

## QUESTION

Is Europe blessed with too much of a good thing in the human rights area? Do you believe that consolidation of the functions performed by these organizations would be desirable? If so, what would be the best approach?

## ADDITIONAL READING

*The EU*: P. Alston, M. Bustelo and J. Heenan (eds.), *The EU and Human Rights* (1999); J. Weiler and N. Lockhart, "Taking Rights Seriously": The European Court and Its Fundamental Rights Jurisprudence, 32 *Common Market L. Rev.* 51 (1995); B. Brandtner and A. Rosas, 'Human Rights in the External Relations of the European Community: An Analysis of Doctrine and Practice', 9 *Eur. J. Int. L.* 468 (1998); A. Toth, 'The European Union and Human Rights: The Way Forward', 34 *Common Market L. Rev.* 491 (1997); L. Betten and D. MacDevitt (eds.), *The Protection of Fundamental Social Rights in the European Union* (1996).

*The OSCE*: OSCE, CD-ROM Compilation of Documents 1973–1997 (1998); *OSCE Handbook* (3rd. edn., 1999); W. Zellner, *On the Effectiveness of the OSCE Minority Regime* (1999); D. Gottehrer, *Ombudsman and Human Rights Protection Institutions in OSCE Participating States* (1998); Bibliography on the OSCE High Commissioner on National Minorities (3rd ed., 1997); M. Bothe, N. Ronzitti, and A. Rosas, *The OSCE in the Maintenance of Peace and Security* (1997); W. Korey, *The Promises We Keep: Human Rights, The Helsinki Process, and American Foreign Policy* (1993); T. Buergenthal, 'The CSCE Rights System', 25 *Geo. Wash. J. Int'l L. & Econ.* 333 (1991); A. Bloed et al. (eds.), *Monitoring Human Rights in Europe: Comparing International Procedures and Mechanisms* (1993), at 45.

## 3. OTHER HUMAN RIGHTS CONVENTIONS ADOPTED BY THE COUNCIL OF EUROPE

## COMMENT ON THREE CONVENTIONS

## The European Social Charter

Although economic and social rights were reflected in the post-Second World War constitutions of France, Germany and Italy, they were not included in the European Convention. One of the key drafters, Pierre-Henri Teitgen, explained this decision in 1949 on the grounds that it was first necessary 'to guarantee political democracy in the European Union and then to co-ordinate our economies, before undertaking the generalisation of social democracy'. These rights were subsequently recognized in the European Social Charter of 1961.

The ESC system consists of: (1) the original Charter of 1961 (ratified by 24 states, as of February 2000), (2) an Additional Protocol of 1988 extending some of

the rights (ten states), (3) an amending Protocol of 1991 which revises some of the original monitoring arrangements (16 states), (4) a revised (consolidated) Charter of 1996 which brings the earlier documents up to date and adds some new rights (eight states), and (5) a further Additional Protocol of 1995 which provides for a system of collective complaints (five states).<sup>15</sup> All but the 1991 Protocol have entered into force. The resulting picture is heavily fragmented since different states are governed by different regimes depending on which parts of the system they have ratified.<sup>16</sup> It is striking that, while every Council of Europe state has ratified the ECHR, 17 out of 41 have ratified none of the Social Charter instruments.

The Charter and its Additional Protocol of 1988 guarantee a series of 'rights and principles' with respect to employment conditions and 'social cohesion'. The former relate to: non-discrimination, prohibition of forced labour, trade union rights, decent working conditions, equal pay for equal work, prohibition of child labour, and maternity protection. Among the latter are: health protection, social security, and certain rights for children, families, migrant workers and the elderly. These rights are not legally binding *per se*. The legal obligations designed to ensure their effective exercise are contained in Part II, which details the specific measures to be taken in relation to each of the rights. Part III reflects the principle of progressive implementation tailored to suit the circumstances of individual states. Each contracting party must agree to be bound by at least five of seven rights which are considered to be of central importance. It must also accept at least five of the other rights as listed in Part II.

Part IV provides for a monitoring system based on the submission of regular reports by contracting parties. The reports are examined by the European Committee of Social Rights whose assessments of compliance and non-compliance are then considered by the Parliamentary Assembly and a Governmental Committee. Finally, on the basis of all these views, the Committee of Ministers may make specific recommendations to the state concerned. The Additional Protocol providing for collective complaints entered into force in July 1998, although by February 2000 only one case had been concluded.<sup>17</sup>

## The European Convention for the Prevention of Torture

In 1987 the Council of Europe adopted the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (ECPT). By comparison with the UN Torture Convention of 1984, the ECPT places a particular emphasis on prevention and is far more innovative and intrusive in its approach to supervision. As of February 2000 the ECPT had been ratified by 40

<sup>15</sup> See generally <www.coe.fr>.

<sup>16</sup> The European Social Charter should be distinguished from the European Community's Charter of Fundamental Social Rights of Workers and the 'social chapter' of the Amsterdam Treaty. See S. Sciarra, 'From Strasbourg to Amsterdam: Prospects for the Convergence of European Social Rights

Policy', in P. Alston, M. Bustelo and J. Heenan (eds.), *The EU and Human Rights* (1999), at 473.

<sup>17</sup> In a case brought by the International Commission of Jurists against Portugal concerning child labour, the Committee of Ministers confirmed in December 1999 that there had been a violation.

Member States of the Council of Europe and is also open to other states by invitation.<sup>18</sup>

The Convention establishes a Committee for the Prevention of Torture (CPT) which is composed of independent experts. Its function is 'to examine the treatment of persons deprived of their liberty with a view to strengthening, if necessary, the protection of such persons' from torture, inhuman or degrading treatment (Article 1). The Convention is not concerned solely with prisoners but with any 'persons deprived of their liberty by a public authority'. Each state party is required to permit the Committee to visit any such place within the state's jurisdiction (Article 2), unless there are exceptional circumstances (which will rarely be the case). Most visits are routine and scheduled well in advance, but there is also provision for *ad hoc* visits with little advance notice (Article 7).

As of January 2000 the CPT had made 67 periodic, and 29 *ad hoc* visits. It meets *in camera* and its visits and discussions are confidential as, in principle, are its reports. The latter, however, may be released, either at the request of the state concerned or if a state refuses to cooperate and the Committee decides by a two-thirds majority to make a public statement. This occurred in 1992 when the Committee concluded after three visits to Turkey that the government had failed to respond to its recommendations.<sup>19</sup> Since then, virtually all states have voluntarily agreed to the release of the Committee's report and (as of January 2000) 61 have been published.

#### Framework Convention for the Protection of National Minorities

Despite the importance of national minorities within Europe and discussions about appropriate measures since 1949, the issue had proven too controversial and complex for the Council of Europe to adopt specific standards until 1994, when the Framework Convention was adopted. In part, the impetus was the adoption of the 1992 UN Declaration on Rights of Persons Belonging to Minorities, p. 1298, *infra*, and the development of non-binding standards and promotional activities in this field by the CSCE. The Council sought to avoid longstanding controversies by, among other things, confining the Convention to programmatic obligations that are not directly applicable and that leave considerable discretion about implementation to the state concerned. International supervision is undertaken by the Committee of Ministers of the Council based upon periodic reports to be submitted by states parties. The Convention entered into force in February 1998 and as of January 2000 had been ratified by 28 states.

Note that even within one region, deep differences appear in the institutional structures of conventions adopted by the same body, as one compares these three

<sup>18</sup> See the Committee's website: <www.cpt.coe.int>; and M. Evans and R. Morgan, *Preventing Torture: A Study of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment* (1998).

<sup>19</sup> Public Statement on Turkey, Doc. CPT/Inf (93)1 (15 December 1992).

conventions among themselves and with the European Convention on Human Rights to which the materials now turn.

#### QUESTION

Compare the powers and functions of the Committee for the Prevention of Torture with those of treaty organs under the UN-related conventions described in Chapter 9, particularly with the Committee formed under the Convention against Torture, p. 775, *supra*. In what respects is the European Committee 'innovative', as the text above states? Is it desirable to apply its innovative characteristics to a universal arrangement?

#### 4. THE EUROPEAN COURT OF HUMAN RIGHTS: ARTICLE 34 INDIVIDUAL PETITIONS

The European Convention on Human Rights (ECHR) provides for two procedures by which member states (referred to in the Convention as the High Contracting Parties) may be held accountable by the European Court of Human Rights ('the Court') for violations of the recognized rights: the individual petition procedure pursuant to Article 34, and the interstate procedure under Article 33.

The Convention makes clear that the primary responsibility for implementation rests with the member states themselves. The implementation machinery of the Convention comes into play only after domestic remedies are considered to have been exhausted. The great majority of complaints submitted are deemed inadmissible, frequently on the grounds that domestic law provides an effective remedy for any violation that may have taken place. Recall the obligations of member states under Articles 1 and 13 of the Convention to 'secure to everyone' the Convention's rights and to provide 'an effective remedy before a national authority' for violations of those rights.

The remedy given by, say, a domestic court may be pursuant to provisions of domestic law that stand relatively independently of the Convention, although perhaps influenced by it: a code of criminal procedure or a constitutional provision on free speech that are consistent with the Convention, for example. Or a remedy may be given pursuant to the substantive provisions of the Convention itself after the Convention has been incorporated into domestic law automatically or by special legislation, a path examined at pp. 999-1006, *infra*.

This preference for domestic resolution is also reinforced by the requirement to seek a friendly settlement wherever possible and by the procedures for full government consultation in the examination of complaints. The confidentiality of part of the proceedings, the role accorded to the Committee of Ministers, and the provision for there to be a judge from every state party again underscore the state-centred nature of many of the Convention's procedures.