The European Convention on Human Rights and Insurance

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The relation between insurance and human rights has not received much attention in the insurance world. The European Court of Human Rights has, however, decided a number of cases relating to different aspects of insurance. Fredrik Sundberg, Principal Administrative Officer at the Council of Europe's Directorate General of Human Rights makes a pioneering contribution when he introduces us to some of the main insurance issues that have arisen under the European Convention on Human Rights. It may be foreseen that this subject will attract considerable attention in the future.

I. Human Rights and Insurance – General Comments

Before engaging in the examination of the problems raised under the European Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention" below) with respect to insurance activities, some preliminary comments are called for.

Insurance could perhaps be described as a special form of risk management aiming at distributing evenly, mostly on a contractual basis, the economic losses caused by certain unforeseeable events. Human Rights is something different. It concerns basically the duties and obligations of States and aims at ensuring good and stable government. Human Rights may still call for state action to assume economic responsibility for certain risks, thus creating, where the needs are not considered adequately cared for through private enterprise, a human rights requirement that the state set up its own insurance systems. Even where the risks are basically cared for through private initiatives, human rights may well call for state surveillance of the manner in which the insurance activity is carried out.

In particular social and economic human rights may require the state to ensure the existence of insurance systems of various kinds: thus e.g. Article 3 and 13 of the revised Social Charter of the Council of Europe from 1996 whereby states accept to secure the right to safe

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and healthy working conditions and the right to social and medical assistance. The present article does not, however, intend to cover this aspect of insurance and human rights.

Civil and political rights are less about the state's duty to set up insurance systems, and more about preventing abusive or arbitrary state action and, at least in Europe, safeguarding the basic elements of democracy. These are also the main purposes underlying the abovementioned Convention from 1950 and this article will concentrate on insurance related issues that have arisen under that instrument.

The duty to care for certain risks is, however, not entirely absent even in the context of civil and political rights. Certain foundations of a State responsibility under the Convention for environmental hazards have thus been laid in the cases of Lopez Ostra against Spain[1] and Guerra against Italy[2] as part of the requirement of respect for private and family life guaranteed in Article 8 of the Convention. Other interesting issues relate to the state's responsibility to care for the victims of national disasters[3] which could raise questions e.g. in relation to the protection of the right to life guaranteed in the Convention's Article 2, to the protection against inhuman or degrading treatment in Article 3 or to the rights protected in the above mentioned Article 8. In the absence of more precise case law, the presentation below will, however, not attempt to develop these questions further.

II. The European Convention on Human Rights

The main objective of the Convention as indicated in the preamble of 1950 is to secure peace, justice and greater European unity through the collective enforcement of some of the human rights set out in the Universal Declaration of the United Nations of 1948 as the new standard of achievement for nations after the debacle of the world order created after the first world war.

The importance of the unity created by the Convention has been self-evident over the years. It contributes to democratic security, efficient inter-governmental co-operation and European integration.

Against this background it has not been a surprise that the Convention was incorporated in the constitutions of the two new states set up by the international community in Europe after the second world war: Cyprus 1959 and Bosnia-Herzegovina 1995 and that adhesion to the Convention system was among the first ambitions of those European states which came out of dictatorship: Greece, Spain and Portugal. In the same vein, the Convention was also the obvious constitutional element of the project for a European political Union that failed before the French *Assemblée Nationale* in 1954. Subsequently, the European Communities' included the Convention amongst the general principles of law binding on the Communities in order to justify the supremacy of Community legislation when this supremacy was being challenged by a number of states in the 1970's as these refused to do away with their national protection of fundamental rights unless some similar guarantees were given at the Community level[4]. Acceptance of the Convention as requirement for membership in the Council of Europe has recently had major political importance in the context of the rush of new states applying for membership after 1989, following the fall of the Soviet empire. As a result the Convention, including its right of individual petition to the European Court of Human Rights, is today part of the legal systems of 43 out of the 44 member states of the Council of Europe (ratification by Bosnia Herzegovina is awaited within shortly). As a consequence of these developments, the European Union also sets respect of the Convention as an essential requirement on candidates for membership of the Union in the context of its own enlargement.

What is then the content of the European minimum standard set up by the Convention, which has been described, "constitutional instrument of European public order"[5]:

• A first basic element of the Convention is to ensure government under the law, i.e. prevent arbitrary government. The Convention not only puts limits to governmental action (such as the obligation to require that limitations of rights and freedoms only be made through accessible and foreseeable laws and the requirement that limitations pursue legitimate aims and are proportional to these aims) it also imposes on the government to provide basic protection against abuses in relations in between citizens (duty to protect many rights by law so as to prevent their being violated by other individuals, e.g. the right to life, the protection of privacy, the right to peaceful assembly etc... and also put the necessary state power in motion to ensure the respect of the laws[6]) and systems for just and efficient conflict solutions in case of disputes between citizens or in their relations with the state as far as "civil" rights and obligations are concerned.

• A second element is the protection of democracy – the Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions that will ensure the free expression of the opinion of the people in the choice of the legislature.

• A third element is the protection accorded against decisions or measures, even if lawfully adopted by national parliaments, governments or other competent bodies, which unduly interfere with the exercise of the specific rights and freedoms protected by the Convention.

The Convention may thus well be described as a standard of "good government" for Europe. Another common description is "the constitutional instrument of European public order"[7].

From the above considerations it is clear that regulation of insurance has never been a specific aim of the Convention. However, insurance raises, as other human activities, intricate questions regarding the relationships between state and individuals, relationships which not infrequently touch fundamental issues of what protection the state must provide in relations between individuals and what limits the state has to set for its actions.

As the Convention is not drafted as a comprehensive code for the insurance market its exact requirements in different insurance situations may not be so easy to foresee. Conclusions will often have to be drawn by extrapolating conclusions from other areas bearing in mind the general purposes that underlie the Convention. Most details regarding the impact of the Convention will have to be ascertained on the basis of the case law of European Court of Human Rights. The protection afforded will develop taking into account many factors, including prevailing societal conditions[8], a matter which this will often require imaginative pleadings in order to help the Court to adapt the Convention standard.

The survey below will only relate the problems so far identified under the Convention. The Convention may well apply also to other situations, but only cases can provide an answer to what the Convention standard then is.

III. Problems raised under the Convention

A first set of problems raised concern the setting up and running of an insurance company. A second set, the rules and procedures that should apply when solving disputes under insurance schemes, and in particular social insurance schemes were the legislator has often provided for special procedures. A third problem area concerns privacy and the extent to which insurance companies may require persons to disclose details of their private lives, and the extent to which tribunals may search for information regarding a persons private life and what right the persons concerned may have to be informed of such searches and comment on their result. A fourth problem area concerns the nature of insurance benefits – can they be equalled to property? A fifth area concerns discrimination in the allocation of benefits tak-

ing into account the fees paid. A sixth area concerns the relevance of insurance, mostly health or social insurance, in expulsion cases.

Below I will briefly expand on the cases that have raised the above-mentioned problems.

a. Insurance activity in general

As first regards the conduct of insurance activity it is worth noting that a fundamental element of the right of property is the right to dispose of one's property[9], e.g. by investing it in an enterprise, presumably also an insurance company, or by bequeathing it. Also the exercise of a profession will give rise to a right of property at least in the form of the goodwill value created by the activity[10].

Introducing a license requirement for an ongoing business or withdrawing the license to engage in a certain business will thus interfere with the right of property. Depending on the severity of the interference the measure may be either an expropriation or a control of use of property[11].

Taxation of the company's assets is also an interference with the right of property, albeit in most circumstances so far examined under the Convention justified in the general interest. An interesting case in this respect concerned a one off tax in Sweden imposed on life insurance companies' assets[12].

The management of the business is also a "civil" right under the Convention. When the Secretary of State in the United Kingdom thus decided in a specific case that the applicant was prevented from taking up the position of chief executive of a large insurance company because of the Secretary of State's decision that he was not a "fit and proper" person to hold such a position, the Secretary of State actively determined the civil rights of the applicant[13]. The decision had thus to be subjected to judicial review in order to have its lawfulness controlled.

In the daily conduct of their business, companies have the right to respect for privacy. State searches of business premises constitute interferences with this right and have to be foreseen by law, pursue legitimate aims and be proportionate to the aims pursued[14]. In addition, there has to be adequate safeguards against abuse.

Who can validly complain to the Court in the corporate context is often a difficult question as e.g. where there are several owners (shareholders for example) or managers of a company or when the interference has led to the forcible sale of the legal entity to the old owners detriment[15].

b. Disputes under insurance schemes – right to court

At the outset it should be recalled that Article 6 of the Convention, which guarantees the right to court, does not guarantee the right to have a fourth instance review of the substance of national proceedings in Strasbourg. Article 6 only guarantees access to a court and that judicial procedures respect the fundamental guaranteed by it[16]. It should, however, be noted that Article 6 also guarantees the enforcement of the national domestic decisions[17]. The executive may thus not refuse to execute a court decision.

Whereas there is no doubt that Article 6 applies to, and has to be respected in, disputes under ordinary private insurance schemes", many cases has raised the question of the applicability of Article 6 to various specially regulated social insurance schemes, including e.g. industrial insurance and health insurances schemes, set up more or less directly by the State.

Governments argued for a long period of time that the rights or obligations under these special insurance schemes were not "civil" so that the decisions of the competent administrative or other specialized bodies need not be subjected to full, if any, judicial review, and are exempted from other requirements such as the right to fair trial within a reasonable time.

In a series of judgments, starting in the mid

1980's, the Court has in general rejected these arguments applying a multi facetted test, weighing the public and private law features of the insurance system in question. The Committee of Ministers of the Council of Europe, which supervises that the respondent States respect the judgments of the Court, has thus supervised a number of important reforms of the national decision making machineries under different insurance schemes in the course of the 1980's and 1990's[18].

The right to a widow's supplementary pension under an industrial injuries scheme in Germany was found to be a "civil" right in the Deumeland case; rights under a state organised health insurance in Germany were also found to be "civil" in the Feldbrugge case. Swiss federal invalidity insurance gave rise to "civil" rights in the Schüler-Zgraggen case. The right to invalidity pension under a Military Accident insurance scheme in Finland was "civil" in the Kerojärvi case. Whether old age pensions under state schemes are insurances or not could be discussed, suffice it here to note that the right to such a pension in Greece was found to be "civil" in the Stamoulakatos case.

Also obligations to pay specific contributions to social security insurance systems are "civil", and disputes must therefore also be subjected to full judicial review. The duty to pay such contributions under a Health and Unemployment scheme run by an occupational association in the Netherlands was thus found to be "civil" in the Schouten and Meldrum case (the Government claimed the contributions were to be considered as taxes) and their imposition thus subjected to the safeguards contained in Article 6[19].

If the rights or obligations, which lead to a dispute with the insurer fall under Article 6, the State has to ensure that the guarantees contained in this Article are respected. Below follows a number of examples of problems that have arisen in connection with insurance benefits, primarily social insurance benefits.

The decision making body thus has to have the characteristics of a court. It has to be impartial and it is not possible to have appeals organized, as was the case in the De Haan case[20] against the Netherlands in such a way that the judge who takes the decision at first instance then sits on the appeal instance. Fairness also requires full communication of the information received by the court. Fairness was thus violated when appeal instances reviewing a refusal to grant the applicant in the case K.P. v. Finland a disability pension requested ex officio opinions from the lower instances without communicating these opinions with the applicant[21]. This is so even if the lower instance providing the uncommunicated opinion is a court as appears from the case F.R. v. Switzerland. The obligation to communicate the case material to the appellant also entails a right for the appellant to reply. The appellant should also normally be able to address directly the judges at an oral hearing if he so wishes, as was underlined in Schüler-Zgraggen v. Switzerland concerning disability benefits[22]. Adequate reasons must also be given for refusals to grant benefits as was stressed in the Hirvisaari case against Finland concerning the right to a disability pension[23]: that the first instance simply cites legal provisions and the appeal court simply endorses the first instance decision was thus held to violate Article 6 in this case. Proceedings must also be brought to a conclusion within a reasonable time as has been stressed in many cases; notably Duclos v. France[24], Kiefer v. Switzerland[25] and Janssen Germany[26].

Respect for the independence of the courts also prevents the legislator from intervening in order to provide a legislative solution to different interpretation problem, at least to the extent that cases pending before the courts are not excluded – see e.g. Papageorgiou v. Greece[27] concerning legislative annulment of a court decision concerning contributions to an unemployment fund, Vasilopoulou against Greece[28] concerning the legislative annulment of a pension decision.

Similarly, the administration is bound to

respect the decisions of the courts – see e.g. Dimitrios Georgiadis against Greece[29], concerning the government's refusal to abide by a court decision concerning certain pension questions.

c. Disputes under insurance schemes – property rights

If the rights under an insurance have become enforceable in national law, e.g. as a result of a final court judgment, the very amount awarded is the property of the applicant and protected by Article 1 of Protocol N° 1 of the Convention so that it has to be paid[30].

Rights under an insurance scheme may be protected by the right of property even outside the protection afforded in general under the Convention to claims enforceable under domestic law. In the Gaygusuz case against Austria, the Court considered that the right to emergency assistance as provided at the time by Austrian legislation was a pecuniary right protected by the right of property in Article 1 of Protocol No. 1 as regards all insured: Entitlement to this social benefit was linked to the payment of contributions to the unemployment insurance fund which paid the emergency assistance in such a way that payment of the contributions was a precondition for the payment of unemployment benefit[31]. Accordingly, it could not be interfered with in violation of the Convention, notably the guarantees provided against discrimination – see more below.

The right to state pension under different legal systems may also have this construction based on specific contributions and may therefore also constitute a property right[32]. Social insurance benefits under schemes financed by ordinary taxation or through other generalized contributions will probably not create this kind of property right in the enjoyment of the benefits under the system.

d. Privacy

An interesting area is the extent to which decision-making under insurance schemes may be based on different materials interfering with the right to privacy.

Case law is so far not as rich as the one existing with regard to the decision-making machinery in general. Some interesting complaints have been rejected on procedural grounds, e.g. because of non-exhaustion of domestic remedies. This was notably the situation with respect to a case against Ireland concerning insurance claims for personal injuries whilst walking on a public footpath. During the course of the trial it emerged that the insurance company had engaged the services of a private investigator to photograph the applicant in secret to have evidence of the extent of the injuries as compared to those claimed by the applicant. In the case at bar the photos had been taken from outside the physical boundaries of the applicant's home[33].

In another case, decided on the merits in Strasbourg, against Sweden the complaint concerned the communication, without the patient's consent, of personal and confidential medical data by one public authority to another with a view to the latter deciding certain claims by the applicant under an industrial injury insurance scheme and the lack of possibility for patient, prior to the communication, to challenge this communication before a court. No violation was, however, found in the case as Swedish law was found to contain other adequate safeguards against abuse[34].

Privacy of information may not only be an issue when it comes to decide benefits under a certain insurance system. In certain cases applicants have also claimed that the State has a duty to prevent the insurance company from getting hold of certain sensitive information.

In a number of cases concerning transsexuals the applicants thus argued that the state must be under an obligation to change their birth certificates so as to avoid that they be compelled to explain their change of sex notably when seeking certain insurances. The Court adopted, however, a very business like approach indicating that an individual may with justification be

required on occasion to provide proof of gender as well as medical history: certainly in case of life assurance contracts which are *uberrimae fidei* and possibly also in case of for motor insurance where the insurer may need to have regard to the sex of the driver in order to make an actuarial assessment of the risk.

e. Discrimination in the enjoyment of insurance benefits

Discrimination is in general prohibited under the Convention's Article 14. In order to establish discrimination it has first to be established that reference is made to an analogous situation. If that is so there will be discrimination if there is no objective justification for the difference in treatment[35].

Such a discrimination based on sex was e.g. established in the Schüler-Zgraggen case against Switzerland. This case concerned the applicant's continued entitlement to an invalidity pension under a federal social insurance scheme following the birth of her first child and the discrimination resulted from the Federal Court's refusal of this pension on the assumption that mothers do not go back to work after child birth. Would enjoyment of certain social insurance benefits, no such justification was found for the as women not found likely go back to labour market after childbirth[36]. A similar violation based on nationality was found in the Gaygusuz case against Austria. Here the discrimination stemmed from the fact that non-Austrians did not enjoy the same benefits under an unemployment insurance scheme as Austrians, albeit subjected by law to paying the same level of contributions as the latter[37]. The United Kingdom has recently, by concluding friendly settlements, avoided having the merits of a number of complaints regarding sex discrimination based on the fact that only women were eligible for certain bereavements benefits under pension schemes in case of the other spouse's death. At the same time the legislation has changed so as to allow also men a right to these benefits[38].

f. Healthcare schemes and expulsion

Especially social insurance may also be a relevant consideration in expulsion cases. The issue has in particular been raised in case of expulsion of AIDS infected persons not likely to receive adequate medical care in the country of destination. Deciding this issue involves intricate assessments of the applicant's health situation and the situation in the country of destination. In most cases, such as the Bensaid case against the United Kingdom or the Karara case against Finland, the Court has held that the existence of free health care is not a sufficient reason allow the applicant to stay in the country. However, in the case of D. against the United Kingdom it did find that the expulsion of the applicant, in final stage of AIDS, to S:t Kitts would violate Article 3 of the Convention. Accordingly, D. was allowed to stay in the United Kingdom[39].

g. Insurance and just satisfaction

The awarding of just satisfaction may raise issues of co-ordination with national insurance schemes. For example, in the case of unreasonably long proceedings regarding insurance compensation because of damage, the applicant may well at the end have a right to compensation for the continuation of his losses during the unreasonably long duration of the proceedings both from the State under Article 41 of the Convention and from the insurance company under the insurance policy. Who shall eventually pay? A question of this kind is presently pending under the Convention in an old case decided by the Committee of Ministers under old Article32 of the Convention (i.e. as the system was before the introduction of the "single" Court by Protocol N° 11 in November 1998)[40]. As the Committee of Ministers usually does not provide reasons for its just satisfaction decisions, there is little likelihood that the question will be answered in this case. The question of principle is however of some importance and may well arise before the Court in the near future.

IV. Conclusions

The implications of human rights thinking on insurance are manifold. They relate to the setting up and running of the insurance company, to dispute solution, to the limits set by privacy to information gathering, to the nature of the insurance holders' claims to benefits and to the possibilities of differentiated treatment of various insured groups. Existence of insurance may even be a relevant consideration in other areas such as expulsion. One of the most important questions dealt with so far has concerned the dispute settlement system, but case law in this area is now abundant. This does not mean that problems have disappeared. Respect of the Convention's requirement that dispute settlement be fair and quick requires constant vigilance on the part of the parties and the authorities.

Interesting new problems to be solved by the Court will probably relate to privacy and discrimination. Increasingly perfected models of risk assessment may thus create greater needs of information gathering and differentiated treatment. Cost chasing and the fight against fraud may well lead to different more or less covert systems of follow up and investigations. Information gathering may, however, as shown above, infringe the right to privacy and differentiated treatment may amount to discrimination. The threat of competition, which is a constant in private insurance, may provide certain built in barriers against abuse. With respect to state run insurance such barriers have from the beginning to be contained in laws and regulations. Adequate protection will thus call both for normative action and effective remedies in individual cases.

The direct effect normally accorded to the Convention and the judgments of the Court by the domestic authorities, including the courts, in the Council of Europe member States, provide an important guarantee against abuse – if the question is raised. In fact the whole Convention protection falls apart if the question is not raised already in the national proceedings. A complaint to the Court will only be admissible where the Convention arguments were presented before the competent domestic authorities. Even in the area of the Convention's human rights protection system the old adage that "*ignoratia juris nocet*" retains validity[41].

Notes

[1] Judgment of 9/12/1994.

[2] Judgment of 9/2/1998.

[3] An unsuccessful attempt to assert claims of this kind was made in the case Nordh v. Sweden, application 14225/88, inadmissibility decision 03/12/90 – certain consequences of the big landslide in Tuve in 1977.

[4] See e.g. Nold v. Commission [1974] ECR491 - for further details on this point for example Lammy Betten and Nicholas Grief , "EU Law and Human Rights" Longman, 1998 and Craig and De Burca "EU Law text, cases and materials", 2nd edition, Oxford 1998.

[5] Bankovic and others, application 52207/99, inadmissibility decision 12/12/01.

[6] See for example Plattform Ärzte für das Leben v. Asutria, judgment of 21/6/1998 or Kilic v. Turkey, judgment of 28/3/2000.

[7] See e.g. the Resolutions and Declarations adopted by the Ministers at the Rome Conference celebrating the Convention's 50th anniversary in November 2000 or the Court's admissibility decision in the above mentioned Bankovic case.

[8] See e.g. Cossey v. United Kingdom, judgment of 27/09/90, § 35; cf the development of the public sensitivity as regards the fairness of proceedings as evidenced in the Court's judgment in the Delcourt case of 17/11/70 finding no violation of Article 6 when compared with its subsequent judgment on the same point (certain privileges on the part of the prosecutor in criminal proceedings) some 20 years later in the Borgers judgment of 30/10/91 which reversed this conclusion.

[9] See e.g. Marckx v. Belgium, judgment 13/06/1979, § 63.

[10] See e.g. Van Marle v. Netherlands, judgment 26/06/1986, § 41

[11] Introduction of license requirement equivalent to a control of use, see the above mentioned Van Marle judgment; withdrawal of licence control of use or expropriation? See e.g. Fredin v. Sweden, judgment 18/2/91.

[12] See WASA Ömsesidigt, Försäkringsbolaget Valands Pensionsstiftelse, a group of approximately 15,000 individuals v. SWEDEN, decision 14/12/88, application number 13013/87 - the applicants were obliged to pay, with certain exceptions, a sum equivalent to 7% of their assets in excess of 10 million Swedish crowns by 31 December 1986: they thus paid 916,091,000 and 356,000 Swedish crowns respectively in one off tax. After a lengthy analysis the case was declared inadmissible by the Commission on account of the special circumstances surrounding this exceptional taxation.

[13] X. v. the United Kingdom, Commission decision 19/1/98, No. 28530/95.

[14] See e.g. Niemietz v. Germany, judgment of 16/12/92.

[15] See e.g. Agrotexim and Others v. Greece, judgment of 24/10/95.

[16] See e.g. Kemmache v. France (no. 3), judgment 24/11/94, § 44: Wallin v. Sweden, 11450/85, decision 08/03/88.

[17] See e.g. Hornsby judgment v. Greece, 19/03/1997.

[18] The results of the Committee of Ministers supervision are published in resolutions available on the internet at the same location as the Court's judgments –" hudoc.Convention.coe.int" – further information may be obtained on the Council of Europe's web site : www.coe.int , "Committee of Minsters"; "documents"; "execution of judgments".

[19] Judgment of 09/12/94.

[20] Judgment of - concerning sickness insurance in the Netherlands

[21] See also the case K.S. v Finland – concerning right to unemployment benefits.

[22] See judgment of 24/06/93; cf also Helle v. Finland – concerning, at least in part, pension rights.

[23] Judgment 27/09/01 – concerning right to disability pension.

[24] Judgment 17/12/96.

[25] Judgment 28/3/00.

[26] Judgment 20/12/01.

[27] Judgment of 22/10/97.

[28] Judgment of 21/03/02.

[29] Judgment of 28/03/00.

[30] See e.g.the above mentioned Vasilopoulou (note 29); see also Stran Greek Refineries v. Greece, judgment of 9/12/94.

[31] Judgment of 16/09/96, § 39.

[32] L. V. Italy, application 12490/86, admissibility decision 09/11/90, also Wessels-Berger Voet v. The Netherlands, application 34462/97, admissibility decision 03/10/00

[33] E.N. v. Ireland, application 18670/91, decision 01/12/93

[34] M.S. v. Sweden, judgment 27/08/97

[35] See e.g. the above-mentioned Fredin judgment.

[36] Judgment of 25/6/93.

[37] Judgment of 16/9/96.

[38] See e.g. Sawden v. United Kingdom, judgment of 12/3/02 ; Cornwell v. United Kingdom, judgment of 25/4/00.

[39] See the Committee of Ministers' final resolution on the execution of this case, DH(1998)10.

[40] Pauchet v. France, application 29877.

[41] From this perspective it is interesting to note the increasing use of other monitoring mechanisms, not based on individual complaints, which have been developed by the Council of Europe – by the Committee of Ministers, the Parliamentary Assembly and the Secretary General. In addition states retain the right to lodge inter-state complaints under the Convention. Usually such complaints will only deal with major political crisis – coup d'état in Greece in 1967 or in Turkey in 1982 or the Turkish intervention in Cyprus in 1974. On a few occasions states have, however, lodged inter-state complaints also to protect an individual citizen or group of citizens or of persons otherwise of concern.