 and therefore in time[187].

Although the six-month time-limit formally starts running at the moment at which the final national decision is taken, the Commission has adopted the date on which the decision has been notified to the applicant as the relevant moment, provided that the applicant was previously ignorant of the decision[188].

The rule that in the absence of a remedy ,the six month period runs from the date of the decision complained of, applies only to cases where the complaint is about a decision as such or other specific occurrences, and not where the complaints are about a so-called "continuing situation". The Commission dealt with a continuing situation for the first time in the *De Becker* case[189]. De Becker had been sentenced to death in 1946 for treason during the Second World War. This sentence was later converted into imprisonment, and in 1961 he was released under certain conditions. Under Belgian criminal law, such a sentence resulted in the limitation of certain rights - including the right to freedom of expression - which also continued to apply after the release. The Commission held that this was a continuing situation

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[186] ibid.

[187] Appl. 9024/80 and 9317/81, Colozza and Rubinat v. Italy, D&R 28 (1982), p. 138.

[188] Appl. 899/60,X v. Federal Republic of Germany, Yearbook V (1962),P.136. For a case in which the final decision was known to counsel of the applicant ,see Appl. 5759/72,X v. Austria, D&R 6(1977), p.15; Appl. 9991/82, Bozano v. Italy, D&R 39 (1984), p. 147.

[189] Zwart, op. cit .note 131, p. 224.

and considered the complaint admissible *natione tempori.* It considered that the six-month rule was not applicable here, because the question was whether, by the application to De Becker of the Belgian legislation in question, the Convention was still being violated[190].

The Commission also may deal with an application if the decision falls outside the six months' time-limit but forms part of a *chain of events* [191]. In *Case No. 2614/65,* for example, the applicant claimed that the length of his detention on remand had been unreasonable within the meaning of Article 5(3) of the Convention[192]. The State party pointed out that the applicant had been detained during two separate periods. Since the applicant had only complained with the six months rule concerning the second period of detention, it argued that the complaint concerning the first period should be found inadmissible. The Commission disagreed. It observed that although it would be barred by the six months rule from considering the first period of detention and remand a separate complaint, it could take the first period into account in forming an opinion on the reasonableness of the applicant's later detention[193].

With respect to the six-month rule, too, the Commission admits that special circumstances may occur in which the applicant need not satisfy this requirement. The case-law of the Commission on this point is almost identical with that regarding special circumstances in connection with the local remedies rule[194].

2.2.2.3. Specific Conditions Governing Individual Applications

Article 27 of the ECHR provides that:

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[190] Appl. 214/56, De Becker v. Belgium, Yearbook II (1958-59),P.214. See also Appl. 4859/71 X v. Belgium, Coll. 44 (1973), p.1 , and Appls. 7572,7586 and 7587/76, Ensslin, Boader and Rospe v. Federal Republic of Germany , D&R 14(1979), p.66.

[191] Zwart op. cit. note 133, p. 225.

[192] Application No. 2614/65, Yearbook 11, p.304.

[193] Zwart, op. cit. note 133, p. 225.

[194] For detailed information for these special circumstances see: Zwart (ibid.) or Gözübüyük, op. cit. note 182.

" 1. The Commission shall not deal with any petition submitted under Article 25 which

a) is anonymous, or

b) is substantially the same as a matter which has already been examined by the Commission or has already been submitted to another procedure of international investigation or settlement and if it contains no relevant new information.

c) The Commission shall consider inadmissible any petition submitted under Article 25 which it considers incompatible with the provisions of the present Convention, manifestly ill-founded, or an abuse of the right of petition[195].

i. Anonymity

In practice this is not an important ground of inadmissibility since applicants are required to disclose their identity when completing the application form[196]. In an application brought by a Church or by an association concerning an infringement of its rights, it is not necessary to reveal the identity of members. The Commission has held, for example, that a Church is capable of possessing and exercising Article 9 rights in its own capacity as a representative of its members[197]. In one case,[198] however, the Commission rejected a complaint brought by a Federation of Medical Trade Unions which had complained of breaches of its members' rights. The Commission noted that the Federation did not claim to be a victim but had stated that it acted as representatives of unnamed individuals who were. Under the Rules of Procedure the association was required to identify the victims and show that they had received specific instructions from each of them[199].

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[195] Convention for the Protection of Human Rights and Fundamental Freedoms with Protocols Nos. 1, 4, 6, 7 and 9 and selected reservations and declarations, op. cit. note 37.

[196] Nevertheless, two complaints have been found inadmissible on this ground. Both petitions had been introduced by non-governmental organisations claiming to represent their members (See: Zwart, op. cit. note 133, p. 155).

[197] X and Church of Scientology v. Sweden (1979),No. 7805/77,16 DR 68

[198] Confederation des Syndicants Medicaux Français v. France No 10983/84,47 DR 225 (1986). See also Rule 43(3) of the Rules of Procedure in Gemalmaz, op. cit. note 90.

[199] D. J. Harris, M. O'Boyle and C. Warbrick, op. cit. note 17, p. 625.

ii. Substantially the Same Applications

Under Article 27 the Commission will reject an application if the factual basis of the new application is the same as that of an application which has previously been rejected by the Commission. The Commission has also pointed out that the contents of two petitions are essentially the same if they relate to substantially the same facts[200] and to identical complaints[201] based on similar rights[202]. The situation is different, where new information is provided which alters the factual basis of the complaint.

The purpose of the second limb of Article 27 is to prevent a duplication of examination by different international bodies. The term "international investigation or settlement" is rather vague but has been interpreted as encompassing organs such as the ICCPR's Human Rights Committee, other enforcement agencies set up within the UN System (such as ILO bodies) and the Court of Justice of the European Union [203].

In the *GCHQ* case [204] the government had drawn the Commission's attention to the fact that an identical complaint had been examined by ILO organs. The Commission did not consider that the applicant was substantially the same since the ILO complaint had been brought by the Trades Union Congress on its own behalf whereas the GCHQ case had been brought by the Council of Civil Service Unions and six individual applicants[205].

iii. Manifestly Ill-founded Applications

Article 27(2) requires the Commission to reject as inadmissible an application which

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[200] Application No. 17512/90

[201] Appl. No. 17512/90, Ap. No 16358/90.

[202] Appl. No. 11603/85, Ap. No. 16358/90

[203] D. J. Harris, M. O'Boyle and C. Warbrick, op. cit. note 17, p. 626.

[204] Council of Civil Service Unions v. UK No 11603/85, 50 DR 228(1987)

[205] D. J. Harris, M. O'Boyle and C. Warbrick, op. cit. note 17, p. 626.

is "manifestly ill-founded". This rule was originally conceived, as a screen or filter designed to ensure that only complaints of substance were examined on the merits[206]. The concept of "manifestly ill-founded" has thus played a key role in the Commission's practice, and the evolution of the Commission itself. This means that to some degree, the merits of the case may be taken into account even at the stage of admissibility. As this rule is an exception to the general rule concerning the formal character of the grounds of admissibility, it might be advocated that the term "manifestly ill-founded" should be given a restrictive interpretation. In practice this has not been so, but complaints have been declared inadmissible as manifestly ill-founded to such an extent to have the word "manifestly" appears to have lost much of its meaning[207].

The practice of the Commission on this point has been frequently criticised, and this criticism has certain merits [208]. On the other hand, there are also reasons which explain, and perhaps even justify, the practice adopted by the Commission. First, it is obvious that Governments are reluctant to see applications against them being admitted by the Commission[209]. The procedure at the stage of admissibility has therefore often been prolonged at the-explicit or implicit- request of the Governments concerned. Secondly, it must be taken into account that the procedure after a case has been declared admissible is very complex and time-consuming, and it is easily understandable that the Commission wishes, as far as possible, to avoid this procedure by making a fuller examination at the stage of admissibility[210].

The Commission's decision in the *Iversen* Case *(Iversen v. Norway)* is one

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[206] Jacobs, op. cit. note 56, p. 243.

[207] Danielus op. cit .note 142, p. 318.

[208] For detailed information about the this merits see: Madra, op. cit. note 95, p. 206.

[209] Danielus, op. cit. note 144, p. 318.

[210] Ibid.

which has been widely discussed in this context[211]. Iversen, the applicant, complained about the possibility existing in Norway that dentists who have recently completed their studies can be obliged to work for some time in the public service[212]. The complaint was decided "manifestly ill-founded" by the Commission, while it raised such complicated questions concerning Article 4 that a more detailed examination of the merits appeared decidedly justified[213].

iv. Abuse of the Right of Complaint

Under Article 27(2) of the Convention, the Commission shall consider inadmissible any individual application which it considers an abuse of the right of petition. The meaning of this expression is far from clear and the Commission has been faced, in a number of cases, with the question of its interpretation.

As it is discussed before, there were long discussions in the beginning of ECHR, and the government had some doubts that the individuals may use the right of application as a political or destructive propaganda against the state. Article 27(2) was a result of those discussions and also this is a (defective) expedient for holding querulous applicants at bay for the Commission[214]. A German in the course of time had lodged a great many applications which had been rejected without exception, either because they were manifestly ill-founded or because of non-exhaustion of the local remedies. When – together with his wife - he once again lodged several applications, which were moreover substantially the same as previous

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[211] For detailed information about *Iversen case* see: Jacobs, op. cit. note 56, p. 244; Darelius, op. cit. note 144, p. 318; Van Dijk and G. J. H. van Hoof, op. cit. note 6, p. 106; Madra, op. cit. note 95, p. 106.

[212] Appl. 1468/62, Yearbook VI (1963), p. 278.

[213] See : Jacobs, op. cit .note 56, p. 244; Darelius, op. cit .note 144, p. 318; Van Dijk and G. J. H. van Hoof, op. cit. note 6, p. 106; Madra, op. cit .note 95, p. 106.

[214] Van Dijk and G. J. H. van Hoof, op. cit. note 6, p. 69.

cases submitted by him, the Commission declared them inadmissible on account of abuse, and gave the applicant to understand:

> It cannot be the task of the Commission ,a body which was set up under the Convention "to ensure the observance of the engagements undertaken by the High Contracting Parties in the present Convention", to deal with a succession of ill-founded and querulous complaints, creating unnecessary work which is incompatible with its real functions, and which hinders it in carrying them out[215].

In *Application No. 1270/61*, the applicant, Ilse Koch, was imprisoned pursuant to a sentence imposed on her for very serious crimes committed in Nazi-Germany[216]. The applicant presented herself as the victim of a propaganda campaign, protesting her innocence and claiming that her state of health had prevented her from defending herself. Although the Commission stressed that it could not deny her the guarantee of the rights and freedoms defined in the Convention, the fact that the applicant had committed crimes against the most elementary rights of mankind seems to have affected its judgement. It came to the conclusion that Ilse Koch, in presenting a series of allegations and complaints that were completely unsupported by the Convention was seeking merely to escape the consequences of her sentence. According to the Commission, the submission of the application, therefore, was a clear and manifest abuse of the right of individual petition within the meaning of article 27(2) of the Convention[217].

2.2.3. Examination of the Merits and the Report of the Commission

If an application is declared admissible, the Commission proceeds, under Article

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[215] Appls. 5070,5171,5186/71,X v. Federal Republic of Germany, Yearbook XV (1972) , p. 474, Appls. 5145/71, 5246/71, 5333/72, 5586/72, Mivheal and Margarethe Ringeisen v. Austria, Coll. 43 (1973), p.152.

[216] App. No. 1270/61, Yearbook 5, pp. 134-136.

[217] Zwart, op. cit. note 133, p. 156-157.

28[218], to an examination of the merits of the case. Under Article 28(a), it is required to ascertain the facts of the case; under Article 28(b), it is required to place itself at the disposal of the parties with a view to securing a friendly settlement of the matter. This task is considered in the next section[219].

The procedure concerning the merits has a contradictory[220] and quasi-judicial character. However, like the procedure concerning admissibility, the examination of the merits also takes place *in camera.* The facts of the case are established by an exchange of written pleadings and further oral argument. The Commission may also call witnesses, carry out a visit of inquiry, or take any other measures which it considers necessary[221]. Witnesses normally testify under oath. and they may be cross-examined by the opposing side and asked questions by members of the Commission. The taking of evidence from witnesses by the Commission need not occur in Strasbourg. Commission delegates may, for example, visit a prison in another country for the purpose of hearing witnesses or examining evidence[222]. Article 28 obliges the state to furnish "all necessary facilities" for the Commission's or delegates' investigations[223].

In the *Greek Case* the Sub-Commission heard a total of eighty-seven witnesses. It visited Athens but returned after hearing fifty witnesses as it considered that the Greek Government had prevented it from hearing others and from visiting an Athens prison and

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[218] see Article 28, Convention for the Protection of Human Rights and Fundamental Freedoms with Protocols Nos. 1, 4, 6, 7 and 9 and selected reservations and declarations,op.cit.note 37.

[219] See below p. 54-56.

[220] This does not necessarily imply direct contact between the parties; see Appl. 8007/77 Cyprus v. Turkey, D&R 13 (1979), p. 85.

[221] Jacobs, op. cit. note 56, p. 251.

[222] Boyle, op. cit. note. 26, pp. 147-148.

[223] To find out what sanctions are available should a government refuse to supply certain information or facilities on security grounds, see: Gölcüklü &Gözübüyük, op. cit. note 28, p. 119.

detention camps on Leros[224]. In the *Irish Case*, delegates of the Commission heard a number of witnesses at a military base in Norway, chosen for security reasons[225].

After the examination of the merits by the Commission, if no friendly settlement is achieved, under Article 31 of the Convention, the Commission is required to draw up a report[226]on facts and state its opinion as to whether the facts found disclose a breach of the Convention. While, legally, the report is not a verdict since it contains only an "opinion" which is not binding upon the parties, it does, however, have the appearances of one[227]. As in a verdict, he main part of the report is devoted to establishing whether the facts ascertained comply or do not comply with the provisions of the Convention[228]. In transmitting the report to the Committee of Ministers of the Council of Europe; the Commission may make "such proposals as it thinks fit" (Article 31 para. 3), which proposals will be aimed at facilitating settlement of the case. In the Greek Case, for example, the Commission made ten separate proposals designed to remedy the various aspects of the situation in Greece which it had found inconsistent with the Convention[229].

Excluding exceptional cases, the Commission's examination of the merits usually lasts about two years. Given the length of proceedings on admissibility, and the possibility of further proceeding before the Court, this period is too long. This is one of the most criticisms to the Convention System[230, 231].

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[224] Jacobs, op. cit. note 56, p. 252.

[225] Ibid.

[226] see Article 31, Convention for the Protection of Human Rights and Fundamental Freedoms with Protocols Nos. 1, 4, 6, 7 and 9 and selected reservations and declarations,op.cit.note 37.

[227] Vasak, op. cit. note 61, p. 474.

[228] Ibid.

[229] Yearbook 12, the Greek Case, 514-15, Jacobs, op. cit. note 56, p. 253.

[230] For these criticisms see Chapter III.

2.2.4. The End of an Application

2.2.4.1. Friendly Settlement

Parallel to its investigation of the merits, the Commission is changed with the responsibility under article 28 "to place itself at the disposal of the parties" in order to facilitate a friendly settlement. Conciliation is one of the traditional methods of peaceful settlement of international disputes[232]. Conciliation or "friendly settlement seems thus to belong to the normal mechanism protecting human rights[233]. This is also one of the major tasks of the Commission. It follows from the terms of Article 28(b) that there are two conditions which have to be satisfied for a friendly settlement to be achieved.

First, there must be an agreement between the parties disposing of the case to their satisfaction. Second, the settlement must be "on the basis of respect for human rights as defined in the Convention"[234]. The procedure for friendly settlement is based upon Rule 49 of the present Rules of the Court concerning the striking out of a case from its list[235]. The Commission has great discretion with respect to the way in which it may try to secure a friendly settlement. This flexible and informal character of the procedure makes it possible to

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[231] For detailed information about examination of merits see : Kertsen Rogge, "*Fact-Finding*", The European System for the Protection of Human Rights, ed. R. St. J. Macdonald, F. Matscher and H. Etzold, Netherlands: Martinus Nijhoff Publishers, 1993, pp. 677-703, p. 685.

[232] See Article 33(1) of the United Nations Charter. The term "friendly settlement" was adopted rather than "conciliation" because the latter was considered more appropriate to exclusively inter-State disputes (see: Alexandre Kiss , *"Conciliation"*, The European System for the Protection of Human Rights, ed. R. St. J. Macdonald, F. Matscher and H. Etzold, Netherlands: Martinus Nijhoff Publishers, 1993, pp. 703-713.

[233] The UN Covenant on Civil and Political Rights, adopted on 16 December 1976, established two different procedures in order to enforce protected rights, but conciliation appears only in the inter-State procedure, which is optional.(Article 41(1) of the Covenant). In the American System, if the Inter-American Commission on Human Rights admits an individual petition or a State communication, it shall place itself at the disposal of the parties concerned with a view to reaching a friendly settlement of the matter(American Convention, Article 48(1))..In the African Charter on Human and Peoples' Rights ,adopted in Nairobi on 26 June 1981, violation of the Charter by Contracting States should be brought to the attention of such States by other Contracting Parties(Article 47) and an attempt should be made to settle the matter "through bilateral negotiation or by any other peaceful procedure" (Article 48). For these Articles see: Gemalmaz, op. cit .note 90.

[234] Jacobs, op. cit. note 56, p. 254.

[235] For these rules see: Gemalmaz, op. cit. note 90, p. 272.

create an atmosphere in which it is easier for the parties to reach a compromise. In this context the fact that the consideration of the application by the Commission takes place *in camera* plays an important part.

It is not easy way to reach a friendly settlement. One finds that 29 precedents of friendly settlement have been registered between 1962 and the end of 1991[236]. Although that is a small number compared with the total of 225 decisions handed down by the Court since 1960. In some cases of friendly settlement the responding state not only paid money to the applicant, also changed their laws and systems. In the *Harman Case*[237] the United Kingdom Government, apart from paying all the applicant's legal costs and expenses, undertook to change the law so that it would no longer be a contempt of court to render public material that is contained in documents which are compulsorily disclosed in civil proceedings, once those documents have been read out in open court[238].

In the *Gussenbauer Case* against Austria the settlement resulted in radical changes in the Austrian system of counsels assigned to prisoners[239]. Furthermore, in the case of *Zimmermann* the Austrian Government was willing to propose to the Federal President to quash, by an act of grace, the conditional prison sentence of seven months imposed on Zimmermann by the Vienna Regional Court[240]. In this case financial compensation was also offered.

If no friendly settlement is reached, the Commission pursues its examination of the facts and, under Article 31 draws up a Report in which it gives its opinion on the question of whether these facts disclose a violation of the Convention. If a friendly settlement is

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[236] ibid.

[237] Report of 15 May 1986, Stock-Taking on the ECHR, Strasbourg 1986, pp. 43-44.

[238] Van Dijk and G. J. H. van Hoof, op. cit. note 6, p. 124.

[239] Report of 8 Oct. 1974, Gussenbauer v. Austria, Yearbook XV (1972), p. 558.

[240] Report of 6 July 1982, Zimermann v. Austria, D&R 30 (1983), p.15.

achieved, the Commission draws up a Report, which under Article 30 is confined to a brief statement of the facts and of the solution reached. The Report is published and that is the end of the case.

Criticisms have sometimes been expressed of the system of friendly settlement. It may be said, for example, that it introduces an extra-judicial, or even a political element into what should be a purely legal process. The very notion of compromise, implied in the idea of a settlement, may seem inconsistent with the concept of human rights. But, there is also a fact that all the international systems of human rights protection have adopted it, for the simple reason that in reality it may lead to the same practical result as would a more or less lengthy procedure. One may also think, however, that the success of this form of conciliation corresponds to a general trend of present international law, which tends to settle international disputes by "soft" methods, rather than by judicial procedure[241].

2.2.4.2. Decision by the Committee of Ministers

If a case on which the Commission has submitted a report under Article 31 has not, within a period of three months, been referred to the Court, the final decision is taken, under Article 32 , by the Committee of Ministers. Under Article 32 the Committee must decide by a majority of two-thirds whether there has been a violation of the Convention[242] . If it is decided that a Party is in breach, the Committee of Ministers is required to prescribe the remedial action which the state must take and the time within which it must be taken. Such decisions are legally binding on the states to which they are addressed[243]. Especially, in the case of individual applications, it is clearly wrong that the respondent state should participate

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[241] Alexsandre, op. cit. note 232, p. 711.

[242] Davidson, op. cit. note 58, p. 115.

[243] For detailed information for the procedure before the Committee of Ministers see :C. Ravaud, "*the Committee of Ministers*", The European System for the Protection of Human Rights, ed. R. St. J. Macdonald, F. Matscher and H. Etzold, Netherlands: Martinus Nijhoff Publishers, 1993, p. 645.

all the procedure before the Committee of Ministers while the applicant has no standing. This system is the result of a compromise which emerged at the time the Convention was drafted, when it appeared that some governments were not prepared to accept compulsory judicial settlement[244]. Therefore, the system is unsatisfactory in principle, since the Committee of Ministers is a political rather than a judicial body[245].

2.2.4.3. Decisions by the European Court of Human Rights[246]

Article 47 provides that the Court may deal with a case only after the Commission has acknowledged the failure of efforts to secure a friendly settlement and within the period of three months referred to in Article 32 [247]. Until Protocol 11 enters into force[248], only the Commission and ECHR Parties enjoy the competence to bring a case before the Court. This was the most criticised side of the ECHR[249], because the Court's decisions are increasingly significant for individual applications. Once the Court gives judgement in a case it is final and admits of no appeal. Furthermore if the respondent state is found to be in violation of the Convention, it must, under Article 53 "undertake to abide by any decision of the Court". Such a decision may include the award of monetary compensation, but increasingly the Court has taken the decision that a declaration of breach of the Convention is sufficient remedy for the applicant, especially where only moral damage has been suffered[250]. The Court does not

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[244] See Chapter I.

[245] This will also change with the Eleventh Protocol (see Chapter III).

[246] For detailed information for the judgement of the Court see: Mustafa Yıldız, Avrupa İnsan Hakları Mahkemesi Yargısı, İstanbul: Alfa Publishers, June 1998.

[247] See Article 47, Convention for the Protection of Human Rights and Fundamental Freedoms with Protocols Nos. 1, 4, 6, 7 and 9 and selected reservations and declarations,op.cit.note 37.

[248] See Chapter III for Protocol 11.

[249] For these criticisms see Chapter III.

[250] See Davidson, op. cit. note 58, p. 116.

have the power to make punitive awards, nor, would it appear, does it have the competence to make orders for specific performance, that is to direct a state to take positive action in a particular area. None the less, the procedure for executing the Court's judgements cannot be regarded as satisfactory. There is a striking contrast in this respect with the judgements of the Court of Justice of the European Communities, whose judgements are directly enforceable in the Member States of the Communities[251].

As was demonstrated in this chapter, the Commission has rejected a great number of applications by declaring that they did not disclose any appearance of violation and therefore were manifestly ill-founded within the meaning of article 27(2) of the Convention. By this deciding cases on the merits at the admissibility stage on the basis of established case-law, the Commission has been able to dispose of a large number of unmeritorious applications, focusing its attention instead on the more important ones. As a consequence of this development, the role of the Commission has been transformed[252]. The Commission has moved from being a service organisation, providing all applicants with detailed decisions, to becoming a commonweal organisation, creating precedents which may affect the legal situation of the general public.

Finally, the admissibility conditions of an application that are discussed in this chapter are rigid and usually used as a "filter function" by the Commission. This is one of the

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[251] For detailed information about the Court of Justice of the European Communities, see: Christiane Duparc, Avrupa Topluluğu ve İnsan Hakları, Avrupa Toplulukları Komisyonu, September 1992.

[252] This can be best shown by using the Blau and Scott typology, classifying formal organisations on the basis of *cui bono*, i.e. who is the prime beneficiary of the operation of the organisation?. Four types of organisations resulted from the application of this *cui bono* criterion:

i. mutual-benefit associations, where the prime beneficiary is the membership;
ii. business concerns, where the owners are prime beneficiaries;
iii. service organisations, where the client group is the prime beneficiary; and
iv. commonweal organisations, where the prime beneficiary is the general public (Zwart, op. cit. note 133, p. 234).

criticised points of the ECHR system, and as we will see in the third chapter, the Eleventh Protocol does not bring any changes from this point of view.

CHAPTER III: REFORM OF THE CONTROL SYSTEM OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS

3.1. GENERAL REMARKS

The mechanism for protecting human rights pursuant to the European Convention on Human Rights is successful, and is rightly praised as the most advanced mechanism of its type. The Convention's achievements have been quite staggering, and the case-law of the European Commission and Court of Human Rights exerting an ever deeper influence on the laws and social realities of the State Parties. A few examples may be mentioned[253] :

In Austria, where the Convention has the rank of constitutional law, the Code of Criminal Procedures has had to be modified as a result of case – law in Strasbourg[254]; so too the system of legal aid fees for lawyers[255]. In Belgium, amendments have been made to the Penal Code, its vagrancy legislation and its Civil Code to ensure equal rights to legitimate and

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[253]See Council of Europe publications: *Stock-taking on the European Convention on Human Rights* and *Collection of Resolutions adopted by the Committee of Ministers in application of Articles 32 and 54 of the European Convention on Human Rights* and regular supplements there to. See also D. Gomien, *Judgements of the European Court of Human Rights. Reference Charts,* Norwegian Institute of Human Rights, 1991 and, *European Court of Human Rights Survey of Activities 1959-1991*(1992), pp. 50-59, and *Survey of Activities 1992*(1993), pp. 18-19.

For further information about the Convention's impact on domestic law, see the proceedings of the Leiden seminar "Domestic Implementation of the ECHR in Eastern and Western Europe" ,in Vol. II All-European Human Rights Yearbook, 1992, (N. P. Engel Publisher) and A. Z. Drzemczewski, *European Human Rights Convention in Domestic Law. A Comparative Study,* 1983, Oxford University Press. See also the study prepared by the DH-PR, "The European Convention on Human Rights: Institution of review proceedings at the national level to facilitate compliance with Strasbourg decisions" in 13 HRLJ 71-78 (1992).

[254] See, for example, the judgements in Neumeister, 1968, Series A No. 8, Stögmüller, 1969, Series A No. 9, Matznetter, 1969, Series A No. 10, Ringeisen, 1971, Series A No. 13, and Bönish, 1985, Series A No. 92.

[255] See for example Gussenbauer, app. No. 4897/71, friendly settlement before the European Commission of Human Rights in October 1974, Stock-taking of the ECHR 1954-1984, AT.P. 123.

illegitimate children[256]. In Germany modifications that bring legislation better into line with the Convention's provisions have also been made, e.g. the Code of Criminal Procedure concerning pre-trial detention was amended. Various measures have been taken to expedite criminal and civil proceedings, and transsexuals have been given legal recognition[257].

In the Netherlands, where most of the Convention's self-executing substantive provisions are endowed with a hierarchically superior status to the Constitution itself, changes have been made in the Military Criminal Code and the law on detention of mental patients[258]. In Ireland, court proceedings have been simplified and civil legal aid and advice schemes set up[259]. Sweden has introduced rules concerning time-limits for expropriation permits and legislation enacted concerning the regulation of building permits[260].

The effects of the Convention are not limited to the follow-up given to judgements of the Court, decisions of the Commission and findings of violation by the Committee of Ministers. The procedure for friendly settlements under the Convention has also produced significant results in this respect. Indeed, over two hundred instances can be cited where settlements have been reached either formally or informally, often with the Commission's or

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[256] See the cases of De Wilde, Ooms and Versyp ("Vagrancy") of 1970, Series A No. 12, and Marckx, Series A No. 31, which concerns filiation.

[257] Examples which may be mentioned here are the judgements of Luedicke, Belkacem and Koç of 1978, Series A No. 29(interpretation fees in criminal procedures),and Öztürk of 1984, Series A No. 73, concerning interpretation fees in the context of "Ordnungswidrigkeitsverfahren". See Resolution DH (89) 8 OF 2 March 1989 of the Committee of Ministers concerning the case of Öztürk (EuGRZ 1989 ,328) ,the decision of the European Commission of Human Rights in the case of Fedele, in 1987 (EuGRZ 1989,329),about the modification of the law on legal fees and the Code of Penal Procedure of 1989 (EuGRZ 1989,350), and the decision of the Commission of 1990 in the case of Shanmukanathan (EuGRZ 1991,160 annotated by Kersten Rogge, ibid., p.161).

[258] See the cases of Engel, 1976, Series A No. 22 (Military Penal Code), and Winterwerp, 1979, Series A No. 33 (mentally ill).

[259] This took place subsequent to the Airey judgement of 1979, Series A No. 32.

[260] The case of Sporrong and Lönnroth, of 1985, Series A No. 88, was instrumental in this instance.

the Court's approval, subsequent to concessionaire measures taken by the governments concerned[261].

As it is seen, many weak points in national legal systems have been identified through proceedings under the European Convention and have subsequently been amended or replaced by rules that better guarantee human rights. Thus, the Convention helps significantly to promote the protection of human rights. By the individual application mechanism the Convention promotes the independence and self-confidence of the individual citizens of Europe. One cannot stand alone against an omnipotent government. In this situation the possibility of bringing an action against the State, of going to an international body when treatment by the national government is considered unfair, strengthens the independence and self-determination of the citizen. The Convention also promotes European integration mainly in the legal field[262]. The decisions of the Commission and especially the case-law of the European Court of Human Rights create European Law.

When we look all the Convention system, it is clear that the key to the effectiveness of the Convention on the international level lies in the individual application system. The individual application mechanism of ECHR became a model for the other human rights treaties such as the American Convention on Human Rights and the African Charter of Human and Peoples' Rights. But none of the other international systems has demonstrated the success of the European Convention mechanism.

3.2. THE NEED TO REFORM THE CONTROL MACHINERY

As a whole the system brought with the ECHR is successful. But this success of the

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[261] See references above at note 250. See further for example the friendly settlements in the inter-State applications v. Turkey = 6 HRLJ 331 ff.(1985),or individual cases ,such as Woukam Moudefo v. France = 15 EuGRZ 487 (1988) and those regularly reported in the survey of decisions by Wolfgang Strasser under the section Pending Proceedings, see most recently the cases of Hurtado v. Switzerland and Diaz Ruano v. Spain = 21 Eugrz pp. 271 and 177 (1994) and the Court's judgements in the case of Hurtado, ibid. at p.219.

[262] H. G. Schermers, The European Commission on Human Rights from the Inside: ,the Josephine Orah Memorial Lecture, Hull University Press, 1990, p. 3.

Convention has inevitably highlighted its weaknesses. In the words of Wachmann, the Convention became the "victim" of its own success[263].

The rights protected under the Convention have been supplemented by additional protocols and by the case-law of the organs of the Convention. However, what is being dealt with here is not an extension of substantive rights but a reform of the control mechanism and, thus, of the heart of the Convention. The human rights protected under the Convention are also guaranteed in other covenants. Further-reaching international obligations also exist. However, there is no other system of protection that is equally effective.

The need for reform stems primarily from the large number of applications and cases before the Convention organs, resulting notably from the success and the widespread acceptance of the substantive and procedural provisions contained in the Convention[264]. The reform is also necessary in view of the fact that a considerable number of states from Central and Eastern Europe have either already adhered to the existing system or have expressed a clear intention of joining the European human rights community. The citizens of Europe have become more and more aware of their rights under the European Convention, and they make use of the existing machinery. Therefore, the pressure of work upon the European Commission and European Court of Human Rights is very great.

The number of applications has tripled in the last 15 years. Whereas approximately 22.500 applications were pending between 1975 and 1980, by the end of 1990 that figure had risen to over 50000 applications, of which nearly 18000 were registered[265]. If we look to the Court; whereas up to 1980 the Court had received 39 cases, by June 1992 that figure had

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[263] Ömer Anayurt, *"Avrupa İnsan Hakları Sözleşmesi ile Kurulu Denetim Mekanizmasını Yeniden Yapılandıran 11 Nolu Protokol"*, Mülkiyeliler Birliği Dergisi, August-September 1997, vol. XXI, no. 202, p. 60.

[264] *"Opinion of the European Court of Human Rights on the Control System of the European Convention on Human Rights"*, Human Rights Law Journal(HRLJ), 26 February 1993, Vol. 14, No.1-2, pp. 47-49, p.47

[265] Jens Meyer-Ladewing, *"Reform of the Control Machinery"*, The European System for the Protection of Human Rights, ed. R. St. J. Macdonald, F. Matscher and H. Etzold, Netherlands: Martinus Nijhoff Publishers, 1993, pp. 909-927, p. 910-11.

already reached a total of 347[266]. As Stefan Trechsel, vice-president of the Commission, wrote in an article, members of the Commission were expected to work for that body more than 150 days[267].

Because of this overburdening of the supervisory machinery, it takes on the average more than 5 years for a case to result[268]. For example, in the *Sallustio* case under Article 25, an application was introduced against Italy on 27 July 1984. In the report which it adopted on 12 December 1986, the Commission concluded unanimously that the applicant had suffered a violation of his rights under Article 6, paragraph 1. The Court was not seized so that the case came under the jurisdiction of the Committee of Ministers. On 18 January 1989, the Commission recommended to Italy to award Mr. Sallustio the sum of 12 million Lire as equitable compensation[269]. By Resolution DH (91) 23 of 27 September 1991, the Commission set a time-limit for the payment of the amount due[270].

The interplay between the Commission and the Court must also be looked at with a critical eye. The work performed by the Commission and the Court is broadly identical. Both organs examine the admissibility of an application. For cases that are ultimately referred to the Court, this procedure undeniably displays a considerable degree of overlapping, thus, duplication of work.

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[266] ibid.

[267] Manfred Nowak, op. cit. note 47, p. 99.

[268] A. Gündüz, *11. Protokol Onaylanmalı mı?* Milliyet. 28.4.1997. According to Gündüz the Eleventh Protocol completes the control mechanism of the ECHR and its effects to Turkish judicial and administrative system will be great.

[269] Resolution DH (89) 1.

[270] Christian Tomuschat *"The Success Story of the European Convention on Human Rights- and a Few Dark Stains"*, Human Rights Law Journal ,1992, pp.400-401.

Criticism is often voiced about having recourse to the Committee of Ministers. The Commission, and the Court are judicial bodies, but the Committee of Ministers is a political body, and it is a much less reliable and trustworthy organ[271]. The giving to a political body

of a function which is judicial in character ,namely to decide whether or not in a given case there has been a violation of the Human Rights Convention, is wrong. Such a decision should be based exclusively on legal considerations, whereas within the Committee of Ministers it was inevitable that considerations of political expediency would also enter into play.

An existing area of considerable criticism has been that the individual applicant may refer matters to the Commission only and not to the Court[272]. This is one of the biggest defects of the control system. Individuals have to have the right of direct recourse to the Court. A fair trial necessitates this requirement. Also, pursuant to Article 31/2, the Commission's report is transmitted to the Committee of Ministers and to the State concerned, through initially not to the Applicant. Furthermore, the applicant is not a participant in proceedings before the Committee of Ministers and has no right to be heard. Also, it is optional for states to accept the right of individual application. Infact, at present all the members of the European Convention accepted the right of individual application.

Another defect of the Convention's control system is the almost mysterious confidentiality and secrecy which characterises the procedures of the Strasbourg organs, in particular the Commission and the Committee of Ministers. In liberal and democratic systems justice should not only be done, but also seen to be done. There is no valid argument why this major principle of the administration of justice, which is laid down for the Council's Member

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[271] Ibid., p. 402.

[272] Tomuschat op. cit. Note 270, p..915.

States in article 6 of the Convention, should not also apply to its international procedures[273]. The majority of the Commission's cases are never published. Many other cases are published only after long delays. Sometimes this creates wrong impressions in the outside world about the opinion of the Commission[274].

3.3. OTHER AREAS OF CRITICISM

There are not defects only in the control machinery, but in the whole Convention as well. As this is not the subject of this paper, here the main areas of criticism will be shortly discussed.

Firstly, the rights protected by the ECHR are classical civil rights and some political rights. The major provision with respect to political rights, Article 3 of the first Additional Protocol, is phrased in a very cautious language allowing for all kinds of electoral systems[275]. Economic, social and cultural rights are missing altogether. It is true, of course, that the European Social Charter of 1961 guarantees the most fundamental economic and social rights, but its rather odd system of ratification and its weak implementation procedure together result in a very low efficiency of the Social Charter[276]. If we compare the European Convention with other international and regional human rights instruments, we may detect a number of omissions apart from economic, social and cultural rights too[277]. Some of these lacunae, have been filled by adopting the Additional Protocols[278]. But some important rights such as the general right to equality and non-discrimination, the prohibition of medical or scientific

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[273]Nowak, op. cit. note 46, p.100.

[274]For these wrong impressions, see: H. G. Schermers, op. cit. note 262, p.13.

[275] Nowak op. cit. note 47, p. 102.

[276] For detailed information about the Social Charter see: Tekin Akıllıoğlu, İnsan Hakları (Kavram,Kaynaklar ve Koruma Sistemleri), A. Ü. SBF. İnsan Hakları Merkezi Yayını, Ankara 1995, pp. 415-417.

[277] For detailed information about the rights protected by the ECHR see: P. Van Dijk and G. J. H. van Hoof, op. cit. note 6, pp.213-515.

[278] For all of these Additional Protocols see: Osman Doğru, İnsan Hakları Uluslararası Mevzuatı, Beta Publishers, İstanbul, August 1998, pp. 277-301.

experimentation without free consent, the general right of prisoners to be treated with humanity, the right to a nationality or the right of equal access to public service, are, however, still missing[279]. So, to expand the existing catalogue of rights and freedoms to the Convention are needed.

Especially, the situation of minority rights is clearly a critical issue being faced by the new Europe[280]. Eastern Europe, in particular, has a large number of minorities, and the Council of Europe is being pressed to deal with this[281]. However, in November 5, 1995 "Framework Convention for the Protection of National Minorities" opened for signature at Strasbourg[282]. In this Convention, contracting states resolved to protect within their respective territories the existence of national minorities.

Lastly, States unfortunately have the possibility to make reservations. With the words of Prof. Dr. Jochen A. Frowein[283], this is not in line with the general spirit of a human rights guarantee which, according to the preamble, is based on the fact that the European countries are like-minded and have a common heritage of political traditions, ideals, freedom and the rule of law[284].

3.4. ELEVENTH PROTOCOL

3.4.1. The Way to Eleventh Protocol

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[279] In H. G. Schermers, op. cit. note 262, you can find information about the rights that could be expanded.

[280] Malcom Shaw, op. cit. note 57, p. 59.

[281] Rolv Ryssdal, president of the European Court of Human Rights at the Academy of European Law stated that the ECHR as it now stands would not appear to be capable of addressing the problem of minorities in its entirety. *See: Rolv Ryssdal, "On the Road to a European Constitutional Court"* ,Human Rights Review, May 1992, Vol 1, No.2, pp. 19-26, p. 24.

[282] For the full text of this Convention see: Osman Doğru, op. cit. Note 278.

[283] First Vice President of the European Commission of Human Rights.

[284] Frowein, *"Contemporary Interpretation of Human Rights"* , " ,Human Rights Review, May 1992, Vol, No. 2, pp. 19-26, p.27.

Because of the problems in the control mechanism of ECHR, discussions began about the reform of the control machinery. Different suggestions had been made. According to Prof. H. G. Schermes, there are three possibilities for improving the Convention system[285]: a new convention, amendment of the convention and judicial development of the Convention. In his article named "Reform of the Control Machinery", Jens Meyer-Ladewing dwell on again three possibilities: control by a single European court of law, transformation of the Commission into a Court (control by two courts), the Commission and the Court on a permanent basis[286].

However these discussions are not only made by the authors of this subject but by the Council as well[287]. Since 1982 the idea of having a single court as the sole control organ under the Convention has been discussed many times in the Council of Europe's competent Committee of Experts under the heading "Merger of Commission and Court"[288, 289]. However, it was not until the European Ministerial Conference on Human Rights (Vienna, March 1985) that the "merger" idea was raised for the first time at a political level[290]. The possibility of a "merger" i.e., the creation of a single Court, was in fact broached in the report on the "functioning of the organs of the European Convention on Human Rights" presented by the Swiss delegation at the above-mentioned Conference, and was referred to - with

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[285] For detailed information, and advantages & disadvantages of these possibilities see H. G. Schermers, op. cit. note 262, pp. 14-17.

[286] For detailed information see Jens Meyer-Ladewing, op. cit. note 265, pp. 917-920.

[287] For the opinions of the Court and Commission about the control system of ECHR see : *"Opinion of the Commission"* ,Human Rights Law Journal (HRLJ), 26 February 1993, Vol. 14, No. 1-2, pp. 45-47, and *"Opinion of the European Court of Human Rights on the Control System of the European Convention on Human Rights"*, op. cit. note 264, pp. 47-49.

[288] The possibility of merging the Commission and Court into a single body was apparently first evoked at the DH-PR's 8th meeting (July 1982), during an exchange of views with representatives of the Commission. See: *"Report of the Committee of Experts(DH-PR) Documentation"*, Human Rights Law Journal (HRLJ), 26 February 1993, vol. 14, No. 1-2, pp 31-38, p. .32.

[289] For arguments advanced in favour of and against the merger idea see ibid., p. 33-35.

[290] *"Explanatory Report on Protocol No. 11"*, Human Rights Law Journal (HRLJ) , 29 July 1994, Vol. 15, No. 3, pp. 91-96, p. 92.

varying degrees of support or opposition - in a number of other contributions[291]. In Conference Resolution No. 1, the Ministers, after referring to "the need to examine the possibility of introducing further improvements (to the Convention's system of control), including as appropriate measures of a more far-reaching nature", underlined that the body of experts entrusted with the task of examining such possible further improvements "should bear in mind the Swiss delegation's report as well as the observations made by other delegations". Thereupon, the DH-PR[292] - upon the instructions of the CDDH[293] - examined the idea of "merger" between 1985-1987, and prepared a report on this subject. In October 1992, the CDDH, referred the different proposal to the Committee of Ministers in order to obtain a clear mandate for its further work on reform. On 28 May 1993 the Committee of Ministers adopted the decision assigning the ad hoc terms of reference to the CDDH[294]. Finally this decision was endorsed by the Council of Europe's Heads of State and Government at the Vienna Summit Conference in the "Vienna Declaration" of 9 October 1993. The Eleventh Protocol to the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms, Restructuring the Control Machinery Established thereby was signed on 11.05.1994 and one year after the ratification by all states' parties, entered into force on 1 November 1998 [295, 296].

3.4.2. Main Features of the Eleventh Protocol

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[291] For an overview of the proposals made by the Swedish and Dutch authorities see *"Overview of the proposals made by the Dutch and Swedish authorities"*, Human Rights Law Journal (HRLJ), 26 February 1993, Vol. 14, No. 1-2, pp. 41-45.

[292] The DH-PR Committee is now called "Committee of Experts for the Improvement of Procedure for the Protection oh Human Rights".

[293] Steering Committee for Human Rights.

[294] For the text of the terms of reference of the Committee of Ministers ,see *"Explanatory Report on Protocol No. 11"* ,op. cit. note 290, p. 91.

[295] During the writing of this thesis.

[296] Turkey ratified the 11th Protocol on 14.5.1997 by Law No 4225 .

The Eleventh Protocol brings radical changes to the existing system. This protocol fundamentally changes the supervisory machinery of the ECHR. Firstly, the Protocol abolishes the European Commission of Human Rights, and builds a new single Court. This new permanent Court replaces the existing Commission and Court. The new Court functions on a full time basis and the Court will have jurisdiction in all matters concerning the interpretation and application of the Convention including inter-State cases as well as individual cases[297]. Also, in the new system it is compulsory for states to accept the right of individual petition and the jurisdiction of the Court. Thus, there is no need for the states to make an Article 25 declaration. As it is seen there are no options for states in the new system[298]. Thirdly, not only the states, but also the individuals have the right to apply directly to the Court. This strengthens the position of the individual. Fourthly, the role of the Committee of Ministers now is limited to supervising the execution of judgements of the Court. This development can only enhance the credibility of the Convention as a judicial system whose decision-making competence is no longer shared by a political body. Fifthly, the Convention now provides expressly for third-party interventions. The provisions of the Protocol provide for the participation of third parties in proceedings before the Court. In cases before a Chamber or the Grand Chamber, States whose nationals have lodged applications against other State Parties to the Convention, have the possibility to submit written comments and take part in hearings[299]. Sixthly, the new system is more open and transparent. Hearings before the Chambers and the Grand Chamber are in public and the principle of confidentiality

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[297] Onur Karahanoğulları, *"İnsan Haklarını ve Temel Hürriyetleri Korumaya Dair Sözleşmeye Ek 11 Nolu Protokol Strasbourg, 11.1.1994 Avrupa Andlaşmalar Serisi/155"*, İnsan Hakları Merkezi Dergisi, November 1995, Cilt III., No.3, pp. 39-43.

[298] Ömer Anayurt, op. cit. note 263, p.63.

[299] *"Explanatory Report on Protocol No. 11"*, op. cit. note 290, p..95.

that governs the Commission's proceedings and those of the Committee of Ministers under Article 32 has, apart from friendly settlement proceedings, been abounded[300].

If we look at the operation of the new Court, it sits in Committees, Chambers and a Grand Chamber, comprising three, seven and seventeen judges respectively[301]. Organisational matters are dealt with by the Court in plenary, comprising all judges. Committees only have the power to declare cases inadmissible or strike them from the list[302]. If no such decision is taken by a Committee ,the application is referred to a Chamber, which decides on the admissibility and merits of the case[303]. The admissibility criteria remain unchanged. Following the judgement delivered by a Chamber of the Court, the Grand Chamber, at the request of one of the parties to the case and in exceptional cases, is competent to re-examine a case if the case raises serious questions concerning the interpretation or application of the Convention or its protocols, or if the case raises an issue of general importance. The judgement of the Grand Chamber is final. The judgement of the Chamber becomes final in accordance with the new Article 44, paragraph 2, if the case in which it has been rendered is not brought before the Grand Chamber. Final judgements of the Court are binding. The Committee of Ministers supervises their execution. And a case may be terminated by a friendly settlement between the parties at any stage of the proceedings before the Court.

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[300] See generally Article 40. This expressly provides that documents deposited with the Registrar shall be accessible to the public unless the President of the Court decides otherwise. Parties to friendly settlement proceedings will not be at liberty to disclose to anyone the nature and content of any communication made with a view to and in connection with a friendly settlement: see the Explanatory Report, para. 93.

[301] Article 27. Committees and Chambers are set up by the Chambers(new Article 27(1)) and the plenary Court (Article 26(b)) respectively for fixed periods. The national judge is ex officio a member of the Chamber and Grand Chamber in a case to which his state is a party: Article 27(2). See: Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocol No 11, European Treaty Series, No. 5, Directorate of Human Rights Council of Europe, Strasbourg , January 1998.

[302] *"Explanatory Report on Protocol No. 11"*, op. cit. note 290, p. .94.

[303] Article 29(1). See: Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocol No 11, op. cit. note 301.

The Protocol also provides transitional provisions, in its Articles 4 and 5, for the "transition" from the present to the new system. Since Protocol No. 11 is an amending Protocol, all Parties must express their consent to be bound by it. It entered into force one year after the last ratification (1 November 1998). The terms of office of the present judges and members of the Commission end with entry into force of this Protocol. The Commission continues to exist for an additional period of one year so as to settle any pending applications[304]. Applications pending before the Commission and already declared admissible are finalised by the Commission under the old system .Applications pending before the Commission which have not yet been declared admissible upon the entry into force of Protocol No. 11 will be examined by the Court under the new system. Cases pending before the present Court will, when Protocol No. 11 enters into force, be dealt with by the Grand Chamber under the new system[305].

[304] The question is dealt with in Article 5. See: Andrew Drzemczewski and Jens Meyer-Ladewing, *"Principal Characteristics of the New ECHR control Mechanism, as established by Protocol No:11 , signed on 11 May 1994 / A Single European Court of Human Rights is to replace the existing Commission and Court in Strasbourg"*, Human Rights Law Journal, 29 July 1994, Vol. 15, No. 3, pp. 81-86.

[305] For the full text of Protocol No. 11, see: Onur Karahanoğulları, op. cit. note 295, Osman Doğru, op. Cit. Note 277, *"Explanatory Report on Protocol No. 11"*, op. cit. note 288. For the main Convention see: Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocol No 11, op. cit. note 301.

CONCLUSION

4.1. ELEVENTH PROTOCOL – A SOLUTION ?

When we look at the area of the individual application mechanism of the European Convention on Human Rights in international law, we see that there are two contrasting views. According to one, the ECHR mechanism brings a revolutionary change in the status of the individual in international law. The individual became a subject in international law for the first time with this mechanism by the right of application to an international organisation. On the other hand, the number of the people who think that the ECHR mechanism does not bring any new change for the rights of individual is not small[306]. Their main critical point is that the organ to which the individual bring his /her application, the Commission, cannot make binding decisions for states. Only the Committee of Ministers and the Court can make binding decisions.

After I began to write this thesis, the control mechanism of ECHR changed by the entering of the Eleventh Protocol into force on 1 November 1998. Because of the significant changes came with the Eleventh Protocol I found it useful to give a place to the Eleventh Protocol in the thesis.

The Eleventh Protocol is the expression of the reform desires to the Convention system. It brings significant changes to the Convention system as the merger of the

[306] Madra, op. cit. note 95, p. 215.

Commission and the Court, the application of the individual directly to the Court, the end of optional provisions for states, the limitation of the role of the Committee of Ministers in the individual application mechanism and a more open and transparent system. Today ECHR is in a transition process. The Commission will continue to exist till the November 1, 1999. After November 1999 the ECHR will pass fully to the new system.

Some criticisms also begin to emerge against the Eleventh Protocol. These criticisms are as fallows:

Firstly, it is argued that it is too optimistic to expect that the time will be cut in half[307]. Compared to the present system it will be a loss that the most important cases will not get a full review by an organ that is not burdened with thousands of individual complaints[308]. Another criticism has been voiced inside and outside the present Convention organs[309]. According to the jurisprudence of these organs, national appeals courts should not include members of the lower court that rendered the judgement being appealed. It is argued that the same principle should be respected on the level of the European Court[310]. Thirdly, the relationship between the chambers and the Grand Chamber of the new Court is another criticised point[311]. Fourthly, some people criticised the possibilities left open by the protocol that preliminary exceptions may be raised only before the Grand Chamber and that the new

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[307] Henry G. Schermers, *Book Review of "P. Wachsmann, M.-A. Eissen, J.-F. Flauss, R. Abraham, L.-E. Petiti, W. Strasser, G. Raimondi, G. Cohen-Jonathan, Le Protocole n. 11 a la Convention Europeenne des Droits de l'Homme. Brussels: Bruylant,1995,194 pages.ISBN 2-8027-0667-5. BF 1,750."*, CML Review, 1997, pp. 743-747, p.743.

[308] ibid.

[309] Henry G. Schermers, *The Eleventh Protocol and the European Convention on Human Rights*, 19 EUR. L. REV. 367 (1994).

[310] Ibid.

[311] For more information about this, see: Rudolf Bernhardt, *Reform of the Control Machinery under the European Convention on Human Rights: Protocol No. 11*, The American Journal of International Law, vol. 89, 1995, p. 153.

Article 57[312] (which is identical to the present Article 64) does not expressly exclude reservations with respect to the competence of the Court[313]. Also it is argued that the right of veto which the parties have with respect to the possibility of a Chamber to relinquish jurisdiction to the Grand Chamber will be used as a delaying tactic[314]. States may also veto relinquishment of jurisdiction and subsequently abstain from their right of appeal to the Grand Chamber if they do not want a Chamber decision against them to obtain the authority of the Grand Chamber. Lastly, there are some anxieties for the friendly settlement procedures. For some, the fact-finding task of the Commission opens possibilities for friendly settlement which a single court will not have[315].

Also, the wish to simplify the present proceedings and thus to make the Convention clearer to the citizens of Europe has not been sufficiently met. The new procedure with its many different possibilities is hardly more simple then the present one. Despite the force of several these points, the argument in favour of the merger appears stronger[316]. A further possible advantage of the merger is that the process of friendly settlement or conciliation might be unduly minimised. It might cut off a useful escape route for states with regard to the system as a whole[317]. The great merits of the Eleventh Protocol are the suppression of the optional character of the right of individual petition and of the jurisdiction of the court. Furthermore, the position of the individual is strengthened. The purely legal character of the proceeding provided for by the protocol may also be considered as a gain. Now the protocol

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[312] Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocol No 11, op. cit. note 301.

[313] Henry G. Schermers, op.cit.note 307, p.743.

[314] ibid.

[315] İbid.

[316] See: Malcom Shaw, op. cit. note 57, p.57.

[317] For these problems that may happen see H. G. Schermers , op. cit. note 307, pp. 745-746, the thoughts of Strasser-a staff member of the Secretariat of the European Commission on Human Rights.

has entered into force and care should be taken that this will not diminish the achievements reached so far. It should not enlarge the margin of appreciation of states. Finally, the new court must be staffed with high quality personnel.

4.2. FUTURE?

The European system for the protection of human rights stands at an important crossroad. The dissolution of the Warsaw Pact and the rise of multiparty democracies in Eastern Europe signal a potentially dramatic transformation in the membership of the Council of Europe[318] . Furthermore, the Eleventh Protocol changes all the system. While the Convention system is in a great transformation, it has to confront some risks and threats. First, there is a risk of proliferation of international or European human rights protection systems. Today the great majority of the Contracting States of the European Convention on Human Rights are at the same time Contracting parties to the International Covenant on Civil and Political Rights and many of them have accepted the competence of the Human Rights Committee to receive communications by a State Party against another State Party under Article 41 of the Covenant and individual petitions in accordance with the provisions of the optional Protocol to the Covenant[319]. Those Convention States have therefore to answer for their decisions and actions not only in Strasbourg but also before the control body set up

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[318]Czechoslovakia was the first state from Eastern Europe to ratify the European Convention, on 18 March 1992. When the republic divided in December 1992, reapplication for membership was made by both the Czech and Slovak Republics in January 1993. The former German Democratic Republic fell within the application of the European Convention by virtue of its merger into the Federal Republic of Germany. Hungary ratified the Convention on 11 May 1992 and Bulgaria ratified on 9 July 1992, both accepting the Article 25 petition process and the Court's jurisdiction. However, Poland ratified the European Convention on 19 January 1993 (Fitzpatrick, op. cit. note 76, pp, 205-206). Today all Eastern Europe states have ratified the Convention (web site of ECHR: http://www.coe.tr/tablconv/5t.htm).

[319] For the differences between 2 systems see: Liz Heffernan, op. cit. note 27; Robert Jaques, *"Constitutional and International Protection of Human Rights: Competing or Complementary Systems? General Report to the LX th Conference of European Constitutional Courts"* , Human Rights Law Journal, Vol. 18, No. 1-4, pp. 79-96. See also The International Bill of Human Rights, United Nations, New York, 1988.

Reform discussions also began for UN system. For these discussions, see: Ineke Boerefijn, *"Towards a Strong System of Supervision: The Human Rights Committee's Role in Reforming the Reporting Procedure under Article 40 of the Covenant on Civil and Political Rights"* ,Human Rights Quarterly, No 17, John Hoppkins University Press, 1995, pp. 766-793.

under the United Nations Covenant. That this situation has not led to confusion harmful to the European system, which is of more binding force, is probably because the citizen wishing to lodge a human rights complaint against a Convention country still feels that his needs are best accommodated by the judicial process available under the European Convention.

The hard-earned achievements in the field of human rights protection in Europe are now under threat from two new ideas. These ideas are: the setting up of a new international system of human rights protection within the context of the Conference on Security and Cooperation[320] in Europe and the move to provide the European Communities[321] or the forthcoming political Union with a catalogue of human rights and freedoms of their own. A further European system for safeguarding human rights would certainly have to be welcome if integration into the already existing system of states from Central and Eastern Europe were not possible or if the new one could provide markedly better protection than that available under European Convention on Human Rights. However, the adoption of the ECHR of 1950 was a unique development and indeed a revolution in international law, which came about as a result of a general feeling that, in view of the then recent history, protection of human rights could no longer be considered to be exclusively a matter between the citizen and his or her State. Today, when the Second World War and the holocaust are, for an increasing number of the citizens of Europe, receding into history, any attempt to set up a new system for protecting human rights in Europe runs a serious risk of creating something which falls far short of the machinery of binding judicial review established by the Council of Europe Convention. A further problem arises within the context of the European communities and the forthcoming political union. Within the Community framework there is the idea to

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[320] For the OECD human rights system, see: Gökçen Alpkaya, AGİK Sürecinden AGİT'e İnsan Hakları,Kavram Publishers, İstanbul, March 1996; Jane Wright, *"The OSCE and the Protection of Minority Rights"*, Human Rights Quarterly, Vol. 18, No. 1, February 1996, pp. 190-205; Rachel Brett, *"Human Rights and OSCE"*, Human Rights Quarterly, Vol. 18, No. 1, February 1996, pp. 668-693.

[321] For EU system, see: Christiane Dupac, op. cit. note 251.

enact a specific catalogue of fundamental rights and freedoms for the European Community citizen. However the result of such an enactment would be the development in Europe of two independent human rights orders with all the damaging consequences that would entail, consequences which inevitably follow the introduction of rival sets of rules in an otherwise homogeneous community, consequences which are especially detrimental in the field of human rights and freedoms[322] .

The second risk for the Convention system is having a catalogue of human rights which is not adopted to present and future requirements. Some important rights such as the general right to equality and non-discrimination, the prohibition of medical or scientific experimentation without free consent, the general right of prisoners to be treated with humanity, the right to a nationality or the right of equal access to public service, are, however, still missing[323]. The Eleventh Protocol brings nothing from this point. New rights cannot be created by judicial interpretation of the Convention. To expand the existing catalogue of rights and freedoms, additional protocols to the Convention are needed.

Lastly, as mentioned before, at present the ECHR system is living a transitionally process. After 1 November 1999, the Eleventh Protocol will begin to apply fully. As we discussed in Chapter III, the new system has many advantages but it may also cause some problems that cannot be foreseen today, especially in friendly settlement procedures. The Eleventh protocol has been carefully fashioned to provide an enforcement system which takes over from the existing institutions. It is not meant to be a fresh start but rather the continuation of the Convention system with more efficient machinery to handle an ever – increasing case – law against the background of a growing number of contracting parties.

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[322] The current debate about this issue is that, for some like Ryssdal accession of the Community to the Convention is the right way. He thinks that it would not only serve to fill the conspicuous gap in the Community's legal order in that the Community is not subject to the Convention's control mechanism, but would also be the surest way to avoid the separate development of two different European Standards of human rights protection, in an area where common standards are essential. (Ryssdal, op. cit. note 281, pp. 22-23).

[323] In H. G. Schermers, op. cit. note 262, you can find information about the rights that could be expanded.

Nevertheless, the new Court will only achieve its goals if there is a strong element of continuity between the old and the new in terms of membership of the single court, personnel experienced in the operation of the previous system and a successful transfer of the working methods and procedural know-how of the existing institutions. Together with Convention case – law these represent *"aquis conventionnel"*[324] which must be preserved and built upon, if the Eleventh protocol is to make the Convention a fitting instrument of human rights protection for the new Europe[325].

Let me finally touch upon our main subject, the core of the convention system, individual application mechanism. It is an accepted agreement that the key to the effectiveness of the Convention at the international level lies in individual applications. This is the main point that differs ECHR system from other international human rights systems and makes the ECHR system more effective and successful. The individual application is conceived as the kernel of the system, and the inter-state application was a subsidiary means of the Convention. From the point of strengthening the status of the individual and the mechanism of individual application , the Eleventh Protocol is a good step. The major advantage of the new system is to open the individual the way of applying directly to the Court and to make the individual application mechanism compulsory for states. This is also a big step to enhance the judicial credibility of the Convention system. As mentioned before, the admissibility procedure of the individual application mechanism is very rigid, and this is generally used as a "filter " and works as a "guillotine". The Eleventh Protocol does not bring any changes to the admissibility conditions. It will be good for the new single Court to be more flexible when exercising the admissibility conditions.

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[324] Totality of the rights already provided by the Convention.

[325] D. J. Harris, M.O'Boyle and C. Warbrick, op. cit. note 17, p. 714.

On the whole, my conclusion about the ECHR is clearly positive. The Convention has gradually gained more influence which is to the benefit of the peoples of Europe and their mutual relations. Of course, improvements are possible. In a dynamic society all issues of any importance can - and must - continuously be improved. Thus there will always be a challenge for lawyers and we can also guarantee to our younger generations a chance of actively participating in the most rewarding task of further developing human rights in Europe[326, 327].

[326] For the problems in the protection of human rights, see: Münci Kapani; *"İnsan Haklarının Uluslararası Korunması Yeni Gelişmeler ve Sorunlar"*, İnsan Hakları Yıllığı, Year 1, 1979, TODAİ, pp. 64-79.

[327] For detailed information on the place and application of ECHR , see: Mehmet Gönlübol, A. Gündüz Ökçün, *"Status of Multilateral Conventions concluded under the auspices of the United Nations and the Council Europe and Turkey's position with regard to them"* ,The Turkish Yearbook of International Relations, 1960, Vol. I, Ankara: Sevinç Press, Institute of International Relations Faculty of Political Sciences University of Ankara, 1961, pp. 121-133; Civan Turmangil, *"Avrupa İnsan Hakları Sözleşmesinin 25. Maddesi ve Türkiye Örneği"* ,İnsan Hakları Merkezi Dergisi, Vol II., No. 2, A. Ü. SBF Press, October 1994, pp. 22-23; Necmi Yüzbaşıoğlu, *"Avrupa İnsan Hakları Hukukunun Niteliği ve Türk Hukuk Düzenindeki Yeri Üzerine"*, İnsan Hakları Merkezi Dergisi, A. Ü. SBF Press, Vol. II, No. 1, May 1994, pp. 26-38.

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