International Human Rights Conventions

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This paper looks at the major 20th century international and European human rights instruments, the mechanisms for their application, supervision and enforcement and some examples of their use in human rights issues, with specific reference to the UK. It also considers some of the political and economic issues surrounding human rights, their applicability as universal principles of human behaviour and their role in the foreign and commercial policies of states.

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Introduction

The philosophical basis of modern human rights protection lies in the liberal democratic tradition of western Europe, although this can be traced back to both secular and religious roots in Greek philosophy, Roman law and the Judaeo-Christian tradition. This is not to say that the concept of human rights is alien to other, non-western, social and religious traditions. For example, though the subject is controversial in the Islamic world, there is a body of Islamic thought which holds Islam to be fully compatible with the western approach and, indeed, to have had some direct influence on it. A E Mayer writes that, "While a philosophy of individualism is absent, the Islamic heritage offers many other philosophical concepts, humanistic values and moral principles that are well adapted for use in constructing human rights principles" (*Islam and Human Rights*: *Tradition and Politics*, 1991, p.48). Human rights theory is complex and eclectic. Definitions of the characteristics of human rights draw on a number of different theories: "utilitarian", "natural", "intuitive", behavioral", "sociological", and those based on justice, dignity and equality. Legal sources tend to distinguish between "human rights", "civil rights" and "civil liberties", and brief definitions of these are given in the Annex to this paper.

In international law, as it developed in the eighteenth and nineteenth centuries, the main concept had been that of sovereignty, the major right of the emerging sovereign nation states. The rights of individuals and the relationship between rulers and their subjects were not matters of concern on an international level, although there were already examples of instruments dedicated to the protection of civil liberties and rights in the domestic law of some countries, in the French Declaration on the Rights of Man and the Citizen of 1789 and the American Bill of Rights of 1791, for example. The rise of authoritarian dictatorships after the First World War gave rise to calls for some kind of international protection of human rights and there were various declarations and articles on the subject. Minority treaties were concluded which aimed at protecting the rights of linguistic and ethnic minorities in the new states set up under the Treaties of Versailles and St Germain. Article 4 of the German-Polish Convention on Upper Silesia of 1922, for example, included the right to life, liberty, religious freedom and equal treatment before the law. One of the first international human rights treaties was the *Slavery Convention*, which was adopted in 1926 and came into force in 1927.

However, it is really only since the end of the Second World War that human rights have become the subject matter of international law. The moral outrage at the atrocities of Hitler and Stalin in the 1940s was the force behind the post-War human rights declarations and instruments which will be discussed below, and "never again" was the leitmotif behind efforts to secure human rights protection at international level. In an assessment of the success of post-War efforts to protect those in need of protection, the Secretary General of the Council of Europe, Catherine Lalumière, said in her opening statement to an interregional meeting on human rights in January 1993:

> Neither in the former Yugoslavia nor in other parts of the world has the international community succeeded in preventing widespread abuses of human rights. Even the most elementary rights, such as the right to life or the right not to be subjected to torture, are but an unkept fine-sounding promise for millions of "members of the human family".
>
> (*Human Rights at the dawn of the 21st Century*, COE proceedings of Inter-regional meeting in advance of the World Conference on Human Rights, 28-30 January 1993)

She went on to draw attention to the progress that had been made since 1945 "to place the individual and his or her dignity and rights at the centre of the international community". She considers the effectiveness and the weaknesses of the COE conventions which address human rights and of the UN Universal Declaration on Human Rights, and asks: "But how do things stand in reality? Are the human rights proclaimed as universal actually and equally available to all?" The answer would appear to be that they are not. The policy of ethnic cleansing in the former Yugoslavia, the racial and religious persecution of minorities which still persists in many parts of the world and the undemocratic or discriminatory practices of liberal democracies, show that the protection of human rights is not guaranteed in either the developed or the developing world and in spite of the willing commitment to a number of binding international treaties. The gap between theory and practice in the area of human rights has been partly the result of political and economic realities. Other shortcomings have been identified in the lack of adequate mechanisms to ensure that states fulfil their treaty obligations or to sanction them if they do not. It could be argued that such a task is impossible, that the expectations of the post-war era were idealistic and impractical, and that economic sanctions, as the preferred non-military option used repeatedly in attempts at enforcement, have not achieved the desired effect or not quickly enough to protect innocent people. This pessimistic view can be countered by the many examples of progress in securing human rights, from the abolition of slavery to more recent examples of the return of states to democratic rule after years of repressive military or communist regimes.

I The United Nations

A. The International Bill of Rights and the Universal Declaration of Human Rights

1. The History of the Declaration

A universal bill of rights was considered by many of those who drafted the UN Charter at the San Francisco Conference in 1945 to be inherent in the Charter itself. Reflecting very much the post-War need to reestablish a sense of morality and respect for human life which fascism

had destroyed, the Charter sought to "reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small...". Even before the Charter had been ratified or implemented, or the United Nations formerly established, the Preparatory Commission of the United Nations and its Executive Committee recommended that the priority of the Commission on Human Rights (set up under Article 68 of the Charter) should be the "formulation of an international bill of rights". This recommendation was adopted by the General Assembly in a resolution (7(1)) in 1946.

On 10 December 1948 the UN General Assembly adopted and solemnly proclaimed the **Universal Declaration of Human Rights**, the first of a series of UN human rights instruments forming part of the international bill of rights which was completed in 1966. The "universal" aspect of the Declaration was based on the concept of the entitlement of all, without distinction or discrimination, to a set of fundamental human rights. The post-war process of decolonisation and recognition of the right to the self-determination of peoples also helped shape the global development of human rights protection in subsequent UN human rights instruments since the end of the Second World War.

The Declaration was adopted in the form of a resolution (General Assembly Resolution 217 (III) (1948)) as a set of moral standards, a "common standard of achievement for all peoples and all nations" in civil and political rights, to which the member states agreed to adhere, or at least aspire. Of the 58 member states at the time, 48 voted in favour, 8 abstained and 2 were absent.

2. The Provisions of the Declaration

The Universal Declaration provides that everyone has the right to:

- life, liberty and security of person;
- recognition as a person before the law;
- equality before the law;
- judicial safeguards such as a fair and public hearing, a presumption of innocence, the prohibition of retroactive punishment;
- freedom of movement within the country of origin and the right to leave it;
- asylum;

- nationality;
- the right to property;
- freedom of thought,conscience, religion, opinion and expression, peaceful assembly and association;
- social security;
- work in just and favourable conditions, the right to join trade unions;
- an adequate standard of living and education;
- right to participate in the community's cultural life, to enjoy its art and share scientific advancement and its benefits.

Article 29(2) provides that the rights set out in the Declaration are only to be curtailed by:

> such limitations as are determined by law solely for the purposes of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

The Declaration takes the form of a Preamble and 30 Articles. It differed from earlier constitutional human rights instruments in that it contained not only civil and political provisions but economic, social and cultural ones too. Since 1948 there have been political, economic, social and cultural changes which have brought the question of human rights, their protection under national and international law and the effectiveness of this protection into the wider political arena. These were later codified in separate conventions, some of which will be considered in more detail below.

3. The Legal Status of the Declaration

Whilst the Declaration has considerable moral weight, it is not an international treaty or convention and is not strictly speaking a legally binding instrument. However, Oppenheim's *International Law* (Vol 1, Parts 2-4, 1992) notes that:

> there is some support for the view that it may properly be resorted to for the interpretation of the provisions of the Charter in the matter of human rights and

> fundamental freedoms. This absence of the element of binding obligation probably explains the willingness of governments to subscribe to the wide terms of the Declaration.

Referring to the fact that the Declaration has been accepted throughout the world as a "standard of action and of moral obligation", Oppenheim adds that:

> ... in the years since its adoption, the widespread acceptance of the authority of the Declaration has led some to the opinion that while the Declaration as an instrument is not a treaty, its provisions may have come to be the embodiment of new rules of customary international law in the matter.
>
> (page 1004)

The Prime Minister Clement Attlee told the House of Commons shortly after the resolution on the Declaration had been adopted:

> The Universal Declaration of Human Rights was adopted by the General Assembly in the form of a Resolution, the United Kingdom representative voting in its favour. There is no question of any separate act of accession by States, or of an obligation to give early legislative effect to any provision with which United Kingdom or Colonial laws may at the moment be at variance. Nevertheless, His Majesty's Government subscribe generally to the idea embodied in the Declaration and will continue to work towards it.
>
> (HC Deb, Vol 460, 18 January 1949, c17)

The Declaration has served as a blueprint for the constitutional guarantee of basic rights in many newly independent states and has been the basis for other human rights conventions such as the European Convention on Human Rights (see below). The UN publication *UN Action in the Field of Human Rights*, 1974, summarises its significance as follows:

> The provisions of the Declaration have been used as a basis for various types of action taken by the United Nations; they have inspired a number of international conventions both within and outside the United Nations; they have exercised a significant influence on national constitutions and on municipal legislation and, in several cases, on court decisions. In some instances the text of provisions of the Declaration was actually used in international instruments or national legislation. There are also very many instances on record of the

use of the Declaration as a code of conduct and as a yardstick to measure the degree of respect for and compliance with the international standards of human rights.

4. The International Covenants and Optional Protocols

It is the two Covenants and Optional Protocols which have provided a more secure legal and treaty basis for human rights protection under international law.

The Covenants, which did not come into force until 18 years after the adoption of the Declaration, were nonetheless conceived at an earlier stage as future parts of the international bill of rights. They, like subsequent UN human rights conventions, were drafted by the UN Commission on Human Rights, the body established by the Economic and Social Council under Article 68 of the UN Charter. The **International Covenant on Economic, Social and Cultural Rights** (ICESCR**)** and the **International Covenant on Civil and Political Rights (**ICCPR**)** were adopted by the General Assembly on 16 December 1966. The former came into force on 3 January 1976 and the latter on 23 March 1976 (Cmnd 6702). The Covenants are formal, legal agreements which recognise in precise terms most, though not all, of the fundamental rights and freedoms set out in the Universal Declaration, and additional ones. The Covenants provide for the protection not only of the basic human rights recognised by the Declaration, but "civic" human rights, that is to say, those which are man-made and based on socio-economics. The ICESCR provides for the right:

- of self-determination of all peoples (Article 1)
- to work (Article 6)
- to enjoy just and fair conditions of work (Article 7)
- to form trade unions (Article 8)
- to strike (Article 8)
- to social security (Article 9)
- to protection of and assistance to the family (Article 10)
- to an adequate standard of living (Article 11)
- to enjoy the highest standard of physical health (Article 12)

- to education (Articles 13 and 14)
- to enjoy certain cultural rights (Article 15)

Article 2 requires legislative measures to be taken to achieve these rights regardless of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Part IV of the Covenant provides for reports by parties to the UN Secretary-General on the achievement and observance of the rights and for further UN action on the basis of the reports (see also below on monitoring procedures).

The ICCPR provides for:

- the right of self-determination (Article 1)
- the right to life (Article 6)
- the prohibition of torture, cruel, inhuman or degrading treatment or punishment (Article 7)
- the prohibition of slavery and forced labour (Article 8)
- the right to liberty and security of person; the prohibition of arbitrary arrest or detention (Articles 9, 10 and 11)
- rights concerning freedom of movement and the expulsion of aliens (Articles 12 and 13)
- the right to equality before the courts and tribunals and certain rights concerning criminal charges (Articles 14,15 and 26)
- right to recognition as a person before the law (Article 16)
- prohibition against arbitrary or unlawful interference with personal privacy (Article 17)
- the right to freedom of thought, conscience, religion and expression (Articles 18 and 19)
- prohibition of war propaganda and national, religious or racial hatred constituting incitement to discrimination, hostility or violence (Article 20)
- the right of peaceful assembly, to freedom of association and the right

to form and join trade unions (Articles 21 and 22)

- the right to protection of the family, the institution of marriage and the rights of children (Articles 23 and 24)

- the right to participate in public affairs, to vote and be elected and to have access to public service (Article 25)

- the rights of ethnic, religious or linguistic minorities (Article 27)

The Covenant also provides for legislative measures to be taken by parties and for effective remedies for people whose rights have been violated (Article 2.3). Derogations are allowed under Article 4 in the event of a public emergency and under certain conditions. Part IV contains reporting and monitoring provisions similar to those for the ICESCR.

The First Optional Protocol to the ICCPR, which entered into force in 1976, recognises the competence of the Human Rights Committee to receive and consider complaints from individuals claiming to be victims of a violation by a party of any of the Covenant's rights.

The UK has ratified the two Covenants but not the Optional Protocols. In a recent Government statement on the First Optional Protocol, Foreign Office Minister Douglas Hogg said :

> We believe that the European Convention on Human Rights -ECHR- provides individuals with a stronger means of redress than they would have under the first Optional Protocol to the International Covenant on Civil and Political Rights.
>
> (HC Deb, 21 May 1993, c349W).

The Government have also said that they have no plans to ratify the Second Optional Protocol of 1989 on the abolition of the death penalty. Foreign Office Minister Douglas Hogg said in a Written Parliamentary Answer in May 1993: "We believe that the abolition of the death penalty is an issue of conscience which should be decided by a free vote of Parliament" (HC Deb, 21 May 1993, c349W). This reply referred also to the sixth optional protocol to the European Convention on Human Rights on the abolition of the death penalty.

B. Other UN Human Rights Conventions

1. Below is a list of other UN human rights instruments and the current situation regarding UK ratification:

Convention	UK Ratification
International Convention on the Elimination of all Forms of Racial Discrimination	Yes
International Convention on the Suppression and Punishment of the Crime of Apartheid	No
International Convention against Apartheid in Sports	No
Convention on the Prevention and Punishment of the Crime of Genocide	Yes
Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crime against Humanity	No
Convention on the Rights of the Child	Yes
Convention on the Elimination of All Forms of Discrimination against Women	Yes
Convention on the Political Rights of Women	Yes
Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment	Yes
Slavery Convention of 1926 and Convention as amended	Yes Yes
Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery	Yes
Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others	No

Convention relating to the Status of Stateless Persons	Yes
Convention relating to the Status of Refugees	Yes
Convention relating to the Status of Refugees	Yes
Convention on the Rights of Migrant Workers and the members of their Families	Yes

2. Enforcement Procedures

The provisions of the Covenants, the Optional Protocol and other UN human rights conventions are legally binding on the states that ratify them, and as they contain measures of implementation and enforcement, states are also subject to international review of the way they carry out their obligations. In the absence of a UN international court of human rights and any systematic application of sanctions on states in breach of the conventions, the reporting system and the publicity this can generate has become an increasingly effective method of international control. The following extract from the UN *Manual on Human Rights Reporting*, 1991, considers various applications of the reporting mechanism and the "special procedures".

The manual also distinguishes between treaty-based control mechanisms and charter-based control mechanisms:

3. The International Labour Organisation

i) Background

The ILO was established in 1919 by the Treaty of Versailles as an organ of the League of Nations. It became a UN specialized agency in 1945 and was awarded the Nobel Peace Prize in 1969. The ILO has a tripartite structure comprising the General Conference of representatives of member states, the Governing Body and the International Labour Office. The first two are composed half of government representatives and half of employers' and workers' representatives.

The ILO concentrates on the area of human rights concerned with the right to form trade unions, the protection of children from child labour, safe and sanitary working conditions and social security. It has adopted conventions in the following areas: freedom of association, collective bargaining, the abolition of forced labour, discrimination in employment, indigenous peoples, minimum employment ages, protection of wages, occupational safety and health, social security, the employment of women and of migrant workers, and labour administration.

ii) Complaints and Monitoring Procedures

The ILO adopts conventions and recommendations at the annual International Labour Conference. Governments of member states decide whether conventions should be ratified and monitor the application of the conventions in those countries which have ratified them. The supervisory process is carried out by the Committee of experts and the Conference Committee on the Application of Conventions and Recommendations, which also receive comments from workers' and employers' associations on the extent to which ratified conventions have been applied in national practice. The Committee of Experts responds to problems of implementation either by sending a "Direct Request" to the government or organisation concerned, or, if the problem is more serious or more persistent, by sending "Observations" to the government concerned. These are published in the Committee's annual report to the International Labour Conference. According to Lee Swepston, writing on the ILO in the *Guide to International Human Rights Practice, 1984*, "The thoroughness of the Committee's analysis and its reputation for independence and objectivity mean that many problems are resolved at the Direct Request stage". In other cases a method of direct contact is used to supervise the application of conventions. At the request of the government concerned, an official from the International Labour Office or sometimes an individual expert will discuss the situation directly with representatives of that government.

The complaints procedures cannot be used directly by an individual, only by a government, a trade union or employers' association or a delegate to the International Labour Conference. There are four basic monitoring and complaints procedures under the ILO Charter:

- representations (Articles 24,25,26.4)
- complaints (Articles 26-29, 31-34)
- special procedures for freedom of association
- special surveys for discrimination in employment

The following table summarises the operation of the various procedures:

(Lee Swepston, "Human Rights Complaints Procedures of the ILO", *Guide to*

International Human Rights Practice, edited by Hurst Hannun, 1984).

iii) The UK and the ILO

The UK has been a member of the ILO since its creation in 1919. By 31 December 1992 Britain had ratified 80 ILO Conventions and 68 were in force (International Labour Conference, 80th Session 1993, *Lists of Ratifications by Convention and by Country*). At the end of 1992, Britain ranked joint thirteenth with Bulgaria for the implementation of ILO Conventions:

1.	Spain	104
2.	France	97
3.	Italy	88
4.	Norway	83
5.	Netherlands	76
6.	Cuba	74
7.	Finland	73
8.	Uruguay	72
9.	Poland, Belgium	70
11.	Panama	69
12.	Sweden	69
13.	UK, Bulgaria	68

The UK's record at the ILO was raised in an exchange in the House of Lords in June 1989:

> (HL Deb, 6 June 1989, c717-8)

The Earl of Dundee concluded (*ibid*):

On the same day in the Commons, in response to a request to list the occasions on which Britain had been found to be in breach of ILO agreements, the then Minister John Cope, replied:

> The Government are convinced that United Kingdom law and practice fully conform with ILO obligations.
>
> (HC Deb, 6 June 1989, c 57W)

On 6 July 1989, the ILO application committee's criticism of six points relating to UK employment legislation was raised in the House of Lords. The Minister Lord Trefgarne commented:

> I should say that the United Kingdom does not accept any of those criticisms, certainly not at first sight. Indeed, at least one of the six points is not even part of the United Kingdom law at present.
>
> (HL Deb, 6 July 1989, c1269)

Since 1989, successive ILO Committee of Experts Reports on the Application of Conventions and recommendations have drawn attention to the UK failure to resolve the issues surrounding UK compliance with ILO Convention 87 on "Freedom of Association and Protection of the Right to Organize". The 1990 Experts Report noted that TUC communications had been transmitted to the Government for comment. The 1991 report looked in more detail at the Government's action in this area, in particular at incompatibilities between the Employment Acts of 1980, 1982 and 1988 and the Trade Union Act of 1984 with the requirements of the Convention. The Experts noted "the complexity of the legislation ... in relation to the matters covered by the Convention since 1980, and suggested that some reconsideration of the form and content of the legislation would be advantageous". The Experts' Report in 1992 noted further discussions that had taken place during 1991, as well as comments from the TUC and the Council of Civil Service Unions in 1991 and 1992. It also referred to the Government's response to its criticism of legislative complexity by agreeing to bring forward a "consolidation" measure "as and when resources and the legislative timetable permit", although the Government remained adamant that such a measure would not make substantive changes to the current laws on industrial relations and trade unions. In its most recent report in 1993, the Experts again noted the on-going dialogue between the Government and the TUC and acknowledged the introduction in October 1992 of the Trade Union and Labour Relations (Consolidation) Act 1992. The report concluded:

> The Committee hopes that, together with the free booklets published by the Government, explaining the legislation as it applies to employers, workers and trade unions, it will contribute to a better understanding of the legislation by all parties concerned.

The Government have consistently maintained that they respect and comply with the provisions of ILO Conventions to which they are party. The Government's response to the Committee of Experts' 1989, 1991 and 1992 observations were deposited in May 1993 (Dep 9250) and November 1993 (Dep 9861). These set out the ways in which the UK has tackled the Experts' observations and list all UK legislation and regulations introduced during the period covered by the reports. A number of employment and social security measures were

introduced to comply with the shortcomings noted by the ILO. With regard to Convention 87 the Government defends its position in some detail (see Dep 9250), emphasising that the dialogue between the unions and the Government continues over the issue of the trades union ban at GCHQ. On 20 December 1993, the civil service unions rejected a proposal put forward by Sir Robin Butler, the Cabinet Secretary, and supported by the Prime Minister, that the staff federation at GCHR might affiliate with the Council of Civil Service Unions. The issue remains unresolved.

II The Conference on Security and Co-operation in Europe (CSCE)

A. The Helsinki Final Act

The CSCE began at Helsinki in July 1973 and was concluded on 1 August 1975 with the signing of the **Helsinki Final Act** (HFA). The Final Act or the Helsinki Agreement, as it is also called, is neither a treaty nor an agreement in the legal sense, but, like the Universal Declaration, a declaration of intentions. It did not require ratification and non-observance of its provisions would not constitute a breach of international law (although there are differing views as to the binding nature of the HFA). Oppenheim's *International Law*, Vol 1, 1992, states: "Although the Final Act is not a legally binding instrument it is, apart from having great moral and political force, of legal value in that the signatories acknowledge that human rights are a matter of legitimate mutual concern and cannot be regarded as solely a matter of domestic jurisdiction". The HFA sets out moral and political obligations of signatory states and is principally concerned with international security and relations between states.

In the absence of a conclusive peace treaty at the end of the Second World War, the HFA was regarded by some as a generally satisfactory definition of post-war relations and territorial boundaries. The Eastern European states were particularly enthusiastic about the agreement, many believing that its human rights provisions meant the beginning of an era of liberalisation. This was not altogether true although politically conscious groups and individuals began to exert pressure on governments to allow greater freedom of expression and information. In Czechoslovakia, for example, several hundred intellectuals and others supported a human rights manifesto called "Charter 77", in which examples were given of rights supposedly protected by the HFA and by the UN Covenants but which were being violated in Czechoslovakia. There was considerable support for the Charter in other Eastern European countries, where Helsinki monitoring groups were set up, often at great personal risk to the initiators. These groups provided the impetus for the creation of non-governmental support groups in Western Europe and together these groups provided information, documentation and evidence for the review phase of the CSCE process.

In the Soviet Union, for example, a Helsinki monitoring committee was set up to monitor the

implementation of the human rights provisions. Andrei Sakharov, the physicist and human rights campaigner who died in December 1989, had formed the Soviet Committee on Human Rights in 1970, and had been active in the monitoring committee. He was exiled to Gorki by the Soviet authorities in 1980. Many of the Helsinki Committee activists who were arrested and imprisoned under Brezhnev died in prison, although others, including Sakharov, were released by Mikhael Gorbachev who came to power in March 1985. Erika Schlager, in an article entitled "The Procedural Framework of the CSCE: From the Helsinki Consultations to the Paris Charter, 1972-1990" (*Human Rights Law Journal*, Vol 12, No 6-7, 12 July 1991), maintained that "the Helsinki Final Act exceeded even the most hopeful expectations, becoming a rallying point for the oppressed peoples of Central and Eastern Europe, the Baltic States and the Soviet Union. As one totalitarian regime after another began to topple in Eastern Europe, each of the emerging, emancipated leaderships pointed specifically to the Helsinki process as a critical catalyst in the drive for democracy".

There has also been criticism of the HFA. One critic, Professor Jacques Freymond of the Geneva Institute of International Studies, wrote in 1979 that the provisions were "incoherent and poorly drafted ... because they had been devised in different languages and from different perspectives. By wanting to cover all possible subjects, the negotiators failed to deal with any in a satisfactory manner" (*Human Rights Thirty Years after the Universal Declaration*, edited by B.G.Ramcharan, 1979). This criticism was perhaps something of an exaggeration. It is true that at the first follow-up meeting to the Final Act in Belgrade in 1977, there was little achieved in the field of human rights. Although it reported that there had been a "full and frank review" of the Final Act's provisions and of compliance with them in certain countries, no agreement was reached in the concluding document. There was no specific reference to human rights in the conclusions mainly because of pressure from the Soviet Union, which regarded human rights protection as the responsibility of individual states. The Final Document simply concluded: "it was recognized that the exchange of views constitutes in itself a valuable contribution towards the achievement of the aims set by the CSCE, although different views were expressed as to the degree of implementation of the Final Act reached so far". At the second follow-up conference in Madrid from December 1980 to January 1981, no significant progress was made in efforts to establish more effective observance of human rights provisions, and although there were some optimistic notes with regard to family reunification in Bulgaria, Czechoslovakia, Hungary and East Germany, implementation of the Helsinki provisions remained poor in much of Eastern Europe, particularly the Soviet Union, where there were reports of wide-scale political and religious persecution.

The human rights provisions of the Helsinki Final Act were aimed at the actions of states rather than individuals. The first section or "basket" of the Final Act began with a declaration of ten principles guiding relations between states, including "Respect for human rights and fundamental freedoms, including freedom of thought, conscience, religion or belief" (Principle VII), "Equal rights and self-determination of peoples" (Principle VIII) and "Fulfilment in good faith of obligations under international law" (Principle X). The full provisions of Principle VII were as follows:

Basket III, entitled *Co-operation in Humanitarian and other Fields*, also concerned human rights. The first section dealt with the reunification of families, marriage between citizens of different states, travel, youth exchanges and sport. Other sections dealt with the dissemination of information and cultural and educational exchanges.

B. The Human Dimension

The Vienna Review Conference of 1986 to 1989 introduced the "Human Dimension", a part of the CSCE process which would deal specifically with the monitoring and strengthening of human rights commitments according to an established mechanism. Under the new procedure, one state could ask another to answer questions relating to CSCE human rights commitments. At a second Human Dimension Conference in Copenhagen in June 1990, conditions on free and fair elections and principles for a judicious legal system were agreed (*Document of the Copenhagen Meeting of the Conference on the Human Dimension (CHD) of the CSCE 1990*, Cm 1324). The enquiry mechanism established by the 1989 Conference has been used by the UK and by joint UK/EC initiatives on several occasions, as Foreign Office Minister Mark Lennox-Boyd pointed out in a written parliamentary answer in February 1992:

> The United Kingdom has made use of the CHD mechanism eight times. Prior to the fall of the Communist regimes, the United Kingdom addressed the treatment of ethnic minorities in Bulgaria, the detention of human rights activists in Czechoslovakia - three times - and Romania - twice. The mechanism was also used to raise two family-reunion cases with the Soviet Union, which was subsequently resolved.
>
> Additionally, the United Kingdom has been associated with 14 uses of the mechanism by the member states of the European Community acting together.
>
> (HC Deb, 17 February 1992, c3W)

One of the problems of the Helsinki process has been that until recently it had no permanent staff or buildings, no systematic records and no regular timetable of meetings. This changed at the Paris summit in November 1990. At this historic meeting of the heads of state or government of the 34 CSCE members, the first major post-HFA instrument, the Charter of Paris for a New Europe (Cm 1464), was signed. The Paris Charter, coming just as the Communist bloc was breaking up and a treaty on arms reductions agreed at the end of the CFE negotiations, marked the end of the Cold War and the beginning of a new era in co-operation in Europe. Schlager (*ibid*) says of the Paris Charter that it was "in many respects ... the `anti-Helsinki Final Act'. While the HFA was rich in substantive commitments while rejecting an institutionalized framework, the Paris Charter contains virtually no new commitments, but takes the unprecedented step of institutionalizing the CSCE", that is to say, by including the human dimension mechanism within the CSCE framework. Amongst the institutions established by the Charter was the Warsaw-based Office of Free Elections, which subsequently became the Office for Democratic Institutions and Human Rights (ODIHR). This has been a centre for exchange of information on human rights situation in participating

countries and for the coordination of efforts to monitor implementation of human rights commitments.

The third meeting of the Conference on the Human Dimension was held in Moscow in September/October 1991. Holding an international human rights summit in the Soviet Union was a significant event in itself, although there had been some hesitation from western governments to the Moscow location. From the Moscow Conference came an agreement on an independent expert procedure for human rights monitoring in CSCE states.

At the Helsinki summit in July 1992, the concluding document noted "major progress in complying with Human Dimension commitments, but recognized developments of serious concern and thus the need for further improvement". The document sets out a Framework for Monitoring Compliance with CSCE Commitments and for Promoting Co-operation in the Human Dimension which gave an enhanced role to the ODIHR for the exchange of information and ideas and as a centre for the early warning of tension and potential conflict. Other functions of the ODIHR would include "seminars on the democratic process" (the four subjects planned for 1992/93 were migration, national minority issues, tolerance and free media) at the request of participating states, facilities to assist the newly created High Commissioner on National Minorities and contacts with national NGOs and the COE. Meetings of experts would take place in any year when there was no review conference in order to review implementation of Human Dimension commitments and proposals for improving compliance might be drawn to the attention of the Committee of Senior Officials (CSO). These meetings might also be attended by officials from the COE, the European Commission for Democracy through Law, the European Bank for Reconstruction and Development and other relevant international bodies.

III The Council of Europe

A. The European Convention on Human Rights

The main instrument for the protection of human rights in Europe is the Council of Europe's **European Convention on Human Rights**. It was signed on 4 November 1950 and came into force on 3 September 1953. The UK was one of the original signatories and the Convention has been signed by all COE members. Acceptance of and the intention to ratify the Convention has become a basic requirement of COE membership and has been an influential factor in recent applications from the former Eastern bloc countries. There is a common misconception that the European Convention is part of the EC machinery and the European Court of Human Rights is sometimes confused with the EC's European Court of Justice. The two institutions and the treaties under which they were established are completely different, although there is now some overlap in their activities. This is discussed in more detail in the section on the European Community/Union.

1. The Provisions

The Convention contains many of the provisions of the United Nations Declaration and Covenants and its wording is identical in some articles. In 1954 the European Commission of Human Rights was created, followed by the European Court of Human Rights in 1959. These two organs form the Convention's complaints and enforcement mechanism which has become an effective guarantor of human rights protection in Europe.

The main rights protected by the Convention and Protocols are:

- the right to life, liberty and security of person
- the right to a fair trial in civil and criminal matters
- respect for private and family life, home and correspondence
- freedom of thought, conscience and religion
- freedom of expression, including freedom of the press
- freedom of peaceful assembly and association, including the right to join a trade union
- the right to have a sentence reviewed by a higher tribunal
- the right to marry and found a family
- equal rights and responsibilities for spouses during marriage
- the right to peaceful enjoyment of possessions
- the right to education
- certain rights concerning elections
- freedom of movement and the right to choose where to live
- the right to leave a country, including one's own
- the prohibition of torture, inhuman or degrading treatment or punishment

- the prohibition of the death penalty
- the prohibition of slavery, servitude and forced labour
- the prohibition of criminal laws that are retroactive
- the prohibition of discrimination in the enjoyment of rights and freedoms guaranteed by the Convention
- the prohibition of expulsion of a state's nationals or denying them entry, or the collective expulsion of aliens

Under Article 15 the Convention allows parties, in the case of war or public emergency threatening the life of the nation, to derogate from obligations of the Convention as long as the COE is kept fully informed of the measures taken. The UK has derogated under this Article with regard to the period of detention of suspected terrorists in Northern Ireland. Following a judgement of the European Court of Human Rights against the UK in 1988 (*Case of Brogan and others*, 10/1987/133/184-187, COE/ECHR/JUD/151), the UK Government informed the COE Secretary General that it would avail itself of the right under Article 15(1) of the Convention to the extent that the exercise of powers under section 12 of the 1984 Prevention of Terrorism (Temporary Provisions) Act might be inconsistent with the obligations imposed by Article 5(3) of the Convention. In a judgement in May 1993 in the *Case of Brannigan and McBride v. the UK* (5/1992/350/423-424), the Court examined the validity of the UK derogation and ruled that detentions for periods of up to six days had **not** been a breach of Article 5(3) and (5) of the Convention (COE/ECHR/JUD/337).

2. The Procedure for Individual Application

The most frequent kind of complaint is the individual application brought against a state under Article 25 of the Convention, which recognises the competence of the European Commission on Human Rights to consider individual complaints of violations of the Convention. The right of individual petition was a significant innovation under international law and a forerunner of a similar right in the later UN Covenants (see above). The declaration under Article 25 is an important feature of the enforcement mechanism and one which prospective COE members must be prepared to make.

Individuals cannot approach the Court directly. The Commission is the body which examines complaints to determine whether they are admissible or not. Only about 10 per cent of applications investigated are declared admissible, and if a petition is rejected there is no right of appeal. Applicants must show that they have exhausted all domestic remedies in the country of the alleged violation and the application must be made within six months of a final

decision by the courts, tribunals or authorities of the state concerned. The complaint must be based on an alleged violation of the Convention or its Protocols of which the complainant has been a victim (complaints about the general principles or provisions of a government's policy or legislation are not acceptable unless the personal rights of the applicant have been affected) and it must have been committed by a public authority such as a local authority, government department or court.

The Commission will often ask the parties involved for information or for observations before it decides on admissibility. Sometimes the parties themselves submit observations at a hearing and it is possible for the parties to agree to a solution even before admissibility has been established. If this is not the case and the application has been accepted, the Commission sets about establishing the facts whilst also trying to secure a friendly settlement. If conciliation fails, the Commission draws up a detailed report on the facts of the case, including a legal opinion as to whether there has been a violation or not.

There are certain legal aid provisions for complainants if a case is declared admissible by the Commission. The report is sent to the COE's Committee of Ministers and to the states involved and within three months it may be referred to the Court. For a case to go to the Court the defendant state must have accepted the compulsory jurisdiction of the Court under Article 46 of the Convention or at least to accept the Court's jurisdiction in the particular case. Written and oral arguments are presented to the Court and the applicant may be required to appear as a witness.

The Court's decision is based on a majority judgement. The Court delivers judgements which are final with no right of appeal. The judgement is binding on the state concerned although the Court has no enforcement powers as such and it is the Committee of Ministers which monitors the implementation of the Court's judgements. The Court can award the victim of a violation "just satisfaction" under Article 50 which may include an award of compensation and an order for the reimbursement of costs. If a case is not referred to the Court, the Committee of Ministers decides by a two-thirds majority vote whether or not there has been a violation of the Convention and can recommend that the state award the victim "just satisfaction". Decisions of the Committee are also final and binding on the state concerned.

Under the present two-tier supervisory system, it takes the Court on average five years to reach a decision. For this reason, proposals have been made to reform and simplify the mechanism, most significantly by a merger of the Commission and the Court into a single full-time court. The two main proposals considered by the Committee on Legal Affairs and Human Rights and by the Parliamentary Assembly were i) the creation of a single court with the jurisdiction to decide on both the admissibility and the merits of a case, and ii) the creation of a two-tier system through a reform of the Commission and Court, leaving out the Committee of Ministers in individual applications (but keeping its role in inter-state ones).

The prospect of additional protocols to the Convention, and above all, an increasing Council of Europe membership (which will undoubtedly mean an increase in the number of applications), means that reform of the process is imperative. Both the Committee and the Assembly support the creation of a single full-time Court. Foreign Office Minister Douglas Hogg replied in a written parliamentary answer that Britain would "participate fully in the drafting process" of a protocol to amend the control machinery of the Convention (HC Deb, 11 June 1993, c388W).

The effectiveness of the Convention depends to a large extent on the commitment of signatory states to its principles and to the cause of human rights as well as the prestige of the Court and the moral force attached to its judgements. Judgements of the Court have had significant effects on the legal order of contracting states. They have led to the revision of professional disciplinary procedures in Belgium, to modification of laws concerning mental patients in the Netherlands, to the introduction of new remedies regarding administrative decisions in Sweden, to the restructuring of certain tribunals in Austria and to new legislation on contempt of court, immigration and telephone tapping amongst other things in the UK (*COE Forum*, 2/89).

3. Cases at the Commission and Court

The Commission now receives over 5,000 individual applications a year of which more than 1,500 are registered. Below is a comparative table giving figures for the Commission's work in 1991 and 1992:

(*Human Rights Case Digest*, November-December 1992)

The following table gives figures for judgements at the European Court of Human Rights in 1992:

(*Human Rights Case Digest*, November-December 1992)

4. UK cases at the Court

The UK has been criticised for having a poor record at the European Court of Human Rights. Whilst it is true that the majority of applications to the Court have come from the UK, the majority of these have been declared inadmissible. One reason for the large number of UK cases that go to the European Court is that the Convention has not been incorporated into UK domestic law (see below), and many complaints are taken to the Court in the absence of domestic remedies to exhaust. The following table compiled by the Statistical Section of the House of Commons Library gives details of files, applications declared admissible and judgements against the UK and other member states from 1990 to 1992. These figures must be interpreted with caution since actions may take several years to reach the Court and figures for the last few years alone will not give an accurate picture of the overall situation.

(Source: *Human Rights Case Digest*)

Below are details of judgements against the UK at the Court since 1981 (excluding Article 50 judgements which concern damages and costs):

(HC Deb, 17 December 1993, cc963-96)

5. The European Convention in the Domestic Law of Member States

The UK has ratified the Convention, including Article 25 on the individual right of petition as an international treaty, but it has not been incorporated into UK domestic law. Twenty-nine of the present thirty-two members of the Council of Europe have ratified the Convention, with Estonia, Lithuania, Slovenia still to ratify. In 23 of the states which have ratified, the Convention is incorporated into the domestic law. The remaining five, apart from the UK, are Ireland, Sweden, Iceland, Norway and Romania. Norway, Iceland, Sweden and Romania intend to incorporate the Convention into their domestic law in 1994, although the UK and Ireland do not intend to do so. In reply to a parliamentary question on the possibility of adopting the European Convention in British law, the Home Office Minister Charles Wardle said:

> We do not intend to incorporate the European Convention on Human Rights into domestic law. We believe that it is for Parliament rather than the judiciary to determine how the principles of human rights in the Convention are best secured.

(HC Deb, 26 November 1992, c770W)

Further reasons for this are given in the reply of the Home Office Minister the Earl Ferrers to a question from Lord Kirkhill (who is currently Chairman of the COE Committee on Legal Affairs and Human Rights):

> ... the individual person can always seek justice. It may be difficult if one has to go to a European Court or Commission but it can be done. The view we take is that the incorporation of the Convention would undermine our constitutional tradition. Parliament has supreme responsibility for enacting and changing our laws. Therefore, while we are in accord with the Convention and have signed and ratified it, because Parliament is supreme we do not believe that it is right to put it into legislation.
>
> (HL Deb, 19 November 1993, c714)

In a parliamentary written answer in 1990, Home Office Minister Peter Lloyd explained how UK law was made to conform with the duties and obligations of international treaties:

> The provisions of our common and statute law have always recognised basic human rights and freedoms. New laws are drafted in the light of international conventions and covenants; and, where necessary, existing laws are amended in the light of international judgments to meet our obligations.
>
> (HC Deb, 19 February 1990, c585W)

British Government policy has been to give effect to decisions of the Court, by changing the law if necessary, although this has implied a somewhat ambiguous relationship between the Convention and UK law. As British courts do not enforce or interpret international treaties, only a legislative act to make the Convention part of UK law would make it directly enforceable in the UK. However, although the European Convention is not part of UK law, British courts have on occasions taken it into account when reaching a decision, and it has been used to help clarify ambiguities in UK law. For example, Article 10, on freedom of expression, has been considered or cited as an expression of a principle of British law on various occasions: in the so-called *Spycatcher* case, (*Attorney General v Guardian Newspapers* [1987] 3 All E.R. 316), in the Esther Rantzen libel damages case (*Rantzen v Mirror Group Newspapers, NLJ Law Reports,* 9 April 1993, p507) and in *Derbyshire County Council v Times Newspapers Ltd* ([1993] 2 WLR 449, 451). In *Waddington v Miah* [1974] 1 WLR 683, the House of Lords referred to Article 7 of the Convention on the prohibition of retroactive criminal laws to clarify an aspect of the Immigration Act 1971. It has thus been argued that the Convention is gradually becoming part of UK law, although it cannot be relied upon in the courts. E.C.S.Wade and A.W.Bradley, in *Constitutional and Administrative Law*, 1993, p.422, summarise the current situation as follows:

> So far as the common law is concerned, the courts are unwilling to rely on the Convention to create new common law rights and duties where none exist, but where there may be an obvious gap which needs to be filled. So in *Malone v Metropolitan Police Commissioner*, ([1979] Ch 344) the Vice-Chancellor (Sir Robert Megarry) preferred not to fashion a new common law right to privacy from Art 8 of the Convention in a case involving the tapping of a private telephone by police officers on the authority of a Home Secretary's warrant, issued without statutory authority. On the other hand, the courts may refer to the Convention to help develop and clarify existing common law rules. So in *Attorney-General v BBC* ([1981] AC 303) Lord Fraser said that the courts should have regard to the Convention and to the decisions of the European Court in cases where "domestic law is not firmly settled".

The Maastricht Treaty on European Union (see also below) includes in its Common Provisions a commitment by the Union to "respect fundamental rights, as guaranteed by the European Convention ... and as they result from the constitutional traditions common to Member States, as general principles of Community law". With the exception of Britain, the other eleven EC member states have a constitutional guarantee of human rights protection or a Bill of Rights which is in many cases based on the principles of the European Convention. The Common Provisions are in Title I of the Maastricht Treaty and were not explicitly transferred into UK law as amendments to the Community Treaties by the *European Communities (Amendment) Act 1993*, as were Titles II, III and IV. However, the Act also provides for the insertion of "the other provisions of the Treaty so far as they relate to those Titles ...". It is not clear whether or not the Maastricht provision on the Convention would be considered relevant although the Maastricht commitment may reinforce the argument that the Convention is becoming enforceable in UK courts.

The question of incorporation remains a somewhat amorphous area, with the academic arguments sometimes at odds with constitutional theory, though less so with constitutional practice. The UK is in any case bound to respect the Maastricht provisions as part of a Treaty to which it is party, as it has been bound under international law to adhere to the provisions of the Convention itself and its guarantee of "an effective remedy before a national authority" (Article 13)

B. The European Social Charter

The Council of Europe's European Social Charter, which has been ratified by the UK, was signed on 18 October 1961 and came into force on 26 February 1965. The COE Social Charter should not be confused with the EC Social Charter, on which the Social Chapter of the Maastricht Treaty is based, and from which the UK has obtained an opt-out clause. The Social Charter with its additional protocols contains 23 fundamental social rights and

principles including provisions such as the right to work, the right to collective bargaining and to strike, the right to social security and medical assistance, and rights for migrant workers. The supervisory mechanism is different from that of the European Convention, being less highly developed and generally less effective. States assume commitments to comply with various parts of the Charter on an *à la carte* basis. Of the seven articles which form the hard core of the Charter, each participating state has to choose at least five, undertaking to implement these fully and promptly. Of the remaining twelve articles, a state must select a number of full articles or separate paragraphs so that it is bound in total by 10 articles or 45 sub-paragraphs. A state may decide to implement other articles or paragraphs and must inform the COE Secretary General of its intentions. Under Article 31 restrictions may be placed on the exercise of protected rights as long as such restrictions are laid down by law and are necessary in a democratic society to safeguard the rights and freedoms of others or to protect the public interest, national security, public health or morals (cf the European Convention on Human Rights).

The implementation of the rights set out in the Charter relies to a great extent on detailed national legislation, which means that there are usually differences in application between parties and considerable latitude is granted in implementation. States can sometimes be considered to have fulfilled the obligations of a provision where it refers "to the great majority of the workers concerned" (see also "decency threshold" case below). Also, a number of the Charter's provisions concern "commitments to progress", where the results are relative to the original situation (eg the gradual reduction of the working week "to the extent that the increase of productivity and other relevant factors permit"). Other provisions refer to "action" but do not specify any particular standards or results (eg the participation of individuals and voluntary organisations in the operation of welfare services).

The supervisory mechanism is non-judicial and modelled on that of the ILO for its conventions. It operates on a two-year cycle and involves four bodies: the COE's Committee of Ministers and Parliamentary Assembly, the Committee of Independent Experts and the Governmental Committee of the Social Charter. At the end of each two-year period, each party sends the COE Secretary-General a report on the application of its provisions of the Charter. Each government also sends a copy of the report to national workers' and employers' associations affiliated to the international organisations connected with the supervisory procedure. Any comments from these organisations are sent with the government's report to the Secretary-General which are then sent to the Committee of Independent Experts for examination. There is an ILO representative on this Committee who acts in a consultative capacity. Conclusions and observations are drawn up and sent to the Governmental Committee of the Social Charter, on which one state representative sits, along with observers from one international employers' organisation and one international workers' organisation. The Parliamentary Assembly also debates the Experts' conclusions and votes on an "Opinion" addressed to the Committee of Ministers. If the Committee of Ministers finds shortcomings in the implementation of the Charter it may make recommendations to the state concerned. Under Article 22 the Committee of Ministers also considers the situation in states which have

opted not to apply specific provisions.

In 1992, the COE reported that the Social Charter had helped bring about over forty changes in national legislation, in areas such as the abolition of certain forms of compulsory labour (eg in the merchant navy), the promotion of equal treatment between nationals and foreign workers, the protection of children and young workers.

One example of the effect of the Social Charter in the UK has been in relation to Article 4 on the right to a fair remuneration, which has been widely referred to as a definition of a "decency threshold" for a minimum acceptable level of earnings. Article 4(1) seeks to ensure that contracting parties "recognise the right of workers to a remuneration such as will give them and their families a decent standard of living". The Article does not define how to calculate the level of remuneration required to assure a "decent standard of living" but the supervisory bodies sought to establish a practical measure of adequate remuneration to secure this standard. In 1977, at the request of the COE Secretary-General, a consultant submitted a report proposing a way of ascertaining whether remuneration was "decent" or not (*Methods of Defining "Decent" Remuneration*, Jean-Pierre Daloz). In brief, this report proposed that the "decent" wage level should be set at 68% of the average wage of the country and that country would comply with Article 4(1) of the Charter if no more than 5% of the active population concerned received a wage below this level. The "decency threshold" was adopted as a working benchmark by the Committee of Independent Experts, which under Article 25 of the Charter examines national reports as part of the supervisory mechanism, although it recognised that other factors such as social benefit payments, family and housing subsidies, should also be taken into account. This threshold is not, however, a minimum wage provision, since 5% are allowed to remain below the "decency threshold". The COE's task would be to ascertain whether or not 5% of the workforce were earning less than the 68% level. The Committee's 1984 report (COE/ESC/CIE/8, *Conclusions VIII*) found that the UK did not comply with Article 4(1):

This position was upheld by the Committee of Experts in its 1985 Conclusions (COE/ESC/CIE, *Conclusions IX*, 1985). In its 1988-89 report, while noting that in the UK "for families, the income of low wage earners is in fact higher after tax and benefits are considered than their gross wages", the Committee of Experts concluded: "However, these taxation and social benefit measures did not appear to be sufficient and the Committee therefore concluded that the United Kingdom failed to satisfy this provision of the Charter" (COE/ESC/CIE, *Conclusions XII-1*, 1988-89). However, the COE Governmental Committee of the European Social Charter, which is composed of representatives of the contracting states and which draws up its own report based on the conclusions of the Committee of Experts and the national reports, decided by a vote of 4 in favour and 6 against (with 6 abstentions) not to make a recommendation or address a warning to the UK (COE/ESC/CIE, *12th report(I)*, 1988-89). Whether this is the end of the story or not remains to be seen. The legal question as to whether social security benefits for those on low incomes satisfy the obligations of the Charter has not been conclusively resolved.

IV The European Community

The 1957 Treaty of Rome did not refer explicitly to human rights in the Community although it did affirm the willingness of member states to safeguard peace and freedom, to improve living standards and abolish discrimination on the grounds of nationality between citizens of the member states. It also created rights such as the freedom of workers to move between member countries and establish themselves in the country of their choice, with equality for men and women in the workplace and equal treatment for immigrant workers. The Single European Act of 1986 amended the Treaty of Rome by the inclusion of Article 118A on encouraging improvements in the working environment "as regards the health and safety of workers". In its Preamble the Act reaffirmed the determination of EC member states "to work together to promote democracy on the basis of the fundamental rights recognized in the constitutions and laws of the Member States, in the Convention for the Protection of Human Rights and Fundamental Freedoms and the European Social Charter, notably freedom, equality and social justice".

Two joint declarations on human rights had already been signed before the SEA. The first, in February 1977, was a joint declaration of the European Parliament, Council and Commission on respect for human rights and fundamental freedoms in the exercise of their powers. The other, in June 1986, was the "Joint Declaration against Racism and Xenophobia". Individual member states have also committed themselves to various human rights declarations: the 1973 Declaration on European Identity, the 1978 Declaration on Democracy and the 1986 Declaration on Human Rights, for example. The protection of fundamental rights in the Community countries is currently guaranteed by the legal traditions of the individual member states, the provisions of international human rights treaties and the EC laws in the human rights area over which the European Court of Justice has jurisdiction.

There has been some confusion over the role and mandate of the Council of Europe's European Court of Human Rights and that of the European Community's Court of Justice (ECJ). The ECJ is the judicial arm of the EC, responsible for authoritative interpretation of the EC Treaties and laws. However, rulings of the ECJ may and increasingly do address rights which are also protected by the European Convention, equal rights for men and women, for example. As Bernard Robertson points out in an article entitled "Which European Court?", *Justice of the Peace*, 24 March 1990, although the ECJ is not formally concerned with human rights, it has "to find a background of generally accepted principles of law against which to interpret the Community laws. Increasingly it has turned to the Convention [ie, the European Convention] as evidence of these generally accepted principles, so in a way the Convention is becoming part of EC law".

To this extent, the European Convention already permeates EC jurisprudence although rulings from the ECJ are still the result of an exclusively EC procedure. The Community has proclaimed its commitment to respect for the democratic values and human rights guaranteed by the European Convention and in 1979 the Commission offered a Consultative Document on Community accession to the Convention (6724/79, COM (79)210). The legal basis for incorporation was held to be Article 235 of the Treaty of Rome which provides for "appropriate measures" to be adopted if an action appears necessary to achieve an objective of the Community. Between 1979 and 1990 nothing materialised from this document. The British Government were opposed mainly on the grounds of procedural problems and the potential for duplication which might weaken existing protection under the Convention.

EC accession was the subject of a Commission Communication of 19 November 1990 (CONS DOC 10555/90, 4 December 1990), which drew attention to a "conspicuous gap in the Community legal system" which could be filled by Community accession to the European Convention. The Communication argued that this would provide better protection of the fundamental rights of Community citizens and would be a complementary rather than an alternative measure for review and enforcement. It also pointed out that since the Convention made application suitable only for accession by individual states rather than organisations, EC accession would be subject to an additional protocol which would be negotiated with the COE

to allow EC representation on the Commission of Human Rights and the Court. The Communication envisaged ad hoc solutions to provide for this.

The question of EC accession to the European Convention (as distinct from EU accession, which would be difficult since the EU does not have legal personality and so cannot ratify international treaties) is again on the European agenda. The Commission has asked the Council to approve Community accession to the Convention and to authorize the Commission to negotiate accession details with the Council of Europe. On 8 December 1993, the European Parliament's Committee on Legal Affairs and Citizens' Rights published a report "on Community accession to the European Convention on Human Rights" (EP Session document A3-0421/93, 8 December 1993). the Committee considered the arguments for and against EC accession, as well as the legal and institutional implications. The rapporteur, Mr. Rinaldo Bontempi, concluded:

The Justice Council and Commission representatives, meeting for the first time under the third pillar of the Maastricht Treaty on 30 November 1993, "tentatively decided to consult the European Court of Justice on the judicial questions that could arise from possible adherence of the EC as such to the European Convention on Human Rights" (*Agence Europe*, 6118, 1 December 1993). This is provided for under Article 228 of the Treaty. A working party examining the possible legal implications of EC adherence to the European Convention identified two major problems which the ECJ might consider. One was whether or not the Treaty of Rome should be amended to take account of this new jurisdiction of the ECJ (guaranteed by the Treaty of Rome under Articles 164 and 219), and the other was a question of legal basis for such a move (the Commission had proposed Article 235).

These are not the only legal problems that EC or EU accession would imply. If the ECJ were made subject to the supervision of the European Court of Human Rights, then a situation

could be envisaged in which a ruling by the EC Court on a point of EC law which was also covered by an Article in the European Convention (discrimination, for example), could then be passed on as in an appeal procedure to the COE Court for another, or final, ruling. The ECJ ruling might then become one more of the domestic remedies exhausted by the complainant as part of the COE process. How could this be reconciled with the ultimate jurisdiction of the ECJ in matters of EC law under Articles 164 and 219 of the Treaty of Rome? It is difficult to say at this stage whether EC accession would make the Convention directly applicable in those member states (Ireland and the UK) where it does not at present have direct effect. This would depend on the method of incorporation. It also remains to be seen whether the Convention provisions would be cited only in areas of EC concern and what the effect in the domestic law of states in **non**-EC areas would be.

On the question of which acts might be contested before ECHR bodies, the EP Committee report states:

V Aid, Trade and Human Rights

R.J. Vincent, in *Human Rights and International Relations*, 1986, considers the issues surrounding aid, trade and human rights. He looks at trade as a mutually beneficial activity which adds a commercial imperative to the concept of human rights and holds that this might be problematic or at least uncomfortable for foreign policy makers in wealthy western states. Should we trade with countries with a poor human rights record, and if so, on what grounds? On the other hand, he puts forward a point of view that trade, communication and friendly relations are ways of establishing contact with other societies and in this way can be a civilising influence. Vincent cites former US President Reagan who adopted a policy of "constructive engagement" by "US society" with South Africa, rather than the imposition of economic sanctions by the US Government. The sanctions issue is complex and the many arguments for and against their effectiveness are beyond the scope of this paper. In the case of South Africa, governments with commercial interests in the country have argued that their approach has been a positive force for change rather than turning a blind eye to apartheid.

Vincent comments on the extension of the free trade argument to cover aid :

> While aid comes from governments for the most part, and is therefore suspect from a traditional liberal standpoint, it is a good thing if it makes it possible for developing societies to gain from trade, to join this civilizing transnational society (p.134).

Vincent also looks at the question of security and human rights:

> In addition to the arguments for preferring communication, friendly relations and trade to human rights in foreign policy, but perhaps first in importance, are the arguments advocating caution on human rights for reasons of security. It is in this connection that the card of national interest is most frequently played against human rights. When it is a question of finding allies against Hitler, even devils will do, and to scrutinize domestic human rights records in this context is to court disaster by dwelling on a lesser evil (p134).

In *Foreign Policy Document 215*, January 1991, "Human Rights in Foreign Policy", the Foreign and Commonwealth Office puts forward its views on the question of linking aid and trade with human rights:

> There is growing recognition of the link between a free market economy where initiative is rewarded and a legal system where individual rights are protected. Good government (ie respect for the rule of law, freedom of the press, protection of human rights, including the right of association, and institutions which make government accountable to the governed) is likely to reinforce sound economic policies and produce conditions in which economic development can take place. On the other hand, evidence suggests that economic growth itself also reinforces pressure for greater pluralism.

More recently, Foreign Office Minister Mark Lennox-Boyd set out the Government's approach to human rights and aid in a written parliamentary answer, as follows:

> (HC Deb 28 June 1993, c356W)

The European Community has supported the idea of "conditionality", the linking of aid and trade to the developing world with improvements in, or pledges to improve, civil and political rights. The Council adopted a resolution on "Human Rights, Democracy and Development" on 28 November 1991. This led to a Commission Consultative Document (9902/92) on how the resolution should be implemented. The Council resolution and the Commission document were debated on 21 July 1993 in European Standing Committee B. Among the issues which had been recommended for debate by the Select Committee on European Legislation were:

> (*Select Committee on European Legislation* 25th Report on Human Rights, Democracy and Development, HC 79-xxv, 1992-93).

The Foreign Office Minister Mark Lennox-Boyd commented on the EC carrot and stick approach to relations with the developing world and the importance placed by the UK Government "on the need to make our aid effective". He acknowledged that there were shortfalls in some countries, in areas such as freedom of the press and other media, "the underpinning of peaceful settlements of internal and regional conflicts and support for political exiles wishing to return to their country of origin". However, he was essentially optimistic about the Commission's report and that conditionality was a workable and acceptable policy, rejecting Asian objections to it on the grounds that donors had no right to impose their views on the recipients of aid. He continued:

> We all recognise ... that aid is not given in a policy vacuum and that for it to be effective, recipient Governments must make a commitment to support the best use of resources and to support sound development policies, which include good government in a wider sense than just good economic management. We do not have unlimited resources. They must be properly used. Neither we nor the recipients can afford to have them wasted (c.24).

He defended the UK's position as a guardian of human rights standards in its trade contacts with the developing world:

> I do not accept that we ignore abuses in some countries because of trade interests and that we ignore abuses willy-nilly where we have certain international objectives which we wish to achieve. For example, we take an active interest in the human rights situation in China and we put forward an initiative at the Commission on Human Rights in Geneva. The resolution was narrowly defeated.
>
> (Debates, *European Standing Committee B,* Human Rights, Democracy and Development, 21 July 1993, 1992-93)

The Government's interest in the human rights situation in China is particularly relevant in view of the return of Hong Kong to China in 1997.

At the UN World Conference on Human Rights held in Vienna from 15 to 25 June 1993, there was a clear north-south divide in the approach towards what have often been termed *universal* human rights, with the poorer countries expressing resentment of the richer countries trying to use foreign aid as a lever to promote political pluralism and individual human rights. Led by China, many African, Asian and Far Eastern countries rejected the tying of development aid to human rights, seeing it as a way for the West to justify interference in the domestic affairs of other countries. Resistance to the West's "conditionality" had been voiced by the hardliners in April 1993 at a pre-Conference meeting of Asian and Arab countries. The statement stressed regional, cultural and religious factors. Human rights were relative rather than universal. They should not be linked to aid and trade, nor be used "as an instrument of political pressure". In the US Bill Clinton has made human rights the cornerstone of his foreign policy, reminiscent of the era of President Jimmy Carter. *The Independent* reported on 22 May 1993: "The US wants human rights to become an integral element of all UN peace-keeping, humanitarian, election-monitoring and economic development activities, instead of being something that many in the UN bureaucracy view as a hindrance to the *realpolitik* of international diplomacy".

The final declaration of the World Conference (The Vienna Declaration, UN General Assembly Doc A/CONF. 157/23, 12 July 1993) , which was reached by consensus, was something of a compromise. It broadly supported the universality of human rights whilst referring also to "national and regional particularities". Exactly how this might translate into aid, trade and foreign policies is not clear. Many observers were critical of the Conference and felt that the final declaration was far from satisfactory.

Conclusion

The continuing violations of human rights in various parts of the world has raised doubts as to the relevance and effectiveness of the current conventions, as well as their monitoring and enforcement provisions.

As larger states in Europe and elsewhere continue to break up and fragment into ethnic, linguistic or political groups, the protection of minorities will become increasingly important. Human rights violations are not so easily swept under the carpet now as they might have been before the days of mass media coverage. The whole world has been made aware of the so-called "ethnic cleansing" that has been taking place among the warring factions in the former Yugoslavia, although knowledge has not necessarily brought solutions, only temporary alleviation in the form of humanitarian aid to small groups of the population. The establishment of an international tribunal to try the alleged perpetrators of human rights abuses might bring some to justice, but will not compensate for the thousands in the Former Yugoslavia who have lost family or who have been tortured, raped or persecuted. The legal and political issues surrounding the establishment and operation of such an international war crimes tribunal in the former Yugoslavia are considered in Library Research Paper 93/35, Peace Proposals for Bosnia-Herzegovina, 23 March 1993.

In Latin America, where some recently elected democratic governments have ordered past human rights violations to be investigated, trials have resulted in convictions in some cases (in Chile and Argentina, for example), but the majority of the so-called "disappearances" have not been solved and probably never will be. In other cases the transition to democracy has been facilitated partly as a result of agreement between the former military rulers and the elected civilian leaders that an amnesty be granted to those accused of human rights abuses under the former regime.

The main aim of current human rights action must be to make such abuses impossible or extremely difficult to carry out without some kind of effective sanctions from the international community. This has sometimes been an allusive objective. The threat of further allied action against Iraq for aggression against the Marsh Arabs has not prevented more bloodshed. The Khmer Rouge remained a potent threat to UN peace efforts in Cambodia long after they had been ousted from power, and whilst Khmer involvement in the subsequent peace process was encouraged by the UN negotiators, their continued acts of violence against the people of Cambodia during this period revealed the fragility of the present protection systems. In the case of China, it is a political imperative that negotiations between the UK and China continue over the future of Hong Kong, in spite of and because of the Tiananmen Square massacre in 1989.

The policy of "quiet diplomacy" is not enough on its own to prevent large-scale human rights abuses, although it has been effective in helping individuals (in securing the release from prison of political prisoners for example, or for improving their chances of release). The activities of non-governmental human rights organisations such as Amnesty International have helped considerably in drawing public and government attention to instances of human rights abuse, but it is ultimately the task of governments to make human rights a much more important factor in their foreign policies.

The western nations have acknowledged in UN and European fora the importance of human rights in international relations, and have also recognised, albeit under pressure, that different cultures have different views on human rights standards which are not necessarily less valid than western standards. However, human rights violations persist in many of the different cultures and the gap between theory and practice has yet to be bridged on all sides. Whether the UN is the best organisation to tackle this remains to be seen. The appointment of a Human Rights Commissioner will not solve the problem on its own. It is perhaps the willingness of the leaders and governments of member states to monitor and control perpetrators of abuse in their own countries and put pressure on other offending countries that will ultimately have more effect than yet another human rights body trying to police the world's wrong-doers.

VM/JML

Annex

Terminology

i) human rights

> Human rights, one of a family of concepts like CIVIL RIGHTS or LIBERTIES, or NATURAL RIGHTS, are those rights and privileges held to belong to any man, regardless of any legal provision that may or may not exist for them in his legal system, simply because man, as man, may not be forbidden certain things by any government.

ii) civil liberties

> Civil liberties are freedoms or rights which are thought to be especially valuable in themselves and vital to the functioning of a liberal and democratic society.

iii) civil rights

> Civil rights are those rights which are, or which it is argued should be, protected constitutionally or legally as fundamental rights that everyone should enjoy, irrespective of his or her status.
>
> (*Penguin Dictionary of Politics*, David Robertson, 1987)

Paul Sieghart, in *The International Law of Human Rights*, 1983, points out that the two UN instruments, the ICCPR and the ICESCR, distinguish between the two main types of human rights recognised today: civil and political rights on the one hand, and economic, social and cultural on the other. However, he is critical of such a clear-cut distinction (p.125):

> It is often argued that the division between the two groups of instruments reflects some substantive differences between the two categories of right which they enumerate. Some take the view, for example, that civil and political rights are `individual' or `personal', whereas economic, social and cultural rights are `collective' or `social'. But on closer examination that proves not to be the case, either formally or in substance. With the exception of a very few rights ascribed to `peoples' or `minorities', the instruments consistently attribute the rights they declare to `every person', `everyone' or `every individual': in both the categories, virtually all the rights are expressed as rights of individuals. At the same time, it is difficult to conceive how most of the rights

in either category could usefully be exercised in total isolation from other individuals: even the right to freedom of expression - one of the classical `civil and political' rights - presupposes at least one other person to whom opinions, information, and ideas may be expressed. Before the arrival of Man Friday, Robinson Crusoe would have found few occasions to claim any of his human rights. In that sense, all human rights are social rights.

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