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Explanatory Report to the Protocol No. 8 to the Convention for the Protection of Human Rights and Fundamental Freedoms

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I. Protocol No. 8 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 19 March 1985.

II. The text of the explanatory report prepared by the committee of experts and transmitted to the Committee of Ministers of the Council of Europe does not constitute an instrument providing an authoritative interpretation of the text of the Protocol although it may facilitate the understanding of the Protocol's provisions.

Introduction

1. In the Declaration on Human Rights adopted on 27 April 1978 at the 62nd Session of the Committee of Ministers, the member states of the Council of Europe expressed their belief "that it is of paramount importance that the institutions established by the European Convention on Human Rights remain an effective instrument for ensuring the observance of the engagements which result from it".

Subsequently, at their 69th Session held on 19 November 1981, the ministers, at the same time as welcoming the decisions taken by Spain and France to recognise the right of individual petition provided for in the European Convention, "reaffirmed the importance they attach to strengthening the protection of human rights in Europe and the effectiveness of the control mechanism instituted by (the) Convention" and "underlined in this context the need to achieve progress along the lines of the Declaration of Member States of the Council of Europe on Human Rights, adopted on 27 April 1978, and to take the necessary steps to enable the Commission and Court of Human Rights to exercise to the full their functions in the interest of the safeguard and effective exercise of fundamental rights in Europe" [(1)].

2. These ministerial statements reflected a general concern that the Convention's supervisory organs should remain in a position to cope adequately with their ever-increasing workload. The number of individuals having recourse to the Convention has grown appreciably in recent years, a development which is in part due to the fact that the vast majority of Parties to the Convention have now made the declaration provided for in Article 25 but which is also a natural consequence of knowledge of the Convention becoming more widespread. Moreover, the importance, complexity and diversity of the cases brought before the organs of the Convention have increased considerably of late.

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(1) Paragraph 9 of the communiqué of the 69th Session.

New measures were clearly required to deal with this situation, the main objective being to avoid unreasonable delays in proceedings under the Convention while maintaining the quality of the work of the Convention's organs and the confidence they presently enjoy.

3. Consequently, the Committee of Experts for the Improvement of the Procedure under the European Convention on Human Rights, a subordinate body of the Steering Committee for Human Rights, examined as a matter of priority the means of accelerating the procedure before the organs of the Convention. A series of possible measures were identified, but the committee of experts decided in the first instance to concentrate on the procedure of the Commission, where there was a particularly urgent need for steps to be taken. Certain of the measures concerning the Commission considered by the committee entailed amendments to the Convention, and for this purpose it prepared a draft amending protocol to the Convention. A small number of changes to the Court's procedures were also introduced in the text.

4. At the same time the Parliamentary Assembly of the Council of Europe was also examining the organisation and working of the Convention's supervisory machinery and on 28 September 1983, on the basis of a report [(1)] presented by its Legal Affairs Committee, adopted Recommendation 970 on cases brought under the European Convention on Human Rights. In that text the Assembly recommended *inter alia* various improvements to the Commission's procedure, and the above-mentioned committee of experts took due account of the Assembly's proposals when drawing up the draft amending protocol.

5. The draft protocol prepared by the committee of experts was subsequently finalised by the Steering Committee for Human Rights and submitted to the Committee of Ministers, which adopted the text at the 379th meeting of the Ministers' Deputies held from 17 to 25 January 1985. The text was opened for signature by member States of the Council of Europe signatories to the European Convention on 19 March 1985, on the occasion of the European Ministerial Conference on Human Rights in Vienna.

General considerations

6. The most important innovation introduced by the Protocol is the competence granted to the European Commission to set up Chambers, each of which will have, in relation to individual petitions referred to it, all the powers conferred on the Commission, up to and including the adoption of a final report. This will be one of the principal means of enabling the Commission to cope with its increasing workload.

7. As regards the implementation of this measure, the authors of the Protocol foresaw that the Commission, when setting up Chambers, would take into account, *inter alia*, the following requirements:

a. the representation in each Chamber of the principal types of legal systems of the member states of the Council of Europe;

b. an equitable geographical representation of the membership of the Commission in each Chamber.

The composition of the Chambers will be fixed, but changes in the allocation of members should be possible at certain intervals to be determined by the Commission.

(1) Assembly Doc. 5102 of 17 August 1983; this report contains in particular chronological tables of the course of proceedings in cases in which the European Court of Human Rights or the Committee of Ministers have been called upon to rule.

8. It was considered essential for the member of the Commission elected in respect of a State against which a petition has been lodged to have the right to sit on a Chamber to which the petition has been referred. Consequently, a provision expressly laying down this rule was included in the Protocol. The importance of ensuring that this member can participate in the examination of the petition lies in the fact that in most cases he will be the member who is most familiar with the legal system of the State concerned. The practice to date has indeed shown the usefulness of enabling a member of the Commission to sit when a case concerning his country is examined.

9. Another significant change contained in the Protocol is the possibility given to the Commission of setting up restricted committees empowered to reject individual petitions which are manifestly inadmissible. These committees will offer a double advantage: the plenary Commission and Chambers will be freed from the task of dealing with such petitions, thereby allowing them more time for the consideration of serious cases, and the waiting-time for a decision on manifestly inadmissible petitions will be considerably reduced, in particular as the committees will be able to meet at frequent intervals.

10. Various other matters concerning the procedure of the Commission have been dealt with in the Protocol.

The qualifications required of candidates for membership of the Commission are spelt out. Moreover, Article 23 of the Convention has been expanded so as to clarify the requirements which persons must fulfil while they are actually members of the Commission.

The majority required for the rejection of a petition during the post-acceptance stage on grounds of admissibility (Article 29) has been made less stringent. In addition, a new provision (Article 30) has been introduced in the Convention concerning the striking out of petitions, thereby confirming what is already a long-established practice.

11. Certain provisions concerning the European Court are also included in the Protocol. In the interests of consistency within the text of the Convention, a provision equivalent to that found in Article 23 has been introduced as regards members of the Court. The opportunity was also taken to make two relatively minor changes to the Court's procedure proposed by the Court itself (Article 41: provision for a second Vice-President; Article 43: size of Chambers increased to nine judges).

Commentary on the provisions of the Protocol

Article 1 (amending Article 20 of the Convention):
The Commissions Chamber and restricted committee system

12. The provisions on the setting up and powers of Chambers and restricted committees are set out in four additional paragraphs (2 to 5) to the text of Article 20 of the Convention. When the term "Commission" is employed in subsequent articles, it is to be understood as covering a Chamber or restricted committee, if this would be appropriate taking into account the terms of these paragraphs.

Paragraphs 2 and 5 of Article 20 - Chambers

13. Paragraph 2 provides the Commission with the competence to set up Chambers and, in conjunction with paragraph 5, stipulates their powers.

14. It should be noted from the outset that the Commission's Chamber system is quite different from that already applied in the Court (Article 43 of the Convention). In particular, it is clear from the opening sentence of paragraph 2 ("The Commission shall sit in plenary session.") that under the Commission's system the examination of petitions in plenary session remains in principle the rule, though the Commission will in practice be able to make extensive use of its powers to refer petitions to Chambers. The situation in the Court is the opposite, the consideration of cases by a Chamber being the rule. Further, in the case of the Commission, petitions will be referred to a pre-existing Chamber, whereas in the Court a new Chamber is created for each case brought before it.

15. Paragraph 2 has been drafted in such a way as to leave the Commission considerable room for manoeuvre as regards the number and size of Chambers to be created, the only stipulation being that a Chamber must be composed of at least seven members. The latter requirement is to be understood as establishing a quorum rule, that is, a Chamber cannot examine a petition unless seven members of the Commission are present.

16. Not all petitions can be referred to a Chamber. Chambers may only examine petitions submitted under Article 25 which can be dealt with on the basis of established case law or which raise no serious question affecting the interpretation or application of the Convention". Indeed, it is obviously preferable for the more difficult petitions to be dealt with in plenary session, given their very nature and the need to ensure consistency of case law. It should also be noted that a decision by virtue of which a petition is or is not referred to a Chamber is a procedural step which can on no account be subsequently challenged.

With regard to the notion of "established case law", the application of the Convention's provisions in relation to certain questions has already been examined extensively; examples include the duration of criminal or civil proceedings and certain aspects of conditions in prison. Chambers can be left to examine petitions raising such issues in the light of the principles previously determined. This should not be taken as introducing a *stare decisis* system; on the other hand, if a Chamber were to consider it necessary to depart from established case law, it should seriously consider the question of relinquishing jurisdiction in favour of the plenary Commission.

As for the notion of petitions "which raise no serious question affecting the interpretation or application of the Convention", it is possible for a petition, while to some extent breaking new ground, not to raise an issue of especial importance; such petitions might also be referred to a Chamber.

With regard to the term "application" of the Convention, it refers to the possible situation where the decision on a petition could have important repercussions on the legal system of the state concerned but where the petition does not in itself raise a serious question of interpretation of the Convention; such petitions shall be dealt with by the plenary Commission.

17. The competence of Chambers is subject to three further limitations.

Firstly (paragraph 5.a), the examination of inter-state applications submitted under Article 24 of the Convention has been reserved to the Commission sitting in plenary session, a provision clearly justified by the intrinsic importance of such cases.

Secondly (paragraph 5.b), a decision to bring a case before the Court in accordance with Article 48.a of the Convention has to be taken by the plenary Commission. The purpose of this provision is to ensure that there is a uniform practice as regards the referral of cases to the Court.

Thirdly (paragraph c), for reasons of uniformity the Commission's rules of procedure have to be adopted by the plenary Commission.

18. The reasons for the rule contained in the last sentence of paragraph 2, that the Commission member elected in respect of a State against which a petition has been lodged shall have the right to sit on a Chamber to which the petition has been referred, have already been explained (see paragraph 8 above).

The rule only requires that the relevant member shall have the right to sit on the Chamber; consequently, his absence for any reason will not prevent the Chamber from examining the petition. In this respect the practice of the Commission has not been changed, since it has always had the possibility of examining a case in the absence of the Commission member elected in respect of the High Contracting Party against which the petition has been lodged.

19. As regards the majorities required for taking decisions, the pro- visions of Articles 29 and 34 of the Convention apply to both the plenary Commission and Chambers (see also paragraph 12 above) that is, a Chamber shall take its decisions by a majority of its members present and voting or, in the particular case covered by Article 29, by a two-thirds majority of all its members.

20. Finally, although the text of Article 20 contains no express provision to this effect, the authors of the Protocol contemplated that before any petition is referred to a Chamber for examination, the state against which it has been lodged, as well as the applicant, would be given the opportunity to express an opinion on the question of referral. It will be for the Commission to regulate this matter in its rules of procedure.

The views expressed will help clarify whether the issues raised by the petition are such that it can be referred to a Chamber, and will in particular be able to highlight any serious question affecting the application of the Convention involved in the petition (see also paragraph 16, fourth sub-paragraph, above).

Paragraph 3 of Article 20 - Restricted committees

21. This provision enables the Commission to set up committees composed of at least three members with the power to declare inadmissible or strike out individual petitions, when such a decision can be taken without further examination. The principal advantages of this restricted committee system have already been mentioned (see paragraph 9 above). It should also be mentioned that in providing for such a system, the authors of the Protocol drew inspiration from the practice of the supreme courts of various member States.

22. Unanimity is required for a committee to exercise its power of decision, a rule which is designed to ensure that only manifestly inadmissible petitions are rejected under this summary procedure. If unanimity is not reached, the petition will have to be referred to the plenary Commission (see also paragraph 25 below).

Paragraph 4 of Article 20 - Relinquishment of jurisdiction

23. Paragraph 4 enables a Chamber or restricted committee, at any stage of the proceedings before it, to relinquish jurisdiction in favour of the plenary Commission, and also gives the latter the power to order the transfer to it of any petition referred to a Chamber or committee. Of course, the fact that relinquishment or transfer has or has not taken place in a given case may not be the subject of challenge.

24. Relinquishment of jurisdiction by a Chamber might prove necessary if, in the course of its examination of a petition, it meets a particular legal problem not foreseen at the time of referral; moreover, as already mentioned, a Chamber should seriously consider relinquishing jurisdiction if it considers that to deal with a petition before it will require a departure from established case law.

25. A restricted committee will have no choice but to refer the case to the plenary Commission if it is unable to reach unanimity as to the inadmissibility or the striking out of a petition.

Article 2 (amending Article 21 of the Convention):
Qualifications required of candidates for Commission membership

26. The qualifications required of candidates for membership of the Commission are contained in an additional (third) paragraph to Article 21 of the Convention. The provision makes clear, in particular, that candidates must be lawyers.

27. With regard to the term "high judicial office", this should not be interpreted too narrowly; in particular its scope is not limited to the very highest Court of a country, nor necessarily to members of the bench (*Juges de siège*). Further, it is not essential for a candidate to have been actually appointed to a "high judicial office"; the requirement is that he possess the qualifications required for such an appointment.

28. Although the text of paragraph 3 of Article 21 is based on Article 39, paragraph 3, of the Convention, which deals with the qualifications required of candidates for membership of the European Court, certain differences between the two provisions can be noted. In paragraph 3 of Article 21, the term "jurisconsults" has been avoided, as it was considered somewhat unclear. Moreover, the text refers to persons of recognised competence "in national or international law", it being desirable that the Commission as a whole should possess expertise in both these fields.

Article 3 (amending Article 23 of the Convention):
Positions incompatible with membership of the Commission

29. The second sentence added to the text of Article 23 highlights the qualities of independence and impartiality required of members of the Commission. Article 6 of the Convention lays down the right of access to an independent and impartial tribunal, and it is appropriate that the Convention should also contain similar express guarantees as regards proceedings before the Commission.

The provision stipulates in addition that members must not hold any position which is incompatible with "the demands" of their office. In other words, members must be able fully to assume all the duties inherent in membership of the Commission, including, for example, the functions of *rapporteur*. This is an indispensable requirement for the efficient working of the Commission; of course, it also implies that the material conditions under which Commission members have to work are such as to enable them satisfactorily to discharge their duties.

30. The requirements contained in Article 23 apply to members of the Commission and not to candidates for membership. A candidate might well hold a position which would, for example, be incompatible with the independence required of Commission members; however, if elected, he would have to comply with the requirements of Article 23.

Article 4 (amending Article 28 of the Convention): Friendly settlements

31. All the Convention's provisions concerning friendly settlements have been brought together in Article 28; previously they were divided between Articles 28 and 30 and separated by an article (Article 29) dealing with a quite distinct issue. Moreover, the words "at the same time" have been inserted at the beginning of paragraph 1.b in order to highlight that the tasks described under sub-paragraphs a and b are carried out simultaneously.

Article 5 (amending Article 29 of the Convention):
Majority for the rejection of petitions in the post-acceptance stage

32. The majority required for the rejection of a petition during the post-acceptance stage on grounds of admissibility has been reduced from unanimity to a two-thirds majority of the Commission's members.

It was not the intention of the authors of the Protocol to encourage by this amendment the rejection of petitions in the post-acceptance stage. The possibility offered by Article 29 has rarely been used in the past, and it is to be expected that this will remain the case. However, there have been occasions when the rejection of a petition which, contrary to what had been thought at the time of the declaration of admissibility, did not meet the conditions of admissibility, has been unjustifiably impeded by the unanimity rule.

33. The expression, "a majority of two-thirds of its members" means two-thirds of all members of the Chamber or the plenary Commission, as the case may be, and not two-thirds of the members present and voting.

Article 6 (inserting a new Article 30 into the Convention): Striking-out provisions

34. The Commission has, from its creation, assumed the power to strike petitions out of its list of cases, and striking-out provisions have been included in the Commission's rules of procedure for a considerable number of years. Nevertheless, it was felt appropriate to regulate the power of striking out in the Convention itself, although the detailed rules concerning its exercise would continue to be left to the Commission's rules of procedure.

On the other hand, it was not considered necessary to include a striking-out provision in the Convention insofar as the Court is concerned, even though it also has introduced the power to strike out cases in its Rules. The decision-making powers of the Court are in fact defined by the Convention in much more general terms than those of the Commission.

Paragraph 1 of Article 30

35. Paragraph 1.a covers both the case of an applicant who expressly withdraws his petition and that of an applicant who by his conduct, for example his failure to provide information requested or to observe time-limits set, has indicated that he does not wish to continue with the petition.

Paragraph 1.b covers, for example, the case of an applicant who, subsequent to lodging his petition, has received full redress at national level and therefore no longer has a valid legal interest in pursuing the petition.

Paragraph 1.c is a general clause designed to cover ail other possible cases in which it is no longer justified to continue the examination of a petition. The authors of the Protocol considered that the scope of this sub-paragraph should be limited to cases which are comparable to those mentioned in sub-paragraphs a and b, for example, where the applicant has died and his heirs do not have a sufficient legal interest to justify the further examination of the petition on their behalf.

36. The power of the Commission to strike out a petition is in ail the above cases circumscribed by the rule set out in the last sentence of paragraph 1, that is the Commission must continue the examination of a petition if respect for human rights as defined in the Convention so requires. In this regard, the views of the respondent state as to the general interest in continuing with the examination of a petition should be given due weight.

37. It should also be noted that the power to strike out a petition extends to inter-State cases under Article 24 as well as individual petitions submitted under Article 25.

Paragraph 2 of Article 30

38. The provision only applies to cases where a petition is struck out during the post-acceptance stage of the proceedings. The Commission will no doubt inform the parties when it strikes out a petition before a decision on admissibility has been taken, but in such a case it does not have to draw up the report provided for in paragraph 2. The publication of reports prepared in accordance with paragraph 2 is at the discretion of the Commission.

Paragraph 3 of Article 30

39. This provision enables the Commission to restore a petition to the list of cases if it subsequently becomes apparent that a decision to strike it out was not justified. However, bearing in mind the general requirement of legal certainty, it is to be expected that this power will be exercised very rarely.

Article 7 (amending Article 3 1, paragraph 1, of the Convention):
Reports on whether or not there has been a breach of the Convention

40. The opening words of the former text of paragraph 1 ("if a solution is not reached,...") were not really suited to cover, in addition to a friendly settlement, cases of the rejection or striking out of a petition. The new wording makes quite clear that Article 31 has no application if a friendly settlement has been reached or if the Commission has rejected a petition under Article 29 or struck a petition out of its list under Article 30.

41. The second sentence of paragraph 1 has also been slightly modified. The former wording ("The opinions of ail the members of the Commission...") could have caused some confusion in connection with an Article 31 report drawn up by a Chamber; in such a case it is clear that only members of the Chamber in question can formulate an opinion.

Article 8 (amending Article 34 of the Convention): Majorities for decisions

42. Article 34 has been amended to take into account the unanimity rule applicable to decisions of the restricted committees.

Article 9 (amending Article 40 of the Convention):
Positions incompatible with membership of the Court

43. The reasons for introducing in relation to members of the Court a provision equivalent to that found in Article 23 have already been indicated (see paragraph 11 above). With regard to the first sentence of this provision, that judges sit in an individual capacity is inherent in the very concept of a court. Nevertheless, the authors of the Protocol thought it appropriate to mention this requirement in the Convention, in particular as the latter already contained such a provision in relation to members of the Commission. Reasons of textual consistency also spoke in favour of including the second sentence following the insertion in the Convention of such a provision for Commission members. The Court has previously, through its Rules, laid down that a judge may not exercise his functions while he holds a post or exercises a profession which is incompatible with his independence and impartiality; the new paragraph 7 of Article 40 strengthens this rule by placing an obligation on a judge holding such a position to resign from the Court.

Article 10 (amending Article 41 of the Convention):
Second vice-presidency in the Court

44. Article 41 of the Convention has been rendered more flexible so as to allow for a second vice-presidency. This is justified by both the increase over recent years in the number of the Court's members and the build-up in its workload.

Article 11 (amending Article 43 of the Convention):
Increase in size of the Court's Chambers

45. With the gradual increase in the number of members of the Court, the Chamber of seven judges has become progressively less representative of the Court as a whole. This, in turn, has tended to increase the frequency of relinquishments of jurisdiction in favour of the plenary Court. To counter this, the number of members of Chambers has been increased to nine.

Articles 12 to 14: Final clauses

46. These articles contain the final clauses of the Protocol and are in conformity with the model final clauses agreed upon by the Committee of Ministers. It should, however, be noted that given the nature of the Protocol, it will not enter into force until all the Parties to the European Convention on Human Rights have expressed their consent to be bound by it.

47. No provision has been included concerning the application of the Protocol to petitions already pending before the organs of the Convention at the time of its entry into force. It will be up to the Commission and Court, when examining such petitions, to settle this question in the light of general principles and of the aim of the Protocol, which is in particular to expedite the procedure under the Convention without in any way prejudicing the position of applicants.

48. The authors of the Protocol also considered there was no need to introduce a transitional provision for members of the Commission and Court in office when the Protocol enters into force, it being clear that they will complete their terms on the basis of the legal situation prevailing at the time of their election.