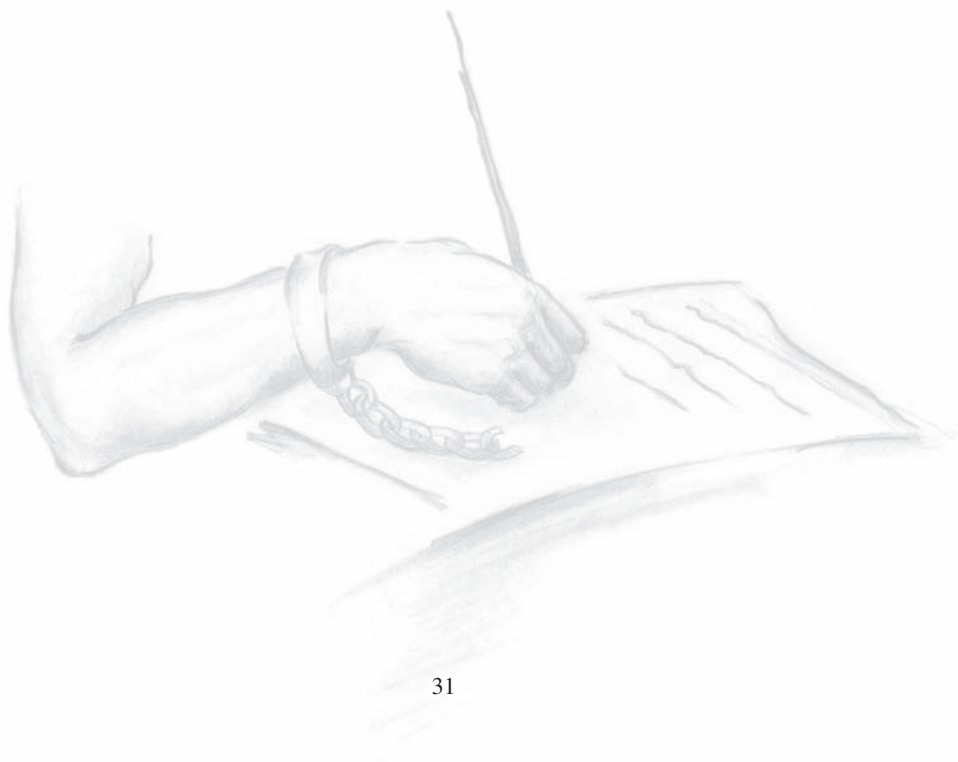


PART I

OVERVIEW OF THE COUNCIL OF EUROPE, THE COURT, AND ITS PROCEEDINGS



OVERVIEW

1.1 The Council of Europe

Map of Council of Europe Member States

1.2 The European Court of Human Rights

Textbox i Dates of Ratification of European Convention on Human Rights and Additional Protocols as of 31 January 2006

1.3 Protocol No. 14

1.4 The Judges and the Registry of the Court

1.4.1 The Judges

1.4.2 The Registry

1.5 Structure of the Court

1.5.1 The Grand Chamber

1.5.2 The Sections and the Chambers

1.5.3 The Committees

1.6 Instruments of the Court

1.6.1 The European Convention on Human Rights

1.6.2 The Protocols

1.6.3 The Rules of Court

1.6.4 Practice Directions

1.6.5 Decisions and Reports of the Commission and Decisions and Judgments of the Court

1.7 Summary of Proceedings Before the Court

1.7.1 First Examination of the Application

1.7.2 Applications Declared Inadmissible by a Committee

1.7.3 Examination by a Chamber

Textbox ii Case-processing Flowchart

1.8 Legal Representation

Textbox iii Form of Authority

1.9 Legal Aid

Textbox iv Legal Aid Fees (applicable as from 1 January 2006)

Textbox v Declaration of Applicant's Means

1.10 The Languages Used in the Court's Proceedings

1.11 Written Pleadings

1.12 Third Party Interventions (*Amicus Curiae*)

1.13 Costs

1.14 Hearings

1.15 Effects of the Court's Judgments

1.1 The Council of Europe

The Convention for the Protection of Human Rights and Fundamental Freedoms, more commonly referred to as the “European Convention on Human Rights” and hereinafter as “the Convention”, was drafted under the auspices of the Council of Europe, an inter-governmental body set up by the Treaty of London on 5 May 1949.⁵

According to Article 1 of the Statute of the Council of Europe, the aim of the organisation “is to achieve a greater unity between its members for the purpose of safeguarding and realising the ideals and principles which are their common heritage and facilitating their economic and social progress”. In pursuit of this aim, each Member State⁶ resolved, in Article 3 of the same Statute, to “accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms”. This special importance which the Member States accorded to human rights – a newly emerging concept at a time when the majority of the world’s States jealously guarded the sovereign privilege to deal with their citizens as they wished – was subsequently taken to a new level with the opening for signature in Rome on 4 November 1950 of the Council of Europe’s Convention for the Protection of Human Rights and Fundamental Freedoms. The Convention, which was the first international legal instrument to safeguard human rights through an enforcement mechanism, entered into force on 3 September 1953.

At the time of writing, the Council of Europe has 46 Member States and is considering the membership application of Belarus.⁷ Membership in the Council of Europe is contingent on ratification of the Convention and its Protocols. The Council of Europe’s headquarters is located in Strasbourg, France.

The Statute of the Council of Europe established two organs – the Committee of Ministers and the Parliamentary Assembly. The Committee of Ministers, which consists of the Ministers of Foreign Affairs of the Member States, is the decision-making body of the Council of Europe. Its functions include, in

5 The treaty was signed by ten European States, i.e. Belgium, Denmark, France, Ireland, Italy, Luxembourg, the Netherlands, Norway, Sweden, and the United Kingdom. In August 1949, Greece and Turkey joined the Council, increasing the number of its members to twelve. Subsequent ratifications have brought the number of Member States to 46. The Council of Europe has granted observer status to the Holy See, the United States, Canada, Japan and Mexico.

6 In this *Handbook*, the term “Member State” is used for a country which is a member of the Council of Europe, whereas the term “Contracting Party” refers to a State that has ratified the Convention.

7 A current list of the Council of Europe’s Member States may be consulted at http://www.coe.int/T/E/Com/About_Coe/Member_states/default.asp

particular, supervising the execution of judgments of the European Court of Human Rights. The Parliamentary Assembly is the parliamentary organ of the Council of Europe. It consists of a number of members of national Parliaments from each Member State, with a President elected each year from amongst them. The Parliamentary Assembly's functions include the election of the judges of the European Court of Human Rights from a list of three candidates submitted by each Contracting Party. Furthermore, the Parliamentary Assembly is responsible for the adoption of Conventions and additional Protocols. Another important function of the Parliamentary Assembly is to examine whether a candidate State has fulfilled the criteria for accession to the Council of Europe.

The Council of Europe is headed by a Secretary General who is appointed by the Parliamentary Assembly on the recommendation of the Committee of Ministers, for a period of five years. The Secretary General has the overall responsibility for the strategic management of the Council of Europe's work programme and budget and oversees the day-to-day running of the organisation and Secretariat. The Secretary General also has the power, under Article 52 of the Convention, to request that a Contracting Party furnish explanations relating to the manner in which its internal law ensures the effective implementation of the Convention.⁸

The office of the Council of Europe's Commissioner for Human Rights was established on 7 May 1999 by a resolution of the Committee of Ministers. That Resolution requires the Commissioner to:

- promote education in, and awareness of, human rights in the Member States;
- identify possible shortcomings in the law and practice of Member States with regard to compliance with human rights; and,
- help promote the effective observance and full enjoyment of human rights, as embodied in the various Council of Europe instruments.

The Office of the Commissioner is a non-judicial institution which does not take up individual complaints. The Commissioner cannot, therefore, accept

⁸ For example, the Secretary General exercised his powers under this Article in his request of 25 November 2005 to the Contracting Parties for information concerning allegations of CIA abductions of terror suspects involving the use of 'Council of Europe' airspace or airports. Specifically, the Secretary General asked the Contracting Parties to provide information on whether "any public official or other person acting in an official capacity has been involved in any manner – whether by action or omission – in the unacknowledged deprivation of liberty of any individual, or transport of any individual while so deprived of their liberty, including where such deprivation of liberty may have occurred by or at the instigation of any foreign agency".

OMCT

any requests to present individual complaints before national or international courts, nor before national administrations of Member States of the Council of Europe. Nevertheless, he or she can draw conclusions and take initiatives of a general nature that are based on individual complaints.⁹

During discussions on the drafting of Protocol No. 14, it was agreed that the Commissioner should play a more active role in assisting the European Court of Human Rights on certain questions, particularly in cases that reveal structural or systematic weaknesses in the Contracting Parties' institutions which lead to repetitive violations of the Convention. It was thus decided to amend Article 36 of the Convention so as to enable the Commissioner to intervene as a third party in cases before the European Court of Human Rights through the submission of written comments and by taking part in hearings.¹⁰

Council of Europe Member States¹¹



9 For further information see http://www.coe.int/T/E/Commissioner_H.R/Communication_Unit/

10 See Article 13 of Protocol No. 14.

11 Source: http://www.coe.int/T/e/com/about_coe/member_states/default.asp

1.2 The European Court of Human Rights

The European Court of Human Rights is the oldest, most well established and effective of the three regional human rights systems in existence today. Its judgments are binding and have the force of law in the Member States of the Council of Europe. Failure to abide by the judgments of the Court can in theory have significant political consequences for the concerned Member State, including exclusion from the Council of Europe. In reality, such sanctions have never been applied because Contracting Parties generally have a good record of compliance with the Court's judgments.

The European human rights system went through several stages of development before crystallizing in its current form as a single permanent court with its seat in Strasbourg. Initially, a three-fold mechanism was established to enforce the obligations entered into by the Contracting Parties under the Convention. Pursuant to former Article 19 of the Convention, a European Commission of Human Rights (hereinafter referred to as "the Commission") and a European Court of Human Rights were established. These two entities – together often referred to as the "Convention institutions" or "Strasbourg institutions" – were complemented by the Committee of Ministers which was entrusted with adjudicative as well as executive powers, including the power to execute the Court's judgments.

The main function of the Commission, which consisted of a number of members equal to that of the Contracting Parties, was to act as a filtering mechanism by determining the admissibility of applications brought by individuals. When the Commission found an application admissible, it placed itself at the parties' disposal with a view to reaching a friendly settlement. If no settlement was reached, the Commission would draw up a report under former Article 31 of the Convention in which it would establish the facts of the case and express an opinion on the merits. This report would be transmitted to the Committee of Ministers. Where the respondent State had accepted the compulsory jurisdiction of the Court, the Commission, and/or any Contracting Party concerned had a period of three months following the transmission of the report to the Committee of Ministers within which to bring the case before the Court for a final and binding adjudication.

Originally, individuals were not entitled to bring their cases directly to the Court; former Article 25 of the Convention enabled individuals to apply directly to the Commission only. Protocol No. 9 to the Convention, which entered into force on 1 October 1994, did provide a limited possibility for individual applicants to have their cases examined by the Court. If a case was not referred to the Court, the Committee of Ministers would exercise its

OMCT

quasi-judicial powers to decide whether there had been a violation of the Convention, generally adopting the conclusion reached by the Commission in its report.¹²

From 1980 onwards, the steady growth in the number of cases brought before the Convention institutions – a development caused partly by the accession of new Member States to the Council of Europe – made it difficult for the Convention system to cope, and a restructuring became necessary. In order to reform the Convention system, Protocol No. 11 was drafted and opened for signature on 11 May 1994. The aim of this Protocol was to simplify the structure of the Convention organs with a view to shortening the length of Convention proceedings and strengthening their judicial character by, *inter alia*, abolishing the Committee of Ministers' adjudicative role.¹³

Following the entry into force on 1 November 1998 of Protocol No. 11, the part-time Commission and Court were replaced by a single, permanent Court, established pursuant to Article 19 of the Convention. As will be seen below, individuals can now bring their Convention complaints directly before the Court.

The Court is presided over by its President, who is also one of the judges of the Court. The functions of the President include representing the Court and issuing practice directions.¹⁴ The President is assisted by two Vice Presidents,¹⁵ who are also judges. The President and his or her deputies are elected by the plenary Court for a period of three years; they may be re-elected.¹⁶ The expression “plenary Court” means “the European Court of Human Rights sitting in plenary session”,¹⁷ i.e. a meeting attended by all the judges. The plenary Court meets at least once a year to discuss administrative matters but it does not perform judicial functions. It deals with internal administrative matters which include, *inter alia*, the adoption of the Rules of Court,¹⁸ the election of the President and the Vice Presidents of the Court, the setting up of the Sections, and the election of the Presidents of Sections and the Registrar and his or her deputy/ies. At this stage, it is important to know that

12 More information on the historical background of the Convention institutions can be found at <http://www.echr.coe.int/ECHR/EN/Header/The+Court/The+Court/History+of+the+Court/>

For a review of the practice and procedure of the Commission, see D.J. Harris, M. O'Boyle and C. Warbrick “*Law of the European Convention on Human Rights*”, Butterworths, 1995, (hereinafter referred to as “Harris, O'Boyle and Warbrick”), p. 571 *et seq.* See also M. Janis, R. Kay, A. Bradley, *European Human Rights Law Text and Materials*, Oxford University Press, 1995, p. 30.

13 More history of the reform can be found in the Explanatory Report to Protocol No. 11 at <http://conventions.coe.int/Treaty/en/Reports/Html/155.htm>

14 For information on practice directions see Section 1.6.4 below.

15 Rule 8 § 1 of the Rules of Court.

16 Article 26 of the Convention. See also Rule 8 § 1 of the Rules of Court.

17 Rule 1 (b) of the Rules of Court.

18 For information on the Rules of Court see Section 1.6.3 below.

the Court is divided into five Sections.¹⁹ When a Section examines an application, it does so either in a formation of seven judges (a “Chamber”), or in a formation of three judges (a “Committee”).²⁰

The Court’s powers and duties are best described by the Court itself in its case-law:

“...its duty, according to Article 19 of the Convention, is to ensure the observance of the engagements undertaken by the Contracting States to the Convention. In particular, it is not its function to deal with errors of fact or of law allegedly committed by a national court unless and in so far as they may have infringed rights and freedoms protected by the Convention.”²¹

Although the Court does not have the powers to examine *ex officio* the legislation or the functioning of the judiciary in the Contracting Parties, it can examine such issues as part of its examination of a case before it.

One of the most widely held misconceptions about the Court is that it is a court of appeal with powers to review and quash decisions and judgments of domestic courts of the Contracting Parties. The Court has no such powers; it cannot quash or revise decisions and judgments of domestic courts.²² The reason why the Court is perceived by many as a court of appeal may be due to the fact that the Court can only examine allegations of breaches of the Convention after those allegations have first been examined by domestic courts. In other words, and as described in detail below,²³ a potential applicant must first give an opportunity to national authorities – usually its domestic court system – to remedy his or her Convention grievances by exhausting domestic remedies in the Contracting Party against which he or she wishes to lodge an application with the Court. The requirement to exhaust domestic remedies is also a logical consequence of the Convention’s main aspiration to achieve a “collective enforcement” of the rights guaranteed in the Convention.²⁴

19 The fifth Section was created on 1 April 2006.

20 See Section 1.5 below.

21 See *P.G. and J.H. v. the United Kingdom*, no. 44787/98, 25 September 2001, § 76.

22 See Myjer, E., Mol, N., Kempees, P., van Steijn, A., and Bockwinkel, J. “Introduire une plainte auprès de la Cour européenne des Droits de l’Homme: onze malentendus fréquents” in *Annales du droit luxembourgeois*, volume 14-2004, p. 11 *et seq.* (Bruylant, Bruxelles, 2005); see Appendix No. 5 for a copy of this article in English.

23 See Section 2.4 below.

24 See the Preamble to the Convention.

OMCT

Textbox i **Dates of Ratification of the European Convention on Human Rights and Additional Protocols as of 26 June 2006²⁵**

Dates of entry into force

States	Convention CETS No. 005	Protocol No. 1 CETS No. 009	Protocol No. 4 CETS No. 046	Protocol No. 6 CETS No. 114	Protocol No. 7 CETS No. 117	Protocol No. 12 CETS No. 177	Protocol No. 13 CETS No. 187
Albania	02/10/96	02/10/96	02/10/96	01/10/00	01/01/97	01/04/05	
Andorra	22/01/96			01/02/96			01/07/03
Armenia	26/04/02	26/04/02	26/04/02	01/10/03	01/07/02	01/04/05	
Austria	03/09/58	03/09/58	18/09/69	01/03/85	01/11/88		01/05/04
Azerbaijan	15/04/02	15/04/02	15/04/02	01/05/02	01/07/02		
Belgium	14/06/55	14/06/55	21/09/70	01/01/99			01/10/03
Bosnia and Herzegovina	12/07/02	12/07/02	12/07/02	01/08/02	01/10/02	01/04/05	01/11/03
Bulgaria	07/09/92	07/09/92	04/11/00	01/10/99	01/02/01		01/07/03
Croatia	05/11/97	05/11/97	05/11/97	01/12/97	01/02/98	01/04/05	01/07/03
Cyprus	06/10/62	06/10/62	03/10/89	01/02/00	01/12/00	01/04/05	01/07/03
Czech Republic	01/01/93	01/01/93	01/01/93	01/01/93	01/01/93		01/11/04
Denmark	03/09/53	18/05/54	02/05/68	01/03/85	01/11/88		01/07/03
Estonia	16/04/96	16/04/96	16/04/96	01/05/98	01/07/96		01/06/04
Finland	10/05/90	10/05/90	10/05/90	01/06/90	01/08/90	01/04/05	01/03/05
France	03/05/74	03/05/74	03/05/74	01/03/86	01/11/88		
Georgia	20/05/99	07/06/02	13/04/00	01/05/00	01/07/00	01/04/05	01/09/03
Germany	03/09/53	13/02/57	01/06/68	01/08/89			01/02/05
Greece	28/11/74	28/11/74		01/10/98	01/11/88		01/06/05
Hungary	05/11/92	05/11/92	05/11/92	01/12/92	01/02/93		01/11/03
Iceland	03/09/53	18/05/54	02/05/68	01/06/87	01/11/88		01/03/05
Ireland	03/09/53	18/05/54	29/10/68	01/07/94	01/11/01		01/07/03
Italy	26/10/55	26/10/55	27/05/82	01/01/89	01/02/92		
Latvia	27/06/97	27/06/97	27/06/97	01/06/99	01/09/97		

25 Source:
<http://www.echr.coe.int/ECHR/EN/Header/Basic+Texts/Basic+Texts/Dates+of+ratification+of+the+European+Convention+on+Human+Rights+and+Additional+Protocols/>

ARTICLE 3 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS
A PRACTITIONER'S HANDBOOK

States	Convention CETS No. 005	Protocol No. 1 CETS No. 009	Protocol No. 4 CETS No. 046	Protocol No. 6 CETS No. 114	Protocol No. 7 CETS No. 117	Protocol No. 12 CETS No. 177	Protocol No. 13 CETS No. 187
Liechtenstein	08/09/82	14/11/95		01/12/90	01/05/05		01/07/03
Lithuania	20/06/95	24/05/96	20/06/95	01/08/99	01/09/95		01/05/04
Luxembourg	03/09/53	18/05/54	02/05/68	01/03/85	01/07/89		
Malta	23/01/67	23/01/67	05/06/02	01/04/91	01/04/03		01/07/03
Moldova	12/09/97	12/09/97	12/09/97	01/10/97	01/12/97		
Monaco	30/11/05		30/11/05	01/12/05	01/02/05		01/03/06
Netherlands	31/08/54	31/08/54	23/06/82	01/05/86		01/04/05	
Norway	03/09/53	18/05/54	02/05/68	01/11/88	01/01/89		01/12/05
Poland	19/01/93	10/10/94	10/10/94	01/11/00	01/03/03		
Portugal	09/11/78	09/11/78	09/11/78	01/11/86			01/02/04
Romania	20/06/94	20/06/94	20/06/94	01/07/94	01/09/94		01/08/03
Russia	05/05/98	05/05/98	05/05/98		01/08/98		
San Marino	22/03/89	22/03/89	22/03/89	01/04/89	01/06/89	01/04/05	01/08/03
Serbia	03/03/04	03/03/04	03/03/04	01/04/04	01/06/04	01/04/05	01/07/04
Slovakia	01/01/93	01/01/93	01/01/93	01/01/93	01/01/93		01/12/05
Slovenia	28/06/94	28/06/94	28/06/94	01/07/94	01/09/94		01/04/04
Spain	04/10/79	27/11/90		01/03/85			
Sweden	03/09/53	18/05/54	02/05/68	01/03/85	01/11/88		01/08/03
Switzerland	28/11/74			01/11/87	01/11/88		01/07/03
The former Yugoslav Republic of Macedonia	10/04/97	10/04/97	10/04/97	01/05/97	01/07/97		01/11/04
Turkey	18/05/54	18/05/54		01/12/03			
Ukraine	11/09/97	11/09/97	11/09/97	01/05/00	01/12/97		01/07/03
United Kingdom	03/09/53	18/05/54		01/06/99			01/02/04

1.3 Protocol No. 14

Despite the changes brought about by Protocol No. 11, by the beginning of the 21st century the Court had already become unable to deal satisfactorily with its increasing case load. At the end of 2003, some 65,000 applications were pending before the Court. Moreover, the percentage of applications terminated without a ruling on the merits, usually because they were declared inadmissible, stood at more than 90%.

The second largest group of cases concerned so-called repetitive or clone cases, i.e. cases that derive from the same structural cause which has led the Court in earlier judgments to find a breach of the Convention. A typical repetitive case, for instance, concerns complaints under Article 6 regarding excessive length of domestic court proceedings. Some 60% of the 703 judgments adopted by the Court in 2003, and 35% of the 718 judgments adopted in 2004 concerned such cases.

In order to guarantee the long-term effectiveness of the Court, the European Ministerial Conference on Human Rights, held in Rome in November 2000 to mark the 50th anniversary of the signing of the Convention, called on the Committee of Ministers to "...initiate, as soon as possible, a thorough study of the different possibilities and options with a view to ensuring the effectiveness of the Court...".²⁶ Subsequently, the Steering Committee for Human Rights (CDDH, *le Comité directeur pour les droits de l'homme*), which was entrusted by the Committee of Ministers with the drafting of a new Protocol to help the Court overcome the difficulties it was facing, set up its own Reflection Group on the Reinforcement of the Human Rights Protection Mechanism (GDR, *Groupe de réflexion sur le renforcement du mécanisme de protection des droits de l'homme*). The CDDH sent the Committee of Ministers its final activity report in April 2004 containing the draft amending protocol to the Convention. Subsequently, the Committee of Ministers, at the 114th ministerial session in May 2004, adopted the amending protocol as well as a declaration on "Ensuring the effectiveness of the implementation of the European Convention on Human Rights at national and European levels". In that declaration, Member States recognised the urgency of the reform, and committed themselves to ratifying Protocol No. 14 within two years. The text of the amending protocol was opened for signature by Council of Europe Member States, signatory to the European Convention on Human Rights, on 13 May 2004. At the time of writing, Protocol No. 14 had been signed by all

26 For a fuller history of Protocol No. 14 see the Explanatory Report to that Protocol in Appendix No. 18. It can also be accessed at <http://conventions.coe.int/Treaty/EN/Reports/Html/194.htm>

the Contracting Parties and ratified by 41.²⁷ As it is an amending protocol, it needs to be ratified by all the Contracting Parties before it can enter into force. Protocol No. 14 can be consulted in Appendix No. 2.²⁸

Unlike Protocol No. 11, Protocol No. 14 makes no radical changes to the control system of the Convention. Rather, its main purpose is to improve the functioning of the existing system by giving the Court the procedural means and flexibility it needs to process applications in a timely fashion, while allowing it to concentrate on the most important cases which require in-depth examination. To achieve these ends, it introduces amendments in three main areas:

- reinforcement of the Court's filtering capacity in respect of the mass of unmeritorious applications;
- a new admissibility criterion (containing two safeguard clauses) concerning cases in which the applicant has not suffered a significant disadvantage; and
- measures for dealing with repetitive cases.²⁹

The changes brought about by Protocol No. 14, in so far as they fall within the scope of the present *Handbook*, will be dealt with in subsequent sections.

1.4 The Judges and the Registry of the Court

1.4.1 The Judges

The Court consists of a number of judges equal to the number of the Contracting Parties.³⁰ Currently there are 45 judges.³¹ There is no restriction on the number of judges of the same nationality.³² The judges sit on the Court

27 A *Chart of Signatures and Ratifications* is available on the Council of Europe's Web site at <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=194&CM=8&DF=6/5/2006&CL=ENG>

28 Protocol No. 14 can also be consulted at <http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=194&CM=8&DF=22/08/2005&CL=ENG>

29 Paragraphs 35-36 of the Explanatory Report.

30 Article 20 of the Convention.

31 A current list of judges may be consulted at <http://www.echr.coe.int/ECHR/EN/Header/The+Court/The+Court/Composition+of+the+Plenary+Court/>

32 For example, the present judge elected in respect of Liechtenstein is a national of Austria.

OMCT

in their personal capacity and do not represent the State Party of which they are a national, or any other State.

Judges are elected by the Parliamentary Assembly of the Council of Europe to sit for a period of six years and may be re-elected. They retire when they reach the age of 70. Following the entry into force of Protocol No. 14, however, new judges will be elected for a non-renewable term of nine years.

Pursuant to Rules 24 § 2 (b) and 26 § 1 (a) of the Rules of Court, judges are required to attend Grand Chamber and Chamber deliberations in cases introduced against the Contracting Party in respect of which they are elected.³³ In case a judge is unable to sit on the case, for reasons set out in Rule 28 of the Rules of Court, the judge in question is required to give notice to the President of the Chamber. The President of the Chamber will then invite the Contracting Party to indicate whether it wishes to appoint another judge of the Court or an *ad hoc* judge.³⁴

Judges also act as judge rapporteurs and, with the assistance of Registry lawyers, examine the applications introduced with the Court.³⁵ The President of the Section to which the case has been assigned designates judge rapporteurs.³⁶ The identity of a judge rapporteur in a particular case is never disclosed to the parties.

1.4.2 The Registry

The Registry of the Court is staffed by lawyers (“legal secretaries”³⁷), administrative and technical staff and translators. The task of the Registry is to provide legal and administrative support to the Court in the exercise of its judicial functions. Within the Registry there are 20 legal divisions. At the present time there are approximately 220 lawyers and 130 other support staff³⁸ in the legal divisions.

All Registry lawyers are employees of the Council of Europe who have been recruited on the basis of open competitions and appointed by the Secretary

33 For the purposes of this *Handbook*, such judges will be referred to as “national judges”.

34 Rule 29 of the Rules of Court. Following the entry into force of Protocol No. 14, the President of the Court will choose a person from a list submitted by the relevant Contracting Party to sit in the capacity of judge; see Article 6 of Protocol No. 14.

35 See Section 1.7 below.

36 Rule 49 §§ 2-3 of the Rules of Court.

37 Article 25 of the Convention.

38 The organisation chart of the Registry can be consulted at <http://www.echr.coe.int/NR/rdonlyres/F213BF94-1A48-41CE-8A43-70D0EDDD4EE2/0/OrganisationChart.pdf>

General of the Council of Europe. Their knowledge of the national law and the language of the Contracting Party as well as their knowledge of the official languages of the Council of Europe, i.e. English and French, play a central role in their recruitment. Members of the Registry do not represent any State and they are expected to adhere to strict conditions of independence and impartiality.

The Registry lawyers are responsible for preparing case files for examination by the Court. Their responsibilities therefore include handling all communication with the applicants relating to the complaints. Most of their time, however, is spent drafting the Court's decisions and judgments under the instructions of the judge rapporteurs. Registry lawyers are also responsible for carrying out research – mostly relating to the domestic law of the Contracting Parties – on behalf of the judges and attending deliberations.

At the Head of the Registry stands the Registrar of the Court who functions under the authority of the President of the Court. The Registrar is assisted by two Deputy Registrars. They are elected by the plenary Court.³⁹

1.5 Structure of the Court

Each application introduced with the Court is dealt with by one of three formations:⁴⁰ the Grand Chamber, a Chamber or a Committee. These are the so-called decision bodies of the Court.

1.5.1 The Grand Chamber

The Grand Chamber consists of 17 judges and at least three substitute judges.⁴¹ It includes the President and the Vice Presidents of the Court, the Presidents of the Sections, and the national judge. In cases referred to the Grand Chamber pursuant to Article 30, the Grand Chamber also includes members of the Chamber that relinquished jurisdiction. However, in cases referred to the Grand Chamber under Article 43, the Grand Chamber does not include any judge who participated in the original Chamber's deliberations on the admissibility or merits of the case, except for the President of that Chamber and the national judge. The judges and the substitute judges who

39 Rules 15 and 16 of the Rules of Court.

40 Article 27 of the Convention.

41 Rule 24 § 1 of the Rules of Court.

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are to complete the Grand Chamber in each case referred to it are designated from among the remaining judges by a drawing of lots. In the performance of its duties, the Grand Chamber is assisted by the Registrar or a Deputy Registrar of the Court.

The Grand Chamber may deal with an application in two situations. Firstly, if a case which is pending before a Chamber raises a serious question affecting the interpretation of the Convention or the Protocols, or where the resolution of a question before the Chamber might have a result inconsistent with a judgment previously delivered by the Court, the Chamber in question may, at any time before it has rendered its judgment, relinquish jurisdiction in favour of the Grand Chamber, unless one of the parties to the case objects within one month of notification of the Chamber's intention.⁴² Such cases may, for example, concern issues which have not been dealt with by the Court previously. They also include cases in which the Court is considering reversing earlier case-law.

The second situation where the Grand Chamber may consider an application is when one of the parties to the case (or indeed both Parties) requests, within a period of three months from the date of delivery of the judgment, that the case be referred to the Grand Chamber.⁴³ Roughly speaking, this may be compared to an "appeal" in a national jurisdiction.

Finally, the Grand Chamber is also empowered to give advisory opinions on questions concerning the interpretation of the Convention and its Protocols.⁴⁴ However, at the time of writing, only one request for an advisory opinion has ever been made. It was rejected unanimously by the Grand Chamber on 2 June 2004 on the grounds that the request did not come within the Court's advisory competence.⁴⁵

Given the fact that only cases of a rather extraordinary nature can come before the Grand Chamber, it deals with far fewer cases than the Court's Sections. For example, in 2005 the four Sections adopted a total of 1,093 judgments whereas the Grand Chamber adopted only 12. In the same period, the Grand Chamber adopted 2 admissibility decisions whereas the Sections adopted 1,420 such decisions.⁴⁶

42 See Article 30 of the Convention and Rule 72 of the Rules of Court.

43 See Section 9.2 below.

44 See Articles 47-49 of the Convention.

45 For the press release concerning the Grand Chamber's decision and the links to the decision, consult <http://www.echr.coe.int/Eng/Press/2004/June/DecisiononAdvisoryopinion.htm>

46 See the Court's Survey of Activities 2005 at <http://www.echr.coe.int/NR/rdonlyres/4753F3E8-3AD0-42C5-B294-0F2A68507FC0/0/SurveyofActivities2005.pdf>

1.5.2 The Sections and the Chambers

As mentioned above, the Court is divided into five Sections. Each judge is a member of a Section. The Sections, which are set up by the plenary Court for a period of three years, are geographically and gender balanced and they reflect the different legal systems of the Contracting Parties.⁴⁷ Each Section has its own President, assisted or replaced where necessary, by a Vice President. Section Presidents are elected by the plenary Court whereas Vice Presidents are elected by the Sections themselves.⁴⁸

However, a case brought before a Section is not dealt with by the full Section but by a Chamber of seven judges⁴⁹ formed from among the judges in the Section.⁵⁰ Each Chamber includes the Section President and the national judge concerned. The other five members of the Chamber are designated from among the remaining members of the Section. The remaining judges who are not designated as members of the Chamber sit in the case as substitute judges. Thus, depending on the parties to the cases on the agenda of a particular Section meeting, a number of different Chambers will be constituted during that meeting.

Where possible – depending on the case load of the Section – an application introduced against a particular Contracting Party will be assigned to the Section which includes among its members the judge elected in respect of that Contracting Party, i.e. the national judge. If such a course of action has not been taken, the national judge in question sits as an *ex officio* member of the Chamber.⁵¹

In the performance of its duties, each Section is assisted by a senior member of the Registry, i.e. the Section Registrar. Section Registrars are assisted by Deputy Section Registrars.

Sections deal with Inter-State cases⁵² and cases lodged by individuals which are not clearly inadmissible.⁵³ They meet once a week to deliberate on the cases assigned to them. Section deliberations are confidential and are not attended by anyone other than the judges and members of the Registry.

47 A list showing the compositions of the five Sections may be consulted at <http://www.echr.coe.int/ECHR/EN/Header/The+Court/The+Court/Composition+of+the+Sections/>

48 Rule 8 §§ 1-2 of the Rules of Court.

49 After the entry into force of Protocol No. 14, and at the request of the plenary Court, the Committee of Ministers may, by a unanimous decision and for a fixed period, reduce to five the number of judges of the Chambers. See Article 6 of Protocol No. 14 amending Article 27 of the Convention.

50 Article 27 of the Convention. See also Rule 26 of the Rules of Court.

51 Rule 26 § 1 (a) of the Rules of Court.

52 I.e. cases introduced by a Contracting Party against another Contracting Party pursuant to Article 33 of the Convention. Such applications are very rare; at the time of writing, there had only been 20 such applications.

53 For admissibility and related issues, see Section 2 below.

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1.5.3 The Committees

Under Article 27 § 1, Committees of three judges are established within each Section for a period of twelve months, by rotation among its members.⁵⁴ Committees deal with cases that are clearly inadmissible under one or more of the grounds set out in Article 35 and which do not require further examination. Committees cannot deal with Inter-State cases. Committees are also empowered to strike out applications pursuant to Article 37. A case can be declared inadmissible if the applicant is found to have failed to satisfy the grounds of admissibility which are set out in Article 35 of the Convention, whereas a case can be struck out of the Court's list of cases pursuant to Article 37 of the Convention if the applicant does not intend to pursue his or her application, if the matter has been resolved, or if for any other reason established by the Court it considers that it is no longer justified to continue the examination of the application.⁵⁵ Committee decisions are final and cannot be appealed. Such decisions must however be taken unanimously; if there is no unanimity amongst the three judges, the Committee will refer the case to a Chamber to decide on admissibility and, if applicable, to rule on the merits. Committees deal with the vast majority of applications lodged with the Court. In 2005 a total of 26,360 applications were declared inadmissible by Committees. During the same period, Committees also decided to strike out a total number of 416 applications.

Protocol No. 14 will bring two important changes to the composition and powers of the Committees. Single-judge formations, as well as Committees of three judges, will be authorized to deal with the type of cases currently handled by Committees of three judges, i.e. cases that appear to be clearly inadmissible.⁵⁶ Furthermore, Committees of three judges will be empowered to render merits judgments in cases where the underlying issue is already the subject of well-established case-law of the Court,⁵⁷ i.e. repetitive cases. The purpose of empowering Committees to deal with repetitive cases is to enable the Chambers to devote more time to cases that warrant in-depth examination.

⁵⁴ See also Rule 27 § 2 of the Rules of Court.

⁵⁵ For strike out related issues see Section 8.2 below.

⁵⁶ When sitting in a single-judge formation, however, a judge will not examine any application against the Contracting Party in respect of which he or she has been elected; see Article 6 of Protocol No. 14.

⁵⁷ Article 8 of Protocol No. 14.

1.6 Instruments of the Court

1.6.1 The European Convention on Human Rights

As pointed out earlier, the Convention entered into force on 3 September 1953. It "...represents the minimum human rights standards which could be agreed by European states more than 50 years ago" and is primarily concerned with protecting civil and political rights, rather than economic, social, or cultural rights.⁵⁸

The Convention consists of three Sections and a total of 59 Articles. The rights and freedoms are listed in Section 1 (Articles 1-18); Section 2 (Articles 19-51) deals with the establishment of the Court as well as its duties and powers; Section 3 (Articles 52-59) contains miscellaneous provisions concerning such issues as territorial application, reservations, denunciations, signature, and ratification. The Convention is included as Appendix No. 1 of this *Handbook* and can also be accessed online.⁵⁹

The substantive rights and freedoms guaranteed by the Convention are set out in Articles 2-14 of the Convention. They are:

Article 2 Right to life

Article 3 Prohibition of torture

Article 4 Prohibition of slavery and forced labour

Article 5 Right to liberty and security

Article 6 Right to a fair trial

Article 7 No punishment without law

Article 8 Right to respect for private and family life

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

Article 13 Right to an effective remedy

Article 14 Prohibition of discrimination.

58 P. Leach, *Taking a Case to the European Court of Human Rights*, 2nd edition, Oxford University Press, 2005 (hereinafter referred to as "Leach"), p. 5 *et seq.*

59 The Convention and its Protocols can be accessed at:
<http://www.echr.coe.int/ECHR/EN/Header/Basic+Texts/Basic+Texts/The+European+Convention+on+Human+Rights+and+its+Protocols/>

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These Articles are declaratory in the sense that they do not, on their own, impose any obligations on the Contracting Parties. For example, Article 3 of the Convention simply states that “No one shall be subjected to torture or to inhuman and degrading treatment or punishment”; it does not expressly bestow on the Contracting Parties an obligation to ensure, for example, that no one is subjected to torture. Rather, as some commentators have stated, “[i]t is Article 1 which transforms this declaration of rights into a set of obligations for the States which ratify the Convention”.⁶⁰ Pursuant to Article 1 of the Convention, Contracting Parties undertake to secure to everyone within their jurisdiction the rights and freedoms set out in the Convention. Difficulties which have arisen in establishing the boundaries of the Contracting Parties’ “jurisdiction” within the meaning of this Article have been resolved by the Court in its case-law.⁶¹

Under Article 32, the Court’s jurisdiction extends to all matters concerning the interpretation and application of the Convention and the Protocols. Because the Court regards the Convention as a “living instrument”,⁶² it interprets and defines Convention rights in light of present-day conditions, not conditions obtaining when it was drafted more than 50 years ago. In the same vein, the Court strives to interpret and apply the Convention “in a manner which renders its rights practical and effective, not theoretical and illusory”.⁶³

For instance, the Court held the following in its judgment in the case of *Christine Goodwin v. the United Kingdom*:

“since the Convention is first and foremost a system for the protection of human rights, the Court must have regard to the changing conditions within the respondent State and within Contracting States generally and respond, for example, to any evolving convergence as to the standards to be achieved”.⁶⁴

The *Goodwin* case provides a good example of what is meant by *interpretation in light of present day conditions*. *Goodwin* concerned the legal status of transsexuals in the United Kingdom. It was the increased acceptance among Contracting Parties in respect of transsexuality which had a direct bearing on the Court’s finding of a violation of Article 8 on a matter which had previously not been found to breach the Convention. Naturally, the

60 See C. Ovey & R. C.A. White, *Jacobs & White: The European Convention on Human Rights*, 3rd edition, Oxford University Press, 2002 (hereinafter referred to as “Jacobs & White”) at p. 14 *et seq.*

61 The issue of jurisdiction within the meaning of Article 1 of the Convention will be examined in Section 2.3.2 (b) below.

62 See, among other authorities, *Mamatkulov and Askarov v. Turkey* [GC], nos. 46827/99 and 46951/99, 4 February 2005, § 121.

63 *Ibid.*

64 *Christine Goodwin v. the United Kingdom* [GC], no. 28957/95, 11 July 2002, § 74, and the cases cited therein.

evolving ethical and legal standards of the Council of Europe will have an equal bearing on Article 3. For instance, it is possible that official conduct that was formerly not considered to be severe enough to reach the threshold for a finding of a violation of Article 3 might in light of current standards be considered to constitute ill-treatment in breach of this Article. Similarly, conduct that was formerly considered to constitute merely inhuman or degrading treatment might under current standards be regarded by the Court as torture, the most severe type of breach of the Article.⁶⁵ Applicants should keep this in mind when assessing the merits of their cases, and of course, in arguing them before the Court.

1.6.2 The Protocols

Following the entry into force of the Convention in 1953, a number of Protocols have been adopted within the Council of Europe by virtue of which some of the Contracting Parties have undertaken to protect a number of additional rights and freedoms within their jurisdictions. Protocol Nos. 2, 3, 5, 8, 9, 10, 11, and 14 are Protocols which amend Convention proceedings and do not include any additional rights or freedoms. The remaining Protocols, and the rights and freedoms they guarantee, are as follows:

- Protocol No.1, which entered into force on 18 May 1954: protection of property, the right to education, and the right to free elections.
- Protocol No. 4, which entered into force on 2 May 1968: prohibition of imprisonment for debt, freedom of movement, prohibition of expulsion of nationals, and the prohibition of collective expulsion of aliens.
- Protocol No. 6, which entered into force on 1 March 1985, provides for the abolition of the death penalty but includes a provision to allow the Contracting Parties to prescribe the death penalty in their legislation in time of war or of imminent threat of war.
- Protocol No. 7, which entered into force on 1 November 1988: procedural safeguards relating to expulsion of aliens, the right of appeal in criminal matters, the right to compensation for wrongful conviction, the right not to be tried or punished twice for the same offence, and equality between spouses.

⁶⁵ The types of treatment prohibited by Article 3 of the Convention are examined in detail in Appendix No. 10.

OMCT

- Protocol No. 12, which entered into force on 1 April 2005: created a free-standing prohibition of discrimination. Unlike Article 14 of the Convention, which prohibits discrimination in the enjoyment of “the rights and freedoms set forth in the Convention”, Protocol No. 12 prohibits discrimination in the enjoyment of “any right set forth by law” and not just those rights guaranteed under the Convention.
- Protocol No. 13, which entered into force on 1 July 2003: abolished the death penalty in all circumstances.

Applicants should note that the Protocols mentioned above have not been ratified by all the Contracting Parties. It follows that a complaint made under an Article of one of the Protocols against a State which has not ratified that Protocol will be declared inadmissible.⁶⁶ The table of *Dates of Entry into Force of the Convention and its Protocols*, reproduced in *Textbox i* above, should be consulted. Also, this table is regularly updated on the Council of Europe’s website.⁶⁷

1.6.3 The Rules of Court

The Rules of Court, which are frequently referred to throughout this *Handbook*, set out in greater detail than the Convention itself the organisation and the functioning of the Court as well as the Court’s procedure. They are indispensable for any applicant or lawyer wishing to make an application to the Court and must be consulted before making the application and throughout the course of the proceedings. The Rules of Court are found in Appendix No. 19 and they can also be accessed online.⁶⁸

The Rules of Court are prepared by the Court and they enter into force after their adoption by the plenary Court. The Rules of Court which are in force at the time of writing were adopted by the plenary Court on 7 November 2005 and entered into force on 1 December 2005. It must be noted that the Rules of Court are continually revised in the light of the Court’s evolving practice and it is expected that they will be subjected to substantial amendments in order to facilitate the entry into force of Protocol No. 14.

66 The compatibility of applications with the provisions of the Convention and the Protocols will be dealt with in Section 2.3 below.

67 <http://www.echr.coe.int/ECHR/EN/Header/Basic+Texts/Basic+Texts/Dates+of+rati+fication+of+the+European+Convention+on+Human+Rights+and+Additional+Protocols/>

68 The Rules of Court may be accessed at <http://www.echr.coe.int/NR/rdonlyres/D1EB31A8-4194-436E-987E-65AC8864BE4F/0/RulesOfCourt.pdf>

1.6.4 Practice Directions

The President of the Court has the power to issue practice directions in relation to such issues as the appearance of parties at hearings and the filing of pleadings and other documents.⁶⁹ Practice directions, which supplement the Rules of Court, are described by the Registry of the Court as documents “to provide guidance to the parties on various aspects of their contacts with the Court and at the same time to introduce more standardised procedures with a view to facilitating the Court’s processing of the cases”. Observance by applicants and their legal representatives of the practice directions will speed up the examination of their applications by avoiding unnecessary and time consuming correspondence with the Court and will prevent an application from being rejected for failure to comply with procedural requirements. These practice directions are reprinted in Appendix No. 3.⁷⁰

To date, three practice directions have been issued. They are:

- i. the practice direction on “Requests for Interim Measures”, issued on 5 March 2003;
- ii. the practice direction on “Institution of Proceedings”, issued on 1 November 2003; and finally,
- iii. the practice direction on “Written Pleadings”, issued on 1 November 2003.

1.6.5 Decisions and Reports of the Commission and Decisions and Judgments of the Court⁷¹

As one commentator has suggested:

“There is no formal doctrine of precedent as such within the Convention system. The Court does not consider itself to be bound by its previous judgments, although it is in the interests of legal certainty, foreseeability and equality before the law that it should not depart, without good reason, from precedents laid down in previous cases”.⁷²

However, the fact remains that the Court speaks through its judgments. The development of the Court’s case-law has parallels with the development of the common law in Anglo-Saxon legal systems; in formulating its judgments,

69 Rule 32 of the Rules of Court.

70 The practice directions are available on the Council of Europe’s Web site at: <http://www.echr.coe.int/ECHR/EN/Header/Basic+Texts/Basic+Texts/Practice+directions/>

71 Although, strictly speaking, Decisions and Reports of the Commission and Decisions and Judgments of the Court are not “Instruments of the Court”, it is appropriate to deal with them in this sub-section.

72 See Leach, p. 165. See also, *Beard v. the United Kingdom* [GC], no. 24882/94, 18 January 2001, § 81.

OMCT

the Court – very much like a court in a common law system – reviews its previous decisions and judgments as well as the decisions of the Commission and applies them to similar situations.

Furthermore, as pointed out above, pursuant to Article 32 of the Convention, the Court’s jurisdiction extends to all matters concerning the interpretation and application of the Convention and the Protocols in the course of which it takes into account present day conditions. As will be seen in subsequent parts of this *Handbook*, there is a very large body of case-law on Article 3 of the Convention. For example, the Court has read into this Article a positive obligation – which is not apparent from the wording of the Article itself – obliging Contracting Parties to carry out effective investigations into allegations of ill-treatment.⁷³ At first sight, Article 3 appears only to contain an obligation that a State ensure that its authorities refrain from inflicting ill-treatment, i.e. a negative obligation. Likewise, what constitutes torture, inhuman or degrading treatment or punishment can only be gathered from the case-law. Indeed, it would have been practically impossible for Article 3 to contain an exhaustive list of every conceivable form of treatment it prohibits.

For the reasons mentioned above, in every decision and judgment adopted by the Court, there will be references to, and quotations from, previous decisions and judgments of the Convention institutions. It is imperative, therefore, that practitioners acquaint themselves with the Convention case-law in order to be able to refer to pertinent decisions and judgments in support of their applications. The case-law of the Court and of the Commission can be searched with the help of the HUDOC database which is available on the Court’s website.⁷⁴ In a number of Council of Europe Member States, important decisions and judgments are translated into the national language. Also, important decisions and judgments are published in English and French in the “Reports of Judgments and Decisions”.⁷⁵

Finally, it should be noted that the Court occasionally refers to decisions and judgments of other international human rights mechanisms and benefits from their experience. For example, in its judgments in the cases of *Timurtas v. Turkey* and *Issa v. Turkey* the Court made extensive references to the jurisprudence of the Inter-American Court of Human Rights on the issue of forced disappearances and on the issue of jurisdiction, respectively.⁷⁶ Similarly, the Court’s judgments also make references to the International

73 See Section 10.2.2 below.

74 www.echr.coe.int/echr. HUDOC is also available on CD-ROM and DVD format.

75 Published by Carl Heymanns Verlag KG.

76 See *Timurtas v. Turkey*, no. 23531/94, 13 June 2000 § 80; *Issa v. Turkey*, no. 31821/96, 16 November 2004 § 71.

Covenant on Civil and Political Rights and the Human Rights Committee.⁷⁷ Of relevance for the purposes of the present *Handbook* is the fact that the Court also relies on reports prepared by the Council of Europe's European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) and reports prepared by non-governmental organisations (NGOs)⁷⁸ when establishing the facts of cases. For example, in cases concerning allegations of unsatisfactory prison conditions, the Court regularly relies on reports prepared by the CPT following that organisation's visits to prisons in the territory of the respondent Contracting Party.⁷⁹ Appendix No. 11 should be consulted for detailed information about the CPT.

1.7 Summary of Proceedings Before the Court

Each stage of the Convention proceedings will be dealt with in greater detail in subsequent sections of this *Handbook*. The purpose of the present section is to give the reader a general overview of these proceedings in outline form. It should be noted at the outset that although the Convention stipulates in Article 29 § 3 that, in principle, the decision on the admissibility of an application is taken separately from the decision on the merits, this is at present more the exception than the rule. At the present time and in anticipation of the entry into force of Protocol No. 14,⁸⁰ proceedings on admissibility and merits are conducted jointly in the vast majority of cases, thus saving time by omitting a separate decision on admissibility. When the Court decides to apply this "joint procedure", the parties are informed of the decision. The overview of the Court's procedure set out below takes this new practice into account.

⁷⁷ See, most recently, *Hirst v. the United Kingdom (no.2)* [GC], no. 74025/01, 6 October 2005, § 27.

⁷⁸ See, *inter alia*, *Van der Ven v. the Netherlands*, no. 50901/99, 4 February 2003.

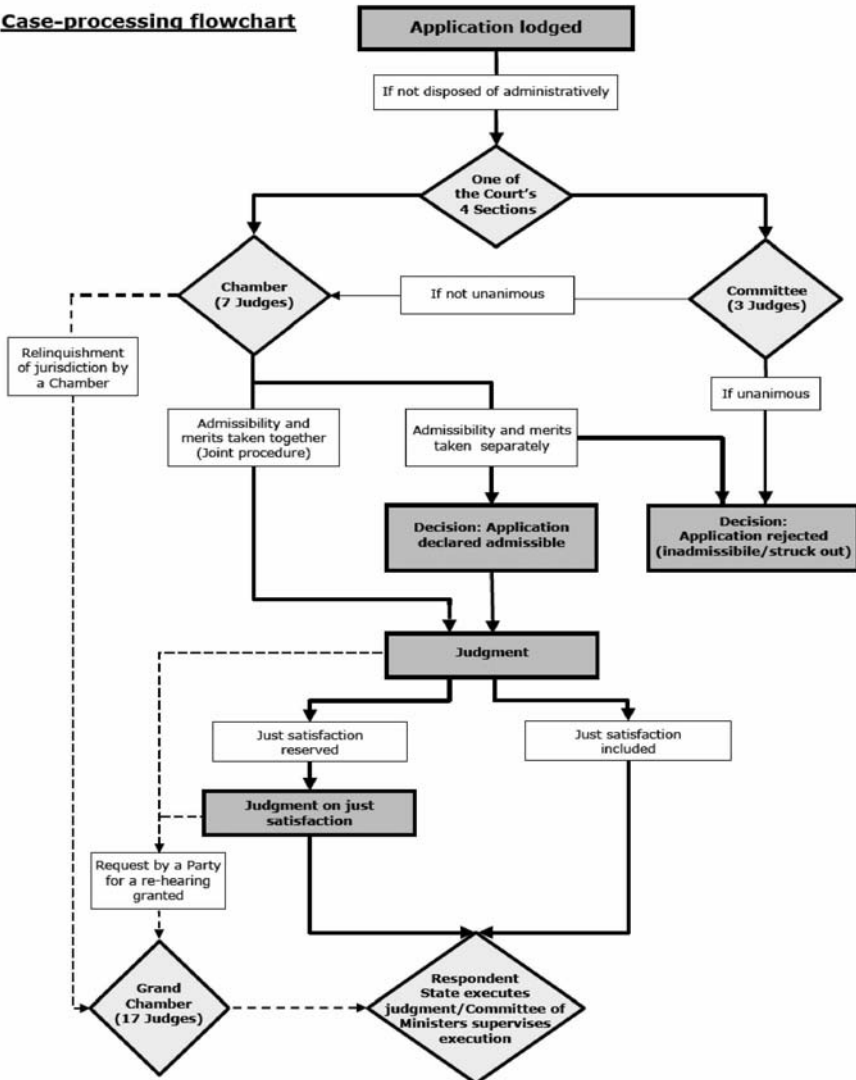
⁷⁹ See *Said v. the Netherlands*, no. 2345/02, 5 July 2005.

⁸⁰ See Article 9 of Protocol No. 14.

OMCT

Textbox ii⁸¹

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

Case-processing flowchart

This flowchart indicates the progress of a case through the different judicial formations. In the interests of readability, it does not include certain stages in the procedure – such as communication of an application to the respondent State, consideration of a re-hearing request by the Panel of the Grand Chamber and friendly settlement negotiations.

81 Source: http://www.echr.coe.int/NR/rdonlyres/BA3F06A3-133C-4699-A25D-35E3C6A3D6F5/0/MicrosoftWordPROGRESS_OF_A_CASE.pdf

1.7.1 First Examination of the Application

Applications must be lodged using the Court's standard application form.⁸² However, if there is a risk that the application cannot be prepared or completed before the end of the six-month period, it is important to note that an application may also be introduced by means of an introductory letter.⁸³ If an application is lodged in a document other than the Registry's standard application form and does not contain all the information required by that form, the Court will ask the applicant⁸⁴ to fill in the standard application form and send it to the Registry within six weeks together with the supporting documents. At this stage the application will also be given a number. The first digits in the application number before the forward-slash indicate the position of the application amongst the applications lodged in the same year. The digits after the forward-slash indicate the year in which the application was lodged. For example, application no. 123/05 is the 123rd application lodged in the year 2005.

If the applicant does not comply with the Court's request for a completed form and/or more information, the file will be destroyed by the Registry, i.e. it will be disposed of administratively within a year of the date of the Registry's letter because the Court will consider that the applicant has lost interest in pursuing the application. In the first six months of 2005, 9,448 applications were disposed of in this way.

Once the application is complete, it will be forwarded to the legal division of the Registry in which the lawyers who handle cases against the relevant Contracting Party are working. The application is then assigned to one of the Registry's lawyers who will be working as the case lawyer for that application. An examination of the application file will then be carried out and the application will be assigned to a decision body in one of the five Sections. In cases where the material submitted by the applicant on its own is sufficient to disclose that the application is inadmissible or should be struck out of the list⁸⁵ and also where such action can be taken "without further examination",⁸⁶ it will be registered as a "Committee case".⁸⁷ Otherwise the application will be registered as a "Chamber case", and a judge rapporteur will be appointed.⁸⁸

82 Application forms may be downloaded at

<http://www.echr.coe.int/ECHR/EN/Header/Applicants/Information+for+applicants/Application+form/>

83 See Section 4.1 below for information on introductory letters and *Textbox vii* for a model hypothetical letter.

84 Or the applicant's lawyer if he or she is represented.

85 Rule 49 § 1 of the Rules of Court.

86 Article 28 of the Convention.

87 On 1 May 2006, 38,500 Committee cases were pending before the Court.

88 On 1 May 2006, 20,900 Chamber cases were pending before the Court. Also on 1 May 2006, 24,850 applications had not yet been allocated to a judicial formation.

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1.7.2 Applications Declared Inadmissible by a Committee

If the application is registered as a Committee case, it will be dealt with by a Committee of three judges⁸⁹ who will in most cases declare the application inadmissible by a unanimous decision. The applicant will be informed of the decision by means of a letter which contains the briefest of indications as to the reasons.⁹⁰ Decisions on inadmissibility are final. If there is no unanimity amongst the judges, the application will be referred to a Chamber of seven judges within the same Section.

1.7.3 Examination by a Chamber

If the application is registered as a Chamber case, or if it is referred to the Chamber by a Committee as described above, the case will be examined by a Chamber.⁹¹ Chamber decisions are taken by majority. The judge rapporteur assigned to the case may propose to the Chamber or to its President that notice of the application be given to the respondent Contracting Party⁹² (more commonly referred to as “communication”). On average, an application may be expected to be communicated within 12 months after its introduction.⁹³

If the Chamber or its President agrees to communicate the case, the Government of the State concerned will be invited to submit to the Court, usually within a period of twelve weeks, its written observations on the admissibility and merits of the case and to answer any questions which may be put to it. At the same time, the Government may also be invited to inform the Court of its position as to a possible friendly settlement of the case.⁹⁴

Instead of communicating the case, the Chamber can also decide to declare the case inadmissible. That decision, which generally contains considerably more reasoning than the letter informing the applicant that his or her application was rejected by a Committee, will be communicated to the applicant and is final, i.e. it cannot be referred to the Grand Chamber.

89 As pointed out earlier, following the entry into force of Protocol No. 14, single-judge formations will deliberate and adopt such decisions. However, national judges will not have powers to deliberate such cases introduced against the Contracting Parties in respect of which they were elected.

90 See *Textbox x* for a sample letter informing the applicant of the decision of the Committee.

91 Article 29 § 1 of the Convention.

92 Rule 54 § 2 (b) of the Rules of Court.

93 See K. Reid, *A Practitioner's Guide to the European Convention on Human Rights*, 2nd edn., Sweet and Maxwell, 2004 (hereinafter referred to as “Reid”), at p. 17 *et seq.*

94 See Section 8.1 below.

If the case is communicated, the Court will forward the observations received from the Government to the applicant and will invite him or her to respond to the Government's arguments as well as to the Government's position on the issue of friendly settlement, if such a position was expressed. In addition, the applicant will be invited to submit his or her claims for just satisfaction under Article 41 of the Convention.⁹⁵ At this stage the applicant may also apply for free legal aid from the Court to cover his or her expenses or a part of them.⁹⁶

Following the receipt of the parties' observations, the Chamber will deliberate on the case. If no friendly settlement is reached and the Chamber is of the view that the application is inadmissible, it will discontinue the joint procedure and issue a decision declaring the case inadmissible. Since such decisions are final, the parties cannot request the referral of the case to the Grand Chamber.

If, on the other hand, the Chamber considers that the application is admissible it will, under the joint procedure, immediately move on to the judgment stage. It will be presented with a draft judgment prepared on the instructions of the judge rapporteur in which the application will be declared admissible and where the Chamber concludes whether or not there has been a violation of the Articles of the Convention invoked by the applicant. Following the adoption of the judgment, the parties will have a period of three months within which to request a referral of the case to the Grand Chamber.⁹⁷ Any such request will be examined by the Panel of the Grand Chamber, whose decisions are final.

If no request for referral to the Grand Chamber has been made, the Government will be expected to pay the applicant, within three months of the date of the judgment, any amounts of just satisfaction awarded in respect of the applicant's costs and expenses and pecuniary and non-pecuniary damage. The Committee of Ministers will be responsible for the execution of the judgment.⁹⁸

95 Rule 60 of the Rules of Court. See also Section 7 below.

96 Rule 91 of the Rules of Court. See also Section 1.9 below.

97 Article 43 of the Convention. See also Section 9.2 below.

98 See Section 9.3 below.

OMCT

1.8 Legal Representation

The application form may be completed and submitted to the Court by the applicant him- or herself; in other words, an applicant does not have to be represented by a lawyer at this early stage of the proceedings. Legal representation will be required, however, “following notification of the application to the respondent Contracting Party”,⁹⁹ i.e. after the application has been communicated. For example, in *Grimaylo v. Ukraine*,¹⁰⁰ the Court struck out the application from its list of cases because of the applicant’s refusal to appoint a lawyer to represent him in the proceedings before the Court following the communication of the application to the respondent Government. Although Mr. Grimaylo insisted on representing himself or appointing his wife to represent him, the Court was of the opinion that a lawyer’s participation was essential, given the complexity of the case from a legal and factual point of view.

As a general rule, the representative should be an advocate authorised to practise in any of the Contracting Parties and resident in the territory of one of them.¹⁰¹ However, permission may be sought from the President of the Chamber allowing the applicant to represent him- or herself or for the appointment of a person other than an advocate.

Although legal representation is not required at the time of lodging the application, it is strongly recommended for a number of reasons. The most important reason, as pointed out above, is the risk that an application may be declared inadmissible by a Committee solely on the basis of the contents of the application form. Although the case lawyer in the Registry of the Court will usually give the applicant adequate opportunity to support his or her case with the necessary documentation, he or she cannot re-draft the application or the arguments set out in the application form – that is, if there are any. Indeed, it is not uncommon that application forms are submitted containing little or even no legal argumentation. Similarly, a legal representative who is retained at a later stage, after the application form has already been submitted to the Court, cannot re-draft the application or the arguments set out in the application form. As will be seen below in the section on admissibility, one of the grounds for inadmissibility is the “manifestly ill-founded” test applied to applicants’ complaints.¹⁰² An application may be deemed to be manifestly ill-founded, *inter alia*, if it is not supported by legal argumentation and/or

99 Rule 36 § 2 of the Rules of Court.

100 *Grimaylo v. Ukraine* (dec.), no. 69364/01, 7 February 2006

101 Rule 36 § 4 of the Rules of Court.

102 See Section 2.6 below.

sufficient evidence. A person without legal training may not be able to provide this. It must be emphasised here that once an application is declared inadmissible, there is virtually *nothing* an applicant can do to overturn that decision.¹⁰³

In most countries that are parties to the Convention, a potential applicant without financial means will be able to obtain the services of a lawyer free of charge, to assist him or her with the application. Alternatively, in certain countries it may be possible to obtain legal aid from the national authorities. Furthermore, domestic legislation of some Contracting Parties allows lawyers to practise on a no-win, no-fee basis. Also in some countries, potential applicants may enter into agreements with their lawyers whereby they undertake to pay a percentage of any award made by the Court by way of just satisfaction pursuant to Article 41. Applicants may also be able to obtain legal assistance from non-governmental organisations (NGOs) with experience in human rights litigation.

In order to represent his or her client in Convention proceedings, the representative must submit to the Court a written authority or power of attorney. The Court's own standard authority form, a copy of which is reproduced below in *Textbox iii*,¹⁰⁴ is the most appropriate and practical one to use, but a power of attorney prepared by a notary public is also acceptable provided it expressly indicates that the advocate is authorised to represent his or her client in proceedings before the European Court of Human Rights.

If the applicant is represented, the Court will correspond with the representative and not with the applicant. Furthermore, it is the Court's policy to correspond with only one representative, even if the applicant is represented by more than one lawyer.

103 In some circumstances, if the reason for inadmissibility is the applicant's failure to exhaust domestic remedies, he or she may submit another application to the Court after having exhausted the relevant domestic remedy. This will only be possible, however, if the applicant does not, in the meantime, miss the deadline in domestic law to avail him or herself of that remedy. See also Section 2.4.2 (e) below.

104 It may be downloaded at
<http://www.echr.coe.int/ECHR/EN/Header/Applicants/Information+for+applicants/Authority+Form/>

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Textbox iii **Form of Authority**¹⁰⁵

EUROPEAN COURT OF HUMAN RIGHTS

AUTHORITY*
(Rule 36 of the Rules of Court)

I,

(name and address of applicant)

hereby authorise

(name, address and occupation of representative)

to represent me in the proceedings before the Europe and Court of Human Rights,
and in any subsequent proceedings under the European Convention on Human
Rights, concerning my application intorduced under Article 34 of the Convention
against.....
(respondent State)

on

(date of letter of introduction)

.....
(place and date).....
(signature of applicant)

I hereby accept the above appointment

.....
(signature of representative)*** This form must be competed and signed by any applicant wishing to be represented
before the Court and by the lawyer or other person appointed.**105 Source: <http://www.echr.coe.int/NR/rdonlyres/001F1ADA-0F5A-4975-8B10-25D0C239865B/0/English.pdf>

1.9 Legal Aid

If a decision has been taken to communicate the case, the Court will inform the applicant that he or she can apply for free legal aid under the Court's legal aid scheme for applicants who have insufficient means to pay for legal representation. The applicant will be invited to inform the Court as soon as possible whether an application for legal aid will be made, in which case the necessary forms will be sent to him or her. Requests for legal aid must be supported by a declaration of means, certified by the relevant domestic authorities, which will be indicated by the Court. The Court's *Declaration of Applicant's Means* form is reproduced below in *Textbox v*.

Legal aid will be granted to an applicant only where the President of the Chamber is satisfied:


- (a) that it is necessary for the proper conduct of the case before the Chamber;
- (b) that the applicant has insufficient means to meet all or part of the costs entailed.¹⁰⁶

Legal aid may be granted to an unrepresented applicant only to cover reasonable expenses associated with the case, e.g. translation, postage, fax, stationery, etc. If the applicant is represented, the Court will also grant a specified sum in respect of the representative's fees. The Court's scale of *Legal Aid Fees* is reproduced below in *Textbox iv*.

106 Rule 92 of the Rules of Court; see also Rules 91, 93-96 of the Rules of Court.

OMCT

Textbox iv **Legal Aid Rates¹⁰⁷**

Legal aid rates	
applicable as from 1 January 2006	
<u>A. FEES AND EXPENSES</u>	Lump sum per case
Preparation of the case	
<ul style="list-style-type: none"> • Filing written pleadings at the request of the Court on the admissibility or merits of the case • Supplementary observations at the request of the Court (on the admissibility or merits of the case) • Submissions on just satisfaction or friendly settlement • Normal secretarial expenses (for example telephone, postage, photocopies) 	
<u>B. OTHER</u>	
1. Appearance at an oral hearing before the Court or attending the hearing of witnesses (including preparation)	€ 300
2. Assisting in friendly settlement negotiations	€ 200
3. Travelling costs incurred in connection with appearance at an oral hearing or hearing of witnesses or with friendly-settlement negotiations	according to receipts
4. Subsistence allowance in connection with appearance at an oral hearing or hearing of witnesses or with friendly-settlement negotiations	€ 169 per diem

107 Source: Council of Europe.

Textbox v ***Declaration of Applicant's Means***¹⁰⁸

DECLARATION OF APPLICANT'S MEANS

1. Name of applicant and case number:
2. Are you married, divorced or single?
3. Nature of your employment, name of employer:
(if not at present employed, give details of your last employment)
4. Details of net salary and other net income (e.g. interest from loans and investments, allowances, pensions, insurance benefits, etc.) after deduction of tax:
5. List and value of capital assets owned by you:
 - (a) Immovable property (e.g. land, house, business premises)
 - (b) Movable property and nature thereof (e.g. bank balance, savings account, motor-car, valuables)
6. List your financial commitments:
 - (a) Rent, mortgage and other charges
 - (b) Loans and interest payable thereon
 - (c) Maintenance of dependants
 - (d) Any other financial obligations
7. What contribution can you make towards your legal representation before the European Court of Human Rights?
8. The name of the person whom you propose to assist you:
(see Rule 94 in conjunction with Rule 36 §§ 4 and 5 of the Rules of Court)
I certify that the above information is correct and complete.

Signed:

Dated:

108 Source: Council of Europe.

OMCT

1.10 The Languages Used in the Court's Proceedings

The official languages of the Court are English and French.¹⁰⁹ However, applicants may fill in the application form in one of the official languages of the Contracting Parties and may continue to correspond with the Court in that language until the communication of the application to the Contracting Party. After reaching that point all correspondence with the Court should be conducted in English or in French. Applicants may, however, seek leave from the President of the Chamber to continue to use the official language of a Contracting Party when communicating with the Court, when appearing before it at a hearing, or in drafting their observations.¹¹⁰

As a general rule, the Contracting Parties are required to communicate with the Court and to submit their observations in English or French. They may seek leave from the President of the Chamber to use their official national languages for their oral or written submissions, in which case they will be required to submit also an English or French translation of those submissions, such as observations. However, as stated above, Contracting Parties usually do submit their observations in English or French and if the applicant does not understand English or French, he or she may arrange for the translation of the observations into his or her own national language and include the expenses in the claim for just satisfaction.¹¹¹ In the alternative, he or she may ask the President of the Chamber to invite the respondent Contracting Party to provide a translation of the observations into an official language of the Contracting Party which he or she understands.¹¹²

Judgments and decisions of the Chambers and the Grand Chamber are handed down in English or French, and it is not the responsibility of the responding Contracting Party or of the Court to arrange for their translation.

1.11 Written Pleadings

As described in Section 1.14 below, hearings are held in only very few cases. It is for this reason that the importance of written pleadings must be highlighted since they will, in the great majority of cases, represent the only

109 Rule 34 § 1 of the Rules of Court.

110 Rule 34 § 3 of the Rules of Court.

111 See Section 7.2.1 (c) below.

112 Rule 34 § 5 of the Rules of Court.

opportunity for applicants to convey their arguments to the Court and to rebut the Government's counter-arguments. The first written pleading is the application, which will form the basis of the Court's consideration of the case. If the Court proceeds to communicate the application to the respondent Government, the applicant will have the opportunity to submit additional written pleadings, including the "observations" (sometimes referred to as "memorial") in reply to the respondent Government's observations on the admissibility and merits of the case.¹¹³ The applicant may have a further opportunity to submit observations if the case is declared (partially) admissible in a separate decision. In such circumstances the Court will generally either request the parties to respond to specific questions or to submit observations on a particular issue, or it will inform the parties that it does not require any further information or observations but that it is nevertheless open to the parties to submit any additional evidence or observations they wish.¹¹⁴ Although the issue of observations is discussed in subsequent parts of this *Handbook*, the present sub-section will summarise the general rules and strategic points to be kept in mind. The applicants' observations in the cases of *Akkum and Others v. Turkey*¹¹⁵ and *Kişmir v. Turkey*,¹¹⁶ and the respondent Government's observations in the case of *Van der Ven v. the Netherlands*¹¹⁷ in Appendices Nos. 12-14, will give an idea of the form and the contents of observations submitted in the course of the Strasbourg proceedings.

It must be stressed at the outset that in preparing their observations, applicants should refer to the "Practice Direction on Written Pleadings"¹¹⁸ and follow the recommendations set out therein. The time limits indicated by the Registry must always be observed. It is possible to seek an extension of the time limit and the first such request is usually granted provided that it is made within the time limit and that it is duly reasoned.

As a general rule, observations must be drafted in one of the official languages of the Court, i.e. English or French. However, as mentioned above, an applicant who has completed the application form in another language may seek leave from the President of the relevant Chamber for the continued use of that language, provided it is an official language of one of the Contracting Parties.¹¹⁹ Such leave is usually given without any difficulty.

113 Such observations are discussed in detail in Section 5.2 below.

114 See Section 6.4 below for further information.

115 No. 21894/93, 24 March 2005.

116 No. 27306/95, 31 May 2005.

117 Cited above.

118 See Appendix No. 3.

119 Rule 34 § 3 (a) of the Rules of Court.

OMCT

It is imperative that the arguments set out in observations are well structured; an unstructured, free flowing set of observations, no matter how strong the legal arguments contained therein, will frustrate the opportunity to support the case. If the applicant does not contest the facts as summarised by the Court, there is no need to set them out once more in the observations; a simple statement to the effect that the applicant agrees with the statement of facts as set out by the Court will be sufficient. Obviously, if there have been any developments (such as a new domestic court decision, a new step in the domestic investigation, or a new witness comes forward, etc.) these need to be mentioned in the observations. Furthermore, if the respondent Government has disputed the facts, the applicant should add further information and evidence to support the facts as alleged by him or herself, and further argumentation to show that his or her version of the events is more credible than that of the Government. Obviously, as the applicant will already have submitted to the Court all the evidence in support of the case, he or she may adduce further material corroborating the evidence previously submitted. For example, if the Government has disputed the accuracy or the contents of medical reports detailing injuries, the applicant should consider obtaining an independent medical opinion to counter the Government's arguments.¹²⁰

1.12 Third Party Interventions (*Amicus Curiae*)

Persons or organisations who are not parties to a case before the Court may, in the discretion of the President of the Court, intervene in the proceedings as third parties. Such third party interventions are usually made by means of *amicus curie* briefs providing additional arguments in support of one of the parties to the case. Article 36 of the Convention provides the authority for such interventions:

“[t]he President of the Court may, in the interest of the proper administration of justice, invite ... any person concerned who is not the applicant to submit written comments or take part in hearings”.

Rule 44 of the Rules of Court governs procedures relating to third party interventions. According to this Rule, once the case has been communicated to the respondent Government, the President of the Chamber may invite or grant leave to any person concerned who is not the applicant to submit written comments or, in exceptional cases, to take part in a hearing. Requests for

120 See the applicant's observations in the case of *Kişmir v. Turkey*, cited above, which include a copy of an independent medical report, Appendix No. 13.

leave to intervene as a third party must be duly reasoned and submitted in writing in one of the official languages of the Court *not later than twelve weeks* after notice of the application has been given to the respondent Contracting Party. In cases before the Grand Chamber, the twelve-week period starts running from the date of notification to the parties of the decision of the Chamber under Rule 72 § 1 to relinquish jurisdiction in favour of the Grand Chamber¹²¹ or of the decision of the panel of the Grand Chamber under Rule 73 § 2 to accept a request by a party for referral of the case to the Grand Chamber.¹²² The time-limits may, in exceptional circumstances, be extended by the President of the Chamber if sufficient cause is shown. Written comments submitted under this Rule must be drafted in one of the official languages of the Court.¹²³ They will be forwarded to the parties to the case, who will be entitled, subject to any conditions, including time-limits set by the President of the Chamber, to file written observations in reply or, where appropriate, to reply at the hearing.

The purpose of an *amicus* intervention is to assist the Court in its deliberations on a case, or a specific issue in a case. In this connection, many NGOs have expertise or specialist information on specific human rights issues relevant to the case in which they seek to intervene, and in practice, most third party interventions are submitted by NGOs. Such information or expertise may not always be within the reach of an applicant, his or her legal representative, or indeed of the Court. A prospective third party must specify in the request for leave to intervene what added value its intervention will have for the Court's examination of the case. For example, an NGO with experience in the subject matter pertinent to the case in which it seeks to intervene could emphasise that experience. Similarly, an NGO with specialised knowledge of other human rights mechanisms may try to persuade the Court of the utility of a comparative legal analysis of a particular issue relevant to the case. In this connection it must be pointed out that the Court is frequently prepared to take account of case-law of other international and domestic courts (occasionally even of courts of countries not parties to the Convention¹²⁴) which may serve as guidance on issues which it has not yet had occasion to consider in its own jurisprudence.¹²⁵ However, third party interventions which only discuss the jurisprudence of the European Court have marginal utility, as this is the speciality of the Court itself.

121 For issues relating to the relinquishment of jurisdiction by a Chamber in favour of the Grand Chamber see Section 1.5.1 above.

122 For issues relating to referral to the Grand Chamber see Section 9.2 below.

123 I.e. English and French; see Section 1.10 above.

124 See *Hirst v. the United Kingdom (No. 2)* [GC], cited above, §§ 35-39.

125 See Section 1.6.5 above.

OMCT

An example of a case in which third party interventions played a role is *Nachova and Others v. Bulgaria*; *amicus* briefs were received from three non-governmental organisations, the European Roma Rights Centre (ERRC), INTERIGHTS, and Open Society Justice Initiative (OSJI).¹²⁶ The ERRC's *amicus* brief informed the Court of incidents of ill-treatment and killing of Roma by law enforcement agents and private individuals. INTERIGHTS criticised the Court's standard of beyond reasonable doubt as erecting insurmountable obstacles to establishing discrimination. The OSJI, for their part, commented on the obligation of States, in international and comparative law, to investigate racial discrimination and violence. The information and the arguments submitted by these NGOs were summarised in the judgment.¹²⁷ Whereas the information submitted by the ERRC provided background information for the Court about the problems facing Roma in Bulgaria, the arguments submitted by INTERIGHTS led the Court to explain its reliance on the standard of proof beyond reasonable doubt and to address – for the first time in its history – the criticisms which have been levelled against the Court for its insistence on this high standard of proof.¹²⁸ Finally, it cannot be excluded that the OSJI's *amicus* brief had some bearing on the Court's conclusion that “the authorities' duty to investigate the existence of a possible link between racist attitudes and an act of violence is an aspect of their procedural obligations arising under Article 2 of the Convention, but may also be seen as implicit in their responsibilities under Article 14 of the Convention taken in conjunction with Article 2 to secure the enjoyment of the right to life without discrimination.”¹²⁹

1.13 Costs

The Court does not require applicants to pay any fees at any stage of the Convention proceedings. If an applicant is successful with his or her application and the Court finds that there has been a violation of the Convention, the Court may order the respondent State to reimburse the expenses incurred by the applicant in connection with the examination of his or her Convention complaints, pursuant to Article 41 of the Convention, including lawyer's fees, translation and postage costs, and costs of attending any possible hearings in Strasbourg. In the course of the Convention proceedings, applicants

126 *Nachova and Others v. Bulgaria* [GC], nos. 43577/98, 43579/98, 6 July 2005, § 8.

127 See §§ 55-59 and 138-143.

128 See 11.6 for issues relating to the standard of proof in the Court's proceedings,

129 § 163.

may also apply for legal aid from the Court to cover – at least partially – their costs.¹³⁰

1.14 Hearings

The Chamber and the Grand Chamber may hold hearings on the admissibility and/or the merits of cases in Strasbourg. Such hearings require the attendance of the parties or their representatives and sometimes also the attendance of witnesses and experts. During a hearing, the parties will present their case and arguments and answer any questions that may be put to them by the judges. However, hearings are held in only very few cases.¹³¹ The parties are informed of the Court's decision at a subsequent date and not on the day of the hearing. Although such hearings are open to the public, the (Grand) Chamber may, of its own motion or at the request of a party or any other person concerned, decide to exclude the public and the press from all or part of a hearing in the interests of, *inter alia*, morals, public order and protection of the private life.¹³²

The Court also has powers to appoint one or more of its judges to conduct an inquiry, carry out an on-site investigation, or take evidence in some other manner within the territory of the respondent Contracting Parties.¹³³ Although the Court uses these powers rarely, it has done so in a number of cases in order to establish the facts through the hearing of applicants, witnesses, experts, and other persons connected with the complaint.¹³⁴

1.15 Effects of the Court's Judgments

After the Court has found a violation of the Convention and awarded just satisfaction to the injured party, it transmits its judgment to the Committee of Ministers to supervise the execution of that judgment by the respondent State in accordance with Article 46 § 2 of the Convention. The Court does not interfere with the execution process thereafter. Thus, aside from awarding monetary compensation, the Court has consistently declined to assume juris-

130 See Section 1.9 above and Section 7 below.

131 In 2005, 20 hearings were held by the Sections and 25 by the Grand Chamber.

132 For other reasons see Rule 63 § 2 of the Rules of Court.

133 Rule A1 of the Annex to the Rules of Court.

134 See also Section 11.3 below.

OMCT

diction to order a State to carry out particular measures of reparation or to change its law or practice in any particular way so as to prevent similar violations from recurring in the future.¹³⁵

Yet in numerous cases the Court has held that in the context of the execution of judgments pursuant to Article 46 of the Convention, a judgment in which the Court finds a violation of the Convention or its Protocols imposes on the respondent State a legal obligation not just to pay those concerned the sums awarded by way of just satisfaction, but also to choose, subject to supervision by the Committee of Ministers, the general and/or, if appropriate, individual measures to be adopted in its domestic legal order to put an end to the violation found by the Court and make all feasible reparation for its consequences in such a way as to restore as far as possible the situation existing before the breach.¹³⁶ In this connection the individual measure most commonly required for *restitutio in integrum* is the reopening of domestic legal proceedings. The need for such a measure arises primarily in respect of criminal proceedings since problems with civil proceedings can frequently be remedied through financial compensation. But a criminal conviction may need to be quashed or a retrial ordered to remedy the violation in question. For example, where an applicant has been tried and convicted by a court which is not independent within the meaning of Article 6 § 1 of the Convention,¹³⁷ or his or her right to freedom of expression under Article 10 of the Convention has been unjustifiably restricted by national law,¹³⁸ the Committee of Ministers interprets the judgments of the Court and, if necessary, exerts pressure on the respondent State with a view to forcing it to remedy the situation giving rise to a violation.

However, despite the declaratory nature of its judgments and its lack of jurisdiction to order consequential measures against a State, recent practice indicates that the Court is willing to assist the Committee of Ministers in the execution process by providing certain guidelines to the respondent States on how the consequences of a particular violation of the Convention may be

135 *Philis v. Greece*, nos. 12750/87, 13780/88 and 14003/88, 27 August 1991, § 79. In *Selmouni v. France*, the Court found violations of Articles 3 and 6 of the Convention on the grounds that the applicant had been subjected to acts of torture in the hands of the French police during his detention in police custody in Paris and that the proceedings in respect of his complaint against the police officers had not been conducted within a reasonable time. The Court awarded the applicant a substantial sum to cover both personal injury and non-pecuniary damage. However, it dismissed the applicant's requests concerning an order for transfer to the Netherlands (of which country he was a national) to serve the remainder of his sentence there and to specify in its judgment that the sums awarded under Article 41 should be exempt from attachment. The Court held that Article 41 did not give it jurisdiction to make such orders against a Contracting Party; see *Selmouni v. France* [GC], no. 25803/94, 28 July 1999, § 126.

136 See, for example, *Scozzari and Giunta v. Italy* [GC], nos. 39221/98 and 41963/98, 13 July 2000, § 249; *Menteş and Others v. Turkey* (Article 50), no. 23186/94, 24 July 1998, § 24; *Maestri v. Italy* [GC], no. 39748/98, 17 February 2004, § 47.

137 See, for example, *Incal v. Turkey*, no. 22678/93, 9 June 1998.

138 See, for example, *Süreç v. Turkey (no. 2)* [GC], no. 24122/94, 8 July 1999.

remedied. For example, in its judgment in the case of *Üküncü and Güneş v. Turkey* the Court, having concluded that the applicant had not received a fair trial within the meaning of Article 6 of the Convention, stated that in principle the most appropriate form of relief would be to ensure that the applicant is granted in due course a retrial.¹³⁹ In its judgment in the case of *Assanidze v. Georgia*, where the applicant was not released by the authorities of the Ajarian autonomous republic in Georgia despite his acquittal by the Supreme Court, the Court held that Georgia had to secure the applicant's release at the earliest possible date in order to put an end to the violations of the applicant's rights under Articles 5 and 6 of the Convention.¹⁴⁰

Likewise, in the case of *Ilaşcu and Others v. Moldova and Russia*,¹⁴¹ four Moldovan citizens brought a complaint about their treatment in the Moldovan Republic of Transnistria. They complained, *inter alia*, that they had not received a fair trial and that they were subjected to ill-treatment and inhuman prison conditions. The Court found a breach of Article 3 of the Convention on account of the ill-treatment inflicted on the applicants. It also found that the continued detention of Mr Ilaşcu by Russia and of the other three applicants by Moldova was in violation of Article 5 of the Convention. In addition to awarding the applicants a certain amount of money for pecuniary and non pecuniary damages, the Court held that any continuation of the unlawful and arbitrary detention of the three applicants would necessarily entail a serious prolongation of the violation of Article 5 found by the Court and a breach of the respondent States' obligation under Article 46 § 1 of the Convention to abide by the Court's judgment.

Coming to the cases concerning allegations of ill-treatment, there is no judgment where the Court specifically indicated, as part of just satisfaction under Article 41, a type of measure that might be taken by the respondent State to remedy the suffering of the victim of torture or other forms of ill-treatment. But, in some cases, the Court did point to certain defects in the legislation or practice of States giving rise to a systemic violation of Article 3 of the Convention. As an example, in the case of *Abdülsamet Yaman v. Turkey*,¹⁴² which concerned the alleged torture inflicted on the applicant during his detention in police custody and where the criminal proceedings against the accused police were discontinued on the ground that the prosecution was time-barred, the Court pointed out that where a State agent has been charged with crimes involving torture or ill-treatment, it is of the utmost importance for the purposes of an "effective remedy" that criminal proceedings and

139 *Üküncü and Güneş v. Turkey*, no. 42775/98, 18 December 2003, § 32.

140 *Assanidze v. Georgia* [GC], no. 71503/01, 8 April 2004, § 203.

141 *Ilaşcu and Others v. Moldova and Russia* [GC], no. 48787/99, 8 July 2004, § 490.

142 *Abdülsamet Yaman v. Turkey*, no. 32446/96, 2 November 2004, § 55.

OMCT

sentencing are not time-barred and that the granting of an amnesty or pardon should not be permissible. The Court also underlined the importance of the suspension from duty of the agent under investigation or on trial as well as his dismissal if he is convicted.

Similarly, in its judgment in the case of *Güngör v. Turkey*, which concerned the criminal investigation into the killing of the son of a member of the Turkish Parliament, the Court found that Turkey must take appropriate measures without delay to discharge, in accordance with the Court's judgment, its obligations to ensure that its legislation was clarified so that parliamentary immunity could no longer operate in practice to prevent prosecutions for ordinary criminal offences in cases in which members of parliament or their families were involved as possible witnesses or suspects.¹⁴³

Mention should further be made of the fact that in some cases involving allegations of ill-treatment or other serious violations of the Convention, the parties agreed to settle their cases on the basis of friendly settlement declarations proposed by the Registry of the Court. In these declarations, the respondent Governments accepted responsibility for the alleged violation of the Convention and undertook to take necessary measures to prevent similar violations in the future and pay compensation to the victims of the violations in question.¹⁴⁴

Thus, although the Court is not empowered under the Convention to order a State to carry out particular measures of reparation or to change its law or practice in any particular way, it has managed to get States to undertake these measures by way of friendly settlement judgments containing the aforementioned type of declarations. Such a situation can be illustrated by the case of *Kalm, Gezer and Ötebay v. Turkey*,¹⁴⁵ which concerned alleged ill-treatment inflicted on the applicants during their detention in police custody. With the assistance of the Registry of the Court, the parties respectively submitted formal declarations accepting a friendly settlement of the case. For their part, the Turkish Government accepted in the declaration that the treatment suffered by the applicants gave rise to a violation of Article 3 of the Convention. The Government also undertook to issue appropriate instructions and adopt all necessary measures to ensure that the prohibition of such acts and the obligation to carry out effective investigations would be respected in the future. It further offered to each of the applicants certain amounts of money. Following acceptance of the Government's declaration the applicants agreed

143 *Güngör v. Turkey*, no. 28290/95, 22 March 2005, § 111.

144 See, for example, *Sak v. Turkey*, no. 29359/95, 30 October 2001. The parties' friendly declarations in this case may be consulted in *Textbox xi*.

145 *Kalm, Gezer and Ötebay v. Turkey*, nos. 24849/94, 24850/94 and 24941/94, 28 October 2003.

to settle their case and it was subsequently struck out of the list of the Court's cases.

It is considered that serious violations of the Convention, such as violations of Articles 2 and 3, are by their very nature irreparable. Any remedy, including pecuniary compensation, will fail to be truly proportional to the gravity of the injury inflicted on the victim, particularly when the perpetrators have not been held to account for their wrongdoing. Having regard to the recent practice of the Court to provide certain guidelines to respondent States as described above, it is hoped that in its future judgments the Court will not merely award damages to victims of ill-treatment but also indicate the specific measures that might be taken by respondent States to remedy the situation giving rise to the violation, such as the (re-)opening of criminal proceedings against the perpetrators of ill-treatment.