
The Collective Complaints System of the European Social Charter: An Effective Mechanism for Ensuring Compliance with Economic and Social Rights?

Robin R. Churchill and Urfan Khaliq*

Abstract

In 1995 the Council of Europe, as part of the revitalization process of the European Social Charter, adopted a Protocol providing for a system of collective complaints. The Protocol came into force in 1998. So far 23 complaints have been lodged under it. The aim of this article is to critically examine the practical operation of this collective complaints system during its first five years. After placing the system in a general human rights context by giving an overview of mechanisms for ensuring compliance with other treaties concerned with economic and social rights, the article then analyses the system for making collective complaints and its functioning in practice to date. The latter part of the article considers the likely utility and effectiveness of the system and concludes that without a major change in the practice hitherto of the Committee of Ministers, the system is unlikely to achieve its objectives.

* Professor of Law and Lecturer respectively, Cardiff Law School, UK. Earlier versions of this paper were given by Robin Churchill at a workshop on 'European Integration and Legal Changes', Prague, April 2002 and the German Academic Exchange Service Conference for Law Lektors, Cumberland Lodge, Windsor, June 2002. We are grateful for comments made by participants at those two meetings. We would also like to thank members of the Secretariat of the European Social Charter for providing us with information and documentation. The usual disclaimer applies.

1 Introduction

The European Social Charter (ESC)¹ is the counterpart, in the field of economic and social rights, of the Council of Europe's much better known European Convention on Human Rights (ECHR).² Originally the only machinery that the Charter provided for seeking to ensure that its parties³ complied with their obligations was a system of reporting. Under this system states parties report every two years on their implementation of the Charter. Such reports are first examined by the European Committee on Social Rights (ECSR), a 13-member body of independent experts in international social questions (formerly known as the Committee of Independent Experts (CIE)). Thereafter reports and the ECSR's views on them are considered by the Governmental Committee (a body of national senior civil servants) and the Committee of Ministers. The latter may make recommendations to states parties that are not fully complying with the Charter.⁴

In the early 1990s the Council of Europe embarked on a process of revitalizing the Charter. As part of this process (which also included overhauling the reporting system and drawing up the Revised Charter), the Council in 1995 adopted a Protocol to the Charter that provides an additional compliance mechanism in the form of a system of collective complaints.⁵ This Protocol came into force in July 1998, the first complaint under the new system was made in October 1998, and by February 2004 a further 22 complaints had been made. Of these complaints, 12 have now been disposed of. After more than five years of operation, it seems an appropriate time to examine how the collective complaints system has so far worked in practice and to attempt an initial stocktaking.⁶

To place the Collective Complaints Protocol (CCP) in a general human rights context, this article begins by discussing the question of the justiciability of economic and social rights and then goes on to give an overview of mechanisms for seeking to ensure compliance by states with their obligations under other treaties concerned with such rights. The article then describes the system for making collective

¹ The Charter was originally adopted in 1961. A Protocol adding further rights was adopted in 1988, while a revised version of the Charter, which updates and extends the rights protected, was adopted in 1996. The texts of these three instruments can be found at ETS Nos. 35, 128 and 163; and I. Brownlie and G. Goodwin-Gill, *Basic Documents on Human Rights* (4th ed., 2002) (hereinafter *Basic Documents*), at 423, 439 and 455. References to the 'Charter' in this article refer to all three instruments unless otherwise indicated.

² ETS No. 5; and *Basic Documents*, at 398.

³ 10 members of the Council of Europe are parties to the Charter only in its 1961 version. Eight states are parties to the 1961 Charter as supplemented by the 1988 Additional Protocol, while a further 16 states are parties to the Revised Charter.

⁴ For further discussion of the reporting system, see Harris, 'Lessons from the Reporting System of the European Social Charter', in P. Alston and J. Crawford (eds), *The Future of UN Human Rights Treaty Monitoring*, (2000) 347, and D. Harris and J. Darcy, *The European Social Charter*, (2nd ed., 2001), at 293–354.

⁵ Additional Protocol to the European Social Charter Providing for a System of Collective Complaints, ETS No. 158; 34 *ILM* (1995) 1453; and *Basic Documents*, at 451.

⁶ Particularly as most of the existing literature on the collective complaints system predates the lodging of the first complaint.

complaints introduced by the 1995 Protocol and examines its practical operation in the light of the complaints so far lodged. The article ends with some remarks about the likely utility and effectiveness of the system.

2 The Question of Justiciability and Mechanisms to Protect Economic and Social Rights

A *The Justiciability of Economic and Social Rights*

Although the international community puts increasing emphasis on the indivisibility between economic, social and cultural rights on the one hand and civil and political rights on the other,⁷ this is in contrast to many of the assumptions underlying the mechanisms for their enforcement. Economic and social rights have traditionally been considered as lacking justiciability, a quality which civil and political rights are deemed to possess.⁸ The reason usually given is that economic and social rights are often progressive in nature and that many such rights are couched in language that is too imprecise to be judicially enforceable. Thus a traditional view has been that only bodies that are charged with the enforcement of civil and political rights treaties should be able to provide remedies, of some sort, for their violation and be given powers to that effect.⁹

Although there is a degree of merit in these arguments, they do not always hold true. As is well known, the mechanisms adopted for the enforcement of the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) were the results of political compromise and the categorization of rights was hardly an exact science.¹⁰

⁷ Emphasis on this relationship has existed since the Universal Declaration of Human Rights (UDHR) 1948, UN Doc. A/811; *Basic Documents*, at 18. Also see, the Vienna Declaration and Programme of Action—World Conference on Human Rights, Vienna, 14–25 June 1993, UN Doc. A/CONF.157/23.

⁸ For detailed discussion of the issue of justiciability, see Addo, 'Justiciability Re-Examined', in D. Hill and R. Beedard (eds), *Economic, Social and Cultural Rights*, (1991) 93; Craven 'The Justiciability of Economic, Social and Cultural Rights', in R. Burchill, D. Harris and A. Owers (eds), *Economic, Social and Cultural Rights: Their Implementation in UK Law* (1999) 1; Craven, *The International Covenant on Economic, Social and Cultural Rights: A Perspective on its Development* (1995), at 106 *et seq*; Eide, 'Economic, Social and Cultural Rights as Human Rights', in A. Eide, C. Krause and A. Rosas (eds), *Economic, Social and Cultural Rights: A Textbook*, (2nd ed., 2001) 9; Scheinin, 'Economic and Social Rights as Legal Rights', in *ibid.*, at 29; *Report of the Expert's Roundtable Concerning Issues Central to the Proposed Optional Protocol to the International Covenant on Economic, Social and Cultural Rights* (2002); and H. Steiner and P. Alston, *International Human Rights in Context: Law, Politics, Morals* (2nd ed., 2001) 275.

⁹ See the discussion in Eide, *supra* note 8, at 10 and Novitz, 'Are Social Rights Necessarily Collective Rights? A Critical Analysis of the Collective Complaints Protocol to the European Social Charter', *EHRLR* (2002) 50, esp. at 57–65.

¹⁰ International Covenant on Civil and Political Rights 1966, 999 UNTS 171; *Basic Documents*, at 182 and International Covenant on Economic, Social and Cultural Rights 1966, 993 UNTS 3; *Basic Documents*, at 172. For a discussion of the debates at the time and on the splitting up of the rights and perceptions of the protagonists see Craven, 'The UN Committee on Economic, Social and Cultural Rights', in Eide *et al.*, *supra* note 8, 455 at 456 *et seq*.

To consider that all of the rights that are found in treaties which promote and protect economic and social rights are incapable of being judicially determined is an oversimplification. Some such rights (for example, the right to equal pay) are sufficiently precisely drafted to be judicially enforceable; and for some rights (such as equal pay or consultation rights in the workplace) a judicial remedy may be suitable. While not all economic and social rights are immediately justiciable, it is clear that some can become so over time, as states parties take measures to give them effect.¹¹ There are, of course, some methodological problems in determining whether a state is complying with its obligations,¹² but these are far from being insurmountable. There is now ample jurisprudence on these issues to illustrate that they can be overcome.¹³ Furthermore, some national courts have adopted decisions as to the obligations imposed by provisions of national constitutions, many of which are couched in terms similar to those found in treaties protecting economic and social rights, in which they have not only defined the obligation but also the remedy.¹⁴ It is important to note, therefore, that there is nothing inherent in economic and social rights that prevents judicial determination of their content.¹⁵

¹¹ See, for example, the Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, UN Doc. E/CN.4/1987/17, Annex, Part I, reproduced in 9 *HRQ* (1987) 122 and General Comment 9 of the Committee on Economic, Social and Cultural Rights (hereinafter CESCR) UN Doc. E/1999/22 Annex IV. It is also worth noting that the Convention on the Rights of the Child, 1577 UNTS 3; *Basic Documents*, at 241, which includes some economic and social rights, does not, unlike the ICESCR, require their 'progressive' realization, but does make allowances for the means available to a state.

¹² For a discussion of this issue, see Leckie, 'Another Step towards Indivisibility: Identifying the Key Features of Violations of Economic, Social and Cultural Rights', 20 *HRQ* (1998) 81; Craven, *supra* note 8, at 106–150; Alston and Quinn, 'The Nature and Scope of States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights' 9 *HRQ* (1987) 156; Van Hoof, 'The Legal Nature of Economic, Social and Cultural Rights: A Rebuttal of Some Traditional Views', in P. Alston and K. Tomaševski (eds), *The Right to Food*, (1984) 97; Vierdag, 'The Legal Nature of the Rights Granted by the International Covenant on Economic, Social and Cultural Rights', 7 *NYIL* (1978) 69, esp. at 83 *et seq.*; and General Comment 3 of the Committee on Economic, Social and Cultural Rights (CESCR), UN Doc. E/1991/23 Annex III.

¹³ In General Comment 9, *supra* note 11, the CESCR considered the domestic application of the Covenant and clearly envisaged the use of judicially determined remedies for violations of it. See also on this issue Craven, 'The Domestic Application of the International Covenant on Economic, Social and Cultural Rights', 40 *NILR* (1993) 367.

¹⁴ See, in particular, the jurisprudence of the Indian Supreme Court and the South African Constitutional Court. For an excellent discussion of this issue, see Liebenberg, 'The Protection of Economic and Social Rights in Domestic Legal Systems', in Eide *et al.*, *supra* note 8, at 55, and Steiner and Alston, *supra* note 8, at 283–302. In the context of South Africa see de Vos, 'Pious Wishes or Directly Enforceable Human Rights? Social and Economic Rights in South Africa's 1996 Constitution', 13 *South African Journal of Human Rights* (1997) 67.

¹⁵ General Comment 3 of the CESCR, *supra* note 12, expressly recognizes this in para. 5. Also see General Comment 9, *supra* note 11, which recognizes that judicial remedies will not always be necessary but will be where administrative remedies are not adequate.

B Mechanisms for the Enforcement of Economic and Social Rights

At the international level, there are various mechanisms for ensuring compliance with treaties containing economic and social rights, some of which illustrate the justiciability of such rights. In the case of treaties which primarily or only contain economic and social rights, the normal mechanism is a system of reporting. This is the case with the ICESCR. It is also largely the case with the San Salvador Protocol of 1988 to the American Convention on Human Rights,¹⁶ although there is a right to individual petition with regard to the right to education and the right to organize.¹⁷

There are also treaties which contain both civil and political rights as well as economic and social rights.¹⁸ Right-specific treaties, such as the Convention on the Rights of the Child, the International Convention on the Elimination of All Forms of Racial Discrimination¹⁹ and the Convention on the Elimination of All Forms of Discrimination against Women,²⁰ cover a broad spectrum of different rights. While reporting is the principal mechanism in all these treaties, the now functioning Optional Protocol to the Women's Convention provides a petition system that can be utilized by individuals, for all of the rights protected.²¹ Similarly, Article 14 of the Race Convention, which establishes the right to individual petition, does not distinguish for enforcement purposes between the different types of rights protected by Article 5 of that treaty. In addition, the African Charter on Human and Peoples' Rights²² also contains a mixture of rights. The experience of the African Commission illustrates that individual complaints that seek to ensure the protection of economic and social rights are certainly possible, even if they have not yet been utilized to their full potential.²³

The ILO system, in particular the eight core ILO Conventions,²⁴ protects many rights that are found in economic and social rights treaties. The main compliance mechanism is a reporting system. However, there are also other mechanisms. Of

¹⁶ Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, 1988, OAS Treaty Series 69 (1988); *Basic Documents*, at 693.

¹⁷ Art. 19(6). However, claims with regard to all other protected economic and social rights may be brought under the American Declaration of the Rights and Duties of Man 1948, OAS Resolution XXX; *Basic Documents*, at 665. For discussion see Craven, 'The Protection of Economic, Social and Cultural Rights Under the Inter-American System of Human Rights', in D. Harris and S. Livingstone (eds), *The Inter-American System of Human Rights* (1998) 289.

¹⁸ Furthermore, some civil and political rights have been deemed to have an economic or social rights aspect to them. In practice this has primarily been limited to inhuman treatment and health conditions in prisons under Article 3 of the ECHR and Articles 7 and 10 of the ICCPR, although see the HRC's General Comment 6 on the Right to Life of 30 April 1982.

¹⁹ International Convention on the Elimination of All Forms of Racial Discrimination, 660 UNTS 195; *Basic Documents*, at 160.

²⁰ Convention on the Elimination of All Forms of Discrimination against Women, 1249 UNTS 13; *Basic Documents*, at 212.

²¹ UN Doc. A/54/49 (Vol. I); *Basic Documents*, at 224.

²² 21 *ILM* (1982) 58; *Basic Documents*, at 728.

²³ See Odinkalu, 'Implementing Economic, Social and Cultural Rights under the African Charter on Human and Peoples' Rights', in M. Evans and R. Murray (eds), *The African Charter on Human and Peoples' Rights: The System in Practice, 1986–2000* (2002) 178.

²⁴ Convention Nos 29, 87, 98, 100, 105, 111, 138 and 182. Although these Conventions are defined as core, many of the ILO's other Conventions also protect aspects of economic and social rights.

particular importance, in our context, is the procedure under Article 24 of the ILO Constitution which provides for examination, in certain circumstances, of representations by employers' or workers' organizations concerning an ILO Member State's alleged failure to apply the ILO Conventions on Freedom of Association.²⁵ The Collective Complaints Protocol of the European Social Charter was consciously modelled on this system.

Outside the human rights context, in the strict sense, other international mechanisms exist that judicially protect and enforce economic and social rights. The European Court of Justice, for example, is competent to adjudicate on the compliance of Member States with obligations imposed by Community law dealing with issues such as health and safety at work, equal pay and treatment, and conditions of employment, among others.

The preceding discussion highlights a number of issues. First, many economic and social rights and the obligations they impose upon states are capable of judicial determination. The fundamental issues are the manner in which the provision in question is drafted and the extent of the obligation it contains. Secondly, while the right to individual and/or collective petition exists in a number of international and domestic fora, there is no generally accepted approach as to who has *locus standi* to bring claims nor with regard to which particular economic and social rights.

3 The Collective Complaints System

A *Genesis of the Collective Complaints System*²⁶

As mentioned earlier, the collective complaints system was introduced as part of the revitalization process of the Charter. This process began in December 1990 with the establishment by the Committee of Ministers of a Committee on the European Social Charter (generally known as the Charte-Rel Committee) to draw up proposals to reform the Charter. At its second meeting in May 1991, the Committee decided to set up a working party to draw up proposals for a collective complaints system. On the basis of proposals produced by this working party, the Charte-Rel Committee adopted draft articles for an additional Protocol in September 1991. These draft articles were discussed at the Ministerial Conference held in Turin in October 1991 to mark the

²⁵ The ILO Committee on Freedom of Association has now examined over 2000 complaints. For detailed discussion of this procedure and the ILO's human rights work, see Leary, 'Lessons from the Experience of the International Labour Organisation', in P. Alston (ed.), *The United Nations and Human Rights — A Critical Appraisal* (1992) 580; Rosas and Scheinin, 'Implementation Mechanisms and Remedies', in Eide *et al.*, *supra* note 8, 425; and Samson and Shindler, 'The Standard-Setting and Supervisory System of the International Labour Organisation', in R. Hanski and M. Suski (eds.), *An Introduction to the International Protection of Human Rights: A Textbook*, (1999) 185. The ILO Committee on Freedom of Association's web page also contains details of the procedure at <http://www.ilo.org/ilolex/english/index.htm> and the cases brought before it at <http://ilolex.ilo.ch:1567/english/>.

²⁶ This section draws heavily on Council of Europe, *Explanatory Report on the Collective Complaints Protocol* (1995), paras 1–8, <http://conventions.coe.int/treaty/en/Reports/HTML/158.htm>.

30th anniversary of the signing of the Charter, but no agreement could be reached on them.²⁷

The Charte-Rel Committee resumed its examination of the draft Protocol and succeeded in finalizing the text of a draft Protocol in May 1992, which it transmitted to the Committee of Ministers. The latter, after consulting the CIE and the Parliamentary Assembly, adopted the text of the Protocol in June 1995 and opened it for signature on 9 November 1995. Under Article 14(1) the Protocol requires five ratifications for its entry into force. This condition was met in May 1998 and the Protocol accordingly entered into force on 1 July 1998. In brief outline, the Protocol allows certain types of organization to make complaints to the ECSR of non-compliance with the Charter by a state party. The ECSR first decides whether the complaint is admissible, and, if it is, it then draws up a report with its conclusions on the merits of the case. On the basis of this report the Committee of Ministers takes the final decision as to whether the complaint is upheld.

According to the Explanatory Report on the Protocol,²⁸ the introduction of a system of collective complaints is 'designed to increase the efficiency of supervisory machinery based solely on the submission of governmental reports. In particular, this system should increase participation by management and labour and non-governmental organizations . . . The way in which the machinery as a whole functions can only be enhanced by the greater interest that these bodies may be expected to show in the Charter.' These views are reflected in the preamble to the Protocol, which speaks of the resolve of the signatories to the Protocol to 'take new measures to improve the effective enforcement of the social rights guaranteed by the Charter', an aim which 'could be achieved in particular by the establishment of a collective complaints procedure, which, *inter alia*, would strengthen the participation of management and labour and of non-governmental organizations'.

Unlike the reporting system, which applies to all states parties to the Charter, acceptance to be bound by the collective complaints system is optional. The first way in which a state may manifest such acceptance is by ratifying the 1995 Protocol. So far 11 states have done so — Belgium, Croatia, Cyprus, Finland, France, Greece, Ireland, Italy, Norway, Portugal and Sweden. The second way is for a state which is a party to the Revised Charter (but which is not a party to the Protocol) to make a declaration under Article D2 of the Revised Charter that it accepts to be bound by the collective complaints system. So far two states — Bulgaria and Slovenia — have made such a declaration. Thus, of the 34 states parties to the Charter, only 13 are currently bound by the system.

Discussion of the collective complaints system will begin by considering who is eligible to make a complaint and then go on to examine the procedure by which

²⁷ Harris, 'A Fresh Impetus for the European Social Charter', 41 *ICLQ* (1992) 659, at 673 says that the reason for the failure to agree was not so much the opposition from certain governments as the fact that representatives of the ILO and international employers' associations and trade unions did not think that the system proposed at that time would be of much interest to employers' associations and trade unions.

²⁸ *Supra* note 26, at 2.

complaints are made and dealt with. The practical operation of the system so far will be reviewed in the following two sections.

B *Who May Complain?*

It is important to note at the outset that the system is one of collective, not individual, complaints. At the time the Protocol was being negotiated, the members of the Council of Europe were not prepared to accept a right to individual petition. Nor was there any suggestion of having an inter-state complaints procedure, probably because of the failure of such procedures in other human rights treaties to be widely utilized. This means that complaints may only be made by some kind of organization, not by one or a number of individuals or a state. There are four types of organizations that are eligible to make complaints under the system.²⁹ The first comprises international organizations of employers and trade unions that are observers at meetings of the Governmental Committee under the reporting system. There are three such organizations — the European Trade Union Confederation, the Union of the Confederation of Industry and Employers of Europe, and the International Organization of Employers.³⁰ The second type of organization entitled to make a complaint are other international non-governmental organizations (NGOs) that have consultative status with the Council of Europe and have been placed on a list drawn up by the Governmental Committee for the purpose of making complaints. To be put on this list, an NGO must show that it has ‘access to authoritative sources of information and is able to carry out the necessary verifications, to obtain appropriate legal opinions etc. in order to draw up complaint files that meet the basic requirements of reliability’.³¹ Organizations are put on the list for renewable four-year periods.³² There are currently 58 NGOs on this list.³³ Harris and Darcy comment that this number is surprisingly small, given that several hundred NGOs have consultative status with the Council of Europe. They criticize the restriction of international NGOs that may make complaints to those on the list, and argue that if the intention was by this means to exclude badly prepared or propagandistic complaints, this would be better done through admissibility criteria rather than a list of approved NGOs.³⁴ Organizations in

²⁹ Arts. 1 and 2, 1995 Protocol.

³⁰ It has been argued that the International Confederation of Free Trade Unions should be included in this category of complainant, even though it does not currently take part in meetings of the Governmental Committee: see K. Löchner, ‘The Social Partners’ Opinion’, in Council of Europe, *The Social Charter of the 21st Century. Colloquy Organized by the Secretariat of the Council of Europe* (1997) 130, at 133.

³¹ Committee of Ministers Decision of 22 June 1995, as summarized by the Explanatory Report, *supra* note 26, at para. 20. This paragraph also summarizes that part of the Committee of Ministers decision setting out the procedure by which the list is drawn up.

³² See the *Explanatory Report*, *supra* note 26, at para. 20.

³³ For this list, see <http://www.coe.int>. Harris and Darcy, *supra* note 4, at 357, state that the process of dealing with applications to be put on the list has operated without controversy and that nearly all applications have been accepted.

³⁴ Harris and Darcy, *supra* note 4, at 357.

this second category are only entitled to submit complaints in respect of those matters in which they have been recognized as having 'particular competence'.³⁵

The third type of organization entitled to make complaints comprises 'representative national organizations of employers and trade unions within the jurisdiction of the Contracting Party against which they have lodged a complaint'.³⁶ It is up to the ECSR when dealing with the admissibility of a complaint to determine whether a national employers' association or trade union is a 'representative' one. The ECSR has taken the view that the representativeness of a trade union is 'an autonomous concept, beyond the ambit of national considerations as well [as] the domestic collective relations context'.³⁷ In the first two cases (Complaint Nos. 6/1999 and 9/2000) brought by complainants in this third category (both complainants were French trade unions), the ECSR, after making the observation just referred to concerning the autonomous nature of the concept of representativeness, simply noted that having made an overall assessment of the documents in the file, its conclusion was that the trade union concerned was a representative one. In the next two complaints brought by this type of complainant, the ECSR made a rather more thorough examination of the representativeness of the complainant. This was despite the fact that, as with the first two cases, the representativeness of the organization concerned had not been challenged by the defendant state. In Complaint No. 10/2000 the ECSR noted that the complainant Finnish trade union represented the great majority of employees in the sector concerned (health care) and participated in the collective bargaining process in that sector. It thus held that the complainant was a representative trade union.³⁸ In Complaint No. 12/2002, brought by a Swedish employers' association, the ECSR noted that the association was the largest body of its kind in Sweden, representing 47,000 companies with about 1.45 million employees; that it had concluded several central-level collective agreements in the private sector; and that it sought to promote general understanding of the needs of enterprise and its contribution to society. The ECSR therefore concluded that the complainant was a representative employers' organization.³⁹ In Complaint No. 23/2003, the French Government challenged the representativeness of a regional trade union in the education sector, pointing out that the union was not considered a representative one under French law. The ECSR, in rejecting this challenge, again stated that the representativeness of a trade union is 'an autonomous concept'. More importantly,

³⁵ Art. 3, 1995 Protocol.

³⁶ Art. 1(c), 1995 Protocol.

³⁷ Complaint No. 6/1999, *Syndicat National des Professions du Tourisme v France*, Decision on Admissibility, para. 6. This view has been repeated in later complaints: see, for example, Complaint No. 9/2000, *Confédération Française de l'Encadrement — CGC v. France*, Decision on Admissibility, para. 6; and Complaint No. 10/2000, *Tehy ry and STTK ry v. Finland*, Decision on Admissibility, para. 6. The texts of the ECSR's decisions on both admissibility and the merits of collective complaints can be found on the Council of Europe's webpage. Some of the decisions on the merits are also reproduced in *IHRR*, and these references will also be given where they exist. After their initial reference, complaints, both in the text and in the footnotes, will be cited by number only.

³⁸ Complaint No. 10/2000.

³⁹ Complaint No. 12/2002, *Confederation of Swedish Enterprise v. Sweden*, Decision on Admissibility, para. 5.

however, it considered the Union to be representative on the basis that it represented a considerable number of employees in the education sector in the geographic region in which it was based and was completely independent of employers.⁴⁰ On the basis of this admittedly limited practice, it would seem that the main tests of whether a trade union or an employers' association is a 'representative' organization will be its size (in terms of the number of its members) relative to the sector or region in which it operates and the degree to which it has participated in collective bargaining in the sector concerned.⁴¹

The final category of complainant organizations comprises 'other representative national' NGOs with 'particular competence in the matters governed by the Charter'.⁴² Again it will be up to the ECSR in its decisions on admissibility to determine whether such an organization is 'representative' and has the 'particular competence' referred to. While the latter qualification may not be so difficult to assess, the former is not so straightforward, certainly not as straightforward as with a trade union or employers' association. Presumably the kinds of factors the ECSR will look for when it comes to making an assessment about representativeness (which it has not yet had to do) are likely to be the number of members (although an organization could have a lot of members but nevertheless such members could still be a small proportion of the total potential membership, e.g. a pensioners organization); the size of an organization in terms of its income/turnover and number of staff; the degree to which it is recognized/consulted by public authorities; and the relationship of all these qualities to other national NGOs working in the same field.⁴³ A national NGO falling into this fourth category of complainant may only make complaints if the state in which it is located has made a declaration allowing it to do so.⁴⁴ Finland is the only state so far to have made such a declaration. According to the Explanatory Report on the Protocol, a state that has made such a declaration may not draw up a list of national NGOs permitted to make complaints, nor may it restrict such organizations to making complaints in respect of only certain provisions of the Charter.⁴⁵ Cullen has suggested that the fact that states may not draw up a list of approved organizations may discourage them from making the necessary declaration since the number of groups which could make complaints is open-ended, unlike the international NGOs in the

⁴⁰ Complaint No. 23/2003, *Syndicat occitan de l'éducation v. France*, Decision on Admissibility, paras 3–5.

⁴¹ These factors are in fact suggested by the Explanatory Report on the 1995 Protocol as being the relevant ones: *supra* note 26, para. 23.

⁴² Art. 2(1), 1995 Protocol.

⁴³ For a fuller discussion of this issue and a somewhat similar viewpoint, see Birk, 'The Collective Complaint: A New Procedure in the European Social Charter', in C. Engels and M. Weiss (eds), *Labour Law and Industrial Relations at the Turn of the Century* (1998) 261, at 266–268. See also Prouvez, 'Opinion of the Non-Governmental Organizations', in Council of Europe, *supra* note 30, 140 at 144–145.

⁴⁴ Art. 2(1), 1995 Protocol.

⁴⁵ Explanatory Report, *supra* note 26, at para. 28.

second category of complainant.⁴⁶ Where a state has not made a declaration, it may be possible for a national NGO to act through an international NGO, if there is an appropriate body on the list.⁴⁷

Organizations of the second and fourth types may make complaints 'only in respect of those matters in which they have been recognised as having particular competence'.⁴⁸ Again, it will be up to the ECSR, when considering the admissibility of a complaint, to decide if a complainant in one of these categories has brought a complaint in relation to a matter in which it has such competence. In practice, the ECSR, when considering this question *proprio motu* in admissibility proceedings, does not carry out a very rigorous assessment. For example, in Complaints Nos. 7/2000 and 14/2003 the International Federation of Human Rights Leagues (IFHR) brought complaints against Greece⁴⁹ and France⁵⁰ concerning the unsatisfactory application of Article 1(2) of the Charter (prohibiting forced labour) and the unsatisfactory application of Articles 13 and 17 and E of the Revised Charter (the right of persons with disabilities and children to protection, and discrimination), respectively. In neither of these complaints did the French or Greek Governments contest the admissibility of the applications. The ECSR, in the admissibility phase, nevertheless considered whether the IFHR had 'particular competence' in relation to the subject matter of the complaints. The IFHR's goal is to 'promote the implementation of the Universal Declaration of Human Rights and other international instruments of human rights protection ... and to contribute to the enforcement of the rights guaranteed by these instruments'.⁵¹ This was considered by the ECSR, in both complaints, to satisfy the stipulation that the organization had 'particular competence' in relation to the subject matter of those complaints. While it is undeniable that the IFHR, as a major international human rights NGO, has some competence with regard to the specific issues raised in both complaints, it is worth noting that the ECSR did not examine the scope of the IFHR's activities nor where its 'particular competence' stemmed from.⁵² In the only cases so far in which a challenge was made by the defendant state that a complainant did not comply with Article 3, the ECSR seems to have adopted a relaxed reading of the provision. In Complaint No. 8/2000,

⁴⁶ Cullen, 'The Collective Complaints Mechanism of the European Social Charter', 25 *ELRev HR*/18 (2000) at HR/22. She probably goes too far when she suggests that a national NGO could be formed purely for the purpose of bringing a complaint, because it is necessary under Article 2 both that it is 'representative' and that it has 'particular competence' in a matter governed by the Charter.

⁴⁷ Harris, 'The Collective Complaints Procedure', in Council of Europe, *supra* note 30, 103 at 115; and Harris and Darcy, *supra* note 4, at 359.

⁴⁸ Art. 3, 1995 Protocol. The relevant part of the equally authentic French text reads 'dans les domaines pour lesquels elles [i.e. organizations] ont été reconnues particulièrement qualifiées'.

⁴⁹ Complaint No. 7/2000, *International Federation of Human Rights Leagues v. Greece*.

⁵⁰ Complaint No. 14/2003, *International Federation of Human Rights Leagues v. France*.

⁵¹ See FIDH, home page <http://www.fidh.org> and Complaint No. 14/2003, Decision on Admissibility, para. 5.

⁵² For further examples of the ECSR's approach, see its decisions on admissibility in Complaint No. 1/1998, *International Commission of Jurists v. Portugal*, 6 *IHRR* 1142 (1999); Complaint No. 2/1999, *European Federation of Employees in Public Services v. France*; and Complaint No. 15/2003, *European Roma Rights Centre v. Greece*.

the Quaker Council for European Affairs brought a complaint that Greece was not in compliance with the Charter in respect of the way its legislation dealt with the conditions of conscientious objectors performing civilian service as an alternative to military service. The Greek Government challenged the competence of the Council to make such a complaint. The ECSR rejected this challenge. It pointed out that the Council's objective, according to its Statute, was to promote the traditions of the Quakers and, to this end, its task was to bring to the attention of the European institutions the concerns of Quakers, which relate to peace, human rights and economic justice. The Committee, therefore, concluded that the Council had made a complaint in a field in which it had 'particular competence' within the meaning of Article 3.⁵³ Secondly, in Complaint No. 17/2003, the World Organization against Torture alleged that Greek law was not in compliance with the Charter because it did not prohibit the corporal punishment or other forms of degrading punishment or treatment of children. The Greek Government challenged the competence of the Organization to make such a complaint because it was 'not particularly qualified in the field of degrading treatment of children'. The ECSR rejected this challenge, simply pointing out that the Organization was a body 'whose aim is to contribute to the struggle against torture, summary executions, disappearances, arbitrary detention, psychiatric internment for political reasons, and other cruel, inhuman and degrading treatment, regardless of the age of the persons against whom such treatments are directed' and therefore was 'particularly qualified' in relation to the subject matter of the complaint.⁵⁴ On the whole, therefore, it would seem that in practice the test is one of 'some competence' with regard to the issue raised by the complaint rather than 'particular competence' in the matters governed by the Charter.

Of the four categories of complainant, the first and the third are concerned with employment issues (broadly, economic rights), while the second and fourth categories may cover such issues but will predominantly be concerned with other aspects of the Charter (broadly, social rights). The fact that the second and fourth categories of complainant are more restricted than the first and third (in that they must be included on a list or operate in a state which has made a declaration accepting their competence to make complaints) illustrates the historic bias of the Charter in favour of employers' organizations and trade unions.⁵⁵ All of the first three categories of complainant have links with the reporting system — the first category comprises the organizations that participate in meetings of the Governmental Committee; the second consists of those bodies that are to be sent copies of national reports and may be consulted by the Governmental Committee;⁵⁶ while the third category comprises

⁵³ Complaint No. 8/2000, *Quaker Council for European Affairs v. Greece*, Decision on Admissibility, para. 9.

⁵⁴ Complaint No. 17/2003, *World Organization Against Torture v. Greece*, Decision on Admissibility, paras 2 and 6.

⁵⁵ Harris, *supra* note 47, at 126.

⁵⁶ Arts. 23(2) and 27(2), European Social Charter, as amended.

organizations that are to be sent national reports on which they may comment.⁵⁷ The fact that the fourth category does not feature in the reporting system may help to explain why it is optional under the complaints system. In linking the categories of complainant to the reporting system, the collective complaints system helps to achieve one of its aims, which (as noted above) is to 'strengthen the participation of management and labour and of non-governmental organizations' in the operation of the Charter.

C The Complaints Procedure

1 Initiating a Complaint

The procedure begins by a qualified complainant making a complaint in writing to the secretary of the ECSR⁵⁸ alleging that a state party 'has not ensured the satisfactory application' of one or more of the provisions of the Charter by which it is bound.⁵⁹ Complaints made by the first two categories of complainant (i.e. international organizations) must be in one of the official languages of the Council of Europe: complaints by national employers' associations, trade unions and NGOs may be submitted in another language.⁶⁰

The terminology of a failure to ensure 'the satisfactory application' (or, as it is put more bluntly in Article 1 of the Protocol, the 'unsatisfactory application' (*'application non satisfaisante'*)) of the Charter is a somewhat unusual one. Birk, along with a number of other commentators, points out that the term 'satisfactory application' is not a legal one: it may be equated with 'compliance', which is the term used in the Charter in connection with the role of the ECSR in the reporting system.⁶¹ The reason for the change in terminology is not apparent, and the Explanatory Report frequently uses the term 'compliance' instead of 'satisfactory application' (e.g. in paras 11 and 31).⁶² The terminology of unsatisfactory application may also be contrasted with that of most civil and political rights treaties, where an individual applicant must claim to be the 'victim of a violation' of one of the recognized rights.⁶³ It may be that the

⁵⁷ Art. 23(1), European Social Charter, as amended. In practice not many national employers' organizations or trade unions show much interest in the reporting system: see Novitz, 'Remedies for Violation of Social Rights within the Council of Europe: The Significant Absence of a Court', in C. Kilpatrick, T. Novitz and P. Skidmore (eds), *The Future of Remedies in Europe* (2002) 231, at 243.

⁵⁸ Rule 20 of the ECSR's Rule of Procedure (1999). This explains that the secretary of the ECSR acts on behalf of the Secretary General of the Council of Europe, who is specified as the addressee of complaints in Art. 5 of the 1995 Protocol.

⁵⁹ Art. 4, 1995 Protocol. The French text reads: '*n'aurait pas assuré d'une manière satisfaisante l'application. . .*'. Note that a state party is not required to accept all the rights contained in the Charter, only a certain minimum.

⁶⁰ Rule 21 of the ECSR's Rules of Procedure.

⁶¹ Art. 24 Charter, as amended.

⁶² Birk, *supra* note 43, at 270.

⁶³ For example, Art. 34, ECHR; Art. 14, CERD; and Art. 1, Optional Protocol to the International Covenant on Civil and Political Rights, 1966, 999 UNTS 171; *Basic Documents*, at 199.

terminology of unsatisfactory application which, according to Sudre,⁶⁴ is broadly inspired by Article 24 of the Constitution of the ILO, is used rather than ‘violation’ because some (but certainly not all) of the provisions of the Charter are sufficiently vague and general and/or programmatic that they do not lend themselves to a straightforward determination that there has been a ‘violation’. Novitz, one of the themes of whose writings on the Charter is that economic and social rights are unjustifiably much more weakly protected by the Council of Europe than civil and political rights, argues that the difference in terminology between the ECHR and the Charter indicates the ‘inferior status of social rights’ protected under the Charter because a ‘violation’ is implicitly a ‘much more serious matter’ than ‘unsatisfactory application’.⁶⁵

The terminology generally utilized in practice by the ECSR and the Committee of Ministers when referring to defendant states considered not to be ensuring the ‘satisfactory application’ of the Charter is being ‘not in conformity’ with the Charter, although occasionally the terms ‘breach’ or ‘violation’ have also been used.⁶⁶ The use of such language was challenged, on one occasion, in the dissenting opinion of Alfredo Bruto da Costa in Complaint No. 1/1998. Mr da Costa considered that the approach of the ECSR, which he felt focused on the situation in the defendant state (rather than on its performance), was not in conformity with the idea of ‘satisfactory application’. There is a degree of merit in this argument, as the idea of ‘satisfactory application’ can be deemed to be concerned with the overall approach of the state party to the issue in question and not necessarily with assessing ‘violations’ of Charter provisions out of the context of overall policy and approach to the protected right(s) in question. Although the choice of terminology in the Charter is probably not a case of semantics, the language utilized by the ECSR in practice is noteworthy. In particular, the use of ‘violation’ and ‘breach’ lends further weight to the idea of the justiciability of economic and social rights.

A complainant, when bringing a complaint, must ‘indicate in what respect’ there has been unsatisfactory application of the Charter.⁶⁷ This means that a complainant must provide some evidence to support its allegation of unsatisfactory application. It seems that such evidence need not be extensive or comprehensive. In Complaint No. 5/1999 Portugal argued that the complainant had not indicated in what respect it had failed to ensure satisfactory application of the provisions of the Charter dealing with the rights to organize and bargain collectively as far as members of the armed forces were concerned, and therefore should be rejected as inadmissible. The ECSR rejected this challenge to admissibility. It pointed out that the complainant had referred to provisions of the Portuguese Constitution and legislation which were alleged to contravene the Charter. ‘The reasons given in the complaint, although

⁶⁴ Sudre, ‘Le protocole additionnel à la Charte Sociale Européenne prévoyant un système de réclamations collectives’, 100 *RGDIP* 715 (1996) 724–725.

⁶⁵ Novitz, *supra* note 9, at 53.

⁶⁶ See, e.g., Complaints Nos. 7/2000, 8/2000 and 10/2000.

⁶⁷ Art. 4, 1995 Protocol.

succinct, are sufficiently indicative of the extent to which the Portuguese Government is alleged not to have ensured the satisfactory application of the provisions concerned.⁶⁸ On the other hand, in Complaint No. 2/1999 (which dealt with a similar issue in France) the ECSR found at the merits stage that the complainant had produced no evidence to rebut the defendant government's claim that French armed forces enjoyed certain rights of consultation and thus that the requirements of Article 6 were satisfied. The complaint was therefore dismissed.⁶⁹ The ECSR will also take account of evidence supplied by those other than the complainant. Thus, for example, in Complaint No. 1/1998, which concerned child labour in Portugal, the ECSR took account of information supplied by the Portuguese Government itself to conclude that in fact there had been an unsatisfactory application of the Charter in that case. Where a complaint relates to legislation that is alleged to be incompatible with the Charter, this is normally sufficient by way of evidence to support an allegation of unsatisfactory application: the ECSR does not normally require the complainant to provide examples of the practical application of the legislation to support a claim of unsatisfactory application of the Charter.⁷⁰ On the other hand, where legislation on its face is compatible with the Charter, the ECSR obviously requires evidence that the application of the legislation in practice is contrary to the Charter in order for a complaint to be upheld. This was successfully shown in the case of Complaint No. 1/1998 (child labour in Portugal), but not in respect of certain aspects of Complaint No. 9/2000 (the right to bargain effectively in France).

A somewhat related issue is the question of the level of generality at which a complaint must be made. The Explanatory Report on the 1995 Protocol notes that it was agreed during the negotiation of the Protocol that because of their collective nature, complaints could only raise questions concerning non-compliance of a state's law or practice with one of the provisions of the Charter: individual situations could not be submitted.⁷¹ Clearly, if a complaint alleges that legislation as such is incompatible with the Charter, this is a general (or collective) complaint and therefore permissible. On the other hand, a complaint that there has been a breach of, say, Article 4(3) (on equal pay) because Ms X has been paid less than her male colleagues performing work of equal value, would be an individual complaint and, therefore, impermissible. However, there may be a grey area in between these two extremes where complaints may be made that the practical application of legislation or an administrative practice, as shown in its application to particular individuals, is contrary to the Charter. It would seem that as long as there are a reasonably significant number of groups of individuals involved demonstrating a generality of practice, complaints of this nature will be admissible. Thus, in Complaint No. 6/1999

⁶⁸ Complaint No. 5/1999, *European Federation of Employees in Public Services v. Portugal*, Decision on Admissibility, para. 10.

⁶⁹ Complaint No. 2/1999, Decision on the Merits, 8 IHRR 564 (2001) para. 32.

⁷⁰ See, for example, Complaints Nos. 7/2000 and 8/2000 on forced labour in Greece; and Complaint No. 9/2000, *Confédération Française de l'Encadrement — CGC v. France* on the length of working hours in France.

⁷¹ *Supra* note 26, at para. 31.

the ECSR accepted as admissible a complaint which concerned the treatment of guides at general categories of historical and cultural sites in France and which also referred specifically to the position at the Louvre. Likewise, in Complaint No. 10/2000 the ECSR accepted as admissible a complaint that concerned workers in general in the Finnish health service exposed to radiation. Although, as mentioned, individual complaints as such may not be made, there seems no reason why an individual who believes his/her rights under the Charter have been violated should not contact an organization entitled to make complaints to request it to make a complaint about that individual's situation. That organization should then be entitled to make a complaint, provided that the situation concerned can be generalized, by showing that the alleged violation of the individual's rights is an example of a general pattern of non-compliance applying in the same way to others in the same position as the individual concerned.⁷² A final point is that issues that are abstract in nature will not be dealt with by the ECSR in the collective complaints procedure. Thus, in Complaint No. 2/1999 the complainant sought to argue that as a general principle the right to collective bargaining under Article 6 of the Revised Charter could be exercised only through trade unions. The ECSR considered that this was an issue that in the context of a collective complaint could not be assessed in the abstract, but needed to be assessed on a concrete case-by-case basis.⁷³

2 *Admissibility*

Once it has received a complaint, the ECSR must first decide whether the complaint is admissible. Unlike many human rights treaties, the CCP does not contain an explicit or comprehensive list of conditions that must be met before a complaint will be considered admissible. A number of conditions are, nevertheless, referred to in the Protocol and applied in practice by the ECSR. The complainant must be a qualified organization; the complaint must be in writing, against a state party to the Charter, and relate to a provision or provisions of the Charter that has/have been accepted by that state; and the complaint must state in what respect that state has not ensured the satisfactory application of the provision(s) concerned.⁷⁴ The Explanatory Report to the 1995 Protocol says that the ECSR may stipulate the conditions governing admissibility in its Rules of Procedure.⁷⁵ In fact, the ECSR has not (yet) done so, except in one minor respect. Rule 20 of the Rules of Procedure provides that the complaint must be signed by a person authorized to represent the complainant organization. In practice, in its decisions on admissibility, the ECSR considers whether this condition has been satisfied.⁷⁶

⁷² If the complaint is successful, it should lead to the offending legislation or practice being amended, but the individual who initiated the complaint will not, of course, obtain a remedy herself/himself. In practice, this is also often the situation where human rights treaties permit individual complaints.

⁷³ Complaint No. 2/1999, Decision on the Merits, at paras 30–31.

⁷⁴ Art. 4, 1995 Protocol.

⁷⁵ *Explanatory Report*, *supra* note 26, para. 31.

⁷⁶ For unsuccessful attempts by a defendant state to argue that Rule 20 had not been complied with, see, for examples, Complaints No. 6/2000, No. 15/2003 and No. 17/2003.

The Explanatory Report then goes on to say that should the ECSR decide to include conditions for admissibility in its Rules of Procedure, it must take account of the fact that the following points were agreed in the course of negotiating the Protocol. First, a complaint may be declared admissible 'even if a similar case has already been submitted to another national or international body', such as the ILO.⁷⁷ This differs from the ECHR, for example, which takes the opposite position.⁷⁸ An interesting question, not raised in the Explanatory Report, is whether a second complaint may be raised in relation to the same issue. For example, suppose a complaint is made and found to be well-founded and the defendant state fails to take corrective action, may a second complaint be made? Common sense suggests that as long as the defendant state has been given a reasonable period of time within which to take corrective action, a second complaint may be made. If it were not so, the effectiveness of the collective complaints system would be significantly impaired. On the other hand, where a complaint has been found not to be substantiated, it would seem impermissible to bring a new complaint relating to the same issue unless there were new material that might alter the view of a state's compliance with the Charter. This seems to be the implication of the ECSR's decision on admissibility in Complaint No. 16/2003. Here the ECSR noted that the complaint was not identical to Complaint No. 9/2000 (in which the Committee of Ministers had found France to be in compliance with the Charter) because it involved new legislation that had been enacted since the earlier complaint. The complaint was therefore admissible.⁷⁹

A second point that the Explanatory Report says that the ECSR must take account of is the fact that the substance of a complaint that has been examined as part of the normal governmental reporting procedure 'does not in itself constitute an impediment to the complaint's admissibility. It has been agreed to give the ECSR a sufficient margin of appreciation in this area.'⁸⁰ The relationship between the collective complaints system and the reporting system is explored in more detail in section 5D below.

Compared with an individual application under the ECHR, for example, the conditions for the admissibility of a collective complaint differ quite considerably: in particular, a number of conditions for the admissibility of an individual application under the ECHR have no counterpart under the collective complaints procedure. First, there is no time limit for bringing a complaint. This is presumably because as the complaint relates to non-compliance of a law or practice with the Charter, the

⁷⁷ Sudre, *supra* note 64, at 731 questions whether this should be so, and says the point is a difficult one. It has also been questioned whether a 'similar' case also includes the same case: see Jaeger, 'The Additional Protocol to the European Social Charter providing for a System of Collective Complaints', 10 *LJIL* (1997) 69, at 74.

⁷⁸ See Art. 35(2)(b).

⁷⁹ Complaint No. 16/2003, *Confédération française de l'Encadrement CFE-CGC v France*, Decision on Admissibility, para. 8.

⁸⁰ Para. 31.

non-compliance is a continuing one.⁸¹ A second difference is that there is no requirement to exhaust domestic remedies. The reason for this is presumably that in many (if not most) cases there will be no domestic remedy available because many of the provisions of the Charter are not part of domestic law and/or are not self-executing,⁸² and even if they were, it is unlikely that a potential complainant would have *locus standi* to challenge the national legislation or practice alleged to be contrary to the Charter.⁸³ A third difference with the ECHR is that a complaint may not be declared inadmissible because it is manifestly ill-founded. Arguments by defendant governments that a complaint should be rejected as inadmissible because it is manifestly ill-founded have been consistently rejected by the ECSR, which has held that this issue is a matter for the merits stage.⁸⁴ Presumably the reason why there is no threshold of *prima facie* non-compliance is because it is anticipated that complainant organizations will not bring frivolous claims, but will bring only complaints with a considerable degree of plausibility. If this is the assumption, then it has certainly been borne out in practice so far. Finally, unlike the ECHR, there is no requirement that a complaint must not be an abuse of the right of petition. An attempt by the Portuguese Government to invoke such a requirement in Complaint No. 11/2001 was unsuccessful. The Government's argument that the complainant (the European Council of Police Trade Unions) was motivated by political considerations was rejected by the ECSR as being 'invalid, not being one which may be relied on to establish the inadmissibility or ill-foundedness of a complaint'.⁸⁵

As far as procedure in admissibility proceedings is concerned, once the ECSR is seized of a complaint, a rapporteur for the complaint is appointed.⁸⁶ The ECSR 'may' request the defendant state and the complainant to submit written information and observations on the admissibility of the complaint within such time limit as it shall prescribe.⁸⁷ In practice the defendant state has been asked to submit observations in

⁸¹ In fact under the ECHR the six-month rule for bringing an application does not apply to continuing violations of the Convention: see *De Becker v. Belgium*, 2 *Yearbook of the European Convention on Human Rights* (1958) 214, at 230–234.

⁸² However, it should be noted that for many rights the ECSR has read in a remedy: see Harris and Darcy, *supra* note 4, at 30.

⁸³ But both Birk, *supra* note 43, at 271, and Harris, *supra* note 47, at 106, argue that if there were a domestic remedy, it should be exhausted before a collective complaint is made. This point has not yet arisen in practice before the ECSR.

⁸⁴ See, for example, Complaint No. 4/1999, *European Federation of Employees in Public Services v. Italy*, Decision on Admissibility, para. 12; Complaint No. 8/2000, Decision on Admissibility, para. 10; Complaint No. 11/2001, *European Council of Police Trade Unions v. Portugal*, Decision on Admissibility, paras 7 and 8; and Complaint No. 18/2003, *World Organization against Torture v. Ireland*, Decision on Admissibility, para. 7. Similarly, arguments by a defendant state that it has taken or is taking the necessary measures to amend the legislation/practice alleged to contravene the Charter have also been rejected as irrelevant to admissibility and considered to be a matter for the merits stage: see, for example, Complaint No. 1/1998, Decision on Admissibility, para. 14; Complaint No. 7/2000, Decision on Admissibility, para. 9.

⁸⁵ Complaint No. 11/2001, Decision on Admissibility, para. 8.

⁸⁶ Rule 24(1) of the ECSR's Rules of Procedure.

⁸⁷ Art. 6, 1995 Protocol and Rule 26 of the ECSR's Rules of Procedure.

every case so far, except Complaint No. 3/1999 where it was obvious that the complaint was inadmissible because the defendant state, Greece, had not accepted to be bound by the provisions of the Charter which were the subject of the complaint.⁸⁸ According to the Explanatory Report, a case may only be declared admissible if the defendant state has been asked to submit its observations.⁸⁹ Only in one case (Complaint No. 1/1998) does it appear that the complainant was asked for its views on the defendant state's observations. Otherwise, the complaint and the documentation attached to it appear to have been regarded as sufficient to give the complainant's viewpoint on the question of admissibility. The written submissions of the parties are all the material that the ECSR has in order to determine the admissibility of a complaint: unlike the merits stage (as will be seen) there is no provision for oral hearings. On the basis of the written submissions, the rapporteur then drafts a decision on admissibility, which is considered by the ECSR in private session.⁹⁰ At these meetings, as with the ECSR's meetings to examine the reports of states parties to the Charter, a representative of the ILO is invited to be present.⁹¹ According to the published decisions on admissibility, an ILO representative has participated in only four of the 23 complaints on which a decision on admissibility has been taken.⁹² Once the ECSR has deliberated, it takes a decision on admissibility, which must be reasoned. The decision is then communicated to the parties to the complaint and to the states parties to the Charter, and made public.⁹³ Even if there has been no challenge to the admissibility of a complaint, which has been the position in almost half of the complaints so far,⁹⁴ the ECSR nevertheless goes through the conditions of admissibility outlined above⁹⁵ to satisfy itself that they have been fulfilled. Where a challenge has been made to the admissibility of a complaint, the ECSR first satisfies itself that the unchallenged conditions of admissibility have been met before considering the challenge(s) to admissibility put forward by the defendant state.

Overall, the ECSR has taken a rather relaxed attitude to admissibility so far. Cullen has suggested that if complaints become more numerous, the ECSR may need to be

⁸⁸ Complaint No. 3/1999, *European Federation of Employees in Public Services v. Greece*, Decision on Admissibility. Cf. para. 35 of the *Explanatory Report*, *supra* note 26, which notes that there is no obligation on the ECSR to 'request information from the defendant state, in order to permit it to reject a complaint that is manifestly inadmissible of its own volition'.

⁸⁹ *Supra* note 26, at para. 35.

⁹⁰ Rules 24(3) and 27(1) of the ECSR's Rules of Procedure.

⁹¹ Rule 10 of the ECSR's Rules of Procedure; *Explanatory Report*, *supra* note 26, at para. 34.

⁹² Complaints Nos. 1/1998, 7/2000, 8/2000 and 10/2000.

⁹³ Rule 27(2)(3)(4) of the ECSR's Rules of Procedure.

⁹⁴ Complaints Nos. 2/1999, 9/2000, 10/2000, 12/2002, 13/2002, 14/2003, 19/2003, *World Organization Against Torture v. Italy*, 20/2003, *World Organization Against Torture v Portugal* and Complaint No. 22/2003, *CGT (Confédération générale du travail) v. France*.

⁹⁵ Viz. that the complaint is in writing; made by a qualified organization; signed by an authorized person; relates to a provision of the Charter accepted by the defendant state; and sets out the grounds for the allegation of unsatisfactory application of the provision concerned.

more restrictive in its approach.⁹⁶ As things stand at present, however, there seems to be little likelihood of this situation occurring in the immediate future.

3 *The Merits Stage*

If the ECSR decides that a complaint is admissible, it then asks the complainant and the defendant state to submit their views on the merits of the complaint in writing within a specified time limit.⁹⁷ Other states parties to the Protocol and organizations belonging to the first category of complainant referred to above (i.e. international organizations of employers and trade unions) are also invited to submit their views on the complaint.⁹⁸ In practice so far no state party to the Protocol has yet submitted observations on a complaint not involving itself.⁹⁹ Of international organizations of employers and trade unions, the European Trade Union Confederation has submitted observations in in all the cases that have been disposed of so far. The International Organization of Employers has submitted its observations on one occasion, in Complaint No. 12/2002, the first complaint to have been brought by an employers' association. Following the receipt of all the written material referred to, each of the parties to the complaint may submit any additional information or observations it wishes within such time limit as the ECSR may prescribe.¹⁰⁰ The ECSR may then, if it considers it desirable, either on its own initiative or at the request of one of the parties, organize a hearing with the representatives of the parties.¹⁰¹ Of the 11 complaints that have so far been dealt with on the merits, a hearing has been held in five cases.¹⁰² Harris has argued that hearings should generally be held in order both to give the ECSR 'a better sense of the issues and arguments' and to promote the familiarity of complainant organizations with the system.¹⁰³

On the basis of the written materials, the hearing (if held) and a draft report prepared by the rapporteur,¹⁰⁴ the ECSR deliberates in private¹⁰⁵ on the merits of the complaint and draws up its report. In this it is required to describe the steps it has

⁹⁶ Cullen, *supra* note 46, HR/22.

⁹⁷ Art. 7(1), 1995 Protocol; Rule 28(1) and (2) of the ECSR's Rules of Procedure. Time limits are usually quite short: e.g. the defendant state is normally given around two months from the date of the decision on admissibility to submit its views.

⁹⁸ Art. 7(1) and (2), 1995 Protocol; Rule 28(3) and (4) of the ECSR's Rules of Procedure.

⁹⁹ Cf. practice before the European Court of Human Rights, where states have from time to time submitted observations in cases brought against other states because they had a particular interest in the subject matter of the case.

¹⁰⁰ Art. 7(3), 1995 Protocol.

¹⁰¹ Art. 7(4), 1995 Protocol and Rule 29 of the ECSR's Rules of Procedure. As well as the parties, states and organizations that have submitted observations shall be invited to attend.

¹⁰² Complaints Nos. 2/1999, 4/1999 and 5/1999 (a joint hearing for the three cases which were concerned with the same matter), Complaint No. 9/2000, 10 *IHRR* 559 (2003) and Complaint No. 12/2003. A sixth hearing was held on 29 September 2003 in Complaint No. 13/2002. The decision on the merits, at the time of writing, had not been given.

¹⁰³ Harris, *supra* note 47, at 106.

¹⁰⁴ Rule 24(3) of the ECSR's Rules of Procedure.

¹⁰⁵ Again, as with admissibility proceedings, an ILO representative may take part, and has in fact done so in five complaints so far — Complaints Nos. 1/1998, 2/1999, 4/1999, 5/1999 and Complaint No. 6/1999, 8 *IHRR* 554 (2001).

taken to examine the complaint and to give, with reasons, its conclusions as to whether or not the defendant state has 'ensured the satisfactory application' of the provision(s) of the Charter referred to in the complaint.¹⁰⁶ In this latter respect the ECSR's role is essentially a quasi-judicial one, applying law to the facts to reach a considered conclusion.¹⁰⁷ This conclusion is not final and binding, however, as the ECSR's report is then transmitted to the Committee of Ministers for a definitive disposal of the complaint. At the same time the report is also sent to the complainant and the states parties to the Charter.¹⁰⁸ Subsequently, the report is also transmitted to the Parliamentary Assembly and made public, either at the same time as the resolution of the Committee of Ministers concluding proceedings for the complaint concerned or four months after the report has been sent to the Committee of Ministers, whichever is the earlier.¹⁰⁹

In its report the ECSR is limited to expressing a view as to whether the defendant state has complied with the Charter or not. It seems that it is not entitled to award or suggest compensation if it finds the defendant state in non-compliance. A request in Complaint No. 9/2000 for it to do so, for the sum of FF78 billion, was summarily dismissed without any discussion of the issue.¹¹⁰ While it may be possible that the Committee did not entertain the request due to the size of the claim, a power to award compensation is not in accordance with the nature and purpose of the Protocol.¹¹¹ Likewise, it seems that the ECSR has no power to award costs to a successful complainant. In Complaint No. 1/1998 the complainant, the International Commission of Jurists, requested that the defendant state, Portugal, pay it the sum of FF50,000 in respect of its costs in preparing and submitting the complaint. The ECSR decided to leave this matter for the Committee of Ministers to determine.¹¹² The matter was not, however, referred to in the resolution of the Committee of Ministers concluding the complaint.¹¹³ The question of costs was raised again in Complaint No. 16/2003, where the complainant sought costs of 9,000 Euros. In its decision on admissibility, the ECSR decided to deal with this issue at the merits stage (which at the time of writing had not yet taken place).¹¹⁴ It remains to be seen, therefore, whether the ECSR will decide that it does have the power to make an award as to costs. It seems clear, however, that the ECSR does not have the power to promote a friendly

¹⁰⁶ Art. 8(1), 1995 Protocol. The requirement of reasons is found in Rule 30(1) of the ECSR's Rules of Procedure.

¹⁰⁷ In so doing the ECSR frequently refers to and follows the 'case law' as to the meaning and scope of Charter rights that it has developed in the reporting procedure.

¹⁰⁸ Art. 8(2), 1995 Protocol.

¹⁰⁹ Art. 8(2), 1995 Protocol; Rule 30(2)-(4) of the ECSR's Rules of Procedure.

¹¹⁰ Complaint No. 9/2000, para. 58.

¹¹¹ Harris and Darcy, however, argue that it would be open to the Committee of Ministers, when making a recommendation to a defendant state found to be in non-compliance with the Charter, to make a recommendation suggesting that appropriate reparation be made to anyone particularly affected by such non-compliance: Harris and Darcy, *supra* note 4, at 367.

¹¹² Complaint No. 1/1998, Report to the Committee of Ministers, para. 5.

¹¹³ Res. ChS (99) 4.

¹¹⁴ Complaint No. 16/2003, Decision on Admissibility, para. 9.

settlement or order provisional measures, something that Harris has argued is regrettable.¹¹⁵

As mentioned above, it is up to the Committee of Ministers to make a definitive disposal of the complaint. Its role in so doing is described in Article 9(1) of the 1995 Protocol as follows:

On the basis of the report of the Committee of Independent Experts [now the ECSR], the Committee of Ministers shall adopt a resolution by a majority of those voting. If the Committee of Independent Experts finds that the Charter has not been applied in a satisfactory manner, the Committee of Ministers shall adopt, by a majority of two-thirds of those voting, a recommendation addressed to the Contracting Party concerned. In both cases, entitlement to voting shall be limited to the Contracting Parties to the Charter.

Of this provision the Explanatory Report says:

The duties of the Committee of Ministers are similar to those it carries out as a supervisory body in the procedure instituted by the Charter [i.e. the reporting procedure].

On the basis of the report of the Committee of Independent Experts, the Committee of Ministers adopts a resolution by a majority of those voting. However, if the conclusions of the Committee of Independent Experts are negative, the Committee of Ministers must adopt a recommendation addressed to the State concerned. . . . The Committee of Ministers cannot reverse the legal assessment made by the Committee of Independent Experts. However, its decision (resolution or recommendation) may be based on social and economic policy considerations.¹¹⁶

These somewhat opaque texts, which are equally unclear in their French versions, have given rise to differing views among commentators. It is generally agreed that if the ECSR reaches the conclusion that the defendant state has ensured the satisfactory application of the Charter, the Committee of Ministers shall do no more than adopt a resolution, by a simple majority of those voting,¹¹⁷ concurring with the finding of the ECSR. This is indeed what has happened in practice.¹¹⁸ Where the views of commentators diverge widely is over what the position should be where the ECSR reaches the conclusion that the defendant state has not ensured the satisfactory application of the Charter. Harris, relying on the use of the mandatory term 'shall' in Article 9(1), is of the view that the Committee of Ministers may not make its own findings of compliance but must endorse the findings of the ECSR and address a recommendation to the defendant state. He regards the reference in the Explanatory Report to account being taken by the Committee of Ministers of economic and social considerations as confusing (even though admittedly this happens in the reporting procedure) and contrary to the clear wording of Article 9(1), and notes that the Explanatory Report is not an authoritative source of interpretation.¹¹⁹ Trechsel has

¹¹⁵ Harris, *supra* note 47, at 120. See also Harris and Darcy, *supra* note 4, at 365.

¹¹⁶ *Explanatory Report*, *supra* note 26, para. 46.

¹¹⁷ It is arguably anomalous that all parties to the Charter are permitted to vote, and not simply those bound by the collective complaints system.

¹¹⁸ See Res ChS (2001)2, 8 *IHR* 570 (2001); (2001)3; (2001)4; and (2002)5 relating to Complaints Nos 2/1999, 4/1999, 5/1999 and 11/2001 respectively. In these Resolutions the Committee of Ministers simply 'takes note' of the ECSR's report.

¹¹⁹ Harris, *supra* note 47, at 107 and 121. See also Harris and Darcy, *supra* note 4, at 365–367.

queried Harris' view on the basis that if the Committee of Ministers was bound to follow the ECSR's conclusion, what would be the point of giving the Committee of Ministers the power to consult the Governmental Committee in certain circumstances (a point dealt with below) or requiring a two-thirds majority, which implies that states have a discretion to vote against the ECSR's findings.¹²⁰ To this Harris and Darcy have responded that 'although there is a vote on the adoption of the recommendation, the vote concerns the content of the recommendation and not whether any recommendation should be addressed to the contracting party concerned at all.'¹²¹ They also respond to the point in the Explanatory Report about account being taken of 'social and economic policy considerations' that this relates to the content of the resolution and/or recommendation, not to whether a recommendation should be adopted at all.¹²² Although discussing the issue only briefly, Brillat appears to share the views of Harris.¹²³

Sudre and Cullen take a very different position, however. Sudre, placing considerable reliance on the passage of the Explanatory Report quoted above, concludes that while the Committee of Ministers may not question the ECSR's findings on compliance, it may reach a decision contrary to that implied by the legal position and take account of non-legal considerations, so that in essence the Committee of Ministers, while legally bound by the opinion of the ECSR, politically is free to disregard that opinion.¹²⁴ Similarly, but more precisely, Cullen concludes that 'the Committee of Ministers may decide, on the basis of economic and social factors, not to make a recommendation to the defendant state to redress the area of non-compliance found by the ECSR in its conclusions, but it may not reject the legal basis of the conclusions.'¹²⁵ All commentators are agreed, however, that any recommendations or resolutions adopted by the Committee of Ministers are not legally binding.

The practice of the Committee of Ministers so far is much closer to the position of Sudre and Cullen than that of Harris (and Harris and Darcy). Of the seven complaints for which the ECSR reached the conclusion that the defendant state had not ensured the satisfactory application of the Charter (and where, therefore, in Harris' view the Committee of Ministers should have addressed a recommendation to the defendant state), only in one case (Complaint No. 6/1999) did the Committee of Ministers in fact address a recommendation to the defendant state (in which it endorsed the ECSR's findings).¹²⁶ In the other six cases the Committee of Ministers merely adopted a resolution concluding the proceedings. These resolutions are examined in detail in the next section of this article. The broader issues raised by the role of the Committee of Ministers are examined later.

¹²⁰ Trechsel, 'Conclusion', in *Council of Europe*, *supra* note 30, at 185.

¹²¹ Harris and Darcy, *supra* note 4, at 366.

¹²² *Ibid.*

¹²³ Brillat, 'A New Protocol to the European Social Charter Providing for Collective Complaints', 1 *EHRLR* (1996) 52 at 61.

¹²⁴ Sudre, *supra* note 64, at 737.

¹²⁵ Cullen, *supra* note 46, at HR/27.

¹²⁶ Res. ChS (2000)1.

As mentioned earlier, the Governmental Committee plays a role in the reporting procedure. One of the most contentious issues in negotiating the 1995 Protocol was what kind of role (if any) the Governmental Committee should play in the collective complaints procedure. Initially the Charte-Rel Committee proposed that the Governmental Committee should have a role similar to the one that it has in the reporting procedure, but this was opposed by the social partners and some governments, which did not wish the Governmental Committee to have any role at all because of its composition (national civil servants) and the delay that its involvement might entail.¹²⁷ The Charte-Rel Committee, therefore, amended its draft Protocol accordingly, and in that form (with no role for the Governmental Committee) the draft was sent to the Committee of Ministers.¹²⁸ The draft was not acceptable to a majority of the Committee of Ministers and, as a compromise, the draft was amended to give a modest role for the Governmental Committee in what is now Article 9(2). This provides that, at the request of the defendant state, the Committee of Ministers may decide, where the report of the ECSR raises ‘new issues’, by a two-thirds majority of the parties to the Charter, to consult the Governmental Committee. It is not altogether clear what is meant by ‘new issues’. Commentators have suggested that the term refers to a new point of interpretation or application of the Charter.¹²⁹ The 1995 Protocol is silent on the procedure to be followed where the Governmental Committee is consulted and as to the significance of any opinion that it might give. In practice, the Committee of Ministers has not yet consulted the Governmental Committee in relation to a complaint.¹³⁰

If the Committee of Ministers endorses the findings of non-compliance by the ECSR and addresses a recommendation to the defendant state, the latter is to ‘provide information on the measures it has taken to give effect’ to the recommendation of the Committee of Ministers in the ‘next report’ that it submits under the reporting procedure.¹³¹ If that report shows the defendant state to have complied with the recommendation of the Committee of Ministers, all well and good. If not, the Committee of Ministers could presumably address a further recommendation to the defendant state urging it to comply. Given that recommendations of the Committee of Ministers are not legally binding, it is unrealistic to expect the collective complaints system to have any stronger sanction against recalcitrant states. In the one recommendation addressed by the Committee of Ministers to a defendant state so far,

¹²⁷ D. Gomien, D. Harris and L. Zwaak, *Law and Practice of the European Convention on Human Rights and the European Social Charter* (1996), at 428.

¹²⁸ Brillat, *supra* note 123, at 61. See also Harris, *supra* note 47, at 108 and 122.

¹²⁹ Harris, *supra* note 47, at 122; Harris and Darcy, *supra* note 4, at 367–368; and Sudre, *supra* note 64, at 735. Less convincingly perhaps, Sudre suggests that the term could also concern the essential interests of the defendant state.

¹³⁰ The writers assume this to be the case, as none of the resolutions or recommendations so far made by the Committee of Ministers refer to it having consulted the Governmental Committee.

¹³¹ Art. 10, 1995 Protocol. It should be noted that the term ‘next report’ means literally that. Thus, if the provision of the Charter with which the defendant State has failed to comply is a non-core right, and the next report due covers only core rights, the response to the recommendation of the Committee of Ministers must nevertheless be contained in that report: see *Explanatory Report*, *supra* note 28, para. 50.

the state concerned (France) reported on various steps that it had taken. The ECSR was only partially satisfied with these measures, and asked the French Government both to take further measures and to supply it with more detailed information.¹³²

Having now examined at considerable length how the collective complaints system operates in general terms, it is time to consider how it has worked in practice and to see what the outcome of the first lot of complaints has been before making a critical assessment of the system.

4 An Overview of the Operation of the Collective Complaints System So Far

By February 2004, five and a half years after the entry into force of the CCP, 23 complaints had been made. These complaints have been made against eight of the 13 states that are bound by the system (eight complaints against France; five against Greece; four against Portugal; two against Italy and one each against Belgium, Finland, Ireland and Sweden). The complainants have all come from the second or third categories of those organizations entitled to make complaints.¹³³ Harris' prediction that the first category of complainant (international employers' organizations and trade unions) would want to make complaints¹³⁴ has not yet been borne out.

The complaints to date concern: child labour in Portugal;¹³⁵ the capacity of members of the armed forces to form trade unions and bargain collectively in France, Greece, Italy and Portugal,¹³⁶ and of the police to do the same in Portugal;¹³⁷ discrimination against certain tourist guides in France;¹³⁸ certain forms of forced labour in Greece;¹³⁹ the working conditions of managers in France;¹⁴⁰ the working conditions of health care workers in Finland exposed to radiation;¹⁴¹ the closed shop in Sweden;¹⁴² educational provision for autistic children in France;¹⁴³ discrimination in the provision of social and medical assistance in France;¹⁴⁴ discrimination against the

¹³² ECSR, *European Social Charter (Revised): Conclusions 2002 (France)*, at 14.

¹³³ 16 from the second category and seven from the third category (six of which are national trade unions and the other an employers' association).

¹³⁴ Harris, *supra* note 47, at 111.

¹³⁵ Complaint No. 1/1998. For comment, see Cullen, *supra* note 46.

¹³⁶ Complaint Nos. 2/1999, 3/1999, 4/1999 and 5/1999.

¹³⁷ Complaint No. 11/2001, 10 *IHRR* 572 (2003).

¹³⁸ Complaint No. 6/1999.

¹³⁹ Complaint No. 7/2000, 8 *IHRR* 1153 (2001) and Complaint No. 8/2000 (8) *IHRR* 1158 (2001). For comments on these complaints, see Darcy, 'Forced Labour in Greece', 27 *ELRev.*, (2002) 218.

¹⁴⁰ Complaints Nos. 9/2000 and 16/2003.

¹⁴¹ Complaint No. 10/2000, 10 *IHRR* 554 (2003).

¹⁴² Complaint No. 12/2002.

¹⁴³ Complaint No. 13/2002.

¹⁴⁴ Complaint No. 14/2003.

Roma in the field of housing in Greece;¹⁴⁵ and the absence of effective prohibition against corporal punishment of children in Belgium, Greece, Ireland, Italy and Portugal;¹⁴⁶ working conditions in general in France;¹⁴⁷ and the prohibition on non-representative professional organizations from presenting candidates in professional elections in France.¹⁴⁸

Of the 23 complaints, all but one have been declared admissible.¹⁴⁹ Of the 22 admissible complaints, the ECSR has upheld the complaint in seven cases,¹⁵⁰ rejected the complaint in four cases¹⁵¹ and in eleven cases has not yet concluded its consideration of the merits.¹⁵² In the four cases where the ECSR rejected the complaint, the Committee of Ministers adopted a resolution concurring with the conclusions of the ECSR.¹⁵³ Of the seven complaints where the ECSR found non-compliance with the Charter by the defendant state, only in one case did the Committee of Ministers address a recommendation to the defendant state, as Article 9(1) appears to suggest it should. This was Complaint No. 6/1999, which concerned a complaint of discriminatory treatment by the French Government against certain kinds of tourist guides. Here the Committee of Ministers addressed a number of quite specific recommendations to the French Government to take certain action to put an end to the discriminatory treatment.¹⁵⁴ Compared with recommendations addressed to states parties at the end of the reporting procedure, this recommendation is unusual because of its detail and specificity. In the recommendations adopted in the reporting procedure, the Committee of Ministers usually does no more than recommend that the state concerned ‘takes account, in an appropriate manner, of the negative conclusion’ of the ECSR.¹⁵⁵

In the other six cases where the ECSR found non-compliance by the defendant state, the Committee of Ministers failed to endorse the ECSR’s finding and address a recommendation to that state. In Complaint No. 1/1998 the International Commission of Jurists alleged that Portugal was not complying with Article 7(1) of the Charter, which prohibits the employment of children below the age of 15, in that, although there was legislation that laid down such a prohibition, that legislation was not being fully enforced in practice. The ECSR, while recognizing that the Portuguese Government had taken steps that had significantly improved the situation in recent years, nevertheless found that Portugal was still not fully in conformity with Article 7(1) and therefore upheld the complaint. The Committee of Ministers, however,

¹⁴⁵ Complaint No. 15/2003.

¹⁴⁶ Complaints Nos. 17/2003, 18/2003, 19/2003, 20/2003 and 21/2003.

¹⁴⁷ Complaint No. 22/2003.

¹⁴⁸ Complaint No. 23/2003.

¹⁴⁹ Complaint No. 3/1999. That such a high proportion of complaints has been found admissible is scarcely surprising, given the nature of those entitled to make the complaints and the limited admissibility criteria.

¹⁵⁰ Complaints Nos. 1/1998, 6/1999, 7/2000, 8/2000, 9/2000, 10/2000 and 12/2002.

¹⁵¹ Complaints Nos. 2/1999, 4/1999, 5/1999 and 11/2001.

¹⁵² Complaints Nos. 13–23.

¹⁵³ See *supra* note 118.

¹⁵⁴ Rec. ChS (2001)1.

¹⁵⁵ See, for example, Rec. ChS (2001)3 (addressed to Malta).

rather than addressing a recommendation to Portugal, adopted a resolution¹⁵⁶ in which it 'takes note' of the ECSR's findings and, after pointing out that it had adopted a recommendation to Portugal on the same issue the previous year,¹⁵⁷ 'recalls that the Government of Portugal will present, in its next report on the application of the European Social Charter, the measures taken in application of the said recommendation'. This action by the Committee of Ministers has been criticized as being 'a very weak response' and as taking insufficient account of the differences between the collective complaints system and the reporting procedure.¹⁵⁸ More could have been achieved if the Committee of Ministers' second recommendation had called on Portugal to improve the enforcement of its child labour legislation, a recommendation on which Portugal would subsequently have had to report. Although Portugal has now taken some action to rectify the situation,¹⁵⁹ the ECSR in its conclusions on Portugal's report for the period 1996–1998 still did not consider that Portugal was fully in compliance with Article 7.¹⁶⁰

In the case of Complaint No. 7/2000 the ECSR found Greece in non-compliance with the Charter's provisions prohibiting forced labour in respect of three particular pieces of legislation. These instances of non-compliance had been pointed out by the ECSR under the reporting system and had been the subject of a series of recommendations by the Committee of Ministers dating back to 1993. When the Committee of Ministers came to consider the first piece of legislation at issue in Complaint No. 7/2000, it took note of the fact that the Greek Government had advanced additional considerations not relied on during the examination of the merits of the complaint by the ECSR, namely a law of 1995, and the Committee went on to note that the Greek Government 'will give a full account of these' in its next report due under the reporting system.¹⁶¹ That the Greek Government should be allowed to raise arguments before the Committee of Ministers which it did not raise (but presumably could have raised) before the ECSR, seems questionable. And even more surprising is the fact that these arguments related to a piece of legislation of 1995 which presumably the Greek Government could have advanced when its failure to comply with the Charter was being revealed in the 1995, 1997 and 1999 reporting cycles. In relation to the second and third pieces of legislation at issue in this complaint, the Committee of Ministers 'takes note that . . . the Greek Government undertakes to bring the situation into conformity with the Charter in good time'.¹⁶² Given that the reporting system had revealed failures of compliance of the relevant legislation with the Charter going back nearly 10 years, it seems feeble in the extreme that the Committee should simply wait for the Greek Government to take action in its own

¹⁵⁶ Res. ChS (1999) 4.

¹⁵⁷ Res. ChS (1998) 5.

¹⁵⁸ Harris and Darcy, *supra* note 4, at 367. Cf. Cullen, *supra* note 46, at HR/26, who describes the Committee of Ministers' actions as 'minimalist'.

¹⁵⁹ See Governmental Committee of the European Social Charter, *15th Report (II)* (2001) at 11.

¹⁶⁰ ECSR, *European Social Charter: Conclusions XV-2 (Portugal)* (2001) at 4.

¹⁶¹ Res. ChS (2001) 6.

¹⁶² *Ibid.*

good time. Complaint No. 8/2000 also concerned alleged forced labour in Greece, this time in respect of conscientious objectors performing civilian service as an alternative to military service. The ECSR, by a majority of 6–3, found that the greater length of civilian service compared with military service, while not as such forced labour, was nevertheless a disproportionate restriction on the freedom to earn one's living in an occupation freely entered upon and thus was contrary to Article 1(2) of the Charter. The fact that the ECSR was quite deeply divided as to the scope of Article 1(2) may help to explain why the Committee of Ministers did not address a recommendation to Greece but instead adopted a resolution.¹⁶³ In this resolution the Committee of Ministers noted that the ECSR's report had been 'circulated to the competent authorities' and was being translated into Greek; noted recent developments in Greece, including a decrease in the length of military service; and finally 'takes note that the Greek Government undertakes to take the matter into consideration with a view to bring the situation into conformity with the Charter in good time'. This final part of the resolution constitutes the same feeble response as was seen in Complaint No. 7/2000, a feebleness which is compounded by the fact that the earlier part of the resolution noted a decrease in the length of military service, thus if anything making the disproportionate length of civilian service worse.

The fourth case of failure by the Committee of Ministers to address a recommendation to a non-complying defendant state concerns Complaint No. 9/2000. Here the ECSR (admittedly by a 5–3 majority) found two breaches of the Charter by France in respect of the length of the working hours of managers. The Committee of Ministers, however, did not endorse this finding. Instead, it noted a number of factors, which collectively appear to amount to a view as to the meaning and application of the relevant provisions of the Charter quite different from that of the majority of the ECSR (but close to the views expressed in a dissenting opinion by two members of the minority), and therefore implicitly finding no breach by France.¹⁶⁴ Here the Committee of Ministers has effectively substituted its own view of the law for that of the ECSR — something which, as noted earlier, all commentators are agreed that the Committee of Ministers is not supposed to do.

The Committee of Ministers did not adopt a recommendation to a non-complying defendant state in Complaint No. 10/2000 either. Here the ECSR found that the exposure of health workers to ionizing radiation was dangerous and unhealthy work within the meaning of Article 2(4) of the Charter and that therefore the failure of the Finnish Government to ensure that such workers were entitled to additional paid holidays or reduced working hours (as Article 2(4) requires) amounted to non-compliance with that article. The Committee of Ministers in its resolution¹⁶⁵ began by noting that the primary concern of the Finnish Government was to eliminate risks created by working with ionizing radiation and that workers in the health sector in Finland were exposed to doses of radiation well below the maximum limits required by

¹⁶³ Res. ChS (2002) 3, 10 *IHRR* 583 (2003).

¹⁶⁴ Res. ChS (2002) 4, 10 *IHRR* 571 (2003).

¹⁶⁵ Res. ChS (2002) 2.

international standards. The Committee of Ministers then went on to take note of the impending ratification by Finland of the Revised Social Charter, including the revised Article 2, paragraph 4, which puts the emphasis on elimination of risks rather than on additional paid holidays or reduced working hours. The Committee of Ministers' resolution is again open to criticism. The complaint and the ECSR's report are couched purely in terms of the original Charter. It was, therefore, at best premature, at worst irrelevant, for the Committee of Ministers to consider the issue in terms of the Revised Charter (which Finland did in fact ratify six months after the resolution was adopted). The resolution can be read as suggesting that once Finland ratified the Revised Charter, it would be in compliance with it. This would mean that the Committee of Ministers had formed a view about the standard of protection required by Article 2(4). This is really a matter for the ECSR.

The final case, to date, where the ECSR found a state in violation of the Charter but the Committee of Ministers did not address a recommendation to that state, is Complaint No. 12/2002. Sweden's representative to the Committee of Ministers had declared Sweden's intent to comply with the Charter through renegotiating collective agreements (of which 4,388 required renegotiation as of August 2003).¹⁶⁶ The Committee of Ministers, in the operative part of its resolution,¹⁶⁷ simply stated that it 'looks forward to Sweden reporting that the problem has been solved at the time of the submission of the next report' on Article 5 of the Revised Social Charter. The Committee of Ministers seems unduly complacent here as there is no guarantee that such a large number of agreements will be renegotiated within the timeframe envisaged. Furthermore, the ECSR had called on Sweden to use legislative, regulatory or judicial means in order to bring about conformity with the Charter.¹⁶⁸

5 Some Comments on the Collective Complaints System

A The Degree of Use of the Complaints System

Since the CCP entered into force, 23 complaints have been lodged, which works out at about four complaints a year on average. Whether the number of complaints that has so far been made is more or less than might have been expected is an impossible question to answer, and one that is perhaps not even worth asking. Instead, it is more fruitful to consider the factors that are likely to influence the degree of use that has been made and probably will be made of the complaints system. These factors include the following. The first is the number of states that have accepted the system. Obviously the more states that have accepted the system, the more complaints it is likely that there will be (although it should be noted that just over a third of the states that have so far accepted the system have not yet had a complaint made against

¹⁶⁶ Appendix to Res ChS (2003) 1.

¹⁶⁷ Res. ChS (2003) 1.

¹⁶⁸ Complaint No. 12/2002, Decision on the Merits, para. 28.

them). Currently the number of states that have accepted the system is disappointingly low — only just over one third of parties to the Charter. A second factor is the degree of knowledge of the system by potential complainants. Obviously the more well known the system is, the greater the likelihood of complaints. Complainants coming into the first two categories of complainant will by definition know about the system. The third category of complainant, national organizations of employers and trade unions, will know about the Charter generally from their involvement in the reporting system, but they may not be very familiar with the collective complaints system. This is likely especially to be the case in states that have been parties to the Charter for a relatively short period of time. The Council of Europe is trying to promote awareness and knowledge of the collective complaints system among potential complainants by holding occasional conferences on the system. A third factor influencing the degree of use of the collective complaints system is the general perceived level of compliance with the Charter (as revealed, at least in part, by the reporting system). The more instances of non-compliance that are revealed, the more likely it is that complaints will be made. Fourthly, the number of complaints will to some degree be influenced by the suitability of provisions of the Charter to be subject to complaints. Not all provisions are so suitable, being too general in nature. A fifth factor is the willingness of potential complainants to bear the costs and effort of making a complaint. Sixth, the speed of the system will be a factor. The quicker that complaints are processed, the more attractive the collective complaints system is likely to be perceived. Finally, the degree of use that will be made of the collective complaints system is heavily dependent on the perceived effectiveness of the system by potential complainants. Such perceptions will depend, in part, on the outcome of the complaints already made under the system. As has been seen, the picture so far is fairly discouraging.

B Speed of the System

It is a common feature of human rights compliance systems that they are not particularly speedy. However, the collective complaints system has so far functioned relatively speedily. The period of time taken to reach a decision on admissibility is about four months on average, while the complete disposal of a complaint takes about 18 months. Of course, the fact that the complaints have been dealt with quite quickly is at least, in part, a consequence of there being relatively few complaints so far. It must be remembered that the bodies that deal with complaints, the ECSR and the Committee of Ministers, are part-time and also exercise a considerable role under the reporting system. Thus, should the number of complaints significantly increase, it is to be expected that it will take longer to deal with them.

C The Role of the Committee of Ministers

As has been seen, the Committee of Ministers has been reluctant to endorse findings of non-compliance by the ECSR, having only done so once out of seven possible occasions. This hardly seems in accordance with the spirit of the CCP and arguably is

not consistent with the letter of Article 9(1). This situation appears symptomatic of a fundamental problem with the role of the Committee of Ministers, which is that it is in principle undesirable that a political body should be involved in what ought to be an independent, quasi-judicial process.¹⁶⁹ Even if one accepts that there is a role for the Committee of Ministers, there are a number of features about the way in which the Committee functions that are unsatisfactory. The defendant state, unlike the complainant, takes part in the Committee's proceedings and may vote; the decisions of the Committee are unreasoned; and a finding of non-compliance requires a two-thirds majority, whereas the ECSR decides by a simple majority.¹⁷⁰ It is possible that for political reasons the Committee may delay in dealing with a complaint. In Complaint No. 8/2000, for example, the Committee took far longer to deal with this complaint (over a year) than it has done with any of the other complaints referred to it. Whether this was because of political factors is impossible to know. Many of the same criticisms were made about the role that the Committee of Ministers originally had under the ECHR, when it ruled on the merits of cases that were not referred to the European Court of Human Rights.¹⁷¹ This role was removed by Protocol 11 to the ECHR. It is unfortunate that the Council of Europe persisted with a determinative role for the Committee of Ministers in the CCP, even though the latter was adopted a year after Protocol 11. This means that the collective complaints system is now the only international human rights mechanism where a governmental body has a decisive say in the outcome of the proceedings.

The efficacy of the CCP is to a considerable degree dependent upon the Committee of Ministers showing the necessary political will and playing a full role by making detailed recommendations to state parties if they are found by the ECSR to be in breach of the Charter, rather than implicitly questioning the assessment of the ECSR. If the Committee of Ministers continues to take the approach that it often has done so far, there is a real danger that this approach will undermine the credibility of the system and dissuade potential complainants from utilizing it.

D The Relationship between the Collective Complaints and Reporting Systems

One of the issues concerning the Protocol, which in practice seems to have been largely already settled, is the relationship between it and the pre-existing reporting mechanism. The existence of more than one compliance mechanism in a human rights treaty is nothing new. However, the fact that the same body engages in both

¹⁶⁹ The same comment can be made about the possible involvement of the Governmental Committee in the collective complaints system under Art. 9(2) of the CCP, given that the Committee consists of national officials. So far such criticism is purely theoretical, as up to now this Committee has not in practice been involved in a complaint.

¹⁷⁰ See further Sudre, *supra* note 64, at 733–737.

¹⁷¹ See further Leuprecht, 'The Protection of Human Rights by Political Bodies — The Example of the Committee of Ministers of the Council of Europe', in M. Nowak and D. Steurer (eds), *Progress in the Spirit of Human Rights* (1988); and Tomkins, 'The Committee of Ministers: Its Roles under the European Convention on Human Rights' 1 *EHRLRev.* (1995) 49.

constructive dialogue through the reporting procedure with state representatives and also sits in judgment upon a state's compliance with its obligations under the same treaty is not without problems. The first is a concern for the workload of the individuals involved. If the system is more extensively used in the future, the burden that this will impose on the part-time ECSR members, in addition to their duties under the reporting system, will become more difficult to manage.

A more fundamental problem, however, may be the potential incompatibility of the two functions the ECSR has. The Independent Expert on the Draft Optional Protocol to the ICESCR has noted '[i]t is a hard assignment for one body, first to engage a State party in constructive, fruitful dialogue ... on the steps it has taken ... a non-confrontational, consultative exercise — and then to behave as a quasi-judicial investigative and settlement body. It should opt for one or the other.'¹⁷² He observes that as a consequence a state may become reluctant to engage in frank constructive dialogue of its problems in the reporting phase, if it is likely to have to face that same committee in a quasi-judicial context.¹⁷³ The establishment of a complaints system under the Social Charter may thus have some adverse consequences for the reporting system.

The preamble to the Collective Complaints Protocol refers only to the fact that it is designed to improve the effective enforcement of the social rights guaranteed by the Charter. It does not elaborate on the relationship between the complaints and reporting mechanisms. The Explanatory Report to the Protocol does state that the reporting system is to remain the 'basic mechanism' for enforcement, with the CCP designed to 'increase the efficiency' of the existing machinery¹⁷⁴ and is to be seen as a 'complement' to the pre-existing system. The exact details of how the two interrelate is for the ECSR to work out.

The relationship between the two procedures was examined by the ECSR in its very first decision on admissibility in Complaint No. 1/1998, which concerned the existence of child labour in Portugal. The Portuguese Government argued that the complaint should be rejected as inadmissible because the matter had already been the subject of a recommendation by the Committee of Ministers to Portugal in an earlier reporting cycle. The ECSR rejected Portugal's argument. It considered that the object of the system of collective complaints, 'which is different in nature from the procedure of examining national reports, is to allow the Committee to make a legal assessment of the situation of a State in the light of the information supplied by the complaint and the adversarial procedure to which it gives rise.'¹⁷⁵ The fact that the Committee had already examined the situation relating to the object of the complaint within the framework of the reporting system, and would do so again, did not in itself imply the

¹⁷² *Report of the Independent Expert on the Question of a Draft Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*, U.N. Doc. E/CN.4/2002/57, at 10. The view of the Independent Expert has been challenged by the participants to the ICJ organized roundtable on the Draft Optional Protocol to the ICESCR, *supra* note 8, at 10.

¹⁷³ *Report of the Independent Expert*, *supra* note 172, at 10.

¹⁷⁴ *Explanatory Report*, *supra* note 26, at paras 1–2.

¹⁷⁵ Complaint No. 1/1998, Decision on Admissibility, para. 10.

inadmissibility of a collective complaint. Furthermore, Portugal's compliance with Article 7 of the Charter (the article at issue) was examined only once every four years, and so the situation would not be assessed again for a further two years. Also the recommendation of the Committee of Ministers related to the period 1994–1995, whereas the complaint referred to legislation and factual circumstances subsequent to that period. The complaints procedure therefore allowed Portugal to furnish information and evidence relating to the actions it had taken since the reporting period concerned.

Portugal also argued that for the ECSR to declare the complaint admissible and subsequently adjudicate on it, would contravene the principles of *res judicata* and *non bis in idem*.¹⁷⁶ If the ECSR had accepted this line of reasoning, the CCP would have become largely redundant as it would, in practice, have prohibited examination of a complaint if the matter had been addressed by the ECSR, possibly even in passing, in the reporting procedure. The ECSR firmly rejected Portugal's argument, declaring that:

[n]either the fact that the Committee has already examined this situation in the framework of the reporting system, nor the fact that it will examine it again during subsequent supervision cycles do not in themselves imply the inadmissibility of a collective complaint concerning the same provision of the Charter and the same Contracting Party.¹⁷⁷

The ECSR went on to note that these principles, i.e., *res judicata* and *non bis in idem*, 'do not apply to the relation between the two supervisory procedures'.¹⁷⁸

If the Protocol is to be effective, the ECSR's approach is essential as it will allow detailed legal analysis and determination of the extent to which a state party is complying with its obligations. Criticism of the duplication of effort can be rebutted on the basis that as the same body will be involved in both compliance mechanisms, it can utilize its own work for both procedures. In declaring Portugal's application admissible, the ECSR also noted that one of the CCP's objectives was to consolidate the participation of the social partners and non-governmental organizations.¹⁷⁹ This in itself is quite interesting as one of the distinguishing features of the CCP is the increased involvement of such organizations compared with the reporting mechanism. Thus to declare an application inadmissible, due to the fact that the issue with which it is concerned may already have been addressed in the reporting procedure, would effectively deprive such organizations of their enhanced status and role.¹⁸⁰ It is worthy of note that in subsequent complaints no state has objected to admissibility on the grounds raised by Portugal in Complaint No. 1/1998. It is worth questioning,

¹⁷⁶ See para. 4.

¹⁷⁷ See para. 10. However, the fact that the ECSR found the complaint admissible was to some extent undermined by the decision of the Committee of Ministers not to issue a recommendation to Portugal on the ground that a recommendation had already been issued under the reporting procedure. See text at *supra* note 156.

¹⁷⁸ *Ibid.*, at para. 13.

¹⁷⁹ *Ibid.*

¹⁸⁰ The CCP is, as far as is known, the first time NGOs other than workers' and employers' organizations have been specifically recognized in an international instrument as having standing to bring a complaint.

however, whether the ECSR will or should maintain its current approach if or when its workload increases significantly. This point can be seen in relation to Complaint No. 7/2000. Unlike Complaint No. 1/1998, the provision at issue in Complaint No. 7/2000 was a core right and thus was examined every two years. It is therefore questionable whether the finding under the CCP of a violation really added anything to the earlier finding of non-compliance under the reporting procedure, as the complainant did not refer to any developments subsequent to the most recent report. Darcy has questioned whether complaints that have nothing new to add to the reporting procedure, such as Complaint No. 7/2000, should be declared admissible.¹⁸¹

Although the ECSR did not reject Complaint No. 7/2000 as inadmissible, the fact that according to the Explanatory Report the ECSR has a 'margin of appreciation' in this matter means that it may in future, if it so wishes, follow the point of view advocated by Darcy and Sudre, especially if it becomes over-burdened by complaints. However, to do so would be to overlook the advantages of a mechanism like the CCP. First, because it is based on comprehensive written proceedings presented by both complainants and governments, it will allow the ECSR to analyse the legislation and the situation in practice, in a manner that is unlikely to happen under the reporting procedure. It will thus highlight in more detail the extent of the non-compliance and will allow the ECSR to provide the state party with greater guidance as to the measures that need to be taken to ensure compliance.¹⁸² This should ensure that national provisions are brought fully into compliance with the Charter. Secondly, complaints under the CCP should not only lead to a consolidation of standards but also allow their progressive development. In numerous complaints to date the ECSR has referred to its conclusions from the reporting cycles to define the standards and the basic requirements of the Charter provisions in question. That much is to be expected. The collective complaints system importantly, however, provides an opportunity for non-governmental bodies to try to persuade the ECSR towards the progressive development of standards. Complaint No. 2/1999 is an instance in question. Here the allegation was that France did not comply with Articles 5 and 6 of the Charter in so far as members of the armed forces did not enjoy the right to organize and there was no right to bargain collectively.¹⁸³ One of the fundamental questions for the ECSR was not only the scope of the obligation but also the construction of the exception clause in the final sentence of Article 5 as regards military personnel.¹⁸⁴ The Committee had elaborated over the years in the reporting procedure what this actually meant, but it is clear from the submissions made that one of the express purposes of the complaint was

¹⁸¹ Darcy, *supra* note 139, at 218. A similar point has also been made by Sudre, *supra* note 64, at 731.

¹⁸² See, for example, Complaint No. 6/1999.

¹⁸³ Substantively, Complaints Nos. 3/1999, 4/1999 and 5/1999 are identical.

¹⁸⁴ See para. 26.

to push for a more restrictive interpretation of the exception¹⁸⁵ and for the interpretation of the Charter as a 'living instrument'.¹⁸⁶ However, on this matter the complainant was not successful.¹⁸⁷

In terms of substance, a complaint can involve a variety of situations *vis-à-vis* the reporting system and offer a number of strategies to supplement it. These situations include the following:

1. The complaint concerns a matter where in the reporting system the ECSR found non-compliance and the Committee of Ministers addressed a recommendation to the defaulting state with which the latter has not complied. Here a complaint can be used to put pressure on the recalcitrant state to comply. Complaints No. 1/1998 and 7/2000 are examples of this.
2. The complaint concerns a matter where in the reporting system the ECSR found non-compliance, but the Committee of Ministers failed to address a recommendation to the state concerned. Here a complaint can be used to try to persuade the Committee of Ministers to issue a recommendation.
3. The complaint concerns a matter where in the reporting system the ECSR found the state concerned to be complying with the Charter. Here the purpose of the complaint will be to persuade the ECSR to reverse its earlier finding.
4. The complaint concerns a matter that does not appear (yet) to have been addressed under the reporting system or that has arisen since the previous report. Here the complaint is essentially designed to raise an issue under the Charter *de novo*. Many of the complaints appear to be of this nature.

Although the collective complaints and reporting systems are different procedures operating in different ways, they do have a number of similarities. The same bodies (the ECSR and the Committee of Ministers) are involved in both procedures, although the ECSR acts in a more quasi-judicial way in the complaints procedure, especially at the admissibility stage, than in the reporting system.¹⁸⁸ Secondly, each procedure involves an examination of the law and practice of the state concerned in general terms, rather than their application to specific individuals. Finally and most importantly, the outcome in cases of non-compliance is the same in each system — the issuing of a non-binding recommendation to the state concerned, to which the latter is then required to give its response in the next cycle of the reporting procedure.

E The Desirability/Feasibility of Bringing More States into the Collective Complaints System

It is obviously disappointing that only 13 out of 34 parties to the Charter have so far become bound by the collective complaints system. Such a low level of participation

¹⁸⁵ See para. 27.

¹⁸⁶ See para. 14.

¹⁸⁷ See para. 29.

¹⁸⁸ Cullen, *supra* note 46, HR 27–28.

reduces the utility of the system, and to some extent undermines its legitimacy and credibility. It would clearly be desirable to have more states bound by the system. This would make the system a standard part of the Charter machinery, rather than an optional minority extra as at present; would increase awareness and knowledge of the Charter; and would make the Charter more effective as more instances of non-compliance were identified and hopefully rectified. Once the collective complaints system was working regularly and frequently, and probably as a result states gained more confidence in it, it might make it easier to amend the CCP to remove some of its more obvious defects, notably the current role of the Committee of Ministers.

It is not clear why more states have not ratified the CCP (or made the necessary declaration under the Revised Charter). There are a number of possible reasons (which are not mutually exclusive). In some cases it may be bureaucratic inertia or inability/unwillingness by governments to find the necessary Parliamentary time in those states where Parliamentary approval is necessary for ratification. In other cases states may be waiting to see how the collective complaints system operates in practice before taking a decision whether to ratify.¹⁸⁹ In the case of Central and East European states (where only three out of 14 such states parties to the Charter have so far accepted the collective complaints system), it may well be that their relative inexperience with the Charter system (all have ratified the Charter since 1997 and most have yet to go for the first time through a full cycle of reporting) has led most of them to decide to obtain more experience with the Charter generally (not least to see how far they are considered to be complying with it as revealed by the reporting system) before deciding whether to take the further step of becoming bound by the collective complaints system. Then there are a small number of older members of the Council of Europe that seem to have limited interest and enthusiasm for the Charter as evidenced by the fact that they have ratified only the Charter in its original form and not any additional or amending protocols or the Revised Charter. Such states include Germany, Iceland, Luxembourg and the United Kingdom. States (such as Turkey) that have been shown by the reporting system to have a poor compliance record with the Charter are obviously less likely to accept the collective complaints system, although it is in such states that the system is potentially most useful.¹⁹⁰ Finally, it may be that there are states that are opposed to the collective complaints system for reasons of principle or that simply have a poor record of accepting optional petition systems in other human rights treaties.

What can be done to persuade states to accept the collective complaints system?

¹⁸⁹ For an example of such a ‘wait and see’ approach (but in relation to the Revised Charter rather than the CCP) see the answer by Mr. Macshane, the UK Minister of State for Foreign and Commonwealth Affairs, to a Parliamentary question dealing with these issues. WA 14 May 2003 Col. 289 W. It has been suggested that some states may fear that the collective complaints system will be abused, will lead to the unrestrained development of social rights, and disturb the way the Charter has operated up until now. See comment by Vandamme in Council of Europe, *supra* note 30, 181 at 183–184.

¹⁹⁰ Nevertheless, four states with indifferent records of compliance (i.e. having been found to comply with less than half the Charter provisions they have accepted) — Belgium, Greece, Ireland and Italy — have accepted the collective complaints system.

Five states (Austria, Czech Republic, Denmark, the Netherlands and Slovakia) have so far signed the CCP but have not yet ratified it. Such signature indicates that these states are seriously considering ratification, and it may, therefore, be only a matter of time before they ratify. In the case of other states, the Council of Europe, particularly through the Parliamentary Assembly and the Committee of Ministers, should encourage participation in the collective complaints system. More effective will probably be domestic political pressure from potential complainants, notably employers' organizations and trade unions. Where such bodies already play an active role in the reporting procedure, pressure to ratify will be greatest. Unfortunately, however, in too many states parties to the Charter such organizations do not get actively involved in the reporting procedure and therefore are unlikely to campaign for their state to participate in the collective complaints system.

While encouraging increased participation in the CCP is in principle desirable, such participation may be of limited benefit in the case of states parties only to the original Charter. Many of the rights contained in the latter are outdated and lag behind the national laws of states parties and EU law (where applicable), so that the bringing of collective complaints is likely to be of limited use. The collective complaints system is likely to be of greatest utility in those states parties to the Revised Charter where the level of protection afforded by the rights of that instrument is higher and less likely to be met by the national laws of its parties. In practice, 10 of the 13 states that are so far bound by the collective complaints system are parties to the Revised Charter, and these 10 states represent two-thirds of the 16 parties to the Revised Charter.

As well as increasing participation in the collective complaints system generally, it would also be desirable to increase the number of acceptances of the optional fourth category of complainant, national NGOs, from its current pitiful total of one (Finland). Allowing such organizations to make complaints would generate more complaints about social rights and increase the level of domestic awareness of the Charter, and also move the Charter away from its historic bias towards employment rights. It is not clear why more parties to the system have not made the necessary declaration under Article 2 of the CCP to accept national NGOs as complainants. It may be that some states have been put off by the rather open-ended nature of this category of complainant.

Finally, it needs to be borne in mind that a substantial number of new accessions to the CCP or widespread acceptance of national NGOs as complainants may not be entirely desirable or deliver some of the expected benefits without some further reform of the overall supervisory system. The increased workload of the ECSR in carrying out its functions should not be underestimated, nor should the repercussions that this could potentially have on both the quality of its work and the length of time taken to reach its conclusions.

F The Relationship between the Collective Complaints System and Other Economic and Social Treaty Provisions

One of the consequences of the existence of the CCP is that it will bring into sharper focus the issue of the difference in standards and the obligations imposed upon states by different treaties in relation to certain economic and social rights and the mechanisms available for their enforcement. As regards the latter, a decision by potential complainants whether to use the CCP or whether to try an alternative mechanism will always be strategic in attempting to achieve a certain objective, but will also depend on their standing to bring a complaint. As an *actio popularis*, the CCP cannot and is not designed to provide individual remedies and thus is of limited utility to provide redress for individual grievances, even if an organization with standing can be convinced to lodge a complaint. Any action taken by the defendant state seeking to rectify the situation will almost certainly not be retrospective in effect and will seek only to ensure that the Charter is not breached in future, no matter the degree of detriment already suffered by individuals. The same is also true of ILO procedures. By contrast, there is the possibility of an individual remedy under, for example, the ECHR and EU law. The choice of remedy may depend on a comparison of Charter rights with any comparable rights under the ECHR and EU law. The content of a right under one instrument may be superior to that under another. Thus complainants may have to choose between a higher level of protection under the Charter but with limited likelihood of its enforcement, and lesser protection under the ECHR or EU law but with a greater prospect of compliance by the Member States.

6 Conclusions

Although the collective complaints system has been in force for over five years, there is still relatively little experience with its practical operation. Nevertheless, there is enough to reveal a number of serious concerns. First, as an alternative to the reporting system as a method of trying to secure the compliance of states parties with the Charter, the collective complaints system is still very much a minority option. Only about one-third of the states parties to the Charter have accepted the system. The reasons behind the lack of acceptances are not entirely clear. Nevertheless, it is desirable, in principle, that the collective complaints system should become generally accepted and used as a compliance mechanism: this will strengthen its legitimacy and probably result in more complaints, thereby helping to increase knowledge of the Charter. The Council of Europe and NGOs (both national and international) ought therefore to lobby governments that have not yet done so, to accept the collective complaints system. Likewise the fact that only Finland, so far, has exercised the option of permitting national NGOs other than trade unions and employers' associations (the fourth category of complainant) to make complaints is another worrying factor. Again, governments need to be encouraged and pressured into accepting this category of complainant.

Once a complaint has been made, the role of the ECSR in dealing with the

admissibility of the complaint and giving an opinion on the merits has worked well. The ECSR has acted speedily, has not been unnecessarily restrictive on issues of admissibility, and has generally given well-reasoned opinions on the merits. Unfortunately, however, it is not possible to be anything like as positive about the role of the Committee of Ministers. While it has generally acted speedily, its handling of those complaints where the ECSR has found non-compliance with the Charter by the defendant state has been quite unsatisfactory. Only in one of the seven complaints has it endorsed the findings of the ECSR and addressed a recommendation to the defendant state. In the other cases it has either effectively decided not to pursue the matter further or improperly adopted an interpretation of the Charter quite different from that of the ECSR. If this trend continues, it will serve only to discredit the system and discourage complaints because complainants will feel that there is little point in utilizing the system if a finding of non-compliance by the ECSR will not be endorsed and a recommendation addressed to the defendant state by the Committee of Ministers. More fundamentally, it is undesirable that the Committee of Ministers, a political body, should have any role to play in what is, or at least ought to be, a quasi-judicial process. Before 1998 the Committee of Ministers was an alternative to the European Court of Human Rights as a body for determining breaches of the ECHR, and both the principle of this and its exercise in practice were rightly criticized.¹⁹¹ The states members of the Council of Europe decided in Protocol 11 to the ECHR to abolish this role. In view of the fact that the CCP was adopted one year after Protocol 11, it is unfortunate, to say the least, that those same states decided that it was nevertheless appropriate for the Committee of Ministers to have a determinative role in the collective complaints system.

A more fundamental issue than any of the above concerns is whether the CCP actually serves a useful purpose. While the complaints system has a number of advantages over the reporting procedure, the real test is whether complaints will actually induce any changes in behaviour on the part of defendant states. It is too early to say yet whether states will amend their behaviour if they are found in violation of the Charter under the CCP, because in nearly all cases the state concerned has not yet reported under the following reporting cycle on the issues that were the subject of the complaint; and, in any case, only one complaint so far has resulted in a recommendation from the Committee of Ministers to the defendant state to take corrective action. The one partial exception to this is Complaint No. 12/2002, where Sweden had already begun making reforms to try to bring it in to conformity with the Revised Social Charter, as interpreted by the ECSR, prior to the adoption of a recommendation by the Committee of Ministers. The action (or lack of it) taken by defendant states in response to other successful complaints is a matter that will deserve close attention in the future. If it turns out that states do not take action, then various approaches could be adopted. First, the CCP could be amended so that decisions of the ECSR became legally binding, with the Committee of Ministers having the same role of supervising the execution of decisions as it has under the ECHR. If the

¹⁹¹ See the literature referred to in note 171.

CCP is to achieve its objectives, it is imperative that the Council of Europe learns from the experiences of the ILO mechanisms upon which it is modelled. States, such as the UK in the *GCHQ* case for example, have for many years simply ignored findings of violations by the Freedom of Association Committee primarily because its decisions are not legally binding.¹⁹² It is unlikely that the UK would have taken the same approach if the then functioning European Commission of Human Rights had found the application concerning the same issues admissible and the European Court had subsequently found it in violation.¹⁹³ But strengthening the CCP in this way is an approach that some Council of Europe States are unlikely to agree to in the foreseeable future. Even less likely are they to support proposals made by some for a right to individual petition to a new European Social Rights Court or a specialized chamber of the European Court of Human Rights.¹⁹⁴

Secondly, the ECSR should try to ensure compatibility between the standards it defines for the Charter, not only under the CCP but also under the reporting procedure, and other relevant treaties. Ensuring such compatibility is more likely to mean that its findings will not be ignored because similar breaches under other treaties are more likely to be enforceable, especially in the case of EU law. In taking this approach, however, there is a risk that the ECSR may need to water down its approach to the obligations imposed by certain Charter provisions, thus to some extent defeating the object of the exercise.

The omens for the CCP, in its current form, are not positive. There is a palpable danger that without some reform the practical long-term impact of the CCP will not be significant in increasing the utility of the rights protected by the Charter.

¹⁹² Although as Novitz has noted, the current Labour Government in the UK has now given effect to the ILO finding in the *GCHQ* case, whereas the previous Conservative Government, whose policy it was to abolish unions at GCHQ, ignored it. See Novitz, 'International Promises and Domestic Pragmatism: To What Extent Will the Employment Relations Act 1999 Implement International Labour Standards Relating to Freedom of Association?', 63 *MLR* (2000) 379.

¹⁹³ Application No. 11603/85. It is worth noting that the UK was not found in breach of the European Social Charter, CIE, *European Social Charter: Conclusions XI-1 (United Kingdom)* at 80.

¹⁹⁴ See, for example, Parliamentary Assembly Rec. 1354 (1998); Harris and Darcy, *supra* note 4 at 373–374; Novitz, *supra* note 57.