



Second Edition

# International Human Rights Law

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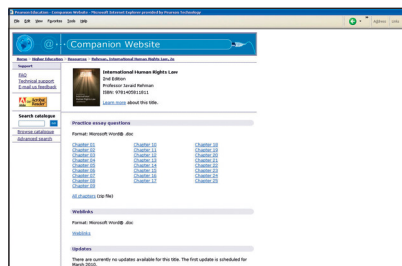


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of Independent Experts) to clarify the meaning of particular provisions and to comment on the problems that a State envisions that the acceptance of those provisions entail.<sup>40</sup> Requests for such reports have been rare, and there have thus far been only a few occasions when States have been called upon to submit these reports.

Two bodies are primarily involved in the monitoring of State reports: the ECSR and the Governmental Committee. The ECSR, a 15-member body of independent experts, is elected by the Committee of Ministers for a term of six years.<sup>41</sup> Members of the Committee sit in their individual capacity and are required not to perform any functions incompatible with the requirements of independence, impartiality and availability inherent in their office.<sup>42</sup> The other body, the Governmental Committee, consists of one representative of each of the Contracting parties.<sup>43</sup> Members of the Governmental Committee are usually civil servants, in charge of the national ministry responsible for implementing the ESC.<sup>44</sup> The Committee is authorised to allow no more than two international organisations of employers and no more than two international trade union organisations to send observers in a consultative capacity to its meetings.<sup>45</sup> It may also, at its discretion, consult representatives of non-governmental organisations with consultative status with the Council of Europe and having a particular competence in matters relating to the Charter.<sup>46</sup> The process is initiated through submission of the report to the Secretary General for its examination by ECSR. At the same time as sending the report to the Secretary General, the relevant State party is required to forward copies of this report to 'such of its national organisations as are members of the international organisations of employers and trade unions to be invited . . . to be represented at the meetings of the Sub-committee of the Governmental Social Committee'.<sup>47</sup> The reports received from these organisations and comments on these reports from the States Parties are sent to the Secretary General.<sup>48</sup> The ECSR may ask for additional information or clarification from the States parties.<sup>49</sup>

The ECSR provides a legal assessment of States' compliance with the provisions which it has accepted.<sup>50</sup> The conclusions made by the Committee are made available as a public document, and are communicated to the Parliamentary Assembly of the Council of Europe and to any other relevant organisations.<sup>51</sup> Once this stage is over, State reports, and the assessment made by the ECSR on these reports, are transmitted to the Governmental Committee.<sup>52</sup>

<sup>40</sup> Harris, 'Lessons from the Reporting System of the European Social Charter' in Alston and Crawford (eds), above n.35, at p. 350.

<sup>41</sup> The number of members was established by the Committee of Minister at 751st meeting of the Ministers' Deputies (2–7 May 2001). The 1961 ESC as amended by the 1991 Protocol Article 25(1) states that the Parliamentary Assembly elects members of the Committee; however, this has not yet been applied. [www.coe.int/t/dghl/monitoring/socialcharter/ESCR/ESCRdefault\\_en.asp](http://www.coe.int/t/dghl/monitoring/socialcharter/ESCR/ESCRdefault_en.asp) <last visited 2 May 2009>. For the current list of members see [www.coe.int/t/dghl/monitoring/socialcharter/ESCR/Members\\_en.asp](http://www.coe.int/t/dghl/monitoring/socialcharter/ESCR/Members_en.asp) <last visited 2 May 2009>.

<sup>42</sup> Article 25(1) and (4) 1961 ESC.

<sup>43</sup> Article 27(2) 1961 ESC.

<sup>44</sup> Harris, 'Lessons from the Reporting System of the European Social Charter' in Alston and Crawford (eds), above n.35, at p. 355.

<sup>45</sup> Article 27(2) 1961 ESC as amended by 1991 Protocol.

<sup>46</sup> Ibid.

<sup>47</sup> Ibid. Article 23(1).

<sup>48</sup> Ibid. Article 23(2).

<sup>49</sup> Ibid. Article 24(3).

<sup>50</sup> Ibid. Article 24(2).

<sup>51</sup> Ibid. Article 24(4).

<sup>52</sup> Ibid. Article 24(4).

The Governmental Committee examines those assessments where there are indications of non-compliance with the provisions of the Charter and, on the basis of social, economic and other policy considerations, prepares recommendations for the Committee of Ministers to adopt.<sup>53</sup> The recommendations prepared by the Governmental Committee are also passed on to the Parliamentary Assembly of the Council of Europe, which transmits its views to the Council of Ministers. In the light of comments made by the Governmental Committee and the Parliamentary Assembly, the Committee of Ministers issues recommendations to States which fail to comply with the Charter.

The Committee of Ministers adopts, 'by a majority of two-thirds of those voting with entitlement to voting limited to the Contracting Parties, on the basis of the report of the Governmental Committee, a resolution covering the entire supervision cycle and containing individual recommendations to the Contracting Parties concerned'.<sup>54</sup> The Secretary General of the Council of Europe transmits 'to the Parliamentary Assembly, with a view to the holding of periodical plenary debates, the reports of the Committee of Independent Experts and of the Governmental Committee, as well as the resolutions of the Committee of Ministers'.<sup>55</sup>

From the above description, the implementation mechanism might appear to be a straightforward one. However, in practice substantial difficulties arise because of a weak and cumbersome system of monitoring of the treaty. Many reasons can be advanced for the weaknesses in implementing the ESC. Giving the mandate to the Committee of Ministers was inappropriate because of the political nature of the body. Politicians have been reluctant to criticise States for fear of generating political tensions. Under the provisions of the original Charter, the Committee has to adopt recommendations by a two-thirds majority of its members. Given the limited membership of this Charter, for many years the Charter's Contracting Parties represented only about one-third of the Council of Europe's membership. This resulted in non-State parties criticising practices in a State, which had committed itself to fulfilling the Charter's obligations. There were other problems generated by the antagonism between the CIE (now ECSR) and the Governmental Experts. For example, a confrontation took place in the very first cycle of reporting, when the ECSR found 57 breaches from all seven States involved. As a reaction to this, the Governmental Committee produced its own less demanding interpretation of the Charter.<sup>56</sup>

National trade unions and employers' organisations are given the right to comment on national reports. However their role is limited in that they may only sit as observers at the meetings of the Committee of Governmental representatives. There are also no explicit provisions to the effect that their comments shall be taken into account by the supervisory bodies. This minor role for the employers and workers' representatives is another reason for the Charter's lack of popularity.

In the context of these issues the decision was taken in November 1990 to revise the Charter. A number of improvements were made in the supervisory system as well as an extension in the range and content of the rights. The 1991 Amending Protocol changed the voting requirements in the Committee of Ministers from a two-thirds majority of member states to a two-thirds majority of Contracting Parties, strengthening the role of the

<sup>53</sup> Ibid. Article 27(3).

<sup>54</sup> Ibid. Article 28(1).

<sup>55</sup> Ibid. Article 29.

<sup>56</sup> Harris, 'Lessons from the Reporting System of the European Social Charter' in Alston and Crawford (eds), above n.35, at p. 353.

Committee of Independent Experts and improving the consultation procedures with employers' and trade unions' representatives as well as with NGOs.<sup>57</sup> In addition, the 1991 Protocol enabled the ECSR to make direct contact with Contracting Parties in order to request clarification and additional information concerning their reports. Under the original provisions,<sup>58</sup> the CIE could only conclude that certain situations were unclear and, therefore, that they were not sure whether the Charter had been infringed.<sup>59</sup> They would have to wait two years to get the relevant information which might still be inconclusive.

The second major improvement has been the better definition of the Governmental Committee.<sup>60</sup> This is intended to avoid what had previously happened, namely that the governmental representatives more or less repeated the work of the experts and usually came to different conclusions. This offered the Committee of Ministers an opportunity to abstain from any further actions as there was no clear indication of a breach of the Charter. The amendment provides that in the light of the reports of the Committee of Independent Experts and of the Contracting Parties, the Governmental Committee shall select the situations which should, in its view, be the subject of recommendations by the Committee of Ministers.<sup>61</sup> In addition to a better description of the role of the Governmental Committee, there has also been a shift in the hitherto confrontational position adopted by the ECSR towards the Governmental Committee. The ECSR has also in the words of Professor Harris 'adopted a somewhat more measured approach. It is much slower to find a new party in breach of its obligations in its early reports. It has also moderated its approach to the application of some particularly delicate provisions or issues'.<sup>62</sup>

#### **(a) Collective complaints procedure**

In order to vitalise the ESC, a collective complaints procedure has been inducted into the protection accorded through the ESC. The process, which was initiated in 1990, culminated in the adoption of an additional Protocol of 1995, providing for a system of collective complaints.<sup>63</sup> The Protocol came into force on 1 July 1998, with the Complaints Mechanism being first initiated in October 1998. The Collective Complaints Procedure (CCP) as established through the Protocol does not allow individuals to make complaints: in other words there is no mechanism of individual petitioning. Nor are there any inter-State complaints procedures. Complaints can only be lodged by certain types of organisations against contracting States parties allegedly failing to comply with their obligations under the Charter. The four types of organisations eligible to launch complaints are detailed in the provisions of the Protocol.<sup>64</sup> Firstly, international organisations of employers and trade unions which act as observers during meetings of the Governmental Committee under the reporting system.<sup>65</sup> These organisations include the European Trade Union Confederation, the Union of Industrial Employers, the Confederation of Europe and the International Organisation of

<sup>57</sup> See Article 28(1) 1961 ESC (as amended by 1991 Protocol).

<sup>58</sup> Ibid. Article 24 1961 ESC.

<sup>59</sup> Ibid. Articles 24 and 27.

<sup>60</sup> Ibid. Article 27.

<sup>61</sup> Ibid. Article 27(3).

<sup>62</sup> Harris, 'The System of Supervision of the European Social Charter—Problems and Options for the Future' in Betten (ed.), above n.9, 1–34, at p. 10.

<sup>63</sup> Additional Protocol to the European Social Charter providing for a system of collective complaints, ETS No. 158 (adopted June 95, opened for signature 9 November 1995).

<sup>64</sup> Articles 1 and 2 1995 Protocol.

<sup>65</sup> Ibid. Article 1(a).

Employees. The second type of organisation includes Non-governmental Organisations with consultative standing with the Council of Europe and recognised in a list drawn by the Governmental Committee allowing them the right to make complaints under this system.<sup>66</sup> Thirdly, the procedure sanctions 'representative national organisations of employers and trade unions within the jurisdiction of the Contracting Party against which they have lodged a complaint'.<sup>67</sup> Fourthly, there is the final broad category of non-governmental organisations with 'particular competence' in the field to submit complaints.<sup>68</sup> A national NGO placed into this category can only make complaints if the State where the NGO is located has made a declaration allowing it to do so.<sup>69</sup> Furthermore, according to the procedure the NGOs of the second and fourth type are restricted to submitting complaints only in 'respect of those matters regarding which they have been recognised as having particular competence'.<sup>70</sup> The ECSR initially decides as to the admissibility of the complaint.<sup>71</sup> Once a complaint is held admissible it requires both the complainant as well as the defendant State party to present its views on the merits of the complaint.<sup>72</sup> On the basis of information that is available, ECSR draws up a report as to whether or not failure to ensure 'the satisfactory application' of one or more provisions of the Charter is found.<sup>73</sup> The findings of the report are forwarded to the Committee of Ministers, which makes the final decision. In articulating the nature of action required from the Committee of Ministers Article 9(1) of the 1995 Protocol provides:

On the basis of the report of the Committee of Independent Experts, [now the ECSR] the Committee of Ministers shall adopt a resolution by a majority of those voting. If the [ECSR] finds that the Charter has not been applied in a satisfactory manner, the Committee of Ministers shall adopt, by a majority of two-thirds of those voting, a recommendation addressed to the Contracting Party concerned. In both cases, entitlement to voting shall be limited to the Contracting Parties to the Charter.

Despite the restrictions regarding the specificity of complainants, in contrast to other complaints mechanisms, the CCP does not set out a comprehensive or explicit list of admissibility requirements.<sup>74</sup> There is no time limit for bringing complaints, nor is there is a requirement to exhaust domestic remedies or (as in the case of ECHR) that a complaint is manifestly ill-founded.<sup>75</sup> The CCP, unlike the reporting system under the Charter, which is applicable to all States parties, applies to parties on an optional basis. Amongst the two possible ways in which CCP could be applicable to a State is: firstly through express ratification

<sup>66</sup> Ibid. Article 1(b).

<sup>67</sup> Ibid. Article 1(c).

<sup>68</sup> Ibid. Article 2(1).

<sup>69</sup> Ibid. Article 2(1).

<sup>70</sup> Ibid. Article 3.

<sup>71</sup> Ibid. Article 6. Unlike other human rights complaints mechanisms, the admissibility criterion also appear not to be rigorously applied; Churchill and Khaliq 'The Collective Complaints System of the European Social Charter: An Effective Mechanism for Ensuring Compliance with Economic and Social Rights?' 15 *EJIL* (2004) 417, at 432.

<sup>72</sup> Article 7(1) 1995 Protocol.

<sup>73</sup> Ibid. Article 8(1).

<sup>74</sup> Churchill and Khaliq, above n.71, at p. 213.

<sup>75</sup> See Chapter 7 above.



of 1995 Protocol; and secondly where a State party to the Revised Charter (but not a party to the Protocol) makes an express declaration under Article D2 of the Revised Charter expressing its agreement to be bound by the CCP. As noted above, complaints can be made regarding general situations and not about particular or individual cases.<sup>76</sup> The complaints procedure adds a new dimension and importance to the Social Charter; its impact is likely to be a beneficial one in generating greater interest in the Charter. That said, currently over half of State parties to the Charter have refused to accept the obligations under the CCP and this unfortunate trend appears likely to continue for the foreseeable future.

Many of the rights contained in the ESC have been addressed at various levels, and in some cases much more strongly at the European level through the European Union. This statement can be tested while contrasting Articles 2, 3, 7, 8, 20, 21, 25 and 29 of the ESC to comparable European Council Directives.<sup>77</sup> In a few instances, even the ECHR jurisprudence has been of greater assistance to disgruntled workers or employees.<sup>78</sup> Despite the shortcomings in the Charter, there are a number of positive features.<sup>79</sup> Although reports are usually delayed (not an unusual feature of international reporting procedures),

<sup>76</sup> *International Commission of Jurists (ICJ) v. Portugal* Complaint No. 1/1998 was the first complaint registered under CCP. The complaint made by the International Commission of Jurists against Portugal, Article 7 of ESC related to Children and Young People. The International Commission of Jurists alleged that notwithstanding an adequate legislative framework for the enforcement of minimum age for employment, illegal child labour persisted in Portugal and that the Portuguese Labour inspectorate was ineffective in enforcing labour laws related to child labour. ECSR was of the view that Portugal was not acting in conformity with its obligations under Article 7(1) ESC. The Committee of Ministers adopted a resolution taking note of the report and conclusion of CSR and Portugal to provide information on the steps towards compliance with requesting 1998 Resolution in the next reporting cycle for Charter. Resolution ChS(99)4 (adopted 15 December 1999: [www.coe.fr/cm/ta/reschs/1999/99cx4.htm](http://www.coe.fr/cm/ta/reschs/1999/99cx4.htm) <last visited 11 May 2009> See Cullen, 'The Collective Complaints Mechanism of the European Social Charter' 25 *EL Rev* (Human Rights Survey HR) (2000) 18, at 26; also see Cullen, 'The Collective Complaints System of the European Social Charter: Interpretative Methods of the European Committee of Social Rights' 9 *HRLR* (2009) 61.

<sup>77</sup> Compare the following Article 2 ESC with Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organisation of working time. Article 3 ESC with Article 137 TEC creates a legal basis for health and safety legislation, and there are too many subsequent Directives to number, all dealing with different dangers; Article 7 ESC with Council Directive 94/33/EC of 22 June 1994 on the protection of young people at work; Article 8 ESC with Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding; Article 20 ESC with Article 141 TEC; Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women; Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions; Council Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex (also a couple of Directives on discrimination in social security); Article 21 ESC with Council Directive 91/533/EEC of 14 October 1991 on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship; Council Directive 94/45/EC of 22 September 1994 on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees; Article 25 ESC with Council Directive 80/987/EEC of 20 October 1980 on the approximation of the laws of the Member States relating to the protection of employees in the event of the insolvency of their employer and Article 29 ESC with Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies.

<sup>78</sup> See above chapter 7.

<sup>79</sup> It is also the case that some rights such as the right to strike is recognised as an important right under Article 6 of the ESC, with the ECSR interpreting this Article as requiring States to show the existence of strong objective justification for the imposition of restrictions on that right. By contrast within the EU context the right to strike in the light of the post *Viking* (*International Transport Workers' Federation v. Viking Line ABP* (C438/05) [2008] 1 C.M.L.R. 51) and post *Laval* (*Laval un Partneri Ltd v. Svenska Byggnadsarbetareförbundet and others* Case C-341/05 [2008] C.M.L.R. 9) environment appears to be less fundamental.

the States parties to ESC have made a point of making a definitive submission.<sup>80</sup> This action represents a major contrast with the situation at the international level, in particular in economic and social rights reporting. It is also to the credit of the ECSR that it reviews each of the State reports objectively and independently.

### 3 THE EUROPEAN UNION<sup>81</sup>

While the Council of Europe (COE) was focused on maintaining peace within Europe by means of co-operation in the field of human rights, the European Economic Community (which later became part of the EU) was founded in order to unite Europe both economically and politically.<sup>82</sup> The Treaty of Rome only indirectly concerned itself with human rights.<sup>83</sup> Amongst the few related provisions was Article 39 (previously Article 48) of the Treaty, which provided for the right of freedom of movement for community workers and Article 141 (previously Article 119) that established equal pay for equal work for men and women. The different approaches taken by the COE and the European Community (EC) meant that, historically, the protection afforded under Community law was different from the rights accorded under the ECHR. Within the Community sphere rights and protection were accorded to the individual not 'by virtue of his or her humanity, but [by reason of] one's status as a community national'.<sup>84</sup> Furthermore:

the essentially economic character of the Communities . . . [made] the possibility of their encroaching upon fundamental human values, such as life, personal liberty, freedom of opinion, conscience etc very unlikely.<sup>85</sup>

<sup>80</sup> Harris, 'Lessons from the Reporting System of the European Social Charter' in Alston and Crawford (eds), above n.35, at p. 353.

<sup>81</sup> Alston (ed.), above n.1; Shaw, *Law of the European Union* (Palgrave, 2000); Betten and MacDevitt (eds), *The Protection of Fundamental Rights in the European Union* (Kluwer Law International, 2006); Hartley, 'The Constitutional Foundations of the European Union' 117 *LQR* (2001) 225; Jacobs, 'The Protection of Human Rights in the Members States of the EC: The Impact of Case-Law of the Court of Justice' in O'Reilly (ed.), *Human Rights and Constitutional Law: Essays in Honour of Brian Walsh* (Round Hall Press, 1992), pp. 243–250; Clapham, 'A Human Rights Policy for the European Community' 10 *YEL* (1990) 309; Mendelson, 'The European Court of Justice and Human Rights' 1 *YEL* (1981) 125; Mendelson, 'The Impact of European Community Law on the Implementation of European Convention on Human Rights' 3 *YEL* (1983) 99; McBride and Neville Brown, 'The United Kingdom, the European Community and the European Convention on Human Rights' 1 *YEL* (1981) 167; Meenan, *Equality Law in an Enlarged European Union: Understanding the Article 13 Directives* (Cambridge University Press, 2007).

<sup>82</sup> See McCrudden and Chambers 'Introduction' in McCrudden and Chambers (eds), *Individual Rights and the Law in Britain* (Clarendon Press, 1994) pp. 1–38, at 24.

<sup>83</sup> See Treaty Establishing the European Economic Community signed at Rome, 25 March 1957, as amended by subsequent treaties through the Treaty of Maastricht (1992), Treaty of Amsterdam (1997), the Treaty of Nice (2001) and Accession Treaty (2003) and Accession Treaty (2005); see *European Union – Consolidated Versions of the Treaty on European Union and of the Treaty Establishing the European Community* (Consolidated Text) Official Journal C 321E of 29 December 2006; see Douglas-Scott, 'Environmental Rights in the European Union – Participatory Democracy or Democratic Deficit?' in Boyle and Andreson (eds), *Human Rights Approaches to Environmental Protection* (Clarendon Press, 1996) pp. 109–128, at p. 109. Similarly, there was as such no recognition of complex 20th-century problems such as environment and pollution: see Sunkin, Ong and Wight, *Source Book on Environmental Law* (Routledge, 2002) at pp. 6–7.

<sup>84</sup> Twomey, 'The European Union: Three Pillars without a Human Rights Foundation' in O'Keefe and Twomey (eds), *Legal Issues of the Maastricht Treaty* (Wiley, 1994) pp. 121–131 at p. 122.

<sup>85</sup> A.G. Toth, 'The Individual and European Law' 24 *ICLQ* (1975) 659 at p. 667.