



**Explanatory Report  
to Protocol No. 4 to the Convention for the Protection of Human Rights and  
Fundamental Freedoms, securing certain rights and freedoms other than those  
already included in the Convention and in the first Protocol thereto**

Strasbourg, 16.IX.1963

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I. Protocol No. 4 to the European Convention for the Protection of Human Rights and Fundamental Freedoms was prepared within the framework of the Council of Europe by the Committee of Experts on Human Rights. It was opened for signature on 16 September 1963.

II. This document contains the text of the explanatory report and of the commentary of the Committee of Experts on Human Rights, which publication was authorised by the Committee of Ministers at the 139th Meeting of the Ministers' Deputies in March, 1965.

**General considerations**

1. In its Recommendation 234 (1960) adopted on 22nd January, 1960, the Consultative Assembly recommended to the Committee of Ministers:

a) that it should convene a Committee of Experts with instructions to draft a Second Protocol to the Convention of Human Rights, based on the draft prepared by the Legal Committee, in order to protect certain civil and political rights not covered by the original Convention or the First Protocol;

b) that it should submit the draft Protocol prepared by the Committee of Experts to the Assembly for an opinion before signature by Member Governments.

2. Acting upon this Recommendation, the Committee of Ministers, by Resolution (60) 6 of 22nd March, 1960, decided to set up a "Committee of Governmental Experts with instructions to study problems relating to the European Convention on Human Rights".

3. The Committee of Experts set up under this Resolution discussed the draft Second Protocol to the Convention at meetings held in Strasbourg:

- from 7th to 11th November, 1960,
- from 24th to 29th April, 1961,
- from 2nd to 11th October, 1961,
- from 2nd to 10th March, 1962,
- from 1st to 7th June, 1962,
- from 22nd to 27th October, 1962 and
- from 11th to 16th February, 1963.

The Chairmanship of the Committee was taken by Mr. Ugo Calderera, Italian Governmental Expert. Secretarial services were provided by the Human Rights Directorate.

4. On 5th March, 1962, a Joint Meeting was held at Strasbourg between members of the Committee of Experts and of the Legal Committee of the Assembly, when the question of the Second Protocol was the subject of a lengthy discussion.

5. At its meeting in February, 1963, the Committee of Experts drafted the present report.

### Commentary

**The words underlined in the draft text prepared by the Committee of Experts indicate the changes made to the Assembly's draft text.**

PREAMBLE: ASSEMBLY DRAFT	PREAMBLE: COMMITTEE OF EXPERTS' DRAFT
"The Governments signatory hereto, Members of the Council of Europe,	"The Governments <u>being</u> signatory hereto, <u>being</u> Members of the Council of Europe,
Considering that the Convention for the Protection of Human Rights and Fundamental Freedoms signed at Rome on 4th November, 1950 (hereinafter referred to as "the Convention") represents, as witness to the text of its Preamble, 'the first step(s) for the collective enforcement of certain of the Rights stated in the Universal Declaration';	
Considering that the Convention marked a first stage which should be followed by others;	
Considering that a second stage was marked by the signature of a Protocol to the Convention at Paris on 20th March, 1952;	
Taking account of the work being done at the United Nations to draw up an international covenant on civil and political rights;	
Being resolved to extend the collective guarantee provided by the Convention to other political rights which are also part of their common spiritual and legal heritage and their common conception of democracy,	Being resolved to <u>take steps to ensure the collective enforcement of certain rights and freedoms other than those already included in Section 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms signed at Rome on 4<sup>th</sup> November, 1950 (hereinafter referred to as 'the Convention') and in Articles 1 to 3 of the First Protocol to the Convention, signed at Paris on 20th March, 1952.</u>
Have agreed as follows:"	Have agreed as follows:"

1. The text of the Committee is more concise than the one of the Assembly. It is based on the wording of the Preamble in the First Protocol.

The Committee agreed that if the second preamble were to differ widely and for no good reason from the first, difficulties might arise in the interpretation of the two Protocols. Doubts were expressed as to the advisability of making any reference in the preamble to the Covenant on Civil and Political Rights which is being prepared by the United Nations when there was no such reference in the Preambles to the Convention and to the First Protocol.

ARTICLE 1: ASSEMBLY DRAFT	ARTICLE 1: COMMITTEE OF EXPERTS' DRAFT
"No-one shall be imprisoned merely on the ground of inability to fulfil a contractual obligation."	"No-one shall be <u>deprived of his liberty</u> merely on the ground of inability to fulfil a contractual obligation."

2. The Committee decided to adopt the text of Article 1 of the Assembly's draft with one amendment: the substitution of the expression "deprived of his liberty" for "imprisoned".

The wording "deprived of his liberty" is designed to cover loss of liberty for any length of time, whether by detention or by arrest.

The arguments which led to the adoption of this proposal were as follows:

- On the one hand, the proposed wording was designed to reinforce the terms of Article 5 of the Convention which guarantees the right of every person to liberty and security. In Article 5, paragraph (1), the expression "no-one shall be deprived of his liberty..." is used;
- Furthermore, in the case it was designed to cover, this provision prohibits not only detention but also arrest (cf. the explanatory memorandum of the Legal Committee). The notion of "depriving an individual of his liberty" covered both cases more precisely than the term "imprisonment". Article 5, paragraph (4), of the Convention speaks moreover of a "person deprived of his liberty by arrest or detention".

3. Like the corresponding Articles of the Assembly and United Nations drafts, this article relates to failure to fulfil contractual obligations of any kind and not only money debts. It may refer, accordingly, to nondelivery, non-performance or non-forbearance.

4. Such obligations must, however, arise out of contract. The Article does not apply to obligations arising from legislation in public or private law.

5. The Committee stressed the importance of the words "merely on the ground of inability"

In the experts' view, the Article aimed at prohibiting, as contrary to the concept of human liberty and dignity, any deprivation of liberty for the sole reason that the individual had not the material means to fulfil his contractual obligations.

Deprivation of liberty is not forbidden if any other factor is present in addition to the inability to fulfil a contractual obligation, for example:

- if a debtor acts with malicious or fraudulent intent;
- if a person deliberately refuses to fulfil an obligation, irrespective of his reasons therefore,
- if inability to meet a commitment is due to negligence.

6. The Committee thought that the Article could not therefore be construed as prohibiting deprivation of liberty as a penalty for a proved criminal offence or as a necessary preventive measure before trial for such an offence, even if criminal law recognised as an offence an act or omission which was at the same time a failure to fulfil a contractual obligation.

For a law which makes a breach of contract into a criminal offence punishable by imprisonment always provides for one or more elements of criminality other than a simple inability to perform the contractual obligation.

For example, the law of a Contracting Party would thus not be in conflict with this article if it permitted the deprivation of liberty of an individual who:

- knowing that he is unable to pay, orders food and drink in a cafe or restaurant and leaves without paying for them;
- through negligence, fails to supply goods to the army when he is under contract to do so;
- is preparing to leave the country to avoid meeting his commitments.

ARTICLE 2: ASSEMBLY DRAFT	ARTICLE 2: COMMITTEE OF EXPERTS' DRAFT
"1. Everyone legally within the territory of a State shall, within that territory have the right to liberty of movement and freedom to choose his residence.	"1. Everyone <u>lawfully</u> within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.
2. Everyone shall be free to leave any State, including his own.	2. Everyone shall be free to leave any <u>country</u> including his own.
3. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and constitute a measure which in a democratic society, is necessary for national security, public safety, economic welfare of the country, the maintenance of law and order, the prevention of crime and the protection of health or morals, or rights and freedoms of others."	No restrictions shall be placed on the exercise of these rights other than such as are in accordance with law and are necessary in a democratic society in the interests of national security or public safety, for the maintenance of ' <i>ordre public</i> ', for the prevention of crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.
	4. The rights set forth in paragraph 1 may <u>also be subject in particular areas to restrictions imposed in accordance with law and justified by the public interest in a democratic society.</u> "

**Paragraph 1 of the Committee's draft**

7. There is only one difference between the text of the Committee and that of the Assembly. The word "*légalement*" was replaced in the French text by "*régulièrement*", since, in most States, the administrative authorities enjoy considerable discretionary powers enabling them to admit or refuse entry to foreigners and to control their stay. (cf. Article 3, paragraphs 1, 2 and 3 of the Convention on Establishment).

In the English text, "legally" was changed to "lawfully" (cf. Article 12. of the draft Covenant on Civil and Political Rights adopted by the Third Committee of the United Nations General Assembly).

8. The Committee did not accept a proposal to substitute the word "*réside*" for "*se trouve*" in the French text, and to insert the term "residing" between the words "lawfully" and "within" in the English text. The purpose of this amendment was to prevent an alien lawfully within the territory of a State from invoking Article 2, paragraph 1, of the draft as a provision conferring on him the right to remain permanently within the territory of that State.

The Committee did not think that Article 2, paragraph 1, was open to such interpretation; an alien passing through the territory of a State, or being there lawfully but for a limited time, would not be entitled, by virtue of this provision, to secure permanent admission to the territory of that State.

The Committee agreed that an alien admitted under certain conditions of entry (not necessarily conditions about residence or movement) which he transgresses or fails to comply with, can no longer be regarded as being "lawfully" in the country.

9. The Committee examined another proposal, to add the words "of a Contracting party" after "territory of a State", since States which are not Contracting Parties are under no such obligation.

This proposal was rejected on the ground that in a Human Rights Convention it was preferable from a psychological point of view to use words in their widest possible sense when laying down regulations equivalent to broad general principles of law.

By virtue of Article 6 of the draft, Article 1 of the Convention is applicable in this matter; thus, there can be no doubt that Contracting Parties alone are bound by the present Article.

#### **Paragraph 2 of the Committee's draft**

10. It was agreed to replace "state" in the Assembly draft by "country" which is found in Article 13, paragraph (2), of the Universal Declaration of Human Rights and in Article 12, paragraph (2), of the draft United Nations Covenant.

The Committee meant to give the greatest possible scope to the freedom to leave a region, whether or not it is a State; the Committee considered further that, from a psychological point of view, the notion of "country" was preferable to that of "State", as having deeper emotional implications.

11. The question arose whether the expression "any country" was adequate since the Protocol can create no obligations for countries which are not Parties to it. The provision which secures for persons within the jurisdiction of the Contracting Parties the freedom to leave a country could not produce a legal effect of a binding nature in respect of every State, but only in respect of States Parties to the Protocol.

Believing that a very general principle ought to be stated, the Committee was in favour of keeping this expression. Furthermore, it was not impossible that a court in a Contracting State might have to render a decision, in a case brought before it, regarding the legality of the emigration of a person who had left the territory of a State which was not a Party to this Protocol. In such a case, it might be asked whether the court should not decide that reference to the law of the other State was authorised only insofar as that law did not prejudice the principle of freedom to leave a country.

### Paragraph 3 of the Committee's draft

12. The Committee made five changes in the text proposed by the Assembly.

13. In the English version, the first change concerns the expression "in accordance with law" (which corresponded fairly closely to the words "in accordance with the law" in Article 8, paragraph (2) of the Convention) which was considered to be better than the expression "prescribed by law" (used in Article 2 (3) of the Assembly's draft and Articles 3 (2) , 10 (2) and 11 (2) of the Convention) or "provided by the law" (to be found in Article 12 (3) of the United Nations draft Covenant and Article 1 of the First Protocol to the Convention).

It was understood that the expression "in accordance with law" allowed for administrative action, provided it were taken in accordance with internal legislation.

However, the Committee did not accept a proposal to substitute in the French text the expression "*conformes à la loi*" for "*prévues par la loi*".

As the words "*prévues par la loi*" were to be found in various restrictive clauses of the Convention, the Committee thought that to adopt a different wording might create difficulties of interpretation.

14. The Committee made a second amendment to the Assembly text, namely:

- in the French text, "*constituent une mesure nécessaire*" was changed to "*constituent des mesures nécessaires*" (cf. Articles 9, 10 and 11 of the Convention);
- in the English text, "and constitute a measure which, in a democratic society, is necessary for" was changed to "and are necessary in a democratic society in the interests of" (cf. Articles 9, 10 and 11 of the Convention).

15. The third amendment consists in the fact that the Committee's text makes no express provision for restrictions founded on what is necessary for the economic welfare of the country.

At the outset, two different positions were taken in the Committee.

Some experts thought that considerations of economic welfare should not justify any restrictions, even if these were confined to the rights referred to in paragraph 1, except insofar as they arose from the need to safeguard *ordre public*.

Others considered that the rights defined in paragraph 1 of Article 2 could be subject to restrictions which, when provided for by law, constitute measures necessary in a democratic society for the economic welfare of the country. They agreed, however, that the right to leave a country, provided under paragraph 2, could not be subject to restrictions of this nature.

The following arguments were advanced in support of the first view:

- a) The inclusion of a provision for restrictions on the ground of economic welfare would permit of abuse by States in the imposition of restrictions on the exercise of the rights enunciated in paragraphs 1 and 2.
- b) To prevent such abuse, the exercise of these rights should be subject to restrictions in the interests of economic welfare only when the restrictions were in accordance with law and justified by the need to safeguard *ordre public*.

c) According to Article 2, paragraph 1, only persons lawfully within the territory of a State have the right to move freely in that territory and choose their residence freely; this does not prevent the State from making regulations for the admission of aliens which take account of the economic welfare of the country.

d) Article 2, paragraph 1 does not guarantee a work permit to aliens lawfully within the territory of a State, nor does it assure them of a free choice of place of work. The State is entitled to control the issue of work permits in the light of the economic and social situation.

e) The inclusion of a restriction relating to economic welfare would constitute a retrograde step in relation to the now commonly accepted principles regarding the movements of foreigners. Recent international agreements on the movement of persons contain no clauses restricting movement in the interests of economic welfare (cf. Article 1 of the European Convention on Establishment signed in Paris on 13<sup>th</sup> December, 1955; Article 48 of the Treaty setting up the European Economic Community, signed at Rome on 25th March, 1957; Article 12 (3) of the United Nations draft Covenant).

f) The adoption of the other view would allow States to restrict the freedom of movement not only of aliens but also of their own nationals on economic grounds and this would be a retrograde step rather than a step forward in the protection of individual rights.

g) Furthermore, it was illogical to provide for restrictions of an economic nature on freedom of movement and choice of residence while at the same time rejecting any such restrictions on the freedom to leave one's country.

h) Article 8, paragraph (2) of the Convention should not be regarded as a precedent. The fact that the Convention contains no general restrictive clauses but that each Article carries its own restrictions shows that the nature of such clauses has to be determined in relation to the subject matter of the particular Article.

i) One expert stated that under his country's Constitution, restrictions on freedom of movement and choice of residence could not be based on purely economic considerations and that therefore he could not accept the other view.

Supporters of the other view argued as follows:

It is difficult to define the conditions in which "economic welfare" is covered by the concept of *ordre public*.

b) With regard to the reference to recent international agreements, and particularly to the European Convention on Establishment, it should be remembered that in Article 2 of that Convention, each Contracting Party undertakes to facilitate the prolonged or permanent Parties "to the extent permitted by its economic and social conditions".

c) There is every reason to keep to the restrictions provided for in Article 8 (2) of the Convention since the right to respect for the home with which it is concerned is very close to the freedom of choice of residence, which is the subject of Article 2 of the Assembly's draft.

d) The powers of the European Court and Commission of Human Rights and the Committee of Ministers constituted a strong safeguard against any possible abuse of such a restriction.

e) One expert also invoked, where his country was concerned, reasons of a constitutional nature making it impossible to agree to a text which did not contain clauses authorising some restrictions based on considerations of economic well-being.

The Committee finally decided to delete all reference in paragraph 3 to considerations of economic welfare and to add a new paragraph relating to this question (see below paragraph 18).

The fourth amendment concerns the English translation of the expression "*ordre public*".

The Committee decided to replace "law and order" by the French words "*ordre public*" written within inverted comas (cf. Article 2, paragraph 3 of the draft United Nations Covenant).

Furthermore, the Committee intended, for the purposes of this article, that the notion of "*ordre public*" should be understood in the broad sense in general use in continental countries.

17. The fifth amendment concerns the French version in which the expression "*prévention des infractions pénales*" was found preferable to "*prévention du crime*" (cf. Article 5, paragraph 1(c), Article 6, paragraphs (2), (7) and (8) of the Convention; contra Articles 10 and 11 of the Convention).

In this connection, one expert asked whether provision should not be made for a restriction for the purposes of the punishment of crime (and not merely for its prevention).

The Committee thought that the need to punish crime was covered by the notion of the maintenance of "*ordre public*".

#### Paragraph 4 of the Committee's draft

18. The majority of the Committee was against the inclusion of a provision permitting restrictions on the ground of economic welfare. In view, however, of the possibility that in particular areas it might be necessary, for legitimate reasons, and solely in the public interest in a democratic society, to impose restrictions which it might not always be possible to bring within the concept of "*ordre public*", the Committee decided to insert an additional paragraph providing that the rights set forth in paragraph 1 might also be subject in particular areas, to restrictions imposed in accordance with law and justified by the public interest in a democratic society.

The term "area", as used in this article, does not refer to any definite geographical or administrative unit. The meaning of this provision is that the restrictions in question must be localised within a well-defined area.

ARTICLE 3: ASSEMBLY DRAFT	ARTICLE 3: COMMITTEE OF EXPERTS' DRAFT
"No-one shall be exiled from the State of which he is a national.	"No-one shall be <u>expelled by means of either an individual or of a collective measure, from the territory</u> of the State of which he is a national.
Everyone shall be free to enter the State of which he is a national."	"No-one shall be <u>deprived of the right to enter the territory</u> of the State of which he is a national."

**Paragraph 1 of the Committee's draft**

19. The Committee made three changes to the text proposed by the Assembly.

20. The first change concerns the addition of the words "by means of either an individual or a collective measure".

The Committee's intention was to specify by this addition that the collective expulsion of nationals was prohibited in the same way as the collective expulsion of aliens referred to in Article 4 of the draft. (So far as measures of collective expulsion taken in the past are concerned, see below at paragraph 33 of this commentary.)

21. The second change relates to the word "exiled", which was replaced by "expelled".

In the opinion of the Committee, the text needed was one which would prohibit any constitutional, legislative or administrative or judicial authority from expelling nationals from their own country.

More often than not the expulsion of nationals, whether individuals or groups, is inspired by political motives.

The majority thought it preferable not to use the term "exile" which is open to various difficulties of interpretation. It was agreed to speak of expulsion, although it was recognised that in normal technical usage this term applies to aliens only.

The word "expulsion" is to be understood here in the generic meaning, in current use (to drive away from a place).

It was understood that extradition was outside the scope of this paragraph.

It was also understood that an individual could not invoke this paragraph in order to avoid certain obligations which are not contrary to the Convention, for example, obligations concerning military service.

22. The third change was made for drafting purposes only, the expression "expelled from the territory of a State" was judged preferable to "expelled from the State".

23. The Committee again referred to the hypothesis of a State expelling one of its nationals after first depriving him of his nationality.

It was proposed to insert in Article 3 a provision to the effect that "a State would be forbidden to deprive a national of his nationality for the purpose of expelling him".

Although the principle which inspired the proposal was approved of by the Committee, the majority of the experts thought it was inadvisable in Article 3 to touch on the delicate question of the legitimacy of measures depriving individuals of nationality. It was also noted that it would be very difficult to prove, when a State deprived a national of his nationality and expelled him immediately afterwards, whether or not the deprivation of nationality had been ordered with the intention of expelling the person concerned.

24. A proposal to replace the words "state of which he is a national" in paragraphs 1 and 2 by "his own country" was not accepted.

Most experts considered that the first expression had a more precise legal meaning than the second.

**Paragraph 2 of the Committee's draft**

25. The Committee made two amendments to the text proposed by the Assembly.

26. The first amendment concerns the words "Everyone shall be free to" which were replaced by "No-one shall be deprived of the right to".

This phrase was suggested by the wording of Article 12, paragraph 4 of the draft International Covenant adopted by the Third Committee of the United Nations General Assembly.

This wording seemed a better solution than the other to a matter of twofold concern to the Committee:

a) On the one hand, paragraph 2 should not relieve persons who wish to enter the territory of the State of which they were nationals, of the obligation to prove their nationality if so required. (A State is not obliged to admit an individual who claims to be a national unless he can make good his claim.)

b) On the other hand, such temporary measures as quarantine should not be interpreted as a refusal of entry.

27. The second change is purely a drafting one. The expression "enter the territory of the State" was found preferable to "enter the State".

28. The Committee considered that this paragraph should not contain the word "arbitrarily", which appears in Article 12, paragraph 4, of the United Nations' draft.

It was understood, however, that an individual's right to enter the territory of the State of which he was a national could not be interpreted as conferring on him an absolute right to remain in that territory. For example, a criminal who, having been extradited by the State of which he was a national, then escaped from prison in the other State, would not have an unconditional right to seek refuge in his own country. Similarly, a soldier serving on the territory of a State other than that of which he is a national, would not have a right to repatriation in order to remain in his own country.

29. The Committee agreed that the terms of paragraph 2 could be invoked only in relation to the State of which the victim of any violation of this provision was a national.

30. The experts of the Federal Republic of Germany declared that the expression "territory of the State of which he is a national" was not to be interpreted in a manner which might be prejudicial to the questions arising from the particular position of Germany as regards its internal relations.

ARTICLE 4: ASSEMBLY DRAFT	ARTICLE 4: COMMITTEE OF EXPERTS' DRAFT
"1. An alien lawfully residing in the territory of a High Contracting Party may be expelled only if he endangers national security or offends against "ordre public" or morality.	
2. Except where imperative considerations of national security otherwise require, an alien who has been lawfully residing for more than two years in the territory of a Contracting Party shall not be expelled without first being allowed to avail himself of an effective remedy before a national authority, within the meaning of Article 13 of the Convention.	
3. An alien who has been lawfully residing for more than ten years in the territory of a Contracting Party may be expelled only for reasons of national security or if the other reasons mentioned in paragraph 1 of this article are of particularly serious nature."	
	"Collective expulsion of aliens is prohibited."

31. The Committee decided that Article 4 should be devoted to the prohibition of collective expulsion of aliens, for which no provision is made in the Assembly's draft .

The Committee thought it desirable to insert in this article a provision by which collective expulsions of aliens of the kind which have already taken place would be formally prohibited.

32. This provision refers to collective expulsion of aliens, including Stateless persons. The collective expulsion of nationals is prohibited under Article 3, paragraph 1.

33. It was agreed that the adoption of this article and paragraph 1 of Article 3 could in no way be interpreted as in any way justifying measures of collective expulsion which may have been taken in the past.

34. The Committee decided not to include any provision in the Protocol regarding the individual expulsion of aliens.

a) This matter has already been dealt with in Article 3 of the Convention on Establishment.

The Committee found that it would be difficult to include in this Protocol the Article 4 of the Assembly's draft, which is very nearly identical to Article 3 of the Convention on Establishment. Whether one or the other were eventually adopted, a certain number of important amendments would be required. The result would have been a very serious risk of conflict between the rules laid down in the Protocol and those of the European Convention on Establishment.

b) The Committee could not have accepted a provision that limited the reasons for expulsion.

It might have been able to approve a text stipulating that the "decision of expulsion must be taken in accordance with law", that is, within the reasons and procedure provided by internal law.

But the majority of the Committee maintained that the State concerned should alone be competent, in applying such a provision, to judge of the reasons which, according to its internal law, could motivate expulsion and that such decisions should not be subject to control by the organs envisaged by the Convention.

The Committee felt that it would be undesirable to include in the Protocol an article in which such an express provision would be necessary, since such a limitation of the powers of these bodies was not easily reconcilable with the general organisation of the system of international protection set up by the Convention.

c) The Committee then considered the possibility of including in the Protocol a provision recognising only certain procedural rights for an alien about to be expelled, in particular a provision which would have read as follows:

"Except where a State considers that compelling reasons of national security otherwise require, the expulsion may not be effected unless the alien has been allowed to submit reasons against his expulsion and to have his case examined by, and be represented if he so wishes for the purpose of this examination before a competent authority or a person or persons designated by the said authority."

The Committee came to the conclusion that a provision to this effect should not be included. It was also felt that a provision limited to guarantees of a procedural character would be insufficient, and that it would be preferable to have no provision at all.

First of all, these procedural rights would have no application whenever the State "considered" that compelling reasons of national security required otherwise. According to this system it would be for the State concerned alone to judge whether such compelling reasons of national security did exist. This situation would prevent the exercise of the powers vested by the Convention in the bodies which it instituted for the purpose of ensuring that Contracting Parties would respect their commitments.

Furthermore, the "competent authority" before which the alien would have the right to have his case examined could be the same as that which was empowered to take the decision of expulsion; in that case, the alien would have no assurance of the impartiality of the authority.

ARTICLE 5: ASSEMBLY DRAFT	COMMITTEE OF EXPERTS' DRAFT
"Every individual shall have the right to recognition everywhere as a person in the eyes of the law."	Nil.

35. The Committee decided not to include any provision to this effect in the Protocol on the grounds that:

- a) it was unnecessary, since its content could be deduced from other Articles in the Convention (especially Articles 4, 6 and 14);
- b) its ambiguous wording might lay it open to dangerous legal interpretations;
- c) in any case, such a clause, if adopted, should have its place in the Preamble or in the early Articles of the Convention, rather than in a Protocol.

The Committee also rejected a proposal suggesting a combination in one provision of the principles of recognition as a person before the law and equality before the law.

ARTICLE 6: ASSEMBLY DRAFT	COMMITTEE OF EXPERTS' DRAFT
<u>Alternative A</u>	
"All persons are equal before the law.	
The law shall afford to all persons equal and effective protection."	Nil.
<u>Alternative B</u>	
"All persons are equal before the law. No-one shall be subjected by the State to any discrimination based on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin belonging to a national minority, property, birth or other status."	

36. The Committee considered that a provision relating to equality before the law should not be included in its draft.

The Committee noted that the notion of equality before the law was subject to a wide variety of judicial interpretations and, for this reason, was not suitable for inclusion in a text which would have the binding legal force of a multilateral convention.

37. The Committee discussed the possibility of restricting the proposed guarantee to the right to equal protection, or to equality in the application of the law.

The majority of the experts thought that, even with this restriction, the provision was unacceptable, for reasons similar to those which prompted them to reject Article 5 of the Assembly's draft.

a) An Article recognising the right to equal protection or to equality in the application of the law was of doubtful value because this right was, to a large extent already guaranteed by the Convention, especially in Articles 6 and 14.

b) Furthermore, a provision of such a vague and general character might be open to dangerous legal interpretations.

c) Lastly, if such a provision were adopted, the organs provided for in the Convention would run the risk of becoming a superior authority to which appeals could be made against alleged errors in the appreciation of the facts or of the law on the part of national authorities. The Commission would then be faced with a large number of appeals against judgments by national courts which, allegedly, had not ensured equality in the application of the law to the person concerned. In practice, the Commission would be obliged to check a multitude of facts in order to decide whether the national court had applied the law correctly from the point of view of equality of treatment.

ARTICLE 7: ASSEMBLY DRAFT	ARTICLE 5: COMMITTEE OF EXPERTS' DRAFT
"1. Any High Contracting Party may, at the time of signature or ratification or at any time thereafter, communicate to the Secretary General of the Council of Europe a declaration stating the extent to which it undertakes that the provisions of the Protocol shall apply to such of the territories for the international relations of which it is responsible as are named therein.	"1. Any High Contracting Party may, at the time of signature or ratification or at any time thereafter, communicate to the Secretary General of the Council of Europe a declaration stating the extent to which it undertakes that the provisions of the <u>present</u> Protocol shall apply to such of the territories for the international relations of which it is responsible as are named therein.
2. Any High Contracting Party which has communicated a declaration in virtue of the preceding paragraph may from time to time communicate a further declaration modifying the terms of any former declaration or terminating the application of the provisions of this Protocol in respect of any territory.	2. Any High Contracting Party which has communicated a declaration in virtue of the preceding paragraph may from time to time communicate a further declaration modifying the terms of any former declaration or terminating the application of the provisions of this Protocol in respect of any territory.
3. A declaration made in accordance with this article shall be deemed to have been made in accordance with paragraph 1 of Article 63 of the Convention."	3. A declaration made in accordance with this article shall be deemed to have been made in accordance with paragraph 1 of Article 63 of the Convention.
	4. <u>The territory of any State to which this Protocol applies by virtue of ratification or acceptance by that State, and each territory to which this Protocol is applied by virtue of a declaration by that State under this article, shall be treated as separate territories for the purpose of the references in Articles 2 and 3 to the territory of a State."</u>

38. The Committee decided to add a paragraph 4 to Article 5 in order to take account of a problem which may arise in connection with States which are responsible for the international relations of overseas territories.

Thus, for example, insofar as nationality is concerned, there is no distinction between the United Kingdom and most of the territories for whose international relations it is responsible; in relation to these territories and the United Kingdom there is a common citizenship, designated as "citizenship of the United Kingdom and Colonies".

Persons who derive the common nationality from a connection with one such territory do not, however, have the right to admission to, or have immunity from expulsion from, another such territory. Each territory has its own laws relating to admission to and expulsion from its territory. Under these laws admission can be refused to persons who, though they possess the common nationality, do not derive it from connection with the territory in question, and in certain circumstances such persons can be expelled from that territory. Equally, persons who derive the common nationality from a connection with a dependent territory can in certain circumstances be refused admission to the United Kingdom or, if admitted, be expelled from the United Kingdom. What is said above is relevant to Article 3 of this Protocol, but a similar situation would arise as regards the interpretation of "territory" for the purposes of Article 2.

Accordingly, it is desirable that the references in Articles 2 and 3 to the territory of a State should relate to the metropolitan territory and each non-metropolitan territory separately, and not to a single geographical entity comprising the metropolitan and the other territories.

This interpretation would apply only to Article 2, paragraph 1, and to Article 3 of this Protocol.

39. One expert expressed the view that a Member State which is responsible for the international relations of a territory should readmit the nationals of this territory.

The Committee considered that the solution of such a problem was not a matter for the Convention on Human Rights or for its Second Protocol.

It was understood that the provisions of Article 5, paragraph 4 should not and could not have the result of affecting the rights of other Contracting Parties as regards the admission of persons to their territory.

40. The text for paragraph 4 originally proposed to the Committee by one expert included at the end of the paragraph the words: "and the reference in Article 3 to the State of which a person is a national shall be understood accordingly". It was agreed not to include this phrase because its sense was already covered by the previous sentence of this paragraph.

41. One expert proposed an amendment substituting for the words "is applied" in paragraph 4 the words "can be applied".

The object of this amendment was to ensure that the paragraph could not be interpreted as meaning that persons whose nationality was derived from connection with an overseas territory to which this Protocol had not been applied could be regarded, in view of the terms of Article 3, paragraph 2, as having any right to enter the metropolitan territory. This amendment was not adopted since the Committee considered that the paragraph could not in any event be interpreted in this way.

42. One expert declared that he could not subscribe to the commentary made by the experts on draft Article 5.

ARTICLE 8: ASSEMBLY DRAFT	ARTICLE 6: COMMITTEE OF EXPERTS' DRAFT
"1. As between the High Contracting Parties the provisions of Articles 1 to 9 of this Protocol shall be regarded as additional articles to the Convention, and all the provisions of the Convention shall apply accordingly.	"1. As between the High Contracting Parties the provisions of Articles 1 to 5 of this Protocol shall be regarded as additional articles to the Convention, and all the provisions of the Convention shall apply accordingly.
2. <u>Alternative A</u>	
A declaration already made, or which may in the future be made, in accordance with Article 25 or Article 46 of the Convention by any High Contracting Party to this Protocol shall become operative in respect of the provisions of this Protocol.	
<u>Alternative B</u>	
Nevertheless, a declaration recognising the right of individual recourse in accordance with Article 25 of the Convention or a declaration recognising the compulsory jurisdiction of the	2. Nevertheless, the right of individual recourse recognised by a declaration made under Article 25 of the Convention, or the acceptance of the compulsory jurisdiction of

<p>Court in accordance with Article 46 of the Convention shall apply in respect of the rights set forth in this Protocol only if the High Contracting Party concerned has so stated."</p>	<p>the Court by a declaration made under Article 46 of the Convention, shall not be effective in relation to this Protocol unless the High Contracting Party concerned has made a statement recognising such right, or accepting such jurisdiction in respect of all or any of Articles 1 to 4 of the Protocol."</p>
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43. The majority of the experts decided to adopt Alternative B of the text proposed by the Assembly.

In the Committee's opinion, it would be inappropriate to apply automatically declarations already made by Governments under Articles 25 and 46 of the Convention, to the rights and freedoms provided for in this Protocol, since such rights and freedoms were not envisaged by the Governments at the time of making such declarations.

It was also considered by the majority of the experts that the adoption of Alternative A might have the effect of delaying the signature or ratification of this Protocol.

44. The Committee decided, however, to amend Alternative B of the text proposed by the Assembly in one respect.

The amended text would permit States which make declarations relating to the right of individual recourse and to the compulsory jurisdiction of the Court to limit the application of such declarations to one or more articles only of the Second Protocol. Such a system would admittedly be different from that of the Convention and that of the First Protocol. But if version B of the Assembly's project were adopted as it stood, it could happen that certain States would refuse to recognise the Commission's competence to hear individual applications or the compulsory jurisdiction of the Court in respect of the whole of the Second Protocol, even though they were disposed to recognise that competence or that jurisdiction in respect of certain articles of the Second Protocol.

ARTICLE 9: ASSEMBLY DRAFT	ARTICLE 7: COMMITTEE OF EXPERTS' DRAFT
<p>"1. This Protocol shall be open for signature by the members of the Council of Europe who are the signatories of the Convention; it shall be ratified at the same time as or after the ratification of the Convention. It shall enter into force after the deposit of five instruments of ratification. As regards any signatory ratifying subsequently, the Protocol shall enter into force at the date of the deposit of its instrument of ratification.</p>	<p>"1. This Protocol shall be open for signature of the members of the Council of Europe who are the signatories of the Convention; it shall be ratified at the same time as or after the ratification of the Convention. It shall enter into force after the deposit of five instruments of ratification. As regards any signatory ratifying subsequently, the Protocol shall enter into force at the date of the deposit of its instrument of ratification.</p>
<p>2. The instruments of ratification shall be deposited with the Secretary General of the Council of Europe, who will notify all members of the names of those who have ratified."</p>	<p>2. The instruments of ratification shall be deposited with the Secretary General of the Council of Europe, who will notify all members of the names of those who have ratified."</p>

45. This text is identical to that proposed by the Assembly and requires no comment.