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Explanatory Report to the Protocol No. 9 to the Convention for the Protection of Human Rights and Fundamental Freedoms

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I. Protocol No. 9 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 6 November 1990.

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. The idea of empowering individuals to seize the European Court of Human Rights is not a new one. It was mentioned as early as May 1948, at the Congress of Europe, and appeared in the draft European Convention on Human Rights drawn up by the European Movement in July 1949. This idea was, however, rejected in the course of the member states' discussions on the draft convention, it being argued in particular that »the interests of the individual would always be defended either by the Commission, in cases where the latter decided to seek a decision of the Court, or by a state in such cases as those listed under paragraphs b and c of Article 48" [(1)].

2. Discussion on this subject was revived in the context of the examination of Assembly Recommendation 683 (1972) on a short- and medium-term programme for the Council of Europe in the general field of human rights.

The committee of experts on Human Rights proposed, *inter alia*, that the activity "*Locus standi* of the Commission and the individual when a case has been brought before the Court" be included in the envisaged programme. In this respect, the committee of experts had consulted the European Commission and European Court of Human Rights. In their opinions given in 1974, the Commission and Court in fact both went beyond the narrow question of *locus standi* and called for the individual to be granted the right to seize the Court.

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(1) See the Collected Edition of the "Travaux préparatoires" of the European Convention on Human Rights, Volume IV, page 44.

3. Subsequently, the Committee of Ministers authorised the committee of experts to go ahead with an examination of the different improvements to the Convention's machinery indicated in the draft short- and medium-term programme, including that concerning the *locus standi* of the individual, and to submit specific proposals. The first medium-term plan (1976-80), adopted some time afterwards, included, as objective 1.2.a, "giving the individual the right to appear before the Court when a case has been referred to it".

4. In carrying out its mandate, the committee of experts adopted a number of recommendations at its 46th meeting (December 1976), designed to enable the applicant concerned to present his observations on a case brought before the Court, and invited the Committee of Ministers to transmit these recommendations to the Court. However, the question of granting individuals the right to bring a case before the Court was left in abeyance.

5. In February 1977 the Committee of Ministers invited the Court to consider ways in which the recommendations of the committee of experts could be put into effect. In reply, the President of the Court – at the same time as welcoming the proposals made in relation to the *locus standi* of the individual in proceedings before the Court – reaffirmed the Court's adherence to the proposal for reform which it had outlined in its opinion of 1974, in relation to enabling the individual applicant to refer his case to the Court ("The Court has asked me to confirm the great interest it attaches to this reform, which it believes to be essential").

6. The Steering Committee for Human Rights (CDDH), the successor of the Committee of Experts on Human Rights, reconsidered this question at its third meeting in May 1978, in connection with the biennial revision of the Council of Europe's medium-term plan. It concluded that a study bearing on the possibility of granting the individual applicant the right to seize the Court should only be undertaken when it appeared that there was a prospect of a majority of governments being ready to approach it in a favourable manner. Not being satisfied that such a majority existed at that stage, the Steering Committee decided to postpone the study of the question to a future date.

7. However, following discussions at the 6th meeting of the CDDH in November 1979, it was decided to propose for inclusion in the 1981 Programme of Intergovernmental Activities the study of the possibility of enabling individual applicants; to refer admitted cases to the Court. Since that time, this activity has featured regularly in the successive Annual Programmes, its implementation being entrusted by the CDDH to its subordinate body, the Committee of Experts for the Improvement of Procedures for the Protection of Human Rights (DH-PR).

8. More recently, the question of granting individual applicants the right to refer admitted cases to the Court was considered at the Ministerial Conference on Human Rights, held in Vienna from 19 to 20 March 1985. The Swiss Delegation (which acted as Rapporteur on the subject of "Functioning of the organs of the European Convention on Human Rights") stated in its report (MDH (85) 1) that it was a "fundamental requirement" which should in future be considered as a "priority" issue. Furthermore, the Court made it quite clear in its observations to the conference that the views expressed in its opinion of 1974 on this subject still held good: "In that opinion it strongly recommended the conclusion of an optional Protocol enabling individual applicants to bring cases before it in accordance with appropriate procedures. Its attitude remains the same today. In its view, the preparation of such a Protocol is inherently justified; it would be wrong to make it conditional on merging the Commission and the Court." The Commission also confirmed its interest in such a reform: "It is clear that at the centre of every reform there should be concern for the individual applicant. In this respect, the proposal to grant the applicant the right to bring himself an application before the Court is of major importance."

9. The question was also raised in the Colombo Commission's. [(1)]

Report to the Council of Europe (June 1986), the Commission recommending the "recognition of the right of the individual to refer to the Court applications declared admissible".

10. Finally, the third medium-term plan (1987-91), adopted by the Committee of Ministers on 20 November 1986, listed "the right of the individual to seize the Court of admissible cases" among those reforms which should be studied in the context of improving and adapting existing procedures under the European Convention on Human Rights. Thus in March 1987, the DH-PR - after having obtained favourable opinions from both the Court and the Commission - submitted alternative texts of a draft Protocol to the CDDH. This matter was subsequently reconsidered in the light of a further opinion given to the DH-PR by the Court. Consideration of this subject was then deferred for two years. Subsequently, at its 28th meeting (June 1990), the CDDH indicated its preference for one of the alternative texts prepared by the DH-PR and instructed the latter to draw up a draft explanatory report.

11. The final text of the draft Protocol was prepared by the DH-PR in September 1990 and was subsequently finalised by the CDDH and submitted to the Committee of Ministers, which adopted the text at the 446th meeting of the Ministers' Deputies held from 22 to 23 October 1990. The text was opened for signature by member states of the Council of Europe signatories to the European Convention on 6 November 1990, at the Committee of Ministers' 87th Session held in Rome, and in conjunction with the celebration of the 40th anniversary of the signature of the Convention.

General considerations

12. This reform is a logical development of the Convention's system of control. On the one hand, a most significant step had already been taken, through Article 25 of the Convention, in allowing individuals who claimed to be victims of human rights violations to submit their complaints against the state concerned to an international control machinery; all States Parties to the Convention have now made declarations under Article 25 and have also accepted the Court's compulsory jurisdiction under Article 46. On the other hand, through its Rules, the Court has accorded a form of *locus standi* to the individual once his case has been referred to the Court. However, although the new Rules of Court (adopted in 1982 and subsequently revised) have very significantly improved the procedural position of such individuals, they have left some disparities in treatment between them and states (for example, Rules 26, 56 and 57). To enable the individual himself to decide to take his case to the Court - rather than letting him remain dependent on the Commission or a State for this purpose - merely completes the existing structure. The situation whereby the individual is granted rights but not given the possibility to exploit fully the control machinery provided for enforcing them, could today be regarded as inconsistent with the spirit of the Convention, not to mention compatibility with domestic-law procedures in States Parties.

13. Indeed, it can be argued that the Convention as it stood - in allowing the State involved to seize the Court but not the applicant - did not guarantee the "equality of arms", a point which had also been made by the Court in its opinion of 1974. Similarly, the principle of the right of access to a tribunal for the purpose of defending one's rights, as well as that of the participation of both parties in proceedings concerning an issue between them, were not fully respected.

(1) The Colombo Commission (commission of eminent European personalities) was set up in accordance with Assembly Recommendation 994 (1984), with terms of reference to work out future perspectives for European co-operation beyond the present decade.

Commentary on the provisions of the Protocol

Article 1

14. Although not strictly speaking necessary, this provision serves to underline the distinction between this new optional Protocol and other earlier Protocols introducing changes of a procedural nature, the entry into force of which has been subject to ratification by all Parties to the Convention.

It should also be noted that once all Parties to the Convention have consented to be bound by the Protocol, the amendments provided for in Articles 2 to 5 would automatically become an integral part of the Convention.

Article 2

15. Article 2 amends Article 31, paragraph 2, of the Convention so as to provide that the Commission's report shall also be transmitted to the individual applicant. The individual must respect the confidentiality of the Commission's report.

The term "applicant" refers to the person, non-governmental organisation or group of individuals who or which had brought a petition under Article 25.

Article 3

16. Article 3 deals with the amendments required to Article 44 of the Convention. In this regard, various possible solutions were considered.

17. One approach would have been simply to delete Article 44 from the Convention. However, the authors of the Protocol were in favour of retaining Article 44, but amended so as to refer also to the individual.

18. The new wording of Article 44 is not to be interpreted as in any way prejudicing the possibilities for third-party intervention provided for in the revised Rules of Court: Rule 37, paragraph 2.

Article 4

19. This provision involves a purely consequential change to Article 45 of the Convention and calls for no particular comment.

Article 5

20. Article 5 amends Article 48 of the Convention with a view to including the individual applicant among the list of those empowered to bring a case before the Court. It is not explicitly stated that the individual shall only have the right to refer admitted cases to the Court; however, this follows from the provisions of Article 47.

21. The individual has an unrestricted right to refer his case to the Court (paragraph 1.e), but a panel of the Court decides whether or not his case should be considered by the Court (paragraph 2).

It is clear that there is no point in bringing the panel system into play if the case is in any event referred to the Court by the Commission or the State concerned. Moreover, it would be inappropriate for the panel to reach a decision before it is known whether the Commission or the State wishes to refer the case to the Court. Consequently, the three-month period provided for in Article 32, paragraph 1, must be allowed to expire before a panel is seized of

the matter (this is achieved by the use of the word "only" in the first sentence of paragraph 2). It is necessary to avoid that the Court thereby loses its competence to deal with the case, as a result of Article 32, paragraph 1 ("If the question is not referred to the Court ... within a period of three months ... the Committee of Ministers shall decide ... whether there has been a violation of the Convention."). Hence the distinction drawn between, on the one hand, the individual's right to refer his case to the Court and, on the other hand, the consideration of the case by the Court. Individuals are able, without qualification, to refer an admitted case to the Court, but a panel acting in the name of the Court is empowered to, decide that the latter should not consider the case.

The Committee of Ministers must, of course, be able to deal with the case in the event of the panel deciding that it should not be considered by the Court. The difficulty here resides in the fact that under Article 32, paragraph 1, the Committee of Ministers loses its potential competence vis-à-vis a case once it is "referred" to the Court. The last sentence of the second sub-paragraph of paragraph 2 is designed to solve this problem.

22. Given the above-mentioned interplay between Article 32, paragraph 1, and Article 48, the authors; of the Protocol considered it preferable, in the interests of clarity, to use the expression "referred to" rather than "brought before" (the Court) throughout the text of Article 48.

23. Provision is made for a panel composed of three members of the Court, subject to an exception in the event of an Article 31 report referred to the Court concerning a complaint lodged against more than one Contracting Party. The "national" judge is an *ex-officio* member of the panel. In case of need, an *ad hoc* judge is chosen by the State concerned.

It will be up to the Court to determine through its Rules the exact composition of the panel, as well as all other matters; concerning the implementation of the panel procedure.

24. The panel's task is to decide whether the case shall not be considered by the Court. The wording of the Article 5, paragraph 2, sub-paragraph 2, implies that two conditions must be fulfilled for taking a decision not to allow a case to be considered by the Court: the case must not give rise to a serious question affecting the interpretation or the application of the Convention and, in addition, must not warrant consideration by the Court for any other reason. If these prerequisites are met the panel may, unanimously, decide that the case shall not be considered by the Court.

25. Cases could be regarded as not giving rise to a serious question affecting the interpretation or the application of the Convention where, *inter alia*, there is already established case-law developed by the Court with respect to the alleged violation. A decision not to have the case considered by the Court could also be taken where the dispute relates mainly to the facts of the case.

26. However, there may be other reasons for not allowing a case to be considered by the Court. In the course of its deliberations the panel could take into account, *inter alia*, the following the fact that the State concerned has indicated that it accepts the conclusions reached by the Commission in its report or the fact that the question of just satisfaction could be solved by a resolution of the Committee of Ministers.

27. It was noted that, according to the Convention, a case not referred to the Court shall be examined by the Committee of Ministers which will then decide whether there has been a violation of the Convention (Article 32). The last sentence of paragraph 2 of Article 48 stipulates that this applies where the panel has decided that a case shall not be examined by the Court.

28. A decision of the panel to decline consideration of a case by the Court requires a unanimous vote. This decision does not prejudge the consideration of the merits of the case by the Committee of Ministers. In the event of the panel not taking such a decision, this fact will simply be recorded.

29. The panel is expected to give its ruling speedily. However, the authors of the Protocol considered that it would be inadvisable to set a definite time-limit.

30. The question also arose whether the panel is to rely exclusively on the Commission's report or instead be empowered to take into account - and even seek - observations from the applicant. If the latter were the case, the State concerned would need to be given an opportunity to comment upon such observations. This issue was left to be dealt with in the Court's Rules.

31. The individual, once he has seized the Court, is placed on an equal footing with the State concerned in so far as the procedure before the Court is concerned. This is essentially a matter for the Court itself to deal with through an appropriate amendment of its Rules.

On the other hand, granting the individual the right to seize the Court should not be taken as implying that he has an absolute right to be present in person at the Court's proceedings. Under the present procedure, applicants who, for example, are in prison cannot insist on attending the Court when their case is considered, and this may remain the position when the individual is granted the right to seize the Court. Representation of the applicant can, of course, always be ensured.

See also, in this connection, the European Agreement relating to persons participating in proceedings of the European Commission and Court of Human Rights (1969).

32. Granting the individual the right to seize the Court does not involve any change in the role of the Commission in the Court's proceedings as it results from the revised Rules of Court.

Articles 6 to 8 : Final clauses

33. Articles 6 to 8 are based on the model final clauses approved by the Committee of Ministers and contain the provisions under which a member State of the Council of. Europe may become bound by the Protocol.

34. No provision has been included concerning the application of the Protocol to petitions which, at the time of its entry into force, are already pending before the organs of the Convention. This being said, the Protocol should apply to such petitions on condition that the three-month period laid down in Article 32 of the Convention has not already begun.