Council of Europe
Conseil de l'Europe

Strasbourg, 12 April 1994



Restricted
CAHMIN (94) 7

# AD HOC COMMITTEE FOR THE PROTECTION OF NATIONAL MINORITIES

## (CAHMIN)

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*Study of control and monitoring systems in international conventions*

*Proposals for a control or monitoring system under a framework Convention on the protection of minorities*

by
**Mrs Florence ROHMER**
**Maître de Conférences**
**Faculty of Law, Strasbourg**

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Florence Benoît-Rohmer

# Control systems and Council of Europe framework Convention on the protection of minorities

1. Conventions relating to human rights generally include **institutional machinery to supervise their implementation and to ensure subsequent monitoring**. The Contracting States consider that the classic machinery under international law is not sufficiently effective to ensure compliance with obligations which they regard as essential since the traditional rule based on reciprocity is not applicable in the field of human rights. If these rights are conferred upon private persons, the Contracting States frequently want the control machinery to be activated by such persons. Furthermore, the initiation of controls on the sole initiative of States may depend on considerations which do not only take account of the interests of the protected persons.

2. **The nature and the scope of the machinery** introduced are closely dependent on the content of the Convention concerned and the will of the Parties.

- They are subordinate to the will of the Parties, because the principle of sovereignty opposes the introduction of a control system in a Convention when the Parties have not agreed to it.

- They depend on the content of the Convention, because the same controls cannot be applied to compliance with measures creating subjective rights for individuals and groups as to the implementation of norms defining an action programme for States. In the first case, the State is obliged, in its legal system, to observe the norms created for the persons for whom they are intended, and controls on compliance with these norms may be either inter-State or even applied under international jurisdiction by Parties or by individuals. In the second case, the State's obligation is to endeavour to use national measures to attain the objective defined by the norm. The controls can then be implemented by introducing a reporting system and/or by setting up a monitoring committee responsible for advising the Parties, allowing an exchange of experiences, giving advice on what the content of internal norms should be, etc.

3. The Conventions signed in the field of human rights are remarkable for the diversity of the mechanisms adopted to ensure their implementation and the ingenuity demonstrated in the search for appropriate procedures. When they are analysed, it can be seen that the controls organised vary in intensity from the most binding system (judicial machinery) to a relatively strict reporting system to a very flexible system (simple monitoring machinery).

## I. Lessons to be drawn from experience

### A. Judicial machinery

#### 1. Advantages and drawbacks

4. It is rare for judicial machinery to be provided for in Conventions connected with human rights in order to guarantee the recognised rights of individuals. However, such machinery offers undeniable advantages.

5. The **first advantage** lies in the impartiality of the decisions handed down, because the legal machinery allows controls to be carried out by a body independent of the Contracting States to the Convention following an adversary procedure. Furthermore, the judge is bound to base his solution on law, which excludes considerations of a political nature, even if in this field more than elsewhere the judge recognises that the Contracting States have a substantial margin of discretion.

6. The **second advantage** stems from the competence and authority of the judges faced with complex problems, due to the time that they have in which to study the files and the experience that they can acquire in the matter if their term of office is sufficiently long and if it can be renewed.

7. On the other hand, the introduction of judicial machinery has the drawback of undermining State sovereignty. Imposing controls on a State, obliging it to report on the way in which it fulfils its obligations, observing with *res judicata* authority that it has failed to fulfil the said obligations and forcing it to remedy this failure all mean restricting its sovereignty. It is therefore understandable that judicial machinery cannot be applied without its having been accepted by the States beforehand. All the same, the latter still fear the publicity to which a legal judgment could expose them.

8. Finally, the introduction of legal controls is possible only if the norms enshrined in the Convention are applicable in law, i.e. if they establish sufficiently precise obligations on the part of States for compliance therewith to be assessed by a judge without the latter being led, by reason of the imprecision of the reference norms, to play a role of international legislator.

9. Consequently, judicial bodies have a very limited place among the existing guarantee mechanisms in the field of human rights.

10. The Minorities Treaties system, therefore, in more than one way the precursor as regards controls, opened up an alternative between examination of difficulties resulting from the application of the treaties by the Council of the League of Nations and their submission to the Permanent Court of Justice for a consultative opinion, although only three cases were brought before it. The ILO has provided for referral to the Court by States involved in a dispute when they do not accept the report by the commission of inquiry; but States hardly appreciate this facility. As for the International Covenants on human rights signed under the auspices of the UN, these do not provide for any possibility of referral to the International Court of Justice. Finally, it should be noted that the European Convention on Human Rights provided for cases brought before the Commission being directed to the European Court of Human Rights only on a subordinate basis, with the decision-making body being primarily the Committee of Ministers. However, referral to the Court has become the accepted procedure, as demonstrated by the revision of the control system that is envisaged.

11. Introduction of obligatory referral to the judge in the field of human rights presupposes the existence of a common legal culture between the parties and sufficient confidence in the judicial ruling. That is why so far it has been possible only at regional level, the only level with sufficient homogeneity in this respect.

## 2. Machinery established by the European Convention on Human Rights

12. In actual fact, the European Convention on Human Rights, along with the Inter-American Convention on Human Rights, is the only international instrument for the protection of human rights to organise judicial control over the application of its provisions.

13. There is no need to describe the functioning of the control machinery established by the Convention[1]. Let us briefly recall that this machinery is a two-stage procedure. **Firstly**, it is the Commission's responsibility to check the admissibility of complaints by States or individuals that are brought before it, thus "screening" the petitions. The Commission is then given a conciliation task by the Convention since it is responsible for establishing the facts and seeking an amicable settlement between the parties concerned. If this conciliation fails, it must issue an opinion on the merits, which initiates the final stage of the procedure.

14. The **second stage** begins when the report is transmitted to the Committee of Ministers, following which the Commission or the States involved have a period of three months within which to bring the case before the European Court of Human Rights, provided however that the State concerned has accepted its jurisdiction (if not, only the Committee of Ministers is competent). If the case has not been referred to the Court, it is the responsibility of the Committee of Ministers to decide whether or not the Convention has been infringed. It is known that the control system will shortly be simplified by the merger of the Commission and the Court, as declared by the Heads of State and Government at the Vienna Conference in 1993. The Committee of Ministers is losing its role in the settlement of cases.

15. The most original and most discussed aspect of the Convention is **the possibility that it opens up for individuals to take action directly before an international body** to exercise their rights and to ensure effective compliance by the Contracting States to the Convention. Of course, this possibility is still limited to applying to the Commission, but Protocol No. 9 adopted on November 6th 1990, which has not yet come into force (ten ratifications are necessary), is aimed at enlarging the scope of referral and recognising the right of individuals applying to the Commission to bring the case before the Court[2]. This reform is considered to be revolutionary in principle by some, in so far as it virtually completes the equality between individuals claiming infringement of their rights and the defendant States.

16. It should be pointed out, however, that whilst the right of individual petition fully recognised by the Inter-American Convention, it is linked within the European framework to prior acceptance by the State and is included in an optional provision because originally

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[1] See in particular G. Cohen Jonathan, "La Convention européenne des Droits de l'Homme", Economica, Paris, 1989.

[2] However, this right is tempered by the intervention of a Committee of three judges set up within the Court with the task of screening individual cases. The Committee may decide unanimously not to refer the case to the Court but to transmit it to the Committee of Ministers.

States were not prepared to accept a referral system which would thus seriously prejudice their sovereignty. It was necessary for confidence gradually to be established in the Strasbourg bodies, and it was not until 1989 that all the member States of the Council of Europe accepted the right of individual petition. As regards the new democracies, acceptance of the right of individual petition remains one of the preconditions for their accession to the Council of Europe. In the future, the draft protocol on the merger of the Commission and the Court, when adopted, will make the right of individual application mandatory for all Parties to the Convention. This will mark the last stage of developments and bring the European system on this point in line with that of the Inter-American Convention. Action by States remains episodic and currently concerns only hypotheses of large-scale infringement of human rights. In effect, States hesitate to conduct a systematic analysis of the legislation of the other Contracting Parties with a view to uncovering human rights violations. They intervene only when such violations threaten the stability of the European order.

17. The right of individual petition has now become an essential element in the safeguard machinery introduced by the European Convention on Human Rights. Without it, the mechanism would slow down, as demonstrated by the ever-increasing number of individual petitions, facilitated by the fact that the procedure before the Strasbourg bodies is free of charge and by the introduction of a legal aid system.

## B. Non-judicial control machinery

18. Since it is a particularly delicate matter to seek out and maintain a balance between preservation of State sovereignty and the introduction of a control system based on the legal settlement of disputes, States have preferred more often than not, when it comes to compliance with the provisions of human rights conventions, to opt for the committee system. However, the procedures established to determine both the composition of the committees and the extent of their powers are extremely diverse and follow an adept gradation according to the degree of acceptance of controls by the Contracting States. It has also been observed that the more a human rights convention tends towards universality as regards participation the lower the acceptability of controls.

### 1. Committees of representatives of the Contracting States

19. The committee can first of all be comprised of State representatives, be it a question of member States of the organisation within whose framework the Convention has been formulated or all the Contracting Parties, or even only some of them (select bodies).

#### - Advantages and drawbacks

20. The elements in favour of such committees are their realism and their authority. Aware of all the factors determining the behaviour of States and the obstacles which sometimes make it difficult for the Parties to fulfil their obligations, they are in a better position to understand and appreciate the efforts made and the assistance that should be

given to States to help them meet their obligations. They also enjoy a substantial authority due to the fact that they represent the States, and the opportunity that they may have in certain cases of availing themselves of the penalties provided for by the charter of the organisation to which they belong.

21. On the other hand, the political nature of these committees is the origin of one of the main criticisms levelled against them. They could yield to the temptation to assess the behaviour of States not on the basis of objective criteria but rather in terms of political and ideological factors. At the United Nations, this situation has given rise in the past to criticisms as to the double standards applied in examining the behaviour of States depending on the group of States to which they belong. They then risk yielding to the "precedent complex", i.e. the fear that each State has of adopting a clear position only to see it turn against its interests one day in the future.

**- Machinery of the Minorities Treaties (1919-1920)**

22. This kind of control was adopted by the only system specially devoted to the protection of minorities, that of the League of Nations. It should be recalled that the practical impossibility of a coherent territorial division of Europe which the Paris Conference ran up against immediately after the first world war, given the difficulties connected with the multiplicity of nationalities, was to result in the division of certain peoples among States that were either newly created or had expanded territorially. To preserve the intangibility of new frontiers and prevent attempts at secession, the Allied Powers deemed it necessary to protect the new minorities by forcing these States to enter into specific undertakings as regard minorities placed under their jurisdiction.
The different peace treaties signed between 1919 and 1920, still called "Minorities Treaties", therefore subjected certain States to a number of obligations towards their minorities.

23. Apart from these very precise obligations imposed on States vis-à-vis their minorities, it is the system aimed at guaranteeing rights that is included in these treaties which should be recalled above all, because **for the first time in history it fell to an international organisation, the League of Nations, to ensure the protection of minority groups.**

24. The Council of the League of Nations took the greatest possible care in performing this task. Whilst only States forming part of the Council had the right to refer matters to it, the restrictive nature of this solution was attenuated by the establishment of a petition procedure enabling not only members of minorities but also States not members of the Council to draw the attention of empowered States to cases of States failing to fulfil their obligations.

25. A relatively complex procedure for examining petitions, but nevertheless one which in many respects can serve as an example, had therefore been introduced. When a petition was presented to the League of Nations Secretariat, the latter conducted an initial examination to determine whether it was admissible. Once this had been established, the petition was passed on to a **"Committee of Three"**, so called because it consisted of representatives of three member States of the Council. The composition of the Committee varied according to the petitions examined and a rotation of Council members was ensured.

This Committee of Three was responsible for establishing the facts and determining whether or not the matter should be brought before the Council.

26. The system worked fairly well, in the beginning at least, since no fewer than 150 sessions of the Committee of Three were held between 1921 and 1929. In most cases, the discussions with the representatives of the State concerned led to a satisfactory solution of the problems raised. It should be noted, in fact, that the secret nature of the procedure before this Committee constituted a not insignificant means of pressure for a solution acceptable to everyone. Indeed, States found it in their interests to accept a settlement which did not expose them to the publicity connected with intervention by the Council. As from 1930, however, for political reasons, the system began to reveal some signs of weakness. Firstly, States bound by the Minorities Treaties considered that the protection system established by the Council had allowed it to overstep its supervisory powers and to interfere in their internal affairs. But above all they found it particularly unfair that obligations should be imposed upon them which did not apply to League of Nations members not concerned by the Minorities Treaties yet themselves having their own very real difficulties with regard to minorities. To these basic reasons was added a conjunctural but decisive factor : the systematic exploitation of the minority issue by Germany for expansionist purposes. The arrival in power of the Nazis sounded the death knell for the control system.

27. Remedies to the disadvantages of excessive politicisation have often been sought in greater independence from the Contracting States for this Committee, which is why the different committees that have been set up have often been comprised of independent experts.

### 2. Committees of experts

28. Independence in function does not, however, prevent States from exerting an influence on the appointment of the members. Whilst some committees - like those of the ILO - are appointed by other main bodies of the same organisation, a number of them are appointed on a collective basis by the States under supervision. This is particularly the case when it comes to human rights. But once the appointment has been made, the essential point is the independence of function, guaranteed by incompatibilities and appropriate immunities.

#### - Advantages and drawbacks

29. The advantages of this independence are a result of the competence of the experts and the experience that they can acquire in the matter, together with the efficacy and, above all, the objectivity of the decisions handed down, since they are free of any concern to spare State susceptibilities. On the other hand, the experts cannot fully appreciate the political obstacles hindering action by States or cannot measure the help that a well-intentioned State may need in fulfilling the obligations that it has entered into. Whatever the case may be, the moral prestige that a committee could derive from its independence and impartiality has never prevented ill-intentioned States from questioning decisions against them. It was therefore thought necessary to strengthen the committee's authority by providing the possibility of bringing the matter before the political body created under the Convention, so as to be able to make use of the means of pressure or the sanctions provided for by the Convention.

**- Control mechanisms**

30. **The extent of the powers devolving upon committees of experts depends primarily on the intensity of the control machinery.** Most human rights conventions use **a control system based on reports, which obliges the States under control to submit a report to a Committee at regular intervals on the measures taken for its implementation.** After examining the report, the Committee presents its observations and makes recommendations. This reporting system is generally coupled with the recognised facility for other Contracting States, and sometimes even private individuals, to bring a matter before the Council when they observe a violation of the convention concerned. In this case, the State's acceptance is required.

31. This reporting system has several advantages. The length of the procedure allows States gradually to adapt their legislation as the controls progress, since each examination cycle lasts several months, even years, and the additional measures (requests for information and, exceptionally, inquiries) which may be taken vis-à-vis States extend the control over two or more cycles. The psychological impact of this sort of control machinery must also be borne in mind. On each examination, governments feel bound, in order to demonstrate that they are anxious to meet their obligations and to avoid reproaches from their own or international public opinion, to announce one or more reforms on various points of the recommendations made to them.

32. Nevertheless, this machinery does not entail any precise obligations, in so far as the observations, recommendations or opinions expressed by the committee of experts or the political body operating upstream have no binding power. In this respect, the machinery has little dissuasive effect. It is also a matter of regret that this machinery leaves no room for individuals who cannot themselves take the initiative of setting the machinery in motion or presenting evidence to the control body. This is opposed both by the sovereignty of the State, which does not allow its subjects to escape its own jurisdiction and refer directly to an international body, and by the political interests of the government, which could be threatened by accusations made, inevitably, by opposition groups. Some Conventions, however, stipulate that individuals may by asked to provide information on the way in which States fulfil their obligations, but here it is a question of quite exceptional hypotheses.

**- CSCE machinery**

33. Following the acceleration of history due to the collapse of the communist parties in Eastern Europe and the nationalist movements rising from their ashes, the Conference on Security and Cooperation in Europe has been endeavouring to find solutions to the problem of minorities. The Conference held in June 1991 in Copenhagen, for instance, set out the rights of the various national minorities. To perfect the system and guarantee effective implementation of these rights, the Moscow Conference (September-October 1991) enlarged the guarantee machinery for the human dimension and consolidated the Copenhagen undertakings by strengthening the preventive mechanism already introduced at the Vienna Conference (November 1986; January 1989). Whilst this mechanism has an extremely broad scope, there can be no doubt that the prevention of conflicts which may arise between a State and its national minorities is a favoured area for its intervention.

34. The **machinery for the prevention of conflicts** established at the Moscow Conference is based on dialogue and cooperation between States and is designed for an amicable settlement of sensitive issues before they degenerate into open conflict. It is therefore a means for political settlement of differences, and a very complex one, placed in the hands of a committee of experts with substantial powers.

35. **First of all**, a State with difficulties on its territory concerning a question of a human dimension has the facility, voluntarily or at the request of another participant State[3], to request the assistance of a CSCE **Experts' Mission** comprising a maximum of three independent experts to examine these difficulties or to help resolve them. In this case, it is up to the requesting State to choose the expert(s) from a list drawn up by all the participant States[4] and to agree with the mission on its exact mandate. In performing its tasks, the mission may collect all the necessary information and, if appropriate, offer its good offices and mediation with a view to encouraging dialogue and cooperation between the parties. The requesting State[5] may entrust other tasks to the mission, such as carrying out inquiries or consultations, so as to be able to propose solutions facilitating compliance with the undertakings entered into within the framework of the CSCE. At the end of its mandate, the experts' mission sets out its observations to the requesting State, which communicates to the other participant States, via the CSCE institution, the mission's observations and the measures that it envisages taking. The mission's observations and any comments by the requesting State may be discussed by the Committee of Senior Officials or the Standing Committee, which will consider any action to be taken.

36. As under the League of Nations, it is stipulated that the work of the mission remains confidential until it has been brought to the attention of the Committee of Senior Officials, so as to improve the chances of a discreet but effective solution to the problem. Consequently, the threat of giving publicity to the case is a not insignificant weapon designed to encourage flexibility in the position of the State concerned.

37. **Secondly**, when a participant State asks another State to request a mission and this State has not formed the said mission within ten days of the request, or considers that the experts' mission has failed to resolve the difficulty concerned, it may, with the support of at least five other States, ask for a CSCE **Rapporteurs' Mission** to be established, with a

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[3] At the request of any participant State, the Committee of Senior Officials or the Standing Committee may also decide to set up a CSCE experts' or rapporteurs' mission.

[4] Each Contracting State is bound to put forward the names of six experts selected from among prominent personalities, preferably with experience in the human dimension and minorities field, providing every guarantee of impartiality in the performance of their duties.

[5] The experts' mission must submit its observations as quickly as possible, preferably within three weeks following its creation. The requesting State has two weeks in which to communicate the mission's observation and a list of the measures that it intends to take to the other participant States (document from the Rome Conference 1993, paragraph 7).

maximum of three rapporteurs[6]. In this case, it is up to the CSCE rapporteur(s) to establish the facts, to draw up a report and to express an opinion on possible solutions to the issue in question. The report is then submitted within two weeks to the State(s) concerned and, unless all the States concerned agree otherwise, to the CSCE institution. The requested State presents its comments on the report. As in the previous case, the reports and the comments made by the requested State are then transmitted within two weeks to all the participant States, and the Committee of Senior Officials or the Standing Committee may decide on any action to be taken. The report also remains confidential until the Committee's work is completed.

38. The **third procedure** is similar to the previous one and concerns the case of a participant State which considers that a particularly serious risk exists in another participant State of the CSCE provisions concerning the human dimension not being observed. In this very particular hypothesis, the participant State may, with the support of at least nine other States, request the creation of a rapporteurs' mission to operate in the manner described above.

39. The value of the system introduced by the Moscow Conference lies in the possibility of subjecting a State which refuses to set up an experts' mission to the machinery for prevention of disputes, whereas in theory the process for settling disputes depends on acceptance by the States. In this, it certainly represents a step forward which should be underlined. It also has the merit of questioning the principle of the necessary consensus to set the machinery in motion, a principle which was proving to have an increasingly paralysing effect in trying to resolve crisis situations.

40. It will be noted that this system provides for the use of both a committee of experts and a political body, i.e. it combines the advantage of independent expertise with the authority attached to intervention by a political body, which is even more essential given the fact that it is a system for the prevention of conflicts, a field calling for political involvement.

The participant States decided at the Helsinki Conference (1992) to complete this machinery with the introduction of an instrument to nip conflicts in the bud as quickly as possible. The **High Commissioner for national minorities** is responsible for sounding an "early warning" and, if necessary, taking "early action" if tension connected with the problems of national minorities threaten to degenerate into a conflict in the CSCE area. After conducting inquiries on the spot and listening to the parties directly involved, the High Commissioner must present a report to the Chairman in-Office, containing his observations,

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[6] The requesting State(s) may choose a CSCE rapporteur from the list of experts. The requested State may, if it so desires, appoint another rapporteur from the list. In this case, the two rapporteurs appointed, who must not be resident in or nationals of one of the States concerned or have been included on the list by one of the States concerned, immediately nominate by mutual agreement a third rapporteur from the list. If they fail to reach an agreement within eight days, a third rapporteur fulfilling the same conditions is chosen from the list by the member with the highest ranking in the CSCE body appointed by the Council.

the results of his action and his conclusions, which is then passed on to the Committee of Senior Officials.

- **Control mechanisms set up within the International Labour Organisation (OIT)**

41. Various mechanisms are provided for at ILO level to monitor compliance with its ratified Conventions. Since the basis for any international controls is the collection of information on the measures taken by States with regard to their obligations, the ILO Constitution stipulated from the very beginning that States are obliged to submit regular reports on application of the ratified Conventions (Article 22) and also on non-ratified Conventions and Recommendations[7]. The reports are examined by two committees set up for this purpose, the **Committee of Experts on the Application of Conventions and Recommendations** and the **Committee on the Application of Conference Conventions and Recommendations**, and are adopted by the **International Labour Conference**. The ILO therefore provides for controls at three levels, on the basis of dialogue between States, experts, representatives of employers' and trade union organisations and ILO bodies.

42. The **first body** to intervene is the Committee of Experts on the Application of Conventions and Recommendations, comprising personalities with recognised technical competence and total independence. This independence is also marked by the fact that the experts are appointed not by the governments of the States of which they are nationals[8] , but by the Governing Body on a proposal by the Director-General of the ILO. His task is to examine, in the light of the reports, the compatibility of national practices and laws with the provisions of the Conventions signed under the auspices of the ILO and the obligations placed on States by the ILO Constitution. If it considers that a State's compliance with its obligations is unsatisfactory, the Committee submits "observations" which are communicated directly to the government concerned for a reply in its next report. Only if the government does not reply or fails to take appropriate measures within a reasonable period of time may the Committee decide to raise the matter in an observation to be published in its report. The objective of this method, complex by its very nature, is to include in the Committee's report only the most delicate cases of failure to act and has the advantage of allowing the State concerned to explain and remedy the situation before the matter is made public.

43. The experts' mission is completely different when it comes to examining the reports on non-ratified Conventions and Recommendations. The Committee is simply charged with carrying out overviews of the situations in the countries from which the reports have come

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[7] This particular obligation is applicable only at the request of the ILO Governing Body, which every year selects a limited number of texts of topical interest and asks each State to provide the information required in this respect by the ILO Constitution on the basis of standard forms.

[8] Some States have found it difficult to accept the appointment of experts from among persons not proposed by themselves. Some experts also hesitate to uphold a point of view different from that of the State of which they are nationals. Whilst such difficulties have disturbed the functioning of the Committee, however, they have been overcome all the same.

and to set out the difficulties with which application of the texts concerned may be confronted.

44. The **second body** before which the summary of the reports by the different States and the report by the Committee of Experts is brought is the International Labour Conference. Since 1926 it has appointed a Committee on the Application of Conference Conventions and Recommendations, comprising representatives of governments and national employers' and trade union organisations. The Committee asks the States to provide explanations on the difficulties referred to by the Committee of Experts and on the measures that they have taken or are envisaging adopting to overcome these difficulties. On the basis of the replies received from the States, a debate is initiated, often very intense, with the workers' and employers' representatives intervening energetically on the subject of the way in which the Conventions are applied either in their own State or in others. The Committee draws up a report summarising the debates and setting out the conclusions that it has reached, which is then transmitted to a plenary session of the Conference. The Conference is therefore the third body called upon to discuss and adopt the report.

45. Different studies aimed at testing the efficiency of the control system have been carried out both by the Committee of Experts and by legal authors. They have revealed the positive side of these controls, since in many cases they have led to elimination of the differences observed between ratified Conventions and national practices and legislation. Whilst progress has been made in these cases, in many others disparities have also been revealed, some fairly long-standing. The preventive role of the machinery has been underlined, in that it has led States to conduct serious studies on and adopt the measures required for application of a Convention before they ratify it.

46. Along with the regular automatic controls based on the submission of reports by States, a general control system has also been established, based on claims and complaints. According to Articles 24 and 25 of the ILO Constitution, claims may be lodged by employers' or workers' organisations against a member State which, in their opinion, has not satisfactorily ensured implementation of a Convention which the said member has approved. It is indicated that the claims must be examined by a committee comprising three members of the ILO Governing Body. The Governing Body has the power to call upon the government in question to issue a statement on the subject. It may then decide to publicise the claim and the reply received. The claims procedure is very rarely used by employers' or employees' organisations.

47. Complaints represent the most formal procedure of the ILO (Articles 26 to 34 of the ILO Constitution). They may be lodged by any member State against another member State which, in its opinion, has not satisfactorily ensured implementation of a Convention ratified by both of them, and also by the Governing Body, either automatically or on receipt of a complaint from a Conference delegate. When a complaint is lodged, the ILO Governing Body may set up a commission of inquiry which, on completion of its work, is to present a report containing its observations on all the substantial facts allowing the scope of the complaint to be defined, together with its recommendations as to the measures to be taken to satisfy the complainant. The States concerned are bound to indicate within a period of three months whether or not they accept the recommendations by the commission of inquiry and, if they do not, bring the dispute before the International Court of Justice if they so

desire. The judgment handed down by the latter is not subject to appeal. In spite of the importance that the authors of the ILO Constitution attached to the complaints and claims procedures, they have not had the success that was hoped for.

48. Other mechanisms are set in motion in specific cases, such as controls based on inquiries and mediation within the context of the freedom of association.

**- Machinery of the European Social Charter**

49. The control system of the European Social Charter is also extremely complex. As in the case of the ILO, the machinery brings in both a committee of independent experts and bodies of a political nature, namely a sub-committee of the Governmental Social Committee and the Committee of Ministers. Unlike the ILO procedure, however, this machinery operates at three levels.

50. The Charter provides for a system of periodic reports intended to ensure its implementation. The reports are examined first of all by a **Committee of Experts**, which draws up a report setting out its conclusions. The experts are appointed by the Committee of Ministers from a list of names put forward by the Contracting Parties. They must be selected for their integrity and their recognised competence in international social questions (Article 25). An observer from the International Labour Organisation (ILO) participates in a consultative capacity in its deliberations (Article 26).

51. The conclusions of the Committee of Experts, appended to the reports submitted by the States and to the observations and information provided by the international employers' and trade union organisations invited to appoint a representative to sit on the sub-committee of the Governmental Social Committee are then communicated to the **sub-committee of the Governmental Social Committee**, which presents a report to the Committee of Ministers containing its conclusions (Article 27). Unlike the Committee of Experts, the sub-committee of the Governmental Social Committee is a political body comprising one representative of each of the Contracting Parties. It may receive technical assistance, however, since it must invite no more than two international organisations of employers and no more than two international trade union organisations to be represented as observers in a consultative capacity at its meetings. It may also consult no more than two representatives of international non-governmental organisations having consultative status with the Council of Europe in respect of questions with which the organisations are particularly qualified to deal (Article 27, paragraph 2). The Parliamentary Assembly of the Council of Europe also receives the conclusions of the Committee of Experts and communicates an opinion on these conclusions to the Committee of Ministers (Article 28).

52. Finally, the **Committee of Ministers** may, on the basis of the report by the sub-committee and after consultation with the Parliamentary Assembly, make any necessary recommendations to each Contracting Party (Article 29).

53. The efficiency of the control machinery has been called into question to a large extent, particularly by the Parliamentary Assembly, and the criticisms levelled at it have led to changes being made to this machinery. It is true that the Parliamentary Assembly had insistently requested on several occasions that the Committee of Ministers demand better

application of the Charter by certain States. It also challenged the policy of the Committee of Ministers in sending recommendations of a general nature to all the States, rather than individualised documents. The protocol amending the European Social Charter takes account of these criticisms and attempts to remedy them by strengthening the independence of the experts and widening the powers devolving upon the political bodies.

54. In so far as the experts are concerned, the minimum number of experts has been increased to nine. Henceforth, they should be elected by the Parliamentary Assembly by a majority of votes cast from a list of experts proposed by the Parties. They must also be of the highest integrity and have recognised competence in international and also national[9] social matters. The independence of the experts has also been strengthened by an incompatibility mechanism designed to ensure the objectivity of their assessments. It is stipulated that throughout their term of office, they may not assume functions incompatible with the requirements of independence, impartiality and availability inherent in this office (Article 25, paragraph 4 of the protocol amending the Charter). Finally, to prevent any political pressure to which they could be subjected, it has been decided that they can be re-elected once only (Article 25, paragraph 2 of the protocol amending the Charter).

55. The **Governmental Committee**, which replaces the sub-committee of the Governmental Social Committee, has had its powers enlarged. It is generally responsible for preparing the decisions of the Committee of Ministers, but it must also select, in the light of the reports by the Committee of Independent Experts and the Contracting Parties and on the basis of considerations of social and economic policy, situations which in its view should be the subject of recommendations to each Contracting Party. It is also responsible for submitting to the Committee of Ministers a report which will subsequently be made public. Finally, the Governmental Committee may submit proposals to the Committee of Ministers for studies to be carried out on social questions or articles of the Charter.

56. The **Committee of Ministers** intervenes in the final instance. The protocol amending the European Social Charter stipulates that it is competent to adopt, by a two-thirds majority of the votes cast[10], a resolution covering the control cycle as a whole and containing individual recommendations to the Contracting Parties concerned (Article 28 of the protocol amending the Charter).

**- Machinery of the United Nations Covenant on Civil and Political Rights**

57. The system of the United Nations Covenant on Civil and Political Rights is entirely focused on monitoring observance of the Covenant. The authors of the Covenant adopted by the United Nations General Assembly in 1966 aimed to ensure effective observance by

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[9] The exact number of members is to be fixed by the Committee of Ministers. The members of the Committee are elected for a period of 6 years and may be re-elected once. The members of the Committee serve in their individual capacity. Throughout their term of office, they may not assume functions incompatible with the requirements of independence, impartiality and availability inherent in this office (new Article 25).

[10] Only the Contracting Parties are entitled to vote.

States of their obligations under the Convention by establishing a **Human Rights Committee** comprising personalities independent of States[11], since the heterogeneity of the States' political systems was an obstacle to the creation of an international court competent in matters concerning human rights. Confidence was placed in the dissuasive virtues of such a procedure and it was hoped that the moral authority of the Committee would be sufficient to lead States to take account of its observations and of the indications given in its decisions and its reports. It should be noted, however, that in a small number of nevertheless dramatic cases, the observations of the Committee have not been acted upon.

58. Essentially, the Committee's powers lie in **examining the reports presented by the Parties on the measures that they have adopted to give effect to the rights recognised in the Covenant and on the progress made in the enjoyment of these rights** (Covenant, Article 1, paragraph 1). It is true that the Committee has gradually elaborated rules to make it easier for States to draw up reports, which has allowed the controls to be improved, but the Committee's powers remain limited in that it has no power to verify the contents of reports, particularly by conducting inquiries. At the very most, the experts may put questions to the representatives of the State whose report is under discussion. But these questions and requests for explanations are an essential part of the procedure because they make it possible to bring out the difficulties involved in implementing the Covenant and to draw the attention of the United Nations General Assembly and other Contracting States to these difficulties (Covenant, Article 40, paragraph 4).

59. The Covenant also provides for a State communications mechanism allowing the Contracting States to draw attention to any violation by another State of its obligations under the Covenant (Covenant, Article 41). However, ratification of the Covenant is not sufficient to empower the Committee to take cognisance of these State communications. The State must also have signed a declaration to this effect (Covenant, Article 41, paragraph 1). Furthermore, this procedure can be used only once ten Contracting States have signed the optional declaration.

60. Finally, the optional protocol to the Covenant, adopted on the same day as the Covenant itself, provides States with the possibility of recognising the competence of the Committee to receive and examine **communications from individuals** coming under their jurisdiction who claim that this State has violated one of the rights enshrined in the Covenant. The only condition placed upon a case being brought before the Committee by an individual is that all internal domestic remedies have been exhausted.

61. It must be acknowledged that the system established by the Covenant for the examination of communications by States or individuals is hardly binding on the States. When a case is brought before it, the Committee, after checking that the conditions of admissibility are fulfilled, limits itself to preparing a report setting out the facts, to which it appends verbal and written observations by the Parties. In normal times, that is the end of the procedure. Nevertheless, with the assent of the Parties concerned, the Committee may appoint an ad hoc conciliation commission to study the problem in all its aspects and seek out an amicable solution. The commission submits to the Chairman of the Committee a

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[11] The Human Rights Committee consists of 18 members elected by the Contracting States. They always serve in their individual capacity.

report with its observations on the facts, together with its conclusions. If the Parties to the dispute do not accept the proposed solution, failure of the attempted conciliation may be brought to the attention of the United Nations General Assembly in the annual report of the Committee on Human Rights. A virtually identical procedure applies for the examination of individual communications.

- **Machinery resulting from the proposal for a European Convention for the Protection of Minorities drawn up by the Commission for Democracy through Law**

62. At European level, the authors of the proposal for a European Convention for the Protection of Minorities drawn up by the Commission for Democracy through Law (also known as the Venice Commission) also preferred not to have the intervention of a judge in order to ensure compliance with the undertakings imposed on the Parties by application of the Convention, but rather controls effected by a committee of independent experts serving in their individual capacity, whose role in some respects is comparable to that of the European Commission of Human Rights. According to Article 18 of the draft, it is in fact the responsibility of a **"European Committee for the Protection of Minorities"** to ensure compliance with undertakings entered into by the Contracting States to the Convention. The members of this Committee, equal in number to the number of Parties (Article 19), would be elected by the Committee of Ministers of the Council of Europe from a list of names presented by the national delegations to the Parliamentary Assembly (Article 20)[12].

63. The control machinery is a **compromise between that established at the UN by the International Covenant on Civil and Political Rights and that introduced under the European Convention on Human Rights.** It too is based on the obligation for the Contracting Parties to present reports to the Committee on the measures adopted in order to give effect to the rights of minorities recognised by the Convention and on the progress made in the enjoyment of these rights (Article 24, paragraph 1). The Committee is required to transmit these reports, together with its observations, to the **Committee of Ministers**, which may make the necessary recommendations to the Parties concerned (Article 24, paragraphs 2 and 3). An initial report should be submitted during the year following that in which the Convention comes into force for the State concerned. The following reports are presented every three years or at the request of the Committee.

64. As under the European Convention on Human Rights and the Covenant, the possibility of inter-State applications (Article 25) and individual petitions after all domestic remedies have been exhausted[13] (Article 26) is provided for, on condition however that the

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[12] As far as the qualifications of the members of the Committee are concerned, they must be selected from among personalities recognised for their competence or having experience in the field of human rights.

[13] In this case, the Committee may be asked to intervene by any natural person but also by any group of individuals, any international non-governmental organisation representative of minorities, claiming to be the victim of a violation by a Party of the rights set forth in this Convention.

States have accepted by an express declaration the competence of the Committee in this respect (Articles 25 and 26). The authors rightly considered that if referral had been compulsory some States would have been dissuaded from ratifying the Convention. However, the Committee's powers are more extensive than those of the UN Committee on Human Rights. The Committee must first of all endeavour to achieve a friendly settlement (Article 28). If this fails, the Committee is to draw up a report in which it establishes the facts, indicates any breach of the provisions of the Convention and puts forward recommendations (Article 29). The report is then communicated to the Committee of Ministers of the Council of Europe, to the State or States involved and to the Secretary General of the Council of Europe. The Committee of Ministers then has the option of taking any action that it deems fit in order to have the provisions observed (Article 30).

65. Whilst the contribution by the Venice Commission to the list of rights to be recognised for minorities was regarded as very positive by legal writers, some deplored the weakness of the guarantee machinery established, considering that the reporting system was insufficiently binding on States and noting that State or individual petitions were not possible until after acceptance by the States. But these criticisms do not seem to be realistic in the current state of the question. The Venice Commission did not want to propose a perfect control system, which would be utopian. It wanted to go to the extreme limits of what it regarded as acceptable in modern-day international society. This system probably also sins more through its ambition than through its timidity.

66. But the major drawback of the project is that it would establish in Europe a body superimposed on those already existing at Council of Europe or CSCE level which, in spite of the precautions taken by the authors of the draft Convention[14], would lead to a risk of differences in decisions which could be exploited in their own interests by the States concerned.

**- Machinery of the Charter for Regional or Minority Languages**

67. A reporting mechanism is also provided for within the framework of the European Charter for Regional or Minority Languages. It is based on a system of periodical reports drawn up by the Contracting Parties on the policy pursued in order to attain the objectives of Part II of the Charter and on the measures that they have adopted to implement the provisions of Part III that they have accepted.

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[14] Cf. Article 30 of the draft convention, which stipulates that the Convention is not to be construed as limiting or derogating from the competence of the organs of the European Convention on Human Rights or from the obligations assumed by the Parties under that Convention. Consequently, the Committee will not be able to deal with any matters calling into question the European Convention on Human Rights that are raised in the proceedings brought before it, just as it will not be able to express interpretations of the provisions of the European Convention on Human Rights.

68. The **Committee of Experts**, comprising one member for each Party, is responsible for examining the reports submitted by the different Parties and, on the basis of these reports, preparing a general report for the **Committee of Ministers**. The general report is accompanied by the observations made by the Parties and the recommendations put forward by the Committee of Experts and the Committee of Ministers with a view to preparing any recommendations by the latter to one or more Parties (Article 16, paragraphs 3 and 4). Although automatic publication of reports was envisaged, with a view to transparency, it was finally agreed that since they could contain recommendations by the Committee of Ministers to States, the Committee should assess each case on its merits to decide if publication was appropriate.

69. Whilst individual petitions or inter-State requests are not admissible before the Committee of Experts, bodies or associations legally established in one of the Parties[15] may draw the Committee's attention to undertakings entered into by States under the Convention (Article 16, paragraph 2). However, the scope for initiative that these bodies have is limited in so far as the Committee of Experts does not have the power, when drawing up the general report, to take account of the information collected until after the Party concerned has been consulted. However, they still have the option of submitting declarations as to the policy pursued by a Party, in accordance with Part II of the Charter.

## C. Monitoring machinery

70. Some Conventions have preferred simple machinery to monitor implementation of the Convention and to collect all the necessary information to this effect. Such machinery is generally only found in Conventions not creating obligations that can be invoked directly by individuals but simply comprising "programming norms", which it is therefore difficult to monitor. Consequently, this type of machinery is designed not so much to penalise a State which fail to comply with one of the objectives set by the Convention as to encourage it to fulfil its undertakings correctly[16].

### - Advantages and drawbacks

71. Circumspection and wisdom have determined this solution: rather than introduce a control system poorly accepted by the States and which could be used as a reason for their failing to adopt the Convention concerned, it was thought preferable to establish a more flexible system allowing an improvement to be obtained - even partial or long-term - in their behaviour. This type of machinery has the advantage of being based on the good will of States: it is presumed that they will adapt their behaviour to meet the guidelines laid down by the Convention. It is simply a question of giving them time to adapt their legislation to

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[15] The purpose of this is to prevent groups with their headquarters outside the Party concerned by the Charter from using the monitoring system provided for in the Charter in order to foment dissent within the Parties.

[16] The vocabulary is very revealing: although it is still a question of a form of control machinery, the term "evaluation" of the results of such and such a programm is preferred, or "monitoring" of such and such a recommendation.

suit the objectives set by the Convention and overcome the problems of a political, legal or material nature that they encounter.

**- Machinery of the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data**

72. The Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data establishes monitoring machinery that is not very binding on States in so far as the Committee set up by the Convention has only a consultative role.

73. The **Committee** comprises one representative and one deputy per Party to the Convention. However, it is stipulated that any member State of the Council of Europe which is not a Party to the Convention is entitled to be represented on the Committee and that any non-member State of the Council of Europe may be invited, by a unanimous decision by the Committee, to be represented by an observer at a given meeting (Article 18).

74. The powers of the Committee are particularly restricted since not even a reporting system is provided for. The only powers that the Committee has consist of the possibility of making proposals with a view to facilitating or improving the application of the Convention or amending it, and of expressing an opinion on any proposed amendment. It may also express its opinion on any question relating to the application of the Convention, although it must have received a request along these lines from one of the Parties (Article 19).

75. The classification of the mechanisms described above is based on the intensity of the controls on the States Parties to the Convention. Obviously, other classifications could have been used, taking account of the moment when the controls are carried out (a priori : case of the CSCE; a posteriori : case of the European Convention on Human Rights), the procedures for bringing matters before the Committee (inter-State requests, individual petitions) and also the nature of the obligation that is being monitored. The system established by the European Social Charter merits our attention in this respect.

76. In so far as the provisions accepted by the Parties are concerned, the Parties undertake to submit a biennial report to the Secretary General of the Council of Europe concerning application of the provisions of Part II (Article 21). But the originality of the system concerns obligations that are not accepted, either on ratification or on approval, or by subsequent notification. As regards these obligations, the Parties are also required to present reports to the Secretary General of the Council of Europe at appropriate intervals and at the request of the Committee of Ministers. The Parties will thus be asked to explain the reasons for which they have not accepted the obligations in question.

77. Controls of this type allow a measurement to be taken of the distance between the State's internal situation and that corresponding to exact application of the norm. It is more particularly intended to encourage the State to accept a norm that it has refused so far by demonstrating to it that its acceptance is possible since its internal legislation shows that it already partly meets the demands to which it is subject. It may also bring out the reasons which have so far dissuaded the State from accepting the norm, either to help it overcome these difficulties or to propose amendments to the Convention in order to simplify its application.

78. In actual fact, it is not so much a question of control machinery as of a promotion mechanism designed to extend the scope of the Charter and to strengthen its authority. It is understandable, therefore, since such controls cannot be effective unless they are thorough and since they do not respect the principle of equality of States vis-à-vis the rule of law, that they should be allowed to operate not systematically but on texts selected by the control body. Under the European Social Charter, it is the responsibility of the Committee of Ministers to "determine from time to time in respect of which provisions such reports will be requested and the form of the reports to be provided (Article 22).

## II. Choice of a mechanism intended to ensure implementation of a framework Convention on national minorities

### A. Irrelevance of judicial controls

79. As we have seen, the choice of a method of control or monitoring depends on different factors. The former takes account of the nature of the norms controlled. Only norms comprising a precisely worded obligation to act or refrain can be subject to control by a judge. In effect, the precision of the norms enables the judge to assess them without running the risk of setting himself up as an international legislator.

80. A judicial mechanism of the sort established by the European Convention on Human Rights therefore seems inappropriate in this respect since the objective set for the framework Convention is primarily lay down to fix norms defining an action programme for States, without creating any subjective right for individuals, implementation of which would be ensured exclusively by the States concerned. For judicial controls to be possible, the objectives should at least be precise and a timetable should be set for the date on which these objectives should be attained so that violation of the obligation can be established.

81. Furthermore, the establishment of a judicial mechanism carries with it a major risk of allowing the development of case law which could come into conflict with that of the control bodies of the European Court of Human Rights.

82. Recourse to the machinery introduced by the European Convention on Human Rights could nevertheless be envisaged if the recognised rights of minorities under the framework Convention had the same content as those included in the European Convention on Human Rights, especially in the future protocol on cultural rights. In this case, a clause in the framework Convention should indicate that it in no way detracts from the competence of the bodies of the European Convention in so far as the rights guaranteed by the protocol and those guaranteed by the Convention are identical.

83. On the other hand, it seems difficult to subject non-member States of the Council of Europe to the competence of the European Court of Human Rights because it is hard to see them accepting the jurisdiction of a court not including a judge of their nationality. It would then be necessary to construct a specific system like the one established by the **European Convention on State Immunity**. This Convention stipulates that, to ensure its application, a specific court is to be set up comprising the members of the European Court of Human Rights, together with, for each non-member State of the Council of Europe, a person appointed by this State with the agreement of the Committee of Ministers.

84. But it must be borne in mind that the creation of a special court is a delicate business under international law. It is not enough to determine its composition, it is also necessary to define the referral procedures, especially for individuals, and the scope of its competence. It will certainly not be easy for the Contracting Parties to reach an agreement on these points. Could it be the case that only the Parties would have this right, with recourse by individuals constituting an additional option?

85. The choice of a more flexible control mechanism would seem more appropriate for the application of norms limited to defining an action programme for States, such as those that it is envisaged including in the framework Convention currently in preparation.

## B. Possible introduction of control or monitoring mechanisms in a framework Convention on the protection of national minorities

### - Value and application of a control mechanism

86. Various control mechanisms can be envisaged within the context of the Convention currently in preparation. The procedures and the intensity will depend on what sort of agreement can be reached as to the scope of the controls.

87. The **reporting system** seems to be particularly well suited to controls on the implementation of "programmatic" norms. It enables the committee responsible for examining the report to know the state of domestic legislation and to follow through successive reports the efforts made by each Party with regard to its own legislation in order to attain the objectives set by the Convention.

88. Consequently, the system itself should not appear too binding for the Contracting States. To take a classic distinction, the Convention does not impose an obligation of results but of means, i.e. States undertake not to obtain a specific and immediate result but simply to use all necessary means to work towards this result. And reports constitute one of the most appropriate means of verifying compliance with this obligation. Contracting States are also able to adapt their legislation according to the procedures which suit them and at the rate that they choose, so as to overcome the different obstacles that they may encounter. The reporting system does not detract from this freedom.

89. The incentive aspect of the system should also be borne in mind. The basic idea behind monitoring through reports is that the main objective is not to identify areas where States have failed but simply to encourage them, through observations and recommendations, to improve their behaviour. It will also be noted that governments, to show how anxious they are to comply with the international undertakings that they have entered into and to avoid reproaches from international public opinion, frequently find it necessary to announce, at the beginning of each report examination cycle, the measures that they are preparing to take so as to bring themselves into line with the objectives of the Convention.

90. Finally, unlike judicial controls which concern only cases brought before the judge, the monitoring here is systematic and relates to implementation of all the provisions set out in the Convention. For this reason too, controls via reports are often more effective as regards their scope than controls through judicial channels.

91. The nature of the body or bodies charged with examining the reports also raises a number of questions. Can a **committee** comprising representatives of the Contracting States acting on instructions from the latter be envisaged in an issue as politically sensitive as that of minorities ? It is certainly difficult initially for an agreement to be reached within this committee since conceptions in matters concerning minorities vary so much from one State to another. But a consensus could gradually be established within its midst on the measures to be adopted to guarantee the rights of minorities in the light of the objectives of the Convention.

92. The solution of a committee consisting of independent experts could also be envisaged in such cases. It would then be necessary to specify that the members of the committee serve in their individual capacity, which would guarantee their independence and impartiality. It would then remain to determine the way in which the experts could be appointed. If we examine the various Conventions signed in the field of human rights, we can see that traditionally it is up to the Contracting States to put forward candidates[17] and the collective responsibility of all the States concerned to appoint them. There are very few cases in which another body intervenes in the appointment of experts. We should, however, mention the example of the Committee of Experts set up under the Charter for Regional or Minority Languages[18]: although their names are put forward by the Contracting States, the experts are appointed by the Committee of Ministers of the Council of Europe. Possible solutions could include the appointment of experts by one of the Council of Europe bodies, provided that non-member States of the Council are also involved in the procedure, or by the Contracting States as a body.

93. The number of experts can vary according to different considerations. The need for practical effectiveness presupposes that the Committee is not too large, whilst political effectiveness requires all sensitivities to be represented. The solution adopted by various Conventions, consisting in the appointment of one expert per Contracting State, therefore seems to be perfectly realistic here. A smaller number can also be envisaged, but it must be ensured that the different sensitivities are represented, and it is not easy to define these sensitivities.

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[17] Whilst States are sometimes required to put forward several candidates (three for the European Commission, two for the Human Rights Committee), they are sometimes required to put forward only one (Commission on racial discrimination).

[18] The European Social Charter had initially specified that the experts would be appointed by the Committee of Ministers from a list of experts proposed by the Contracting Parties. The protocol amending the Social Charter modified this provision and it is now the task of the Parliamentary Assembly of the Council of Europe to elect them by a majority of votes cast.

94. As far as the qualifications of the members of this committee are concerned, a formula of the CSCE type could be adopted. These experts will be prominent personalities, preferably with experience in the field of human rights and more particularly in that of the rights of minorities, offering every guarantee of impartiality in the performance of their duties[19].

95. However, realism suggests that political efficacy should be allied with technical efficacy and, therefore, that the system of a committee of representatives of the Contracting States should be combined with that of a committee of independent experts. The model of the European Social Charter can serve as an example in this respect.

96. **Firstly**, there would be a committee of experts responsible for examining the reports submitted to it at regular intervals. Two years would seem to be a reasonable interval since this leaves the States concerned with enough time in which to improve their legislation in accordance with the recommendations made to them.

97. The role of the committee of experts would therefore be to examine the reports presented to it at regular intervals[20]. In analysing these reports, the committee will be more particularly responsible for assessing to what extent national laws, regulations and practices are in conformity with the obligations arising from the framework Convention. To perform the task assigned to it as efficiently as possible and to remedy the shortcomings often observed in State reports, the committee of experts should have the right to ask Contracting States to provide further information or clarifications.

It would be up to the committee to make observations and put forward recommendations to encourage the States concerned to bring their domestic legislation into line with the objectives of the Convention.

The committee of experts will also have the option of making proposals so that studies can be undertaken on questions concerning minorities or on the difficulties encountered in implementing the norms defined by the Convention.

98. **Secondly**, a Committee of High Contracting Parties, comprising one representative per State, would be responsible for examining the report by the committee of experts and the recommendations that it contains. Two solutions are then possible : either place this committee at a higher level and let it have the last word as regards controls or, as in the case of the Social Charter, have this committee report to a political body at a higher level.

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[19] Document from the Moscow meeting of the CSCE Conference on the human dimension, paragraph 3. See also the document from the fourth meeting of the CSCE Council, paragraph 6.

[20] Two years would seem to be a reasonable interval since this leaves the States concerned with enough time in which to adapt their legislation.

99. In the first case, the committee could itself make observations or make individual recommendations to the Parties concerned. The effectiveness of this system will lie in the authority and political clout which the committee has. It would be essential, if this solution was adopted, for the committee to be comprised of members appointed at a high enough level for the comments or recommendations made to have sufficient authority to guarantee that the work of the committee led to concrete action. The possibility of publishing reports is an important attribute, constituting a weapon against States not wishing to be subjected to criticism from their own or international public opinion following the publication of a report.

100. **A second solution could be envisaged in theory**. It would simply be up to the Committee of High Contracting Parties, consisting of governmental experts, to prepare the decisions of a sufficiently prestigious political body, such as the Committee of Ministers, for example. In the light of the reports by the committee of independent experts and the Committee of Contracting Parties, this political body would be called upon to select situations which, in its opinion, should be the subject of recommendations to each Contracting Party concerned. It would present a report which would be made public. The intervention of a political body such as the Committee of Ministers would give more political weight to the recommendations made by the committees. As in the European Social Charter, the Committee of Ministers would have to make individual recommendations itself to the Contracting Parties concerned (Article 28) or decide on the publicity to be given to the general report drawn up by the experts on the basis of the reports presented by the participant States.

101. **This solution does, however, pose one essential problem**, that of non-member States of the Council of Europe, which in view of their status cannot take part in the work of the Committee of Ministers. Moreover, given that not all the members of the Council will become Parties to the Convention, it would be difficult for the Parties which are not members to accept the presence on the Committee of Ministers of the members which are not Paries. One could envisage the Committee of Ministers, deliberating as an ad hoc body of the Convention, being joined by representatives of the non-member Parties with the right to vote and non-Party members having only observer status.

102. This is a complicated formula, however. Is there any point in creating three levels of control whilst, in order to achieve the desired result, it would be enough to give sufficient political authority to the second level?

103. **In the final analysis, a solution involving a committee of independent experts followed by a Committee of High Contracting Parties, sitting at ministerial level when adopting the report and recommendations, could also be satisfactory.**

104. The problem also arises of the role played by minority groups or non-governmental organisations working in the field of minorities. Obviously, to be credible among minorities and international public opinion, such machinery should be based on active participation by the minorities themselves or by non-governmental organizations. However, setting up a cooperation system involves some difficulties that are hard to overcome. Since it is a question of machinery not designed to settle conflicts or even to prevent them, no provision can be made for individual petitions to be submitted to the committees.

105. If the Convention contains norms creating subjective rights for individuals or groups, a system could be introduced allowing petitions to be made to the control bodies. This was the formula that the Venice Commission wished to establish. But is this formula acceptable to the Parties?

106. In the case of programme-type norms, the committees could be authorised to hear representatives of minorities or non-governmental organisations particularly well-qualified in the field of minorities, so as to instruct them in the preparation of their reports. But the delicate question again arises of the definition of national minority, which has proved a stumbling block to all the work already undertaken in this field. Given the difficulties involved in such an undertaking and the dissent that exists within States, the different international instruments intervening in the field of minorities have abandoned any definition of this term (UN, CSCE). And indeed it is not necessary to define the concept of minority; it is enough to leave the committee free to decide in this respect. That being the case, there is a choice between providing for intervention by minorities or saying nothing at all. If this possibility is not allowed, it must be accepted that minorities will intervene in any case and it will be up to the committee to adopt a position on the scope to be granted to such interventions.

107. It must not be overlooked that in establishing a system based on technical controls coupled with political controls there is a risk of general accession not being achieved. We know in this connection that the control machinery established by the proposed Convention drawn up by the Venice Commission, which is also based on a system of technical and political controls, has been reproached for constituting too serious a prejudice to State sovereignty. However, this machinery was accompanied by a mechanism for the settlement of disputes open to both States and individuals. It is above all the political sensitivity involved in the problem of minorities which explains the fact that States are disinclined to accept controls, however superficial they may be.

**- Value and application of a monitoring mechanism**

108. To avoid directly offending State sensitivities and to improve the chances of ratification of the Convention, a solution more acceptable to the Parties must therefore be envisaged on a subordinate basis.

For a Convention to have its desired effects; especially when it contains programme-type norms, it is essential for it to comprise at least one monitoring mechanism designed to help States to implement the Convention and gather together all the necessary information to this effect. A monitoring mechanism is therefore an indispensable addition to any Convention setting out programme-type norms.

108. The monitoring mechanism envisaged should be organized on the basis of a **consultative committee** comprising one representative per Contracting Party appointed by the latter. To encourage accession to the Convention and to enlarge the scope of the norms laid down by the Convention, the committee could be open to the member States of the Council of Europe which are not Parties to the Convention; they would have to be entitled to representation on the committee in the form of observer status. As regards non-member States of the Council of Europe which are not Parties to the Convention, it could also be envisaged that the committee would also allow them to be represented by an observer in appropriate cases.

110. Of course, the efficiency of the work of the committee presupposes, when it comes to the choice of representatives, that one of the factors taken into consideration should be their qualifications in the field of minorities.

111. Simply designed to encourage States to adapt their behaviour to meet the norms laid down by the Convention, the committee will have only consultative powers. These could vary according to the importance and the authority that it is intended to give to the committee.

112. **The minimum powers of the committee could be as follows :**

- **making general proposals with a view to facilitating and improving the application of the Convention by the member States;**

- **regularly re-examining the provisions of the Convention and recommending the necessary amendments to the Contracting Parties;**

- **stating an opinion, at the request of a Party, on any matter relating to application of the Convention under its domestic legislation.**

113. To this minimum list could be added other powers such as the organisation of exchanges of experience among States, the collection of information on legislation concerning minorities, the possibility of carrying out studies, etc.

114. Meetings of the committee would be convened by the Secretary General of the Council of Europe. It would meet at least once a year and whenever requested by one third of the Parties. Following each of these meetings, the committee would draw up a report on its work and the functioning of the Convention. This report would be circulated to the Contracting Parties.

115. **In conclusion**, if it is considered that judicial controls are inappropriate, three hypotheses can be envisaged :

I. A control system based on periodical reports examined by a committee of independent experts reporting to a political body;

II. A control system based on regular reports examined by a political body;

III. A monitoring committee.

It should be noted that if formula I or II was adopted, the role played by the monitoring committee (stating opinions at the request of Parties, formulating general recommendations, proposing amendments to the Convention, carrying out studies, etc.) could be assigned to the political body or committee of experts designated in formulas I and II.

## SUMMARY

The following points emerge from the study: that

1. Considering the norms whose inclusion in the framework Convention is envisaged, a judicial control system would not be appropriate and, even if it were, would not be easy for States to accept;

2. The most effective conceivable system would be one based on regular examination of reports by a committee of independent experts which would report to a committee of representatives of the High Contracting Parties, which would in turn adopt a report containing recommendations. The committee could, where appropriate, be authorised to seek additional information from States and to receive information and contributions from bodies representing minorities;

3. The system described above could be confined to the examination of regular reports by a committee composed of representatives of the High Contracting Parties;

4. Finally, if these systems seem too restrictive, supervision could be limited to the establishment of a committee of representatives of the High Contracting Parties with responsibility for monitoring the implementation of the convention and delivering opinions at the request of the Parties on the interpretation of the convention and for formulating general recommendations (without reference to any particular situation).