

International Institute of Human Rights, Strasbourg

The European Convention on Human Rights

Cases and Materials

A reader for students of the international law of human rights

by Herbert Petzold

1981 Fourth edition

Carl Heymanns Verlag KG · Köln · Berlin · Bonn · München

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by Herbert Petzold

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1981 ISBN 3-452-18974-0
Printed by grafik + druck, München

INTRODUCTION

1. The Convention for the Protection of Human Rights and Fundamental Freedoms, which was the first "European Convention" drawn up within the Council of Europe and is open only to the Member States of that Organisation, was signed in Rome on 4 November 1950. It entered into force on 3 September 1953 and today binds all the Member States of the Council of Europe with the exception of Liechtenstein which prepares at present its ratification (1).

Up to now five Protocols have supplemented or amended the Convention: the first Protocol (of 20 March 1952) entered into force on 18 May 1954 (2); the second (3) and third (4) Protocols (of 6 May 1963) entered into force on 21 September 1970; the fourth Protocol (of 16 September 1963) entered into force on 2 May 1968 (5); and the fifth Protocol (of 20 January 1966) entered into force on 20 December 1971 (6).

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- (1) Namely: Austria, Belgium, Cyprus, Denmark, Federal Republic of Germany, France, Greece, Ireland, Iceland, Italy, Luxembourg, Malta, Norway, the Netherlands, Portugal, Spain, Sweden, Switzerland, Turkey and the United Kingdom.
 - (2) This Protocol, which adds certain rights to the Convention catalogue, has been ratified by all the Member States of the Council of Europe except Liechtenstein, Spain and Switzerland.
 - (3) This Protocol, which confers on the European Court of Human Rights the competence to give advisory opinions, has been ratified by all the Member States of the Council of Europe except France, Liechtenstein and Spain.
 - (4) This Protocol, which has amended Articles 29, 30 and 34 of the Convention, has been ratified by all States Parties to the Convention; Spain ratified the Convention in its amended version.
 - (5) This Protocol, which adds certain rights to the Convention catalogue, has been ratified by Austria, Belgium, Denmark, Federal Republic of Germany, France, Ireland, Iceland, Luxembourg, Norway, Portugal and Sweden.
 - (6) This Protocol, which amended Articles 22 and 40 of the Convention, has been ratified by all the States Parties to the Convention; Spain ratified the Convention in its amended version.

1. The rights and freedoms guaranteed

2. Under the Convention and Protocols Nos. 1 and 4, the Contracting States secure to everyone within their jurisdiction (Article 1) (7), and 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 14), the following rights and freedoms:

- the right to life (Article 2);
- the prohibition of torture and inhuman or degrading treatment or punishment (Article 3);
- the prohibition of slavery, servitude and forced or compulsory labour (Article 4);
- the right to liberty and security of person (Article 5 and Article 1 of Protocol No. 4);
- the right to a fair trial (Article 6);
- the prohibition of retroactive penal law (Article 7);
- the right to respect for private and family life, home and correspondence (Article 8);
- the right to freedom of thought, conscience and religion (Article 9);
- the right to freedom of expression (Article 10);
- the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions (Article 11);
- the right to marry and to found a family (Article 12);
- the right for everyone whose rights and freedoms as set forth in the Convention are violated, to have an effective remedy before a national authority (Article 13);
- the right to the peaceful enjoyment of one's possessions (Article 1 of Protocol No. 1);
- the right to education (Article 2 of Protocol No. 1);
- the undertaking by the Contracting States to hold free elections at reasonable intervals by secret ballot (Article 3 of Protocol No. 1);
- the right to liberty of movement and freedom to choose one's residence (Article 2 of Protocol No. 4);
- freedom to leave any country, including one's own (Article 2 of Protocol No. 4);
- the right not to be expelled from or deprived of the right to enter the territory of the State of which one is a national (Article 2 of Protocol No. 4);
- the prohibition of collective expulsion of aliens (Article 4 of Protocol No. 4).

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(7) Articles without reference are those of the Convention.

3. Under Article 17, nothing in the 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 in the Convention or at their limitation to a greater extent than is provided for in the Convention. The Convention in fact allows the exercise of certain rights and freedoms to be made subject to restrictions which are prescribed by law and necessary in a democratic society in the interests of, inter alia, national security, public safety, 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 (8). Those restrictions may not be applied for any purpose other than those for which they have been prescribed (Article 18).

4. In time of war or other public emergency threatening the life of the nation, any Contracting State may take measures derogating from its obligations under the Convention, but only to the extent strictly required by the exigencies of the situation and provided that those measures are not inconsistent with its other obligations under international law (Article 15 § 1).

The Convention does, however, not allow any derogation from Article 2 (right to life), Article 3 (prohibition of torture, inhuman and degrading treatment or punishment), Article 4 § 1 (prohibition of slavery and servitude) or Article 7 (prohibition of retroactive penal law) (9).

2. The protection machinery

5. Three institutions - the first and second of which were set up by the Convention itself (Article 19) - are invested with supervisory powers to ensure the observance of the engagements undertaken by the Contracting States in the Convention and Protocols:

- the European Commission of Human Rights;
- the European Court of Human Rights;
- the Committee of Ministers of the Council of Europe.

(a) The European Commission of Human Rights

6. The Commission is composed of a number of members equal to that of the Contracting States (Article 20). Its members are elected for a period of six years (Article 22) by the Committee of Ministers from a list of names drawn up by the Bureau of the Parliamentary Assembly of the Council of Europe; each group of the representatives of the Contracting Parties in the Assembly puts forward its candidates (Article 21). They sit on the Commission in their individual capacity (Article 23).

7. Any violation of the Convention alleged to have been committed by a Contracting State may be referred to the Commission. The Convention gives this right of application to:

- any Contracting State (State application, Article 24); and to
- any person, non-governmental organisation or group of individuals (individual application, Article 25).

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(8) See for example paragraphs 2 of Articles 8, 9, 10 and 11.

(9) Article 15 § 2.

However, the right of individual application, the true cornerstone of the collective guarantee of the rights set forth in the Convention, may be exercised only against those Contracting States which have accepted the competence of the Commission to receive such applications. Only Cyprus, France, Greece, Malta, Spain and Turkey have not yet satisfied this condition.

8. The Commission, which meets in camera (Article 33), examines firstly the admissibility of the application. Necessary conditions for the admissibility of all applications (Articles 26 and 27 § 3) are the following:

- exhaustion of all domestic remedies, according to the generally recognised rules of international law;
- observance of a period of six months from the date on which the final decision was taken.

Furthermore, an application introduced under Article 25 may not be dealt with by the Commission (Article 27 §§ 1 and 2) when it is:

- anonymous;
- substantially the same as a matter which has already been examined by the Commission or has already been submitted to another procedure of international investigation or settlement and if it contains no relevant new information;
- incompatible with the provisions of the Convention;
- manifestly ill-founded;
- abusive.

In the course of that examination, the Commission may invite the parties to give it all relevant information on matters connected with the application. The Commission's decision to reject the application as being inadmissible - where it so decides at the end of its examination - is final.

9. In the event of the Commission accepting the application, it undertakes, with a view to ascertaining the facts, with the representatives of the parties an examination of the application and, if need be, an investigation. The States concerned furnish all necessary facilities, after an exchange of views with the Commission, for the effective conduct of that investigation (Article 28 (a)).

10. In addition, the Commission places 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 (Article 28 (b)).

If the Commission succeeds in effecting a friendly settlement, it draws up a report which is confined to a brief statement of the facts and of the solution reached. This report is sent to the States concerned, to the Committee of Ministers and to the Secretary General of the Council of Europe for publication (Article 30).

11. If a friendly settlement is not reached, the Commission draws up a report on the facts and states its opinion as to whether the facts found disclose a breach by the State concerned of its obligations under the Convention. This report is transmitted to the Committee of Ministers and to the States concerned who are not at liberty to publish it. In transmitting the report to the Committee of Ministers the Commission may make such proposals as it thinks fit (Article 31).

12. At this point ends the task which the Convention has assigned to the Commission. The decision on the merits of the case, namely as to whether or not the Convention has been violated, is taken either by the European Court of Human Rights or, if the case is not referred to the Court within a period of three months after the transmission of the report, by the Committee of Ministers of the Council of Europe.

(b) The European Court of Human Rights

13. The European Court of Human Rights consists of a number of judges equal to that of the Members of the Council of Europe (Article 38). The judges are elected for a period of nine years (Article 40) by the Parliamentary Assembly from a list of persons nominated by the Members of the Council of Europe (Article 39).

14. The Court's jurisdiction extends to all cases concerning the interpretation and application of the Convention which the Contracting States or the Commission refer to it.

The Convention does not give to the individual applicant who instituted the proceedings before the Commission any right to bring his case before the Court. Under Article 48, the following may submit a case to the Court:

- the Commission;
- the Contracting State whose national is alleged to be a victim;
- the Contracting State which referred the case to the Commission;
- the Contracting State against which the complaint has been lodged.

However, for a case to be brought before the Court, the State concerned must be subject to the compulsory jurisdiction of the Court or, failing that, have consented in the particular instance (Article 48). The Court's jurisdiction is thus optional, but today Malta and Turkey alone have not yet recognised it (Article 46).

15. For the consideration of each case brought before it, the Court consists of a Chamber composed of seven judges (Article 43). There sit as ex officio members the President or Vice-President of the Court and the judge who is a national of any State Party concerned. Under certain conditions the Chamber may or must relinquish jurisdiction in favour of the plenary Court (Rule 48 of the Rules of Court).

16. The procedure usually falls into two stages: the written stage when those appearing before the Court file memorials, and the oral pleadings at a hearing which takes place in public unless the Court decides otherwise in exceptional circumstances.

For the purposes of this procedure, the Delegates representing the Commission may, according to the case-law and practice of the Court, "take into account" on their own authority any "views" the applicant may have on the Commission's report or on any other matter arising in the course of the proceedings. Under certain conditions they may even have the assistance of the applicant's lawyer or former lawyer or of the applicant himself.

17. The Court's decisions, taken by majority vote, are reasoned and final; the States concerned have to abide by them (Articles 51, 52 and 53). The judgment is transmitted to the Committee of Ministers which supervises its execution (Article 54).

If the Court has found a violation of the Convention, it may in certain circumstances afford just satisfaction to the injured party (Article 50).

(c) The Committee of Ministers

18. The Committee of Ministers is the executive organ of the Council of Europe (Article 13 of the Statute of the Council of Europe). It is composed of the Ministers for Foreign Affairs or their deputies nominated for that purpose, of the Member States of the Council of Europe (Article 14 of the Statute).

19. If at the close of the proceedings before the Commission the question is not referred to the Court, the Committee of Ministers has to rule on the merits of the case. Under Article 32 § 1, it decides by a majority of two-thirds of the members entitled to sit on the Committee whether there has been a violation of the Convention. In the affirmative case, it prescribes a period during which the State concerned must take the measures required by the Committee's decision (Article 32 § 2). If that State has not taken satisfactory measures within the prescribed period, the Committee of Ministers decides by the majority mentioned above what effect shall be given to its original decision and publishes the report of the Commission (Article 32 § 3).

The Contracting States undertake to regard as binding on them any decision which the Committee of Ministers may take in application of the above-mentioned provisions (Article 32 § 4).

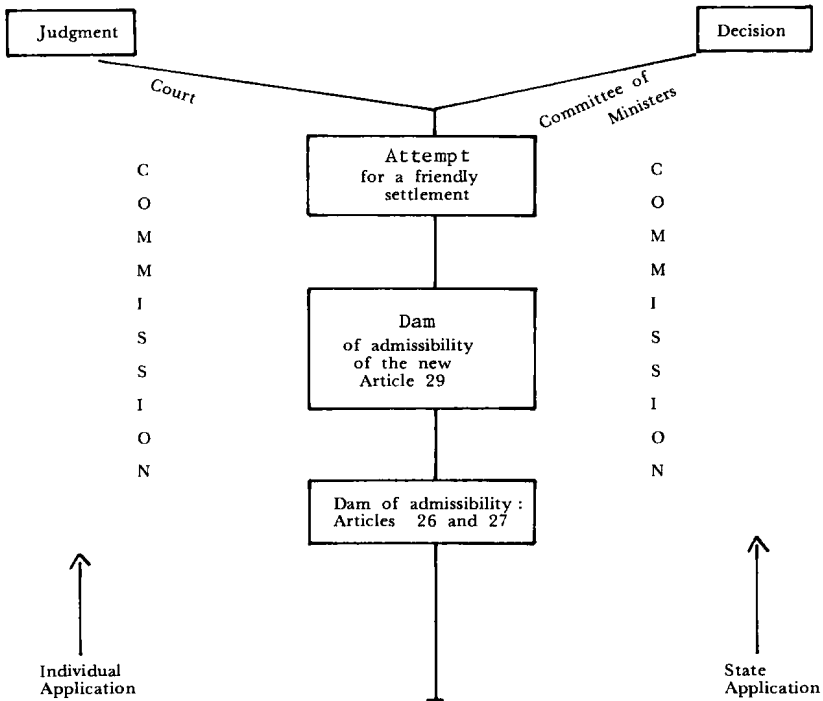
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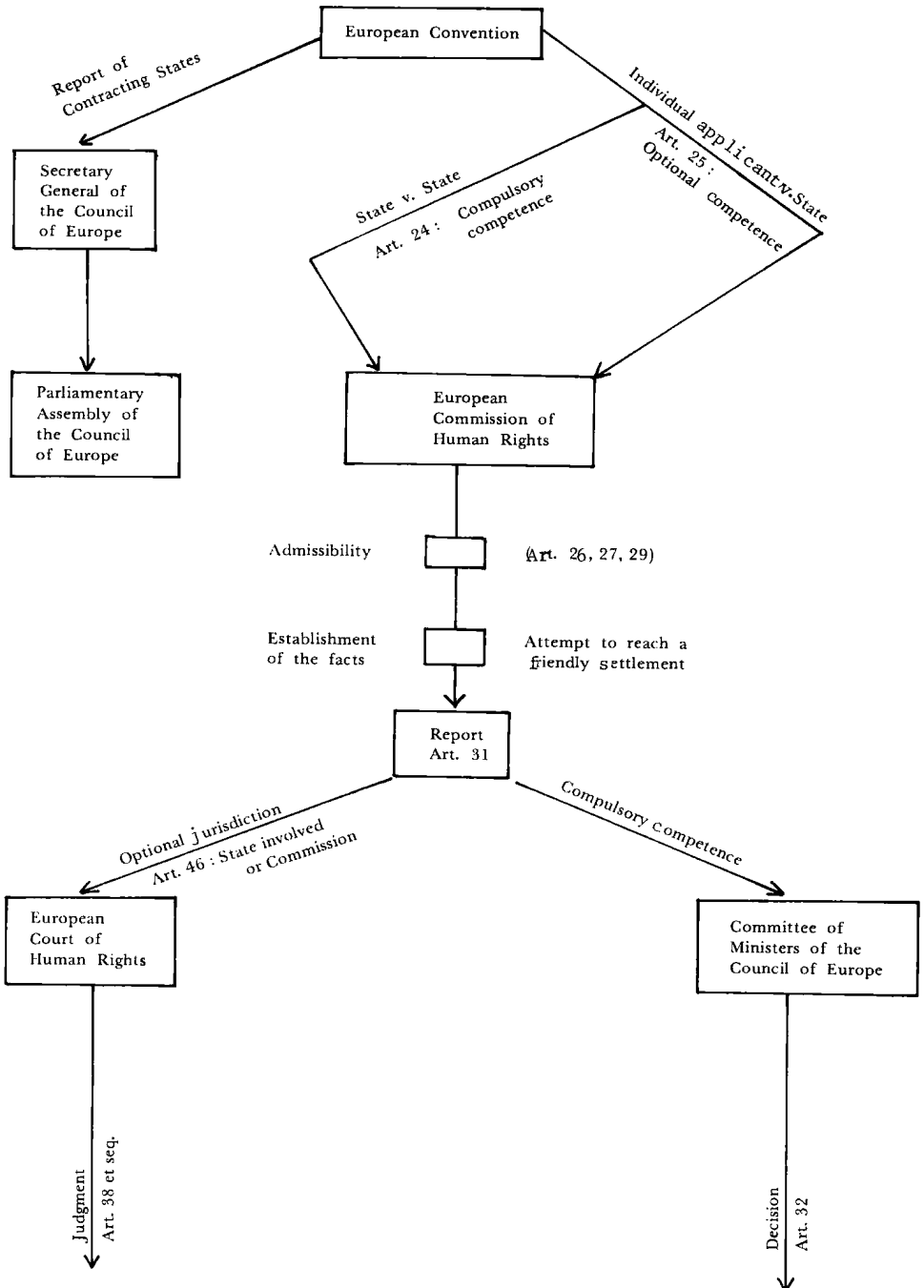
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Diagrams showing the implementation of the machinery of the European Convention on Human Rights.

1. Diagram A



2. Diagram B



LIST OF ABBREVIATIONS

A.F.D.I.	Annuaire français de droit international
A.J.C.L.	American Journal of Comparative Law
A.J.I.L.	American Journal of International Law
B.Y.B.I.L.	Britisch Yearbook of International Law
C.D.E.	Cahiers de droit européen
C.L.J.	Cambridge Law Journal
C.M.L.R.	Common Market Law Review
EuGRZ	Europäische Grundrechte-Zeitschrift
I.C.L.Q.	International and Comparative Law Quarterly
J.T.	Journal des tribunaux
J.Z.	Juristenzeitung
N.J.	Nederlands Juristenblad
N.J.W.	Neue Juristische Wochenschrift
R.B.D.I.	Revue belge de droit international
R.D.E.	Rivista di Diritto Europeo
R.D.H.	Revue des Droits de l'Homme - Human Rights Journal
R.D.I.	Rivista di Diritto Internazionale
R.D.I.D.C.	Revue de droit international et de droit comparé
R.D.P.	Revue de droit public
Recueil	Recueil des décisions de la Commission européenne des droits de l'homme
R.H.R.D.I.	Revue hellénique de droit international
Vol.	Volume
YB	Yearbook of the European Convention on Human Rights
Z.a.ö.R.V.	Zeitschrift für ausländisches öffentliches Recht und Völkerrecht
Coll.	Collection of Decisions of the European Commission of Human Rights (Vol. 1 - 43)

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(1) A more complete bibliography is available from the Directorate of Human Rights of the Council of Europe ; a selective bibliography of publications concerning the Convention is reproduced in each of the Yearbooks of the European Convention on Human Rights. Cf. also the bibliographical notes below following the different cases included in this Reader.

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