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Explanatory Report to Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, restructuring the control machinery established thereby

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I. Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, drawn up within the Council of Europe by a committee of governmental experts under the authority of the Steering Committee for Human Rights, was opened for signature by the member States of the Council of Europe on 11 May 1994.

II. This publication contains the text of the explanatory report prepared by the committee of experts and transmitted to the Committee of Ministers of the Council of Europe.

I. Introduction

1. In November 1991, the Ministers of Foreign Affairs, meeting at the 89th session of the Committee of Ministers of the Council of Europe, instructed their Deputies to give absolute priority to speeding up work on the reform of the control mechanism of the European Convention on Human Rights.

2. At their 91st session in November 1992, the Ministers noted that the technical background work on this subject had been completed and that various proposals awaited consideration as to the substance of the reform (notably the creation of a single Court or the introduction of a two-tier judicial system) [(1)]. The Ministers reiterated the importance they attached to this urgent problem and, having also noted Recommendation 1194 (1992) of the Parliamentary Assembly – which supported the proposal to create a single Court as a full-time body in replacement of the existing European Commission and Court of Human Rights – agreed that a search for a rapid solution should feature prominently among the Organisation's priorities.

3. At the 92nd session of the Committee of Ministers, held in May 1993, the Ministers noted that there had been significant progress at the level of their Deputies in recent weeks on the preparation of a mandate, and instructed their Deputies "to complete this work urgently in time for the meeting of the Steering Committee for Human Rights (CDDH) starting on 7 June 1993, with a view to preparing a draft protocol to amend the European Convention on Human Rights for submission to Heads of State and Government in Vienna in October 1993 ".

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(1) For further details consult the Council of Europe document entitled "Reform of the control system of the European Convention on Human Rights", doc. H (92) 14 (also published in Vol. 14 Human Rights Law Journal (H.R.L.J.), 1993, pp. 31-48).

4. On 28 May 1993, during a special meeting, the Ministers' Deputies adopted a decision assigning *ad hoc* terms of reference to the CDDH. The text of the terms of reference were:

> "The Committee of Ministers stresses the necessity of a reform of the supervisory mechanism of the Convention for the Protection of Human Rights and Fundamental Freedoms, with the aim of improving efficiency and shortening the time taken for individual applications, at minimum cost.
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> For this reason the Committee of Ministers instructs the CDDH to prepare a draft amending protocol to the Convention, restructuring the existing supervisory mechanism by replacing it with:
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> – a Court which:
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> – should consist of a number of judges equal to, that of the members of the Council of Europe;
> – should work in committees and Chambers; and
> – must be provided with:
>
> – an effective mechanism for the filtering of applications; an effective procedure to enable friendly settlements;
>
> – an appropriate structure to ensure the quality and consistency of its case-law and to enable a re-hearing in exceptional cases, for example those raising serious questions affecting the interpretation or application of the Convention; provision should be made for the presence of a national judge in any such re-hearing;
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> – the Committee of Ministers retaining its competence under Article 54, it being understood that its competence to deal with individual applications under the present Article 32 of the Convention is abolished.
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> The CDDH should also examine:
>
> – whether the right of individual petition should remain optional or not;
> – the way in which inter-State applications should be dealt with;
> – the role and functions of possible Advocates-General. "

Furthermore, the terms of reference of the CDDH stipulated that the mandate be completed by "30 September 1993, with a view to submitting the draft Protocol to amend the European Convention on Human Rights to Heads of State and Government in Vienna on 8-9 October 1993 ".

5. In June 1993, the CDDH requested the Committee of Experts for the Improvement of Procedures for the Protection of Human Rights (DH-PR), a subordinate body of the CDDH, to prepare, as a matter of utmost priority, a draft protocol in accordance with the terms of reference assigned to it by the Ministers' Deputies. At the Vienna Summit, held on 8-9 October 1993, the Heads of State and Government of the Council of Europe member States mandated the Committee of Ministers to finalise the draft protocol with a view to adopting a text and opening it for signature at its ministerial meeting in May 1994. The draft protocol prepared by the DH-PR and subsequently finalised by the CDDH – after due consultation of the European Commission and Court of Human Rights as well as the Parliamentary Assembly – was submitted to the Committee of Ministers, which adopted the text at the 511bis meeting of the Ministers' Deputies held on 20 April 1994. The text was opened for signature by member States of the Council of Europe signatories to the European Convention on 11 May 1994.

II. Background

6. The idea of a European Convention on Human Rights to be implemented by a Court to which individuals would have access can be traced back to the Congress of Europe, convened by the International Committee of Movements for European Unity and held at The Hague from 8 to 10 May 1948. In their "Message to Europeans" adopted at the final plenary session, the Congress delegates pledged *inter alia*:

> "2. We desire a Charter of Human Rights guaranteeing liberty of thought, assembly and expression as well as the right to form a political opposition;
>
> 3. We desire a Court of Justice with adequate sanctions for the implementation of this Charter;".

The Resolution adopted by the Congress on the proposal of its Political Committee should also be noted:

> "The Congress –
>
> 6. Is convinced that in the interest of human values and human liberty, the [proposed] Assembly should make proposals for the establishment of a Court of Justice with adequate sanctions for the implementation of this Charter [of Human Rights], and to this end any citizen of the associated countries shall have redress before the Court, at any time and with the least possible delay, of any violation of his rights as formulated in the Charter. "

7. The idea of a Human Rights Charter and a Court of Justice was subsequently examined in depth by the European Movement, which on 12 July 1949 submitted the text of a draft European Convention on Human Rights to the Committee of Ministers. This text notably made provision not only for a Court but also for a Human Rights Commission, to which litigants would first have to submit their case. It was foreseen that this body would be empowered to reject without investigation petitions from individuals who had failed to exhaust domestic remedies and that, moreover, its authorisation would be required for an individual to initiate proceedings before the Court.

The proposal for a Human Rights Commission, in addition to a Court, was made to counter the criticism that the latter would be inundated with frivolous litigation and its facilities exploited for political ends. The subsequent debates in the Consultative (now renamed "Parliamentary") Assembly and the bodies established by the Committee of Ministers to draw up the Convention confirmed that these fears were deeply felt.

8. The creation of a European Commission of Human Rights was in fact not a contentious issue during the drafting of the Convention. On the other hand, there was considerable opposition to the creation of a Court, it being argued that it would not correspond to a real need of the member States. Articles 46 and 48 of the Convention represented a compromise between this position and that of those States which felt the creation of a Court was essential (the controversy over whether individuals should have the right to address petitions to the Commission was, of course, settled in a similar way).

9. The net result was the tripartite structure, which entered into force on 3 September 1953: [1] the Commission – to consider the admissibility of petitions, to establish the facts, to promote friendly settlements and, if appropriate, to give an opinion as to whether or not the petitions reveal a violation of the Convention; the Court – to give a final and binding judgment on cases referred to it by the Commission or by a Contracting Party concerned; [2] the Committee of Ministers – to give a final and binding decision on cases which cannot be referred to the Court or which, for one reason or another, are not referred to it.

The idea of creating a single Court ("merger" of the Commission and the Court)

10. The possibility of "merging" the Commission and Court into a single body was apparently first evoked at the 8th meeting (July 1982) of the Committee of Experts for the Improvement of the Procedure under the European Convention on Human Rights (DH-PR) [3] during an exchange of views with representatives of the Commission, and since that time it has featured on the DH-PR Committee's list of possible long- term reforms. However, it was not until the European Ministerial Conference on Human Rights (Vienna, March 1985) that the "merger" idea was raised for the first time at a political level.

11. The possibility of a "merger" i.e., the creation of a single Court, was in fact broached in the report on the "functioning of the organs of the European Convention on Human Rights" presented by the Swiss delegation at the above-mentioned Conference (see doc. MDH (85) 1), and was referred to – with varying degrees of support or opposition – in a number of other contributions.

In Conference Resolution No. 1, the Ministers, after referring to "the need to examine the possibility of introducing further improvements (to the Convention's system of control), including as appropriate measures of a more far-reaching nature", underlined that the body of experts entrusted with the task of examining such possible further improvements "should bear in mind the Swiss delegation's report as well as the observations made by other delegations".

12. The Ministerial Conference also stimulated discussion of the "merger" idea (creation of a single Court) in other fora. It was raised, for example, during the debates at the 6th International Colloquy about the European Convention on Human Rights held at Seville in November 1985. Again, the "merger of the European Commission and European Court of Human Rights" was the subject of a two-day colloquy held at the University of Neuchâtel in March 1986, at which participated politicians, members of the Convention's organs, government officials, practising lawyers and other persons concerned by or interested in the envisaged reform. [4]

13. Thereupon, the DH-PR – upon the instructions of the CDDH – examined the idea of "merger" between December 1985 and December 1987, and prepared a report on this subject for the CDDH.

In January 1989, the Committee of Ministers decided – upon the request of the CDDH – to declassify the report of the DH-PR, in order to facilitate the examination of the "merger" idea within interested circles (published as doc. H (89) 2). [5]

(1) See European Convention on Human Rights. Collected Texts (1994), passim.
(2) It was not considered appropriate for the individual applicant himself to be allowed to refer the case to the Court (see further the Collected Edition of the Travaux Préparatoires of the Convention, Volume IV, page 44). Cf Protocol No. 9 to the Convention.
(3) The DH-PR Committee is now called "Committee of Experts for the Improvement of Procedure for the Protection of Human Rights" (see para. 5 above).
(4) See "Merger of the European Commission and European Court of Human Rights", in Vol. 8 H.R.L.J., 1987, pp. 1-244, for the colloquy's proceedings. See also Recommendation 1087 (1988) of the Parliamentary Assembly, adopted on 7 October 1988.
(5) Also published in Vol. 14 H.R.L.J., see footnote 1, p. 1.

14. Both within the CDDH and the DH-PR opinions remained divided on the advisability of the proposed reform. There was, however, general agreement within the CDDH that consideration of the reform should be pursued and the CDDH thereupon instructed the DH-PR to draw up the detailed structure of a possible single Court system, to examine methods of implementation and, at a suitable moment, to seek information on the budgetary implications of the proposal. At its 28th meeting, in June 1990, the CDDH examined the DH-PR's "detailed structure of a possible single Court system ".[(1)] Discussion on this subject was then postponed with the request that the DH-PR not pursue consideration of methods of implementation and the question of budgetary implications.

The Dutch-Swedish initiative

15. In the meantime, initiatives had been undertaken by the Dutch and Swedish authorities to try to get out of the existing impasse. The proposals, put forward almost simultaneously by the Netherlands and Sweden in October 1990, turned out to be very similar.

16. The central idea in both proposals was that the opinions of the Commission under Article 31 of the Convention – in so far as individual applications were concerned – would have been transformed into legally binding decisions. In other words, there would have been established a two-tier judicial system, i.e. the Commission operating like a court of first instance from which individual applicants and States would be accorded the right to appeal to the Court against the Commission's decision on the merits, subject to leave to appeal being granted by the Court. These proposals envisaged no changes in the present procedures relating to inter-State cases, and would have – as Protocol No. 9 to the Convention has partially done – placed individual applicants and States on an equal footing to bring cases before the Court. In addition, the proposals entailed the abandonment of the role played by the Committee of Ministers under Article 32 of the Convention in respect of individual applications.

17. These proposals were examined in depth by the DH-PR, which submitted its report on the matter to the CDDH in March 1992. [(2)] Although a majority of the experts in the DH-PR and CDDH was in favour of an eventual two-tier system as proposed by the Netherlands and Sweden, no consensus as to such a reform could be reached.

18. Having tried unsuccessfully to reach agreement on the proposals for a reform, the CDDH, in October 1992, referred the different proposals to the Committee of Ministers in order to obtain a clear mandate for its further work on reform. On 28 May 1993 the Committee of Ministers adopted the decision assigning the *ad hoc* terms of reference to the CDDH as mentioned in paragraph 4 above. This decision was endorsed by the Council of Europe's Heads of State and Government at the Vienna Summit in the "Vienna Declaration" of 9 October 1993.

III. The urgent need to restructure the control machinery established by the Convention

19. Although the question of a reform of the supervisory machinery has been discussed since the beginning of the 1980s, the need for a reform is considered increasingly urgent as a growing number of complaints has been lodged with the Commission; in addition, new States have joined the system. The increasing workload of the Commission has also resulted in more cases being referred to the Court in the last few years.

(1) See doc. H (93) 14, pp. 20-27 (also published in Vol. 14 H.R.L.J., see footnote 1).
(2) For a detailed description of the Dutch and Swedish proposals, see note 1 above (As to the views of the members of the Court and the Commission, see par. 80-113).

20. The number of applications registered with the Commission has increased from 404 in 1981 to 2,037 in 1993. This figure can be expected to increase significantly in view of the fact that the system has become better known to individuals in member States, and in view of the fact that new States have and will become Parties to the Convention. By the year 2000, there may well be 35-40 States Parties to the Convention. The number of judges and members of the Commission will increase in a corresponding manner.

21. The backlog of cases before the Commission is considerable. At the end of the Commission's session in January 1994, the number of pending cases stood at 2,672, more than 1,487 of which had not yet been looked at by the Commission. It takes on average over 5 years for a case to be finally determined by the Court or the Committee of Ministers.

Also, whereas up to 1988 there were never more than 25 cases referred to the Court in one year, 31 were referred in 1989, 61 in 1990, 93 in 1991, 50 in 1992 and 52 in 1993, and it is probable that the number will increase even more in the next few years when the full effects will be felt of Protocol No. 8 regarding the Commission. Likewise at the end of 1992 the Committee of Ministers had before it 15 cases for examination under Article 32 of the Convention; the figure was 189 at the end of 1993.

22. In the light of these facts, the Committee of Ministers has, on several occasions, stressed the urgency of reform, most recently at its 92nd session on 14 May 1993. The Parliamentary Assembly has also addressed this question. In its Recommendation 1194 (1992), adopted on 6 October 1992, the Parliamentary Assembly

> "[noted] that the number of Council of Europe member states has risen [...] and will continue to rise in the next few years and that the considerable increase in the number of applications submitted to the Commission and to the Court is thus to be expected.
>
> [It expected] that the number of individual applications will increase disproportionately to the population of the new member States as, contrary to older member States, the Council of Europe's system for the protection of human rights constitutes for them an important element for the building-up of fundamental rights, democracy and the rule of law.
>
> [Maintaining] that the real test for its system of the protection of human rights is still to come and that the reform of the control mechanism of the Convention is therefore of the utmost importance for the Council of Europe."

It then recommended that the Committee of Ministers

> "i. take the necessary steps to reform the control mechanism of the European Convention on Human Rights without delay;
>
> ii. in doing so, give clear preference to the proposal to create a single court as a full-time body in place of the existing Commission and Court;
>
> iii. refrain from opting for a temporary solution that would further delay the necessary reform. "

23. The reform proposed is thus principally aimed at restructuring the system, so as to shorten the length of Strasbourg proceedings. There is need for a supervising machinery that can work efficiently and at acceptable costs even with forty member States and which can maintain the authority and quality of the case-law in the future.

This point was emphasised by the Council of Europe's Heads of State and Government in the "Vienna Declaration" of 9 October 1993

> "Since the Convention entered into force in 1953 the number of contracting States has almost tripled and more countries will accede after becoming members of the Council of Europe. We are of the opinion that it has become urgently necessary to adapt the present control mechanism to this development in order to be able to maintain in the future effective international protection for human rights. The purpose of this reform is to enhance the efficiency of the means of protection, to shorten procedures and to maintain the present high quality of human rights protection."

24. The creation of a single Court is intended to prevent the overlapping of a certain amount of work and also to avoid certain delays which are inherent in the present system.

25. Finally, this Protocol aims at strengthening the judicial elements of the system.

IV. Main features of the single Court system

26. The new single Court will replace two of the existing supervisory organs created by the European Convention on Human Rights and will perform the functions carried out by these organs. The Committee of Ministers will retain its competence under former Article 54; its competence under former Article 32 of the Convention will be abolished.

Competence of the new Court

27. The Court will have jurisdiction in all matters concerning the interpretation and application of the Convention including inter-State cases as well as individual applications. In addition, the Court will, as at present, be able to give advisory opinions when so requested by the Committee of Ministers.

28. The Court will function on a permanent basis.

Composition of the Court

29. The Court will consist of a number of judges equal ta, that of the State Parties to the Convention, elected, as at present, by the Parliamentary Assembly with respect to each State Party. The members of the Court will be elected for a period of six years; they can be re-elected.

30. The Court will have a registry.

31. Judges may be assisted by legal secretaries (law clerks), i.e. assistants appointed for a specific period of time to work on case-files.

Organisation of the Court

32. When deciding cases the Court will sit in committees, Chambers and in a Grand Chamber. The judge elected in respect of the State concerned will always sit in the Chambers and Grand Chamber. Organisational matters will be dealt with by the Court in plenary, comprising all judges.

33. Committees will consist of three judges, Chambers of seven judges and the Grand Chamber of seventeen judges. There will be no quorum. The Court will appoint substitute members so that committees and Chambers can sit with the required composition of judges.

34. Committees will be set up by Chambers for a fixed period of time. Chambers will themselves determine the judges and substitute judges who are to sit in the committees. Committees will only have the power to declare cases inadmissible or strike them from the list.

35. Chambers will also be set up by the Court for a fixed period of time. The Court will designate the seven judges who will sit in a Chamber. The Court will appoint the judges and substitute judges in a way which may be specified in its rules. The possibility that a judge may be a member of two Chambers is not excluded.

36. There will be a Grand Chamber of seventeen judges to decide on individual as well as inter-State applications referred to it and to consider requests for advisory opinions. The President of the Court, the Vice-Presidents, the Presidents of the Chambers and the judge elected in respect of the State against which the application is lodged, will be *ex officio* members of the Grand Chamber. The other judges will be appointed by the Court in a way specified in the rules. When the Grand Chamber examines cases referred to it under Article 43, of the Chamber concerned only the judge elected in respect of the State and the President of the Chamber which rendered the judgment may sit in the Grand Chamber.

37. The Court may determine in its rules that members of the Grand Chamber, other than the *ex officio* members, be drawn by lot for every case.

The Court may also set up a Grand Chamber for a fixed period. Judges precluded from taking part in certain cases by virtue of Article 27, paragraph 3, will then have to be replaced by other judges, e.g., substitute members or judges chosen by lot.

Procedure before the Court

38. The Court will receive applications from:

a. any person, non-governmental organisation or group of individuals claiming to be the victim of a violation of the Convention by one of the States Parties; or

b. a State Party in the case of inter-State applications.

39. As the Secretariat of the Commission does at present, the registry of the new Court will communicate with applicants in order to deal with any matters requiring clarification before registration of an application.

40. As soon as an application is registered, a judge rapporteur will be designated by a Chamber. The individual application will normally be examined by a committee, including the judge rapporteur. The committee will have the power, exercisable by unanimous vote, to declare an application inadmissible or strike it from its list of cases if such a decision can be taken without further examination. If an application is not considered inadmissible by the committee, the case will be transferred to a Chamber, which will examine both the admissibility as well as the merits of the case. Details concerning the procedure may be dealt with in the rules of the Court. The rules of the Court may provide for the immediate transfer of applications to the Chamber, when appropriate.

41. The admissibility criteria remain unchanged. Thus the intention is that the Court will continue to exercise an effective filter function, as presently performed by the Commission.

42. Subject to powers specifically attributed to committees and the Grand Chamber, Chambers will have inherent competence to examine the admissibility and the merits of all individual and inter-State applications (for inter-State cases see also paragraph 54 below).

43. As already indicated, every application registered will be allocated to a judge rapporteur. With the help of the registry of the Court, the judge rapporteur will, under the authority of the Court, prepare the case, communicate as appropriate with the parties for that purpose and may, after the case has been declared admissible, take steps with a view to a friendly settlement.

44. The procedure will be written and oral, unless otherwise decided by the Court after consultation with the parties. Subject to powers delegated to committees, the admissibility of applications will be examined by the Chambers or the Grand Chamber. The Chambers' decisions on admissibility will, in principle, be taken separately from the merits.

The facts will be established by the Court, with the co-operation of the parties. The Court will be at the disposal of the parties in order to secure a friendly settlement on the basis of respect for human rights.

45. The merits of an application will be examined by a Chamber and, exceptionally, by the Grand Chamber. The parties will present their sub- missions by means of a written procedure. Oral procedure will consist of a hearing at which the applicant, or a State Party in an inter-State case, and the respondent State will have the right to speak.

46. In cases with specified serious implications, a Chamber will be able to relinquish jurisdiction *proprio motu* in favour of the Grand Chamber at any time, as long as it has not yet rendered judgment, unless one of the parties to the case objects. Such relinquishment should also speed up proceedings. Once a judgment has been rendered by a Chamber, only the parties may request that the case be referred to the Grand Chamber for a re-hearing.

47. Following the judgment delivered by a Chamber of the Court, the Grand Chamber, at the request of one of the parties to the case and in exceptional cases, will be competent to re-examine a case if the case raises serious questions concerning the interpretation or application of the Convention or its protocols, or if the cases raises an issue of general importance. The purpose is to ensure the quality and consistency of the Court's case-law by allowing for a re-examination of the most important cases if the above-mentioned conditions are met. A panel of five judges of the Grand Chamber will decide on whether a case is to be accepted for re-examination.

48. The provisions of the Protocol also provide for the participation of third parties in proceedings before the Court. In cases declared admissible, States whose nationals have lodged applications against other States Parties to the Convention, will have the possibility to submit written comments and take part in hearings.

Likewise, the President of the Court will be able to invite or authorise any Contracting State which is not Party to proceedings and any person establishing an interest in the result of any case brought before it to submit observations.

49. The Court will determine the question of just satisfaction, including that of costs and expenses.

50. The judgment of the Grand Chamber will be final. The judgment of the Chamber will become final in accordance with the new Article 44, paragraph 2, if the case in which it has been rendered is not brought before the Grand Chamber. Final judgments of the Court will be binding. The Committee of Ministers will, as at present, supervise their execution.

Procedure governing friendly settlements

51. A case may be terminated by a friendly settlement between the parties at any stage of the proceedings before the Court.

As already indicated, the Court, with the help of its registry, may assist the parties (see also, paragraphs 93 and 94 below).

Outline of the procedure

52. The basic order of procedure in a case which proceeds to judgment on the merits will be, in most cases, as follows:

– lodging of application;
– preliminary contacts with the Court's registry;
– registration of application;
– assignment of application to a Chamber;
– appointment of judge rapporteur by the Chamber;
– examination by a three-member committee;
– communication of the application to the Government;
– filing of observations and establishment of facts;
– oral hearing;
– admissibility decision by Chamber;
– possibility of friendly settlement negotiations;
– judgment by the Chamber.

53. In exceptional cases an application may be referred to the Grand Chamber which will render judgment after written and, if the Court so decides, oral proceedings.

Procedure applicable to inter-State applications

54. Any State Party will be able to refer to the Court any alleged breach of the provision of the Convention by another State Party; a Chamber will have jurisdiction.

V. The choice of an amending rather than an optional protocol

55. The fundamental character of the reform of the control mechanism necessitates approval by all States Parties to the Convention. Therefore, Protocol No. 11 is conceived in the form of an amending protocol, in respect of which all States Parties must express their consent to be bound in order for it to enter into force.

56. Only an amending protocol can prevent two different mechanisms of control from existing side by side. Such a parallelism would not be desirable because a homogeneous and clearly consistent development of case-law constitutes an important basis of human rights protection under the Convention. Furthermore, the existence of two groups of States subject to two different supervisory mechanisms would invariably cause considerable procedural complications, e.g. for the registry and for judges sitting in both the old and the new Courts. This would run counter to the aim of the reform to increase efficiency. Finally, the parallelism of two mechanisms of supervision could cause confusion for individual applicants, a result contrary to the aim of creating a more transparent system.

Moreover, it should be pointed out that during the Vienna Summit, the Heads of State and Government affirmed that this Protocol be submitted for ratification at the earliest possible date (see also paragraphs 5 and 23 above).

VI. Commentary on the provisions of the Protocol [(1)]

Article 1 of the amending Protocol

Article 19 – Establishment of the Court

57. The text of Article 19 follows closely that of former Article 19 of the Convention. However, unlike former Article 19 of the Convention, this and certain later articles in the text mention the protocols to the Convention; this addition reflects developments after the adoption of the Convention in 1950. Obviously, States will be bound only by the protocols they have ratified.

58. The same title as that of the former Court has been retained for the supervisory institution. This, however, should not disguise the fact that it is a new institution. The new Court is to be a permanent Court, whose seat is in Strasbourg.

Article 20 – Number of judges

59. Article 20 is based on former Article 38 of the Convention, except that the second sentence of former Article 38 of the Convention has been deleted. i.e., the condition that no two judges may be nationals of the same State has been removed. In principle, there should be no more than two judges of the same nationality on the Court. A State Party will have the possibility to put forward the name of a judge who is a national of another State Party rather than propose a judge from a State which has not ratified the Convention.

The Court consists of the number of judges equal to that of Contracting Parties rather than, as beforehand, that of the members of the Council of Europe. In this respect it was considered preferable to follow the procedure relating to the appointment of members of the Commission (see Article 20 of the former text of the Convention).

Article 21 – Criteria for office

60. Paragraphs 1 and 2 of Article 21 follow closely paragraph 3 of former Article 39 and paragraph 7 of former Article 40 of the Convention. The provision in paragraph 3 concerns incompatibility "with the demands" of this office and means that judges must be able fully to assume all the duties inherent in membership of the new permanent Court; this is an indispensable requirement for the efficient working of the Court. During their term of office judges may not engage in any activity incompatible with the full-time character of their office.

Article 22 – Election of judges

61. The text of Article 22 is virtually identical to that of former Article 39, paragraphs 1 and 2 of the Convention. As to paragraph 3 of former Article 39, this has been included in Article 21. The judges of the new permanent Court will be elected in respect of each State Party in the same manner as those of the Court, prior to the Convention's amendment by this Protocol, namely by the Parliamentary Assembly.

Article 23 – Terms of office

62. The text of Article 23 is similar tc, that of paragraphs 1 to 6 of former Article 40 of the Convention (as to paragraph 7 of that Article, see Article 21). Judges will be elected for a period of six years, as compared to, nine years, as was previously the case (see Article 22, paragraph 1, of the former text of the Convention). Consequently, the rotation provisions have been amended accordingly.

(1) Unless otherwise stated, Article references are to the Articles of the Convention as amended by this Protocol.

If the number of judges is uneven, paragraphs 1 and 3 are to be interpreted to mean one half of the judges, minus one person.

63. Paragraph 6 adds the requirement that judges must retire at the age of 70; the Court's rules will determine in which circumstances a judge can continue to deal with a case upon reaching the age of 70, as envisaged in paragraph 7. Since the Court will function on a permanent basis, it was deemed appropriate to introduce an age limit, as exists in most domestic legal systems.

Article 24 – Dismissal

64. This Article is modelled on Article 18, paragraph 1, of the Statute of the International Court of Justice. However, unlike the latter text, which requires unanimity, in the present text dismissal from office requires a majority of two-thirds of all the judges of the Court. This provision was added in order to ensure the independence of the Court.

Article 25 – Registry and legal secretaries

65. The text of Article 25, first sentence, is derived from Rules 11 and 12 of the former Rules of Court.

66. A Registrar and one or more Deputy Registrars are elected by the Court. The Court's registry is provided by the Secretary General of the Council of Europe.

67. The second sentence is a new provision inserted into the text of the Convention in order to ensure that members of the Court can, if they so wish, be assisted by legal secretaries (law clerks). Such assistants, who may be appointed upon the proposal of the judges, must have the required qualifications and practical experience to carry out the duties assigned to them by the judges.

Article 26 – Plenary Court

68. The text of Article 26 is a substantially expanded version of former Article 41 of the Convention (see also paragraphs 32 to 37).

69. Article 26 d. is modelled on former Article 55 of the Convention. In relation to the advisory jurisdiction of the Court under Articles 47 to 49, it fulfills the same function as Article 4 of the former Protocol No. 2.

70. The rules of Court will have to be adapted to the new structure and, in particular, to be supplemented on the following points: the role of the registry; the functions of the plenary Court; the constitution and the composition of the Grand Chamber, Chambers and committees; procedure on questions of admissibility and procedure concerning friendly settlement negotiations. The Rules of Procedure of the Commission will be of assistance in this connection.

71. Another matter for the rules of the new Court will be the question of publicity. The Court's proceedings (unlike those of the Commission; see former Article 33 of the Convention) will, save in exceptional circumstances, be public (see Article 40). Material relating to the friendly settlement negotiations will remain confidential (see Article 38, paragraph 2; see also Article 40, paragraph 2).

Article 27 – Committees, Chambers and Grand Chamber

72. The organisation of the Court is described above (see paragraphs 32 to 37). Cases are to be decided by committees, Chambers and the Grand Chamber. The judge elected in respect of the State concerned will sit ex officio in Chamber and in the Grand Chamber; this judge does not necessarily sit in a committee. Persons sitting in the capacity of judges, in accordance with paragraph 2, must fulfil the requirements laid down in Article 21 (with the exception of the requirement relating to the demands of a full-time office).

73. There are, as *ex officio* members of the Grand Chamber, the President of the Court, the Vice-Presidents, the Chamber Presidents and the judge elected in respect of the State concerned. The other judges are chosen in accordance with the Rules of the Court (Article 27, paragraph 3). To make sure that the Grand Chamber looks into the matter afresh when examining a case referred to it under Article 43, judges from the Chamber which made the initial judgment are excluded, with the exception of the President of the Chamber and the judge who sat in respect of the State concerned.

74. In order to ensure the consistency of the Court's case-law it was considered necessary to ensure that Presidents of all Chambers sit in the Grand Chamber.

The presence of the judge elected in respect of the State concerned is necessary in order to avoid *ad hoc* "national judges" in cases before the Grand Chamber.

Article 28 – Declarations of inadmissibility by committees

75. In this and other articles, complaints submitted by persons, non-governmental organisations or groups of individuals are referred to as "applications" rather than "petitions" as in the English text of former Article 25 of the Convention. This reflects practice that existed under the former supervisory system.

76. The procedure before a committee will be similar to the procedure followed by committees that were set up within the European Commission of Human Rights. Every application will first be dealt with by the registry, which will have to perform the functions mentioned in paragraphs 39 and 52. Before registration of an application, the file of the case is to be treated as a "provisional file". After registration the case will be allocated to a judge rapporteur who will, in conformity with the Court's rules of procedure, direct the further preparation of the case. Since the Court is to function on a permanent basis, and the members; of the Court will be present in Strasbourg, the judges may also be provided with the task of supervising the preparation of cases which are not registered, and in particular to keep themselves informed of their number and the length of time such cases have been pending without formal registration. This will concern, in the first place, the judge who is elected in respect of the country concerned by the application, and probably also the President of the Chamber in which this judge sits. The rules of procedure of the Court will need to specify this function in more detail.

Article 29 – Decisions by Chambers on admissibility and merits

77. The text of Article 29 clarifies that the Chamber has to examine the admissibility and the merits of the case. It can declare an application as inadmissible at any stage of the proceedings (Article 35, paragraph 4) even though it originally declared it admissible. The decision on admissibility should be reached at the earliest appropriate stage.

78. The decision on admissibility will be taken separately. It has to be reasoned (Article 45, paragraph 1). The Chamber may provide the parties with an indication of its provisional opinion on the merits. The separate decision on admissibility is important for the parties when considering whether they should start friendly settlement negotiations.

There may, however, be situations in which the Court, in exceptional cases, might not take a separate admissibility decision. This could occur, for example, where a State does not object that a case be declared admissible.

Article 30 – Relinquishment of jurisdiction to the Grand Chamber

79. The text of Article 30 is derived from Rule 51 of the former Rules of Court. Contrary to Rule 51, paragraph 1, second sentence, of the former Rules of the Court, Article 30 does not oblige a Chamber to relinquish jurisdiction.

The reason for making relinquishment subject to the approval of the parties should be seen in the light of the introduction of the concept of "re-hearing", in accordance with the decision of the Committee of Ministers on 28 May 1993 (see paragraph 4 above). The provision is designed so as to secure the possibility that such a "re-hearing" not be adversely affected. This procedure of relinquishment, the use of which can be made any time prior to judgment, must thus be distinguished from that of a re-hearing as provided for in Article 43.

Article 31 – Powers of the Grand Chamber

80. Notwithstanding new Article 26, the Grand Chamber, as described above (see paragraphs 36, 37 and 44 to 50), replaces the plenary Court of the former system. In a Court with more than 30 judges, a plenary with all the judges could work only with difficulty. The Grand Chamber with seventeen judges will be sufficiently representative of the Court. It shall, as far as possible, provide a balanced representation of judges from each Chamber as well as a diversity of legal systems.

The plenary comprising all judges will only deal with matters of organisation mentioned in Article 26.

81. The Grand Chamber is to have competence both with regard to inter-State applications referred to it under Article 30 or 43 as well as individual applications when they are referred to it under Article 30 or 43. The Grand Chamber is also to consider requests for advisory opinions, a function which the plenary Court carried out under the former system. (See Article 3, paragraph 1, of former Protocol No. 2).

Article 32 – Jurisdiction of the Court

82. The first paragraph of Article 3 2 follows closely former Article 45 of the Convention, with an additional reference to its competence to consider requests for advisory opinions; the second paragraph is identical to former Article 49 of the Convention.

Article 33 – Inter-State cases

83. The text of Article 33 is based on that of former Article 24 of the Convention. This Article on inter-State cases reflects the former system whereby proceedings could be instituted before the Commission by one or more States against another State that had ratified the Convention, without the necessity for any additional acceptance of competence on the latter's part. States are, of course, bound only by the protocols they have ratified.

84. "High Contracting Party" in this Article is any State which is a Party to the Convention, as amended by this Protocol.

Article 34 – Individual applications

85. The text of Article 34 is based on that of former Article 25 of the Convention. Under the former system, cases originating in applications by private individuals or non-governmental organisations could only come into being if the State concerned had declared that it accepted

the Commission's competence in the matter and could only be decided by the Court if the State had, in addition, declared that it recognised the Court's jurisdiction. It should be noted that all Contracting Parties have accepted the right of individual petition, and that full acceptance of the supervisory mechanism established by the Convention has become, de facto, a condition for admission to the Organisation. This has resulted in the jurisdiction of the Court, as provided in Article 34, becoming mandatory.

86. Under the former system, a case which was capable of being the subject of judicial decision (because the Court's jurisdiction was recognised) need not necessarily have been so decided because it was not referred to the Court either by the Commission or the State concerned and so was left to be determined by the Committee of Ministers. Such a situation, which was linked to the fact that the individual applicant had no power to refer his own case to the Court, was changed by Protocol No. 9. Under the new system applicants; can bring their cases directly before the Court without restrictions. The present text entails the abandonment of the role played by the Committee of Ministers under former Article 32 of the Convention.

States are, of course, bound only by the protocols they have ratified. (But see also new Article 56 and paragraph 113 below.)

Article 35 – Admissibility criteria

87. Paragraph 1 of Article 35 is derived from former Article 26 of the Convention and paragraphs 2 to 4 from former Article 27. The intention here is to continue practice based on the former Commission's Rules of Procedure.

Grounds of inadmissibility, as they existed under the former system, have been left unchanged in order to provide the new Court with an effective filter mechanism. An application which is patently inadmissible can be so declared at the initial stage of the proceedings by a committee, as provided for in Article 28. The decision declaring an application inadmissible will be final. The decision on admissibility will, in most cases, be taken separately (see Article 29, second sentence).

88. Paragraph 4 of Article 35 does not signify that a State is able to raise an admissibility question at any stage of the proceedings, if it could have been raised earlier.

It is nevertheless important to stress that the Court will be able to reject an application at any stage of the proceedings – even without an oral hearing – if it finds the existence of one of the grounds of non- acceptance provided in Article 35 (see Article 29 of the Convention's former text).

89. Copies of all decisions declaring applications inadmissible should be transmitted to the States concerned for information.

Article 36 – Third-party intervention

90. This article provides for the possibility for States Parties and other interested persons to take part in proceedings before the Court.

Paragraph 1 gives a State Party one of whose nationals is an applicant the right to submit written comments and to make an oral intervention once the case has come before a Chamber or the Grand Chamber (see Article 48.b of the former text of the Convention).

91. Paragraph 2 follows closely Rule 37, paragraph 2, of the former Rules of Court. The person concerned may be a natural or a legal person.

States and persons taking part in such proceedings are not parties to the proceedings.

Article 37 – Striking out applications

92. The text of Article 37 follows closely that of former Article 30, paragraphs 1 and 3, of the Convention. As was the case under former Article 30 of the Convention, the power to strike out is extended to applications submitted by a State under Article 33 as well as applications submitted by an individual under Article 34. Although it could be argued that an inherent power to strike out cases is vested in any court, this article has been included to avoid any doubts on the matter.

Article 38 – Examination of the case and friendly settlement proceedings

93. The text of Article 38, paragraph 1, is based on that of former Article 28, paragraph 1, of the Convention, although paragraph 1 a. of the latter has been somewhat shortened. The Court is responsible for the establishment of the facts and may conduct an investigation on the understanding that the parties furnish the Court with all the relevant information. Parties to friendly settlement proceedings will not be at liberty to disclose to anyone the nature and content of any communication made with a view to and in connection with a friendly settlement. The second paragraph does not mean that all other proceedings shall not be confidential (see Article 40, paragraph 2). Details are to be specified in the rules of the Court.

94. Experience demonstrates the great utility of the conciliation element in Convention proceedings. Friendly settlement negotiations could be "guided ", or even encouraged, by a judge (with the help of the registry of the Court). Also, during friendly settlement negotiations, parties may call upon the services of the Court's registry to help them in these negotiations. A member of a Chamber might at any stage assist the parties in settling their case.

Article 39 – Finding of a friendly settlement

95. The text of Article 39 is modelled on Rule 49, paragraph 2, of the former Rules of Court. The second part of this Article is virtually identical to the last sentence of paragraph 2 of former Article 28 of the Convention.

Article 40 – Public hearings and access to documents

96. The two paragraphs of Article 40 are modelled on, respectively, Rules 18 and 56, paragraph 2, of the former Rules of Court. The text thus indicates that proceedings, where oral, are, in principle, to be conducted in public. It also specifies that documents submitted in the written proceedings (memorials and formal written information) are also, in principle, accessible to the public. Thus, documents deposited with the Registrar and not published will be accessible to the public unless otherwise decided by the President either on his own initiative or at the request of a party, or of any other person concerned.

Article 41 – Just satisfaction

97. The text of Article 41 is a simplified and shortened version of former Article 50 of the Convention.

Article 42 – Judgments of Chambers

98. The Chamber will decide, as the Court had done in the past, by means of a judgment. This judgment will not – contrary to the former system – be immediately definitive, but will become so later in accordance with Article 44, paragraph 2. The judgment will have to be reasoned (Article 45, paragraph 1). It shall be transmitted to the parties but will not be published until it has become final (Article 44, paragraph 3). Further details may be determined in the rules of the Court.

Articles 43 and 44 – Referral to the Grand Chamber and final judgments

99. A re-hearing of the case, as envisaged in Article 43, shall take place only exceptionally when a case raises a serious question affecting the interpretation or application of the Convention or a serious issue of general importance (see also paragraph 47 above). These conditions are taken, in part, from Article 5, paragraph 2, sub-paragraph 2, of Protocol No. 9 to the Convention. (At the time of entry into force of this Protocol, Protocol No. 9 to the Convention is repealed: see below and Article 2.) The intention is that these conditions will be applied in a strict sense.

100. Serious questions affecting the interpretation of the Convention are raised when a question of importance not yet decided by the Court is at stake, or when the decision is of importance for future cases and for the development of the Court's case-law. Moreover, a serious question may be particularly evident when the judgment concerned is not consistent with a previous judgment of the Court.

101. A serious question concerning the application of the Convention may be at stake when a judgment necessitates a substantial change to national law or administrative practice but does not itself raise a serious question of interpretation of the Convention.

102. A serious issue considered to be of general importance could involve a substantial political issue or an important issue of policy.

103. The parties to the case may request that the case be referred to the Grand Chamber within three months from the date of the judgment of the Chamber. In order to ensure that the parties are in a position to observe this time limit, they must be informed about the date on which the judgment is delivered. Modalities relating to the delivery and swift transmission of judgments to the parties need to be specified in the Court's rules. If the conditions for a referral are met, a panel of five judges of the Grand Chamber accepts the case and the Grand Chamber has to make the final determination as to whether the Convention has been violated after written and, if the Court so decides, oral proceedings. If these conditions are not met, the panel rejects the request and the Chamber's judgment becomes final (Article 44, paragraph 2.c.

104. Article 44, paragraph 1, is taken from former Article 52 of the Convention. Only judgments of the Grand Chamber are final, with immediate effect. The judgments of Chambers become final under conditions set out in paragraph 2. These judgments shall be published when they have become final; all judgments are accessible to the public.

The registry of the Court is to ensure all necessary arrangements relating to the transmission of judgments.

Article 45 – Reasons for judgments and decisions

105. Article 45, which is modelled on former Article 51 of the Convention, lays down a general rule that all judgments and most decisions of the Court must be reasoned, whether they relate to its jurisdiction, a question of procedure, the merits of the case or the award of just satisfaction to the applicant. It is understood that reasons for decisions rejecting or accepting applications can be given in summary form.

This article does not concern decisions taken by the panel of five judges of the Grand Chamber in accordance with Article 43.

Article 46 – Binding force and execution of judgments

106. Article 46 regroups Articles 53 and 54 of the former text of the Convention, no change of substance being involved. (The word "decision" is replaced by "judgment" in the first paragraph.)

The Committee of Ministers supervises the execution of judgments.

Articles 47, 48 and 49 – Advisory opinions

107. These articles are virtually identical to Articles 1, 2 and 3, paragraphs 2 to 4, of former Protocol No. 2 to the Convention. The words "two-thirds" have been deleted in paragraph 3 of Article 47 to take into account the change made by Protocol No. 10 with respect to former Article 32 of the Convention. As to Article 3, paragraph 1, of Protocol No. 2, consult Article 31 and paragraph 81 above.

108. Since Protocol No. 2 referred, in Article 1, paragraph 2, to the Commission, the present text needed appropriate amendment. It was considered more appropriate to incorporate Protocol No. 2 into the body of Protocol No. 11 rather than to amend the former.

Article 50 – Expenditure on the Court

109. Article 50 follows closely the text of former Article 58 of the Convention. The "expenditure" on the new Court will include, in addition to items relating to staff and equipment, the salaries and social security contributions which will be paid to or for the judges in lieu of the allowances provided for in former Article 42 of the Convention.

Article 51 – Privileges and immunities of judges

110. The text of Article 51 follows closely former Article 59 of the Convention.

111. The word "agreements" refers to the Fourth Protocol to the General Agreement on Privileges and Immunities of the Council of Europe and any further treaties ratified by States Parties on related subjects.

Article 2 of the amending Protocol – Replacement, deletion and amendment

112. Article 2 indicates which other provisions are replaced, deleted or amended by this Protocol.

113. The text of Article 56 repeats former Article 63 of the Convention. Paragraph 1 of this Article enables States to extend the Convention to territories for whose international relations States are responsible. Paragraph 4 enables States to make declarations in respect of territories accepting the competence of the Court to receive individual applications. Such declarations may be made for a specific period (the same applies to any similar declarations under Protocols Nos. 4 and 7). The provision in paragraph 3, that regard should be had to local requirements, is retained. The only changes of importance that have been made to the former Article 63 of the Convention (now Article 56) are that the words 'subject to paragraph 4' have been added to paragraph 1 and that the word 'Commission' is replaced by 'Court' in paragraph 4. (See also paragraph 75, above.)

114. Headings have been included in order to facilitate comprehension of the text. As a consequence, and for the sake of consistency, this Article extends the insertion of titles to sections and headings to all the other Articles in the Convention and its protocols.

The headings listed in the appendix form an integral part of the Convention and its protocols, as amended by the present Protocol. The inclusion of such headings should not be understood as an interpretation of the Articles themselves or as having any legal effect. These headings have been added in order to make the text of the Convention more easily understandable (see the American Convention on Human Rights).

Article 3 of the amending Protocol – Signature and ratification

115. The text of Article 3 is one of the usual final clauses included in treaties and agreements prepared within the Council of Europe. It is identical, for instance, to Article 6 of Protocol No. 9 to the Convention.

This Protocol does not contain any provisions on reservations. By its very nature, this amending Protocol excludes the making of reservations.

Article 4 of the amending Protocol – Entry into force

116. The text of Article 4 is also one of the usual final clauses included in treaties and agreements prepared within the Council of Europe. The Protocol, which is an amending Protocol (see Section V, paragraphs 55 and 56 above), shall enter into force one year after the last ratification. The States Parties, as well as the competent bodies of the Council of Europe, should take all necessary steps to set up the new Court immediately after the last ratification, and especially the election of new judges. The Court should also take measures concerning its organisation as early as possible, especially those mentioned in Article 26. The second sentence of Article 4 of the Protocol makes such preparatory measures possible.

Article. 5 of the amending Protocol – Transitional provisions

117. This article provides the necessary transitional provisions for applications, pending the present Protocol's entry into force.

118. Paragraph 1 specifies that the office of members of the former Court and Commission, as well as the Registrar and the Deputy Registrar, will terminate as soon as this Protocol enters into force. This is to prevent two courts operating at the same time. The Commission will nevertheless continue to exist for the additional period of one year, as specified in paragraph 3.

119. Paragraphs 2 to 4 deal with applications pending before the Commission. When they have not yet been declared admissible by the Commission, applications will be dealt with by the Court under the new system (paragraph 2). On the other hand it was deemed appropriate that applications already declared admissible should be finalised by members of the Commission under the former system (paragraph 3). As it was considered inappropriate for the Commission to continue its work many years after this Protocol's entry into force, paragraph 3 provides for a time-limit of one year. This period was deemed to, be sufficient for members of the Commission to finalise admissible applications. Applications that cannot be completed during this time-limit are to be examined by the Court under the new system. As these applications will have already been declared admissible by the Commission, there will be no need for them to, be examined by a committee of the Court.

It should be noted that paragraph 3, first sentence, stipulates that members of the Commission are to continue their work for one year after the entry into force of this Protocol, even if their term in office expired before that date. This will allow them to, complete all work on cases declared admissible during that period. Since the office of members of the Commission expires at the entry into force of the present Protocol, those Commissioners elected as judges to the new Court may continue, at the same time, their Commission functions as provided in paragraph 3 of Article 5. Any vacancy which occurs in the Commission during this period may be filled in accordance with the former relevant provisions

of the Convention, so that no Contracting Party need be without a Commissioner during the said period.

120. Paragraph 4 of Article 5 concerns cases in which the Commission adopts a report in the period of twelve months following the entry into force of Protocol No. 11. For such cases, the procedure for bringing cases before the Court in the former Article 48 of the Convention (and Protocol No. 9, where applicable) shall apply. In other words, the Commission or a State Party – as well as the applicant if Protocol No. 9 is applicable – will have the right to refer a case to the new Court.

121. In order to avoid cases which have already been examined being dealt with at three levels, the panel of five judges of the new Court will decide whether the Grand Chamber or a Chamber is to decide the case.

122. Cases not referred to the new Court under this article will be decided by the Committee of Ministers in accordance with former Article 32 of the Convention.

123. The former Court will cease to function at the date of entry into force of this Protocol. All cases pending before the former Court are to be transmitted to the Grand Chamber of the new Court.

124. Paragraph 6 provides that the Committee of Ministers is to continue to deal with cases which have not been transmitted to the Court under former Article 48 of the Convention. The Committee of Ministers will continue to deal with such cases under former Article 32 of the Convention, even after this Protocol has entered into effect, until such time as they are completed.

Article 6 of the amending Protocol – Declarations

125. This article makes it clear that declarations made under former Articles 25 and 46 of the Convention in relation to the applicability of the Convention *ratione temporis* (see paragraphs 83 to 86 above) shall, *mutatis mutandis*, remain valid for the jurisdiction of the new Court.

126. Moreover, declarations made before the entry into force of this Protocol under paragraph 4 of former Article 63 of the Convention remain valid.

Article 7 of the amending Protocol – Notification

127. Article 7 is one of the usual final clauses in Council of Europe treaties and agreements. It is virtually identical, for instance, to Article 14 of Protocol No. 8 to the Convention.