ABHANDLUNGEN

"Competence" and "Incompatibility" in the Jurisprudence of the European Commission of Human Rights

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I. Introduction

1. In the course of the years, since its creation, the European Commission of Human Rights has undergone a change. It has developed beyond its originally intended framework. For the European Court of Human Rights there never existed any doubts as to its judicial nature; this is not the case for the Commission. Its original mission was that of a *filtrage* of cases before they went to the Court in order to avoid a flux of applications emanating from non-serious applicants[1]). Of course, during those stages there were also scholars and politicians who pointed out the difficulties which such a definition of the Commission would present and already observed that it would certainly develop and would be bound to act not solely as a *filtre*[2]).

It was the anxiety of the innovation and the fear of its complications, *i. e.* to give the individual a "right"[3]) to seize an international tribunal, which made the Contracting Parties try and assign to the Commission a particular non-judicial role. Nevertheless, the elements of a future transformation of the first stage of the proceedings for the protection of human rights in Europe — *i. e.* before the Commission — were already contained in the European Convention itself.

The Commission's systematical definition was not precise during the first stages of its existence, and it was qualified as a political organ, or an administrative instance, etc. Its task, however, remained: an *examen contradictoire* of an application (Article 28 of the Convention). This *examen contradictoire* is currently largely applied by the Commission also at the admissibility stage. In many serious cases the Commission invites the parties to present

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Abbreviations: Collection (of Decisions) = European Commission of Human Rights – Collection of Decisions (Commission Européenne des Droits de l'Homme – Recueil de Décisions); F.R.G. = Federal Republic of Germany; No. (Application No.) = Number of application before the European Commission of Human Rights; Yearbook = Yearbook of the European Convention on Human Rights (Annuaire de la Convention Européenne des Droits de l'Homme).

[1]) Such a character was attributed to the Commission by its creators: cf. Teitgen, Consultative Assembly, Report 1949, p. 215; Rolin, *ibid.*, 1953, p. 52.

[2]) Recommendation No. 38, Consultative Assembly; Wiederkehr, Le défaut manifeste de fondement devant la Commission européenne des droits de l'homme (1965), p. 16, who points out correctly: «La notion de requête manifestement mal fondée ne conduisait-elle pas la future Commission à sortir du rôle modeste qu'on voulait lui assigner et à annoncer un glissement vers une forme juridictionnelle?»; Dupuy, La Commission européenne des droits de l'homme, Annuaire Français de Droit International (A.F.D.I.) 1957, pp. 452 ff.; he states on p. 452: «Ainsi, une instance prévue pour la conciliation, s'est dès le depart organisée à l'instar d'une juridiction».

[3]) Discussion as to this "right" of the individual and attempt at its limitation see: Walter, Die Europäische Menschenrechtsordnung (1970), pp. 4 ff.

oral arguments on the question of admissibility. Article 36 of the Convention must also be mentioned, which provides: "The Commission shall draw up its own rules of procedure" [4]).

It should anyway be borne in mind that, at another stage of an application before the Commission, according to Article 28 (b), the Commission "shall place itself at the disposal of the parties concerned with a view to securing a friendly settlement ...". There, its "political" nature appears. But this task is imminent only after "admissibility".

But again this task of the Commission is easily comparable to the traditional conciliatory task of a judge. And, of course, in admissible cases, if the efforts for a friendly settlement fail, the Commission exercises a judicial function in establishing the facts and drawing up its report (Articles 28 and 31).

(1) Judicial nature of the Commission at the admissibility stage

2. It is today virtually undisputed [5]) that the Commission at the stage of admissibility exercises a judicial function. Applying formal and material criteria [6]), referring to the decision of the International Court of Justice on the judicial nature of the UN Administrative Tribunal [7]), and examining the development of the Commission's jurisprudence, opinion today agrees that the Commission had developed to a judicial instance with regard to its decisions on admissibility.

Reference should be made here to the recent *Vagrancy* Cases before the European Court of Human Rights where the question arose whether the Court could review the decision of the Commission on admissibility. The Commission's delegates submitted with firmness that its decisions on admissibility were final:

> "We have frequently had occasions to note the peculiarities of the system set up by our Convention to protect human rights. The relations between the Court and the Commission have no parallel either in existing international institutions or in national systems. For lack of adequate characterisation these relations are sometimes said to be *sui generis*. Each organ has been given its own special functions. On the merits of a particular case, in other words, on the question whether or not the Convention has been violated, the Commission expresses an opinion

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[4]) Cf. also Articles 21 and 23 of the Convention; Dupuy, *loc. cit.*

[5]) Sørensen, La recevabilité de l'instance devant la Cour européenne des droits de l'homme, in: René Cassin Amicorum discipulorumque liber vol. 1 (1969), p. 334; Monconduit, La Commission européenne des droits de l'homme (1965), pp. 299–301.

[6]) Cavaré, La notion de juridiction internationale, A.F.D.I. 1956, pp. 496 ff.; Wiederkehr, *op. cit.* (above note 2), pp. 18 ff.; Dupuy, *loc. cit.* (above note 2).

[7]) I.C.J. reports 1954, pp. 47 ff.

and this Court passes judgment. Neither organ is subordinate to the other; there is no hierarchy of levels of jurisdiction such as we find in national systems.

One of the Commission's functions, as we know, is to rule on the admissibility of applications under Article 27 of the Convention. Everyone agrees that there the Commission exercises a judicial function ...

Thus the decision is final ..." [8]).

The Court, in its judgment[9]) referring to Article 45 of the Convention "which determines its jurisdiction *ratione materiae*", which should extend "to all cases concerning the interpretation and application of the ... Convention", pronounced that it has jurisdiction to "examine the question of non-exhaustion and of delay raised in the present cases".

If the Court's opinion is correct, and if it constitutes *res judicata,* then it paves a new way of approach with regard to the relations between the two organs; it creates a hierarchy, a "two instances" scheme. If it is wrong — and the Commission's arguments with respect to the "finality" of its decisions on admissibility are convincing[10]), and there are hardly indications in the Convention to support a *res judicata* force of the Court's decisions on this point — the Commission's character as a "judicial organ" is retained. And it is obviously also retained if it is — under the assumption of correctness of the Court's decision — a first instance.

(2) Nature of the dispute — competence

3. But whatever is the theoretical qualification of the Commission, it has also the function of deciding upon the admissibility of a "dispute", *i. e.* to subject a set of facts to principles of law and decide whether these facts are admissible under the Convention[11]). And this is, of course, the first moment when the Commission's terms of reference, its competence, appear.

Nowhere is this competence generally established and circumscribed in the Convention. Nevertheless, the Convention itself, through its numerous specific provisions, constitutes the limits of this competence.

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[8]) *Vagrancy* Cases, European Court of Human Rights, Series B, pp. 258–259 (per Sørensen, principal delegate of the Commission).

[9]) *Vagrancy Cases,* European Court of Human Rights, decision of 28 May 1970, paras. 47–52; cf. also European Court of Human Rights, *Case relating to certain aspects of the laws on the use of languages in education in Belgium,* decision of 3 May 1966, pp. 18 ff.

[10]) Cf. note 8.

[11]) Cf. *Mavrommatis* case in I.C.J. reports, Series A 2, p. 11, and the analysis of "dispute" before the I.C.J. by Rosenne, The law and practice of the International Court vol. 1 (1965), pp. 292 ff. Here, of course, the "dispute" before the Commission is a dispute as to the admissibility and between either an individual and a State or between two or more States. It is nevertheless a "disagreement on a point of law or fact, a conflict of legal views".

It is generally accepted that the limits of the activities of international organs are laid down by their statutes, that is by the international treaties or conventions which are, in fact, their origin. It is further common theory that basically these organs are the sole judges of the limits of their competence[12]).

However, the concept of competence, in particular where it appears in its jurisdictional form, needs an explanation and a definition. By the word competence we understand, in the positive sense, the capacity to act with legal effects, to accomplish a task. Incompetence denotes the absence of such a capacity, the interdiction of exercising a certain activity or accomplishing a certain task[13]).

The above is certainly a general description of the term "competence". It applies to States and their organs and to international institutions. However, there are certain institutions, for example, the International Court of Justice, where competence and jurisdiction are, if not always at least very often, used as equivalents[14]). Both terms are used in the jurisprudence of the International Court of Justice in the sense that the Court is in a position to deal with a certain case and take a decision[15]).

When examining the notion of competence or jurisdiction in international law, it is necessary to put aside all notions or criteria in municipal law. In international law the creation of a certain organ and the allocation to it of its jurisdiction is not a function of a government, but a voluntary and collective act on the part of a number of sovereign States, which in fact, in the exercise of their sovereignty, agree to assign part of their rights to the extent that they consent to enable an international court or organ to act.

Most jurisdictional questions in municipal law consist in determining whether the proceedings have been brought in the correct court. In international law, there is no hierarchy of courts with predetermined competence, each one has jurisdiction to the extent specified by the international treaty by which it was established.

With regard to the International Court of Justice, it is suggested that, in so far as it is concerned, "jurisdiction relates to the capacity of the Court to decide a concrete case with binding force. Competence, on the other hand,

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[12]) Article 49 of the Convention; Article 36(6) of the Statute of the I.C.J.; cf. also *Fisheries Jurisdiction (Federal Republic of Germany* v. *Iceland)*, Order of 18 August 1972, I.C.J. reports 1972, p. 188, and *(United Kingdom* v. *Iceland)*, Order of 18 August 1972, *ibid.*, p. 181; Sørensen, *op. cit.* (above note 5), p. 337.

[13]) Bindschedler, La délimitation des compétences des Nations Unies, RdC 1963 II, pp. 307 ff.; Kelsen, General theory of law and State (1946), pp. 90–91.

[14]) Dictionnaire de Droit International, edited by J. Basdevant (1960).

[15]) Rosenne, *op. cit.* (above note 11), pp. 296 ff.

is more subjective, including both jurisdiction and the element of the propriety of the Court's exercising its jurisdiction" [16]).

4. The Commission in the course of the years since its establishment has frequently employed the notion of competence, which is basic in legal thinking, in its jurisprudence. It appears that it has based it on general principles of international law, which it also applied, *mutatis mutandis,* and also on the several specific provisions of the Convention; both being binding. It has, however, not followed a consistent line throughout its jurisprudence and this inconsistency has led to extensive discussions.

Nevertheless, Article 27 (2), which provides that the Commission "shall consider inadmissible any petition submitted under Article 25 which it considers to be incompatible with the provisions of the present Convention ..." led several authors who examined the Commission's jurisprudence to the conclusion that precisely this term "incompatibility" gives expression to the Commission's competence. They consider "incompatibility" as the notion under which the Commission has to define the limits of its competence.

It is, therefore, common to identify the conditions of admissibility of a complaint with the limits of the Commission's competence.

Exactly this problem and the effort to classify it is the object of this article. This classification is important in order to explain the correlation between competence and admissibility (cf. below paras. 49 ff.). Of course the Commission is competent to reject an application as inadmissible, but again competence is a *conditio sine qua non* of admissibility in international adjudication. At one stage the Commission rejected some applications for non-competence alone without reference to admissibility [17]). This practice was later abandoned and now applications are declared only inadmissible or admissible.

The classification mentioned above is also important for State applications (cf. below paras. 35 ff.), that is, can non-competence be used as a reason for rejection of such an application? It is furthermore important in the cases of Articles 13 and 5 (5) of the Convention (cf. below paras. 62 ff. and 69 ff.).

(3) Various opinions

5. The problem has been dealt with by several authors. The Commission has never made a clear distinction between "competence" and "incompati-

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[16]) Rosenne, *op. cit.*, pp. 301–302.

[17]) Cf. Applications Nos. 1327/62, *X* v. *F.R.G.* (unpubl.); 1336/62, *X* v. *Austria* (unpubl.); 1348/62, *X* v. *Austria* (unpubl.); 1358/62, *X* v. *F.R.G.* (unpubl.); 1719/62, *X* v. *F.R.G.* (unpubl.); 1723/62, *X* v. *Austria* (unpubl.); 1714/62, *X* v. *F.R.G.* (unpubl.).

bility" and in fact used the term "competence" at a later stage in its jurisprudence.

Fawcett [18]) says:

> "Without exclusion of other possibilities, an application may be incompatible with the Convention, which
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> (1) claims a right or freedom, which is not protected or guaranteed by the Convention; or
>
> (2) falls outside the scope of the Convention *ratione temporis, personae* or *loci;* or
>
> (3) falls within the scope of a reservation ... under Article 64; or
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> (4) is made by an applicant engaged in activities described in Article 17".

He does not expressly refer to the competence *ratione materiae,* but apparently, he either includes it under "incompatibility" as with everything else or considers it to be as such the "incompatibility".

Sørensen [19]) although saying that: «L'Article 27, paragraphe 2 impose à la Commission le devoir de déclarer irrecevable toute requête individuelle qui est considérée incompatible avec la Convention — ce qui vise les différents chefs d'incompétence — ...», later [20]) when expressly mentioning those *différents chefs d'incompétence* does not mention the competence *ratione personae.*

This, obviously, intended omission seems to coincide with the construction of Antonopoulos [21]) who distinguishes between *conditions lato sensu* and *stricto sensu* of admissibility. He further considers it wrong to speak of *compétence ratione personae,* he prefers to speak of «la qualité de la personne de la partie».

Golsong [22]) includes in its contents also the lack of proper parties *(Aktiv- und Passivlegitimation),* and Danelius [23]) excludes the non-competence *ratione temporis.* Similarly, Eissen [24]) examines the Commission's competence *ratione temporis* as such and considers "incompatibility" as

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[18]) Application of the European Convention on Human Rights (1969), p. 312; Morrison, The developing European Law of Human Rights (1967), pp. 88 ff., seems to adopt the same line.

[19]) *Op. cit.* (above note 5), pp. 335 ff.

[20]) *Ibid.,* p. 338.

[21]) La jurisprudence des organes de la Convention européenne des droits de l'homme (1967), pp. 23 ff. (in particular pp. 37 ff.).

[22]) Das Rechtsschutzsystem der europäischen Menschenrechtskonvention (1958), pp. 51 ff.

[23]) Conditions of admissibility in the jurisprudence of the European Commission of Human Rights, Revue des Droits de l'Homme vol. 2 (1969), pp. 284 ff. (306).

[24]) Jurisprudence de la Commission européenne des droits de l'homme, Décisions en matière de compétence *ratione temporis,* A.F.D.I. 1963, pp. 722 ff.

excluded in cases of incompetence *ratione temporis*. Monconduit[25]) again identifies "incompatibility" and "non-competence" without restrictions.

Vasak[26]), referring to the Commission's Decision No. 788/60, *Austria* v. *Italy*[27]), observes that the Commission has established in it a distinction between rules of admissibility and rules of competence but, he observes, it does not consequently distinguish between the two.

Nay-Cadoux[28]) assumes that the Commission in its jurisprudence identified "incompatibility" and "non-competence" in general, but suggests that a particular case of incompatibility remains, which is quite independent from competence: that one under Articles 15 and 17 of the Convention. She refers to various decisions of the Commission in order to prove this suggestion.

Khol, who also identifies incompatibility with non-competence[29]), in his further references to the problem[30]) points out that the Commission declares an application inadmissible for non-competence if the particular complaint does not enter into the *Geltungsbereich* (scope of application) of the Convention, or the *Zuständigkeit* (jurisdiction, competence) of the Commission. He further touches the heart of the problem when saying that the "incompatibility *ratione materiae*" is a result of an examination similar to an examination of the merits of an application.

The problem of the distinction between competence and incompatibility is obviously recognised. Nevertheless, neither the various opinions expressed nor the Commission itself have adequately described or laid down the systematical limits between the two notions. It is submitted that the distinction is sufficiently simple if one considers that the provisions of the Convention regarding admissibility can be divided into two categories: the procedural, preliminary provisions (which if not expressly laid down are derived from elementary legal notions and the wider application of international law) and the substantial provisions which lay down which rights are guaranteed. Therefore an application's admissibility depends on a twofold examination: (a) whether the Commission is competent (preliminary

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[25]) *Op. cit.* (above note 5), pp. 345–346.

[26]) La Convention européenne des droits de l'homme (1964), p. 88.

[27]) Yearbook vol. 4, pp. 117 ff.

[28]) Les conditions de recevabilité des requêtes individuelles devant la Commission européenne des droits de l'homme (1966), pp. 108 ff. (116 ff.).

[29]) Zwischen Staat und Weltstaat (1969), p. 363: »... das Wort "incompatible" weist auf das Wort ›Kompetenz‹ hin ...«.

[30]) *Ibid.*, p. 364.

question) and (b) whether the conditions of admissibility, as laid down in the Convention, are fulfilled.

In order to prove this thesis we shall now examine the Commission's jurisprudence on the subject.

II. The Notion of Competence in the Jurisprudence of the Commission

A. Ratione temporis[31])

6. In its early decisions, the Commission declared complaints which referred to situations prior to its entry into force as inadmissible *ratione temporis*. It, of course, explained that it could not examine those complaints in relation to the Convention because it concerned the facts prior to its existence, and referred to "generally recognised rules of international law"[32]). It used the following formula[33]):

> «Considérant que les décisions qui ont rejeté l'opposition du requérant ... constituent des actes instantanés dont la Commission ne peut apprécier la compatibilité[34]) avec la Convention puisqu'elles se placent toutes à une date antérieure à l'entrée en vigueur de la Convention à l'égard de la Belgique.
>
> Qu'il y a donc lieu de déclarer de ce chef la requête irrecevable ratione temporis».

In another case the terms used are slightly different:

> «... selon les principes du droit international généralement reconnus ladite Convention ne régit pour chaque Etat Contractant que les faits postérieurs à son entrée en vigueur à l'égard de cet Etat; qu'il y a donc lieu de rejeter la requête de ce chef comme irrecevable *ratione temporis*»[35]).

7. In Application 788/60, *Austria* v. *Italy*, (*Pfunders'* case) the Commission discussed at length the limits of its competence *ratione temporis* (and additionally the character of the Convention as an objective public order)[36]). The way the Commission has examined this subject and decided upon it is indeed very significant.

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[31]) See for more details among others, Eissen, *op. cit.* (above note 24), pp. 722 ff.; Danelius, *op. cit.* (above note 23), pp. 331 ff.

[32]) No. 310/57, *X* v. *F.R.G.* (unpubl.); cf. *Mavrommatis* case (above note 11), p. 35: "... that in case of doubt, jurisdiction based on any international agreement embraces all disputes referred to it after its establishment".

[33]) Cf. No. 369/59, *X* v. *Belgium*, in Collection of Decisions 1, (henceforth Collection).

[34]) Note the use of the term *compatibilité avec la Convention*.

[35]) No. 631/59, *X* v. *F.R.G.*, in Collection 3. Note the clear reference to the generally recognised principles of international law; No. 655/59, *X* v. *F.R.G.* in Collection 4, p. 1.

[36]) Yearbook 4, pp. 117 ff.

The Italian Government submitted two preliminary objections concerning the Commission's competence *ratione temporis* and *ratione materiae*[37]. Italy had deposited its instrument of ratification of the Convention on 26 October 1955 and Austria on 3 September 1958. The Court's decisions attacked by the applicant government (Austria) were rendered before the latter had ratified the Convention. It was argued that Italy and Austria assumed mutual rights in respect of one another under the Convention on 3 September 1958, and therefore the Commission was not competent *ratione temporis* to examine the application. The Commission following the view that the obligations undertaken under the Convention are of objective character[38] affirmed its competence.

The operative clause *(dispositif)* of the Commission's decision is of particular importance for the purpose of this article, it runs as follows:

> "Now, therefore, all matters respecting the substance of the case being reserved;
>
> Affirms that it is competent to examine the admissibility of the application;
>
> Declares the application inadmissible in respect of ...
>
> Declares the application admissible and retains it in respect of ..." [39].

8. It is true that the Convention does not contain any express provisions dealing with the Commission's competence *ratione temporis*. Provisions dealing with its entry into force are of little relevance, for example, Article 66(2) and (3)[40]. These provisions, however, are not specific enough and the Commission's competence *ratione temporis* is derived more directly from the "principles of international law generally recognised" [41].

In its decision in the *de Becker* case[42], the Commission said:

> "... whereas the question then arises whether the above-mentioned claim is inadmissible *ratione temporis;* whereas it is true that this is not one of the grounds for inadmissibility enumerated in Articles 26 and 27 of the Convention; for Article 66 of the Convention merely determines when the Convention shall

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[37]) With regard to the objection concerning non-competence *ratione materiae* see below, paras. 35–36.

[38]) Discussion of the problem, cf. Walter, *op. cit.* (above note 3), pp. 48 ff., who distinguishes between the *Gegenseitigkeitstheorie* (theory of reciprocity) and the *objektive Verpflichtungstheorie* (theory of objective obligations). In his opinion, the latter theory emanates clearly from the Commission's decision in Application No. 788/60, *Austria* v. *Italy*. Walter's assumption appears justified. The Commission's decision does not leave any margin of doubt.

[39]) Yearbook 4, p. 182.

[40]) We find similar provisions in Article 6 of Protocol No. 1 and 7(1) of Protocol No. 4.

[41]) Cf. Eissen, *op. cit.* (above note 24), p. 723.

[42]) No. 214/56, *de Becker* v. *Belgium*, Yearbook 2, pp. 213 ff. (230).

come into force, without specifying the date from which its entry into force shall have effect; whereas, however, inadmissibility on *ratione temporis* grounds derives from the generally recognised principle of international law that treaties and conventions are not retrospective in effect; ...".

9. Until its decision 788/60, the Commission spoke solely of "inadmissibility *ratione temporis*"[43]). It then gradually changed, as it was shown above, by the several decisions cited and speaks today of competence *ratione temporis*. This formula has, ever since, been retained and there are hundreds of decisions confirming it[44]).

The usual formula used today for the *ratione temporis* cases concludes:

"It follows that the examination of the application is outside the competence of the Commission *ratione temporis*".

10. It is further obvious from the *Pfunders'* case (see above under 7) that competence *ratione temporis* is a pre-preliminary question to be decided by the Commission first, and only if it is answered in the affirmative does the Commission proceed to examine the question of admissibility.

11. It clearly separates the issue from the question of incompatibility, which — being a question of admissibility proper — arises after the decision on the Commission's competence *ratione temporis*. This is perfectly clear from the wording of one of the early decisions of the Commission, No. 369/59[45]).

12. Throughout the Commission's jurisprudence the notion of competence *ratione temporis* has been kept systematically distinct from any other reason of inadmissibility, including also the notion of incompatibility, under Article 27 (2).

13. Therefore the theory that incompatibility and non-competence are identical, is not exact, at least so far as the competence *ratione temporis* is concerned (cf. below paras. 53—58).

B. Ratione loci[46])

14. It is on the basis of Articles 1 and 63 (1)[47]) and (4) of the Convention

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[43]) *de Becker, idem*, p. 235 *in fine*.

[44]) Cf. Eissen, *op. cit.*, p. 723: 450 applications between September 1955 till June 1963.

[45]) Collection vol. I; cf. above under para. 6.

[46]) See for more details, among others, Danelius, *op. cit.* (above note 23), pp. 307 ff.

[47]) It has been suggested that in this respect Article 1 and Article 63(1) contradict each other, are in apparent conflict; cf. Morrison, *op. cit.* (above note 18), pp. 76–77; however, this question is outside the limits of this article; cf. also Article 4 of Protocol No. 1 and Article 5 of Protocol No. 4.

that the competence of the Commission *ratione loci, i. e.* the limitation of its competence by geographical boundaries[48]) is fixed.

15. The question whether competence of the Commission *ratione loci* and geographical *espace d'application* of the Convention coincide or not, does not concern this article.

16. Article 27(2) of the Convention does not refer to the inadmissibility because of geographical reasons. It only refers to incompatibility with the provisions of the Convention; a possible heading for the "inadmissibility" *ratione loci?* Further, the *ratione loci* competence, contrary to the *ratione temporis* competence, is expressly mentioned and described by the Convention itself. It is sufficiently described under Article 1 and Article 63(1) and (4) of the Convention[49]).

17. In one of its earliest decisions[50]), the Commission refers to the competence *ratione loci:*

> "Whereas the applicant's principal complaint relates to the refusal of the authorities of the Federal Republic of Germany to delete from his »Strafregister« (police record) the decision of a Court in the Eastern Zone of Germany sentencing him to pay a fine of 400 marks, which decision he claims to have been rendered under conditions that do not accord with the terms of the Convention, especially those of Article 6;
>
> Whereas the decision in question was that of a tribunal whose activities do not fall within the competence of the Commission; whereas, therefore, the Commission is not concerned in the present case to determine the actual conformity or otherwise of the proceedings of that tribunal with the provisions of the Convention, but is only concerned to examine, in the light of the provisions of the Convention, the action of the authorities of the Federal Republic . . .[51]) (emphasis supplied).
>
> Now therefore the Commission
>
> Declares this application inadmissible".

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[48]) It has been referred to as *espace d'application* of the Convention which coincides with the competence *ratione loci,* cf. Antonopoulos, *op. cit.* (above note 21), p. 28; Partsch, Die Rechte und Freiheiten der europäischen MRK (1966), p. 35, refers to it as *Geltungsbereich,* viz part of it *the räumlicher Geltungsbereich;* and Khol, *op. cit.* (above note 29), p. 364, refers to it as *örtlicher Geltungsbereich* or *örtliche Zuständigkeit der Kommission.*

[49]) Article 63(4) *in fine* mentions expressly the notion of competence. Article 25 says "the Commission may receive ...", Article 63(4) *in fine* says "... it accepts the competence of the Commission to receive petitions ...".

[50]) No. 448/59, *X* v. *F.R.G.,* Yearbook 3, pp. 254 (264–265); cf. also No. 1322/62, *X* v. *F.R.G.,* Collection 13, pp. 55 ff. (67).

[51]) At pp. 258–259 we find a summary of the submissions of the respondent government, it is stated: "... the trial at which the applicant was concerned and which took place in territory where the Convention did not apply ..." (emphasis supplied).

It is obvious that in its above decision the Commission established its non-competence *ratione loci* with regard to one point and does not proceed in its examination, it says: "whereas, therefore, the Commission is not concerned ... to determine the actual conformity ... of the proceedings of that tribunal ... but ... the action of the authorities of the Federal Republic, etc.". The examination of the latter led to the decision of inadmissibility, while the examination of the first point stopped after the establishment of non-competence. The rest of the case was rejected as being manifestly ill-founded (not incompatible).

18. In another case, No. 1065/61 [52]), the method followed is the same. In this case, several Belgian nationals, ex-residents of the Belgian Congo, sued to recover assets frozen in various banks in the Congo by the Congolese Government. They complained that Belgium's policies towards her colony had led to the confiscation of their property. Confronted with Article 63, they argued that the Convention applied to the Congo since Belgium had treated it as part of its metropolitan territory. At any rate, they contended that they had been within the jurisdiction of Belgium.

The Commission found that the Belgian parliament had discussed extensively the Convention's protection to the colonies but had voted against it. Deciding that the Belgian Congo was the kind of territory Article 63 was meant to cover, the Commission ruled that it did not have jurisdiction over the territory where the case arose:

> "...
> whereas, therefore, it is manifest, from the examination of the file, that a part of the application does not come within the competence of the Commission ratione loci...".

The Commission does not specify further which part is outside its competence [53]).

19. Obviously, again, this second form of incompetence of the Commission is not confused in its jurisprudence with the incompatibility mentioned in Article 27 (2) of the Convention. Complaints outside its competence *ratione loci* have never been declared inadmissible or being incompatible but only for non-competence *ratione loci* [54]).

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[52]) *X and others* against *Belgium*, Yearbook 4, pp. 261 ff. The question whether this decision is correct in view of Article 1 and Article 63 of the Convention, does not concern the present article; cf. Morrison, *op. cit.* (above note 18), p. 77.

[53]) The next two points dealt with in the decision were both rejected as being incompatible, but in no connection with the incompetence *ratione loci.*

[54]) Cf. No. 1322/62, *X* v. *F.R.G.*, Yearbook 6, pp. 494 (515).

20. Although competence *ratione loci* is described in the Convention, it is analogous to the competence *ratione temporis*. This is also recognised by the Commission in the above-cited case against Belgium:

> "... nevertheless, the said guarantee is valid only within the limits of time and space recognised by those States ..." [55]).

C. Ratione personae [56])

21. Another limiting factor of the Commission's competence is the existence of a proper party; party applicant and party respondent. This has been classified as competence *ratione personae*. This competence is defined by Articles 24 and 25 of the Convention [57]).

Article 24 limits State petitioners to signatories to the Convention, and Article 25 stipulates: "The Commission may receive petitions from any person, non-governmental organisation or groups of individuals claiming to be the victim [58]) of a violation by one of the High Contracting Parties ...". Respondents can be only States who are members of the Council of Europe which "... have recognised the competence [59]) of the Commission to receive such petitions ...". The Commission in its jurisprudence has not followed a consistent line.

(1) Jurisprudence with regard to parties respondent

(a) State respondents which did not recognise its competence under Article 25(1)

22. In Application 3813/68 [60]) the applicant lodged a complaint against the United Kingdom concerning his conviction and sentence and the conduct of proceedings before the Criminal Court of Malta. These complaints related to events which occurred in Malta subsequent to the date of her independence. The Commission rejected them and said the following:

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[55]) Yearbook 4, p. 268.

[56]) Cf. for more details, among others, Müller-Rappard, Le droit d'action en vertu des dispositions de la Convention européenne des droits de l'homme, Revue Belge de Droit International 1968, pp. 485 ff.; Danelius, *op. cit.* (above note 23), pp. 311 ff.

[57]) Vasak, *op. cit.* (above note 26), pp. 95 ff.; Antonopoulos, *op. cit.* (above note 21), pp. 37 ff.; Morrison, *op. cit.* (above note 18), pp. 71 ff.; Case-Law Topics vol. 3 "Bringing an application before the European Commission of Human Rights", pp. 1 ff.

[58]) Great difficulties arose as to the notion of "victim", cf. Case-Law Topics vol. 3, pp. 2 ff., for the Commission's jurisprudence on the subject and later discussion in this article, below paras. 27–28.

[59]) Here again we have a direct reference to the "competence of the Commission".

[60]) Collection 32, pp. 12 (18–19); cf. also No. 655/59, Collection 4; No. 4517/70, Collection 38, pp. 90(96).

"... whereas these events can in no way be held to involve any responsibility, under the Convention, of the Government of the United Kingdom; whereas therefore the Commission has no competence *ratione personae* to examine these complaints; whereas it follows that in this respect the application is incompatible with the provisions of the Convention..." (emphasis supplied).

With the same wording, the Commission rejected a further complaint made by the applicant against the rejection of the Judicial Committee of the Privy Council of the applicant's petitions for special leave to appeal to it and the resulting failure of the Judicial Committee to remedy irregularities allegedly committed by the judicial authorities and the legislature of Malta. It considered, according to the Judicial Committee's own case law[61]), that the appeal to the Privy Council is part of the judicial system of the country from which the appeal comes.

(b) Complaints against private individuals

23. The same formula is used for the dismissal of complaints against private individuals including lawyers. It says[62]):

"... It follows that the Commission has no competence *ratione personae* to admit applications directed against private individuals... It follows that the application is incompatible with the provisions of the Convention..." (emphasis supplied).

(c) Recent modification of the wording

24. Recently, the Commission has modified the wording of its decisions with regard to complaints against private individuals (and lawyers). It now says[63]):

"... The Convention may not, therefore, admit applications directed against private individuals... It follows that the application is incompatible *ratione personae* with the Convention within the meaning of Article 27 (2)".

25. It appears that in its previous decisions (under 22. and 23. above) the Commission not only took competence and incompatibility as synonymous reasons for inadmissibility, but, even further, it considered that

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[61]) No. 3813/68, *loc. cit.*, and the case *Iralebbe* v. *The Queen* [1964] A. C. 900 cited there.

[62]) Nos. 172/56, *X* v. *Sweden*, Yearbook 1, p. 211; 852/62, *X* v. *F.R.G.*, Yearbook 4, p. 346; 3925/69, Collection 32, pp. 56, 58; 1599/62, Yearbook 6, pp. 348, 356.

[63]) Cf. Nos. 4500/70, *X* v. *F.R.G.* (unpubl.); No. 4534/70, *X* v. *U.K.*, Collection 38, pp. 120(128); No. 4445/70, *X* v. *F.R.G.*, Collection 37, pp. 119(121).

"since it had no competence *ratione personae* it followed that the complaint was incompatible within the meaning of Article 27(2)".

There is a *non sequitur* in this wording, because it would make incompatibility a result of non-competence. That would mean two things: first that the two notions were not identical (with which we agree) and second, that after establishing its incompetence, the Commission proceeds further to find that the reason for inadmissibility is the incompatibility; instead of stopping and rejecting the complaint simply for non-competence.

26. It is this confusion which the recently introduced modification (see para. 24) sought to eliminate. However, it still remains virtually the same since it says that "the Commission may not admit such complaints, therefore it follows that the application is incompatible *ratione personae*". It eliminated the preliminary reference — *expressis verbis* — to the competence and made it appear that there exists incompatibility *ratione personae*, which is not, in our opinion, the case.

(2) Jurisprudence with regard to parties applicant

27. The Commission's competence is also limited *ratione personae* to cases where the application is brought by a (proper) party entitled to lodge such an application. With regard to applicant States, the Commission had never had to deal with an application by a State not legitimated to bring an application under Article 24. With regard to individual applicants, as defined by Article 25(1), the notion of (alleged) "victim" qualifies those entitled to lodge a complaint[64]).

It could be argued that cases in which the Commission did not accept that the applicant was a "victim", within the meaning of Article 25(1), should have been rejected for non-competence *ratione personae*. However, this reason of inadmissibility does not appear expressly in cases where the Commission considered that the applicant was not a victim.

In some cases the general inconsistency of certain national legislation with the Convention was alleged. In Application 290/57 against Ireland[65]) the applicant alleged that the "Offences against the State Act, 1939" and the "Offences against the State (Amendment) Act, 1940" were inconsistent with various provisions of the Convention. The Commission held:

"... it is not within the competence of the Commission in the present case to examine the conformity [of the Acts] ... with the Convention; and whereas ...

[64]) For further details on the notion of victim, direct and indirect, see: Case-Law Topics, *op. cit.* (above note 57), p. 177; Morrison, *op. cit.* (above note 18), pp. 71 ff.

[65]) Yearbook 3, pp. 214 (220); cf. also Nos. 867/60, *X* v. *Norway*, Yearbook 4, p. 270; 1691/62 and 1769/63, *X* v. *Belgium*, Yearbook 7, pp. 141, 159, 161.

therefore, the application ... is incompatible with the provisions of the Convention, in particular of Article 25 governing the conditions under which the Commission may receive an application from an individual ...".

In cases where the Commission refused to regard an applicant as a victim, it used a simpler formula which is more close to the wording of Article 25(1). It says:

"... whereas it follows that, in regard to this complaint the conditions under which the Commission may receive an application from an individual are not satisfied; and whereas therefore, this part of the application is incompatible with the provisions of the Convention ..." [66]).

In the Case-Law Topics[67]), the principles applied are summarized as follows:

"An individual applicant must show that he has been a victim of a violation of the Convention. Where he does not even claim himself to be such a victim, the Commission has no competence *ratione personae* to deal with his application. However, where he alleges himself to be a victim, the Commission examines his allegation and also takes into consideration the possibility of his being an 'indirect victim', that is to say, a person who would indirectly suffer prejudice as a result of a violation committed against another person or who would have a valid personal interest in securing the cessation of such violation".

28. Although the term competence *ratione personae* does not appear, as such, in any of the Commission's decisions which reject applications for lack of a "victim" applicant, the above passage correctly concludes that this is what happens in all such cases.

D. Ratione materiae[68])

(1) General

29. Admittedly the notion of competence *ratione materiae* is well known in international law, in the functioning of international organs and, in particular, of judicial ones. The European Court of Human Rights in its judgment in the *Vagrancy* Cases[69]) said:

[66]) No. 2358/64, Collection 23, p. 147; cf. also 436/58, Yearbook 2, p. 386; 486/69, Yearbook 5, p. 192; 2257/64, Collection 21, p. 72; 2291/69, Collection 24, p. 20; 2472/65, Collection 23, p. 42.

[67]) *Op. cit.* (above note 57), p. 7.

[68]) Cf. for more details, among others, Vasak, *op. cit.* (above note 26), pp. 93 ff.; Danelius, *op. cit.* (above note 23), pp. 309 ff.

[69]) European Court of Human Rights, Series A, p. 29; cf. also *Belgian "Linguistic"* cases, European Court of Human Rights, Series B, p. 18, and Series A, Decision of 9.2.1967, pp. 18–19.

"In order to judge whether is has jurisdiction to examine the submissions of the government objecting to the examination of the present applications, the Court refers to the text of the Convention and especially to Article 45 which determines its jurisdiction *ratione materiae*. This Article specifies that 'the jurisdiction of the Court shall extend to all cases concerning the interpretation and application of the ... Convention ... etc.'".

No similar provision exists for the Commission. However, from several provisions one could describe its competence *ratione materiae:* it "may only deal" (Article 26), "shall not deal", "shall consider inadmissible", "shall reject" (Article 27 (1) (2) and (3)) or it may "accept" (Article 28) an application. That is, the Commission may declare an application inadmissible (for the reasons stated in Articles 26 and 27), or admit it (accept it) for the purposes of Articles 28, 29, 30 and 31[70]). All these Articles, of course, in conjunction with Article 19 constitute the limits of its competence *ratione materiae; i.e.* to decide on admissibility and, if it declares the Application admissible, to proceed to its tasks under Articles 28, 29, 30 and 31 of the Convention. Be that as it may, again one should examine the Commission's jurisprudence on this point.

30. The Commission in its jurisprudence, till very lately, understood the limits of its competence *ratione materiae* to be the "rights guaranteed" under the Convention and its Protocols. When an infringement of rights obviously guaranteed is alleged, the Commission, without expressly establishing its competence proceeds in the examination of its admissibility. If the contrary is the case, it establishes its incompetence *ratione materiae* and rejects the complaint as incompatible with the provisions of the Convention. For example, where the complaint is directed against the refusal of political asylum, the Commission says[71]):

"whereas otherwise its examination is outside the competence of the Commission *ratione materiae;* whereas the right to political asylum is not as such included among the rights and freedoms guaranteed by the Convention; ... whereas ... incompatible with the provisions of the Convention".

31. However, this formula has not always been constant; for example, in an early case 159/56[72]) it was said:

«... que le droit à un niveau de vie suffisant et le droit à un logement convenable dont la méconnaissance prétendue constitue l'unique objet de la requête,

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[70]) Articles 24 and 25 deal also with competence but only with the competence *ratione personae* and the subject matter of an application.

[71]) No. 1802/62, *X.* v. *F.R.G.*, Yearbook 6, pp. 462(478).

[72]) Yearbook 1, pp. 202–203.

ne figurent pas, quant à leur principe, parmi lesdits droits et libertés; qu'en effet la Convention ne contient aucune disposition correspondant à celle de l'article 25 (1) de la Déclaration Universelle des Droits de l'Homme; qu'il appert donc que la requête est incompatible avec les dispositions de la Convention; qu'il y a lieu, par conséquent, de la rejeter en vertu de l'article 27 (2) de la Convention; ...».

Obviously at the time competence *ratione materiae* was not mentioned.

(2) Recent modification

32. Recently the Commission has modified the wording of its decisions with regard to rights not guaranteed. It now says[73]):

"... However, under Article 25 (1) of the Convention, it is only the alleged violation of one of the rights and freedoms set out in the Convention that can be the subject of an application ... In particular no right to receive a pension ... is as such included among the rights and freedoms guaranteed by the Convention ...

It follows that this part of the application is incompatible *ratione materiae* with the provisions of the Convention within the meaning of Article 27 (2)".

33. This modification is of great systematical importance. The deletion of the previous wording which included reference to the non-competence *ratione materiae* and concluded that therefore the complaint was incompatible leads in our opinion to the following conclusions:

(a) the Commission assumes competence to examine at the stage of admissibility whether a right, the violation of which is alleged, is or not guaranteed under the Convention[74]);
(b) incompatibility with the provisions of the Convention becomes thus an independent notion; and
(c) one case of incompatibility is that of *ratione materiae*.

34. This modification was obviously made in order to correct the old wording which was indeed incomplete. It is obvious today that incompatibility includes a certain examination of the merits (cf. below para. 42) therefore it could never be either identical or a result of the Commission's competence *ratione materiae*.

Furthermore the Commission in its previous decisions used to say that the examination of the admissibility of rights not guaranteed was outside its competence. It continued with the establishment of the legal fact that a

[73]) No. 4130/69, *X.* v. *the Netherlands*, Collection 38, pp. 9 (13).

[74]) This is absolutely correct, since the Commission is always obliged to do so, say for example, in the case of whether the right of access is guaranteed by Article 6 (1); No. 4115/69, *Knechtl* v. *U.K.*, Collection 36, pp. 43 ff.; No. 4451/70, *Golder* v. *U.K.*, Collection 37, pp. 124 ff.

certain right was not guaranteed under the Convention. Normally it should have stopped there since the reason for the rejection of the complaint — non-competence — was established, and it did not need to refer further to Article 27 (2). This is what happened in the cases of *ratione temporis* and *ratione loci.*

Finally, it seems that the previous description of the Commission's competence *ratione materiae* was wrong. It referred to *materiae* which are not referrable to its competence (cf. also above under 29). In fact it said:

> "the Commission wishes to point out that the Convention, under the terms of Article 2, guarantees only the rights and freedoms set forth in Section I of the Convention; and whereas, under Article 25 (1), only the alleged violation of one of those rights and freedoms by a Contracting Party can be the subject of an application presented by a person, non-governmental organisation or group of individuals; whereas otherwise its examination is outside the competence of the Commission ratione materiae".

That is too wide a description of the Commission's competence *ratione materiae* since it decides only on the admissibility of such complaints (cf. below paras. 60—61).

It would further mean that for rights which are obviously not guaranteed the Commission announces non-competence *ratione materiae;* but for rights which might, impliedly be guaranteed — as the right of access[75]) — not only has the Commission the competence to examine whether they are guaranteed or not but also declares them admissible and proceeds to the examination of the merits. This differentiation between rights obviously not guaranteed and rights which might be, in one way or the other, guaranteed is not systematically clear.

What the Commission does in both cases at the admissibility stage is to examine against the text of the Convention whether a right is included or not. It obviously assumes competence for such an examination.

(3) Applicability of competence ratione materiae on State applications

35. According to the Commission, Article 27 (2) does not apply to inter-State applications. It said in Application No. 788/60[76]):

> "Whereas the Commission has already pronounced and judged in its decisions of 2 June 1956 and 12 October 1957 with respect to the admissibility of Applications Nos. 176/56 and 299/57 of the Greek Government against the Government of the United Kingdom, that the provisions of Article 27, para-

[75]) Cf. above note 74.

[76]) *Pfunders'* case, Yearbook 4, pp. 117 (180—183).

graph (2) of the Convention refer solely to applications submitted under Article 25, and not to applications submitted by Governments; whereas it has deduced, in the second of these decisions, that when it investigates the admissibility of an application made by a State it does not have to investigate whether the applicant Contracting Party has submitted preliminary evidence with respect to the truth of its allegations, since such an investigation goes to the substance of the case;

Whereas, moreover, the complaints set forth in the application are not outside the general scope of the Convention;

Decides that the ground of incompetence *ratione materiae* examined above must be set aside, and notes that in any case the Italian Government did not pursue these grounds in its final submissions of 9 January 1961;

Whereas it has not found *ex officio* any other grounds of incompetence or inadmissibility;".

36. It is not specified which part of Article 27 (2); it obviously includes the incompatibility. And the Commission proceeds further and identifies non-competence *ratione materiae* and incompatibility. If that were correct then the Commission would never be able to reject an inter-State application for not falling within its competence[77]).

In its first decision on admissibility in the First Greek Case[78]), the Commission examined the preliminary objection raised by the Greek Government that it was not within the Commission's competence to examine the actions of a revolutionary Government. After examination of this objection, the Commission found that it was competent.

The question arises what would the Commission say if it found that it had no competence? The Commission would then be faced with the following problem. There would be no question of non-competence *ratione temporis* or *ratione loci*. Incompetence *ratione personae* or *ratione materiae*? They would be excluded as well according to the Commission's own jurisprudence, because those two cases of incompetence are identified with incompatibility under Article 27 (2) of the Convention, and this provision is not applicable in State applications.

This would thus lead to the conclusion: (if we follow the authors who fully identify non-competence and incompatibility), that the Commission would never be able to reject a State application for non-competence. This is obviously unacceptable.

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[77]) Except in case of non-competence *ratione temporis*? The last phrase of the citation (para. 35 above) might be interpreted to mean that. Another indication for the separate (from incompatibility) existence of competence *ratione temporis*.

[78]) Collection 25, pp. 92 (112–114); Report of the Commission on the First Greek Case vol. I part 2, pp. 1 (21–23).

(4) Non-competence to act as fourth instance

37. In cases where the applicant complains of wrongful conviction and sentence the Commission uses the so-called "fourth instance" formula. It says that[79]):

> "... in regard to the judicial decisions of which the applicant complains, the Commission has frequently stated that, in accordance with Article 19 of the Convention, its only task is to ensure the observance of the obligations undertaken by the Parties in the Convention. In particular, the Commission is not competent to deal with an application alleging that errors of law or fact have been committed by domestic courts, except where it considers that such errors might have involved a possible violation of any of the rights and freedoms set out in the Convention ... In the present case, the Commission finds that there is no appearance of any such violation in connection with the decisions complained of". (Emphasis supplied).

It usually continues to say:

> "An examination by the Commission of this complaint as it has been submitted, including an examination made ex officio, does not therefore disclose any appearance of a violation ... It follows that the application is manifestly ill-founded ...".

38. The conclusion "manifestly ill-founded", which the Commission reaches in such cases contradicts the construction of the decision and also the (according to us wrong) identification of incompetence and incompatibility.

In such cases the Commission examines (declares itself competent to examine: except where etc.), mostly *ex officio*, whether the errors of law or fact possibly committed by the domestic courts involve a violation *e. g.* of Article 6 of the Convention. It finds that they do not, therefore the complaint remains barely an allegation of errors of law or fact committed by the domestic courts. If so, then the solution is pointed out in the same decision; the Commission is not competent to deal with such complaints. It should therefore be rejected for non-competence or (if identical) for incompatibility. The reasoning "manifestly ill-founded" appears not only superfluous but also wrong. The Commission's incompetence to act as a fourth instance is, in our opinion, a case *par excellence* of non-competence *ratione materiae*.

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[79]) See for example, Nos. 458/59, Yearbook 3, pp. 222 (236); 1140/61, Collection 8, pp. 57 (62); 4171/70, Collection 39, pp. 44 (45).

III. Incompatibility

(1) General

39. The term "incompatible with the provisions of the Convention" appeared for the first time in the Preliminary Draft Convention[80]) of 9 March 1950, in Article 23 (19). It stated in paragraph 3:

> "The Commission shall reject any application ... which it considers (a) incompatible with the provisions of the present Convention; (b) manifestly ill-founded".

The draft immediately before it, Article 17[81]), did not mention the term "incompatible". It stated:

> "The Commission shall reject any application which it considers irregular under the provisions of Articles 14, 15 and 16[82]) and those which it considers to be manifestly ill-founded".

The *travaux préparatoires* are therefore unable to furnish us with any explanation of such ingenuity of drafting. It is in any event impossible to assume that the term "incompatible" simply replaced the term "irregular".

40. The term "incompatible" or "incompatibility" does not appear in the «Dictionnaire de la terminologie du droit international»[83]), nor does it appear in the "Stroud's Judicial Dictionary"[84]), nor does the German equivalent term *unvereinbar* appear in the »Wörterbuch des Völkerrechts«[85]). In international law, it is a *novus terminus*[86]). Of course, in internal public law the term is known as the word to describe, for example, the legal impossibility of a civil servant, member of parliament or member of a cabinet to assume a second office, or more offices. This of course has nothing to do with the

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[80]) Doc. CM/WP 1 (50) 14, p. 16; Travaux préparatoires, Collected Edition II, p. 462.

[81]) Doc. A. 833, p. 8; Travaux préparatoires, Collected Edition II, p. 394.

[82]) Article 14: right of the States to petition; Article 15: right of individuals to petition; Article 16: exhaustion of domestic remedies.

[83]) Edited by J. Basdevant (1960).

[84]) Editor J. Burke (London 1952).

[85]) 2nd edition edited by Schlochauer (Berlin 1972).

[86]) We find the same term in Article 3 of the Optional Protocol to the International Covenant on Civil and Political Rights: "The Committee shall consider inadmissible any communication under the present Protocol which is anonymous, or which it considers to be an abuse of the right of submission of such communications or to be incompatible with the provisions of the Covenant". The term "out of order" appears in Article 47 (c) of the English text of the American Convention on Human Rights, which is similar to the term "irregular" as used in previous drafts of the European Convention (cf. note 81). It is also used in the Commission's phraseology, paradoxically enough, in order to describe, for example, legislative measures which violate the Convention: they are considered as "incompatible" with the Convention.

phraseology of Article 27(2) of the Convention. The "Shorter Oxford English Dictionary"[87]) explained the word incompatible as: incapable of being held together; mutually intolerant; incapable of existing together in the same subject; discordant, incongruous, inconsistent, etc.[88]). It obviously has no relation to the term "competence" as Khol[89]) assumes, even if one goes far back into historico-etymological origin.

41. We saw before that the Commission never used the term "incompatible" for cases rejected for non-competence *ratione temporis* and *ratione loci*. It did, however, employ it for the other two cases of incompetence *ratione personae* and *ratione materiae*. However, it should be observed that for the cases where an applicant is not found to be a victim, the term "incompatible" appears alone and it is only assumed by theory that it was meant to be the incompetence *ratione personae* regarding applicant persons[90]). We also saw the recent modifications in the latter two forms of decisions (cf. above paras. 24—26 and 32—34).

(2) Incompatibility result of an examination similar to an examination of the merits

42. It is very often said and written[91]) that the rejection of a complaint as being incompatible with the provisions of the Convention presupposes an examination similar to an examination of the merits of the complaint, as it is the case with the reasoning "manifestly ill-founded". It is the examination of the complaint against one or more provisions of the Convention in order to determine whether the facts alleged fall within the ambit of one or other right guaranteed under the Convention. This means that in any case the Commission assumes competence to examine the compatibility and that it is impossible to identify the two notions, the one, competence, referring to procedure and incompatibility referring to the merits. It was said above (paras. 30 and 34) that if the Commission is not certain whether a complaint is incompatible or not, it declares the application admissible[92]).

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[87]) 3rd Edition (1964).

[88]) Equivalent explanations we find in: »Der Grosse Duden« vol. 2, under *Vereinbaren* and in the «Dictionnaire alphabétique et analogique de la langue française» (1957) under *incompatibilité* and *incompatible;* In "Black's Law Dictionary" (1951) incompatible is explained as: incapable of harmonising or agreeing.

[89]) Khol, *op. cit.* (above note 29), p. 363.

[90]) Cf. above under para. 27.

[91]) Cf. for example Khol, *op. cit.*, p. 531, who considers the examination of the competence *ratione materiae* as similar to an examination of the merits (while identifying it with incompatibility).

[92]) With regard to Article 6, cf. Nos. 4115/69, *Knechtl* v. *U.K.*, in Collection 36, p. 43, and 4451/70, *Golder* v. *U.K.*, in Collection 37, p. 124; cf. also 4475/70, *Svenska Lotsförbundet* v. *Sweden*, Collection 38, pp. 68 (75—76), concerning Article 11 of the Convention.

43. This is indicated by a series of cases where the notion of incompatibility was examined completely independently from the notion of competence and the latter word does not even appear in the decisions. These cases are also taken before the recent textual modifications:

44. In Application 4121/69[93]), it said:

«...

Que dans le cas du requérant il ne fait pas de doute que le requérant qui s'est vu infliger une amende pour faute de service ne peut pas être considéré comme une personne accusée d'une infraction au sens des paragraphes 1, 2, 3 de l'article 6;

...

Que, partant, cette partie de la requête est incompatible avec les dispositions de la Convention au sens de l'article 27 paragraphe 2;».

45. In Applications 2834/66 and 4038/69[94]) it is stated:

«...

Whereas, Article 14 ... prohibits discrimination on the grounds mentioned therein 'of the rights and freedoms set forth in the Convention'; whereas the Commission has first found that no right to subsidies or the performance of a particular play in schools is as such included ... in the Convention; whereas it follows that Article 14 is inapplicable (emphasis supplied) and this part of the application is also incompatible ...".

46. Again in Application 2428/65[95]) it was said:

"Whereas the applicant complains ..., that the proceedings under which the Regional Court revoked the suspension (of his sentence) were not brought against him within reasonable time; whereas the Commission observes in this respect that the applicant in these proceedings did not have the status of a person charged with a criminal offence but that of a person convicted by a sentence which had become final although its execution had been suspended; whereas a court, when revoking the suspension of a sentence is not determining a civil right..., nor a criminal charge...; whereas the provisions of Article 6 therefore do not apply to such proceedings; ... whereas it follows that this part ... is incompatible with the Convention;".

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[93]) *X.* v. *F.R.G.*, Collection 33, pp. 23 (25); cf. also on Article 6, more recent application, No. 4483/70, *X.* v. *F.R.G.*, Collection 38, pp. 77 (78–79); No. 1850/63, Collection 19, pp. 71 (78); No. 2793/68, Collection 23, pp. 125 (128); No. 2992/68, Collection 24, pp. 116 (131).

[94]) *X.* v. *F.R.G.*, Collection 35, pp. 29 (34).

[95]) Collection 25, pp. 1 (12); cf. also Nos. 913/60 in Collection 8, pp. 43 (45); 1098/61, *ibid.*, pp. 50 (56): «... Qu'il s'ensuit que l'article 6 de la Convention ne s'appliquait pas à la procédure litigieuse»; No. 864/60, Collection 9, pp. 17 (21); cf. also No. 4733/71, *X.* v. *Sweden*, Collection 30, pp. 75 (78–79), with regard to Article 2 of Protocol No. 1.

47. Without any need to quote more decisions, it is seen from the above cited decisions that an examination similar to an examination of the merits has taken place. The Commission's conclusion in such cases is that a certain article does not apply and therefore the complaint is rejected as incompatible.

There is no reference to competence whatsoever. This is not a coincidence or a lapsus, but the correct interpretation of Article 27(2), *i. e.* incompatible. It is taken to mean that complaints are "incompatible" when they refer to events not covered by an article of the Convention or a right guaranteed thereunder. This is also the case with the recent modification of the Commission's decisions which now — although not absolutely consistent — distinguish between competence and incompatibility (cf. above paras. 32—34).

(3) Incompatibility under Articles 15 and 17 of the Convention

48. Fawcett[96]) considers an application to be incompatible under Article 27(2) if made by an applicant engaged in activities described in Article 17 of the Convention. Nay-Cadoux[97]) refers to the «interprétation spécifique de l'incompatibilité par rapport aux Articles 15 et 17 de la Convention».

Without entering into a discussion as to the justification of such differentiation made by the above authors of several cases of incompatibility, suffice it to mention Application 250/57[98]), lodged by the German Communist Party against the Federal Republic of Germany, referred to by both authors. The German Communist Party, which was dissolved after a decision of the Federal Constitutional Court (Bundesverfassungsgericht) lodged an application alleging violations of Articles 9, 10 and 11 of the Convention. The Commission considered, after lengthy discussion of its decision, that the activity of this Party constituted "activity ... aimed at the destruction of ... rights and freedoms" (Article 17) set forth in the Convention, and declared the application incompatible with the Convention. It, in fact, went deeply into the merits of the application. Obviously, this is a case of incompatibility which can in no way be identified with non-competence — under any form — of the Commission.

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[96]) *Op. cit.* (above note 18), p. 312.

[97]) *Op. cit.* (above note 28), pp. 116 ff.; she refers to the *Lawless* case as regards Article 15.

[98]) Yearbook 1, pp. 222 ff.

IV. Discussion

49. We are of the opinion that incompetence and incompatibility are distinct notions and that incompatibility has a legal content of its own which is clearly traceable in the Commission's jurisprudence, and further, that the Commission has interpreted its competence *ratione materiae* in a far too extensive way.

The correct distinction between the two notions has great practical repercussions on the application of the Convention. We shall now try to describe, with arguments derived from the aforemade examination, our thesis, and shall demonstrate, by reference to Articles 13 and 5(5) of the Convention, some of its practical repercussions.

50. It is a common conviction that the existing practice does not satisfy. There have been demands for systematisation[99]) and the obvious disagreement of the writers who dealt with the Convention indicates that the problem exists.

51. Even though the *travaux préparatoires* contain no explanation for the last minute insertion of the term "incompatibility", it seems illogical to identify the two notions. The term "incompatible" would then be completely unnecessary and obsolete. The mere establishment of the Commission's incompetence would suffice to make an application inadmissible.

52. It cannot be argued that "incompatible" was inserted in order to "institutionalise" competence as a reason for inadmissibility. First, it is unnecessary, since the lack of competence in national and international law is *ipso facto* a reason for inadmissibility. And secondly, it should, if that were its purpose, automatically cover all cases of incompetence. This is admittedly one line of opinion which, however, leads to an oversimplification. If this opinion were correct then the resort to "generally recognized principles of international law", as in the case of incompetence *ratione temporis* would be unnecessary. We would instead have a clear, specific provision.

53. The Commission's decisions relating to incompetence *ratione temporis* (cf. above paras. 6—13) clearly demonstrate the fallacy of that argument and make this incompetence distinct from any other reason of inadmissibility, incompatibility included.

54. Similarly, the Commission's jurisprudence with regard to incompetence *ratione loci* (cf. above paras. 14—20) follows the same line. In no such decision is incompatibility ever mentioned. Is it in both cases a coin-

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[99]) Cf. among many Vasak, *op. cit.* (above note 26), p. 133; Golsong, *op. cit.* (above note 22), pp. 51 ff.; Wiesler, Die Rechtsschutzeinrichtungen nach der europäischen Menschenrechtskonvention (1961), pp. 56—60.

cidence? Or did the Commission think that incompatibility was meant any way and no need arose expressly to mention it? Why then the reference to "generally recognised principles of international law"?

55. Furthermore, the competence *ratione temporis* (and this should not be different from other cases of competence) is considered by the Commission[100]) as a pre-preliminary question to be solved before entering at all into the examination of the admissibility of an application. Is incompatibility also a preliminary question to be solved? If so the Commission should always establish that a complaint is compatible with the Convention and then proceed to examine whether it is well-founded or not. This is not the case and, in fact, some cases are alternatively rejected as incompatible or manifestly ill-founded[101]). Moreover, incompatibility is, *expressis verbis*, a reason of inadmissibility proper under Article 27(2).

56. It has been argued and expressly adopted by the Commission in its decision in the *Pfunders'* case (cf. above para. 35) that Article 27(2) does not apply to State applications. That, of course, leads us to the conclusion that, if incompatibility and competence were identical, an inter-State application could not be rejected for non-competence *ratione temporis, loci, personae* or *materiae.*

57. Sørensen[102]) states:

> «Ce qui est essentiel de retenir comme traits caractéristiques de toutes ces hypothèses, c'est d'abord que l'incompétence visée n'est pas l'incompétence d'un organe particulier, mais l'incompétence de l'ensemble du mécanisme de contrôle établi par la Convention. Ensuite, cette incompétence résulte essentiellement des limites tracées aux obligations matérielles de l'Etat mis en cause à la différence de sa soumission aux procédures prévues par la Convention. En autres termes, l'incompétence est, d'après la Convention, une conséquence inéluctable des éléments de fond» (emphasis supplied).

In the light of this statement the decisions of the Commission on the basis of incompetence and/or incompatibility appear to be construed in the following manner: "Incompatibility" is the reason in law for the inadmissibility of a certain complaint; it is mentioned in Article 27(2) and is taken to denote that certain claims fall outside the scope of the Convention. The non-competence, therefore, *ratione temporis, loci, personae* and *materiae*, is in fact a consequence of the incompatibility (which entails necessarily a

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[100]) Cf. above paras. 6–13.

[101]) Cf. for example the Commission's jurisprudence on Article 14 of the Convention, Eissen, L'autonomie de l'Article 14 de la Convention Européenne des droits de l'homme dans la jurisprudence de la Commission, in: Mélanges Modinos (1968), pp. 122 ff.

[102]) *Op. cit.* (above note 5), p. 338.

certain degree of examination of the merits). That is, incompatibility is the reason in law (substantial law as opposed to procedural) and non-competence its procedural consequence.

This argument, however, would lead us to two far-reaching conclusions: (a) if it were so then all reasons of inadmissibility (in particular the "manifestly ill-founded") should have non-competence as a necessary consequence. This has never been asserted and cannot be derived from the Commission's jurisprudence. (b) *Ratione temporis* and *loci* should also be procedural consequences of "incompatibility" or "manifestly ill-founded" which is obviously not correct.

58. The latter would be incorrect because then one should assume that the Convention applies also in order to determine the compatibility of events lying outside its scope (time and place) *a priori*.

59. As to the Commission's competence *ratione personae* objections were raised with regard to the question whether it is competence as such. Antonopoulos[103]) applying notions of domestic law disputes the correctness of those decisions of the Commission which employ this term. He contends that «... il s'agit là de la question touchant à la qualité de la personne de la partie, en tant que demanderesse ou défenderesse, et non de la compétence de la Commission». This *qualité de parties (Aktiv- und Passiv-Legitimation)* is an indispensable condition of admissibility of an administrative recourse *(recours)* or an action in national law[104]).

It is true that when one speaks of "competence" or "jurisdiction" in international law, notions of domestic law should be left aside. It is however, obvious that also in international jurisdictions the "proper parties" is a *conditio sine qua non* for a decision upon a dispute. Whether it is called "competence *ratione personae*" *or qualité de parties* is of little importance. It obviously constitutes a preliminary question to be decided upon.

With regard to the Convention, it has been clearly described in Articles 24 and 25 of the Convention. On the basis of those provisions it suffices to refuse admissibility of an application emanating from a "non-victim" individual, or a State not a Party to the Convention and/or directed against a State not Party, or a State which did not recognise the right of individual petition.

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[103]) *Op. cit.* (above note 21), pp. 37 ff.; cf. also Sørensen, *op. cit.* (above note 5), who, although saying on page 334 that: «... 27 (2) impose à la Commission le devoir de déclarer irrecevable toute requête individuelle qui est considérée incompatible avec la Convention – ce qui vise les différents chefs d'incompétence – ...» in the following, he directly refers to these *chefs d'incompétence* on page 338, diligently avoiding to mention expressly the incompetence *ratione personae*.

[104]) Antonopoulos, *loc. cit.*

Its Repetition in Article 27(2), in the form of the term "incompatible", is not justified.

60. It is true that Article 19 of the Convention stipulates that:

> "To ensure the observance of the engagements undertaken by the High Contracting Parties in the present Convention, there shall be set up: 'a Commission and a Court'".

The European Court of Human Rights has clearly defined its competence *ratione materiae* in its decisions on the *Linguistic* Cases[105]) and the *Vagrancy* Cases[106]). If the Commission's competence (and powers) *ratione materiae* were as shown in its jurisprudence, this would be identical with the Court's competence *ratione materiae*. Although Article 19 refers to both organs of the Convention, it would seem unjustified to assume that this is the case.

In our opinion (cf. above para. 29) the Commission's competence *ratione materiae* (in the exercise of its task to ensure observance of the obligations undertaken by the parties) is limited to a decision on the admissibility of an application. If it decides that a case is inadmissible then its competence *ratione materiae* is exhausted. If, however, it decides that a case is admissible, then new *materiae* are added and its competence is extended, as described in Articles 28, 29, 30, 31 of the Convention.

61. This interpretation might justify the addition of "incompatibility" as a reason of inadmissibility. For, if an application were submitted, which alleged and proved that a flagrant violation of a right not guaranteed had taken place, and the application was not abusive, the only reason for its inadmissibility would remain the "manifestly ill-founded". This would not be systematically correct for alleged violations of rights which could, after some interpretation be taken to be guaranteed under the Convention, as for example, the right to access to the courts under Article 6(1) (cf. above para. 34).

Incompatibility has, therefore, the task (similar to the "manifestly ill-founded" reason) of assigning to the Commission some possibility of interpretation of the Convention on the basis of the merits of the complaints. It was destined to enforce the Commission's function as a *filtre* of applications.

It, however, led in common with the "manifestly ill-founded" to develop and fortify the Commission's judicial character. And in this sense it has been, partly, applied by the Commission in numerous decisions as shown above (paras. 42—47). The recent modification of the wording of the Commission's

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[105]) Decision of 9 February 1967, European Court of Human Rights, Series A, pp. 18–19.

[106]) European Court of Human Rights, Series A, p. 29.

decisions, in particular with regard to rights not guaranteed (cf. above paras. 32–34) fortifies the aforesaid.

V. Conclusions

62. From the above discussion of the problem we are led to the following conclusions:

(a) Inadmissibility, *lato sensu*, of an application includes every head of inadmissibility mentioned expressly or implied by the Convention or emanating from principles of international law generally recognised and from basic legal concepts. That is, it includes inadmissibility on procedural or preliminary grounds to which belong all cases of incompetence as mentioned above; it also includes all cases of inadmissibility proper *(stricto sensu)*.

(b) Inadmissibility proper contains a certain amount of examination of the merits. It is limited only to the heads of "manifestly ill-founded", "incompatibility" and "the abuse of the right of petition"; those reasons mentioned in Article 27(2).

(c) Non-competence and incompatibility are distinct and this emerges clearly from the Commission's jurisprudence as examined above.

(d) Non-competence is always a reason for inadmissibility *(lato sensu)* of an application.

(e) Non-competence is a procedural, pre-preliminary question and has to be – expressly or impliedly – decided upon by the Commission, before it examines the other heads of admissibility proper.

(f) The Commission's competence *ratione materiae* is in fact narrower and it is limited to the question of admissibility but does not include interpretation of the Convention as such; otherwise it would completely coincide with the competence *ratione materiae* of the European Court of Human Rights. In this sense, the conditions of Article 26 (exhaustion of domestic remedies[107]) and the six months' rule) constitute (as expressed in Article 27(3))

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[107]) Cf. No. 1714/62, *X.* v. *F.R.G.* (unpubl.) where the Commission stated: «Considérant quant à l'ensemble de la requête, que la Commission, aux termes de l'article 26 de la Convention de Sauvegarde des Droits de l'Homme et des Libertés fondamentales, «ne peut être saisie qu'après l'épuisement des recours internes, tel qu'il est entendu selon les principes de droit international généralement reconnus»; que la requérante déclare elle-même que son affaire est encore pendante devant le Tribunal régional de Brême et qu'elle n'a donc pas épuisé les voies de recours internes; que les griefs de la requérante relatifs à la durée de cette procédure ne constituent pas, aux yeux de la Commission, une circonstance qui puisse dispenser la requérante, selon les principes de droit international généralement reconnus en la matière, d'épuiser les voies de recours internes et qu'il n'y a pas non plus une autre circonstance particulière qui ait pu dispenser la requérante de cette obligation;

some of the contents of the Commission's competence *ratione materiae*. The same applies to the reasons mentioned in Article 27 (1), *i.e.* anonymity of a petition and repetition of the same complaints in a new application.

(g) Incompatibility is a separate condition of inadmissibility proper (as it is the "manifestly ill-founded" and the "abuse of the right of petition"). It is this head which gives to the Commission the authority to interpret the Convention up to a certain extent, measuring the merits of a complaint to its provisions. It therefore presupposes the Commission's competence.

VI. Article 13 of the Convention

63. This provision created great discussions as to its interpretation and its application by the Commission as well as to its place in the Convention system[108]). However, this dispute, which refers to the substance of Article 13 and the nature of the "remedy" will not be the object of our examination. We shall deal with the Commission's jurisprudence on this article, in connection with its competence and the notion of "incompatibility".

Article 13 provides:

> "Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity".

It is sufficient to mention at this point that Article 13, according to its accepted interpretation[109]) means that "an effective remedy must be provided, when a violation has actually taken place".

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qu'il échet donc de rejeter la requête en vertu de l'article 27, paragraphe 3 de la Convention: Par ces motifs, se déclare incompétente»; (emphasis supplied).

Cf. also European Court, *Ringeisen* case, judgment of 16 July 1971, para. 88: "The Commission's delegates, on the contrary, maintained that in the English text, which is equally authentic with the French text [of Article 26], the phrase 'the Commission may only deal' showed that non-exhaustion of domestic remedies did not prevent the lodging of the application, but solely its examination by the Commission" (emphasis supplied).

[108]) Cf. Buergenthal in Human Rights in national and international law, Vienna Conference 1967, English edition by A. H. Robertson, p. 194; Fawcett, *op. cit.* (above note 18), pp. 227 ff.; in a document of the Committee of Experts (Doc. DM/WP I (50) 15, p. 15) this right to a remedy was said to be "not a Human Right itself, but a mode to secure these rights"; Mertens, Le droit à un recours effectif devant l'autorité nationale compétente dans les Conventions internationales à la protection des droits de l'homme, Revue Belge de Droit International 1968, pp. 446 ff.

[109]) Fawcett, *op. cit.*, p. 230.

Therefore it seems to be the task of the organs entrusted with the application of the Convention to examine, at a second stage, after they have established a violation by the Convention, whether an effective remedy with respect to that violation had in fact been provided.

The Commission's jurisprudence on Article 13 has been very fluid and it cannot be said that a "constant" line has been followed. Its examination shows that applications alleging violation of this article have been declared inadmissible either for being manifestly ill-founded or incompatible with the provisions of the Convention. The criteria for such differentiation are not clear. We shall examine in the following the Commission's case law with regard to inadmissible and admissible cases.

(1) Jurisprudence of the Commission on inadmissible cases

64. (a) In a series of applications, the grounds for inadmissibility is "incompatibility". The decisions' wording, used almost always, is the following:

> "Whereas this provision (Article 13) relates exclusively to a remedy in respect of a violation of one of the rights and freedoms set forth in the other articles of the Convention; whereas, the applicant not having established even the appearance of a violation of one or the other rights invoked by him, there is no basis for the application of Article 13 of the Convention; whereas it follows that this part of the application is incompatible with the provisions of the Convention within the meaning of Article 27, paragraph (2) of the Convention;" [110]).

Similarly, in Application 2717/66[111]) the Commission arrived at the same conclusion.

65. (b) In other cases[112]) another line is followed, namely manifestly ill-founded. There the Commission said:

> "... whereas it follows that an application or part of an application alleging a violation of Article 13 can be considered only in so far as the Commission has declared the application admissible in respect of one of the articles of Section I of the Convention; whereas this is not the case in the present application;

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[110]) No. 3435-3438/67, Collection 28, pp. 109 (131); cf. also No. 3325/67, Collection 25, pp. 117 (124); No. 3798/68, Collection 29, pp. 70 (80); Nos. 3549/68 (unpubl.); 4203/69, Yearbook 13, p. 836.

[111]) Collection 29, pp. 1 (13).

[112]) Cf. No. 768/60 (unpubl.); No. 912/60 (unpubl.); No. 1092/61, Yearbook 5, p. 210; No. 1167/61, Yearbook 6, p. 204; No. 1918/63, Yearbook 6, p. 484; No. 3253/67 (unpubl.); No. 3298/67 (unpubl.).

whereas this part of the application is manifestly ill-founded and must be rejected in accordance with Article 27, paragraph (2) of the Convention" [113]).

66. (c) Finally a third line is followed. In these decisions the Commission had regard to the main claim. If it was, as such, not a right guaranteed under the Convention, or generally incompatible, the consequent complaint under Article 13 was also declared incompatible with the Convention, or otherwise the Commission concluded that Article 13 was simply not applicable [114]).

67. The "manifestly ill-founded" decisions are not of interest for the purposes of the present examination. It is obvious that the Commission arrives at this result on the basis of almost the same wording as in the cases of incompatibility.

In the latter cases it is conclusive that the notion of competence *(ratione materiae)* is never mentioned in the decisions regarding Article 13. If the Commission thought that the "non-competence" and "incompatibility" were identical, it would be only too logical to mention its incompetence in such cases as well. Here, the Commission follows our construction with regard to incompatibility as explained above (para. 62). For, with regard to inadmissible cases, the Commission decides in a final form as to whether there has been a violation, that is, it finds none.

At a second stage the Commission is then called upon to decide, again in a final form, on the admissibility of complaints under Article 13. Since it found that no violation has taken place, there is no question of the application of Article 13 or its further consideration. Therefore, the Commission deals with it and rejects the complaint as incompatible (or manifestly ill-founded). That of course means that the Commission considers itself competent to deal with it in inadmissible cases and there is no other organ (unless gradually the Court develops to a second instance) to decide upon this at a second stage. In our opinion, the reason for inadmissibility should always be "incompatibility", since Article 13 is not applicable, and in no case manifestly ill-founded.

(2) Jurisprudence of the Commission on admissible cases

68. With regard to applications declared admissible, the Commission in the past decided that it was not necessary in the present stage of the

[113]) Text from decision on Application No. 768/60 (unpubl.).

[114]) No. 472/59, Yearbook 3, pp. 206 (212); cf. also No. 655/59, Yearbook 3, p. 280; No. 2145/64, Yearbook 8, pp. 282 (312); No. 2793/66, Collection 23, p. 125; Nos. 2991/66 and 2992/66, Yearbook 10, p. 478. In the latter cases the term "incompatible" is explicitly employed with regard to Article 13, not so in the above cited passage from 472/59. It clearly, however, refers to incompatibility; cf. also more recently, application No. 3927/69 (unpubl.).

proceedings to enter into an examination of the complaint under Article 13 of the Convention[115]).

However, with regard to the First Greek Case, the Commission, in its report[116]) expresses the following opinion:

> "The Commission observes that the remedies called for by Article 13 have not been fully effective in Greece since 21st April, 1967 ... Since, therefore, the most elementary principles were disregarded in these enquiries, it is impossible to consider the existing process of administrative enquiry as an effective remedy in the sense of Article 13 of the Convention".

In fact, the First Greek Case establishes a new jurisprudence. The Commission considered itself competent to deal with Article 13 and expressed an interim opinion, as it did with all other articles.

According to Article 31 of the Convention, with regard to the admissible cases, the Commission:

> "Shall draw up a report and state its opinion as to whether the facts found disclose a breach ...".

Accordingly, the Commission does not take any decision and it is the Court of Human Rights or, more often, the Committee of Ministers, which decides whether a violation has taken place. This gives rise to the question if, in this case, the Commission is at all competent to deal with Article 13, and here it is quite logical that the Commission should express a preliminary or interim opinion as it did in the First Greek Case. This is certainly within the meaning of Article 13 and within the framework of the Commission's task.

(3) Alternatives

69. With reference to the above general discussion, where we concluded that "non-competence" and "incompatibility" are distinct, the following considerations with regard to Article 13 should be made:

If we accept that a case is rejected as incompatible since the Commission has no competence *ratione* ..., then we can never say "incompatible" for a complaint under Article 13, because as it has been shown, the Commission consistently held that it has competence to deal with the said article (finally in inadmissible cases and provisionally in admissible cases).

If we accept the alternative opinion that the Commission declares a case incompatible, when, exactly because of the incompatibility, it has no com-

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[115]) Cf. 2208/64, Collection 18, p. 60; Nos. 2832/66, 2835/66, 2899/66, Commission's report on *Vagrancy* cases, p. 95, and Nos. 2991/66, 2912/66, Collection 24, pp. 116 (132).

[116]) Vol. I part 1, pp. 211–212.

petence to deal with the complaint, it follows that theoretically it could reject a complaint under Article 13 as incompatible, falling outside the scope of the Convention. But in this case it should state why it falls outside the scope of the Convention. This is not possible for complaints under Article 13, because undoubtedly they are within the scope of the Convention.

If it is accepted (as it is our opinion) that non-competence is a separate reason for the inadmissibility of the case, this could not be applicable for complaints under Article 13, because the Commission has competence to deal with them.

Finally, whether complaints under Article 13 should be rejected as being manifestly ill-founded or incompatible is a different question altogether. In our opinion — without entering into details — the correct reason for the inadmissibility should be "incompatibility". This is also valid for Article 5(5), to the examination of which we proceed in the following.

VII. Article 5(5) of the Convention

70. An analogy between Article 13 and Article 5(5) of the Convention, both referring to a "second stage" proceeding before the Commission, is obvious. The Commission's jurisprudence as regards the latter provision is again inconsistent. Its examination, however, fortifies our contention that "non-competence" and "incompatibility" possess different content.

(1) Jurisprudence on inadmissible cases

71. The Commission followed different lines in inadmissible cases with regard to complaints under Article 5(5): manifestly ill-founded, non-competence *ratione temporis*, incompatible:

(a) Manifestly ill-founded

This result appears to be a *non-sequitur*. The Commission in such cases said that Article 5(5) is not applicable[117]) because there was no violation established under Article 5(1) to (4) and because it considered that the arrest or detention was justified.

In such cases the formula used generally reads as follows:

> "Whereas the applicant complains that the respondent government's refusal to compensate him for his unjustified detention violates Article 5, para-

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[117]) "Not applicable" usually refers to "incompatibility" in the Commission's jurisprudence.

graph (5), of the Convention; whereas under this provision, the applicant would be entitled to compensation if he had been the victim of arrest or detention in contravention of paragraphs (1) to (4) of Article 5; whereas, however, the Commission has already found that his complaints under paragraph (1), sub-paragraphs (a) and (c), and paragraph (3) do not disclose any appearance of a violation of the Convention; whereas it follows that his complaint under paragraph (5) of Article 5, is also manifestly ill-founded" [118]).

In Application No. 2932/66 [119]), however, it was held that:

«...

Qu'il se pose donc la question de savoir si en l'absence d'une décision expresse l'internement de sûreté devait être considéré comme irrégulier et si le requérant qui a subi cette détention pendant six ans est fondé à réclamer des dommages intérêts en vertu de l'article 5 alinéa 5 de la Convention; ...

Que compte tenu des circonstances particulières de l'affaire, notamment des antécédents judiciaires du requérant et de son comportement pendant les rares périodes où il se trouvait en liberté il y a lieu de constater que le requérant n'a subi aucun dommage;

Qu'en conséquence, la Commission après examen du dossier dans son ensemble, ne discerne aucune apparence de violation des dispositions de la Convention et notamment de l'article 5 alinéa 5 de la Convention, de sorte qu'il échet de rejeter la requête en vertu de l'article 27 alinéa 2, pour défaut manifeste de fondement;».

It is obvious that in such cases the Commission considered itself competent to deal with complaints under Article 5(5) and, in fact, in the latter case (2932/66) it went further and examined the merits of the complaint.

(b) Incompatible

72. In some cases [120]) the claims for compensation on the basis of Article 5(5) were rejected as incompatible with the provisions of the Convention as being outside its competence *ratione materiae*, on the ground that the prior complaint, against arrest and detention, falls outside the competence of the Commission *ratione temporis*.

73. In other cases, as Application No. 3051/67 [121]) and 4149/69 [122]) the

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[118]) Text from Application No. 3245/67, Collection 30, pp. 31 (51); cf. also No. 367/58 (unpubl.); No. 1699/62 (unpubl.); No. 3215/67 (unpubl.); No. 3516/68 (unpubl.).

[119]) Yearbook 13, p. 264.

[120]) No. 1151/61, Collection 7, pp. 118 (119); No. 1267/61 (unpubl.); No. 1532/62 (unpubl.); No. 2074/63 (unpubl.). In Application No. 956/60 (unpubl.), the claim is rejected as incompatible without mentioning the non-competence *ratione materiae*.

[121]) Collection 26, pp. 61 (66).

[122]) Collection 36, pp. 66 (68).

ground for inadmissibility is, simply, "incompatible". In a well-reasoned decision the Commission said in the latter case:

> "Whereas, finally, the applicant claims compensation for material damage which he allegedly suffered because of his detention prior to his trial; whereas, in this respect, he relies on Article 5 (5) of the Convention which provides that everyone who has been the victim of arrest or detention in contravention of the provisions of Article 5 (1) to (4) shall have an enforceable right to compensation;
>
> whereas the Commission has in Application 2122/64[123]) (*Wemhoff* against *the Federal Republic of Germany*, cf. Report of the Commission, para. 76) stated the opinion that it cannot consider the applicant's claim before:
>
> '1. the competent organ, namely the Court or the Committee of Ministers, has given a decision on the question whether Article 5 (3) has been violated in the present case; and
>
> 2. the applicant has had the opportunity, with respect to his claim for compensation to exhaust, in accordance with Article 26 of the Convention, the domestic remedies available to him under German law'.
>
> whereas the same considerations apply there, as in the present case, an applicant alleges violation of Article 5 (1) of the Convention and consequently claims compensation under Article 5 (5); whereas the Commission has already found that the applicant's complaints ... are out of time and therefore inadmissible; whereas it follows that the applicant's complaint under Article 5 (5) cannot be examined by the Commission and is therefore to be regarded as being incompatible with the provisions of the Convention;".

The first mentioned case (3051/67) under this category is not as detailed and therein competence and incompatibility are not confused as it happens in the latter. Application 4149/69 is an isolated instance and the reasoning followed is identical with the reasoning on admissible cases (cf. below para. 76). Normally the Commission, in inadmissible cases, does not refer to its competence, which is assumed[124]). Exception is made in the Commission's jurisprudence with regard to its competence *ratione temporis*.

(c) Non-competence ratione temporis

74. In a few, unpublished cases, the ground for inadmissibility was simply the non-competence of the Commission *ratione temporis*[125]). It was held there:

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[123]) Note that that case was an admissible case.
[124]) Example 3051/67, *ibid.*, p. 66.
[125]) No. 380/58 (unpubl.); No. 760/60 (unpubl.); No. 844/60 (unpubl.).

"the right to compensation under paragraph (5) of Article 5 for a detention which occurred prior to the entry into force of the Convention is in any event a question which falls outside the competence of the Commission *ratione temporis;* ... whereas the application insofar as it is founded upon Article 5, paragraph (5) must be rejected *ratione temporis*;" [126]).

(d) Non-exhaustion

75. In at least one case [127]) the Commission rejected the applicant's complaint under Article 5 (5) for non-exhaustion of domestic remedies.

The applicant's complaints under Article 5 were rejected before for non-observance of the time limit of six months under Article 26.

(2) Jurisprudence on admissible cases

76. When referring to Application No. 4149/69 above (para. 73), we also saw the Commission's opinion as regards Article 5 (5) in the *Wemhoff* case [128]). There the Commission stated that it could not consider a claim under Article 5 (5) before the competent organ (Court or Committee of Ministers) found a violation and before domestic remedies were exhausted. It clearly declared itself non-competent to decide on the admissibility, *i. e.* incompetent *ratione materiae* according to our opinion.

In the *Lawless* case [129]), however, the Commission in its Report expressed the opinion:

"The Commission having regard to its majority opinion that there was no violation of the Convention on the part of the respondent Government, considered that no award should be made to the applicant in respect of his claim for damages and costs".

Obviously this is exactly contrary to what was decided in the *Wemhoff* case. Here the Commission — as in the case of Article 13 — assumes competence to express an opinion. It had, of course, as basis for that its majority opinion that no violation was established. This makes the *Lawless* case in this respect appear similar to the inadmissible cases in general.

(3) Discussion

77. It is, therefore, obvious that in inadmissible cases the Commission

[126]) Text from decision on Application No. 844/60.

[127]) *Huber* v. *Austria,* No. 4517/70, partial decision, Collection 38, pp. 90 (96).

[128]) Publications of the European Court of Human Rights, Series B, p. 90.

[129]) Publications of the European Court of Human Rights, Series B, p. 183. Subsequently the Court in its decision expressed the same opinion: Publications of the European Court of Human Rights, Series A, pp. 62–63.

follows the same line as in the case of Article 13. That is, it considers itself competent to deal with complaints under 5 (5) in a final form. It rejects them as inadmissible either as being manifestly ill-founded or as incompatible with the Convention. What has been said relating to Article 13, is equally valid for Article 5 (5).

Exception is made here by the Commission as regards cases falling outside its competence *ratione temporis*. There the Commission rejects them simply for that reason or additionally for non-competence *ratione materiae* and incompatibility according to its old formula. The strength of one case (No. 4149/69) (above para. 73) cannot defeat, in our opinion, the rest of the Commission's jurisprudence.

In so far as admissible cases are concerned, we encounter a different result. The *Wemhoff* case appears to carry greater weight, since the *Lawless* case in this respect is more or less assimilated to inadmissible cases. Again, however, the solutions reached in admissible cases are of no importance for the purposes of our examination.

In any case, it would be absurd to identify here "incompatibility" and "non-competence". This is impossible for the manifestly ill-founded cases and for those falling outside the competence *ratione temporis*. Those cases under 5(5) which are being rejected as incompatible are again clearly distinguishable. For, the Commission — in inadmissible cases — is the sole organ to decide on Article 5(5) and there is no second stage. The Court does not have the opportunity of pronouncing a decision.

One is the category of cases, in our opinion, which can be rejected for non-competence *ratione materiae*, those where the domestic remedies have not been exhausted[130]).

For the choice between "incompatibility" and "manifestly ill-founded" we refer to what is said above (para. 69) under Article 13.

With regard to admissible cases, in our opinion the Commission, indeed, has no competence *ratione materiae* to decide upon the existence of a violation of Articles 13 and 5(5) of the Convention. The *materiae* is transferred either to the second stage organ or to the Commission's renewed competence to examine admissibility after the Court or the Committee of Ministers had finally found a violation of any other article, in the case of Article 13, or of paragraphs (1) to (4), in the case of Article 5(5). It has however, competence to express an opinion *ad interim* in admissible cases similar to the *Lawless* case.

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[130]) Cf. our analysis above under IV and V.