EXHAUSTION OF LOCAL REMEDIES IN RELATION TO LEGISLATIVE MEASURES AND ADMINISTRATIVE PRACTICES —THE EUROPEAN EXPERIENCE

1. *Introduction*

In cases where individual rights are claimed to have been disregarded in violation of international law, the State where the violation occurred should have the opportunity to redress the wrong by its own means and within the framework of its own domestic legal system before resort may be had to an international organ. The incorporation of this well-established rule of international law in the system under the European Convention on Human Rights has been met with innumerable problems of interpretation in the handling of concrete cases. One of the most difficult problems that the organ entrusted with the admissibility of complaints (the European Commission of Human Rights) has faced in this connection has been that of the application of the local redress rule when a whole pattern of administrative practices or of legislative measures is complained of before the Commission as being incompatible with the provisions of the Convention. In such cases is there room for the application of the local remedies rule as enshrined in Article 26 of the Convention? The main difficulty lies in the fact that, in situations of the kind, even though local remedies may exist or be alleged to exist, it may be forcefully argued that their availability or effectiveness may be rendered questionable by the existence of certain administrative practices or legislative measures.

A related problem which has arisen in the Commission's practice has been the notion of "victim". In cases of legislative measures and administrative practices must an individual applicant be a victim of a specific act already perpetrated or may he complain of administrative and legislative act that may in the near future very likely violate his rights as set forth in the Convention? In a useful indication for a study of the problem, the Commission has approached the question in applications both from States (Article 24) and from individuals (Article 25). We shall accordingly survey inter-State and individual applications before proceeding to an assessment of the matter.

2. *Inter-State cases*

In the early days of the Commission, in the *First Cyprus* case, the applicant government brought charges against the respondent government (in May 1956) on account of the latter's legislative measures and administrative practices in Cyprus.[1] In its decision on the admissibility of the application (of 2 June 1956), the Commission declared that "the provision of Article 26 concerning the exhaustion

[1] Application No. 176/56, *First Cyprus* case *(Greece* v. *United Kingdom), Yearbook of the European Convention on Human Rights* (hereinafter referred to as "Yearbook"), vol. 2, pp. 182/184.

of domestic remedies according to the generally recognized rules of international law does not apply to the present application, the scope of which is to determine the compatibility with the Convention of legislative measures and administrative practices in Cyprus".[2] The Greek application was accordingly declared admissible and retained by the Commission.[3]

In the following year the Commission was seized of the *Second Cyprus* case, concerning cases of alleged ill-treatment by officials in Cyprus.[4] This time there was no explicit mention of an "administrative practice" as such, but rather references to instances of individual cases — classified into three separate categories — of maltreatment.[5] The Commission decided (12 October 1957) that in all those cases where the perpetrators (or some of them) of the alleged ill-treatment had already been identified, domestic remedies ought first to have been exhausted in conformity with Article 26 of the Convention.[6] Accordingly, in all those particular instances the Commission upheld the plea of inadmissibility on the ground of non-exhaustion of local remedies[7] and, without prejudice to the merits, declared the application admissible with regard to certain facts and inadmissible with regard to other facts.[8] It is to be noticed, however, that in the *First Cyprus* case, where "legislative measures and administrative practices" were as such being complained of before the Commission, the latter held the application admissible and declared that in such a particular situation the rule of exhaustion of local remedies did not apply.

This decision was relied upon by the Commission while examining the *Austria* v. *Italy* case (11 January 1961), but it immediately added that the situation in the present case was manifestly not the same as in complaints concerning the compatibility with the Convention of legislative measures and administrative practices regardless of any individual or specific injury.[9] It was therefore made clear that the local remedies rule would in principle not apply only when the complaints related to the alleged incompatibility of "legislative measures and administrative practices" with the Convention, as distinguished from complaints of individual specific injuries, in which the rule applied.

Years later, in the *First Greek* case brought before the Commission in September 1967, the applicant governments complained of some constitutional acts as well as "legislative and administrative

2 *Ibid.,* p. 184.
3 *Ibid.,* p. 186.
4 Application No. 299/57, *Second Cyprus* case *(Greece* v. *United Kingdom), Yearbook,* vol. 2, pp. 188/192.
5 *Cf. ibid.,* p. 194. The Commission found it "superfluous" to distinguish among the three categories of cases for the purpose of the application of Article 26 of the Convention *(ibid.,* p. 194).
6 *Ibid.,* p. 196.
7 Article 27(3) of the Convention.
8 Appl. No. 299/57 *cit.,* p. 196.
9 Application No. 788/60, *Austria* v. *Italy* case, *Report of the Plenary Commission,* adopted on 31 March 1963, p. 45. The case concerned certain criminal proceedings (alleged by Austria to be incompatible with the Convention) leading to the conviction of six young men for the murder of an Italian customs officer in the German-speaking part of South Tyrol.

measures" incompatible with the Convention, "regardless of any individual or specific injury".[10] The three Scandinavian governments in particular submitted that, on the basis of the Commission's finding in the *First Cyprus* case (*supra*), Article 26 did not apply to the present case.[11] In its admissibility decision of 24 January 1968, the Commission began by rejecting the respondent government's objection to its competence as "unfounded",[12] and added that "in determining the question of admissibility, the provisions of Article 26 and Article 27(3) of the Convention concerning the exhaustion of domestic remedies according to the generally recognized rules of international law do not apply to the present applications, the object of which is to determine the compatibility with the Convention of legislative measures and administrative practices in Greece".[13] Accordingly, the Commission declared the applications admissible.[14]

Thus, the Commission again stated that legislative measures and administrative practices did *not* fall within the scope of application of the local remedies rule in international law. The applicant governments insisted that Article 26 of the Convention did not apply to further allegations they raised in the course of the proceedings, also relating to administrative practices of the respondent government;[15] alternatively, should the Commission deem the local remedies rule applicable on the ground that an administrative practice had not been established, they submitted, local remedies alleged to be available were in fact "inadequate and ineffective".[16] The Greek government, maintaining that the new allegations should be rejected for non-exhaustion of domestic remedies, argued further that "an essential element of an 'administrative practice' is that the practice concerned should be based on specific legislation, executive authority express or implied, or finally on established custom", and that in Greece no

[10] Applications Nos. 3321/67, 3322/67, 3323/67, 3344/67, *First Greek* case (*Denmark, Norway, Sweden and Netherlands* v. *Greece*), *Yearbook,* vol. 11, p. 714, see pp. 710/714.

[11] *Ibid.,* p. 714, also for reference to similar Dutch submissions. As the respondent government contested the Commission's competence in the case (*ibid.,* p. 714, and see pp. 714/718), the applicant governments replied that the Greek government was bound by the whole Convention (to which Greece had been a party since 1953), and that under Articles 19 and 24 of the Convention the Commission was competent to examine the applications and in particular "the question whether legislative measures and administrative practices of the new Greek government were compatible with the Convention" (*ibid.,* p. 720).

[12] *Ibid.,* p. 724.

[13] *Ibid.,* p. 724. The Commission further stated that it was bound "to reserve for an examination of the merits of this case the question whether the legislative measures and administrative practices in Greece, which form the subject of the present applications, were or are justified under Article 15 [of the Convention]" (right of derogation in time of public emergencies); *ibid.,* p. 728.

[14] *Ibid.,* p. 728.

[15] *First Greek* case, *ibid., Yearbook,* vol. 11, p. 748. The respondent government had submitted that the new allegations raised by the applicants were inadmissible as regards their form of presentation and that they should have been filed as new applications (*cf. ibid.,* p. 764). But the Commission took the view that they had been "properly" introduced as "an extension of the original applications" of the three Scandinavian governments (*cf. ibid.,* p. 766).

[16] *Ibid.,* p. 748. They recalled in this connection that, e.g., "the constitutional and conventional guarantees of a fair and public trial had been suspended" (*cf. ibid.,* p. 748).

such ground existed on which existence of the alleged administrative practice could be based.[17]

The Commission considered (decision of 31 May 1968) the meaning of the term "administrative practice" (first with regard to allegations under Article 3 of the Convention). Assuming that an "administrative practice" might exist in the absence of, or contrary to, specific legislation, the Commission stated, the applicants had not adduced at that stage of the proceedings substantial evidence that such a practice existed in Greece (with particular reference to ill-treatment within the meaning of Article 3 of the Convention); therefore, it added, the application of the local remedies rule (Article 26) to the present allegations could not be excluded on the above ground.[18] But after examining the domestic remedies to be exhausted in the case, the Commission did not find that they could be considered as effective and sufficient, concluding therefore that the present allegations could *not* be rejected for non-exhaustion of local remedies.[19]

As to the other set of allegations (under Article 7 of the Convention and Article 1 of the First Protocol), the Commission categorically stated that the local remedies rule did *not* apply to them, "the object of which is to determine the compatibility with the Convention and the Protocol of legislative measures of the respondent government".[20] The Commission, therefore, without prejudice to the merits, finally declared admissible the new allegations of the applicants[21] in the *First Greek* case.

In its report on the case, adopted on 5 November 1969, the Commission observed that "the Convention does not in terms speak of administrative practices incompatible with it but the notion is closely linked with the principle of exhaustion of domestic remedies".[22] The local remedies rule (Article 26) was based on the assumption[23] that for a breach of the Convention there was a domestic remedy available and effective. However, where an administrative practice of ill-treatment existed, the Commission considered, "the remedies prescribed will of necessity be side-stepped or rendered inadequate. Thus, if there was an administrative practice of torture or ill-treatment, judicial remedies prescribed would tend to be rendered ineffective by the difficulty of securing probative evidence, and administrative enquiries would either be not instituted, or, if they were, would be likely to be half-hearted and incomplete".[24]

17 *Ibid.,* p. 770. It further contended that ill-treatment was prohibited by laws the enforcement of which was strictly supervised by "competent administrative and independent judicial authorities", and that therefore the alleged ill-treatment could not be held to constitute an "administrative practice" as alleged by the applicant governments (*ibid.,* p. 770).

18 *Ibid.,* p. 770.

19 *Ibid.,* p. 774.

20 *Ibid.,* p. 778. The same was true of other allegations under Article 3 of the First Protocol, not subject to the local remedies rule for the same reason (*cf. ibid.,* pp. 778/780).

21 *Cf. ibid.,* p. 780.

22 *First Greek* case, *Report of the European Commission of Human Rights* (5 November 1969), *in Yearbook,* vol. 12, p. 194.

23 Borne out by Article 13 of the Convention (right to an effective domestic remedy).

24 *Report, op. cit., in Yearbook,* vol. 12, p. 194. The Commission then defined an "administrative practice" of ill-treatment as necessarily consisting of two elements, namely, *repetition of acts* and *official tolerance* (see *ibid.,* pp. 195/196).

On 10 April 1970, the governments of Denmark, Norway and Sweden filed with the Commission a further application against Greece on account of a trial in alleged violation of Articles 3 and 6 of the Convention,[25] — the *Second Greek* case. The Commission invited the respondent government to submit within a four-week time-limit its observations in reply to the applicants' submission that the local remedies rule did not apply to the present allegations[26] (partial decision of 26 May 1970), and examination of the case was adjourned.[27] The respondent government failed to make any submissions,[28] whereas, on the other hand, the applicants insisted that the local remedies rule did not apply to the present application, "the object of which is to have determined the compatibility with the Convention of certain administrative practices and legislative measures".[29] The Commission's final decision on the admissibility of the application (16 July 1970) was rendered in particularly emphatic terms: "It is true that, according to the Commission's constant jurisprudence, the condition of exhaustion of domestic remedies does not apply where an application raises, as a general issue, the compatibility with the Convention of 'legislative measures and administrative practices' ".[30]

In the present case, the Commission dealt first with allegations of administrative practices and then with contentions of legislative measures. As to the former (under Article 3 of the Convention), as they concerned an administrative practice of the respondent government (which in the *First Greek* case the Commission had found to exist), if further substantiated they would not be subject to the local remedies rule, in accordance with the Commission's jurisprudence; therefore, they could not .be rejected for non-exhaustion of local remedies.[31] As to the latter submissions (under Article 6 of the Convention), relating to a trial before an extraordinary court martial and to the special legislation creating such courts, the Commission added that as the applicants' object was "to have determined the compatibility of this legislation with the Convention",[32] the condition of exhaustion of domestic remedies "again does not apply".[33] These allegations concerning the special legislative measures in force in the field of the administration of justice could not therefore be rejected for non-exhaustion of domestic remedies, and the application was accordingly declared admissible by the Commission.[34]

Possibly one of the most remarkable features of the Commission's final admissibility decision in the *Second Greek* case was its express

25 Application No. 4448/70, *Second Greek* case, *Yearbook,* vol. 13, p. 108. While the respondent government submitted that the local remedies rule should be applied in the case, the three Scandinavian governments alleged that there were "no domestic remedies available" to the individuals concerned (*ibid.,* p. 116).

26 *Ibid.,* p. 122.

27 *Ibid.,* p. 122.

28 *Ibid.,* p. 130.

29 *Ibid.,* p. 128, and see pp. 128/130 for the facts. The applicants, moreover, denied that there were domestic remedies available (*cf. ibid.,* p. 130).

30 *Ibid.,* p. 132.

31 *Ibid.,* p. 134.

32 *Ibid.,* p. 134.

33 *Ibid.,* p. 134.

34 *Ibid.,* pp. 134/136.

and reiterated reliance upon its own *jurisprudence constante* to the effect of placing the question of the compatibility with the Convention of "legislative measures and administrative practices" outside the scope of application of the rule of exhaustion of local remedies in international law.

The matter was further discussed in the *Ireland* v. *United Kingdom* case. In its written and oral submissions, the applicant government maintained that the local remedies rule in Article 26 did not apply to *any* part of the application, "whose object and purpose was to seek a determination of the compatibility of certain legislative measures and administrative practices with the respondent government's obligations under the Convention"; it further pointed out that the application was "neither in form nor in reality concerned with compensation for, or reparation of, wrongs committed in respect of individual persons", and that "there was no domestic remedy available in respect of such a claim by a High Contracting Party and no question of exhausting any domestic remedies could arise".[35] The present application was a "breach of treaty claim", as such not subject to the local remedies rule, as it was "only concerned with ensuring the observance by the respondent government of the obligations undertaken by them in the Convention", thus seeking to obtain a determination of the compatibility with those obligations of certain "legislative measures and administrative practices".[36] The respondent government replied that the applicant's allegation of an administrative practice was "unsupported by any assertion of law or fact from which such practice was to be deduced"; as the burden of proof in this connection was incumbent on the applicant government, "in the absence of such supporting material the issue of exhaustion of domestic remedies was not to be excluded" at the present admissibility stage.[37]

The Commission's admissibility decision of 1st October 1972 in the *Irish* case concerned itself with four major items. The Commission first examined allegations under Article 2 of the Convention (failure, as a matter of administrative practice, to protect right to life by law): while it was true that the local remedies rule did not apply where an application raised as a general issue the compatibility with the Convention of "legislative measures and administrative practices", the Commission held, it was not sufficient on the other hand that the existence of such measures and practices should be "merely alleged". In order to exclude the application of the local remedies rule, it was also necessary that their existence was "shown by means of substantial

[35] Application No. 5310/71, *Ireland* v. *United Kingdom* case, *Collection of Decisions of the European Commission of Human Rights* (hereinafter referred to as "Collection"), vol. 41, p. 25.

[36] *Ibid.,* p. 26. The applicant government further argued that generally recognized rules of international law made a distinction between a breach of treaty claim and claims of diplomatic protection, the local remedies rule applying only to the latter category of cases; the same distinction should be made with regard to inter-State claims brought under Article 24 of the Convention (*cf. ibid.,* pp. 26/27).

[37] *Ibid.,* p. 24. On the problem of the burden of proof regarding the exhaustion of local remedies in such cases of legislative measures and administrative practices, *cf.* A.A. Cancado Trindade, "The Burden of Proof with Regard to Exhaustion of Local Remedies in International Law", *Revue des droits de I'homme/Human Rights Journal* [1976] vol. IX, pp. 81/121, esp. pp. 99/100.

evidence".[38] As this was lacking in the present case, those allegations (under Article 2) could not be dealt with until local remedies had been exhausted. And with regard to the argument that the local remedies rule did not apply where breaches of treaty were alleged (*supra*), the Commission replied that it was required by Article 27(3) of the Convention to apply the rule (as set out in Article 26) to *any* application, whether brought under Article 24 or Article 25 of the Convention. Accordingly, the Commission found that it must declare under Article 27(3) that part of the application inadmissible.[39]

Secondly, the Commission considered the applicant's allegations under Article 3 of the Convention (certain interrogation techniques and other forms of ill-treatment of persons in custody, constituting an "administrative practice"). The Commission had "no doubt" that the employment of certain interrogation techniques amounted to an "administrative practice"; therefore, in accordance with its own jurisprudence, those allegations (under Article 3) could not be declared inadmissible for non-exhaustion of local remedies, and were thus retained for further examination on the merits.[40]

Thirdly, allegations in connection with Articles 5, 6 and 15 of the Convention (relating to internment without trial and detention under special regulations) were examined: the issue of exhaustion of local remedies was not raised in this regard, and the Commission found the matters complained of admissible.[41] Fourthly, the Commission considered the applicant's allegations that detention and internment under special regulations had been and were carried out "with discrimination on grounds of political opinion in violation of Article 14 of the Convention".[42] As the complaints were very closely related to the previous items, the Commission found that they should likewise be retained for further examination of the merits.[43]

Thus, except for the applicant's initial allegations under Article 2 of the Convention *(supra)* which were declared inadmissible, all its other allegations were declared admissible by the Commission and retained for further examination without prejudging the merits of the case,[44] in conformity with the Commission's case-law on the matter.

[38] *Ibid.,* p. 85. While the respondent party submitted that this part of the application should be rejected for non-exhaustion of local remedies, the applicant maintained that Article 26 did not apply where an administrative practice in violation of the Convention was complained of (*cf. ibid.,* p. 84).

[39] *Ibid.,* p. 85.

[40] *Ibid.,* pp. 85/87.

[41] *Cf. ibid.,* pp. 87/88.

[42] *Ibid.,* p. 88. The respondent government *inter alia* denied the charge and raised the objection of non-exhaustion of local remedies, whereas the applicant government submitted that this latter did not apply to any part of the application, whose object was "to seek a determination of the compatibility with the Convention of certain legislative measures and administrative practices" (*ibid., p.* 89). As a subsidiary argument, the Irish government submitted that even if the local remedies rule was held applicable, there were no adequate and effective remedies for the purposes of Article 26 of the Convention (*ibid., p.* 89).

[43] *Ibid.,* p. 89. The Commission also reserved to an examination of the merits the question whether there had been a breach of Article 1 of the Convention with regard to those parts of the application found to be admissible (*cf. ibid., p.* 90).

[44] *Cf. ibid.,* pp. 91/92.

As for the exception indicated above (complaints relating to Article 2 of the Convention), those allegations in particular were declared inadmissible for the sole reason that the applicant had not sufficiently demonstrated the existence of the "legislative measures and administrative practices" complained of. But once this proves to be the case, it is the Commission's *jurisprudence constante* that the rule of exhaustion of local remedies does not apply.

3. *Applications by individuals*[45]

The problem of the application of the local remedies rule in cases of alleged wrongful "legislative measures and administrative practices" has been raised before the European Commission also in applications lodged by individuals. Thus, in an application concerning Ireland lodged with the Commission as early as 20 March 1957, in which the applicant complained against domestic legislation allegedly incompatible with the provisions of the Convention, the Commission remarked that it could only properly receive an application from an individual who claimed to be the *victim* of a violation by one of the High Contracting Parties of the rights set forth in the Convention.[46] It followed that it could examine the compatibility of domestic legislation with the Convention *only* with respect to its application to an individual and *only* insofar as its application was alleged to constitute a violation of the Convention *in regard to the individual applicant.*[47] The Commission was thus not competent to examine *in abstracto* the question raised in an individual application under Article 25 of the conformity of domestic legislation with the provisions of the Convention.[48] Furthermore, in the present case, even if the applicant had alleged to have been a victim of violations of the Convention, as he did not avail himself of his right to appeal to a higher court against his convictions, his application had to be rejected for non-exhaustion of local remedies; the application was therefore declared inadmissible on that ground.[49] It should not pass unnoticed, however, that the legislation complained of in the case consisted of a law and its amendment,[50] and that in

45 The term "individuals" is used in the present sub-section as within the scope and meaning of Article 25 of the Convention, i.e., as comprising "any person, non-governmental organization or group of individuals" claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention.

46 Application No. 290/57, *X* v. *Ireland* case, *Yearbook,* vol. 3, p. 218.

47 *Ibid.,* p. 220.

48 *Ibid.,* p. 220.

49 *Ibid.,* p. 222.

50 The "Offences Against the State Act 1939" and the "Offences Against the State [Amendment] Act 1940". — The Commission's decision in the *X* v. *Ireland* case was delivered on 29 March 1960. Shortly afterwards the same problem arose in the *X* v. *Norway* case (Application No. 867/60), in which the applicant's claim was made on behalf of parents who without their own consent or knowledge "have or will have their offspring taken away by *abortus provocatus,* and on behalf of those "taken away by such operations". The applicant requested the Commission to investigate the compatibility of the Norwegian Act of 12 October 1960 with the provisions of the Convention. The Commission, however, noticed that the applicant had not pretended to have been himself in any way a victim of the Norwegian Act of 12 October 1960. As the Commission had already made clear that it was competent to examine the compatibility of domestic legislation with the Convention only with respect to its application to an individual and only insofar as that application is alleged to constitute a violation of the Convention in regard to the individual concerned, the Com-

no moment did the applicant seem to complain of a *pattern* of legislation, still less of administrative practices. But the case remains useful for the light it sheds on the notion of "victim", a notion which subsequently, as it will be seen, was to assume vital importance in cases brought by individuals complaining against "legislative measures and administrative practices" as such.

One complaint of this sort, questioning the compatibility with the Convention of certain legislative measures, was properly raised in the *Kjeldsen* v. *Denmark* case. The two applicants complained that, by making sex education compulsory in Danish public schools, the Danish government failed to respect the parents' right to ensure that the education of their children should be in conformity with their religious and philosophical convictions (Article 2 of the First Protocol to the Convention). Referring also to the manner in which that education was carried out by the various authorities concerned, they pointed out that the introduction of compulsory sex education in the only school available in the locality where they lived might oblige them to keep their daughter away from school and thereby amount to "a denial of her right to education".[5] The Danish government, in his turn, first remarked that by the country's Constitution (Article 76) Danish parents were *not* obliged to send their children to public schools, but only to ensure that they received an elementary education; sex education had been compulsory in the whole country since 1970, the educational policies lying ultimately in the hands of the Minister of Education, even though the administration of public schools was decentralized.[52] The respondent government added that the applicants had made "no attempt to take their complaint before the Danish courts".[53]

Elaborating on the question of exhaustion of domestic remedies, the Danish government, after dwelling upon the proper relationship between international law and municipal law in the circumstances of the case,[54] indicated that Article 63 of the Danish Constitution autho-

mission in the present case did not find itself competent to examine *in abstracto* the question of the conformity of this Act with the provisions of the Convention. The Commission therefore declared the application inadmissible, the issue of the exhaustion of local remedies not having been raised. *Cf.* Application No. 867/60, *X* v. *Norway* case, *Collection,* vol. 6, pp. 37/38

[51] Again under Article 2 of the First Protocol to the Convention. *Cf.* Application No. 5095/71, *Kjeldsen* v. *Denmark* case, *Collection,* vol. 43, p. 46.

[52] *Ibid.,* p. 46.

[53] *Ibid.,* p. 50.

[54] Following the two *rules of interpretation and presumption,* the Danish government contended, "it would be open to the applicants to plead before the Danish courts that the provisions for compulsory integrated sex education were at variance with Article 2 of Protocol No. 1". The government explained: although the Convention had never been incorporated directly into Danish law by legislation, this was so because special enactment was not considered necessary; in fact, rules similar to the Convention provisions were in force in Denmark before 1953 when the Convention was ratified. However, when a treaty had been ratified and no special implementing legislation had been passed, "it was the duty of the administrative authorities and of the law courts to interpret internal law in such a way as to ensure its compliance with such treaty": such was the meaning of the so-called "rule of interpretation", which ensured that "a legal provision whose meaning was obscure should be interpreted so as to conform with treaty obligations". The second principle, referred to by Danish legal writers, was the so-called "rule of presumption", to the effect that "a

rized domestic courts "to decide any question bearing upon the scope of the authority of the administration".[55] In the Danish government's submission, moreover, "the applicants were at liberty to bring an action against the Minister of Education claiming that the Minister be ordered to recognize the applicants' right to have their daughter exempted from obligatory sex education"; the application should thus be rejected on the ground of non-exhaustion of available domestic remedies.[56]

The applicants, on their part, stated that they had in fact written a letter to the Danish Parliament (in May 1971), which had not been answered, and thus the government was "not justifiable" in declaring that the applicants had failed to exhaust domestic remedies "which the government had failed to point out to them when it had had the opportunity".[57] Alternatively, the applicants submitted, Article 63 of the Danish Constitution entitled domestic courts to decide any question bearing upon the scope of the authority of the administration, but the present case was not about the authority of the administration, but rather about an Act of Parliament "which had itself laid down the basic rule, i.e. compulsory sex education and authorized the Minister of Education to issue regulations to implement this rule".[58] Besides, a decision of the Danish Supreme Court of 26 September 1972 showed that "Article 63 of the Constitution could not be invoked against an Act of Parliament".[59] The applicants, thus, although conceding that they had brought no proceedings before the Danish courts regarding the matters complained of, submitted however that a legal action of the kind suggested by the respondent government "would not be an effective remedy for the purposes of Article 26 of the Convention".[60]

In its decision of 16 December 1972 on the *Kjeldsen* v. *Denmark* case, the Commission considered two questions in connection with the issue of the exhaustion of local remedies. First, with regard to the possibility of challenging administrative regulations, the Commission began by recalling that in order to comply with Article 26 of the Convention an applicant was obliged to exhaust "every domestic remedy which cannot clearly be said to lack any prospect of success".[61]

legal provision enacted after a treaty had come into force should be interpreted to comply with the treaty even if its *prima facie* meaning seemed to be at variance with the treaty". *Ibid.,* p. 50. Under Danish law, however, an express statutory provision which was clearly contrary to a treaty provision would prevail over the treaty "if the legislator had intended to enact the statute so as to vary the international obligation" (*ibid.,* p. 50).

55 *Ibid.,* p. 50.

56 *Ibid.,* p. 51. The respondent government further submitted that the applicants could plead that administrative rules precluding exemption were not binding on them and should be read in the light of Denmark's international obligations, in particular Article 2 of the First Protocol, — *if* they had sought for local redress. *Cf. ibid.,* p. 51. (As for the administrative rules, references were made to an amended Danish Act of 27 May 1970 on the matter). The legal action suggested by the Danish government could be based — in its submission— on Article 63 of the Danish Constitution (*ibid.,* p. 51).

57 *Ibid.,* pp. 51/52.

58 *Ibid.,* p. 52.

59 *Ibid.,* p. 52.

60 *Ibid.,* p. 54.

61 *Ibid.,* p. 54.

Although in the present case the respondent government had not been able to show that the Danish courts, in proceedings brought under Article 63 of the Constitution, had ever ruled on "the question whether the Convention could be invoked in judging the legality of administrative regulations", on the other hand the government explained that "it is a widely accepted view in Danish legal theory that a valid treaty, such as the Convention, imposes on the domestic authorities an obligation to apply and interpret national law in a manner to ensure that, wherever possible, Denmark's treaty obligations are fulfilled".[62] The Commission found that, in regard to administrative measures concerning the manner in which the sex education should be carried out, it could not be stated that the remedy indicated by the respondent government would clearly have been without any prospect of success.[63] It followed that, in this respect, this part of the application should be rejected for non-exhaustion of local remedies.[64]

Secondly, the Commission considered the question whether there was any remedy against the Danish Act of 27 May 1970 which laid down the principle of compulsory sex education and authorized the Minister of Education to issue regulations on the manner the instruction should be given. As the respondent government did not contest the applicants' assertion that no proceedings could be taken (under Article 63 of the Constitution) against an Act of Parliament, and as it did not suggest that any other specific remedy might be available, the Commission thereby concluded that "there was no effective domestic remedy available to the applicants with regard to the principle of compulsory sex education as embodied in the Act", and, therefore, in this respect, the application could not be rejected for non-exhaustion of local remedies.[65]

The Commission, thus, declared the application admissible insofar as it complained of the 1970 Act on compulsory sex education in the public schools as violating Article 2 of the First Protocol, and declared the application inadmissible insofar as it related to the directives issued and other administrative measures taken by the Danish authorities regarding the manner in which such sex education should be carried out.[66]

This decision served as basis for the Commission's subsequent partial decision (of 29 May 1973) in the *Pedersen* v. *Denmark* case, which involved similar complaints and allegations.[67] The examination of the part of the application not declared inadmissible was adjourned until 19 July 1973, date of the final decision on the case; the Commission confirmed that the reasons it had given for declaring the *Kjeldsen* v. *Denmark* case partly admissible applied "with equal

62 *Ibid.,* pp. 54/55.
63 *Ibid.,* p. 55.
64 *Ibid.,* p. 55.
65 *Ibid.,* p. 55.
66 *Ibid.,* p. 56.
67 Directed against compulsory sex education in public schools introduced by an Act of Parliament, regarding the parents' right to have their children educated in conformity with their religious and philosophical convictions (Article 2 of the First Protocol to the Convention). *Cf.* Application No. 5926/72. *Pedersen* v. *Denmark* case, *Collection,* vol. 44, pp. 93/95. And *cf.* also application No. 5920/72, *Busk Madsen* v. *Denmark* case, *Collection,* vol. 44, p. 93 No. 1.

force" to the corresponding part of the *Pedersen* v. *Denmark* case.[68] As in the view of the Commission determination of the issues raised depended on an examination of the merits of the case, the *Pedersen* application was declared admissible insofar as the applicants complained that the Act of Parliament (of 27 May 1970) providing for compulsory sex education in Danish public schools constituted a violation of Article 2 of the First Protocol to the Convention.[69]

One of the most illustrative cases for the problem under study has been that of *Donnelly and Others* v. *United Kingdom,* concerning ill-treatment — while in custody — by the security forces in Northern Ireland (in April and May 1972) contrary to Article 3 of the Convention.[70] The seven applicants jointly submitted that the maltreatment practices and procedures to which they had been subjected in breach of Article 3 constituted "part of a systematic administrative pattern" which permitted and encouraged violence, incompatible with the Convention. Denying the application of the local remedies rule in the case, they requested the Commission to start a full investigation of the case as soon as possible in order to determine whether or not those administrative practices were incompatible with the Convention.[71]

The respondent government promptly observed that as the seven applicants were complaining "on behalf of themselves and all other persons similarly situated", for the purpose of seeking an investigation into the compatibility of alleged administrative practices, or the conformity of domestic laws, with the Convention, their application, being an *individual* application (under Article 25), "was as a whole incompatible with the Convention within the meaning of Article 27(2)".[72] In support of this submission, the British government referred to the Commission's case-law according to which "the Commission was not competent to examine *in abstracto* the question whether domestic legislation was incompatible with the Convention, but could only examine the compatibility of such legislation as it affected the applicant".[73] The government argued that this case-law was "equally applicable to an application which sought to obtain a determination of the compatibility of certain alleged practices".[74] An individual, in the government's submission, "could not raise before the Commission the question of the compatibility with the Convention of legislation or an administrative practice in general. Such a general claim could only be considered in an application under Article 24 of the Convention" (inter-State application). In an individual application under Article 25, "the Commission was only competent to examine the compatibility of legislation insofar as it had actually impinged on the applicant. If no application of a statute was involved, an individual could only complain of a particular action which affected him and the Com-

[68] Application No. 5926/72, *Pederson* v. *Denmark* case, *Collection,* vol. 4, p. 100.
[69] *Ibid.,* p. 100.
[70] Applications Nos. 5577/72 to 5583/72 (joined), *Gerard Donnelly and Others* v. *United Kingdom* case, *Collection,* vol. 43, p. 122.
[71] *Ibid.,* pp. 124/125.
[72] *Ibid.,* p. 128.
[73] *Ibid.,* pp. 128/129.
[74] *Ibid., p.* 129.

mission had no power to consider whether there were other actions which might form an administrative practice".[75]

In their written observations, the applicants asserted that each of them had been a victim of Article 3 of the Convention, and references to "persons similarly situated" concerned a request for a "temporary injunction pending a full hearing of the allegations".[76] They denied that they were requesting the Commission to examine *in abstracto* an administrative practice allegedly incompatible with the Convention; their claim was based on "personal experiences" and they had requested a decision that they had been subjected to treatment contrary to Article 3. In addition, they sought to have the Commission protect them from "further abuse of their rights" by requiring that such practices in breach of the Convention be stopped. In order to ensure this protection, they proceeded, "the Commission should require the respondent government to satisfy it that domestic law no longer facilitated or permitted such practices".[77]

Considering themselves "fully entitled" to request relief from the Commission, they pointed out that, for the purpose of the present proceedings, they had no connection with the government which had initiated the inter-State application (see the *Irish* case, *supra).* At the hearing, the applicants' representatives denied that they were raising, as submitted by the respondent government, two separate and distinct issues before the Commission, namely, the question of violation of their individual rights, and an *in abstracto* or general claim. Although they agreed that an individual was not competent to raise *in abstracto* a general issue before the Commission, they sought, however, to put in issue the existence of an administrative practice of ill-treatment "only in relation to their claim that the direct application to each of them of this practice had violated their rights under Article 3".[78]

In this connection they referred to the Commission's decision in the *Kjeldsen* case *(supra),* where the complaint concerning legislation on compulsory sex education had been declared admissible (in part) although "the legislation had not yet been applied to the particular applicants of their daughter"; in their view that was, in a technical sense, "a complaint about a future violation", and they argued that in this respect "no distinction should be made between legislation and administrative practices".[79]

The applicants further argued that "the competence of a State Party to the Convention to raise an issue of the compatibility of

[75] *Ibid.,* p. 129. The respondent government also denied the charges that the applicants had been treated in any manner amounting to a violation of Article 3 of the Convention, and further denied that there had been in Northern Ireland, at any time relevant to the applications, any administrative practice of ill-treatment or other conduct which might contravene Article 3 of the Convention or any official tolerance of such practice or conduct. *Cf. ibid.,* p. 125.

[76] *Ibid.,* p. 130.

[77] *Ibid.,* p. 130. They envisaged particularly powers under the Civil Authorities [Special Powers] Act (Northern Ireland) 1922 "which allowed for arrest and detention for interrogation in depth for indefinite periods" (*ibid.,* pp. VCJ/131).

[78] *Ibid.,* p. 131.

[79] *Ibid.,* pp. 131/132.

legislative measures and administrative practices could not detract from the power of an individual applicant under Article 25 to raise the issue of an administrative practice which directly affected him as a victim. The distinction under the Convention between the powers of a State and an individual would still be maintained because an individual application was subject to the requirements under Article 25 and Article 27".[80]

In their written and oral observations, the British government then submitted that the application was inadmissible because each of the applicants had failed to exhaust the remedies available under domestic law.[81] Furthermore, in their view, the Commission's findings in previous cases *(supra)* that the local remedies rule did not apply in cases of "legislative measures and administrative practices" incompatible with the Convention were—they argued—*inapplicable* to an application lodged by an individual under Article 25 of the Convention.[82] The government accepted that an alleged administrative practice could be considered by the Commission in relation to the effectiveness of domestic remedies, but such a practice "could only be relevant to the extent it was established that the particular practice impeded the effectiveness of the particular remedy open to the applicant".[83] In the government's view none of the applicants had shown to have been impeded in the access to available local remedies, and therefore the applicants' contention that Article 26 of the Convention did not apply to the case was "misconceived and ill-founded".[84]

The argument was promptly rejected by the applicants: denying that the case was inadmissible for non-exhaustion of local remedies, they maintained that the exception to the local remedies rule relating to administrative practices (in the context of Article 3), previously elaborated by the Commission (*supra*), was *not* limited to inter-State applications under Article 24. In an application by an individual, the Commission might examine the existence of "administrative practices" as *part* of the determination of whether the applicants' rights had been denied, and the Commission might in its discretion choose to postpone a decision on this point until the merits.[85]

Provided they were victims of violations of Article 3 and claimed that the violation resulted directly from the administrative practice complained of, the applicants submitted, "there was no barrier to

[80] *Ibid.,* p. 132.
[81] *Ibid.,* p. 132. The government alleged that there were available remedies (proceedings for damages for assault) which were effective and sufficient in respect of the allegations under Article 3; the argument that any remedy for damages would not have any preventive effect and could not protect individuals from future ill-treatment was "not relevant in an application under Article 25 as an applicant was required to exhaust the remedies available to him in respect of the precise violation alleged" (in *ibid.,* pp. 132/133). Both the respondent government and the applicants stated that local remedies were being pursued (in each of the applicants' respective individual cases); *cf. ibid.,* pp. 132 and 131, respectively.
[82] *Ibid.,* p. 133.
[83] *Ibid.,* p. 133.
[84] *Ibid.,* p. 133. The government further submitted that the applicants had not discharged the burden of proving the existence of an administrative practice *(cf. ibid.,* p. 133).
[85] *Ibid.,* pp. 137/138.

prevent them putting in issue the existence of an administrative pattern as part of their application".[86] Given the existence of such a pattern of ill-treatment, they argued, Article 26 of the Convention was inapplicable and there could be no barrier to their application.[87] The respondent government replied that the exception to Article 26 invoked by the applicants could not be applied to an application by individuals under Article 25, which could raise no general issue of compatibility; and even in an inter-State application under Article 24 where such a general issue could be raised, the local remedies rule applied where the State *also* complained of a violation of the rights of individuals. It followed *a fortiori* that in an application under Article 25 where the individual applicant was only entitled to complain of a violation of his individual rights, his complaint "could only be admitted if he had exhausted domestic remedies".[88]

As in a previous case (*supra*), the related question of the proper relationship between international law and municipal law (in relation to the issue of exhaustion of local remedies) was also raised and debated. The assertion by Donnelly and Others that "a person's international human rights were not justicable under internal British law"[89] was admitted by the government as true, but with the additional observation that "although the acts of which the applicants complained might well infringe international human rights, they would also constitute an infringement of rights under domestic law for which there was a domestic remedy. It could not affect the effectiveness of the

86 *Ibid.,* p. 138.

87 *Ibid.,* p. 138. They relied upon previous decisions *(supra)* stating that whether the applicant was an individual or a State Party to the Convention, "the situation complained of remained the same" (*in ibid.,* p. 138). — After describing the "administrative pattern" of maltreatment in Northern Ireland, the applicants added that "no adequate or effective domestic relief existed", and stressed that they were themselves victims of that "administrative pattern" against which they were complaining. *Cf. ibid.,* pp. 138/140.

88 *Ibid.,* p. 134. After repeating that adequate and effective remedies were available and had not been exhausted by any of the applicants, the government was faced with the argument by *Donnelly and Others* that "an award for compensation was not a remedy", as they were "not seeking compensation but protection for themselves and others" from violence which they were afraid of suffering in the future. The government's answer to this argument was that "Article 25 only entitled an applicant to complain of violations of which he was a victim and gave him no right to be protected from something which had not yet happened". Furthermore, although it was true that the question of the existence of legislation or an administrative practice incompatible with the Convention could not be raised before a domestic court in the United Kingdom, this did not mean however that no effective remedy was available for a violation of rights of which the applicants were entitled to complain to the Commission, since under Article 25 "individuals could not complain of the compatibility of an administrative practice in general". Their right under Article 3 was a right not to be subjected to maltreatment, and the government reiterated that, if there was a violation of this right, a domestic was available. The government further denied that there was any evidence of an administrative practice in Northern Ireland which would "prevent the effective pursuit of domestic remedies"; moreover, in the government's submission "the applicants had produced no substantial evidence to show that they were being deterred from pursuing the remedies available to them", and in fact "such remedies were being pursued by individuals against agents of the respondent government". *Cf. ibid.,* pp. 135/136, and see also p. 132. The government also opposed the applicants' suggestion for joining to the merits the question of exhaustion of local remedies (see *ibid.,* p. 137).

89 *Cit. in ibid.,* p. 135.

remedy if the domestic law placed the act in the category of acts infringing domestic law rather than acts infringing international law".[90]

The applicants retorted that they were not bound to exhaust local remedies before seeking relief before the Commission: they would be bound to do so in "normal circumstances" (e.g., an "isolated incident" of ill-treatment), but not in the present case where a systematic practice of ill-treatment in detention and interrogation was being complained of.[91] The exception to the local remedies rule in respect of "legislative measures and administrative practices" applied to complaints under Article 25 (by individuals) as well as those under Article 24 (by States) of the Convention. In the applicants' view "there was no support in the Commission's case-law for the contention that this exception should be confined to applications under Article 24, although it was true that the Commission had not previously held that it applied also to an Article 25 application".[92] The application of the exception to Article 26 to both types of cases (inter-State and individual) would in no way affect the intent and purposes of the limitations and conditions (set in the Convention)[93] with regard to the right of individual petition. To hold that the exception did not apply would run "counter to the purpose of the Convention which was *to provide full protection not to States but to individuals"*[94] and would also be "contrary to normal rules of interpretation of treaties generally".[95] It would thus be "unreasonable" if an "administrative pattern" could not be questioned by an individual applicant.[96] Claiming that in the circumstances of the case "domestic remedies were not adequate and effective", the applicants stated that the existence of the administrative practice of which they had offered "substantial evidence" was the primary factor in rendering any "theoretically available" domestic remedy ineffective.[97]

Such were the main contentions of the two parties before the Commission. In its admissibility decision of 5 April 1973 on the *Donnelly* case, the Commission began by observing that the Convention provisions did *not* prevent an individual applicant from raising before itself a complaint in respect of an alleged "administrative practice" in breach of the Convention, provided that he brought *"prima*

90 *Ibid.,* p. 135.
91 *Ibid.,* pp. 140/141.
92 *Ibid.,* p. 141.
93 *I.e.,* the requirements of Article 25 and the Commission's powers under Article 27 to reject applications.
94 Emphasis added.
95 *Donnelly* case, *Collection,* vol. 43, p. 142.
96 *Ibid.,* p. 142. The applicants submitted that they had already produced sufficient evidence in support of their claim and that the burden of proof did not anyway rest upon them at the admissibility stage (*ibid.,* p. 142).
97 *Ibid.,* pp. 142/143. — The applicants pointed out that the only remedies indicated by the respondent government were directed either to *commensation* or to the *prosecution* of those responsible for causing the injuries. Criminal prosecution, they submitted, "could not provide an adequate remedy because the applicants had no control over the initiation of such proceedings and any private prosecution might be quashed by the public prosecutor" (*in ibid.,* p. 143). For further complaints in this connection, *cf. ibid.,* pp. 143/144. As to compensation, they conceded that the civil actions referred to by the government would constitute adequate remedies for "isolated cases" of ill-treatment, but in the present case, "merely awarding damages to a few individuals would have no ameliorative effect on the practice [of ill-treatment] itself" (*ibid.,* p. 143).

facie evidence of such a practice and of his being a victim of it".[93] Recalling its previous opinions whereby the local redress rule did not apply in cases raising as a general issue the compatibility with the Convention (Article 3) of an administrative practice, the Commission added in particular that where there was "a practice of non-observance of certain Convention provisions, the remedies prescribed will of necessity be side-stepped or rendered inadequate"; thus, if there was an administrative practice of maltreatment, "judicial remedies prescribed would tend to be rendered ineffective by the difficulty of securing probative evidence, and administrative enquiries would either not be instituted or, if they were, would be likely to be half-hearted and incomplete".[99] By similar reasoning, the Commission considered, "where an applicant under Article 25 submits evidence, *prima facie* substantiating both the existence of an administrative practice [... contrary to Article 3], and his claim to be a victim of acts part of that practice, the domestic remedies' rule in Article 26 does not apply to that part of his application".[1]

The Commission examined the allegations made in the present *Donnelly* case in the light of its previous admissibility decision of 1972 in the *Ireland v. United Kingdom* case (cf. *supra*). After drawing a parallel between the issues involved in the two cases, the Commission found that the present applicants "have provided evidence which *prima facie* substantiates their allegations of an administrative practice in violation of Article 3 and of their being victims of that practice. It therefore follows that the domestic remedies' rule does not apply to this part of the present applications and [...] the applicants' complaint in this respect raises issues of law and fact whose determination should depend upon an examination of the merits of the case".[2]

The Commission then turned to the question whether each applicant was himself a victim of specific acts—as distinct from an administrative practice — in violation of Article 3. In principle, the Commission observed, the applicants must comply with the local remedies requirement before complaining of such acts; however, the Commission recalled in this connection its own case-law to the effect that "the exhaustion of a given remedy ceases to be necessary if the applicant can show that, in the particular circumstances of his case, this remedy was unlikely to be effective and adequate in regard to the grievances in question".[3] In the present case the question of the effectiveness of available remedies was "closely linked with the alleged existence of an administrative practice in breach of Article 3".[4] In such circumstances, the issue under Article 26 could not be examined without an examination of questions concerning the merits of the applicants' complaint with regard to the alleged administrative practice. Like the previous part of the present application, the Commission

98 *Ibid.,* p. 146.
99 *Ibid.,* pp. 146/147.
1 *Ibid.,* p. 147.
2 *Ibid.,* pp. 147/148.
3 *Ibid.,* p. 148. — In this connection, the Commission referred to its decision on admissibility in the *Simon-Herold* v. *Austria* case (application No. 4340/69), in *Collection,* vol. 39, pp. 18/33, *cit. ibid., p.* 148.
4 *Ibid.,* p. 148.

found it appropriate to join to the merits also the issue whether each individual applicant had himself been a victim of specific acts in breach of Article 3 and exhausted local remedies under Article 26 of the Convention. The Commission, in conclusion, declared admissible and retained (without prejudging the merits of the case) the issue raised by the applicants that they were victims of an "administrative practice" in violation of Article 3 of the Convention, and joined to the merits "any question relating to the remedies to be exhausted by each applicant as the alleged victim of specific acts, as distinct from an administrative practice, in violation of Article 3".[5]

4. *Concluding observations*

The relatively little writing to date on the problem under study[6] may possibly be explained by the fact that only recently did the problem of the exhaustion of local remedies in relation to legislative measures and administrative practices undergo some of its most important developments in the experiment of the Council of Europe. There has been a consistent tendency of the Commission to dispense with the requirement of the exhaustion of domestic remedies when an application (inter-State or individual) raises the compatibility with the Convention of alleged "legislative measures and administrative practices". Examination of this problem has compelled the Commission to elaborate on related questions of relevance for the interpretation of Article 26 and indeed of the Convention as a whole, e.g., the proper relationship between international law and municipal law (in connection with the application of the local remedies rule), often involving examination of constitutional law issues (as in the *Kjeldsen* and *Donnelly* cases), and the Commission's elaboration on the notion of "victim". This may in the long run prove beneficial to the jurisprudence of the Convention organs as a whole.

Consideration of the notion of "victim" was by no means restricted to applications by individuals; although it was in the *Donnelly* case that the Commission had possibly the best opportunity so far to develop that notion in relation to an administrative practice, the question has attracted the Commission's attention in a series of decisions in the course of several years. Earlier, in 1961, in the *Austria* v. *Italy* case, the Commission stated that the local remedies requirement of the Convention "appeared in quite a different light in the

[5] *Ibid.,* pp. 148/149.

[6] F. Castberg, *The European Convention on Human Rights,* Sijthoff/Oceana, Leiden, 1974, pp. 46/48; K. Boyle and H. Hannum, "Individual Applications under the European Convention on Human Rights and the Concept of Administrative Practice: the *Donnelly* case", American Journal of International Law [1974] pp. 440/453; E. McGovern, "The Local Remedies Rule and Administrative Practices in the European Convention on Human Rights", International and Comparative Law Quarterly [1975] pp. 119/127. On the *non-application* of the local remedies rule in relation to legislative measures and administrative practices under the European Convention, *cf.*: Sir Humphrey Waldock, "General Course on Public International Law", Recueil des Course de 1'Academie de Droit International [1962]-II, p. 209; E. Muller-Rappard, "Le droit d'action en vertu des dispositions de la Convention europenne des droits de 1'homme", Revue Beige de Droit International [1968]-II, pp. 489/490. *A contrario sensu,* cf.: H. Danelius, "Conditions of Admissibility in the Jurisprudence of the European Commission of Human Rights", Revue des droits de 1'homme/Human Rights Journal [1969] p. 287, see pp. 286/287.

case of individual applications and in the case of applications from States: individuals could only apply to the Commission (under Article 25) if they claimed to be *victims* of a violation of their rights as set forth in the Convention and if they had exhausted all domestic remedies, whereas States could refer to the Commission (under Article 24) "without having suffered any prejudice and even without any individual having been harmed".[7] Thus, a State party to the Convention could claim that another High Contracting Party had committed some breach of the Convention's provisions by, e.g., promulgating a law or decree. This had the necessary implication of rendering apparently irrelevant the requirement of exhaustion of local remedies under the Convention to the admissibility of applications *from States* based on "concepts of collective guarantee and general interest".[8]

As remarked by the Commission in the *First Greek* case, while under Article 25 of the Convention "only such individuals may seize the Commission as claim to be 'victims' of a violation of the Convention", the condition of "victim" was not however mentioned in Article 24 on inter-State applications; consequently, the Commission added, "a High Contracting Party, when alleging a violation of the Convention under Article 24, is not obliged to show the existence of a victim of such violation either as a particular incident or, for example, as forming part of an administrative practice".[9] In their turn, individual applicants must claim to be *victims* of a violation of the Convention as a condition of receivability of their applications (cf. *X* v. *Ireland* and *X* \. *Norway* cases, *supra*). The Commission elaborated on the notion of "individual victim" in its decision of 13 July 1970 in the *X* v. *Federal Republic of Germany* case, in which it stated that the term "victim" meant "not only the direct victim or victims of the alleged violation but *also any person who would indirectly suffer prejudice* as a result of such violation or who would have a valid personal interest in securing the cessation of such violation".[10] This notion of *"indirect victim"* was also relied upon or upheld by the Commission in at least two other decisions.[11]

[7] Application No. 788/60, *Austria* v. *Italy* case, *Report of the Plenary Commission cit.,* p. 42.

[8] *Ibid., Report, p.* 42.

[9] *First Greek* case, *Yearbook,* vol. 11, p. 776.

[10] Application No. 4185/69, *X* v. *Federal Republic of Germany* case, *Collection,* vol. 35, p. 142. The applicant in the case was the wife of a person detained in a lunatic asylum, who claimed to be an "indirect victim" of her husband's detention following decisions of German courts; the Commission found *inter alia* that the condition as to the exhaustion of domestic remedies had not been complied with by the applicant (*cf. ibid.,* pp. 140/142).

[11] Application No. 1478/62, *Koolen* v. *Belgium* case, *Collection,* vol. 13, p. 89; application No. 282/57, *X* v. *Federal Republic of Germany* case, *Yearbook,* vol. 1, p. 166. On this question (direct and indirect victims of violations of the Convention), see: European Commission of Human Rights, *"Case-Law Topics/Sujets de jurisprudence"* — No. 3, Strasbourg, January 1974, pp. 2/7. And *cf.* also J.E.S. Fawcett, *"The Application of the European Convention on Human Rights",* Oxford, Clarendon Press, 1969, pp. 282/285. Rule 36(2) of the Commission's Rules of Procedure allows individual applicants (under Article 25 of the Convention) to be assisted or represented by lawyers approved by the Commission. On this point, see European Commission, *"Case-Law Topics"* — No. 3, *op. cit.,* pp. 7/9. On the gradual strengthening of the individual's role in the proceedings before the Commission, see mainly the *Lawless* (1961) and the *"Vagrancy"* (1970) cases.

This new element gave more precision to the conception of "victim" under the Convention which, however, remained nonetheless construed in rather strict terms. Hence the great significance of decisions such as those in the *Kjeldsen* and the *Donnelly* cases. In the *Kjeldsen* case the Commission allowed the two applicants, *prospective* or *future* victims, to raise the general issue of the compatibility with the Convention (and Protocol) of the introduction of compulsory sex education in public schools. When the Commission declared their application admissible insofar as it was directed against the Danish Act providing for that compulsory education, the Commission was implicitly but clearly recognizing — it may be submitted — that individuals could raise the issue of the compatibility of legislative measures with the Convention, measures whose general and widespread effects (like those of administrative practices) might well go far beyond the immediate requests and interests of the individual applicants in particular. The way would be paved, in this manner, for the Commission to be concerned not only with the protection of victims of past violations of the Convention, but also of those who may in the future, in circumstances such as those described in the *Kjeldsen* and *Pedersen* cases, be the object of likely violations of rights.

The significance of the *Donnelly* case, on its part, was a distinct one. The exception to the local remedies rule on account of "legislative measures and administrative practices" had until then been developed by the Commission only in inter-State cases *(First Cyprus, First Greek, Second Greek* and *Irish* cases). In the *Donnelly* case the Commission was called upon for the first time to state whether an individual victim could also rely on that exception to the local redress rule recognized in inter-State cases. The Commission found that if the individual concerned submitted *prima facie* evidence of the existence of an administrative practice in breach of the Convention and of acts of which he was a victim, the local remedies rule then would not apply to that part of the application.

This is *not* therefore, it is submitted, merely a question of subjective appreciation by the applicant of the existence of an administrative practice of maltreatment for the purpose of waiving the local remedies rule. As early as 6 September 1957, in a case against Germany, the Commission categorically stated that the personal opinion of the applicant (unsupported by evidence) on the ineffectiveness of remedies shall not be taken into consideration for the determination of the application or not of the local remedies rule.[12] Moreover, the lack of evidence cannot be an objection *in particular* to a claim of wrongful administrative practice, but possibly to any claim under the Convention. A claim against an administrative practice does *not* differ from a claim of ineffectiveness of local remedies, in that *it is the Commission and not the applicant* that ultimately examines it for the purpose of rejecting or upholding it for further investigation. The applicant's subjective appreciation uncorroborated by evidence seems altogether irrelevant in this context.

In the European experiment under the Convention, it has been suggested that, by lodging an application under Article 25, the in-

[12] Application No. 289/57, *X* v. *Federal Republic of Germany* case, *Yearbook,* vol. 1, p. 149.

dividual concerned is initiating an *action publique* (set forth in the Convention) rather than strictly pursuing a *droit subjectif.*[13] The whole procedure can in this way be approached on the basis of rights as well as *duties.* Writing in 1957, before the Commission had developed its case-law on the problems raised by legislative measures and administrative practices, Eustathiades observed that individual applications certainly aimed at reparation to the victims, but served also a general interest particularly when they concerned legislature measures and judicial or administrative practices independently of their application *vis-a-vis* the individual applicants; inter-State applications were even more closely related to the *general interest* of seeing the Convention observed *vis-a-vis* all persons concerned.[14]

Henri Rolin identified in individual applications a point of coincidence between the individual and the general interest: complaints of individual violations in a way helped to secure respect *erga omnes* for the provisions of the Convention. The *action publique* initiated by the individual complainant worked not only as a means to obtain *reparation* for particular injuries, but also — in cases of legislative measures and administrative practices — as a *preventive measure of protection,* in an identification between the individual and the general interest. Furthermore, once seized of a case, the Commission's task was not limited to that of redressing a tort, but of ensuring the observance of the engagements undertaken by the High Contracting Parties under the Convention (in the terms of its Article 19).[15]

The Commission itself stressed the *"objective* character of the" engagement s undertaken by the States parties to the Convention (Article 19) in the *Austria* v. *Italy* case. The Commission emphasized that an application from a State referring to an alleged breach of the Convention was "not to be regarded as exercising a right of action for the purpose of enforcing its own rights, but rather as *bringing before the Commission an alleged violation of the public order of Europe".*[16] The Commission, as the international organ seized of the

[13] K. Vasak, *"La Convention europiénne des droits de l'homme",* Paris, Pédone, 1964, pp. 97/98; C.P. Economopoulos, "Les éléments politiques et judiciaires dans la procédure instaurée par la Convention européenne des droits de 1'homme", Revue Hellénique de Droits International [1969] pp. 125/126.

[14] C. Th. Eustathiades, "Une nouvelle expérience en Droit international: les recours individuels à la Commission européenne des droits de 1'homme", *in "Grundprobleme des Internationalen Rechts — Festschrift für Jean Spiropoulos",* Bonn, Schimmelbusch & Co., 1957, pp. 120/122.

[15] Henri Rolin, "Le rôle du requérant dans la procédure prévue par la Commission européenne des droits de l'homme", Revue Hallénique de Droit International [1956] pp. 8/10.

[16] Application No. 788/60, *Austria* v. *Italy* case, *Report cit.,* p. 37 (emphasis added). The Commission drew attention not only to the "objective character of the obligations and rights established in the Convention", but also to the "unqualified terms in which the right to refer alleged breaches of the Convention to the Commission is formulated in Article 24", — a provision which was the expression of the *"system of collective guarantee"* underlying the Convention (*ibid.,* p. 38). The Commission then stated that the local remedies rule applied to inter-State applications in the same way as it applied to applications from individuals. Although the rule (Article 26) referred to general international law, in its application regard should be had to the particularities of the system inaugurated by the Convention, e.g., the extension of the protection not only to aliens but also to a State's own nationals, thus embracing claims which would be "inadmissible under general international law, irrespective of the exhaustion of domestic remedies" (*ibid.,* pp. 43/44, see pp. 42/45).

applications under the Convention, has a *duty* and not only a faculty of examining the complaints and giving continuance to the procedure for the settlement of the cases.

The application of the local remedies rule and related problems can first be approached on the basis of the different kinds of *interests* involved, e.g.: the individual's interest to have the international wrong judicially settled and remedied as quickly and efficiently as possible, the respondent State's interest to have a chance of doing justice in its own way and by its own domestic courts in order to discharge its responsibility, the international community's interest to see that local remedies work efficiently in order to have the dispute settled in the quickest, most effective and least expensive way.[17] But the whole question can also be approached on the basis of the *duties* of the parties concerned, e.g., the individual's duty to exhaust local remedies, the respondent State's duty to provide local remedies.[18]

In cases concerning legislative measures and administrative practices the individual, having shown that such a practice exists, is *not* under the duty of exhausting local remedies, and is entitled to raise the question of the compatibility with the Convention of those measures or practices. The Commission's findings in, e.g., the *Kjeldsen* and *Donnelly* cases may have the effect of strengthening the status of individual applicants under the Convention. In instances of wrongful legislative measures and administrative practices the respondent State would be placed under the duty to forbid legislative or administrative acts which may encourage or allow or tolerate systematic practices of ill-treatment (in breach of Article 3 of the Convention). Thus, in the context of cases of legislative measures and administrative practices the issue of the exhaustion of local remedies should be approached preferably on the basis of duties rather than interests.

The Commission may at times go further than upholding contentions of administrative practices in breach of the Convention. In the recent *Cyprus* v. *Turkey* case, for example, the applicant government complained of large-scale violations of human rights by Turkish authorities in Cyprus, while the respondent government raised an objection of non-exhaustion of local remedies (based mainly on Article 114 of the Turkish Constitution). The applicant retorted that the multiple complaints in the case related to "an 'administrative practice' in the sense of the Commission's case-law", forming part of a government policy which rendered domestic remedies ineffective in the

[17] C.F. Amerasinghe, "The Rule of Exhaustion of Local Remedies and the International Protection of Human Rights", *Indian Yearbook of International Affairs* [1974] pp. 5/6; C.F. Amerasinghe, "The Rule of Exhaustion of Domestic Remedies in the Framework of International Systems for the Protection of Human Rights", *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* [1968] pp. 261/263; J.E.S. Fawcett, *"The Application of the European Convention ...", op. cit.,* pp. 293/294. And see also G. Gaja, *"L'esaurimento del ricorsi interni nel Diritto internazionale"*, Milano, Giuffré, 1967, pp. 95/99; A. Miaja de la Muela, "El Agotamiento de los Recursos Internos como Supuesto de las Reclamaciones Internationales", *Anuario Uruguayo de Derecho Internacional* [1963] p. 16.

[18] A.J.P. Tammes, "The Obligation to Provide Local Remedies", in *"Volkenrechtelijke Opstellen aangeboden aan Professor Gesina H.J. van der Molen",* Kampen, 1962, pp. 1/17; K. Doehring, "Does General International Law Require Domestic Judicial Protection against the Executive?", in *"Gerichtsschutz gegen die Exekutive",* vol. 3 (Colloquium, Max-Planck-Institut fur auslandisches öffentliches Recht und Volkerrecht), Koln, C. Heymanns/Oceana, 1971, pp. 240/244.

circumstances. In its admissibility decision of 26 May 1975 the Commission found that it had *not* been established that remedies available in domestic courts in Turkey or before Turkish military courts in Cyprus were practicable and normally functioning. As they could not be considered as effective and sufficient within the meaning of Article 26 of the Convention, the Commission concluded that the complaints could *not* be rejected for non-exhaustion of local remedies. In so deciding, the Commission regarded the case not as one of "administrative practice" as suggested by the applicant government, but expressly as one relating to "a military action by a foreign power" and to "the period immediately following it".[19]

The waiver of the local remedies rule by the Commission in cases of wrongful administrative practices (endorsed by the *Donnelly* decision) should *not* be interpreted as a means of unduly strengthening the procedural status of individuals under the European Convention. There does not seem to be any strong reason for supposing that by invoking an alleged administrative practice the individuals concerned could pursue their case with considerably better prospects of success and circumvent procedural obstacles. Besides the fact that the admissibility decision rests with the Commission alone, even if the local remedies rule is dispensed with the applicants would still have to face the other grounds of inadmissibility of applications set forth in Article 27 of the Convention. It thus remains unlikely that a successful contention of administrative practice would *ipso facto* and automatically clear all the way for a subsequent consideration of the merits of the case.

Besides that, the local remedies rule in Article 26 of the Convention was never meant to be an *absolute* ground of inadmissibility of complaints, as sometimes inaccurately assumed. A most important point, often overlooked and misinterpreted, was clarified by the Commission itself when, in the *Austria* v. *Italy* case, it stressed that, by formulating the local remedies rule in Article 26 by reference to general international law, *"the authors of the Convention intended to limit the material content of the rule"*[20] *rather than to extend it.* International law recognizes exceptions to the local remedies rule, notably, e.g., when domestic remedies do not exist or are manifestly ineffective or inadequate for the object of the claim.

The Commission's exclusion of the local remedies rule in cases of substantiated administrative practices also meets the requirements of common sense. Without that exclusion, and in face of the usually slow process of domestic litigation, individuals would have little — if any — protection against certain practices amounting to systematic violations of human rights. However, by granting remedies in the form of, e.g., monetary compensation to the individual victims, a government could forestall indefinitely any inquiry upon the international plane into its larger policies.[21] If one considers that out of

[19] Applications Nos. 6780/74 and 6950/75, *Cyprus v. Turkey* case, in European Commission of Human Rights, *Decisions and Reports,* vol. 2, December 1975, pp. 129/130, 132, 134 and 137/138.

[20] Application No. 788/60, *Austria* v. *Italy* case, *Report cit.,* p. 44. (Emphasis added).

[21] K. Boyle and H. Hannum, *op. cit.,* p. 452.

a total of 6847 applications registered with the Commission until the end of 1974 only 127 were declared admissible,[22] and out of the overwhelming majority of rejected applications a considerable number of them was declared inadmissible for non-exhaustion of domestic remedies, one can hardly avoid the apprehension that unless the Commission sets standards for a more flexible application of the local remedies rule the very foundations of the Europeansystem of human rights protection are likely to be undermined. In this way, the Commission's exclusion of the rule in cases of legislative measures and administrative practices may well render a valuable service to the cause of human rights in the European regional context.

The Commission's tendency to accord what appears to be an increasingly broader meaning to the notion of "victim" (of legislative measures and administrative practices) — as seen in the *Kjeldsen* case — seems to be well in keeping with the parallel experience and developments in the United Nations. Pursuant to ECOSOC resolution 1503 (XLVIII) of 1970, the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities set forth in its resolution 1 (XXIV), adopted on 13 August 1971, procedures on the admissibility of communications concerning human rights violations addressed to the UN Secretary-General. Those procedures not only expressly exclude the application of the local remedies rule where domestic remedies are "ineffective or unreasonably prolonged",[23] but also provide *inter alia* that, in cases disclosing "reasonable grounds to believe that they may reveal a consistent pattern of gross and reliably attested violations of human rights", admissible applications may originate not only from individuals who are "reasonably presumed" to be victims of those violations but also from individuals and non-governmental organizations having "direct and reliable knowledge of such violations.[24]

Thus, by ascribing to the notion of "victim" an increasingly broader interpretation and by excluding the application of the rule of exhaustion of local remedies in cases of substantiated legislative measures and administrative practices incompatible with the provisions of the Convention, the European Commission of Human Rights seems to be slowly but steadily moving into the right direction, towards an effective accomplishment of the ultimate goals of the European experiment on human rights protection.

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[22] A.B. McNulty (Secretary to the Commission), *"Stock-Taking on the European Convention on Human Rights",* Council of Europe doc. DH(75) 4, Strasbourg, 1st October 1975, p. 65.

[23] Sub-Commission's resolution 1 (XXIV) of 1971, Article 4(b).

[24] *Ibid.,* Articles 1(b) and 2(a).

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