

Women's Human Rights in Regional Human Rights Systems

A review of experiences from Europe



United Nations Development Fund for Women



UNIFEM is the women's fund at the United Nations. It provides financial and technical assistance to innovative programmes and strategies to foster women's empowerment and gender equality. Placing the advancement of women's human rights at the centre of all of its efforts, UNIFEM focuses on reducing feminised poverty; ending violence against women; reversing the spread of HIV/AIDS among women and girls; and achieving gender equality in democratic governance in times of peace as well as war.

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UNIFEM East and Southeast Asia Regional Office
UN Building 5th Floor, Rajdamnern Nok Avenue
Bangkok 10200, Thailand
Tel: +66-2-288-2093
Fax: +66-2-288-6030
www.unifem-eseasia.org

Written by Deirdre Fottrell
Peer Reviewed by Clara Sandoval
Edited by Amarsanaa Darisuren and Collin Piprell
Proofread and Layout by Joel Mark Barredo

Note on the Author

Deirdre Fottrell is a Lecturer in International Human Rights Law at the University of Essex, United Kingdom. From 1997-2000, she was Director of the Human Rights Programme at the Institute of Commonwealth Studies, University of London. Her areas of interest lie in the field of international human rights law, focused on the European Convention on Human Rights, Children's Rights and the Human Rights of Women. She has taught in human rights training programmes in Brazil, Tunisia, Algeria, Bosnia, Serbia, Armenia and Georgia. She practices at the Bar of England and Wales. She is a barrister at the Coram Chambers.

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FOREWORD

In recent years, the Association of Southeast Asian Nations (ASEAN) has made striking progress in better promoting and protecting the human rights and fundamental freedoms of its peoples. Related achievements have included establishing the ASEAN Inter-Governmental Commission on Human Rights (AICHR); setting up the ASEAN Commission for the Promotion and Protection of the Rights of Women and Children (ACWC); and developing the ASEAN Legal Instrument for the Protection of Migrant Workers.

These developments promise still greater progress in gender equality and women's empowerment, while advancing the human rights of all excluded groups. ASEAN's Political Declaration, adopted in October of 2009, declares that these developments also aim to ensure "progressive social development and justice, the full realisation of human dignity and the attainment of a higher quality of life for ASEAN peoples."

ASEAN is now well placed to draw upon the lode of knowledge, the trove of experience generated during longer histories of adapting and refining human rights mechanisms in Africa, the Americas and Europe.

The growing body of literature focused on these regional human rights mechanisms has, in relative terms, neglected their promotion and protection of women's human rights. This publication, *Women's Human Rights in Regional Human Rights Systems: A review of experiences from Europe*, is designed to address this deficiency. It is part of three-book series of UNIFEM's study on the existing regional human rights systems approaches to gender equality and women's empowerment in Africa, the Americas and Europe. We hope that this exploration will inform and inspire gender equality advocates in government and civil society across the ASEAN region.



Moni Pizani
Regional Programme Director
UNIFEM East and Southeast Asia Regional Office

TABLE OF CONTENTS

Part 1: Protection and Promotion of Human Rights: The European Regional Mechanism

1. Background: European human rights system.....	3
European Convention on human rights	3
Political structure of the COE.....	3
The Court and the Convention.....	4
Application process.....	4
Admissibility criteria	5
Enforcement of decisions	6
Gender-specific processes	6
European Convention on the Exercise of Children’s Rights	7
European Social Charter.....	8
Other relevant human rights processes within the COE	9
2. Establishing protective mechanisms.....	10
3. Promoting and protecting the rights and interests of women: How the mechanisms work.....	11
Object and purpose test.....	11
Dynamic interpretation of the Convention.....	11
Proportionality	12
Margin of appreciation	12
Programmes on gender equality.....	13
Children.....	14
4. Advantages of joint mechanisms.....	15
5. Key principles & lessons learned	16
6. Frequently Asked Questions	17

Part 2: The European regional legal instruments: Protection of gender equality and the rights of children

1. European Convention on Human Rights.....	21
European Court of Human Rights	21
Content of the Convention	21
2. Women’s human rights under the ECHR	22
Gender equality and non-discrimination under Article 14	22
Reproductive freedom and self-determination	23
Violence against women	24
3. Protection of children under the ECHR.....	26
Right to family life	26
Corporal punishment.....	27
Juvenile justice issues	28
Education	28
Protection of children’s rights: Other legal mechanisms	29
5. The role of regional systems for the protection of rights.....	30
6. Key lessons.....	31
Annex	32
References.....	41
Internet resources: Jurisprudence	42

ACRONYMS

CDEG	Steering Committee for Equality between Women and Men
COE	Council of Europe
ECECR	European Convention on the Exercise of Children's Rights
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
EU	European Union
ICCPR	International Covenant on Civil and Political Rights
NGO	Non-governmental organization
UK	United Kingdom
UNCRC	United Nations Convention on the Rights of the Child
VAW	Violence against women

Part **1**

Protection and promotion of human rights: The European regional mechanism

1. BACKGROUND: EUROPEAN HUMAN RIGHTS SYSTEM

European Convention on Human Rights

The European regional system for the protection and promotion of human rights operates under the control and supervision of the Council of Europe (COE). The COE, established in 1949, is based in Strasbourg, France.

The European Convention on Human Rights (ECHR) was opened for signature in 1950, and came into force in 1953. The importance of the Convention to the COE is evidenced by the fact that, since the early 1990s, acceptance of the ECHR has been a political obligation of membership of the Council, as have both the right of individual petition and the jurisdiction of the European Court of Human Rights (hereafter the “Court”).¹ The COE has expanded since 1949 from the original 10 States to its current membership of 47, all of which are parties to the ECHR.²

While the COE has passed more than 200 treaties in its 60-year history, many of these have been regulatory in nature, and have had little to do with protection of human rights. The primary purpose of the COE, however, is the promotion of human rights, democracy and the rule of law, based on the ECHR.³

Political structure of the COE

The COE itself has a relatively simple political structure. The Council’s executive decision-making body is the Committee of Ministers, comprising the Foreign Affairs Minister of each Member State or a representative of its permanent mission in Strasbourg. The Council meets at the ministerial level once a year, either in May or in November. Most of its business, however, is conducted in weekly meetings attended by diplomatic representatives. The Committee operates as a legislative body, performing the standard-setting functions of the organization by concluding Conventions, recommendations and agreements. It also serves as the chief administrative body of the organization. In addition, under Article 46 of the Convention, it is charged with supervision of States parties in the execution of Court judgements. This accounts, to a significant extent, for the high levels of compliance with and overall success of the Convention.

The Committee of Ministers sets its own rules of procedure, including the timing of its meetings and its own decision-making processes. Since March 2003, the Chairmanship of the Committee of Ministers has been held by States, on a rota basis (according to English alphabetical order), for six months at a time.⁴ Each session at the ministerial level focuses on a limited number of topics directly related to topical issues of COE policy. Generally one main topic is selected as the focus for all events organized around a session. The rules are designed to promote interest in the work of the COE among the media and the public, with a final communiqué issued at the end of the session being one particularly effective means.

Meetings of Deputies conduct the main business of the organization. These are either ordinary meetings, which are more administrative and general in focus, or human rights meetings, the focus of which is the supervision of judgements. Since 2008, four human rights meetings have been held annually.⁵ The Deputies cannot deliberate or decide on a course of action unless two-thirds of members are present or represented. All documents to be considered at the meeting are circulated four weeks in advance, and decisions are distributed electronically three working days after each meeting. Committee documents are available only in electronic form, but the user-friendly COE website is updated frequently. This is the main source of information regarding the Committee and the COE. The Committee agenda is prepared by the secretariat in compliance with substantive issues set by the Committee itself.

¹ See Harris, Warbrick and O’Boyle, *The law of the European Convention on Human Rights* (Butterworths, 1st ed. 1995), p. 5.

² The Council of Europe (COE) is an organization distinct from the European Union (the EU has 27 Member States, and was primarily established to engender economic and political cooperation between States).

³ The COE’s political mandate was redefined by the third Summit of Heads of State and Government (Warsaw, 16-17 May 2005). The meeting adopted a political declaration and action plan that restated the focus of the organization following its expansion, in the 1990s, to include Central and Eastern European States.

⁴ See Rules of Procedure of the Committee of Ministers (5th revised ed. 2005); see also the reform document completed by the Deputies Committee (12 March 2003), CM/DEL/Dec (2003) 831/1.5.

⁵ See CM (2005) 79 Final and CM (2005) 80 Final for the Declaration and Action Plan of the third summit at which this procedure was agreed by the Committee of Ministers.



The business of the Committee and the Deputy Committee ranges from receiving conventional reports and reviewing States' compliance with judgements to approving the COE budget. It therefore relies heavily on the COE Secretariat and the Bureau of the Committee, comprising six members, the present chair, previous chairs and future chairs. In addition, the Committee has established nine subsidiary groups covering the main fields of COE activity. Referred to as 'rapporteur groups', their chairs are appointed by the Chair of the Committee of Ministers. Membership is open to any delegation. These groups engage in policy discussions and feed into the Committee's agenda on areas within their interest.

The Committee details its decisions and its activities in regular statutory reports to the Parliamentary Assembly. Committee meetings at both levels are held in private, and the Secretary General or Deputy Secretary General of the COE is present at all meetings.

The Parliamentary Assembly, the deliberative body of the organization, holds four week-long sessions each year in Strasbourg. It currently has 318 representatives appointed by national Parliaments. Each country, depending on its population, delegates between 2 and 18 representatives. The Assembly has no direct role in the Convention itself, but it is the source of many of the human-rights initiatives.⁶

The Court and the Convention

The ECHR is a classic civil and political document for reasons explored below, in the second section of this paper. The ECHR comprises the main treaty and 13 protocols, some of which add substantive rights, in particular Protocols 1, 4, 6, 7 and 12, and others that have amended supervisory processes.

The relative simplicity of the Convention's substantive provisions accounts in part for the strength of the European System. Combined with the robust supervisory mechanism, this treaty has proved uniquely successful in achieving its objects and purposes. The ECHR, at its centre, essentially operates as a pan-European constitutional court, is established by Article 19 of the Convention, which provides that its role is to 'ensure the observance of the engagements undertaken' by States parties.

Application process

The Court operates on a permanent basis, and is composed of a number of judges equal to the number of Contracting States (47 at present); no two judges may be nationals of the same State.⁷ Judges are elected by the Parliamentary Assembly of the COE, but they sit in their individual capacity and do not represent the interests of any State. The term of office for judges is six years, and they may be re-elected.

Three types of petitions may be adjudicated by the Court:

- applications from an individual or group claiming a violation of the Convention (Article 34);
- applications from a State or group of States alleging a breach of the Convention by a Member State (Article 35); and
- at the request of the Committee of Ministers, the Court may provide an advisory opinion on legal questions concerning the interpretation of the Convention (Article 47).

The vast bulk of the Court's work is concerned with applications from individual claimants. In itself this is interesting, given that such petitions were an optional process until 1998, when Protocol 11 imposed the right of individual petition as compulsory for all Member States. At the time of drafting, it was envisaged that interstate applications were likely to be the most common method of supervision, reflecting the contractual nature of the obligations which, under international law, are owed to each other by States parties. The mechanism for interstate cases, however, is under-utilized generally in international human rights law, and has been activated only infrequently by States parties.

⁶ The COE has granted observer status at the Parliamentary Assembly level to a number of States including Canada, Japan, the USA and the Holy See State.

⁷ See Article 38 of the ECHR. Note that under Article 39 (1) each Member State nominates three candidates, of which at least two must be its own nationals. Under Article 39 (3) judges must be persons of high moral character and must possess the qualifications required for appointment to high judicial office.



Under Article 47(1), the Committee of Ministers may request an advisory opinion from the Court. Such an opinion cannot deal with issues relating to the scope or content of the protected rights or freedoms, or with any question that the Court or the Committee of Ministers may have to consider as a consequence of proceedings which may be instituted in accordance with the Convention. A Committee decision to request an advisory opinion requires a majority vote of the Committee. The Court must then decide whether the request for such an opinion addresses a matter within its competence. At the time of writing, this process has never been activated. That is unsurprising, given that the volume of contentious jurisprudence before the Court already provides it with ample opportunity to explore the parameters of the Convention's provisions.

The capacity to provide an advisory opinion is a potentially useful mechanism, but—given the opportunities to resolve and confront ambiguities in either the meaning of the Convention's substantive guarantees or States' obligations there under—it has in reality been unnecessary within this region. In the inter-American system, by contrast, with comparatively fewer contentious applications and opportunities for judicial mechanisms to address controversial issues, it has proven a necessary and important device for the expansion of State's understandings of their legal obligations.

The ECHR presides over an adversarial procedure. Hearings occur in public unless, given exceptional circumstances, the Court decides otherwise. Individual applicants may present their own cases, but the Court has established a legal-aid scheme for those with insufficient means to engage counsel. The official languages of the Court are English and French, but an application may initially be submitted in one of the official languages of the Contracting State.

The application process is largely conducted on paper. In most cases the Court receives evidence and the application from the claimant. The Government is provided with an opportunity to respond in writing. Both claimant and respondent Government may make further written submissions in response before the matter is listed for an oral hearing. The oral hearing lasts no longer than a matter of hours.

Admissibility criteria

Articles 34 and 35 of the Convention stipulate admissibility criteria for applications common to other treaties:

- it must be made by an eligible person (a victim of a violation);
- it must concern a right protected by the Convention;
- violation must have occurred when the Convention was in force for that State;
- the applicant must have exhausted domestic remedies.
- the application must be made within six months of the final decision of a domestic court; and
- it cannot be anonymous (Article 35).

The Court operates in five sections referred to as Chambers. Each Chamber comprises seven judges, and is composed so as to strike an appropriate balance in terms of gender, geography and different member-state legal systems. The vast majority of Court judgements are given by Chambers.

Upon receipt of an application, the President of the Chamber assigns the case to a judge who acts as rapporteur and who can decide whether the issue of admissibility should be decided, within the Chamber, by a three-person committee. Such a committee may, by unanimous vote, rule an application inadmissible. This brings the matter to an end without further examination of the issues. Where the decision is not unanimous, it is decided by the Chamber, which in turn must give reasons for its decisions.

In limited circumstances, where a case raises issues of general importance for the Convention or other States parties, it may be referred by either party or by the Chamber itself to a Grand Chamber, a plenary body comprising 21 judges. Such a referral must be made within 3 months of the Chamber's decision. In the first instance, upon referral, a panel of 5 members of the Grand Chamber—the section presidents of the Chambers (excluding the president of the Chamber that made the referral)—decides on the issue of admissibility of any case. If the Panel accepts, the Grand Chamber renders its decision in the form of a judgement. Its decisions, based on majority vote, are final. If the judgement does not represent the unanimous opinion of the Court in whole or in part, however, any judge may deliver a separate opinion.



Under Article 50, the Court may award 'just satisfaction' to a successful applicant; this includes damages where a State party has violated the Convention.

Enforcement of decisions

Contracting States to the Convention are required by Article 53 to abide by any decision of the Court in any case to which they are a party. The Committee of Ministers has a supervisory role in the enforcement of judgements. In addition, in providing a specific remedy to the individual, the Convention requires that general measures are taken by the State to obviate the need for repeat applications. In most circumstances, this requires a legislative or administrative change to state laws and practices. The Committee of Ministers continues to consider a case until it is satisfied that the state-proposed remedy is sufficient. This level of supervision is unique in international law, and it gives the Convention added force, distinguishing it from other, similar processes.

In the past 60 years the Court has delivered over 10,000 judgements. Given its supra-national jurisdiction, this is extraordinary. It delivers over 1,500 judgements a year, a figure that has almost doubled in the past decade, such that 90 percent of its judgements have been delivered between 1998 and 2008.⁸

More than half of the Court's judgements have concerned 4 of the Council's 47 Member States, and the Court has on occasion had to deal with 'clone' cases, which have raised similar issues. To expedite matters, given the volume of applications, over the past five years the Court has consolidated such cases.⁹

The Convention, in its original form, established three institutions. This was revised in 1998, and currently the Court makes decisions and the Committee of Ministers supervises their implementation.¹⁰ The Court receives over 100,000 applications a year, and this figure is increasing. In more than 81 percent of cases the Court has found at least one violation of the Convention by the respondent State.¹¹

Gender-specific processes

Given the success of the Convention, it is striking that the Council of Europe was so slow to recognize that the human rights of women were an inalienable and indivisible part of universal human rights, or at least to articulate it in those terms. On an institutional level, it appears, a rather reductive liberalist view of rights protection was taken, based on an assumption that litigation strategies focused on specific violations could advance the interests of all women. It is of course correct to assert that the Court, when presented with gendered applications, has delivered the thoughtful and robust judgements that have characterized its work generally. Until relatively recently, however, there has been insufficient gender awareness within the COE.

Since the 1993 Vienna World Conference put the issue of women's rights firmly on the human rights agenda, the COE has responded with a series of quasi-legislative and political strategies aimed at providing a European response to the universal processes instigated by that Conference and the 1995 Beijing World Conference on Women of 1995.¹²

The COE structure, it is true, includes no binding international gender-based treaty. The absence of a gender-specific legal mechanism is ameliorated to some degree, however, by the fact the Council has developed gender-focused programmatic initiatives, and these benefit from the generally high levels of compliance by States parties to human rights provisions.

The primary body charged with promoting such efforts is the **Steering Committee for Equality between Women and Men (CDEG)**. The Committee is composed of one independent expert from each Member State. It is charged with the task of stimulating action at the national level and within the COE itself to achieve equality between women and men. It conducts studies and evaluations, defines strategies and political measures and frames legal instruments. It has had notable impact in a number of areas (these are considered further in Section 3, below).

⁸ See European Court of Human Rights, *Some facts and figures: 1959-2009 Council of Europe* (2009), p. 5.

⁹ See above, Note 6. The four States are Italy (1,953 judgements) Turkey (1,939 judgments) France (740 judgments) and Russia (643 judgments), figures current as of July 2009.

¹⁰ Until 1998, applications were initially considered by a filtering body, the Commission on Human Rights, which could rule on admissibility and merits but did not have the authority to make a final determination. This came to be viewed as essential duplication of processes, and the Commission was abolished by Protocol 11 in 1998, which created the current structure under which decisions are determined.

¹¹ See Note 6, above.

¹² 'Vienna Declaration and Programme for Action: [http://www.unhchr.ch/huridocda/huridoca.nsf/\(symbol\)/a.conf.157.23.en](http://www.unhchr.ch/huridocda/huridoca.nsf/(symbol)/a.conf.157.23.en) (Accessed: June 2010) see also 'Beijing Declaration and Platform for Action', Fourth World Conference on Women (Beijing, 4-15 September 1995; 15 September 1995) UN Doc A/CONF.177/20 (1995) and A/CONF.177/20/Add.1 (1995).



European Convention on the Exercise of Children's Rights

The European Convention on the Exercise of Children's Rights (ECECR), adopted by the COE on the 8th of September 1995, was part of a wider strategy implemented in response to the United Nations Convention on the Rights of the Child (UNCRC), the primary focus of which was urge Member States to fully implement the provisions of the latter.¹³ The ECECR is a regulatory document focusing on a narrow aspect of children's rights, one that is in fact reasonably well addressed in the domestic law of many COE Member States. It aims to give full effect to UNCRC Article 12, which provides the right of the child to freedom of expression and enjoins Member States to allow children to express their views, and to have weight attached to them in all matters affecting children be they judicial, administrative or legislative.

In common with the UNCRC, the ECECR applies to all children younger than 18 years. It states its overall objective as the pursuit of the child's best interests, while it aims more specifically to ensure the representation of children in judicial family proceedings that directly affect them, particularly those concerning the exercise of parental responsibility. The explanatory report accompanying the ECECR makes it clear that 'family' proceedings include public and private proceedings, but may not, for example, include criminal proceedings or indeed civil proceedings regarding the use of parental corporal punishment.

The Convention views the child as the subject, rather than as an active litigant, in the proceedings. It also allows for children's views to be solicited and filtered through a Court-appointed adult. Article 3 of the ECECR requires that the child be provided with all relevant information so the child can form their views within the context of proceedings; this can be restricted, however, subject to the child's maturity and capacity. The same provision also makes it clear that children's views are one factor to be taken into account in the decision-making process, but that the views of the child can be overridden if the Court considers this to be in the child's best interests.

Article 3 of the ECECR provides that a child in family proceedings should have, at a minimum, the following procedural rights:

- to receive all relevant information;
- to be consulted and express his or her views;
- to be informed of the possible consequences of compliance with these views and the possible consequences of any decision.

Article 4 of the ECECR provides for children to have the additional right:

"... to apply, in person or through other persons or bodies, for a special representative in proceedings before a judicial authority affecting the child where internal law precludes the holders of parental responsibilities from representing the child as a result of a conflict of interest with the latter."

The ECECR imposes specific duties on the domestic Court under Articles 6 to 9. In particular, this Court is required to ensure the child has the relevant information, and is to consult the child in a manner commensurate with her level of understanding. Having done so the Court must determine, in any given situation, the weight to be attached to the child's views.

This is undoubtedly a positive development, on one level, advocating as it does for the recognition and respect of children's participatory rights in the context of decision-making processes that can be of fundamental importance to their future. It is also interesting that the COE broke with its usual practice of not creating issue-specific mechanisms, and sought to give full effect to the UNCRC.

But the ECECR has been the subject of considerable criticism from scholars and activists¹⁴ because it does not add significantly to the existing standard of protection within States. The issue, here, is the caveat in Article 2(d) that information should be provided to children considered by the internal law of the State to have a sufficient degree of understanding. This suggests that the position of children not deemed to be of sufficient understanding is not particularly advanced by the treaty.

¹³ See Caroline Sawyer, 'International developments: One step forward, two steps back – The European Convention on the Exercise Of Children's Rights', *Child and Family Law Quarterly* 151 (1999). 529 UNTS 89; ETS 35.

¹⁴ See Caroline Sawyer, 'International developments: One step forward, two steps back – The European Convention on the Exercise of Children's Rights', *Child and Family Law Quarterly* 151 (1999).



Interestingly, the European Court of Human Rights has developed a robust and impressive body of case law promoting and protecting the rights of children, notwithstanding the fact that children rarely litigate issue before the Court. A compelling case may be made that those within its jurisdiction seeking to advance the rights of children are better advised to make applications to the Court, rather than seek to create additional mechanisms.

European Social Charter

The European Social Charter sets out the social and economic rights that States parties to the Charter must guarantee for persons living within their jurisdiction.¹⁵ The Charter was adopted in 1961, revised in 1996, and has three amending protocols. It has been ratified by 38 COE Member States. In terms of its substantive content, this document in many ways complements the ECHR.

Its supervisory mechanism, however, is far less robust than that of the ECHR. Article 25 of the Charter established the European Committee of Social Rights. The main function of this body is to monitor States' compliance with the rights contained in the Charter. It comprises 13 experts, who serve in an independent capacity. They are elected for 6-year terms and may be re-elected once.

The Charter presents a complicated division—effectively a weighting system—of its own substantive provisions. States parties must accept, at a minimum, six 'hard-core' provisions of the Charter, which are distributed over nine articles as follows:

- Article 1 – the right to work
- Article 5 – the right to organize
- Article 6 – the right to collective bargaining
- Article 7 – the right of children and young persons to protection
- Article 12 – the right to social security
- Article 13 – the right to medical and social assistance
- Article 16 – the rights of the family to legal, economic and social protection
- Article 19 – the right of migrant workers and their family to protection
- Article 20 – the right to equal treatment in matters of employment without discrimination on the basis of sex

The total number of articles accepted by the State cannot be fewer than 16. All of which speaks to a lack of enthusiasm from States parties generally for the protection of economic and social rights within the framework of this document

Two provisions are of particular relevance to women's human rights:

- Article 8 – the right of employed women to maternity leave
- Article 20 – the right to equality of opportunity at work without discrimination as to sex

The Committee supervises compliance through a self-reporting procedure whereby States parties are required to take steps domestically to give effect to the Charter's substantive guarantees. States are required to report to the Committee on measures taken to meet their obligations. The Committee has divided the rights into four sub-categories, and States report on each sub-category once every four years—effectively, an annual reporting obligation on some aspect of the Charter.

Having considered a State report, the Committee issues conclusions detailing its view as to the nature and extent of the State's compliance with the Charter. A governmental committee composed of representatives of States parties reviews non-compliance with the reports, and the Committee can issue a specific recommendation through the Committee of Ministers, requesting that particular measures be taken by the State. An annual report is submitted to the Committee of Ministers on levels of compliance generally, and specifically with regard to each State.

Since 1998, the Charter also allows for a collective complaints procedure. Currently, 14 States have accepted its jurisdiction. Only one State (Finland), however, has accepted the right of NGOs to lodge collective complaints. The Committee considers the complaint based on written submissions from both parties. It may in exceptional cases decide to hold a hearing. It then issues a decision on the merits of the complaint, which it transmits to the concerned State. Decisions are made public.

¹⁵ 529 UNTS 89; ETS 35.



Under-utilized in respect of women's human rights, the Committee's processes have to some extent been directed to protecting the interests of children. For example, the Committee has considered collective complaints about the failure to prohibit corporal punishment under Article 17 of the Charter (which safeguards the rights of children to social, legal and economic protection).¹⁶ The Committee has also considered complaints about the lack of education provision for children with special needs in Bulgaria and France.

The COE has strengthened this process in the past decade, but it remains less effective than the ECHR. That, of course, reflects difficulties complying with economic, social and cultural rights under international human rights law generally—it is by no means unique to this region. Many Charter provisions, in any case, are also addressed with considerably more rigour within the EU legal framework.

Other relevant human rights processes within the COE

Another relevant COE body is the Commissioner for Human Rights, a post established by the Committee of Ministers (7 May 1999).¹⁷ The Commissioner exercises a broad mandate. The office focuses on reform, but it is a non-judicial post, and the Commissioner does not address individual complaints of rights violations. The main functions of the office are these:

- fostering the effective observance of human rights, and assisting Member States in the implementation of COE human rights standards;
- promoting education and awareness regarding human rights in COE Member States;
- identifying possible shortcomings in the law and practice concerning human rights;
- facilitating the activities of national ombudsperson institutions and other human rights structures; and
- providing advice and information regarding the protection of human rights across the region.

The present Commissioner is Thomas Hammarberg, a former chair of the United Nations Committee on the Rights of the Child; he took office 1 April 2006. The Commissioner has identified the following key themes for his mandate:

- cooperation with national human rights structures;
- eradication of discrimination;
- human rights defenders; and
- rights of migrants.

The Commissioner clearly avoids duplication of process and addressing themes already well covered within the COE. Thus his work on discrimination, for example, has focused on groups and issues not previously prioritized by the COE, e.g. children with disabilities, homosexual rights and transgender rights. The Commissioner chose migrants as one of his themes in 2007 because of the legal, social and political exclusion of undocumented persons. He works with Governments to emphasize that all migrants have human rights, even if they are not citizens of the State, and that rights are guaranteed without discrimination to aliens and citizens alike.

¹⁶ Belgium, Greece, Ireland, Italy and Portugal have had collective complaints made against them for this reason.

¹⁷ See Resolution (99) 50 on the Council of Europe Commissioner for Human Rights.

2. ESTABLISHING PROTECTIVE MECHANISMS

The catalyst for the creation of the COE itself was the experience of Western European States during the Second World War, which had been characterized by widespread violations of human rights on a massive scale and, in particular, the unprecedented victimization of civilian populations in many States. In the aftermath of the conflict, political leaders and civil society strongly felt the need of a robust regional system for the protection of human rights.¹⁸

By today's standards, the drafting of the European Convention on Human Rights itself was a remarkably swift process. Initiated in November 1949, it was completed in August 1950 and opened for signature 4 November 1950. While to an extent it mirrored the content of the Universal Declaration on Human Rights (1948), its focus was largely on civil and political rights. In that regard, it reflected the domestic bills of rights of many of its Member States. Within a year, the first protocol to the Convention was drafted and opened for signature. This added three more substantive rights to the Convention, two of which—the right to education and the right to property—were economic and social in character.¹⁹

During the drafting process, clear divisions emerged between States in the perception of which rights were most relevant. Particularly important was the division between those States that preferred to focus on civil and political rights, and those that favoured economic, social and cultural rights.

The focus on civil and political rights, according to some observers, was a matter of priorities and tactics based on the immediate need for a short, non-controversial text acceptable to Governments. There was a strong impetus, in the post-War context, to create a supra-national structure.²⁰ The main difficulty in the drafting process, however, did not concern this issue. It was rather a difference of opinion between States that preferred that the rights be expressed as very general principles, and States, led by the United Kingdom (UK), that argued for a more narrowly defined catalogue of enforceable rights.²¹ Interestingly, the UK was forced to compromise (in the terms it sought on the issue of implementation) to achieve the inclusion of these rights. Most States favoured a robust system built around a strong judicial mechanism capable of determining claims from individuals and States. Vehemently opposed by the UK, this was nevertheless included in the final Convention. The Court is without a doubt the key to the success of the entire system.

At the drafting stage, the issue of women's human rights was most notable in its absence. The drafters simply did not consider the protection of women's human rights. This can perhaps be explained by historical factors, including, prior to the mid-1970s, the general lack of awareness of women's rights as human rights. But it is a sad indictment of the views of States parties at the time that the issue of equality did not in itself merit development—as it did at the universal level, in the United Nations—of parallel processes for the protection of women.

Similar observations can be made regarding the drafters' lack of recognition of children's rights *per se*. But what is clear from the case law of the Court, and the approach of the COE generally to rights protection, is the quickness to adopt emerging trends, and to recognize universal developments and initiatives in other regions. That has allowed the Court to apply an expansive interpretation of the substantive provisions to include protection of groups and issues in a way not necessarily envisaged at the time the Convention was drafted. This is addressed further in the next section.

¹⁸ The Council of Europe was created following the 7-10 May 1948 Congress of Europe. The Congress was attended by over 1,000 delegates, primarily from within Western Europe but including representatives from the United States and the British Commonwealth. Interestingly, conference participants, beyond the politicians, included representatives from trade unions, religious groups, business and academia. See A. Mowbary, *Cases and materials on the ECHR* (2nd ed. OUP, 2008), p. 11.

¹⁹ The first protocol was opened for signature in May 1952. Member States ratifying the Convention are required to ratify this protocol.

²⁰ See Harris, Warbrick and O'Boyle, *The Law of the European Convention on Human Rights* (1st ed.), p. 4.

²¹ See Elizabeth Wicks 'The United Kingdom Government's perceptions of the European Convention on Human Rights at the time of entry', *Public Law*, 438 (2000) p. 439.

3. PROMOTING AND PROTECTING THE RIGHTS AND INTERESTS OF WOMEN: HOW THE MECHANISMS WORK

To appreciate the effectiveness of the European Court as a process, it is necessary to understand its general approach to deciding cases. The robustness of its judicial interpretation of rights, combined with a pragmatic approach to State sovereignty, has allowed the Court to develop its diverse jurisprudence while commanding respect and, perhaps more importantly, high levels of compliance from States parties.

Certain rights set out in the Convention include explicit limitation clauses allowing the State to place restrictions upon a right. Article 8, for example, which protects the right to respect for family life, provides as follows:

“Everyone has the right to respect for his private and family life, his home and his correspondence.”

“There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

Much of the process of determining whether a State is in violation of the Convention, in any application, can focus on the meaning and interpretation of such limitation clauses. Limitation clauses are to be found in the second paragraphs of Articles 8-11. The interpretive tools applied by the Court therefore take on considerable significance in the decision-making process.

Object and purpose test

In common with other human rights treaties, the Convention must be interpreted in accordance with the basic principles of the international law of treaties.²² At its simplest, that requires that a treaty should be interpreted in good faith and in accordance with its ‘object and purpose’.²³ By relying on the object and purpose test—by reading into the provisions of the Convention requirements that the State party in question recognizes the importance of that right in the context of a pluralist and democratic society—the Court has been able to develop expansive case law on issues such as freedom of expression.²⁴ By focusing on the wider objects and purposes of the Convention, the Court has been able to read into the Convention interpretations of substantive provisions that do not appear obvious on the face of the text. Given the limited explicit protection offered to women and children in the Convention itself, that approach assumes particular significance for the purposes of this paper.

Dynamic interpretation of the Convention

One of the most innovative features of the Court’s interpretation of the Convention is the concept it has developed that, in deciding cases, it must approach the Convention as a living instrument. In its own case law, that has had greatest relevance to issues of morality and personal autonomy. It is also potentially crucial in the context of gender.

Marckx v. Belgium²⁵ developed the dynamic approach, where this case raised questions regarding both children’s rights and women’s equality. The facts of the case concerned a woman who had a child out of wedlock and, for her and her child to have a legal relationship with each other, was therefore required to go through a legal process known as ‘maternal affiliation’. Had she been married, no such process would have been required. The Court found this violated her right to respect for her family life under Article 8, and that it was also discriminatory under Article 14—that ‘maternal affiliation’ was in breach of both articles. Of special significance in the judgement, the Court’s finding rejected an argument from the Government that the drafters of the Convention intended to provide protection to the marital nuclear family. The Court took the view, in *Marckx*, that the Convention had to be interpreted so as to reflect changes in social mores, and what was determinative were the standards of European society at the time the decision was made—not the views prevalent at the time of drafting. It also found that the Court could introduce into a right a meaning not envisaged at the time the Convention was adopted.

²² See further the Vienna Convention on the Law of Treaties, 1969, 1155 UNTS 33.

²³ See further Article 31 of the Vienna Convention on the Law of Treaties, above, note 20.

²⁴ See, e.g., the case of *Handyside v. the United Kingdom* (1979), 1 EHRR.

²⁵ *Marckx v. Belgium* (, [1979],] 2 EHRR 20.



Given the tension associated with States' resistance to supra-national judicial supervision in general, this approach has immense significance for the development of rights protection by an international court. It has particular resonance for the rights of women, moreover, in that limitations of women's human rights are often justified by reference to traditions and customs. The dynamic approach clearly mitigates such arguments by States. This approach also speaks to the level of confidence the Court has developed over time, clearly signalling that no issue within the elastic parameters of the Convention's substantive guarantees, however sensitive, lies outside its own jurisdiction.

Proportionality

A common and recurring theme in the Court's decision-making, 'proportionality' has particular resonance in Articles 8-11, which include the limitation clauses. These clauses, as mentioned earlier, allow States to restrict a right to the extent this is considered 'necessary in a democratic society'. This has been interpreted by the Court to mean that any restriction must be 'proportionate' to the legitimate aim being pursued by the State.²⁶ The Court has clearly developed the proportionality principle in a manner that seeks to remind contracting States of the need to strike a fair balance between the interests of the wider society and the protection of the rights of the individual. Where violations are found by the Court, it is often because States have erred in their interpretation of where that balance lies. The proportionality principle has also become a key factor in the Court's reasoning in discrimination cases. The Court imposes a heavy burden on States parties to justify differences in the treatment of individuals who come within the protected categories, which of course includes discrimination based on sex.

Margin of appreciation

This doctrine is central to the Convention's acceptance by States. It is perhaps also the most frustrating and difficult aspect of the Court's practice to predict. In its simplest form, it amounts to a measure of discretion granted to the State regarding measures taken in respect of substantive rights in the Convention. It was introduced by the Court in the case of **Handyside v. the United Kingdom**,²⁷ which concerns restrictions placed on the circulation of a publication aimed at adolescents on the basis it was deemed obscene by the UK authorities. The Court accepted that the restriction amounted to interference with the right to freedom of expression under Article 10(1). But it also accepted the UK Government's argument that, because of the sensitive nature of the material in the book, it was better placed than the Court to determine what was appropriate for adolescents within its own jurisdiction. The Court granted it a wide 'margin of appreciation', effectively tolerating the breach on the basis of an argument that quite simply allowed the State to assert cultural particularity.

The margin of appreciation remains a much disputed and widely discussed aspect of the Court's approach. On one view, it represents recognition of State sovereignty and the need to cede jurisdiction on (a) certain issues around which there is little or no European consensus or (b) issues of particular sensitivity to the State in question. On the other hand, the principle presents a dilemma because it can result in the Court side-stepping a difficult domestic issue that requires the objectivity which can only be provided by an international tribunal.

The margin of appreciation in general applies to Articles 8-11, though not exclusively. It is almost always claimed by States parties in a somewhat opportunistic attempt to take advantage of the Court's largesse. In reality, it is infrequently granted by the Court, and then mainly in cases of national security and/or morality.

The principle can represent an impediment to the recognition of children's rights, given that such cases can often be reduced to arguments about the evolving capacities of the child as a rights holder. But it is rarely of significance to gender-related matters because, as we shall see below, though there is a dearth of jurisprudence on issues of gender, those cases that have been decided by the Court make it clear that the Court has little tolerance for arguments based on culture, particularly in the context of women's rights.

In its case law, the Court has demonstrated growing awareness of the gendering of international law, and it has delivered a number of important decisions. In **Aydin v. Turkey** (1997),²⁸ for example, the Court found that the sexual assault and rape of a woman while in police detention amounted to a breach of the prohibition on torture under Article 3. In its judgement, the Court emphasized the gendered nature of the degrading treatment. Similarly, in the recent decision of **Opuz v. Turkey** (2009),²⁹ the Court found breaches of Articles 2, 3 and 14 arising from the failure of the State to protect a woman from the long-term domestic violence that ultimately resulted in her death. The robustness of the judgement, which cited jurisprudence from the inter-American

²⁶ See further, Harris, Warbrick and O'Boyle, op. cit., p. 11.

²⁷ *Handyside v. the United Kingdom* (1979) 1 EHRR. <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=695376&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>

²⁸ *Aydin v. Turkey* (1997). http://www.hrcr.org/safrica/enforcement/aydin_turkey.html

²⁹ *Opuz v. Turkey* (2009), decision of 9 June 2009. <http://www.coe.int/t/dghl/standardsetting/minjust/mju29/Opuz%20v%20Turkey.pdf>



system and from CEDAW, makes it a landmark decision under international human rights law. Its reach and significance are likely to be considerable. For reasons associated with its status as a quasi-Constitutional court, it is arguable that such decisions have as much impact as legislative and standard-setting measures produced by other international organizations.

Programmes on gender equality

In 2005, the COE passed the Recommendation (Rec. [2002] 5) on the protection of women against violence in Council of Europe Member States, and the Steering Committee was charged with supervising its implementation. It circulated a series of questions to Member States, which led to its producing a series of analytical publications on the prevalence of domestic violence within the COE States and identifying strategies to address it.³⁰ This resulted in the establishment of a monitoring framework under which States were requested to report to the Steering Committee every two years.

The report's analysis is both instructive and useful for States and NGOs. In its conclusions, the Committee expressed the view that the 2005 Recommendation is functioning as a common framework for the majority of Member States because it articulates guiding principles and formulates practical challenges without too narrowly defining obligations and procedures.³¹

The impact of this low-key political process can be seen in the report. In 2007, 15 reporting States had given effect to the COE recommendation by establishing National Programmes of Action on VAW (violence against women). By 2008 that number had more than doubled to 32 States. For its most recent report, published in 2008, 40 members of the COE had provided the Steering Committee with the data requested—a high rate of return for an entirely voluntary process, one which in itself evidences the cooperative spirit in which States engage with the COE.³²

The collation of information seems to have been relatively simple. The Steering Committee circulated a detailed questionnaire to States parties. A responsible officer was nominated by the State to complete the information. Aggregated data was sought addressing specific indicators, ensuring a uniformity to the information provided by States parties. A marked improvement was noted between the information provided in 2007 and 2009, not so much in terms of the State meeting its obligations as in terms of the State providing the Committee with solid benchmarks so that it can assess progress.

The Committee reports that it is primarily interested in practical monitoring by means of defining simply measured indicators and by making the questionnaire available online, seeking brief, centrally available data.

The Committee noted that Plans of Action on domestic violence tended, in some States, to be part of overall plans for gender equality, particularly in central and eastern Europe. It has expressed a view that this does not meet the requirements of the Recommendation, which specifically invites States to undertake a dedicated programme of action. Full text of the replies to the Committee are available online, and a table summarizing trends from the replies was annexed to the report.

In 2008, the Steering Committee also produced a report, a comprehensive and far-reaching analytical study, on the minimum standards of support services needed to combat domestic violence.³³ The study aimed to develop consensus on minimum standards for support services, their range and extent and the core principles and practices applicable. It noted that research on support services is not as extensive as that on the prevalence of violence against women, and it has tended to focus on evaluation, mapping existing provisions and establishing promising practice. It sought to focus on the minimum standards that Governments should achieve and implement to meet their obligation to exercise due diligence in preventing acts of violence, punishing them and protecting victims.

³⁰ See *Protecting Women against Violence: Analytical study on the effective implementation of Recommendation (Rec. [2002] 5) on the protection of women against violence in Council of Europe Member States* (2007), www.coe.int/equality/.

³¹ See above, Note 28.

³² See *Protecting Women against Violence: Analytical study of the second round of monitoring the implementation of Recommendation (Rec. [2002] 5) on the protection of women against violence in Council of Europe Member States* (2008), www.coe.int/equality/.

³³ See Liz Kelly and Lorna Dubois, *Combating violence against women: Minimum standards for support services*, Directorate General of Human Rights and Legal Affairs (Strasbourg, Council of Europe, 2008). See also Elina Ruuskannen and Kauko Aromaa, *Administrative data collection on domestic violence in Council of Europe Member States*, Directorate General of Human Rights and Legal Affairs (Strasbourg, Council of Europe, 2008).



After four years of extensive research and consultation with experts, the study identified key themes and overarching principles that should establish the basis of minimum standards achievable by States:

- service providers should operate from a gender-analysis perspective that recognizes gender dynamics and the impacts, causes and consequences of violence against women;
- services should ensure that all interventions prioritize safety, security and dignity of the person;
- service staff should bring specialized knowledge and skill bases to their work;
- services should respect diversity of users and positively engage in anti-discriminatory practices;
- services should advocate and support users and their rights;
- services should ensure that users are familiar with their rights and entitlements;
- users should be involved in the development and evaluation of services;
- services should respect the confidentiality of users; and
- services should be effectively managed.

The minimum standards focused on two levels of services provision:

- standards applicable to all services for all forms of violence; and
- service-specific standards that apply to help lines, advocacy and advice services, counselling, outreach, intervention projects, shelters, rape crisis centres, shelters/refuges, assault referral centres, law enforcement and perpetrators programmes.

As part of the COE's gender mainstreaming programme, under which it seeks to discharge the obligations accepted by Member States under the Programme of Action from the Beijing World Conference on Women (1995), the Steering Committee published *Handbook on gender budgeting*, intended to act as a guide for States to the practice of gender budgeting, presented as a way of linking gender equality policy with macroeconomic policy.³⁴

Children

As noted above, the COE has a specific child-oriented Convention, but it is narrow in focus. Nevertheless, the Court has demonstrated its ability to serve as a creative and effective tribunal for the promotion and protection of children's rights. Over the past three decades in particular, it has developed significant case law in four main areas regarding children:

- corporal punishment under Article 3,³⁵
- juvenile justice under Articles 5 and 6,³⁶
- the right to family life under Article 8,³⁷ and
- the right to identity under Article 8.³⁸

In the absence of a child-specific general Convention, similar arguments apply to those regarding gender. In particular, there are good reasons to advocate issues before the Court, given the proven efficacy of this process.

³⁴ See Sheila Quinn, *Gender budgeting: Practical implementation* (CDEG, 2008) 15, Directorate General of Human Rights and Legal Affairs (Strasbourg, Council of Europe, 2009).

³⁵ See, e.g., the cases of *Tyrer v. the United Kingdom* (1976) 2EHRR 1, in which the Court found that judicial corporal punishment of a 15-year-old boy constituted inhuman and degrading treatment and was in breach of Article 3. In *A v. the United Kingdom* (1998) decision of 2nd September, the Court found a further breach of Article 3 in an instance of parental corporal punishment that arose from the fact the domestic law was not sufficiently precise to protect a child from physical chastisement.

³⁶ See, e.g., *T and V v. the United Kingdom* (1999) 30 EHRR 121, in which the Court found that two 10-year-old boys convicted of murdering a 2-year-old had not had a fair trial because they were tried in an adult Court and were unable to fully participate in their own defence due to the public nature of proceedings.

³⁷ In *P, C and S v. the United Kingdom* (2002) 3 FCR 1, the Court found a breach of the Article 8 rights of a child who was removed from her parents in circumstances that mitigated against reunification.

³⁸ See *Mikulic v. Croatia* (2002), in which the Court found violations of Articles 6 and 8 because a child had been unable to resolve the issue of her paternity due to the putative father's non-compliance with Court orders for DNA testing. The Court found the inability of the domestic court to compel the father to undertake tests left the child in a situation where she did not know her origins, and this was a breach of her right to respect for her private life.

4. ADVANTAGES OF JOINT MECHANISMS

Tension underlies contending approaches to the rights of the child and women's human rights.

Women's rights advocates in particular are eager to avoid an agenda that links women's rights and children's rights generally. They are concerned about reinforcing conceptions of women as being essentially no more than caretakers and homemakers. Further difficulties arise from the primary role of women as mothers and the impact this has on the equality agenda. Children's rights advocates, on the other hand, are focused on promoting a catalogue of rights for the child as rights holder, and need to avoid strategies that can make children seem dependant on others for the implementation of their rights.

An interconnected approach offers advantages. This is especially true in addressing gender-specific 'invisibility' of rights violations. A public-private dichotomy still dominates legal and political discourse regarding the rights of women and girl children, encouraging systematic failures to report or recognize violations. There are also benefits from inter-linking related issues such as the status of girls and their increased vulnerability arising from both age and gender, and their being discriminated against on the basis of gender. A sequential approach may present an effective strategy, in particular for the rights of girl children, and an integrated commission offers that possibility.

The idea that children have human rights now commands broad 'acceptability'. Evidence of this includes the nearly universal ratification of the UNCRC, including by hitherto 'unreachable' States. This is of clear interest to those advocating for women's human rights. The UNCRC is strong on economic and social rights and requires States to take steps beyond the equality agenda, and its language is gender neutral. An approach to the rights of girls that emphasizes the lifelong benefits of realizing their rights under the CRC—particularly with respect to matters of education and health—has a clear knock-on effect for women.

Common areas of interest to women and children include sexual exploitation, trafficking and prostitution. These are areas in which much progress has been made at an international level regarding the protection of children. Women could profit from adapting, or associating their causes with, such measures.³⁹ Linking the rights of women and children benefits both groups, particularly in circumstances where Governments have traditionally introduced programmes for women without considering linkages to children, or have shown a reluctance to promote women's human rights.

In the context of the ECHR, these issues are more matters of strategy than of actual substance. The options for either group are (1) to seek to proliferate additional processes and mechanisms, or (2) to work within the robust mechanism that already exists.

³⁹ See UNCRC Articles 34, 35 and 39, which provide an extensive framework for the protection and reintegration of the exploited child. See also the CRC optional protocol on sale of children, child prostitution and child pornography (2001).

5. KEY PRINCIPLES & LESSONS LEARNED

Among all international human rights treaties, the European Convention is regarded as the most consistently effective. This is mainly because of its relatively simple catalogue of rights and their interpretation by a robust judicial body. In addition, the enforcement of decisions by the Committee of Ministers guarantees a level of compliance unequalled in international law.

Another reason for the Convention's success is that it has remained at the focus of the activities of the COE. And while the COE has a full legislative agenda, it has avoided creating a proliferation of rights processes, a practice common to other regional organizations and to the UN in particular.

In some opinion, the absence of a binding document devoted to the particular needs of women indicates a gap in COE protection. At the same time, however, a compelling case can be made that the rights of women in common with those of other individuals and groups are best served through strategic litigation. The promise of State compliance at the end of any such application must make it a highly attractive and efficacious option. As we have seen, another feature of the Court's approach is that it takes account of relevant treaties and measures in other regions, which in itself provides an opportunity to arrive at common definitions and approaches.

The Court's recent decision in the case of **Opuz v. Turkey** on domestic violence illustrates the strengths of the ECHR. This is something that will likely be applied in other regions and in the domestic Courts of many States across Europe, even outside the jurisdiction of the Court. (It is not uncommon for Court decisions to be cited and relied on in jurisdictions far beyond the reach of the ECHR itself.)⁴⁰ The Opuz decision must also lay to rest any residual concerns that the Court—when addressing issues which expose fundamental structural deficiencies in domestic legal systems that leave women without protection—was insufficiently open to the gendering of its own approach to international law.

Another positive development in the past decade has been the Steering Committee on Equality's elaborate framework of practical and technical programmes. Levels of compliance with this voluntary process are also impressive, and bode well for future Committee efforts.

The COE's success may be partly explained by shared economic and political interests among Member States. But the greatest strength of this system lies in its simplicity.

⁴⁰ See the decision of the South African Constitutional Court in the matter of *Christian Education South Africa v. Minister for Education*, www.concourt.gov.za/judgments/1995/williams.html. See also the decision of the Israel Supreme Court in the matter of corporal punishment of children, which also cited decisions of the ECHR, *Plonit v. Attorney General*, decision of Supreme Court of Israel, January 2000.

6. FREQUENTLY ASKED QUESTIONS

Can the regional mechanism ‘force’ a State to accept their findings and recommendations?

Decisions of the European Court of Human Rights are binding on Member States that are parties to the case under Article 46. Upon finding a violation, the Court will generally make an order for ‘just satisfaction’. Supervision of its implementation is overseen by the Committee of Ministers, the political body of the Council, which regularly reviews the measures a State has taken until it is satisfied that it has given effect to the Court’s judgement. This system is effective, and results in a specific and general remedy in the vast majority of cases. It is unique under international law because of the high levels of compliance by States parties.

Is there a system/mechanism to facilitate inter-regional cooperation by the African, American and European human rights systems?

There is no formal process for such cooperation. The practice of the European Court of Human Rights has been to embrace developments in other regional and universal processes to the extent that the Court frequently cites the case law and legislative measure from other such bodies in its own decision-making. This cross-fertilization of approaches to human rights between regional and universal bodies has the effect of synchronizing the working methods and standards imposed by the various treaty-based processes.

What is the relationship between the UN mechanism and the regional system? How do the regional mechanisms work to advance women’s human rights without duplicating international mechanisms (UN) while reinforcing and strengthening international human rights law and principles?

The Council of Europe has a close and cooperative working relationship with the United Nations. Members of the COE are enthusiastic participants in the UN human rights system and have a record of early ratification of its treaty mechanisms. This is reflected in the fact that, in response to UN actions, the Council itself has developed programmes on both gender and children’s rights that mirror the UN activities. For example, the COE programme on the Beijing Platform for Action 1995 and its framework for the prevention of domestic violence were clearly initiated in response to the UN Declaration on VAW and the work of the Special Rapporteur on VAW. The COE closely tracks the work of the UN on gender, and complements it by utilizing established links between its Member States to create regional processes, as it is required to do under Chapter 8 of the United Nations Charter.

What role can civil society play in the implementation of the recommendations of the Regional Commission, its Special Rapporteur, etc.?

The Court allows NGOs to submit third-party interventions in cases where the subject matter is relevant to the work of the organization. Such briefs are commonplace, and greatly inform the work of the Court, in particular, because NGOs can often provide detailed research and information regarding comparative approaches to similar issues within other international or domestic process. NGOs also lobby on both the national and regional levels for the development of processes.

Were assertions of relativist human rights standards (e.g. debates regarding cultural or region-specific values) expressed when Governments were drafting regional human rights instruments. If yes, how has this issue been resolved?

This has not been a factor in the context of the ECHR or the COE.

What is the added value of a regional system on women’s rights?

A regional human rights system in any context considerably enhances the protection and promotion of rights, as is evidenced by the enormous success of the ECHR. It has specific advantages, including proximity to the States parties and for applicants in the case of individual petitions. It harnesses regional cooperation in such other fields as the economic and political, and uses established frameworks and channels to promote the rights of particular groups and issues. As is evidenced by the COE initiative on domestic violence, smaller-scale regional projects allow for more regular focused reporting and strategizing between States and regional bodies regarding identification of effective means for domestic implementation.



What resources are necessary?

The Committee of Ministers determines the budget of the organization, which is set in accordance with data on population and GDP under a formula set by the Committee in Resolution (94) 31. The priorities set by the Committee in terms of expenditure are human rights, democracy and the rule of law. The Secretary General is the chief administrative officer of the organization and is head of the Secretariat. The Secretariat is divided into Directorates similar to government departments that are responsible for different aspects of the Council's work.

Can you give examples of good practices regarding how States have been persuaded to implement Regional Commission recommendations?

A recent example of good practice is the Second Analytical Study of the Steering Committee on Equality Between Men and Women (CDEG) on the implementation of the Recommendation on the Elimination of Domestic Violence, whereby the number of States that had completed National Programmes of Action had increased from 15 to 32 States in two years.

Can you give examples of good practice regarding the role of the Regional Commission in providing promotional, awareness raising and technical assistance to States?

There is no regional commission within the European system, but the Steering Committee on Equality Between Men and Women (CDEG) might be considered a cognate body. Its April 2009 study on gender budgeting is an example of good practice regarding both awareness-raising and technical assistance. It is intended to serve as a framework for States to develop gender awareness in the development of their macroeconomic policies.

Part 2

The European regional legal instruments: Protection of gender equality and the rights of children

1. EUROPEAN CONVENTION ON HUMAN RIGHTS

This part focuses more on the European Court of Human Rights (hereafter the 'Court'). The real strength of the ECHR lies in individual petitions, whereby claimants can challenge breaches by Member States. This mechanism has provided opportunities for scrutinizing the substantive rights contained in the ECHR, which has in turn generated a vast body of case law. Our analysis of the legal protection of rights within the region, as they apply generally or as they affect a particular group, thus focuses on the Convention, its substantive guarantees and their interpretation by the Court.

The Council of Europe has sought to promote the rights of women and children by establishing parallel political processes and initiatives. In particular, the Council itself has promoted women's human rights through strategic programme initiatives. These accomplishments were reviewed in Part 1. This Part instead focuses on legal protection of the rights of women and children within the Council of Europe.

While the Council has made progress in its protection of the rights of both groups through its group-specific mechanism, the Convention remains the primary instrument for promoting rights, and the Court is the body charged with ensuring effective protection of rights.⁴¹ Whereas Part 1 presented the structure and operating methods of the Court in some detail, this Part instead reviews the Court's approach to legal protection of women's and children's human rights.

European Court of Human Rights

Over the past decade, the ECHR through the work of the Court has developed ground-breaking jurisprudence protecting women's and children's rights. The potential impact of the Court on the protection of rights for these two groups is immense. In part, this is due to the Court's evolutive and dynamic interpretation of Convention provisions.

The ECHR pre-dates universally binding, group-specific treaties protecting the rights of women and children such as the Convention on the Elimination of Discrimination Against Women and the Convention on the Rights of the Child. Well established as an adjudicating body by the time these treaties came into force, the Court nevertheless demonstrated its willingness, when considering applications in which matters of gender or children's rights were at issue, to import the substantive guarantees contained in those treaties into its own decision-making.

Two points regarding the Court noted earlier should be reiterated here: (a) the Court has been in operation for longer than any other international human rights tribunal, in the process amassing an unrivalled body of case law; and (b) it commands the highest Member-State compliance levels of any international body. In that sense, it may be described as the world's most successful international court.

The success of the Court is linked to its regional status. This is because Member States share common political values and, historically, high levels of cooperation.

Content of the Convention

As noted in Part 1, the ECHR focuses primarily on civil and political rights. For its part, the Court applies an expansive interpretation of ECHR provisions. In this spirit, it has often revisited the parameters of the rights and reinterpreted the nature of State obligations in light of international legal trends and developments. Thus, as the universal mechanisms have more surely acknowledged gender issues and their advocated mainstreaming, the Court has itself become more stringent in scrutinizing decisions concerning women's human rights.

The ECHR includes neither gender- nor child-specific articles. Clearly, however, certain rights are of greater or lesser importance to both groups. The protection of the right to respect for private life contained in Article 8(1), for example, has acquired great significance in cases regarding women's reproductive freedom. In the past decade, the Court has also demonstrated greater recognition of the way in which issues of gender equality, in and of themselves, affect such matters as domestic and sexual violence, availability of State benefits, and immigration policies.

⁴¹ For the operation of the Court generally, see Harris, O'Boyle and Warbrick, *The law of the European Convention on Human Rights*, 2nd ed. (Oxford, 2009).

2. WOMEN'S HUMAN RIGHTS UNDER THE ECHR

An analysis of ECHR case law reveals that the Court has made decisions of real importance to the protection of women's rights.⁴² Those decisions fall into three broad areas:

- gender equality and non-discrimination under Article 14;
- reproductive freedom under Article 8(1) and Article 10; and
- domestic violence under Articles 2 and 3.

Gender equality and non-discrimination under Article 14

The European Court has achieved a strong record on issues of discrimination generally, and has developed a robust body of related jurisprudence. Two main provisions of the Convention are relevant here: (a) Article 14 provides specifically that the rights specified in the Convention are to be secured without discrimination on the basis of range of classifications, including sex; and (b) Protocol 12 prohibits discrimination generally.⁴³ In addition, Article 5 of Protocol 7 guarantees equality between spouses in the private-law area of decision-making regarding their children.

Article 1 of Protocol 12 requires States to prohibit discrimination quite generally. International tribunals interpret that prohibition as entailing a positive obligation to achieve and promote equality. Thus the Preamble to Protocol 12 refers to the need for 'equal treatment before the law and equal protection of the laws',⁴⁴ and the Explanatory Report to the Protocol equates equality with the principle of non-discrimination.⁴⁵ The Report specifically links the definition of discrimination and its parameters to the established case law of the Court regarding Article 14.

Given the increased focus on the importance of gender equality, both within Member States and internationally by the Council itself, it is unsurprising that the Court has strongly criticized Member-State policies and decisions that undermine this goal. The Court has consistently found that equality of the sexes is a major objective among Council of Europe Member States.⁴⁶ It has also recently acknowledged that achieving gender equality is a key underlying principle of the Convention.⁴⁷

Thus, even in its earliest cases, the Court required compelling reasons to justify treating men and women differently. Its case law on gender equality has developed incrementally, and now reflects the approach not just of other international tribunals but also those of the UN Human Rights Committee.

The Court's approach to gender-equality cases includes striking features. As noted above, the Court views discrimination based on gender to be a particularly serious breach of the Convention. In the case of *Abdulaziz, Cabales and Balkandali v. the United Kingdom*,⁴⁸ the Court considered a UK immigration policy provision that allowed men to obtain residence visas for their non-resident spouses but did not extend the same right to women. Finding herein a violation of the prohibition on discrimination under Article 14 as regards the right to family life under Article 8(1), the Court stated the following:

"The advancement of equality of the sexes is today a major goal in the Member States of the Council of Europe. This means that very weighty reasons would have to be advanced before a difference in treatment on the ground of sex could be regarded as compatible with the Convention."

⁴² See further: I. Radicic, 'Gender and equality jurisprudence of the European Court of Human Rights'. Critical review of jurisprudence: An occasional series, 19 *EJIL* (2008), p. 841.

⁴³ Protocol No/ 12 provides for a free-standing non-discrimination right. Article 1 reads:

1. The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.
2. No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph

⁴⁴ The phrase 'equal protection of the laws', also used in other international human rights instruments such as the International Covenant on Civil and Political Rights (ICCPR), has been interpreted as securing equality of results, rather than equal treatment. See M. Novak, *UN Covenant on Civil and Political Rights — CCPR commentary* (N.P. Engel, Kehl am Rhein, 1993).

⁴⁵ While the Explanatory Report with the Commentary to the Protocol is not an instrument of authoritative interpretation, it will likely influence the interpretation of the Protocol by the Court (n. 417).

⁴⁶ See *Abdulaziz, Cabales and Balkandali v. the United Kingdom* (1985), paragraph 78.

⁴⁷ See *Leyla Sahin v. Turkey* (2005), paragraph 115.

⁴⁸ *Abdulaziz, Cabales and Balkandali v. the United Kingdom* (1985) 7 EHRR 741.



The Court's approach in that case was significant. It not only sought to resolve the complaint as it related to the individual applicants, it also located its own analysis of the legal issues within the wider context of the policy goals regarding gender in the Council of Europe itself and among its Member States.

In **Unal Tekeli v. Turkey**,⁴⁹ the Court considered a Turkish law that required a woman to change her surname, upon marriage, to that of her husband. The court concluded that this amounted to a breach of her right to respect for private life under Article 8(1), and was discriminatory under Article 14. The Court acknowledged the importance and relevance of cultural traditions regarding a joint family name to family unity. At the same time, the Court recognized the fact that a consensus had emerged, among the Member States, in favour of allowing a spouse to choose whether she would retain her maiden name on marriage.

Another striking feature of the Court's approach to gender equality is how it has interpreted relevant provisions creatively, thereby allowing itself to accept complaints regarding rights that are essentially economic and social in character. Thus, it has considered claims regarding the availability of State benefits and social security, matters that are essentially economic and social in character and, as such, might appear to fall outside the scope of the Convention. In **Wessels-Bergervoet v. the Netherlands**, for example, the Court found a violation of Article 14 where the pension entitlement of a wife who was a homemaker was entirely dependant on her husband's domiciliary presence in the Netherlands.⁵⁰ In this, the Court reaffirmed the central importance Member States have given, in recent years, to eliminating measures that place women in economically disadvantaged situations.

Reproductive freedom and self-determination

The Court has also developed interesting jurisprudence regarding reproductive freedom and self-determination. A review of its case law in this area clearly shows it has sought to avoid direct clashes with States regarding the sensitive issue of abortion. Although it has not always been able to avoid this, the Court has been reluctant to resolve direct attacks on the legality of abortion law based on Article 2 of the Convention, which protects the right to life. Thus, in the case of **Vo v. France** the Court found only that termination of a pregnancy in and of itself did not amount to a violation of the right to life of a foetus under Article 2.⁵¹ It concluded that, in the absence of a medical or legal consensus among Member States regarding the viability of a foetus, the Convention could not be read in such a way that it imposed an obligation on States to protect the right to life of a foetus.

Decisions about women's reproductive freedom have been considered, with reference to Article 8(1) of the Convention,⁵² under the rubric of 'private life'. For example, in **Tysiac v. Poland** the Court found the State had failed to discharge its legal obligation to respect the applicant's right to respect for her private life, in particular her reproductive freedom, by proactive measures. The applicant had been prevented from terminating her pregnancy despite the fact this condition seriously endangered her health.⁵³ In this case, the Court decided that the Convention could not be read as providing a right to abortion. Nevertheless, the right to respect for private life (Article 8) did require that, where abortion was lawful within the State, it was to be available as a real possibility rather than one which merely existed in theory. The Court has repeatedly found that a decision about whether or not to have children falls within the scope of private life.⁵⁴

In **Evans v. the United Kingdom**,⁵⁵ the Court considered an application by a woman who wanted to use frozen embryos conceived with her husband by means of in vitro fertilization, despite his refusal to give consent following marital separation. The case was complicated by the fact that the woman had suffered an illness rendering her incapable of bearing a biological child, other than by using one of these frozen embryos. While the Court recognized the issues related to the reproductive freedom of the applicant, it did not view the case as having any particular gender dimension, given that the facts also involved a potential father's right not to reproduce. Given that the case involved the competing interests of two rights-holders, the Court rejected the claim that the applicant's desire to become a parent could trump the contrary desire of her former husband. It concluded, therefore, that the balance struck in the domestic courts between the competing rights of the potential parents did not, of itself, constitute a violation. The case raises interesting points, partly because of the reproductive possibilities presented by new technologies, but also because it does not in itself include any particular gender consideration. The applicant had argued that, owing to a mother's more direct involvement

⁴⁹ *Tekeli v. Turkey*, judgement of 16 November 2004.

⁵⁰ *Wessels-Bergervoet v. the Netherlands* (2001) 38 EHRR 793.

⁵¹ *Vo v. France* (2004) 40 EHRR 259.

⁵² See further, Harris, O'Boyle and Warbrick, *The law of the European Convention on Human Rights*, 2nd ed. (Oxford University Press, 2009), p. 367.

⁵³ *Tysiac v. Poland* (2007) 45 EHRR 235.

⁵⁴ *Evans v. the United Kingdom* (2007) 45 EHRR 947.

⁵⁵ *Ibid.*

in the bearing of children, her reproductive rights should be given greater weight than that of the father. This argument, however, did not find favour with the Court.

Another interesting example of the Courts approach to women's reproductive freedom and abortion is found in the case of **Open Door Counselling and Well Woman Centre v. Ireland**.⁵⁶ The application challenged a ban on the publication of information within Ireland that might help a woman to obtain an abortion outside that State's jurisdiction. The Court found a violation of the right to freedom of expression under Article 10 of the Convention, concluding in particular that a blanket application of the prohibition was too broad and disproportionate.

A review of the case law on reproductive freedom and self-determination from a gender perspective clearly shows that the Court has made related decisions of some importance. Arguably, however, the Court has not sufficiently recognized the gender dimension in these matters. Protective mechanisms are essentially litigation based; they rarely include the capacity to examine economic and social factors that underpin structural deficiencies in societies that perpetuate discrimination against women. Nonetheless, the recent decision in *Tysiak* (above), in particular, signals the Court's willingness to find violations of the Convention even in the sensitive area of access to abortion.

Violence against women

Since the Vienna World Conference and Declaration of 2003, the Council of Europe has introduced a plethora of standards-setting measures addressing the issue of domestic violence. The Court, meanwhile, has made decisions regarding State obligations which interpret the substantive rights in the convention to require the State to prevent, investigate and provide remedies for violence against women. Related case law, meanwhile, has established that both Article 2 (right to life) and Article 3 (prohibition on torture, inhuman and degrading treatment) include broad and far-reaching procedural obligations that reflect the 'due diligence' principles developed in the Inter-American Court of Human Rights. The Court had developed its case law in this area over a decade that culminated, in 2009 in **Opuz v Turkey**, a highly significant decision on domestic violence.

The Court's case law on violence against women can be broadly divided into two categories: cases considering violence imputable to the State; and cases of abuse or maltreatment by an intimate. In both circumstances, the Court has repeatedly emphasized, gender-based violence presents an especially abhorrent breach of the Convention, and the relevant obligation imposed on the State requires strict compliance.

In **Aydin v. Turkey**,⁵⁷ the Court found that the rape of a woman in police custody amounted to torture, and was thus a breach of Article 3. The decision is distinguished by the robustness of the language used by the Court, and for its clear and unequivocal condemnation of the use of sexual violence on women in custody by agents of the State:

"Rape of a detainee by an official of the State must be considered to be an especially grave and abhorrent form of ill-treatment given the ease with which the offender can exploit the vulnerability and weakened resistance of his victim. Furthermore, rape leaves deep psychological scars on the victim which do not respond to the passage of time as quickly as other forms of physical and mental violence. The applicant also experienced the acute physical pain of forced penetration, which must have left her feeling debased and violated both physically and emotionally."

This characterization of rape as torture is immensely significant in a gender context, since the Court has repeatedly said that torture is a barbaric form of ill-treatment to which a special stigma is attached, emphasizing the serious nature of an abuse to which women are particularly vulnerable.

In **MC v. Bulgaria**,⁵⁸ the Court found a violation of Article 8 in circumstances where domestic law required a female rape victim to prove she has physically resisted her attacker, thus demonstrating her unwillingness to engage in sexual conduct. Interestingly, in *Aydin v. Turkey* the Court found a breach of the prohibition on torture arising from the failure to provide a remedy when she was raped in police custody. It is likely that the different approaches in these two cases reflect different ways in which the public and private spheres impact on the Court. In the *Aydin* case, the Court especially condemned the direct involvement of state agents.

⁵⁶ *Open Door Counselling v. Ireland* (1993) 15 EHRR 244.

⁵⁷ *Aydin v. Turkey* (1997) 25 EHRR 251.

⁵⁸ *MC v. Bulgaria*, judgement of 4 December 2003.



In its recent **Opuz v. Turkey** decision,⁵⁹ the Court found a violation of Article 3 in circumstances where the applicant had been subjected to a sustained campaign of harassment and violence by her partner. The violence against the applicant culminated in the death of the applicant's mother, which in itself gave rise to a breach of her right to life under Article 2. The Court also found that the State had breached the prohibition on discrimination on the basis of sex, given the way in which had failed to protect the applicant from violence and failed to investigate and punish acts of violence that had occurred. In highlighting the pernicious effect of violence against women and the obligation of State institutions, including Courts, to investigate domestic violence and provide effective remedies, the Court stated the following:

“The general and discriminatory judicial passivity in Turkey, albeit unintentional, mainly affected women, the Court considers that the violence suffered by the applicant and her mother may be regarded as gender-based violence which is a form of discrimination against women. Despite the reforms carried out by the Government in recent years, the overall unresponsiveness of the judicial system and impunity enjoyed by the aggressors, as found in the instant case, indicated that there was insufficient commitment to take appropriate action to address domestic violence.”

Opuz v Turkey is a landmark decision in the development of the Court's case law on gender. It also provides a clear framework for States parties regarding obligations under the Convention in protecting women from domestic violence. The Council of Europe, which has supported other regional and universal standard-setting processes in this regard, has thus welcomed the decision.

⁵⁹ *Opuz v. Turkey*, judgement of 9 June 2009.

3. PROTECTION OF CHILDREN UNDER THE ECHR

Part 1 noted⁶⁰ that the ECHR does not include a child-specific provision (unlike, e.g., Article 24 of the International Covenant on Civil and Political Rights or Article 19 of the American Convention on Human Rights). No lower age limit for potential beneficiaries of the Convention is specified, however, and children are protected by these rights to the same extent as are adults.

The Court also refers to other texts and treaties as indicative of an emerging consensus, and it can rely as being persuasive on Articles of the Convention on the Rights of the Child (CRC), and the concluding comments of its committee. Clearly, then, the ECHR can serve as a supplementary mechanism for the protection and promotion of children's rights, developing CRC principles where the CRC Committee itself has not yet taken the opportunity to develop its own jurisprudence.

The Court's tradition of upholding the rights of children pre-dates the CRC. Interestingly, though perhaps unsurprisingly, children most often appear as co-litigants to claims filed by their parents or carers. Arguably, this is one area in which ECHR potential for advancing the rights of children has not been realised.

The claims that have come before the Court have advanced the rights of the child in four key areas:

- right to respect for family life under Article 8(1);
- protection of children from corporal punishment under Articles 3 and 8;
- rights of children in the justice system; and
- right to education.

Right to family life

The Court has always taken a dynamic approach to the protection of the child in the family, and has recognized that relationships between parents and children are protected, as are those between siblings and those between children and other family members such as grandparents.

- In **Marck v. Belgium**,⁶¹ an early case, an unmarried mother and her child succeeded in a claim that a failure to legally recognize their relationship amounted to a violation of Articles 8 and 14. This extends the concept of the family to include the non-marital family. In the decision, the Court referred to the Convention as a 'living instrument', one that required dynamic interpretation of its provisions. It also noted the positive obligation of the State vis-à-vis respect for family life.
- In **Johnson v. Ireland**,⁶² it expressed further recognition of the importance of the blood tie. The decision upheld the right of a child to be legally recognized as the child of her father, who was not married to her mother. The Court found the ECHR requires the State to provide both de jure and de facto protection for the family relationship.
- The Court has consistently acknowledged the weight of the 'blood tie'. Thus, **Keegan v. Ireland**⁶³ found that family life existed between parents and biological children from the moment of birth, even in circumstances where a child had no other meaningful relationship with a parent. A blanket policy that excluded unmarried fathers from the process of adoption contravened Articles 8 and 6, in that the exclusion of parents from the life of the child could only be justified in exceptional circumstances.
- In **Berrehab and Koster v. the Netherlands**,⁶⁴ the Court found a violation of Article 8 when the State proposed to deport a non-residential father whose immigration status had been revoked. This, the Court argued, would unjustifiably interfere with the father's family life with his child, finding that family life is not extinguished if parents and children no longer live together. This case provides evidence of the premium the Court has placed on children's rights, sometimes defending them even when this has meant venturing into sensitive areas such as State regulation of immigration.

⁶⁰ Section 3, 'Children'.

⁶¹ *Marck v. Belgium* (1979) 2 EHRR 30.

⁶² *Johnson v. Ireland* (1986) 9 EHRR 203.

⁶³ *Keegan v. Ireland* (1994) 3FCR 165.

⁶⁴ *Berrehab and Koster v. Netherlands* (1988) 11EHRR 322.



The Court has also developed robust and child-centred case law around the rights of children, following a marriage separation, to maintain relationships with both parents.

- On occasion, that has been characterized more as a right of the parents than of the children, e.g. in **Hokkanen v. Finland**,⁶⁵ which established the ‘right of a parent to have measures taken with a view to his or her being reunited with the child and an obligation for the national authorities to take such action’.

Article 8 provides clear protection for both parents and children against State intervention in the family, and in particular regulates the removal of children from parents. The Court has had to negotiate the competing interests of three rights holders: the family unit, the parents and the child. State intervention is clearly needed to protect the rights of the latter. Case law regarding the removal of children from parents by the State has introduced the principle that, where the State is required to balance the rights of the child against those of the parent, the best interests of the child will prevail.

ECHR case law expresses a principle that the rights of parents will always be trumped by the best interests of children. Strict procedural requirements also protect the rights of the parents, however, and from the outset it has been assumed that the rights of the parents and the child coincide. There is a strong presumption that children belong with the parents, and that any removal requires clear and cogent reason, with the evidential burden on the State. The Court has established that removal is a last resort, and is temporary, aiming at reunification of the child with its birth family. Where children are separated from parents, relationships between children and other family members are to be preserved by way of contact.

- The Court’s robust child-centred approach in this regard is evident in **Johansen v. Norway**,⁶⁶ where children were removed from their parents and the Court found an overriding obligation under Article 8(1) to work towards reunification as swiftly as possible, while at the same time protecting the best interests of the child. Furthermore, it stated: In carrying out this balancing exercise, the Court will attach particular importance to the best interests of the child, which, depending on their nature and seriousness, may override those of the parent.
- The Court has also shown reluctance, e.g. in **K and T v. Finland**,⁶⁷ to approve the removal of a child from its parents at birth. Any removal of the child from the parents, the Court found, must be done in a way that does not destroy the natural bond, and the State must consider the long-term effects. Under Article 8, furthermore, there should not be a presumption in favour of permanent separation, and it must be recognized that it is particularly important for very young children to maintain the family ties. The Court found that removal of a child at birth required exceptional justification. Further, there must be an immediate risk to the child, and, if removal is not supported by relevant and sufficient reasons, removal will breach Article 8.⁶⁸
- **Z v. UK** produced an interesting child-centred decision, with the Court concluding that Article 3 was violated where the State had failed, despite being aware of the difficulties, to intervene to remove children from abusive and neglectful parents.⁶⁹ Failure to act to protect the children amounted to a violation.

Corporal punishment

The European Court has played a leading role in developing international consensus regarding the prohibition of corporal punishment for children.

- As early as 1978, in the case of **Tyrer v. the United Kingdom**,⁷⁰ the Court decided that imposing judicial corporal punishment on a 15-year-old boy amounted to a violation of his Article 3 rights. The humiliating nature of the punishment amounted to institutionalized violence.
- In **Campbell and Cosans v. the United Kingdom**,⁷¹ it found that a policy of corporal punishment in a public school, where a parent had a philosophical objection to physical punishment of the child, could breach the Convention. In that case the breach was of the parents’ right under Article 2, Protocol 1, to have their child educated in accordance with their religious and philosophical convictions. Curiously, the decision did not recognize the child, as such, as the real victim in such circumstances.

⁶⁵ *Hokkanen v. Finland* (1996) 1 FLR 289, paragraph 55.

⁶⁶ 23 EHRR 33 (1996).

⁶⁷ *K and T v. Finland* ([2001]) 2FLR 707.

⁶⁸ See also *P, C and S v. the United Kingdom* (2002) 3 FCR 1.

⁶⁹ *Z v. the United Kingdom*, judgement of 10 May 10th 2001.

⁷⁰ *Tyrer v. the United Kingdom* (1978) 2 EHRR 1.

⁷¹ *Campbell and Cosans v. the United Kingdom* (1982) 4 EHRR 293.

- In **A v. the United Kingdom**,⁷² the Court found a violation of Article 3 where a child was beaten by his stepfather. The domestic law, which allowed parents to use ‘reasonable chastisement’ as a defence against a charge of assault, was insufficiently precise to protect children from maltreatment.

The influence of the Court in this area cannot be underestimated. Within Council of Europe Member States, largely owing to the approach of the Court, either judicial or educational corporal punishment have been illegal for some years. Court decisions have also been cited and informed judgements by domestic courts outside Europe, e.g. in Israel, Namibia and South Africa.⁷³

Juvenile justice issues

The Court has also had significant impact on the protection of the rights of minors in conflict with the law. (Articles 5 and 6 have particular relevance, in this regard.) The Court has established that fair trial guarantees are as relevant and important for children as they are for adults, and it has emphasized the centrality of due process in decisions that may lead to children being deprived of their liberty.

- In **Hussain v. the United Kingdom**,⁷⁴ the Court found a violation arising from the detainment of a child without a tariff being set for release. This violated Article 5(4), which says a person must have the opportunity to challenge the legality of their detention.
- In **T and V v. the United Kingdom**,⁷⁵ the Court found a violation of the same provision, where the tariff was fixed by a politician on the recommendation of the trial judge, and resulted in indefinite detention. A clear violation of fair trial requirements under Article 6(1) was also found, where the child defendants, unable to follow the complex evidential process, had been unable to participate in their own defence.
- **Bouamar v. Belgium**⁷⁶ concluded that detention must be for the purpose stipulated in the text of the Convention, but that, in this case, the State detained a 16-year-old juvenile on repeated secure orders in a prison-like facility while providing no education—a clear violation of Article 5(1) (d), which allows the State such detainment of children only for the purposes of educational supervision.

The case law on juvenile justice demonstrates again that the Court is receptive to the protection of children’s rights in relation to all rights contained in the Convention. The Court’s decisions very often refer to the provisions of the UN Convention on the Rights of the Child, and the well-reasoned and expansive judgements provide a comprehensive analysis of the legal parameters of rights common to both the ECHR and the UNCRC. These judgements have important impacts. Not only they are binding between the parties to a particular case, they are generally followed by all Member States of the Council of Europe. Thus, as its case law on corporal punishment also demonstrated, the Court can, through its decisions, influence legal protection of rights throughout the region.

Education

The Court has made important decisions regarding the right to education under Article 2 of Protocol 1. It has focused on the content of education, rather than the issue of access to education.

- Thus in **Kjeldsen, Busk Madsen and Pederson v. Denmark**⁷⁷ the Court considered a domestic policy under which children were provided with compulsory sex education in State schools. The applicants were parents who objected to such education on religious grounds. The Court decided that the sex education was objective and neutral, and that, in any event, parents with blanket objections could send their children to private schools.

⁷² *A v. the United Kingdom*, decision of 23 September 1998.

⁷³ See e.g. *Ex parte: Attorney General, In Re: Corporal Punishment by Organs of State* (SA 14/90) 1991 NASC 2; 1991 (3) SA 76 (NmSc) 5 April 1991; *Christian Education South Africa v. Minister of Education*, decision of 18 August 2000; Israel Supreme Court, Criminal Appeal 4596/98 *Plonit v. A.G.* 54(1) P.D.

⁷⁴ *Hussain v. the United Kingdom* (1996) 22 EHRR 1996 1.

⁷⁵ *T and V v. the United Kingdom* (1999) 30 EHRR 121.

⁷⁶ *Bouamar v. Belgium* (1988) 11 EHRR 1.

⁷⁷ *Kjeldsen, Busk Madsen and Pederson v. Denmark* (1976) 1 EHRR 711.



Protection of children's rights: Other legal mechanisms

Two other significant legal mechanisms address the protection of children's rights within the Council of Europe.

- **Convention on the Exercise of Children's Rights (ECECR).** Considered in detail in Part 1,⁷⁸ the ECECR focuses on the representation of children in judicial proceedings, especially the need to ensure that children's views are solicited and given due weight. It is not a self-executing treaty, as such. It does not require States parties to take measures to achieve the broadly stated aims of the Convention within their domestic legal and administrative structures. Given that that it is confined to family proceedings, its impact has been limited, and in many instances domestic law goes further than the Convention in terms of protection.
- **Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse.**⁷⁹ The catalyst for this Convention was the passing of an optional protocol to the UN CRC addressing the same issue. The two main aims of the Convention are stated in Article 1: preventing the sexual abuse and exploitation of children; and providing protection for child victims. The Convention is largely programmatic in nature, inasmuch as it requires Member States to protect against exploitation and abuse through such measures as awareness-raising among children and training for professionals working with children.⁸⁰ The Convention does detail these measures, however, and requires States parties to establish coordinated multi-agency and multi-disciplinary programmes and strategies to protect children and to meet the needs of child victims.⁸¹ Article 39 provides for the setting up of a supervisory committee of the parties, to be convened by the Secretary General of the COE within one year of the Convention coming into force (sufficient ratifications are expected by July 2010). Its role is to oversee implementation and strengthen cooperation between Members. In due course, it is to establish its own rules of procedure.

The Council of Europe does apply a coordinated strategy for the protection of children's rights. Following the Third Summit of Heads of State and Government for the Council of Europe in Warsaw in 2005, the Council established a dedicated programme focusing on the protection of children from violence and on the promotion of children's rights generally. The programme is policy oriented, assisting decision-makers and national agencies with policy design and implementation of national strategies to promote the rights of children generally. To these ends, it concentrates on awareness-raising regarding the ECHR, the European Social Charter, and the two dedicated COE children's-rights Conventions.

⁷⁸ Section 1. See also Caroline Sawyer, 'One step forward, two steps back – The European Convention on the Exercise of Children's Rights', *Child and Family Law Quarterly* 151 (1999) 111.

⁷⁹ Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse Lanzarote, 25.X.2007. The Convention is expected to enter into force 1 July 2010.

⁸⁰ See generally explanatory report at <http://conventions.coe.int/Treaty/EN/Reports/Html/201.htm>.

See in particular Article 5 on the recruitment, training and awareness-raising of persons in contact with children, and Article 6 on the education of children.

⁸¹ See Article 10 on national measures of coordination and collaboration.

4. THE ROLE OF REGIONAL SYSTEMS FOR THE PROTECTION OF RIGHTS

Chapter 8 of the UN Charter requires States parties to develop regional mechanisms and organizations within which States can cooperate to achieve the aims and purposes of the UN. Regional mechanisms for the promotion and protection of human rights draw their authority from Chapter 8 of the UN Charter and the provisions of Article 1(3), which commits the organization to the promotion and protection of rights.

Regional organizations have obvious advantages in promoting human rights. States parties within regions, for one thing, often share political values and history. On a practical level, self-interest in regional cooperation can result in more effective working systems and mechanisms. Thus, effective human rights mechanisms have been established by both the Organization of American States and by the Organization of African Unity, as well as by the Council of Europe.

Since the Vienna World Conference of 1993, regional systems have tended to adopt what has been the UN pattern, on a global level, of establishing thematic and group-specific rights mechanisms. The European region, however, has faced a dilemma: whether to create parallel institutions and mechanisms for the protection of particular groups, or instead to apply existing structures built around the European Convention and the Court. The Member States of the Council have chosen the latter option.

5. KEY LESSONS

1. The COE case study shows how a dedicated and relatively narrowly constructed legal instrument such as the ECHR can provide a highly successful platform for promoting and protecting human rights.
2. The most important factor in the ECHR's overall success has been the Court's role as a strong supervisory mechanism. This experience suggests the value of a relatively uncomplicated judicial model for supervision and an approach to rights protection that mirrors the structure of national law among most Member States. A robust court of this type, operating in this way, provides a clear model for supervision and transparent decision-making. As part of this, the model imposes limits on the ambiguities and legal manoeuvring that sometimes characterizes relations between States and quasi-judicial supervisory bodies.
3. The Court's jurisdiction is compulsory, so States cannot opt in and out in the way other international supervisory mechanisms may permit. The ECHR requires an all-or-nothing approach—States parties are either fully involved or else they are not party to the process.
4. The Council of Europe provides political support. This gives States incentive to comply with decisions of the Court, knowing that failure to do so can lead to protracted and embarrassing deliberations on the part of their political peers in other Member States.
5. In seeking to promote and protect the rights of women and children, the Council has taken, to some extent, a *laissez-faire* approach. Nevertheless, in legal terms the Court has made significant and far-reaching decisions that have reshaped the gender equality landscape within the Council. At the same time, innovative Court decisions have improved awareness and understanding among Member States of their international obligations to children.
6. This paper, has described, on the one hand, a coordinated approach involving policy measures and soft-touch resolutions, and, on the other, the more hard-hitting approach of the Court. This combination is proving effective, and it provides a model that other regional mechanisms can adopt and adapt to their own contexts.

Convention for the Protection of Human Rights and Fundamental Freedoms

213 U.N.T.S. 222, entered into force Sept. 3, 1953, as amended by Protocols Nos. 3, 5, 8, and 11 which entered into force on 21 September 1970, 20 December 1971, 1 January 1990, and 1 November 1998 respectively.

Rome, 4.XI.1950

“The text of the Convention had been amended according to the provisions of Protocol No. 3 (ETS No. 45), which entered into force on 21 September 1970, of Protocol No. 5 (ETS No. 55), which entered into force on 20 December 1971 and of Protocol No. 8 (ETS No. 118), which entered into force on 1 January 1990, and comprised also the text of Protocol No. 2 (ETS No. 44) which, in accordance with Article 5, paragraph 3 thereof, had been an integral part of the Convention since its entry into force on 21 September 1970. All provisions which had been amended or added by these Protocols are replaced by Protocol No. 11 (ETS No. 155), as from the date of its entry into force on 1 November 1998. As from that date, Protocol n° 9 (ETS No. 140), which entered into force on 1 October 1994, is repealed and Protocol n° 10 (ETS No. 146), which has not entered into force, has lost its purpose.”

The governments signatory hereto, being members of the Council of Europe, Considering the Universal Declaration of Human Rights proclaimed by the General Assembly of the United Nations on 10th December 1948;

Considering that this Declaration aims at securing the universal and effective recognition and observance of the Rights therein declared;

Considering that the aim of the Council of Europe is the achievement of greater unity between its members and that one of the methods by which that aim is to be pursued is the maintenance and further realisation of human rights and fundamental freedoms;

Reaffirming their profound belief in those fundamental freedoms which are the foundation of justice and peace in the world and are best maintained on the one hand by an effective political democracy and on the other by a common understanding and observance of the human rights upon which they depend;

Being resolved, as the governments of European countries which are like-minded and have a common heritage of political traditions, ideals, freedom and the rule of law, to take the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration,

Have agreed as follows:

Article 1¹ – Obligation to respect human rights

The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.

Section I – Rights and freedoms

Article 2¹ – Right to life

1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
2. Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:
 - a. in defence of any person from unlawful violence;
 - b. in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
 - c. in action lawfully taken for the purpose of quelling a riot or insurrection.

Article 3¹ – Prohibition of torture

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

Article 4¹ – Prohibition of slavery and forced labour

1. No one shall be held in slavery or servitude.
2. No one shall be required to perform forced or compulsory labour.



3. For the purpose of this article the term “forced or compulsory labour” shall not include:
 - a. any work required to be done in the ordinary course of detention imposed according to the provisions of Article 5 of this Convention or during conditional release from such detention;
 - b. any service of a military character or, in case of conscientious objectors in countries where they are recognised, service exacted instead of compulsory military service;
 - c. any service exacted in case of an emergency or calamity threatening the life or well-being of the community;
 - d. any work or service which forms part of normal civic obligations.

Article 5¹ – Right to liberty and security

1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
 - a. the lawful detention of a person after conviction by a competent court;
 - b. the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfillment of any obligation prescribed by law;
 - c. the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
 - d. the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
 - e. the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;
 - f. the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.
2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.
3. Everyone arrested or detained in accordance with the provisions of paragraph 1.c of this article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.
4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.
5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation.

Article 6¹ – Right to a fair trial

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.
2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
3. Everyone charged with a criminal offence has the following minimum rights:
 - a. to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
 - b. to have adequate time and facilities for the preparation of his defence;
 - c. to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
 - d. to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
 - e. to have the free assistance of an interpreter if he cannot understand or speak the language used in court.



Article 7¹ – No punishment without law

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.
2. This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations.

Article 8¹ – Right to respect for private and family life

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Article 9¹ – Freedom of thought, conscience and religion

1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

Article 10¹ – Freedom of expression

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

Article 11¹ – Freedom of assembly and association

1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.
2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

Article 12¹ – Right to marry

Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.

Article 13¹ – Right to an effective remedy

Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

Article 14¹ – Prohibition of discrimination

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.



Article 15¹ – Derogation in time of emergency

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

Article 16¹ – Restrictions on political activity of aliens

Nothing in Articles 10, 11 and 14 shall be regarded as preventing the High Contracting Parties from imposing restrictions on the political activity of aliens.

Article 17¹ – Prohibition of abuse of rights

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

Article 18¹ – Limitation on use of restrictions on rights

The restrictions permitted under this Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed.

Section II – European Court of Human Rights

Article 19 – Establishment of the Court

To ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols thereto, there shall be set up a European Court of Human Rights, hereinafter referred to as “the Court”. It shall function on a permanent basis.

Article 20 – Number of judges

The Court shall consist of a number of judges equal to that of the High Contracting Parties.

Article 21 – Criteria for office


1. The judges shall be of high moral character and must either possess the qualifications required for appointment to high judicial office or be jurisconsults of recognised competence.
2. The judges shall sit on the Court in their individual capacity.
3. During their term of office the judges shall not engage in any activity which is incompatible with their independence, impartiality or with the demands of a full-time office; all questions arising from the application of this paragraph shall be decided by the Court.

Article 22 – Election of judges

1. The judges shall be elected by the Parliamentary Assembly with respect to each High Contracting Party by a majority of votes cast from a list of three candidates nominated by the High Contracting Party.
2. The same procedure shall be followed to complete the Court in the event of the accession of new High Contracting Parties and in filling casual vacancies.

Article 23 – Terms of office

1. The judges shall be elected for a period of six years. They may be re-elected. However, the terms of office of one-half of the judges elected at the first election shall expire at the end of three years.
2. The judges whose terms of office are to expire at the end of the initial period of three years shall be chosen by lot by the Secretary General of the Council of Europe immediately after their election.
3. In order to ensure that, as far as possible, the terms of office of one-half of the judges are renewed every three years, the Parliamentary Assembly may decide, before proceeding to any subsequent election, that the term or terms of office of one or more judges to be elected shall be for a period other than six years but not more than nine and not less than three years.
4. In cases where more than one term of office is involved and where the Parliamentary Assembly applies the preceding paragraph, the allocation of the terms of office shall be effected by a drawing of lots by the Secretary General of the Council of Europe immediately after the election.

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5. A judge elected to replace a judge whose term of office has not expired shall hold office for the remainder of his predecessor's term.
 6. The terms of office of judges shall expire when they reach the age of 70.
 7. The judges shall hold office until replaced. They shall, however, continue to deal with such cases as they already have under consideration.

Article 24 – Dismissal

No judge may be dismissed from his office unless the other judges decide by a majority of two-thirds that he has ceased to fulfil the required conditions.

Article 25 – Registry and legal secretaries

The Court shall have a registry, the functions and organisation of which shall be laid down in the rules of the Court. The Court shall be assisted by legal secretaries.

Article 26 – Plenary Court

The plenary Court shall

- a. elect its President and one or two Vice-Presidents for a period of three years; they may be re-elected;
- b. set up Chambers, constituted for a fixed period of time;
- c. elect the Presidents of the Chambers of the Court; they may be re-elected;
- d. adopt the rules of the Court, and
- e. elect the Registrar and one or more Deputy Registrars.

Article 27 – Committees, Chambers and Grand Chamber

1. To consider cases brought before it, the Court shall sit in committees of three judges, in Chambers of seven judges and in a Grand Chamber of seventeen judges. The Court's Chambers shall set up committees for a fixed period of time.
2. There shall sit as an ex officio member of the Chamber and the Grand Chamber the judge elected in respect of the State Party concerned or, if there is none or if he is unable to sit, a person of its choice who shall sit in the capacity of judge.
3. The Grand Chamber shall also include the President of the Court, the Vice-Presidents, the Presidents of the Chambers and other judges chosen in accordance with the rules of the Court. When a case is referred to the Grand Chamber under Article 43, no judge from the Chamber which rendered the judgment shall sit in the Grand Chamber, with the exception of the President of the Chamber and the judge who sat in respect of the State Party concerned.

Article 28 – Declarations of inadmissibility by committees

A committee may, by a unanimous vote, declare inadmissible or strike out of its list of cases an application submitted under Article 34 where such a decision can be taken without further examination. The decision shall be final.

Article 29 – Decisions by Chambers on admissibility and merits

1. If no decision is taken under Article 28, a Chamber shall decide on the admissibility and merits of individual applications submitted under Article 34.
2. A Chamber shall decide on the admissibility and merits of inter-State applications submitted under Article 33.
3. The decision on admissibility shall be taken separately unless the Court, in exceptional cases, decides otherwise.

Article 30 – Relinquishment of jurisdiction to the Grand Chamber

Where a case pending before a Chamber raises a serious question affecting the interpretation of the Convention or the protocols thereto, 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 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.

Article 31 – Powers of the Grand Chamber

The Grand Chamber shall

- a. determine applications submitted either under Article 33 or Article 34 when a Chamber has relinquished jurisdiction under Article 30 or when the case has been referred to it under Article 43; and
- b. consider requests for advisory opinions submitted under Article 47.



Article 32 – Jurisdiction of the Court

1. The jurisdiction of the Court shall extend to all matters concerning the interpretation and application of the Convention and the protocols thereto which are referred to it as provided in Articles 33, 34 and 47.
2. In the event of dispute as to whether the Court has jurisdiction, the Court shall decide.

Article 33 – Inter-State cases

Any High Contracting Party may refer to the Court any alleged breach of the provisions of the Convention and the protocols thereto by another High Contracting Party.

Article 34 – Individual applications

The Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right.

Article 35 – Admissibility criteria

1. The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of six months from the date on which the final decision was taken.
2. The Court shall not deal with any application submitted under Article 34 that
 - a. is anonymous; or
 - b. is substantially the same as a matter that has already been examined by the Court or has already been submitted to another procedure of international investigation or settlement and contains no relevant new information.
3. The Court shall declare inadmissible any individual application submitted under Article 34 which it considers incompatible with the provisions of the Convention or the protocols thereto, manifestly ill-founded, or an abuse of the right of application.
4. The Court shall reject any application which it considers inadmissible under this Article. It may do so at any stage of the proceedings.

Article 36 – Third party intervention

1. In all cases before a Chamber or the Grand Chamber, a High Contracting Party one of whose nationals is an applicant shall have the right to submit written comments and to take part in hearings.
2. The President of the Court may, in the interest of the proper administration of justice, invite any High Contracting Party which is not a party to the proceedings or any person concerned who is not the applicant to submit written comments or take part in hearings.

Article 37 – Striking out applications

1. The Court may at any stage of the proceedings decide to strike an application out of its list of cases where the circumstances lead to the conclusion that
 - a. the applicant does not intend to pursue his application; or
 - b. the matter has been resolved; or
 - c. for any other reason established by the Court, it is no longer justified to continue the examination of the application.However, the Court shall continue the examination of the application if respect for human rights as defined in the Convention and the protocols thereto so requires.
2. The Court may decide to restore an application to its list of cases if it considers that the circumstances justify such a course.

Article 38 – Examination of the case and friendly settlement proceedings

1. If the Court declares the application admissible, it shall
 - a. pursue the examination of the case, together with the representatives of the parties, and if need be, undertake an investigation, for the effective conduct of which the States concerned shall furnish all necessary facilities;
 - b. place itself at the disposal of the parties concerned with a view to securing a friendly settlement of the matter on the basis of respect for human rights as defined in the Convention and the protocols thereto.
2. Proceedings conducted under paragraph 1.b shall be confidential.



Article 39 – Finding of a friendly settlement

If a friendly settlement is effected, the Court shall strike the case out of its list by means of a decision which shall be confined to a brief statement of the facts and of the solution reached.

Article 40 – Public hearings and access to documents

1. Hearings shall be in public unless the Court in exceptional circumstances decides otherwise.
2. Documents deposited with the Registrar shall be accessible to the public unless the President of the Court decides otherwise.

Article 41 – Just satisfaction

If the Court finds that there has been a violation of the Convention or the protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.

Article 42 – Judgments of Chambers

Judgments of Chambers shall become final in accordance with the provisions of Article 44, paragraph 2.

Article 43 – Referral to the Grand Chamber

1. Within a period of three months from the date of the judgment of the Chamber, any party to the case may, in exceptional cases, request that the case be referred to the Grand Chamber.
2. A panel of five judges of the Grand Chamber shall accept the request if the case raises a serious question affecting the interpretation or application of the Convention or the protocols thereto, or a serious issue of general importance.
3. If the panel accepts the request, the Grand Chamber shall decide the case by means of a judgment.

Article 44 – Final judgments

1. The judgment of the Grand Chamber shall be final.
2. The judgment of a Chamber shall become final
 - a. when the parties declare that they will not request that the case be referred to the Grand Chamber; or
 - b. three months after the date of the judgment, if reference of the case to the Grand Chamber has not been requested; or
 - c. when the panel of the Grand Chamber rejects the request to refer under Article 43.
3. The final judgment shall be published.

Article 45 – Reasons for judgments and decisions

1. Reasons shall be given for judgments as well as for decisions declaring applications admissible or inadmissible.
2. If a judgment does not represent, in whole or in part, the unanimous opinion of the judges, any judge shall be entitled to deliver a separate opinion.

Article 46 – Binding force and execution of judgments

1. The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.
2. The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution.

Article 47 – Advisory opinions

1. The Court may, at the request of the Committee of Ministers, give advisory opinions on legal questions concerning the interpretation of the Convention and the protocols thereto.
2. Such opinions shall not deal with any question relating to the content or scope of the rights or freedoms defined in Section I of the Convention and the protocols thereto, or with any other question which the Court or the Committee of Ministers might have to consider in consequence of any such proceedings as could be instituted in accordance with the Convention.
3. Decisions of the Committee of Ministers to request an advisory opinion of the Court shall require a majority vote of the representatives entitled to sit on the Committee.

Article 48 – Advisory jurisdiction of the Court

The Court shall decide whether a request for an advisory opinion submitted by the Committee of Ministers is within its competence as defined in Article 47.



Article 49 – Reasons for advisory opinions

1. Reasons shall be given for advisory opinions of the Court.
2. If the advisory opinion does not represent, in whole or in part, the unanimous opinion of the judges, any judge shall be entitled to deliver a separate opinion.
3. Advisory opinions of the Court shall be communicated to the Committee of Ministers.

Article 50 – Expenditure on the Court

The expenditure on the Court shall be borne by the Council of Europe.

Article 51 – Privileges and immunities of judges

The judges shall be entitled, during the exercise of their functions, to the privileges and immunities provided for in Article 40 of the Statute of the Council of Europe and in the agreements made thereunder.

Section III – Miscellaneous provisions footnote ³ footnote ¹

Article 52 ¹ – Inquiries by the Secretary General

On receipt of a request from the Secretary General of the Council of Europe any High Contracting Party shall furnish an explanation of the manner in which its internal law ensures the effective implementation of any of the provisions of the Convention.

Article 53 ¹ – Safeguard for existing human rights

Nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a Party.

Article 54 ¹ – Powers of the Committee of Ministers

Nothing in this Convention shall prejudice the powers conferred on the Committee of Ministers by the Statute of the Council of Europe.

Article 55 ¹ – Exclusion of other means of dispute settlement

The High Contracting Parties agree that, except by special agreement, they will not avail themselves of treaties, conventions or declarations in force between them for the purpose of submitting, by way of petition, a dispute arising out of the interpretation or application of this Convention to a means of settlement other than those provided for in this Convention.

Article 56 ¹ – Territorial application

1. ⁴ Any State may at the time of its ratification or at any time thereafter declare by notification addressed to the Secretary General of the Council of Europe that the present Convention shall, subject to paragraph 4 of this Article, extend to all or any of the territories for whose international relations it is responsible.
2. The Convention shall extend to the territory or territories named in the notification as from the thirtieth day after the receipt of this notification by the Secretary General of the Council of Europe.
3. The provisions of this Convention shall be applied in such territories with due regard, however, to local requirements.
4. ⁴ Any State which has made a declaration in accordance with paragraph 1 of this article may at any time thereafter declare on behalf of one or more of the territories to which the declaration relates that it accepts the competence of the Court to receive applications from individuals, non-governmental organisations or groups of individuals as provided by Article 34 of the Convention.

Article 57 ¹ – Reservations

1. Any State may, when signing this Convention or when depositing its instrument of ratification, make a reservation in respect of any particular provision of the Convention to the extent that any law then in force in its territory is not in conformity with the provision. Reservations of a general character shall not be permitted under this article.
2. Any reservation made under this article shall contain a brief statement of the law concerned.

Article 58 ¹ – Denunciation

1. A High Contracting Party may denounce the present Convention only after the expiry of five years from the date on which it became a party to it and after six months' notice contained in a notification addressed to the Secretary General of the Council of Europe, who shall inform the other High Contracting Parties.



2. Such a denunciation shall not have the effect of releasing the High Contracting Party concerned from its obligations under this Convention in respect of any act which, being capable of constituting a violation of such obligations, may have been performed by it before the date at which the denunciation became effective.
3. Any High Contracting Party which shall cease to be a member of the Council of Europe shall cease to be a Party to this Convention under the same conditions.
- 4.⁴ The Convention may be denounced in accordance with the provisions of the preceding paragraphs in respect of any territory to which it has been declared to extend under the terms of Article 56.

Article 59¹ – Signature and ratification

1. This Convention shall be open to the signature of the members of the Council of Europe. It shall be ratified. Ratifications shall be deposited with the Secretary General of the Council of Europe.
2. The present Convention shall come into force after the deposit of ten instruments of ratification.
3. As regards any signatory ratifying subsequently, the Convention shall come into force at the date of the deposit of its instrument of ratification.
4. The Secretary General of the Council of Europe shall notify all the members of the Council of Europe of the entry into force of the Convention, the names of the High Contracting Parties who have ratified it, and the deposit of all instruments of ratification which may be effected subsequently.

Done at Rome this 4th day of November 1950, in English and French, both texts being equally authentic, in a single copy which shall remain deposited in the archives of the Council of Europe. The Secretary General shall transmit certified copies to each of the signatories.

Footnotes

- 1 Heading added according to the provisions of Protocol No. 11 (ETS No. 155).
- 2 New Section II according to the provisions of Protocol No. 11 (ETS No. 155).
- 3 The articles of this Section are renumbered according to the provisions of Protocol No. 11 (ETS No. 155).
- 4 Text amended according to the provisions of Protocol No. 11 (ETS No. 155).

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NOTES

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UNIFEM is the women's fund at the United Nations. It provides financial and technical assistance to innovative programmes and strategies to foster women's empowerment and gender equality. Placing the advancement of women's human rights at the centre of all of its efforts, UNIFEM focuses on reducing feminised poverty; ending violence against women; reversing the spread of HIV/AIDS among women and girls; and achieving gender equality in democratic governance in times of peace as well as war.

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