



**Explanatory Report  
to Protocol No. 2 to the Convention for the Protection of Human Rights and  
Fundamental Freedoms, conferring upon the European Court of Human Rights  
competence to give advisory opinions**

Strasbourg, 6.V.1963

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I. Protocol No. 2 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 6 May 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. On 22nd January, 1960, the Consultative Assembly adopted Recommendation 232 on the "extention of the competence of the European Court of Human Rights as regards the interpretation of the Convention on Human Rights".

2. By Resolution (60) 20 of 15th September, 1960, the Committee of Ministers instructed the Committee of Experts to "determine whether it is desirable to conclude an agreement on the basis of the proposals made in Recommendation 232 (1960) of the Consultative Assembly"

3. In the report which it prepared in April, 1961, the Committee of Experts expressed the view that it would be desirable to confer upon the European Court of Human Rights competence to give, subject to certain conditions, advisory opinions.

4. At its meeting in July, 1961, the Committee of Ministers in principle adopted the conclusions of the above-mentioned report and instructed the Committee of Experts to submit a draft Agreement based upon these conclusions.

5. The Committee of Expelts prepared the draft at its meetings held from 2nd to 11th October, 1961, from 2nd to 10th March, 7.962 and from 1st to 7th June, 1962. On 5th March, 1962, a wide exchange of views was held on the matter at a joint meeting of members of the Committee of Experts and the Legal Committee of the Consultative Assembly.

6. The Committee of Experts in June, 1962 submitted a Report to the Committee of Ministers containing a draft Agreement conferring on the Court of Human Rights competence to give advisory opinions.

7. Also in June, 1962, the European Commission of Human Rights sent to the Secretary General of the Council of Europe a letter proposing that the draft Agreement should confer on the Commission, as on the Committee of Ministers, the right to request advisory opinions from the Court.

8. The Minister's Deputies agreed at their 113th Meeting, held in September, 1962, to send the draft Agreement back to the Committee of Experts with new instructions to give an opinion on the proposals put forward by the Commission and also on the comments of certain delegations.

9. The Committee of Experts discussed these proposals and comments at the meeting held from 22nd to 27th October, 1962, under the Chairmanship of Mr Ugo Calderera, Italian Governmental Expert.

In the course of this meeting, Mr Petren, President of the Commission, explained the reasons which had led the Commission to submit proposals for amending the draft Agreement.

In addition, the Committee of Experts, after noting the model text for final clauses adopted in September, 1962, by the Ministers' Deputies, revised the wording of the final clauses of the draft in the light of that model text.

10. At the same meeting the Committee of Experts drew up a further Report which it submitted to the Committee of Ministers.

This included the final text of the Second Protocol and the comments of the Committee of Experts on:

- the proposals submitted by the Commission;
- the comments made by some of the Ministers' Deputies;
- the changes made to the draft prepared in June, 1962.

#### **Commentary relating to the draft prepared in June, 1962**

##### **Title**

1. The following title has been given to the draft Agreement of which the Committee recommends the adoption: "(draft) Agreement conferring upon the European Court of Human Rights competence to give advisory opinions".

2. The draft includes a preamble and five Articles.

##### **Preamble**

3. The preamble calls for no comment.

##### **Article 1**

4. The purpose of this article is to define the consultative competence of the Court.

5. Paragraph 1 provides that the Court may, at the request of the Committee of Ministers, give advisory opinions on legal questions concerning the interpretation of the European Convention on Human Rights and the Protocols thereto.

6. The questions on which such opinions may be given must therefore have a legal character. The term "legal questions" is to be understood as having the same meaning as is given to this term in similar international conventions.

As the Committee stated in its first report, this rules out, on the one hand, questions which would go beyond the mere interpretation of the text and tend by additions, improvements or corrections to modify its substance; and, on the other hand, questions whose solution would in any way involve matters of policy.

7. Only the Committee of Ministers shall have the right to request advisory opinions of the Court.

The Consultative Assembly, the European Commission of Human Rights and the Secretary General may submit proposals for requests for advisory opinions to the Committee of Ministers. In such cases it would be for the Committee of Ministers to decide whether the proposed request for an advisory opinion, by its purport, is capable of being submitted to the Court by application of paragraphs 1 and 2 of this article.

The Committee of Ministers would also be in a position to judge of the desirability of referring any such proposal to the Court.

8. The question was considered whether the text of the Agreement should not contain a provision determining what vote should be required for decisions of the Committee of Ministers on requests for advisory opinions from the Court.

The Legal Committee was of the opinion that such decisions should be taken by a majority of two-thirds of the members entitled to sit on the Committee (which is the majority provided for in Article 32 of the Convention) rather than by a unanimous vote.

Most of the experts shared this opinion.

Some experts considered that the question of voting in the Committee of Ministers was part of the procedure for putting into operation the advisory competence conferred on the Court, and that the majority required for this vote should therefore be the subject of a statutory provision. They concluded that there was nothing to prevent the Committee inserting in the draft Agreement a provision on this point which might be worded as follows:

"The decision of the Committee of Ministers to request the Court to give an advisory opinion shall be taken by a majority of two-thirds of the members entitled to sit on the Committee."

The majority of the experts thought it preferable not to include such a provision in the Agreement. They considered it was for the Committee of Ministers itself to determine what rules it would adopt in the matter (cf. Article 20 of the Statute of the Council of Europe).

9. The Court may exercise its consultative competence along within the limitations set out in paragraph 2 of Article 1. The object of those limitations is to prevent exercise of the consultative competence of the Court in questions which could come within the Court's primary function, namely, its judicial function.

Under paragraph 2, the Court may not give an advisory opinion :

a) on any question regarding the content or the scope of the rights and freedoms defined in Section 1 of the Convention and the Protocol thereto; or

b) any other question which the Commission, Court or Committee of Ministers might have to consider in consequence of any such proceedings as could be instituted in accordance with the Convention.

10. As regards 9(a) above, the reasons for its inclusion are self-evident.

11. As regards 9(b) above, the Commission, the Court or the Committee of Ministers might, in consequence of the institution of proceedings, have to consider questions other than those concerning the content or scope of rights and freedoms.

In the first place the Committee intended to exclude all questions of substance which, while they do not concern the content or scope of the rights and freedoms, involve obligations on the Contracting Parties.

Thus, Article 25, paragraph 1 of the Convention in fine provides that Contracting Parties which have recognised the right of individual application undertake not to hinder in any way the effective exercise of this right .

Article 57 stipulates that Contracting Parties must furnish, on request from the Secretary General, an explanation of the manner in which their internal law ensures the effective implementation of any of the provisions of the Convention.

According to Article 24 of the Convention any Contracting Party may refer to the Commission "any alleged breach" of the provisions of the Convention by another Contracting Party. Owing to the general terms in which this provision is cast, it would be possible for the bodies provided for by the Convention to have to consider breaches of the Convention which do not necessarily result from a violation of the rights and freedoms defined in Section 1 of the Convention and the Protocols, namely, violations of Articles 25, paragraph 1 and 57.

The Committee also intended to rule out questions of competence or of procedure which might come before one of the bodies provided for by the Convention in consequence of the institution of proceedings.

Thus, for example, the consultative competence of the Court does not extend to questions regarding the conditions of admissibility of applications before the Commission, which are defined in Articles 26 and 27 of the Convention.

The Committee has employed the phrase in French "par suite de l'introduction d'un recours" ("in consequence of ..... proceedings") rather than the phrase "à l'occasion de l'introduction d'un recours" ("in the course of proceedings") because it considered that the latter phrase was too wide.

The questions which are excluded are those which the Commission, the Court or the Committee of Ministers might have to consider in consequence of the institution of proceedings provided for in the Convention whether such proceedings are past, present, future or merely hypothetical.

The reference to the Commission in this text naturally includes a Sub-Commission (cf. Articles 29 and 30 of the convention).

## **Article 2**

12. This article provides that the Court shall decide whether a request for an advisory opinion submitted by the Committee of Ministers is within its consultative competence as defined in the preceding article.

This provision is based upon Article 49 of the Convention which states that "in the event of disputes as to whether the Court has jurisdiction, the matter shall be settled by the decision of the court".

Thus, the Court has both the right and the obligation to refuse a request for an advisory opinion which the Committee of Ministers has asked to give if it comes to the conclusion that the request made is not within the scope of the Court's power as defined in this Agreement.

### **Article 3**

13. Paragraph 1 of this article states that for the requests for an advisory opinion the Court shall sit in plenary session.

In its present form, Article 43 of the Convention provides that for consideration of cases brought before it, the Court shall consist of a Chamber composed of seven judges.

The Committee considered that the power conferred on the Court to give advisory opinions was such an important one that it ought to be exercised by the Court sitting in plenary session.

14. Paragraph 2 states that reasons shall be given for the advisory opinion of the Court.

This provision is based on Article 51, paragraph 1, of the Convention, which provides that reasons shall be given for the judgments of the Court.

15. Paragraph 3 provides that if the advisory opinion, in whole or in part, does not represent the unanimous opinion of the judges, any judge shall be entitled to deliver a separate opinion.

This paragraph is based upon Article 51, paragraph 2, of the Convention, Article 57 of the Statute of the International Court of Justice and also on Article 84, paragraph 2, of the Rules of Court of the International Court of Justice.

16. Paragraph 4 provides that an advisory opinion of the Court shall be communicated to the Committee of Ministers. This paragraph calls for no observations.

### **Article 4**

17. The object of this article is to extend the powers of the Court laid down in Article 55 of the Convention to meet the purposes of the present Agreement.

Under Article 55, the Court has the power to draw up its own rules and determine its own procedure in respect of its jurisdiction in contentious matters.

The Court will also be able, by virtue of Article 4 of this Agreement, to exercise such power as regards its consultative competence if it thinks it necessary.

### **Article 5**

18. This article contains the final clauses.

Paragraph 1 provides that the States signatories to the Convention may become Parties to the Agreement either by signature without reservation in respect of ratification, or by signature with reservation in respect of ratification followed by ratification.

This formula, which is intended to make it possible to speed up the entry into force of the Agreement, is based on similar clauses included in recent instruments concluded by the Council of Europe <sup>(1)</sup>.

19. Paragraph 2 provides that this Agreement shall enter into force as soon as all States Parties to the Convention shall have signed it without reservation in respect of ratification or shall have ratified it.

Since the effect of this Agreement is to extend the competence of the Court as it is defined in the Convention, its entry into force will of necessity require the consent of all States which are Parties to the Convention.

20. Paragraph 3 concerns the notifications which must be made by the Secretary General and requires no comment.

### **Further commentary relating to the draft prepared in October, 1962**

1. The Committee of Experts first considered whether the wording of the draft Protocol should not be reviewed in the light of the latest proposals presented by the European Court of Human Rights to the effect that two new articles, Articles 54 (bis) and 54 (ter), be incorporated in the Convention.

Article 54(bis) would confer on the Court competence to give a prejudicial ruling, at the request of certain courts or tribunals, on any question of interpretation which might arise before these courts or tribunals.

Article 54(ter) would confer on the Court competence to render an advisory opinion, at the request of a government, on any question of interpretation of the Convention which might arise in connection with a draft regulation or decree, a Bill or any projected legislation.

The Committee of Experts has not yet concluded its examination of these proposals.

While recognising that there might be certain connections between the latter and the present draft, the majority of the Committee of Experts thought that there was no need to review the wording of the draft in the light of the Court's proposals.

2. The Committee of Experts also discussed whether the provisions of the Agreement should not be incorporated in the Convention in the form of additional Articles.

The Committee of Experts finally came to the conclusion that the Agreement should be presented to the States for signature in the form of a Protocol to the Convention.

It was agreed, however, that from the date of the entry into force of the Protocol, Articles 1 to 4 thereof should become an integral part of the Convention. This is specified in the new paragraph 3 of Article 5 of the draft.

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(\*) See Article 7 of the Agreement on the exchange of war cripples, signed on 13th December, 1955; Article 5 of the Second Protocol to the General Agreement on Privileges and Immunities, signed on 15<sup>th</sup> December 1956; Article 8 of the European Agreement on Regulations governing the Movement of Persons, signed on 13th December, 1957; Article 6 of the European Arrangement on the exchange of television programmes, signed on 15th December, 1958; Article 7 of the European Agreement on the exchange of therapeutic substances, signed on 15th December, 1958; Article 8 of the European Agreement on the abolition of visas for refugees, signed on 20th April, 1959; Article 5 of the Agreement for the temporary importation of medical and surgical equipment, signed on 28th April, 1960; Article 7 of the European Arrangement for the protection of television broadcasts, signed on 22nd June, 1960; Article 9 of the Fourth Protocol to the General Agreement on Privileges and Immunities, signed on 16<sup>th</sup> December, 1961.

The Committee of Experts was anxious to ensure that after the entry into force of the present Protocol, a State could not become a Party to the Convention without at the same time becoming a Party to the Protocol.

A number of experts thought that to this end it would be preferable to amend the text of the Convention.

#### **Title**

3. For the reasons explained in paragraph 2 of this commentary, the title of the Agreement has been changed to read as follows:

"Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, conferring upon the European Court of Human Rights competence to give advisory opinions"

#### **Preamble**

4. To conform with the model text of final clauses adopted by the Ministers' Deputies at their 113th Meeting, the experts made a purely drafting change to the first sentence of the Preamble.

#### **Article 1, paragraph 1**

5. For the reasons of principle set out in the report of June, 1962, the majority of the experts felt unable to adopt the Commission's proposal to the effect that the latter, like the Committee of Ministers, should be able to apply directly to the Court for advisory opinions. They considered, in particular, that the Committee of Ministers, as a body representing the governments, was the one best qualified to appreciate the advisability of asking the Court for an advisory opinion.

6. Some experts expressed the view that the commission's proposals could be adopted. One of them made the following declaration on this point <sup>(1)</sup>:

"There is no disadvantage in granting the Commission, concurrently with the Committee of Ministers, the power to request opinions of the Court. In fact, none of the principles laid down in the Human Rights Convention, or deriving from that instrument, imply that the right to request opinions on the interpretation of the Convention must be reserved to a single organ, in this case the Committee of Ministers. Moreover, since the Commission is an essential part of the machinery set up by the Convention, it would be a logical extension of the idea which has inspired the granting of advisory competence to the Court that the right to invoke such competence should not be refused to the Commission or subjected to what appears to be the prior approval of the Committee of Ministers.

The material field of the Court's advisory powers has been so narrowly circumscribed in the draft of the Committee of Experts that the additional precaution, whereby any request for advisory opinion is channeled through the Committee of Ministers, appears excessive."

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(\*) This expert asked that his declaration should appear in extenso in this report.

**Article 1, paragraph 2**

7. The majority of the experts took the view that the scope of the court's advisory powers could not be more precisely defined than in the present text.

8. The Committee considered that it would be useful to confer upon the Court competence to give advisory opinions within the limitations of the text adopted by the Commission.

**Article 1, paragraph 3**

9. After having again examined the matter, the Committee of Experts considered it preferable to insert a third paragraph in Article 1 of the Protocol, expressly stating that a decision of the Committee of Ministers to request an advisory opinion must be taken by a two-thirds majority vote of the representatives entitled to sit on the Committee.

**Article 2**

10. For the reasons set forth in paragraph 2 of this commentary, the word "Agreement" has been replaced by the word "Protocol".

**Article 3**

11. No comment.

**Article 4**

12. See comment in paragraph 10 of this commentary.

**Article 5**

13. General comment on Article 5. Referring to the model text of final clauses adopted by the Ministers' Deputies at their 113th Meeting, the Committee made a number of changes to the wording of this article. In paragraph 1, in particular, mention has been made of the procedure, not only of ratification, but also of acceptance.

**Article 5, paragraph 2**

14. One expert made some comments on paragraph 2 of Article 5.

The Committee of Experts considered that, for the reasons set forth at paragraph 19 in the Commentary to the draft Agreement, the present Protocol should not enter into force until all the States Parties to the Convention become Parties to this Protocol.

**Article 5, paragraph 3**

15. The reasons why the Committee decided to insert a third paragraph have already been set out in paragraph 2 of this commentary.