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OBSERVING AND ENFORCING HUMAN RIGHTS UNDER THE COUNCIL OF EUROPE: THE CREATION OF A PERMANENT EUROPEAN COURT OF HUMAN RIGHTS

Jonathan L. Black-Branch[†]

In the past fifty years, the protection of human rights under the European Convention of Human Rights has developed at a slow, yet, steady pace. At present there are thirty-nine Member States of the Council of Europe, of which twenty-six currently adhere to the European Convention which is enforced by two bodies, namely the European Human Rights Commission and the European Human Rights Court. These organs, unique to any other international treaty, have come to symbolize a rare success story in the international arena. To date, however, the Commission and the Court operate in a capacity whereby no member is permanent. That is to say, commissioners and judges are appointed in affiliation with their permanent work in their respective countries. They are not full-time appointees of the Council.

A half century into the existence of the Council of Europe, it has finally come of age, introducing a new and permanent Court of Human Rights. Specifically, the Procedural Committee of the Council produced a new protocol to the Convention of Human Rights calling for reforms to the control system of the Convention, which become open for signatures in May 1994. Protocol 11 effectively substitutes the present European Commission and Court of Human Rights with a single permanent Court. Such a move marks an important turning point in the evolution of international human rights development with regards to the contracting nations under the Council of Europe. The

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purpose of this article is, first, to discuss the function and the role of the present Commission and Court, followed by a brief commentary on what the proposed changes actually mean for the protection of human rights as per this international treaty called the European Convention of Human Rights.

I. INTRODUCTION

Human rights protection gained considerable attention on a global scale in the aftermath of World War II. Many individual rights were suspended during the war in States around the world. Numerous atrocities were committed against particular ethnic groups and classes of people, thus illustrating the precarious nature of human rights and civil liberties. History serves as a constant reminder that this era of the power of government can indeed be abused. Hence, the call for international protections.

II. UNIVERSAL DECLARATION OF HUMAN RIGHTS

The United Nations was formed in the wake of World War II with the intent of establishing a uniform commitment to protecting human rights on an international scale. On December 10, 1948, one of its first acts was the adoption of the Universal Declaration of Human Rights.¹ It was considered "a significant milestone"² in protecting human rights.

This declaration provided a set of standards, a model for countries to follow. Moreover, it provided a direction for countries to take toward upholding human rights for their own citizens and

¹ P. VAN DIJK & G.J.H. VAN HOOF, *THEORY AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 1 (2d ed. 1990) [hereinafter VAN DIJK & VAN HOOF].

² *Id.*

served as a precedent for individual countries seeking to establish their own policies on human rights issues. A group of nations comprising the fledgling Council of Europe did just that.

III. THE EUROPEAN COMMITMENT: GOING BEYOND THE UNITED NATIONS

Parallel to the international developments regarding human rights, important initiatives were being taken at the Supra-national level. European neighbors sought to institute a more profound recognition of rights and freedoms.

Within Western Europe the ravages and destruction of its second catastrophic war within a half century had convinced its leaders and statesmen of the need to forge a new Europe built on a greater degree of unity and understanding. By doing so they would guard against the rise of further dictatorship, and lessen the risk of relapse into disastrous war.³

“In May 1948 the International Committee of the Movements for European Unity organized a ‘Congress of Europe’ in The Hague” at which the fetus of the Council of Europe was conceived.⁴ An important resolution, regarding the establishment of an interstate regional body with the aim of protecting human rights, was adopted at the congress which was the genesis of the present European

³ THE COUNCIL OF EUROPE, *THE PROTECTION OF HUMAN RIGHTS IN EUROPE 1* (1981) [hereinafter *PROTECTION OF HUMAN RIGHTS*].

⁴ DIRECTORATE OF INFORMATION, COUNCIL OF EUROPE, *THE EUROPEAN CONVENTION ON HUMAN RIGHTS* (1968). For general information and background to the Convention, *see also* EUROPEAN COMMISSION OF HUMAN RIGHTS, *DOCUMENTS AND DECISIONS 1955-1956-1957*, at 92-96 (1959).

Convention. To that end, this resolution stated:

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 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.⁵

These two important points, regarding the drafting of a Charter (now called the Convention) and establishing standards to which a state must now conform, dominated the agenda of the first and subsequent sessions of the Consultative Assembly (now referred to as the Parliamentary Assembly) of the Council of Europe. Hence, a commitment was made toward a greater protection of human rights within the larger European community.

In that regard, in February 1949, the International Council of the European Movement, meeting in Brussels, advised its Legal Committee to prepare a preliminary draft of a convention for the protection of human rights. It was intended that this draft would be submitted to prospective member countries interested in joining the Council of Europe. On May 5, 1949 ten European states signed the Statute of the Council of Europe in London: the United Kingdom, Norway, Sweden, Federal Republic of Germany, including West Berlin, the Saar, Ireland, Greece, Denmark, Iceland, and

⁵ VAN DIJK & VAN HOOF, *supra* note 1, at 1.

Luxembourg.⁶

Moreover, each signatory state strengthened its commitment to guarantee individual basic rights and fundamental freedoms by pledging its support for the United Nation's Universal Declaration of Human Rights. This Declaration later served as the model for the European Convention for the Protection of Human Rights and Fundamental Freedoms [hereinafter European Convention].

The preamble of the European Convention states that: [t]he Governments signatory hereto being Members of the Council of Europe, [and] considering the Universal Declaration of Human Rights proclaimed by the General Assembly of the United Nations on 10th December 1948; [and] Considering that this Declaration aims at securing the universal and effective recognition and observance of the rights therein declared; . . . [and] being resolved, as the Governments of European countries which are like-minded and have a common heritage of political traditions, ideals, freedom and the rule of law, [are] to take the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration.⁷

In other words, the Council of Europe was motivated to go beyond recognizing the principles of human rights enshrined in the U.N. Declaration and set out to entrench these principles in an international treaty which was open for nations to sign.

⁶ The draft, submitted on July 12, 1949, was prepared by Pierre-Henri Teitgenm, Sir David Maxwell-Fyfe and Professor Fernand Dehousse. MARK W. JANIS & RICHARD S. KAY, *EUROPEAN HUMAN RIGHTS LAW* 23 (1990).

⁷ Convention for the Protection of Human Rights and Fundamental Freedoms, Sept. 3, 1953, 213 U.N.T.S. 221, 222 [Hereinafter European Convention].

Most notably, they instituted a Commission and a Court of Human Rights to enforce this European Convention. These organs operate in an extra-functionary capacity whereby no member is permanent; commissioners (to the Commission of Human Rights) and judges (of the Court) are appointed in affiliation with their permanent work in their respective countries. They are not full-time employees (as commissioners or judges) of the Council of Europe.

Today, some fifty years later, there are thirty-nine Member States signatory to the Council of Europe⁸, with others having filed applications to join⁹. What is more, a half century into the existence of the Council of Europe, it has finally come of age, introducing a new and permanent Court of Human Rights. The Council has recently passed a resolution to take effect upon ratification by all member states.

Discussion in this note begins with an overview of the Convention, highlighting the main protections therein and the numerous protocols attached thereto. A detailed explanation of the current workings of the Commission and Court are subsequently presented followed by discussion on the proposed changes under Protocol 11.

IV. THE EUROPEAN CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS

The European Convention for the Protection of Human Rights

⁸ Member States as of January 1996 include: Albania, Andorra, Austria, Belgium, Bulgaria, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Macedonia, Malta, Moldova, Netherlands, Norway, Poland, Portugal, Romania, Russia, San Marino, Slovakia, Slovenia, Spain, Sweden, Switzerland, Turkey, Ukraine, and United Kingdom. *See generally* Michael Binyon, *Council to Vote Decisively for Russian Entry*, THE TIMES OF LONDON, Jan. 26, 1996.

⁹ Countries with "Special Guest" status to the Council of Europe include: Belarus, Bosnia-Herzegovina, and Croatia. *Id.*

and Fundamental Freedoms was signed in Rome on November 4, 1950, and came into force on September 3, 1953.¹⁰ This Convention reiterates the principles established under the United Nations Universal Declaration on Human Rights 1948. Unlike other international human rights treaties, the European Convention has an infrastructure in place for protecting the rights enlisted in the Convention and the Protocols thereunder. This is accomplished by the European Commission and the European Court of Human Rights. Under the auspices of the Council of Europe, these bodies work in line with the Committee of Ministers, which, in essence, is the decision-making body of the Council. It is composed of the Foreign Ministers of the Member States or their deputies. The endeavors of the Council of Europe are heralded as "landmarks in the broadening of safeguards for Human Rights."¹¹

While the European system is not perfect in its enforcement of rights under the Convention, many academics and lawyers agree that the Convention is unique in both its approach to international law and its enforcement within an international community. "The European Convention on Human Rights establishes what is not only the world's most successful system of international law for the protection of human rights but, one of the most advanced forms of international legal process."¹²

Faulkner reiterates this sentiment, contrasting European mechanisms to the United Nations. He draws attention to the strengths of the European system for protecting human rights by highlighting the deficiencies of the U.N. Declaration, and in particular the lack of effective machinery for their enforcement.

The Universal Declaration did not itself provide any

¹⁰ European Convention, *supra* note 7, at 222.

¹¹ EUROPEAN COMMISSION OF HUMAN RIGHTS, DOCUMENTS AND DECISIONS 1955-1956-1957, *supra* note 4, at 92.

¹² JANIS & KAY, *supra* note 6, at 1.

machinery for enforcement, and the same is true of a number of other instruments which have been developed in the United Nations and elsewhere during the last 40 years. We do however have effective machinery for enforcement within Europe, in the shape of the European Convention of Human Rights and the Commission and Court set up under it. Based on the right of individual petition to the Commission and the compulsory jurisdiction of the court, the European machinery is the most powerful and most effective that is available.¹³

The European system has since served as an example for other human rights declarations and charters. "For example, it provided the model for the Inter-American Convention on Human Rights that took effect in 1978."¹⁴ The Convention was also instrumental in the drafting of the Canadian Charter of Rights and Freedoms in 1982, a constitutionally entrenched mechanism in Canada.¹⁵ Moreover, the European system for protecting human rights is the largest mechanism of international law of its kind in the world.

V. THE CONVENTION

The Convention opens with a preamble which attests to certain considerations and affirmations regarding the mandate of the Council of Europe. Among these are the aim of securing universal and effective recognition and observance of the rights enshrined in the Universal Declaration of Human Rights and the aim of achieving

¹³ Speech by David Faulkner to a meeting of *Justice* (Mar. 11, 1989) (transcript on file with author).

¹⁴ PROTECTION OF HUMAN RIGHTS, *supra* note 3, at 3.

¹⁵ CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms) § X.

greater unity between Members of the Council of Europe.¹⁶

The main body of the Convention itself is divided into five distinct sections. Section I delineates the rights and freedoms granted under the Council of Europe. Section II ensures the observance of said rights and freedoms through the European Commission and the European Court. Section III specifies the rules and procedures of the Commission, while Section IV highlights the rules of the Court. Section V lists operating guidelines and procedural items regarding the Convention under the umbrella organization of the Council of Europe. In addition, as previously mentioned, there are eleven Protocols to the Convention. All of these will be discussed briefly in turn.¹⁷

VI. RIGHTS AND FREEDOMS UNDER THE CONVENTION

Section I of the Convention contains basic human rights and fundamental freedoms, such as the right to life, prohibitions of torture and slavery, the right to personal liberty, the guarantee of a fair trial, the principle "ne bis in idem," the right to respect for private and family life, home and correspondence, the freedom of thought, conscience and religion, the freedom of expression and information, the freedom of peaceful assembly and association and others.¹⁸ These are largely protective rights, targeted to protect the individual against wrongs perpetrated by the member state. Nevertheless, in certain cases, states themselves can lay a claim against another government for alleged violations of the rights enshrined in the Convention.¹⁹

¹⁶ European Convention, *supra* note 7, at 222-24.

¹⁷ *Id.* at 224-55.

¹⁸ European Convention, *supra* note 7, at 224-34.

¹⁹ See Table 1.1, *infra* note 23 (condensed version of the rights and freedoms offered under the Convention).

VII. PROTOCOLS TO THE CONVENTION

In addition to the Convention, a series of protocols have since been added. While some of the protocols serve to establish additional basic rights not previously enlisted in the Convention, others contain procedural provisions central to the operation of the European Committee, the European Commission and the European Court. Specifically, the First, Fourth, Sixth, and Seventh Protocols largely serve to supplement rights, whereas the others, Second, Third, Fifth, Eighth, Ninth, Tenth, and Eleventh, touch on issues of a more administrative and procedural nature. The Eleventh Protocol, the most recent, will be addressed in detail later in this discussion.

The First Protocol guarantees the right to peaceful enjoyment of possessions, the right to education, and the right to free elections to be held by secret ballot. The Fourth Protocol prohibits the deprivation of liberty on the ground of the inability to fulfill a contractual obligation and regulates the freedom of movement. The Sixth Protocol, concerns the abolition of the death penalty. The Seventh Protocol protects foreigners from arbitrary expulsion, contains elements guaranteeing a fair trial in criminal proceedings, and proclaims men and woman as equal under marital law.²⁰

The remaining protocols deal with procedural matters and the machinery of the Commission and the Court. The Second Protocol grants the European Court of Human Rights the power to offer advisory opinions on questions concerning the Convention and the Protocols thereto. The noted exception to this regards questions relating to the content or scope of the rights and freedoms enshrined under the Convention (Section I) and the relevant protocols.

The Third and Fifth Protocols encompass amendments to procedural provisions of the Convention while the Tenth Protocol²¹

²⁰ See Table 1.2, *infra* note 24 (condensed version of the rights and freedoms offered under Protocols 1, 4, 6, and 7).

²¹ The Ninth and the Tenth Protocols are not yet in force.

serves to amend the procedure before the Committee of Ministers. The Eighth Protocol focuses on proceedings relating to the European Commission of Human Rights and the Ninth Protocol allows the complaining party to appeal to the Court under certain circumstances.

The Eleventh Protocol is very important for it outlines a complete restructuring of the control machinery of monitoring rights. Specifically, the text of this latest Protocol effectively abolishes the Commission of Human Rights, transferring all of its functions to a new and permanent Court. This Protocol is due to take effect as soon as all thirty-eight Member States of the Council of Europe have signed and ratified the resolution.²²

Table 1.1 ²³

Articles of the European Convention for the Protection of Human Rights and Fundamental Freedoms

Article 1:	Guarantee of rights and freedoms
Article 2:	Right to life
Article 3:	Freedom from torture or inhuman or degrading treatment or punishment (Physical Integrity)
Article 4:	Freedom from slavery, servitude, and forced labor
Article 5:	Right to liberty and security of person
Article 6:	Right to a fair hearing within a reasonable time by an independent and impartial tribunal

²² See Table 1.3, *infra* note 25 (condensed version of Protocols 2, 3, 5, 10 and 11).

²³ CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS, Sept. 3, 1953, 213 U.N.T.S. 221 (compiled from table of contents).

	established by law
Article 7:	Freedom from retroactive criminal law
Article 8:	Right to respect for private and family life, home, and correspondence
Article 9:	Freedom of thought, conscience, and religion
Article 10:	Freedom of expression
Article 11:	Freedom of assembly and association
Article 12:	Right to marry and found a family
Article 13:	Right to an effective remedy before a national authority
Article 14:	Freedom from discrimination
Article 15:	Derogation
Article 25:	Applications by persons, non-governmental organizations, or groups of individuals
Article 30:	Report of the Commission in case of friendly settlement
Article 31:	Report of the Commission "if a solution is not reached"
Articles 38-41:	Composition of the Court
Article 46:	Compulsory jurisdiction of the Court

Table 1.2²⁴

Articles of Protocols Nos. 1, 4, 6 and 7 under the European Convention for the Protection of Human Rights and Fundamental Freedoms

Protocol No. 1

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

²⁴ *Id.*

Protocol No. 4

- Article 1:** Freedom from imprisonment for debt
Article 2: Freedom of movement of persons
Article 3: Right to enter and remain in one's own country
Article 4: Freedom from collective expulsion

Protocol No. 6

- Article 1:** Abolition of the death penalty

Protocol No. 7

- Article 1:** Procedural rights of aliens
Article 2: Right of appeal
Article 3: Compensation for miscarriage of justice
Article 4: Right not to be tried or punished twice
Article 5: Equality of spouses

Table 1.3²⁵

Protocols Nos. 2, 3, 5, 10 and 11 under the European Convention for the Protection of Human Rights and Fundamental Freedoms: Procedural Matters and the Machinery of the Commission and the Court.

Protocol No. 2

Grants the European Court of Human Rights the power to offer Advisory Opinions on questions concerning the Convention and the Protocols (with some exceptions).

Protocol No. 3

Amendments to procedural provisions of the Convention.

²⁵ *Id.*

Protocol No. 5

Amendments to procedural provisions of the Convention.

Protocol No. 10

Amendments to procedure before the Committee of Ministers.

Protocol No. 11

A complete restructuring of the control machinery of monitoring rights.

Abolishes the Commission of Human Rights, transferring all of its functions to a new and permanent Court.

VIII. THE OBSERVANCE OF RIGHTS AND FREEDOMS

As evidenced from the discussion above, there is a wide range of rights and freedoms encompassed under the Convention and the relevant Protocols thereto. Rights enlisted in documents of this nature are mere platitudes unless they are enforced, however. Providing mechanisms by which they can be upheld is a key factor in the realization of rights and freedoms. There are such mechanisms in place for upholding the European Convention, namely the Commission and the Court of Human Rights. Section II of the Convention makes express provision for these mechanisms. Article 19 states:

To ensure the observance of the engagements undertaken by the High Contracting Parties in the present Convention, there shall be set up:

- (a) A European Commission of Human Rights, hereinafter referred to as "the Commission";
- (b) A European Court of Human Rights, hereinafter

referred to as "the Court".²⁶

These bodies are the decision-making authorities regarding the alleged violations of rights. A complaint is first heard by the Commission and then possibly the Court, the procedures of which will be discussed in turn. First it is necessary to address the issue of lodging a complaint before the European Commission.

IX. TYPES OF COMPLAINTS UNDER THE CONVENTION

In order for individuals to file applications with the Commission, Member States must have granted the right of individual petition to their citizens.²⁷ Such being the case, basically three types of complaints can be lodged before the Commission. These are by: (1) individuals; (2) non-governmental organizations or group of individuals; and (3) one member state against another.²⁸ Specifically, pursuant to Article 25, individual applicants and non-governmental organizations complaining of violations of the rights or freedoms enlisted in the Convention and the various Protocols thereto are permitted to lodge their complaints with the Commission against a state within whose jurisdiction the alleged violation occurred.²⁹ In addition to individual complaints, one member state can lodge a complaint against another member state under Article 26. This is called an "inter-state application".³⁰

It is essential to note that certain criteria must be met before applications can be lodged. For example, the state concerned must have been recognized by express declaration under Article 25 of the Convention and the state must also recognize the jurisdiction of the

²⁶ European Convention, *supra* note 7, at 234.

²⁷ European Convention, *supra* note 7, art. 25, at 236.

²⁸ *Id.*

²⁹ European Convention, *supra* note 7, art. 25, at 238.

³⁰ European Convention, *supra* note 7, art. 26, at 238.

Court under Article 46.³¹ Article 25 specifically states:

1. The Commission may receive petitions addressed to the Secretary General of the Council of Europe from any person, non-governmental organization or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in this Convention, provided that the High Contracting Party against which the complaint has been lodged has declared that it recognizes the competence of the Commission to receive such petitions. Those of the High Contracting Parties who have made such a declaration undertake not to hinder in any way the effective exercise of this right.
2. Such declarations may be made for a specific period.
3. The declarations shall be deposited with the Secretary General of the Council of Europe who shall transmit copies thereof to the High Contracting Parties and publish them.
4. The Commission shall only exercise the powers provided for in this Article when at least six High Contracting Parties are bound by declarations made in accordance with the preceding paragraphs.³²

X. EXHAUSTION OF DOMESTIC REMEDIES AND TIME LIMITATIONS FOR COMPLAINTS

In addition to the criteria set under Article 25, individuals filing complaints with the Commission must also comply with Article 26,

³¹ European Convention, *supra* note 7, art. 46, at 246.

³² European Convention, *supra* note 7, art. 25, at 246-248.

the exhaustion of domestic remedies and time limitations for applying.

Article 26 states: "The Commission may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognized rules of international law, and within a period of six months from the date on which the final decision was taken."³³ Petitions conforming to the said criteria can be filed with the Commission.

XI. THE COMMISSION

The competence of the European Commission of Human Rights to receive individual applications under Article 25, was adopted in a resolution by the Consultative Assembly. Once again, Member States of the Council of Europe must recognize the competence of the Commission in order for their residents to file a complaint with it when they feel their rights and freedoms have been violated.

Members of the Commission are elected by the Committee of Ministers by an absolute majority of votes from a list of names drawn up by the Bureau of the Consultative Assembly.³⁴ The Commission consists of an equal number of members as there are High Contracting Parties.³⁵ No two members of the Commission may be nationals of the same State.³⁶ The candidates must be of high moral character and must either possess the qualifications required for appointment to high judicial office or be persons of recognized competence in national or international law.³⁷

Commission members are elected for a period of six years and

³³ European Convention, *supra* note 7, art. 26, at 238.

³⁴ European Convention, *supra* note 7, art. 21(1), at 238.

³⁵ European Convention, *supra* note 7, art. 20(1), at 236.

³⁶ *Id.*

³⁷ European Convention, *supra* note 7, art. 39(3), at 244.

they may be re-elected.³⁸ One half of the membership of the Commission is renewed every three years,³⁹ in order to ensure some continuity in the commission. The seat of the Commission is in Strasbourg but it can meet elsewhere (Rule 14 of the Commission Rules). The Commission does not sit permanently. That is to say, they decide on the number and length of the meetings on an annual basis.

The Commission convenes in plenary session or it may set up chambers, each composed of at least seven members.⁴⁰ Sessions are held in camera.⁴¹ The plenary Commission can (a) examine inter-state applications;⁴² (b) bring cases before the Court in accordance with compulsory jurisdiction of the Commission,⁴³ and (c) draft detailed rules of procedure beyond the framework outlined in the Convention.⁴⁴

Alternatively, chambers can exercise most of the powers conferred on the plenary Commission but they are restricted in that they can only examine petitions submitted under Article 25 of the Convention regarding issues of established case law.⁴⁵ They are not granted the power to hear cases which raise serious questions affecting the interpretation or application of the Convention.⁴⁶ They are also subject to the above stated provisions of Article 20(5) for the plenary Commission.

In addition, the Commission may set up committees. Each is composed of at least three members, with the power, exercisable by a unanimous vote, to declare inadmissible or strike from its list of

³⁸ European Convention, *supra* note 7, art. 22(1), at 236.

³⁹ European Convention, *supra* note 7, art. 22(2), at 236.

⁴⁰ European Convention, *supra* note 7, art. 29(1), at 240.

⁴¹ European Convention, *supra* note 7, art. 33, at 242.

⁴² European Convention, *supra* note 7, art. 24, at 236.

⁴³ European Convention, *supra* note 7, art. 48(a), at 248.

⁴⁴ European Convention, *supra* note 7, art. 36, at 242.

⁴⁵ European Convention, *supra* note 7, at 236.

⁴⁶ European Convention, *supra* note 7, art. 27(2), at 238.

cases a petition submitted under Article 25, when such a decision can be taken without further examination (as per Article 20(3)). A committee, like a chamber, may at any time relinquish jurisdiction in favor of the plenary Commission (as per Article 20(4)). Commission members are not permitted to take part in any case in which they have a personal interest. In addition, members swear an oath under Rule 2 of the Commission Rules to act as Commissions who are independent of their home states.⁴⁷

XII. THE ROLE OF THE COMMISSION

Essentially, the role of the Commission is two-fold: to take decisions on the admissibility of applications and to examine the said complaints, if admissible. In order to be admissible, applications must adhere to set criteria in accordance with Articles 25, 26, and 27 of the Convention. Essentially, Article 25 delineates eligible applicants to the Commission and Article 26 calls for the exhaustion of domestic remedies before applying. Article 27 sets procedural guidelines regarding Articles 25 and 26. The complaint must not have been previously examined by the Commission or any other international body and the applicant cannot claim anonymity.

When applications have been declared admissible the Commission subsequently examines the complaints for the alleged violation(s). In that regard, it is the responsibility of the Commission to clarify the facts of the case at hand and to encourage a friendly settlement. Such procedures are governed under Article 28 of the Convention which states:

1. In the event of the Commission accepting a petition referred to it:
 - (a) it shall, with a view to ascertaining the facts,

⁴⁷ VAN DIJK & VAN HOOF, *supra* note 1, at 20-21.

undertake together with the representatives of the parties an examination of the petition and, if need be, an investigation, for the effective conduct of which the States concerned shall furnish all necessary facilities, after an exchange of views with the Commission;
(b) it shall at the same time place itself at the disposal of the parties concerned with a view to securing a friendly settlement of the matter on the basis of respect for Human Rights as defined in this Convention.⁴⁸

Moreover, Article 30 provides that:

If the Commission succeeds in effecting a friendly settlement in accordance with Article 28, it shall draw up a Report which shall be sent to the States concerned, to the Committee of Ministers and to the Secretary General of the Council of Europe for publication. This Report shall be confined to a brief statement of the facts and of the solution reached.⁴⁹

While investigating admissibility of the complaint, the Commission usually requests information in the form of written observations and testimonials from the respondent Government. In some instances both parties, the applicant and the Government, are asked to submit further information, orally or in writing, at a hearing. A ruling that an application is found to be inadmissible constitutes a final decision with no appeals process. The acceptance of admissibility leads to a full investigation aimed at establishing the facts of the case. It is important to note that friendly settlements are encouraged at all times during the Commission stage of the proceedings.

⁴⁸ European Convention, *supra* note 7, art. 28, at 238.

⁴⁹ European Convention, *supra* note 7, art. 30, at 240.

When a friendly settlement is reached, the Commission is required under Article 30 to submit a report to that effect to the Committee of Ministers of the Council of Europe. When it is not possible to reach a friendly settlement, the Commission will offer an opinion as to whether there has been a breach of said rights, issuing a somewhat more detailed report on the proceedings and, in particular, its opinion on the case.

This report is submitted to both the Committee of Ministers and to the state involved in the alleged breach. The case hence may be referred to the Court by the Committee of Ministers, within three months of the issuing of the Commission's report. All cases put forth to the Court must be heard by the Commission first.

XIII. THE COURT

The function of the Court is to supervise the observance of human rights by Member States. Specifically, it is to issue rulings in cases which have been referred to it by the Commission or the State concerned.⁵⁰ Court decisions are binding on the parties. Article 46 specifies the compulsory jurisdiction of the European Court of Human Rights:

1. Any of the High Contracting Parties may at any time declare that it recognizes as compulsory *ipso facto* and without special agreement the jurisdiction of the Court in all matters concerning the interpretation and application of the present Convention.
2. The declarations referred to above may be made unconditionally or on condition of reciprocity on the

⁵⁰ European Convention, *supra* note 7, art. 44, at 246 (After the ratification of the Ninth Protocol the Court can issue rulings in cases which have been referred to it by the Commission, the state concerned or, by the applicant).

part of several or certain other High Contracting Parties or for a specified period.

3. These declarations shall be deposited with the Secretary General of the Council of Europe who shall transmit copies thereof to the High Contracting Parties.⁵¹

The European Court meets in Strasbourg but sessions may be held in other Nations of the Council of Europe.⁵² Hearings are held in public, although in exceptional circumstances they may be held in private.⁵³ The number of Court judges is equal to that of the Members of the Council of Europe. Like the Commission, no two judges may be nationals of the same state.⁵⁴ Members of the Court are first nominated by members of the Council of Europe, and then elected by the Consultative assembly through a majority vote. Specifically, each Member State is permitted to nominate three candidates, at least two of whom must be nationals of that particular State.⁵⁵ Similar to the Commission, eligible candidates must be of high moral character and must either possess the qualifications required for appointment to high judicial office or be *juris consults* of recognized competence.⁵⁶

Members of the Court are elected for a period of nine years and may be re-elected.⁵⁷ In order to provide some continuity in the Court one-third of the membership of the Court is renewed every

⁵¹ European Convention, *supra* note 7, art. 46, at 246.

⁵² 15 Eur. Ct. H.R.

⁵³ 18 Eur. Ct. H.R.

⁵⁴ European Convention, *supra* note 7, art. 38, at 242.

⁵⁵ European Convention, *supra* note 7, art 39(1) at 242 (Judges and Commissioners do not have to be citizens of a member state of the Council of Europe. In 1980 Professor MacDonald, from Canada, was nominated by Liechtenstein and subsequently elected to the Court where he has since been re-elected for a second term of office).

⁵⁶ European Convention, *supra* note 7, art. 39(3), at 244.

⁵⁷ European Convention, *supra* note 7, art. 40(1), at 244.

three years.⁵⁸ Members sit on the Court in their individual capacity and cannot hold any position which is incompatible with their duties as members of the Court.⁵⁹ Like members of the Commission, they pledge an oath or solemn declaration to act independently and impartially.⁶⁰

From its members, the Court elects a president and one or two vice-presidents for a period of three years. They may be re-elected.⁶¹ Rule 16 of the Rules of Court requires that the president call at least one annual meeting of the plenary (full) Court.⁶² In addition, the Court (plenary or Chambers) convenes as required to exercise its function of hearing cases. This usually occurs less frequently than meetings of the Commission.

Each case brought before the Court is heard by a Chamber composed of nine judges.⁶³ Either the president or vice-president sits in an *ex officio* capacity at the meeting.⁶⁴ In addition, a member of the Chamber from the state party concerned also sits in an *ex officio* capacity.⁶⁵ This requirement ensure that at least one person will be highly familiar with the legal system from which the case emanates. The *ex officio* can be either the judge who is a national of the state party concerned or a person of its choice who satisfies the conditions under Rules 21-23 of the Rules of Court.⁶⁶

⁵⁸ European Convention, *supra* note 7, art. 40(3), at 244.

⁵⁹ European Convention, *supra* note 7, art. 40(7), at 244.

⁶⁰ 16 Eur. Ct. H.R.

⁶¹ European Convention, *supra* note 7, art. 41, at 244.

⁶² *Supra* note 60.

⁶³ 1(D) Eur. Ct. H.R. (The term Court refers either to a Chamber or to the plenary Court: the full Court. This interchangeability of phraseology also applies throughout this article. So the use of the word Court may, indeed, refer to a Chamber. Distinctions will be highlighted where necessary).

⁶⁴ 21 Eur. Ct. H.R.

⁶⁵ European Convention, *supra* note 7, art. 43, at 244.

⁶⁶ European Convention, *supra* note 7, art. 39(3), at 244.

XIV. THE ROLE OF THE COURT

The Court may only deal with a case after the Commission has acknowledged the failure of efforts for a friendly settlement and within the period of three months.⁶⁷ As stated earlier, the jurisdiction of the Court extends to all cases concerning the interpretation and application of the Convention which the High Contracting Parties or the Commission shall refer to it.⁶⁸ Article 48 provides that the following may bring a case before the Court: (a) the Commission; (b) a High Contracting Party whose national is alleged to be a victim; (c) a High Contracting Party which referred the case to the Commission; (d) a High Contracting Party against which the complaint has been lodged.⁶⁹ This comes under the provision that the High Contracting Party, or Parties if more than one, concerned are subject to the compulsory jurisdiction of the Court. Disputes as to whether the Court has jurisdiction will be decided by the Court.⁷⁰

Just satisfaction will be afforded to the injured party when the court finds a complete or partial violation of the Convention.⁷¹ The Court will give reasons for the judgment and judges are entitled to deliver separate opinions from the majority Court.⁷² Court decisions are final⁷³ and High Contracting Parties must undertake to abide by the decision.⁷⁴ The judgment of the Court is submitted to the Committee of Ministers which subsequently supervises its execution.⁷⁵

⁶⁷ European Convention, *supra* note 7, arts. 32, 47, at 240, 246.

⁶⁸ European Convention, *supra* note 7, art. 48 at 246.

⁶⁹ *Id.*

⁷⁰ European Convention, *supra* note 7, art. 49, at 248.

⁷¹ European Convention, *supra* note 7, art. 50, at 248.

⁷² European Convention, *supra* note 7, art. 51, at 248.

⁷³ European Convention, *supra* note 7, art. 52, at 248.

⁷⁴ European Convention, *supra* note 7, art. 53, at 248.

⁷⁵ European Convention, *supra* note 7, art. 54, at 248.

XV. THE COMMITTEE

The Committee of Ministers of the Council of Europe differ from the Commission and the Court in at least two respects. First, they do not follow procedural guidelines for hearing cases and second, they do not derive their powers from the Convention. Hence they are not regulated in the same fashion. Essentially, the function of the Committee of Ministers is to decide on those cases that are not, or cannot be, submitted to the Court regarding alleged violations of the Convention. This is vital in instances where a Contracting Nation has not yet recognized the competence of the Court. Hence, the Committee of Ministers can make a decision regarding violations.⁷⁶

The Committee consists of one representative from each of the Member States of the Council of Europe. Although they meet twice annually, their duties are largely discharged by a Committee of the Ministers' Deputies. In accordance with Article 2 of the Rules of Procedure, "the Ministers' Deputies are competent to discuss all matters within the competence of the Committee of Ministers. Decisions made by the Deputies in virtue of the authority given to them by the Ministers have the same force and effect as decisions of the Committee".⁷⁷

The Committee of Ministers' Deputies are granted the power to take a decision as per Article 32 of the Convention, which states that:

1. If the question is not referred to the Court in accordance with Article 48 of this Convention within a period of three months from the date of the transmission of the Report to the Committee of Ministers, the Committee of Ministers shall decide by a majority of two-thirds of the members entitled to sit

⁷⁶ VAN DIJK & VAN HOOF, *supra* note 1, at 26-30.

⁷⁷ VAN DIJK & VAN HOOF, *supra* note 1, at 30.

on the Committee whether there has been a violation of the Convention.

2. In the affirmative case the Committee of Ministers shall prescribe a period during which the High Contracting Party concerned must take the measures required by the decision of the Committee of Ministers.

3. If the High Contracting Party concerned has not taken satisfactory measures within the prescribed period, the Committee of Ministers shall decide by the majority provided for in paragraph 1 above what effect shall be given to its original decision and shall publish the Report.

4. The High Contracting Parties undertake to regard as binding on them any decision which the Committee of Ministers may take in application of the preceding paragraphs.⁷⁸

XVI. THE SECRETARY GENERAL OF THE COUNCIL OF EUROPE

It is important to acknowledge that another important component of the Council of Europe is the office of the Secretary General. In essence, this is the highest official in the Council and elected by the Parliamentary assembly from a list of candidates prepared by the Committee of Ministers (Article 36 of the Statute of the Council of Europe).⁷⁹ The Secretary General plays an important supervisory role in the affairs of the Council. For example, ratification of the Convention is deposited with the Secretary General,⁸⁰ at which

⁷⁸ European Convention, *supra* note 7, art. 32, at 240.

⁷⁹ VAN DIJK & VAN HOOF, *supra* note 1, at 31.

⁸⁰ European Convention, *supra* note 7, art. 66(1), at 254.

time he notifies the State Members of this registry status.⁸¹ Conversely, the denunciation of the Convention must similarly be registered with the Secretary General and made known to other Member States.⁸² In addition, all applications submitted to the Commission are filed with the Secretary General.⁸³

XVII. DEROGATION OF THE CONVENTION

One of the most important functions of the Secretary General regards the right to derogate.⁸⁴ That is, a State may avail itself of its obligations under the Convention under certain conditions. Those opting to do so must file its declaration with the Secretary General.⁸⁵ Article 15 states that:

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 of this right of derogation shall keep the Secretary General of

⁸¹ European Convention, *supra* note 7, art. 66(4), at 254.

⁸² European Convention, *supra* note 7, art. 65, at 252.

⁸³ European Convention, *supra* note 7, arts. 24, 25(1), at 236, 238.

⁸⁴ European Convention, *supra* note 7, art. 15, at 232.

⁸⁵ European Convention, *supra* note 7, art. 15(3), at 232.

the Council of Europe fully informed of the measures which it has taken and the reasons therefor. It shall also inform the Secretary General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed.⁸⁶

Examples of this would be in regard to the United Kingdom and the situation in Northern Ireland. On December 23, 1988, the Government of the United Kingdom submitted a notice of derogation under Article 15 with the Secretary General regarding terrorism connected with the affairs of Northern Ireland the Prevention of Terrorism Act.⁸⁷

XVIII. JURISDICTION, RATIFICATION AND INCORPORATION OF THE CONVENTION

Upon ratification, most contracting states simultaneously incorporated the Convention into their domestic laws. Hence, this international treaty would also hold the status of national law. This was not the case with Ireland and the United Kingdom, however. Although they have ratified the Convention, they did not incorporate the Convention into their respective domestic legislation. As a result, the Convention merely sets out the rules of international law to which Ireland⁸⁸ and the United Kingdom⁸⁹ are bound to conform in its

⁸⁶ European Convention, *supra* note 7, art. 15, at 232-34.

⁸⁷ 51 PARL. DEB., H.L. (5th ser.) 3 (1994).

⁸⁸ It should be noted, however, that unlike the United Kingdom, the Republic of Ireland does have a written bill of rights, as such. *See* REP. OF IRELAND CONST. art. 40-44.

⁸⁹ In January 1995, a private members bill proposed by Lord Lester of Heron Hill passed second reading in the House of Lords in England. Lord Lester proposes, effectively, to incorporate the European Convention at par as a Bill of Rights for the

municipal law. Nevertheless, the Convention itself is not an integral part of either country's municipal laws.

XIX. NEW DIRECTIONS UNDER PROTOCOL 11:
THE ABOLITION OF THE COMMISSION OF HUMAN RIGHTS

On May 11, 1994, Protocol 11 opened for signatures by Member States of the Council of Europe. This new protocol mandates reform of the control system of human rights protections under the Convention, as per issues and concerns presented in an earlier discussion document.⁹⁰ Effectively, the Protocol will substitute the present Court and the Commission with that of a single permanent Court of Human Rights. The intent of the re-structuring initiative is "to maintain and improve the efficiency of its protection of human rights and fundamental freedoms, mainly in view of the increase in the number of applications and the growing membership of the Council of Europe".⁹¹

XX. AMENDMENTS TO THE PRESENT CONVENTION

Sections II through IV of the Convention (Articles 19 to 56)

United Kingdom. 51 PARL. DEB., H.L. (5th ser.) 3 (1994). While similar efforts have failed to win Parliamentary approval in the past, at this time there is increasing sympathy for such a move. Key players, such as the Master of the Rolls, the Law Society, and others (who may not have supported this notion in the past) are now espousing the concept of having a Bill of Rights for the United Kingdom. What is more, according to speeches given at the Second Reading of the Bill of Rights in the House of Lords, January 25, 1995, popular opinion polls indicate support by the general populace for such a Bill.

⁹⁰ Protocol 11 to the Convention for the Protection of Human Rights, May 11, 1994, reprinted in 15 HUM. RTS. L.J. 86, 92-94 (1994) [hereinafter Protocol 11].

⁹¹ Protocol 11, *supra* note 89, at 86.

and Protocol 2, as they stand today, shall be replaced with new wording which deletes any former mention of the Commission of Human Rights. Specifically, in the new version, Article 19 of Section II of the Convention deletes any mention of the Commission and establishes a Court which "shall function on a permanent basis."⁹²

The amended version of the Convention maintains many of the current aspects of the Court such as: the number of judges;⁹³ the criteria for office;⁹⁴ the election of judges;⁹⁵ and the terms of judicial office.⁹⁶

The criteria as to who may apply to the Court for a ruling remains but under the new regime they shall apply directly to the Court and not the Commission in the first instance.⁹⁷ A Committee consisting of three judges, a Chamber of seven judges, or a Grand Chamber of 17 judges shall consider the admissibility and merits of applications filed.⁹⁸ The choice of which body reviews the case depends largely on the nature of the case.⁹⁹ In most instances the Committee will review the application for admissibility. Committees can declare, with a unanimous vote, an application inadmissible. Their decision is final.¹⁰⁰

A Chamber can rule on the admissibility of a case (providing no action is taken by a Committee). They can also rule on the merits of a case.¹⁰¹ If a case before a Chamber is deemed to "raise a serious question," however, "affecting the interpretation of the Convention or the protocols thereto," the Chamber may relinquish its jurisdiction to

⁹² Protocol 11, *supra* note 89, at 87.

⁹³ Protocol 11, *supra* note 89, art. 20, at 87.

⁹⁴ Protocol 11, *supra* note 89, art. 21, at 87.

⁹⁵ Protocol 11, *supra* note 89, art. 22, at 87.

⁹⁶ Protocol 11, *supra* note 89, art. 23, at 87.

⁹⁷ Protocol 11, *supra* note 89, at 94.

⁹⁸ Protocol 11, *supra* note 89, at 94-95.

⁹⁹ *Id.*

¹⁰⁰ Protocol 11, *supra* note 89, at 95.

¹⁰¹ Protocol 11, *supra* note 89, art. 29, at 87.

a Grand Chamber.¹⁰² The decision of a Chamber is final, be it a referral of the case to a Grand Chamber or a verdict on the actual merits of the case at hand.¹⁰³

The Grand Chamber shall determine applications submitted thereto¹⁰⁴ and its decision is also final.¹⁰⁵ Like the current system, finding a friendly settlement is encouraged throughout the judicial process¹⁰⁶ and the Court shall strike a case from its list any time a friendly settlement is reached.¹⁰⁷ Similarly, the Court can also grant "just satisfaction".¹⁰⁸ Reasons for the judgment and decisions shall be given¹⁰⁹ and the member nations will "abide by the final judg[.]ment of the Court".¹¹⁰ Judgments will be transmitted to the Committee of Ministers which will "supervise its execution".¹¹¹

XXI. ENACTING THE NEW PROTOCOL

Once again, Protocol 11 was opened for signatures in May 1994 but it will only take effect once all member states of the Council of Europe have ratified the new protocol in their respective countries. At present most member states have signed in principle. Yet to date not all have ratified in their home countries. The United Kingdom was the first to ratify Protocol 11 in December 9, 1994.

A time line as to exactly when all thirty-nine Member States will have ratified the protocol is difficult to predict. It would seem

¹⁰² Protocol 11, *supra* note 89, art. 30, at 88.

¹⁰³ Protocol 11, *supra* note 89, art. 44, at 88.

¹⁰⁴ Protocol 11, *supra* note 89, art. 31, at 88.

¹⁰⁵ Protocol 11, *supra* note 89, art. 44, at 88.

¹⁰⁶ Protocol 11, *supra* note 89, art. 38, at 88.

¹⁰⁷ Protocol 11, *supra* note 89, art. 39, at 88.

¹⁰⁸ Protocol 11, *supra* note 89, art. 41, at 88.

¹⁰⁹ Protocol 11, *supra* note 89, art. 45, at 89.

¹¹⁰ Protocol 11, *supra* note 89, art. 46, at 89.

¹¹¹ *Id.*

that different countries will take varying lengths of time to complete their own internal procedures leading up to ratification. While some countries are similarly placed to the United Kingdom, hence ready for such a move, a number of others may take two or more years to bring themselves to the point of ratification.

It is not only internal politics but internal and legal procedures, some of which take longer than others, which must be tended to prior to ratification. Nevertheless, the majority of the states are expected to ratify the protocol reasonably quickly. Ones that begin to lag behind will likely come under increasing political pressure from those member states which have ratified, eventually succumbing to common demand. At this point, the Protocol, and hence the new and permanent Court, will come into being for all thirty-nine Member States which have signed the European Convention of Human Rights.

XXII. CONCLUSION

In summation, the important task of protecting rights and freedoms enshrined in the European Convention and its Protocols thereunder is presently shared by the European Commission and the European Court of Human Rights, in affiliation with the Committee of Ministers, which acts as the decision-making body of the Council of Europe. Within a few years, for all intents and purposes, this system will be obsolete, replaced by that of a new and permanent Court of Human Rights. The new protocol serves to reform the control machinery, aimed at maintaining and improving the efficiency of protecting human rights for member nations. This protocol is undoubtedly a major step forward towards greater protection for monitoring and enforcing human rights pursuant to the international obligation under the European Convention of Human Rights.