# International Commission of Jurists

## Conference

## of

## European National Sections

Held in cooperation with the Human Rights Directorate
of the Council of Europe.

Strasbourg

22 to 24 April 1987

CONTENTS

# List of Participants

## INTERNATIONAL COMMISSION OF JURISTS, GENEVA

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## A U S T R I A

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| Dr. Elisabeth Kehrer | Legal Advisor of the Constitutional Court |
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| Dr. Rudolf Machacek | Judge, Constitutional Court; Secretary-General of the Austrian Section of the ICJ |
| Dr. Josef Teiner and Mrs. Teiner | Former Director of the Austrian National Bank |
| Dr. Faust Wresounig | Judge, Civil Court, Graz |
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## B R A Z I L

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## F E D. R E P. O F G E R M A N Y

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| Michael Protz-Schwarz | Deputy on Human Rights at the Evangelical Church in Germany |
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| Chr. Manfred Schölkopf | Advocate, Stuttgart |
| Dr. Theo Vogler | Professor for Criminal Law and International Criminal Law, University Giessen |
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| Jean Moore | President, Libre Justice |
| Louis Pettiti | Honorary President, Libre Justice |
| Jacques Mauro | Advocate at the Paris Court |
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| Tomas Krüger | Judge, District Court, Malmö |
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## U N I T E D  K I N G D O M

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| Philip English and Mrs. English | Rtd. solicitor, Treasurer of Justice |
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C O U N C I L   O F   E U R O P E

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| Peter Leuprecht | Director of Human Rights |
| Andrew Drzemczewski | Administrative Officer, Directorate of Human Rights |

# P R O G R A M M E

Wednesday, 22 April

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| 14.00 - 15.30 | Opening Session<br><br>Mr. N. MacDermot, Secretary-General, ICJ<br>Mr. P. Leuprecht, Director of Human Rights, Council of Europe |
| 16.00 - 17.30 | Topic One: Functioning of the Organs of the European Convention on Human Rights<br><br>Introduced by:<br>Prof. Dr. J.A. Frowein, Vice-President, European Commission on Human Rights<br><br>Chairman:<br>Mr. L. Groll, President, ICJ Swedish Section<br><br>Rapporteur:<br>Mr. H.A.M. von Hebel, Member, NJCM General Board (Netherlands) |
| 18.00 | Reception hosted by the Council of Europe |
| 19.30 | Private 'son et lumière' concert (trumpet and organ) in Strasbourg Cathedral |

Thursday, 23 April

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| 09.00 - 10.30 | Topic One continued |
| 11.00 - 12.30 | Topic Two: The European Convention and Domestic Law and Procedure<br><br>Introduced by:<br>Mr. P. Sieghart, Chairman, Executive Committee Justice (UK-Section)<br><br>Chairman:<br>Dr. R. Machacek, Secretary-General, ICJ Austrian Section<br><br>Rapporteur:<br>Mr. G. Høgtun, Secretary, Norwegian Association of Jurists for Human Rights and Peace |

Thursday (cont'd)

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| 14.30 - 16.00 | Topic Two continued |
| 16.30 - 18.00 | Topic Three: The Role of Non-Governmental Organisations in the Council of Europe<br><br>Introduced by:<br>Mr. P. Boulay, Representative of the Fédération Internationale des Droits de l'Homme at the Council of Europe<br><br>Chairman:<br>Prof. R. Lahti, President, Finnish Jurists for Human Rights<br><br>Rapporteur:<br>Mrs. L. Levin, Director, Justice (UK-Section) |
| 18.30 | Reception hosted by the Mayor of Strasbourg |

Friday, 24 April

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| 09.00 - 10.30 | Topic Three continued<br><br>Mr. A. Drzemczewski from the Human Rights Directorate, Council of Europe, will be available to answer questions |
| 11.00 - 12.30 | Topic Four: New Technologies and Human Rights<br><br>Introduced by:<br>Mr. P. Sieghart, Chairman of the Executive Committee, Justice (UK-Section)<br><br>Chairman:<br>Dr. I. Cromme, Member of the Board, ICJ German Section<br><br>Rapporteur:<br>Mr. D. Marchand, Member of the Executive Committee, Libre Justice (France) |
| 14.30 - 16.00 | Topic Four continued |
| 16.30 - 18.00 | Closing Session: Conclusions |

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# TOPIC ONE

## FUNCTIONING OF THE ORGANS OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS

INTRODUCED BY

PROF. DR. J.A. FROWEIN
VICE-PRESIDENT, EUROPEAN COMMISSION ON HUMAN RIGHTS

CHAIRMAN

MR. L. GROLL
PRESIDENT, ICJ SWEDISH SECTION

RAPPORTEUR

MR. H.A.M. VON HEBEL
MEMBER, NJCM GENERAL BOARD (NETHERLANDS)

# REPORT

## TOPIC ONE: Functioning of the Organs of the European Convention on Human Rights

This topic was introduced by Professor Frowein who pointed out that the European Convention, was set up for two purposes. First, as a safety device against massive violations of human rights and second to protect individuals in the exercise of their basic constitutional rights. No one could have foreseen that the Convention would become such a dynamic instrument and would operate with such success. However, some problems have arisen, especially in the last decade, regarding the functioning of the Convention organs.* These have resulted from the growing volume of cases brought to the Commission, the increasing complexity of many of these cases, the increasing number of cases which are declared admissible and the growth occasioned by the dynamic jurisprudence of the organs themselves.

Professor Frowein then drew attention to two other issues, namely the impossibility of challenging national legislation before a national court in most of the states parties to the Convention and the fact that in some countries the Convention cannot be invoked before the courts at all. As a result, the pressure of work on the Commission and the Court has increased considerably and has resulted in an increasingly lengthy procedure. The best solution would be a radical change in the Convention: the merger of the Commission and the Court into one full--time court. At the same time, however, Professor Frowein was pessimistic about the possible realization of this change in

*The European Commission of Human Rights and the European Court of Human Rights.

a reasonable time. Therefore, steps should also be taken to develop short- and medium-term measures to cope with the present critical situation. One of those measures would be to give the Court a permanent status, combined with a change in the Commission's work, namely to select important cases to be dealt with by the Court. To achieve any result, an intensive European lobby is needed and ICJ national sections in member states could, and should, make representations to their national governments. In this respect Professor Frowein spoke about a "European public".

Several members of Justice, the ICJ British section, pointed out the need for a considerable increase in the budget for the Convention organs and their staff and for measures to speed up the complaints procedure. For example, by increasing pressure on governments to submit information within a specific time. Reference was made in this respect to a recent memorandum of Justice (see infra). The second part of the discussion of this topic emphasized the desirability of working towards the long-term goals. The Dutch section presented a draft protocol (see infra), of which the main features are:

- a merger of the European Commission and Court into one full-time Court
- a strengthening of the position of the individual by providing him with locus standi before the Court
- the conferment on the Court of the competence to give preliminary rulings at the request of national tribunals on the basis of an optional clause

During the discussion the possibility of incorporating into the draft protocol provisions conferring competence on the Court to give advisory opinions on draft-legislation at the request of national governments was suggested.

It was proposed to adopt a resolution to serve as a starting point for further examination and lobbying. A drafting committee was nominated.

During the discussion it became clear

- that further examination of the draft Protocol does not preclude the promotion of short- and medium-term measures. Mr. Leuprecht and Mr. MacDermot pointed out that both sorts of measures should be promoted at the same time.
- and that the draft protocol or any other long-term measure must not weaken the results that have already been achieved.

To conclude, several recommendations by different speakers have been made on this topic, some of which have been incorporated in the formal draft resolution.

## RESOLUTION

TOPIC ONE: Functioning of the Organs of the European Convention on Human Rights

The European national sections of the International Commission of Jurists (ICJ) represented at the Conference in Strasbourg from 22 to 24 April 1987;

Recalling the need for the maintenance and development of the rights and freedoms set forth in the European Convention on Human Rights (the Convention) and its Protocols;

Noting the critical problems threatening the effective functioning of the Convention's supervisory mechanism as a result of the increase in its workload;

Considering that urgent steps have to be taken in order to preserve the effectiveness of the Convention;

Having taken note of the recent proposal of the U.K. Section of the ICJ (Justice) for expediting proceedings before the Commission;

Having considered the Swiss Report for the Ministerial Conference on Human Rights in Vienna in 1985, the proposals made at the Neuchâtel Seminar in 1986, and the draft protocol to the Convention submitted by the Dutch Section (NJCM) of the ICJ at the present Conference, in regard to the merger of the Commission and the Court and the power of a reconstituted court to consider individual petitions and to give preliminary rulings;

Realising that budgetary measures offer a necessary though incomplete answer to the problems mentioned;

1. Recommend to the States Parties to the Convention:-

(a) That they should regard a substantial increase of the budget for the Convention's organs as an immediate need;

(b) That they should give urgent consideration to other short-term measures, such as those proposed by the U.K. Section;

(c) That they should take note as a long-term objective of the draft protocol submitted by the Dutch Section and should examine any difficulties which may be encountered in finalising and giving effect to it.

2. Urge the national sections of the ICJ to take action to persuade their governments to accept and carry out these recommendations.

# WORKING PAPERS

# FOR

# TOPIC ONE:

## FUNCTIONING OF THE ORGANS OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS

COUNCIL OF EUROPE

CONSEIL DE L'EUROPE

MDH (85) 1

EUROPEAN MINISTERIAL CONFERENCE ON HUMAN RIGHTS

Vienna, 19-20 March 1985

# FUNCTIONING OF THE ORGANS OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS

(Assessment, improvement and reinforcement of the international control machinery set up by the Convention)

Report submitted by the Swiss delegation

STRASBOURG
1984

## Contents

## Introduction

In a few months it will be 30 years ago - namely 5 July 1955 - that the first individual petition was lodged with the European Commission of Human Rights. Who could have guessed then that by 1985 more than 11,000 individual petitions would have been sent to the Commission, at the present rate of between 400 and 600 a year?

From one angle these figures are reassuring. They prove that the fundamental innovation introduced by those who drafted the Convention - the recognition of an individual right of petition before an independent international organ (Article 25 of the Convention) - has not remained a dead letter. The right of individual petition, which constitutes the cornerstone of the protection of human rights in Europe, has contributed significantly to making known the rights guaranteed by the European Convention on Human Rights and its additional protocols. And if the protection of human rights remains the crowning feature of the Council of Europe's activities, it is more especially due to the echo produced by the case-law of the independent control organs set up by the Convention: the European Commission and Court of Human Rights.

An observer cannot fail to be struck by the fact that, in spite of the considerable increase in the number of petitions lodged with the Commission, the international control system appears to be functioning normally. The flexibility the control machinery has so far demonstrated is certainly in part due to certain specific measures taken by the Council of Europe and by the supervisory organs themselves. But it must be admitted that this adapting to circumstances has only been made possible by a remarkable degree of personal commitment on the part of the members of the Commission and the judges of the Court and of their respective Secretariat and Registry, as well as of the Directorate of Human Rights, which assists the Committee of Ministers in the carrying out of its functions under the Convention.

Nearly 35 years after the opening for signature of the European Convention on Human Rights (4 November 1950) and after some three decades during which the supervisory organs have been in operation (the Commission began work in 1955 and the Court in 1958), the time has come for a general political discussion on the international control machinery set up by this instrument and on the possibilities of reinforcing it. The first European Ministerial Conference on Human Rights would seem to be the ideal occasion for making such an assessment.

In this report, the Swiss delegation will first demonstrate (in Part I) that such a general discussion is needed for three types of reasons: practical reasons, legal reasons and political reasons. In Part II, stock will be taken of possible improvements and desirable reforms; priority will deliberately be given to reforms involving a political examination at the highest level. Finally in the third and last part of this report the need for a political impetus in favour of improving and reinforcing the international control machinery provided by the Convention will be emphasised.

## I. NEED FOR A GENERAL DISCUSSION OF THE QUESTION

### 1. Practical necessity

The system of protection set up by the European Convention on Human Rights is just emerging from a long running-in period (the Commission spoke recently of the end of a "transitional period" (1)). In short, the typical features of the present situation are that 17 of the 21 member states of the Council of Europe have recognised the right of individual petition under Article 25 of the Convention (the exceptions are: Cyprus, Greece, Malta and Turkey), that 19 of them have recognised the compulsory jurisdiction of the Court by making the declaration provided for in Article 46 of the Convention (the exceptions are Malta and Turkey); that the impact of the European system of protection on the internal legal order of Contracting States is greater than in the past; and that as a result of better knowledge of the Convention within the member States of the Council of Europe, there has in recent years been a significant increase in the number and diversity of complex petitions submitted for examination by the organs of the Convention.

As early as 1980 the Commission sent a memorandum to the Committee of Ministers describing the position regarding the examination of petitions as "serious" (2). On the assumption that no change in its structure could be contemplated at the time, the Commission stated that it had decided to adopt as a matter of urgency certain internal measures (further simplification of the procedure for dealing with manifestly inadmissible petitions; condensing of the procedure for complex petitions; request for more staff and material). In its opinion, the measures suggested were not only urgent but constituted the "minimum for ensuring that the performance of its duties under the Convention is not jeopardised in the near future".

What then has happened since 1980?

A glance at the available statistics reveals that since 1980 a further increase in the Convention organs' caseloads has occurred. To be precise, although the number of petitions registered has not undergone any substantial annual fluctuations for ten years or so (annual average of 431 for the period 1973-83, against 331 for the period 1955-72), an appreciable increase is now occurring in the number of complex petitions necessitating communication to the governments involved (average annual number of petitions communicated to governments by the Commission: about 100 since 1980 compared with about 20 before 1972). Even more spectacular is the increase in the activities of the Court: during the period 1958-72 the Court delivered one judgment a year on average; between 1973 and 1980, three judgments a year on average; and during the period 1981-84, 11 judgments a year on average. The Committee of Ministers itself is also having to take action more often, in pursuance of either Article 32 of the Convention (almost 60 resolutions up to the end of 1984) or Article 54, for the purpose of supervising the execution of the Court's judgments establishing one or more violations of the Convention (nearly 30 resolutions adopted in this context up to the end of 1984).

The available statistics also provide some interesting figures in the form of proportions. For example, nearly 30% of all the petitions declared admissible by the Commission between 1955 and the end of 1984 (about 350) were so declared since 1981 (about 115). Similarly, more than 50% of the 85 or so judgments delivered by the Court so far were delivered since 1981.

Lastly, as regards the Committee of Ministers, more than 30% of all its Article 32 resolutions and even more than 60% of all its Article 54 resolutions were adopted since 1981 (3).

These figures fully bear out the fears which the Commission, despite the measures taken so far, has expressed of a "serious backlog" situation developing in the future. The internal measures taken hitherto have had some effects, but it is scarcely realistic to hope to contain in future, through measures of this kind, the effects of the increase in the Convention organs' workloads. Accordingly, one can readily agree with the Commission that it is now "high time to provide the organs of the Convention with the means to cope with this situation, while maintaining the quality of their work and the confidence they enjoy" (4).

Here is where a discussion by the European Ministers responsible for Human Rights assumes particular significance.

2. Legal necessity

A general discussion is also necessary for legal reasons. Here, the problem arises in terms of coherence. The international procedure before the Strasbourg organs is, of course, fundamentally different from a judicial procedure before national courts. The applicant cannot therefore expect vis-à-vis the Convention's organs all the guarantees which Article 6 of the Convention (right to a fair trial) confers on him at domestic level.

Nevertheless, any judicial procedure worthy of the name - even an international one - must observe a number of fundamental principles, ie the procedure must be conducted expeditiously, in public and before an impartial body.

So far, an attempt has been made to deal with one of the most obvious defects of the international control machinery, namely the slowness of the proceedings. Work has been concentrated on the proceedings before the Commission, and the Committee of Ministers itself conceded on 29 September 1982 in its reply to Written Question No. 248 by Lord Northfield (5), that the acceleration of these proceedings seemed to be "urgently needed". But to tell the truth, it is the excessive length of the proceedings as a whole which brings the control machinery established by the Convention into discredit with lawyers and public opinion. In fact, the average total length of proceedings has not increased very much in recent years, and the States Parties to the Convention - which are often long in submitting their observations - are in part to blame for the slowness of the procedure. However, it would be useless to attempt to hide the fact that the Commission sometimes takes several years before declaring petitions lodged with it inadmissible (97% of the petitions lodged are rejected at the admissibility stage).

As regards those peitions declared admissible (3% of the cases), which make up the main part of the workload of the Convention's organs, the length of the proceedings is also excessive. For a case which terminates in a judgment of the Court, the average total length of the proceedings is six years (four years before the Commission and two years before the Court). For a case which leads to a decision of the Committee of Ministers, the average total length of proceedings exceeds four years (three years before the Commission and slightly less than one year before the Committee of

Ministers). In addition to these average figures, the extremes as regards the length of proceedings might be noted: when a case terminates in a judgment of the Court, its total length as from the lodging of the petition with the Commission varies between three years (Schiesser case, 1979) and nine years (Winterwerp case, 1979); when it leads to a decision of the Committee of Ministers, the total length of the proceedings as from the lodging of the petition with the Commission varies between one-year-and-a-half (Albrecht case, 1962) and ten years (Fourons case, 1964) (6).

Faced with this situation, it is no longer possible merely to repeat as the Committee of Ministers did once again on 23 October 1981 that for it the length of the proceedings and the delay in treating waiting cases "are a matter of continuing concern" (7). At the present stage one conclusion is obvious: the length of the international proceedings before the Strasbourg organs is manifestly excessive. The legal incoherence arising from this situation does not escape the attention of the general public, which fails to understand, for example, how it can take the Strasbourg organs three years and ten months to reach the conclusion that domestic proceedings lasting three-and-a-half years have exceeded the "reasonable time" prescribed by Article 6 of the Convention (8).

But the speed of the proceedings is not the only criterion of their quality. The object must be to expedite the proceedings without falling into the error of summary justice. In other words, one must maintain an excellent system of justice, as regards both the procedure and the substance.

The Swiss delegation considers that more than three decades after the entry into force of the Convention (3 September 1953), we must have the political courage to undertake a critical reassessment of the system of control by asking the following questions against the background of Article 6 of the Convention: in 1985, can the international procedure with which we are familiar be considered as guaranteeing the litigant's right of access to an international tribunal when he has no right to bring his case before the Court? Is the intervention of the Committee of Ministers, which is an essentially political organ, compatible with the guarantee of impartiality of a tribunal to which the litigant is entitled on the domestic level? Finally, are the proceedings in the Commission and the Committee of Ministers, which are heard in private, compatible with the principle of a public hearing, which is fundamental to legal proceedings of any kind.

Let it be repeated that the international control procedure before the Strasbourg organs is no doubt fundamentally different from the procedure before the domestic courts. Nevertheless, lawyers and the public at large accept and understand less and less the obvious contradictions inherent in the system.

3. Political necessity

The preceding considerations naturally lead to the conclusion that there is a political need for a general discussion on the operation of the organs of the Convention. For the member States of the Council of Europe it is a question of showing that the maintenance of the gains of the European Convention on Human Rights, including the effectiveness of its control machinery, is still a matter of political priority. An effort to strengthen this machinery is moreover in line with the reasoning of the Council of Europe's Statute of 5 May 1949, which provides in Article 1 (b) that the means of achieving the aim of the Council of Europe (ie greater unity between its members) include "the maintenance and further realisation of human rights and fundamental freedoms".

In recent years the political organs of the Council of Europe have repeatedly stressed the political necessity of rethinking the control machinery established by the Convention. We may mention that in the solemn Declaration on Human Rights of 27 April 1978, the Committee of Ministers of the Council of Europe expressed its conviction "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"; that at its 69th session held on 19 November 1981, the Committee of Ministers reaffirmed this commitment and underlined in this context the need 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" (9); and finally that in its reply on 29 September 1982 to Lord Northfield's Written Question No. 248, the Committee of Ministers recalled that it was "fully aware of the importance of improving and speeding up procedures before the Convention's organs in the interests of the efficiency and credibility of the supervisory machinery set up by the Convention" (10).

In turn the Parliamentary Assembly fears that the delay in dealing with cases "are bringing the Convention and its procedures into disrepute". It considers that the existing structures of the Commission, created 30 years ago, "need to be reviewed with a view to coping adequately with the present workload", and has recently requested the Committee of Ministers in Recommendation 970 (1983), which was adopted after Mr Muheim's report (11), to "give high priority to the work on the improvement of procedure under the European Convention and to the efficiency of the Secretariat".

Finally, on 26 January 1983, speaking to the Parliamentary Assembly as Chairman-in-Office of the Committee of Ministers of the Council of Europe, Mr Leo Tindemans, Belgian Minister for External Relations, pointed out the need to strengthen the European regional system for the protection of human rights. He stated in particular the following (12): "Ways of simplifying and accelerating procedures still remain to be explored (...). The elimination of obstacles to the genuine protection of human rights at international level will take time, but it also calls for a firm determination to tackle the problem once again, analysing present realities and past errors as a prelude to action. Is this not a challenge to Europe to display renewed imagination?"

Assuming that for practical, legal and political reasons there is a recognised need for a general discussion on the system of control under the Convention, this report will attempt, in Part II, to set out the possible improvements of the system and desirable reforms.

## II. POSSIBLE IMPROVEMENTS AND DESIRABLE REFORMS

### 4. Recapitulation of the characteristics of the control machinery set up by the Convention

Before reviewing the possible ways of strengthening the control machinery set up by the Convention it is desirable briefly to recall the reasons for the Convention's existence.

According to Article 19 of the Convention, the European Commission and Court of Human Rights were set up "to ensure the observance of the engagements undertaken by the High Contracting Parties in the present Convention". According to the preamble of the Convention the political bond uniting the member States of the Council of Europe is based, in addition to the democratic system, "on a common understanding and observance of (...) Human Rights". By securing certain rights and freedoms "to everyone within their jurisdiction" (Article 1 of the Convention), the European States have sought to preserve human dignity against the arbitrary exercise of State power. Since the rights it contains are fundamental rights, the Convention, by means of its independent supervisory organs, is intended gradually to create a uniform nucleus of European constitutional law in the field of human rights. Both the Commission and the Court have pointed out the objective nature of the undertakings made by the States, and the will of the latter to establish a sort of European public order in the sphere of human rights (13). The rarity of inter-State cases under Article 24 of the Convention (11 cases to date, brought to Strasbourg via 20 applications) is significant: in the control machinery it is the individual who, in protecting his own interests, plays the role of a useful stimulus and contributes indirectly to building up a body of law of a unitary and regional nature. Thus, though it is subsidiary when seen in relation to the national machinery for the control of human rights, the profound originality of the Strasbourg system lies in the place accorded to the individual (the individual applicant), proceeding under Article 25, and to the independent supervisory organs (the Commission and the Court set up under Article 19).

In the opinion of the Swiss delegation all improvements to the system and reforms to the control machinery should contribute to strengthening these two fundamental characteristics of the system. This is the fundamental political issue of the debate to be undertaken in 1985, at the end of a 30 year running-in period.

### 5. Criteria for selecting reforms

To date all the reforms considered were essentially directed to meeting two urgent needs: expediting the procedure and coping effectively with the present and foreseeable increase in the number of petitions.

In July 1982 the Committee of Experts for the Improvement of the Procedure held an exchange of views on reforms which might be contemplated in the short-, medium- and long-term. On further thought it may be asked whether this approach remains completely valid. In fact not so long ago (up to 1980) the States Parties to the Convention were not prepared to contemplate revising that instrument to improve the control machinery (14).

In this context, the distinction between short-term reforms (not requiring revision of the Convention), medium-term reforms (requiring in most cases such revision) and long-term reforms (requiring a more radical revision) made sense.

Today, however, when the taboo on revision is about to be overcome by the implementation of a number of medium-term reforms (establishment of a flexible system of Chambers and restricted committees in the Commission; establishment of Chambers of nine judges in the Court; strengthening of the requirements of independence and availability of the members of the Commission etc), it would be more useful, from the point of view of the work of the Ministerial Conference on Human Rights, to distinguish between two types of reforms: firstly, reforms with slight or medium political implications; secondly, those with considerable political implications.

The following considerations are conceived on the basis of this distinction. In fact, owing to the urgent nature of the reforms required, it is important to ensure that this first European Ministerial Conference on Human Rights immediately concentrates on the political choices which must be made now so as to possess tommorrow an international control machinery adapted to the requirements of European society at the end of the 20th century.

6. Reforms with slight or medium political implications

As already suggested, the attention of the European Ministers responsible for Human Rights should not be engaged for too long by this category of reforms. Most of these reforms can be achieved by mere administrative measures (notably through amendments to the Rules of Procedure of the Commission, the Court and the Committee of Ministers) or by means of amending protocols similar to the one that is on the point of being opened for signature by member States (establishment of a flexible Chamber system for the Commission). However, some of the measures needed might have considerable budgetary implications. These should therefore be mentioned here as a preliminary.

It is no longer possible to ignore the fact that the working conditions of the Convention's organs are inadequate. This affects not only the Commission and its Secretariat and the Court and its Registry but also the Directorate of Human Rights, which assists and advises the Committee of Ministers and the Secretary General in the exercise of their functions under the Convention (Articles 32, 54 and 57). Without going into detail, it may be pointed out that in the present building neither the members of the Court (who already spend nearly a week every month in Strasbourg on average) nor the members of the Commission (who often spend more than a week every month in Strasbourg, at the rate of five to six two-week sessions a year) have private offices or suitable premises for carrying out their work as rapporteurs. The two deliberation rooms are decrepit and inconvenient, and the Court's hearing room is now too small. The Commission's Secretariat and the Court's Registry are also short of space; so is the Directorate of Human Rights. Some think that the situation would be improved if the Directorate moved out of the Human Rights Building. Such a step would certainly be regrettable, however, as the premises thus vacated would in any case be inadequate for the actual needs of the

Convention's organs. Moreover, it is necessary and sensible for all the Council of Europe departments that deal with human rights - including the new Documentation Centre set up as a result of a decision by the Committee of Ministers in 1982 - to be grouped together. It will be remembered that this Centre, which has made an encouraging start, is designed to serve not only the Commission and the Court but also the general public. It is at present run by the Directorate of Human Rights. In view of the still serious inadequacy of the documentary and data-processing resources available in Strasbourg for the human rights sector, the rapid expansion of the Documentation Centre may be seen as a priority; it would be sensible to transform it gradually into the biggest human rights data bank in Europe. The Swiss delegation would like the Ministerial Conference on Human Rights to support this idea. It also suggests that the Conference advance forthwith the idea of erecting a new Human Rights Building in Strasbourg to accommodate all the organs and departments concerned. There is already a clear practical need for such a project, and it would also be of obvious symbolic value for that most prestigous of the Council of Europe's activities: the international protection of human rights.

After mentioning these practical matters, let us now quickly review the measures and reforms which have been, are being or might be envisaged for the Commission, the Court and the Committee of Ministers.

As regards the <u>Commission</u>, the projected system of Chambers and restricted committees will no doubt speed up the processing of cases, especially the rejection of manifestly unfounded petitions. One may also welcome the present concern of the Convention's Contracting States to strengthen the guarantees concerning the independence and availability of the Commission's members. Other measures are also conceivable, such as: the publication of the Commission's reports in all cases; the abolition of hearings before the Commission in cases where it immediately becomes clear that there will be a referral to the Court; and an increase in the number and length of the Commission's sessions (16-17 weeks a year instead of the present 12). However, in view of the preparation time needed, such an increase would mean that the Commission's members would have to devote about 32-34 weeks a year to their Commission duties, which would amount to more than a half-time activity. In this context, consideration should be given to the proposal made by Mr Nørgaard, President of the Commission, to the Steering Committee for Human Rights on 21 March 1984 that arrangements might be made in future for members of the Commission, while continuing to work professionally in their home countries, to work principally as members of the Commission in Strasbourg (15).

As for the <u>Court</u>, several internal measures taken by it during the revision of its Rules, the new version of which came into force on 1 January 1983, may be welcomed. As a result of these: an applicant's status before the Court has been significantly strengthened, as he may take part in the proceedings if he wishes (Rule 33 (3) (d)); an intervention by a Contracting State not party to the proceedings may be authorised in the interest of the proper administration of justice (Rule 37 (2)); and the parties may dispense with the written stage of the proceedings (Rule 37 (1)). This last possibility should enable the frequent and tedious repetitions of the parties' arguments before the

Commission and the Court to be avoided. In future, the projected increase in the membership of Chambers (from 7 to 9 members) should also enable the proceedings to be speeded up, as there should be fewer relinquishments of jurisdiction by Chambers in favour of the plenary Court. In addition, the transmission of the case-file from the Commission to the Court should be made automatic whenever a case is referred to the Court, and the combining of the judgment on the merits and the decision concerning Article 50 of the Convention (award of just satisfaction by the Court) should be made even more systematic.

As far as the Committee of Ministers is concerned, ways ought to be envisaged of facilitating its decisions under Article 32 of the Convention. In particular, the present requirement of a two-thirds majority might be replaced by a simple-majority rule, and it might be suggested that the Commission make increased use of its option of making proposals to the Committee of Ministers when transmitting its report to the Committee (Article 31 (3) of the Convention). It would also be in accordance with the spirit of the Convention if the Committee of Ministers could award just satisfaction to the applicant, in the same way as the Court does under Article 50 of the Convention (16). Similarly, the Committee of Ministers might specify more precisely the "measures" which the State should take to implement its decisions (Article 32 (2) of the Convention) and also play a part in supervising friendly settlements reached under Articles 28 and 30 of the Convention.

It would, of course, be disrespectful to describe this initial series of reforms - which are listed here only indicatively - as mere logistical measures. Nevertheless, the Swiss delegation considers that once the need has been recognised to consolidate the present control system, improve the position of the applicant, provide better working conditions for the supervisory organs and simplify and speed up the procedure, the measures mentioned above go more or less without saying. It will, of course, remain to fix the practical details, a task that will not always be easy. These, however, are activities that can be entrusted to government experts within the present structures (Steering Committee for Human Rights, Committee of Experts for the Improvement of the Procedure). In this connection, the role of the first Ministerial Conference on Human Rights should be to express its interest in the current activities and invite the responsible authorities to make every endeavour to ensure that they are actively continued and swiftly completed.

## 7. Reforms with considerable political implications

It is on such reforms that the first Ministerial Conference on Human Rights should concentrate its attention. Now that the system has been operating for 30 years there is no point, in 1985, in further postponing the necessary political decisions. The risk attending the current reforms is to take too short-term a view, to prefer, on grounds of principle as well as of ease, to take measures to meet the immediate need. The effect of such measures is uncertain and they might well make it more difficult later to make the necessary choice between the fundamental options.

In the opinion of the Swiss delegation any thorough reform of the Convention's control machinery must combine the requirement of efficiency, at present given priority, (expediting the proceedings and effectively coping with the present and foreseeable increase in the number of petitions) with three fundamental requirements which should in future receive the same priority:

- conferring on the individual the right to bring his case before the Court;
- making the system of control completely independent;
- concentrating more on preventive measures.

If all these criteria were taken into account at the same time it would make possible a considerable qualitative step forward as regards the consolidation of the Convention's current control machinery.

There can be no question of considering each of these reforms in detail here. The Swiss delegation nevertheless believes it essential to draw the Ministerial Conference's attention to the range of conceivable reforms, the interdependence of some of them and the need to tackle them without any bias at ministerial level so as to give fresh impetus to the regional protection of human rights in Europe. As will be seen, not only are these reforms being debated in academic circles but many allusions are to be found to them in political speeches over the past few decades. Surely the time has come for Europe to embark once more on some pioneering work, if only by consolidating what has already been achieved.

a. Recognition of the individual's right to bring his case before the Court

This idea is not new. It was given a prominent place in the famous Declaration of the European Congress in The Hague in May 1948 and was also to be found in the draft Convention drawn up by the European Movement in July 1949.

In 1974 as part of the follow-up to the Parliamentary Conference on Human Rights, held in Vienna in 1971, the Committee of Experts on Human Rights considered that "the time had come ... to redefine the respective roles of the Commission and the individual in the proceedings before the Court" (17). The committee of experts took the precaution of obtaining the opinions of the Commission and the Court on these questions.

Who still remembers today that in an opinion of 19 July 1974, the Commission, after finding that the present system was "... unsatisfactory", suggested "the recognition of the right of the individual applicant to refer his case to the Court when at least one-third of the members of the Commission, having participated in the adoption of a report prepared under Article 31 of the Convention, have concluded that a violation of the Convention exists" (18). The Court in turn, in its opinion of 4 September 1974, pointed to the "serious inconvenience" of the present system owing to the absence of "equality of arms" within the meaning of Article 6 of the Convention in the proceedings before the Court, and stated: "The States should be encouraged to draw up an optional protocol - rather than an amending protocol remaining beyond reach for the immediate future - which would open to the individual applicant a right of direct access to the Court" (19). The Court suggested that the applicant's right to bring his case before the Court should be excluded in a case where the Commission had unanimously reached the view that there had been no violation of the Convention.

It seems surprising that such marked encouragement from the two organs set up by the Convention has not so far led to concrete results. Admittedly the question of the individual being able to bring his case before the Court is still included in the terms of reference of the Committee of Experts for the Improvement of the Procedure. But it would not be realistic to imagine that any results will be achieved in the absence of a political stimulus.

In the opinion of the Swiss delegation the first Ministerial Conference on Human Rights, in 1985, should encourage progress in this direction thus showing by a practical example that the Europe of human rights still places the human interest at the centre of its concern. In proceeding in this way the Ministerial Conference would only be taking one step further the suggestion made on 26 January 1983 by the Chairman of the Council of Europe's Committee of Ministers. Speaking to the Parliamentary Assembly Mr Tindemanns said: "Now that the Convention has been in existence for more than 25 years, the time has surely come to reassert the individual's position at the heart of the whole protective system, for example by giving the applicant the right to seize the Court?" (20).

b. Making the control system completely independent

Another decisive step to strengthen the international control machinery set up by the Convention would be to reduce to the indispensable minimum the intervention of the Committee of Ministers.

Under the present system the Commission filters the applications, it conducts investigations and acts as conciliator but the final decision lies with the Court (when the case is brought before it) or with the Committee of Ministers, acting under Article 32 of the Convention. Moreover, by virtue of Article 54 of the Convention, the Committee of Ministers is entrusted with the important task of supervising the execution of the Court's judgments (21).

The Swiss delegation would like to emphasise the importance it attaches to the functions exercised by the Committee of Ministers under Article 54 of the Convention. In its opinion, it would be useful if States, in informing the Committee of Ministers "of the measures which it has taken in consequence of (a) judgment, having regard to its obligation under Article 53 of the Convention to abide by the judgment" (Rule 2 (a) on the application of Article 54), did not confine themselves to supplying the relevant information on specific measures taken in respect of the applicant (payment of the just satisfaction fixed by the Court, for example) but also furnished information on the more general action taken in pursuance of the judgment (informing of interested circles, legislative reforms in progress etc). This, at any rate, is the approach followed by the Swiss Government in the matter. It would be desirable in this connection if the Committee of Ministers were to invite the Court, in pursuance of Protocol No. 2 to the Convention, to give an advisory opinion on the exact purport of Article 54 of the Convention.

It may also be wondered whether in future a certain role should be conferred on the Committee of Ministers in the supervision of the execution of friendly settlements concluded between the applicant and the State with the assistance of the Commission under Article 28 (b) of the Convention.

By contrast, the functions exercised by the Committee of Ministers under Article 32 of the Convention are much more problematical. Of course, strictly speaking, decisions taken by the Committee of Ministers under Article 32 of the Convention have the same binding force as the Court's judgments under Article 53. Some writers consider that when the Committee of Ministers adopts as its own the arguments set out in the Commission's report, it in some way confers a sort of quasi-judicial quality on this report. Such an approach, however, cannot disguise the fact that, in this last case, the entire proceedings are held in private (both in the Commission and in the Committee of Ministers) and that the organ that makes the final decision remains, by virtue of its composition, a political organ, which was admitted by the Committee of Ministers itself in 1975 (22).

The reasons for introducing this hybrid system into the Convention in 1950 are well known: when they made the acceptance of the jurisdiction of the Court optional, those drafting the Convention made provision for the intervention of the Committee of Ministers under Article 32 so as to insure that if a case was not brought before the Court it would not remain pending at an intermediate stage (the report mentioned in Article 31 of the Convention, which contains the Commission's "opinion" as to whether there has been a violation of the Convention). At present, however, intervention by the Committee of Ministers may increasingly be regarded as an anomaly within a system whose primary function is a judicial one. The Committee of Ministers, it is true, is still the organ most commonly called upon to settle inter-State disputes (Article 24 of the Convention); but it should also be remembered that in the course of such cases, which often involve allegations of very serious breaches of the Convention, the difficulties encountered by the Committee of Ministers in reaching a decision impair the reputation of the control machinery as a whole.

The time would therefore seem ripe for taking up some historical initiatives which, after the passage of a few decades, would now appear, politically speaking, feasible.

In this context we may mention that The Hague Congress of 1948 advocated the establishment of a single "Cour de justice" to ensure the observance of a "Charte des droits de l'homme" (23); the preliminary draft Convention drawn up by the European Movement in July 1949 made no provision for the intervention of the Committee of Ministers; the Parliamentary Assembly's Recommendation 38 of 8 September 1949 also contained no provision corresponding to Article 32 of the Convention (24); on 13 September 1973 the Parliamentary Assembly itself proposed the simple deletion of Article 32 of the Convention (25); the Court, too, considered this solution as being in some ways attractive but preferred, in 1974, the granting of a right to the individual to bring his case before the Court (26); and recently, on 6 July 1982, the President of the European Commission of Human Rights, Mr C A Nørgaard, suggested, in his personal capacity, that the Committee of Experts for the Improvement of the Procedure should once again consider the question of revising Article 32 of the Convention and, if appropriate, making the Commission's report automatically binding once the three months period had expired without the case being brought before the Court (27).

Two further reasons for bringing this question to the attention of the Ministerial Conference on Human Rights are to be found: first, in the fact that in his above-cited speech of 26 January 1983, Mr Tindemanns, too, expressed the opinion that the Court, as a judicial organ, should assume the functions exercised by the Committee of Ministers under the Convention, pointing out that "we would benefit greatly by a single supervisory system, operated by the body best qualified to do so both by its appointed role and membership" (28); secondly, in the fact that in its report of 23 September 1983 on cases brought under the European Convention on Human Rights, the Parliamentary Assembly considered that when completely reorganising the control machinery it would be possible to envisage the following system: "individual applications would be referred to the Court for decision, whereas the Committee of Ministers would be required to examine only inter-State applications" (29).

The completion of the independence of the control system would have another practical advantage: it would get rid of the well-known difficulties with which the Committee of Ministers is sometimes faced when exercising its functions under Article 32 of the Convention, either because it does not succeed in obtaining a majority of two-thirds of the representatives entitled to sit on the Committee during the vote on the question of the existence of a violation (30), or again because, contrary to what is required by Article 32 (1) of the Convention, it is unable to proceed to a decision on the question "whether there has been a violation" of the Convention (31). From the political point of view it is impossible to continue to overlook the disrepute which these "non-decisions" cast on the control machinery established by the Convention.

After these remarks on the completion of the international system of control, reference should be made to the existence and value of the procedure provided for in Article 57 of the Convention, which confers on the Secretary General of the Council of Europe the right, which he must exercise in complete independence, to request Contracting Parties to the Convention to furnish him with an explanation of the manner in which their internal law ensures the effective implementation of one or more of the Convention's provisions. So far the Secretary General has exercised this right four times (in 1964, 1970, 1975 and 1983) (32). Lastly, it should be remembered that the firm resolve of Contracting Parties to the Convention to preserve the Commission's independence is reflected in the plan to supplement Article 23 of the Convention ("The members of the Commission shall sit on the Commission in their individual capacity") with a sentence worded as follows: "During their term of office they shall not hold any position which is incompatible with their independence and impartiality as members of the Commission or the demands of this office" (see Article 3 of the draft amending Protocol to the Convention, at present under discussion).

c. Concentrating attention on preventive measures

The paramount aim of the Convention is that the rights it contains should be secured by the Contracting Parties (Article 1), whatever the domestic or international means most suitable to attain this object. In this connection Article 60 of the Convention throws light on the complementarity of the national and international procedures designed to attain this high objective.

The possibility of making States internationally liable through the binding international establishment of breaches of the Convention is undoubtedly one of the most fundamental features of the control machinery set up by the Convention. The Court thus has occasion to establish breaches of the Convention in about two-thirds of the cases submitted to it, while the Committee of Ministers for its part establishes breaches in about a quarter of the resolutions it adopts under Article 32 of the Convention. But it should not be forgotten that this characteristic of the system is not its ultimate purpose, rather its extreme consequence.

From this point of view, therefore, the importance, under the present system, of several procedures which may be described as preventive should not be neglected.

It may first of all be noted that the very existence of the control system gives States a powerful incentive to observe the Convention's provisions domestically. National courts are not alone in feeling the effects; to an increasing extent, national governments, administrations and legislatures are becoming aware of it. The procedure under Article 57 of the Convention should once more be mentioned in this context, for by asking States for an explanation of the manner in which they ensure the effective implementation of this or that provision of the Convention, the Secretary General can easily lay emphasis on what he regards as weak points in the implementation of the Convention. The Commission, too, can, under Rule 36 of its Rules of Procedure, indicate, as soon as a petition is lodged, "any interim measure the adoption of which seems desirable in the interest of the parties or the proper conduct of the proceedings before it". In this way it can forestall any damage which might be irreparable (particularly in extradition cases). It may be wondered whether this power is not important enough to warrant being embodied in the Convention itself. Among the preventive measures deriving from the very system of the Convention, mention may also be made of the possibility of reaching friendly settlements (Article 28 (b) of the Convention) and the possibility for the Commission, when transmitting its report to the Committee of Ministers, to make such proposals as it thinks fit (Article 31 (3) of the Convention). Lastly, one cannot deny the preventive effect of decisions of the Committee of Ministers and the Court (Articles 32 and 53 of the Convention) or that of the procedure whereby the Committee of Ministers supervises the execution of the Court's judgements (Article 54). In the last three instances, there is a preventive effect not only for the State involved in the case but for all Contracting Parties to the Convention.

The Swiss delegation would ask whether in future one should not concentrate more on preventive measures. In this context it would like once again (as it has already done at the 14th Conference of European Ministers of Justice in Madrid, 21-31 May 1984) (33) to draw attention to the great political importance of the Parliamentary Assembly's recent Recommendation 971 (1983), adopted on 28 September 1983, to which is appended a draft European Convention on the protection of detainees from torture and from cruel, inhuman or degrading treatment or punishment. In fact, torture and inhuman or degrading treatment or punishment (Article 3 of the Convention) provide the most obvious example of violations of the Convention for which judicial control after the event by the organs of the Convention is admittedly necessary, but often unsatisfactory because it comes too late. The original feature of the system of control proposed in the draft Convention lies in the idea of setting up in the framework of the Council of Europe a system of unannounced visits to places of detention by a Commission of five members, sitting in their individual capacity, in order to provide preventive protection against the torture of detainees. Like the Parliamentary Assembly, the Swiss delegation considers that this instrument will provide a useful supplement to the a posteriori control machinery set up by the European Convention on Human Rights. It would therefore be happy to see the first Ministerial Conference on Human Rights give its political support to a rapid completion of the work in this field (34).

Also under the heading of reforms placing emphasis on preventive measures, allusion may be made to the frequently mentioned idea of one day empowering the European Court of Human Rights to give preliminary rulings at the request of national courts.

It would, of course, be wrong to think that the preliminary rulings procedure which permits the well-known judicial dialogue between the Court of Justice of the European Communities and the national courts of the Community's member States (Article 177 of the EEC Treaty) can be transposed lock, stock and barrel to the framework of the European Convention on Human Rights. Under the Strasbourg system, the existence of two parallel control procedures (viz preliminary supervision, followed, if appropriate, by ex post facto contentious control) might raise some awkward problems. It should not be forgotten either that certain questions concerning the interpretation of the Convention might be somewhat unsuited to a preliminary examination.

Having made these qualifications, it will be recalled that the idea of introducing a preliminary rulings procedure was put forward by the Court itself in 1962; two present members of the Commission (Professor Ermacora in Vienna in 1965 and Professor Frowein in Brussels in 1970) have supported this idea; in its Recommendation 683 (1972), the Parliamentary Assembly called on the Committee of Ministers to study the possibility of adding to the system of the Convention a procedure of this type (35); at the request of the Committee of Experts on Human Rights, the International Institute of Human Rights (Cassin Foundation) gave its full support to this idea (36); and, most significantly, the Court, in an opinion requested by the Committee of Experts on Human Rights, stated in 1979 that: "In the Court's view, such an innovation would have indisputable advantages: it would ensure unity in the interpretation of the Convention and make it possible to prevent - or correct in good time - the greater part of the violations instead of having to establish them after the event; the Convention, familiar to lawyers for the future, would be accepted by them as an important feature of the positive law in force; the Court itself, which would have frequent opportunities for interpreting and applying the Convention, would become fully integrated into the judicial system of the Contracting States" (37).

Two recent proposals on the possible introduction of a preliminary rulings procedure before the Court might properly merit the attention of the European Ministers responsible for Human Rights. At an annual meeting of the Netherlands Bar Association, held in Dordrecht on 25 September 1981 and attended by 450 barristers, the wish was unanimously expressed that a provision should be included in the Convention to allow national courts to submit preliminary inquiries to the European Court of Human Rights.

The memorandum of the Netherlands Bar Association of 23 April 1982 (38) inspired a motion for a recommendation by the Parliamentary Assembly of 6 July 1982, tabled by Mr Margue and several others (39). The Committee of Ministers was called on to prepare a Protocol to the Convention empowering the Court to give preliminary rulings at the request of national courts. Despite the innovatory nature of such a reform, it should not be ruled out for the future. It might be possible, for instance, for the right to consult the Strasbourg Court on a preliminary basis to be confined to the Contracting Parties' highest courts. These would thus have an opportunity to have certain questions of principle clarified within a non-contentious procedure, avoiding the danger and disadvantages of any subsequent establishment of a violation of the Convention, this time at the end of a contentious procedure.

Lastly, among the reforms placing emphasis on preventive measures, mention may be made in passing of two other ideas which have not yet been put into practice: that of empowering the Court to give advisory opinions on draft legislation at the request of States; and that of revising Protocol No. 2 so as to facilitate and broaden the consultation of the Court by the Committee of Ministers on questions concerning the interpretation of the Convention (40).

### d. Merger of the existing organs in a full-time European Court of Human Rights

The reforms outlined above lead us naturally to the idea that already in the medium-term the most rational way of effectively ensuring international control of the undertakings accepted by the European States under the Convention would be to operate a merger of the existing organs to form a single full-time Court, assisted by full-time Advocates General.

At the present time there is an undeniable and regrettable overlapping between the activities of the Commission and those of the Court. We know, too, that if these two organs manage to cope with their task it is due to the exceptional personal commitment of each of their members. The considerable extension of their activities in the last four years shows that the existence of a permanent organ will very soon be justified. In July 1982 Professor J A Frowein, Vice-President of the Commission, suggested to the Committee of Experts for the Improvement of the Procedure that it should look into the desirability of setting up a single full-time judicial body, if necessary assisted by Advocates General (41). The fact that the Commission itself is at present in favour of the idea of "the merger of the two organs, establishing one European Court to which applicants would have direct access" (42) is a factor of considerable importance for the development of ideas in this direction. If such a plan was carefully worked out (with a view, in particular, to enabling restricted Chambers of the Court to effectively filter petitions, as the Commission does at the moment), a merger to form a single judicial body would constitute a considerable reinforcement of the international control system set up by the Convention. There is also every reason to believe that this measure would make the international proceedings considerably quicker.

## III. NEED FOR A POLITICAL IMPETUS IN FAVOUR OF REINFORCING THE CONTROL SYSTEM

### 8. Possible framework for a discussion

The questions raised in the present report have for years been the subject of academic debate or discussion in the Council of Europe's expert committees (the former Committee of Experts on Human Rights; now the Steering Committee for Human Rights and the Committee for the improvement of the procedure before the organs of the Convention).

The current activities, which relate mainly to reforms with slight or medium political implications (Section 6 above), should, of course, be actively continued. But the Ministerial Conference on Human Rights is not the appropriate forum for discussing them. The Conference should confine itself to supporting the continuation of work in progress and recommending the adoption of any appropriate urgent measures (such as improving the working conditions of the Convention's organs and of all the Council of Europe departments which contribute to their smooth functioning).

The reason why this report has deliberately laid emphasis on reforms with considerable political implications is that, in the Swiss delegation's opinion, only a political impetus from the Ministerial Conference on Human Rights can advance work on the reforms briefly described in Section 7 above (recognition of the individual's right to bring his case before the Court; making the control system completely independent; concentrating attention on preventive measures; and, finally, merger of the existing organs into a European Court of Human Rights operating full-time).

As it will be difficult for the Ministers to examine even superficially all these questions, it would be very useful if the 1985 Vienna Conference could at least give a decisive political impulse to the reforms mentioned in paragraph 7 (a) (recognition of the individual's right to bring his case before the Court) and initiate a favourable trend for the development of the present control system in the directions outlined in 7 (b) and 7 (d) (making the control system completely independent, with a view to creating in due course a single full-time judicial body).

The Swiss delegation considers that, on account of the interdependence and complementarity of the reforms outlined, it would be extremely difficult to introduce any of them separately by means of amending or additional Protocols to the Convention. It therefore believes that these reforms should forthwith be incorporated in the central objective of merging the existing organs into a full-time European Court of Human Rights that is accessible to individuals. It will be up to a "think tank" - eg a committee of experts on the reform of the Convention's control machinery, subordinate to the Steering Committee for Human Rights - to work out a balanced and coherent set of reforms geared to that central objective.

### 9. Nature of the political impetus to be provided by the conference

After discussing this report, the first Ministerial Conference on Human Rights might adopt a Resolution addressed to the Committee of Ministers of the Council of Europe, stating that it has examined the present control machinery set up by the European Convention on Human Rights. It might reaffirm in the Resolution its profound political commitment to that international control machinery, which has been in existence for about 30 years. It might then invite the Contracting Parties to the Convention actively to continue the work in progress (creation of Chambers and restricted committees within the Commission; increase in the size of the Court's Chambers etc) and express its full support for an improvement in the working conditions of the Convention's organs and the administrative departments which assist the Commission, the Court and the Committee of Ministers. In that connection it might recommend to the Committee of Ministers the construction of a new Human Rights Building to accommodate all those departments. Finally, and most importantly, the Ministerial Conference should decide to initiate forthwith a study of a more radical reform of the control machinery, including recognition of the individual's right to bring his case before the Court and the completion of the independence of the control system, with a view to merging the existing organs into a European Court of Human Rights operating full-time. More specifically, the Conference should advocate the setting up of a "think tank" of appropriate form under the Committee of Ministers of the Council of Europe, to be entrusted with the drawing-up of practical proposals by, say, the end of 1987. The think tank should have considerable autonomy and carry out its terms of reference with the sole aim of strengthening the present system. It should not only comprise government representatives but also involve the Commission and Court in its work, in a manner to be decided. In addition, the Conference should make a point of emphasising, with an eye to the establishment of a European human rights area, the importance of all Council of Europe member States recognising the right of individual petition (Article 25 of the Convention) and the compulsory jurisdiction of the Court (Article 46).

## IV. CONCLUSION

The foregoing considerations show that, even on the traditional question of the control machinery under the Convention, Europe could open a new chapter and "move away from the mere management of a heritage" (43). On this question, too, the first Ministerial Conference on Human Rights could have a considerable impact both within the Council of Europe and outside. It could in this connection encourage a greater awareness of the need to give a "human rights dimension" to some aspects of national policy (43).

Some writers have stated that politics is merely the "art of the possible". By taking up some important options for the future of the regional protection of human rights at the end of the 20th century, the first European Ministerial Conference on Human Rights could prove that politics is much more a means of rendering possible what appears to be necessary or desirable.

NOTES

1. Memorandum of the European Commission of Human Rights of 17 November 1983 for the attention of the Committee of Experts for the Improvement of the Procedure under the European Convention on Human Rights (DH-PR), doc. DH (83) 7.

2. Memorandum of the European Commission of Human Rights of 29 May 1980 addressed to the Committee of Ministers of the Council of Europe, doc. CM (80) 155.

3. For these figures see, as far as the Commission is concerned, the statistics given in DH (84) 1; as regards the Court, Series A of the publications of the Court (judgments and decisions); as regards the Committee of Ministers, see the Collection, published in 1984, of the Resolutions adopted under Articles 32 and 54 of the European Convention on Human Rights between 1959 and 1983, and the memorandum from the Directorate of Human Rights of 8 August 1983 on the Committee of Ministers' role in the framework of the European Convention on Human Rights, doc. CM (83) 108.

4. See the memorandum of 17 November 1983 cited above (note 1).

5. Parliamentary Assembly, Doc. 4985. Reply from the Committee of Ministers to Lord Northfield's Written Question No. 248 of 26 January 1982 on cases brought under the European Convention on Human Rights, Doc. 4846 (text set out in Appendix III to Doc. 5102, cited in note 6).

6. See the chronological table of cases in which the Court or the Committee of Ministers have been called upon to rule prepared in 1983 by the Court's Registry and set out in Appendix II of Parliamentary Assembly Doc. 5102 of 12 August 1983 (Muheim report on cases brought under the European Convention on Human Rights).

7. Parliamentary Assembly Doc. 4809. Reply from the Committee of Ministers of 23 October 1981 to Lord Northfield's Written Question No. 240, of 12 May 1981, on cases brought under the European Convention on Human Rights (text also set out in Appendix III to Doc. 5102, cited in note 6).

8. See Mr F Muheim's speech to the Parliamentary Assembly of 28 September 1983 (reference to the Court's judgment of 13 July 1983 in Zimmermann-Steiner v. Switzerland, Series A No. 66).

9. Communiqué of the 69th session of the Committee of Ministers, Strasbourg 19 November 1981, para 9.

10. Parliamentary Assembly Doc. 4985, cited in note 5.

11. Parliamentary Assembly Recommendation 970 (1983) of 28 September 1983 on cases brought under the European Convention on Human Rights. See also the Muheim report, Doc. 5102, cited in note 6.

12. Parliamentary Assembly. Official Report of the debates of the 34th ordinary session (Part 3), sitting of 26 January 1983.

13. See inter alia the judgment in Ireland v. United Kingdom of 18 January 1978, para 239, and more particularly the Commission's report in the Temeltasch case of 5 May 1982, paras 62-64, where the reasons expressed were adopted and confirmed by the Committee of Ministers in its Resolution DH (83) 6 of 14 March 1983.

14. The change of position occurred in 1981; see the reports of 29 October 1981 and 29 March 1982 of the 6th and 7th meetings of the Committee of Experts for the Improvement of the Procedure under the Convention, docs. DH-PR (81) 4, p 6 and DH-PR (82) 1, para 30.

15. See the report, dated 2 May 1984, of the 15th meeting of the Steering Committee for Human Rights, doc. CDDH (84) 17, p 9.

16. The Directorate of Human Rights is correct to consider possible the application of a rule analogous to Article 50; see its memorandum of 8 August 1983 entitled "The role of the Committee of Ministers under the European Convention on Human Rights", doc. CM (83) 108, p 12, para 37.

17. Doc. DH/EXP (74) 18, paras 30-31.

18. Commission's opinion of 19 July 1984 set out in Appendix I to doc. CDDH (77) 24 of 9 November 1977 (p 9).

19. Opinion of the Court, of 4 September 1974, set out in Appendix II to doc. CDDH (77) 24 of 9 November 1977 (pp 10-13).

20. See note 12.

21. On the functions of the Committee of Ministers as a whole in the context of the Convention, see the above-cited memorandum of the Directorate of Human Rights of 8 August 1983 entitled "The role of the Committee of Ministers under the European Convention on Human Rights", doc. CM (83) 108 (41 pp).

22. See the memorandum cited in note 21, paras 14-16.

23. Cited from Etienne Cerexhe, Le droit européen (Les institutions), Louvain 1979, p 13.

24. On these historical aspects, see the memorandum cited in note 21.

25. Parliamentary Assembly Doc. 3334 of 13 September 1973, para 94, cited in doc. CDDH (77) 24, p 12, para 16.

26. See above-cited Opinion of 4 September 1974, Appendix II to doc. CDDH (77) 24, p 12, para 16.

27. Report of the 8th meeting (5-9 July 1982) of the Committee of Experts for the Improvement of the Procedure under the European Convention on Human Rights, doc. DH-PR (82) 3 of 9 July 1982, para 50.

28. See note 12.

29. Parliamentary Assembly, Muheim report of 12 August 1983, Doc. 5102, para 46.

30. Two precedents: DH (75) 2 Huber v. Austria and Resolution DH (77) 2 East African Asians v. United Kingdom.

31. Three precedents: Resolution DH (74) 1 Inhabitants of Fourons v. Belgium; Resolution DH (79) 1 Cyprus v. Turkey; and Resolution DH (79) 7 Eggs v. Switzerland; see doc. CM (83) 108 of 8 August 1983, cited in note 21.

32. See on this subject the information note, dated 1 March 1984, prepared by the Directorate of Human Rights, doc. CDDH (84) 13 (56 pp).

33. Fourteenth Conference of European Ministers of Justice, Madrid 29-31 May 1984, Conclusions and Resolutions of the conference, doc. MJU-14 (84), Concl., Strasbourg 1984, p 11.

34. See Recommendation 971 (1983) of the Parliamentary Assembly of 28 September 1983 and its Appendix, and Parliamentary Assembly Docs. 5099 and 5123.

35. Recommendation 683 (1972) of the Parliamentary Assembly, of 23 October 1972, proposal C4.

36. Doc. DH/Exp. (76) 23.

37. Opinion of the European Court of Human Rights, H (79) 3, p 7.

38. Memorandum of 23 April 1982, set out in the Appendix to the study undertaken by Professor A H Robertson for the Legal Affairs Committee of the Parliamentary Assembly entitled "Proposals to confer on the European Court of Human Rights power to give preliminary rulings at the request of national courts", doc. AS/Jur (35) 19 of 7 October 1983.

39. A motion for a recommendation of 6 July 1982 submitted by Mr Margue on the basis of Parliamentary Assembly Doc. 4937 (co-signatories: Schulte, Valiante, Elmquist, Muheim, Alder, Stoffelen, Van Der Elst, Berrier, Scholten, Kazazis, O J Flanagan). See also Mr Sieglerschmidt's report, Doc. 3852.

40. As regards these two proposals, see the report dated 15 January 1980 drawn up by the Steering Committee for Human Rights on the question of the revision of Protocol No. 2, doc. H (80) 1 (6 pp).

41. Doc. DH-PR (82) 3 of 9 July 1982 cited above, note 27.

42. See the above-cited memorandum of the Commission (note 1) of 17 November 1983, DH (83) 7, p 1.

43. See the concern expressed in this regard in the letter of 15 June 1982 from the Austrian Chairman of the Ministers' Deputies, Mr Bukowski, at the time of the launching of the idea of a Ministerial Conference on Human Rights, doc. CM (83) 47.

## SUMMARY


The international control system set up by the European Convention on Human Rights has now been in existence for some 30 years. It has on the whole proved its worth. However, the considerable increase in the workloads of the Commission and the Court in recent years makes it necessary, at the 1985 Vienna Ministerial Conference, to hold a general discussion on possible improvements to the system and desirable reforms.

In the Swiss delegation's opinion, such a general discussion is necessary for practical reasons (significant increase in the caseload since 1980, when the Commission was already describing the situation as "serious"), legal reasons (need to ensure a degree of coherence between national procedures and the international control procedure), and political reasons (the priority regularly affirmed by the Council of Europe's organs of consolidating the present control system).

The originality of the present control system mainly resides in two factors: the role played by individual applicants and the central place occupied by the Commission and the Court, two independent organs. In the Swiss delegation's opinion, any reform and improvement of the system should be aimed at reinforcing this twofold fundamental characteristic.

To facilitate the Conference's discussions, it seems appropriate to distinguish between reforms with slight or medium political implications - to which the Ministerial Conference could simply give its full support with a view to the continuation of the work already in progress - and reforms with considerable political implications, on which the Conference should concentrate.

The reforms with slight or medium political implications include in particular the present plan to set up Chambers and restricted committees within the Commission, the intention to increase the size of the Court's Chambers, the improvement of the working conditions of the Convention organs and the administrative departments which assist them, and, possibly, a decision to group all these departments (including the Human Rights Documentation Centre) together in a new Human Rights Building.

However, the above matters are not the most important issues.

The Swiss delegation believes that the Ministerial Conference should initiate forthwith consideration at the political level of a more far-reaching reform of the control machinery so as to ensure that at the end of the 20th century Europe possesses a control system appropriate to its contemporary needs. In this context it suggests that the Conference recommend the Council of Europe's Committee of Ministers to set up an appropriate "think tank" under its authority entrusted with the drawing up of concrete proposals by, say, the end of 1987.

The think tank should in particular: pave the way for recognition of the individual's right to bring his case before the Court; identify appropriate ways of strengthening the control system's independence; lay emphasis on preventive measures; and draw up plans forthwith for merging the existing organs into a European Court of Human Rights operating full-time.

The pitfall to be avoided by the Ministerial Conference is failure to look far enough ahead. If Europe is to possess effective international control machinery in the year 2000, it must lay the foundations here and now, in 1985. That is the only way of consolidating a gain to which all the member States of the Council of Europe attach the utmost importance.

# DRAFT PROTOCOL TO THE EUROPEAN CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS.

submitted by:
the Netherlands Jurists Committee for Human Rights,
(Dutch section of the ICJ)

NOTE FROM THE DUTCH SECTION OF THE I.C.J.

As a contribution to the discussion on the functioning of the Organs of the European Convention on Human Rights the Dutch section of the I.C.J. has prepared a Draft Protocol containing several fundamental changes in the supervisory-mechanism of the Convention.* These changes have been taken from the proposals of the Swiss delegation to the Ministerial Conference on Human Rights in Vienna in 1985 (See: Swiss report, Human Rights Law Journal 1985, pp. 97-117).

The changes intended are:

- the merger of the European Commission and Court into a permanent European Court of Human Rights;
- the conferment of the right to individuals to submit their case to the Court and to participate in the procedure before the Court on the basis of an optional clause;
- the conferment to the Court of the competence to give preliminary rulings on the request of national tribunals on the basis of an optional clause;

The purpose of this Draft Protocol is twofold. First it is aimed at solving the present problems of the overburdening of the Commission and the Court by establishing a more up to date and a more efficient procedure. Second, it is aimed at a better implementation of the Convention into the legal orders of the States Parties by a preliminary rulings-procedure.

The Draft Protocol should not only serve as a framework for the discussion during the conference, but should also be brought to the attention of members of the Commission and the Court, of members of national parliaments and governments and of officials of other NGO's in the field of Human Rights.

Realizing that this Draft Protocol can only be effective on the long term, another measure has to be taken on the short term. This measure is the extension of the Secretariat of the Commission which is badly needed. We hereby urge every member of the I.C.J.-sections to bring this serious message to the attention of national parliaments and governments.

* The Text of the European Convention and of its Protocol No. 8 will be found at Appendix A.

## TEXT OF THE DRAFT PROTOCOL

The member States of the Council of Europe, signatories to this Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950 (hereinafter referred to as "the Convention"),

Considering that it is desirable to change certain provisions of the Convention with a view to improving and expediting the procedures for ensuring the observance of the engagements undertaken by the High Contracting Parties in the Convention,

Considering that it is desirable to merge the European Commission of Human Rights and the European Court of Human Rights into one European Court of Human Rights,

Have agreed as follows:

Article I.

Article 19 of the Convention shall read as follows:

"To ensure the observance of the engagements undertaken by the High Contracting Parties in the present Convention, there shall be set up a European Court of Human Rights, hereinafter referred to as "the Court"."

Article II.

Section III (the Articles 20 to 37 of the Convention) shall be deleted and section IV shall become section III. The new section III shall read as follows:

Article 20 (art. 38 ECHR):

"The European Court of Human Rights shall consist of a number of judges equal to that of the Members of the Council of Europe. No two judges may be nationals of the same State."

Article 21 (art. 39 ECHR):

"1. The members of the Court shall be elected by the Parliamentary Assembly by a majority of the votes cast from a list of persons nominated by the Members of the Council of Europe; each Member shall nominate three candidates, of whom two at least shall be its nationals.

2. As far as applicable, the same procedure shall be followed to complete the Court in the event of the admission of new members of the Council of Europe, and in filling casual vacancies.

3. The candidates shall be of high moral character and must either possess the qualifications required for appointment to high judicial office or be jurisconsults of recognised competence."

Article 22 (art. 40 ECHR and art. 9, 8th Prot.):

"1. The members of the Court shall be elected for a period of nine years. They may be re-elected. However, of the members elected at the first election the terms of four members shall expire at the end of three years, and the terms of four other members at the end of six years.

2. The members whose terms are to expire at the end of the initial periods of three and six years shall be chosen by lot by the Secretary General immediately after the first election has been completed.

3. In order to ensure that, as far as possible, one third of the membership of the Court shall be renewed every three years, the Parliamentary Assembly may decide, before proceeding to any subsequent election, that the term or terms of office of one or more members to be elected shall be for a period other than nine years but not more than twelve and not less than six years.

4. In cases where more than one term of office is involved and the Parliamentary Assembly applies the preceding paragraph, the allocation of the terms of office shall be effected by the drawing of lots by the Secretary General immediately after the elections.

5. A member of the Court elected to replace a member whose term of office has not expired shall hold office for the remainder of his predecessor's term.

6. The members of the Court shall hold office until replaced. After having been replaced, they shall continue to deal with such cases as they already have under consideration.

7. The members of the Court shall sit in their individual capacity. During their term of office they shall not hold any position which is incompatible with their independence and impartiality as members of the Court or the demands of this office."

Article 23 (art. 41 ECHR and art. 10, 8th Prot.):

"The Court shall elect its President and one or two Vice-Presidents for a period of three years. They may be re-elected."

Article 24 (art. 43 ECHR and art. 11, 8th Prot.):

"For the consideration of each case brought before it the Court shall consist of a chamber composed of nine judges. There shall sit as an ex officio member of the chamber the judge who is a national of any State party concerned, or, if there is none, a person of its choice who shall sit in the capacity of judge; the names of the other judges shall be chosen by lot by the President before the opening of the case."

Article 25 (cf. art. 45 ECHR):

"The jurisdiction of the Court shall extend to all cases concerning the interpretation and application of the present Convention."

Article 26 (art. 46 ECHR):

"1. Any of the High Contracting Parties may at any time declare that it recognises as compulsory ipso facto and without special agreement the jurisdiction of the Court in all matters concerning the interpretation and application of the present Convention.

2. The declaration referred to above may be made unconditionally or on condition of reciprocity on the part of several or certain other High Contracting Parties or for a specified period.

3. These declarations shall be deposited with the Secretary General of the Council of Europe who shall transmit copies thereof to the High Contracting Parties."

Article 27 (compare art. 177 EEC-treaty):

"1. Any of the High Contracting Parties may at any time declare that it recognises the competence of the Court to give preliminary rulings concerning the interpretation of this Convention.

2. Where such a question is raised before any court or tribunal of a State which has made such a declaration, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon.

3. The declarations referred to above shall be deposited with the Secretary General of the Council of Europe who shall transmit copies thereof to the High Contracting Parties."

Article 28 (cf. art. 24 ECHR):

"1. Any of the High Contracting Parties may refer to the Court any alleged breach of the provisions of the Convention by another High Contracting Party, provided that the High Contracting Parties concerned have made the declaration referred to in Article 26.

2. If the question is not referred to the Court an ad-hoc Commission shall be established.

3. The ad-hoc Commission shall consist of five members. The members shall be nominated by the Court, and they shall be elected by the High Contracting Parties concerned.

4. The ad-hoc Commission shall elect its own Chairman and adopt its own rules of procedure. The articles 30, 32, 40 and 45 are applicable to the procedure before the ad-hoc Commission.

Article 29 (art. 25 ECHR):

"1. Any of the High Contracting Parties may at any time declare that it recognises the competence of the Court to receive and consider petitions from any person, nongovernmental organisation or group of indivivuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in this Convention, provided that the High Contracting Party against which the complaint has been lodged has made the declaration referred to in Article 26. Those of the High Contracting Parties who have made such a declaration undertake not to hinder in any way the effective exercise of this right.

2. Such declarations may be made for a specific period.

3. The declarations shall be deposited with the Secretary General of the Council of Europe who shall transmit copies thereof to the High Contracting Parties and publish them.

4. The Court shall only exercise the powers provided for in this Article when at least six High Contracting Parties are bound by declarations made in accordance with the preceding paragraphs."

Article 30 (cf. art. 26 ECHR):

"The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of six months from the date on which the final decision was taken."

Article 31 (cf. art. 27 ECHR):

"1. The Court shall not deal with any petition submitted under Article 29 which:

(a) is anonimous, or

(b) is substantially the same as a matter which has already been examined by the Court or has already been submitted to another procedure of international investigation or settlement and if it contains no relevant new information.

2. The Court shall consider inadmissable any petition submitted under Article 29 which it considers incompatible with the provisions of the present Convention, manifestly ill-founded, or an abuse of the right of petition.

3. The Court shall reject any petition referred to it which it considers inadmissible under art. 30."

Article 32 (cf. art. 28 and 30 ECHR and art. 4, 8th Prot.):

"1. In the event of the Court accepting a petition referred to it:

(a) it shall, with a view to ascertaining the facts, undertake together with the representatives of the parties an examination of the petition and, if need be, an investigation, for the effective conduct of which the States concerned shall furnish all necessary facilities, after an exchange of views with the Court;

(b) it shall at the same time place itself at the disposal of the parties concerned with a view to securing a friendly settlement of the matter on the basis of respect for Human Rights as defined in this Convention.

2. If the Court succeeds in effecting a friendly settlement it shall draw up a Report which shall be sent to the States concerned, to the Committee of Ministers and to the Secretary General of the Council of Europe for publication. This Report shall be confined to a brief statement of the facts and of the solution reached."

Article 33 (cf. art. 29 ECHR and art. 5, 8th Prot.):

"After it has accepted a petition submitted under Article 29, the Court may nevertheless decide by a majority of twothirds to reject the petition if, in the course of its examination, it finds that the existence of one of the grounds for non-acceptance provided for in Article 31 has been established. In such cases, the decision shall be communicated to the parties."

Article 34 (art. 6, 8th Prot.):

"1. The Court may at any stage of the proceedings decide to strike a petition out of its list of cases where the circumstances lead to the conclusion that:

(a) the applicant does not intend to pursue his petition, or

(b) the matter has been resolved, or

(c) for any other reason established by the Court, it is no longer justified to continue the examination of the petition.

However, the Court shall continue the examination of a petition if respect for Human Rights as defined in this Convention so requires.

2. If the Court decides to strike a petition out of its list after having accepted it, it shall draw up a Report which shall contain a statement of the facts and the decision striking out the petition together with the reasons therefor. The Report shall be transmitted to the parties, as well as to the Committee of Ministers for information. The Court may publish it.

3. The Court may decide to restore a petition to its list of cases if it considers that the circumstances justify such a course."

Article 35 (art. 49 ECHR):

"In the event of dispute whether the Court has jurisdiction, the matter shall be settled by the decision of the Court."

Article 36: See article 50 of the Convention.

Article 37: See article 51 of the Convention.

Article 38: See article 52 of the Convention.

Article 39: See article 53 of the Convention.

Article 40: See article 54 of the Convention.

Article 41: See article 55 of the Convention.

Article 42: In the first paragraph of article 56 of the Convention "Article 46" shall be replaced by "Article 26".

Article III.

Section V shall become section IV.

Article 43: See article 57 of the Convention.

Article 44: "The expenses of the Court shall be borne by the Council of Europe."

Article 45: "The members of the Court shall be entitled, during the discharge of their functions, to the privileges and immunities provided for in Article 40 of the Statute of the Council of Europe and in the agreements made thereunder."

Article 47: See article 60 of the Convention.

Article 47: See article 61 of the Convention.

Article 48: See article 62 of the Convention.

Article 49: In the fourth paragraph of Article 63 of the Convention, the word "Commission" shall be replaced by the word "Court".

Article 50: See article 64 of the Convention.

Article 51: In the fourth paragraph of article 65 of the Convention, "Article 63" shall be replaced by "Article 49".

Article 52: See article 66 of the Convention.

Article IV.

1. This Protocol shall be open for signature by member States of the Council of Europe signatories of the Convention, which may express their consent to be bound by:

(a) signature without reservation as to ratification, acceptance or approval, or

(b) signature subject to ratification, acceptance or approval, followed by ratification, acceptance or approval.

2. Instruments of ratification, acceptance or approval shall be deposited with the Secretary General of the Council of Europe.

Article V.

This Protocol shall enter into force on the first day of the month following the expiration of a period of three months after the date on which all Parties to the Convention have expressed their consent to be bound by the Protocol in accordance with the provisions of Article IV.

Article VI.

The Secretary General of the Council of Europe shall notify the member States of the Council of:

(a) any signature;

(b) the deposit of any instrument of ratification, acceptance or approval;

(c) the date of entry into force of this Protocol in accordance with Article V;

(d) any other act, notification or communication relating to this Protocol.

## EXPLANATORY REPORT.

### Introduction.

The European Convention for the Protection of Human Rights and Fundamental Freedoms is well known for its rather unique supervisory-mechanism. Although it may have served as a source of inspiration for other international and regional covenants, conventions and charters, its main features are to be seen as a set of compromises which were unavoidable in the years the Convention was drawn up. Now, thirty-five years later, these compromises (such as the establishment of a Commission besides a Court, both functioning on a part-time basis) appear to be the Achilles' heel of the supervisory-mechanism. An increasing number of individual complaints has clearly demonstrated this weakness.

Aware of the need for a more fundamental change of the supervisory-mechanism, the Swiss delegation to the Ministerial Conference on Human Rights in Vienna (19/20 March 1985) presented a study on possible measures of improvement (see: Swiss Report, in: Human Rights Law Journal, 1985, pp. 97-117). Subsequently, the Swiss proposal to merge the Commission and the Court was made subject of the Colloquium in Neuchâtel (14/15 March 1986).

The Draft-Protocol hereby presented is based on some of the Swiss proposals, such as the merger of the Commission and the Court into a permanent Court of Human Rights, and the empowering of this Court to give preliminary rulings.

### Changing the Convention: a Draft-Protocol.

The Draft-Protocol hereby presented may be considered as an attempt to translate the outcome of several discussions on improvement of the supervisory-mechanism of the Convention by formulating an integral and coherent set of treaty-articles.

The text of the articles corresponds to a large extend to the existing text of the Convention. Behind each proposed article the corresponding number of the present article of the Convention is indicated. Alterations, such as those based on the 8th Protocol have been incorporated in the text. Article 27 (introducing a preliminary rulings-procedure) was, with adaptations, derived from the text of article 177 of the EEC-treaty. The use of existing texts has the advantage of a more fixed interpretation based on existing jurisprudence.

The merger-proposal.

The most fundamental change provided by this Protocol is the merger of the European Commission and the European Court of Human Rights into a permanent Court. This proposal has been made by the Swiss delegation to the Ministerial Conference in Vienna in 1985 (see: Human Rights Law Journal, 1985, p. 114 (d)). At the Colloquium in Neuchâtel, which was dedicated to this merger-proposal, nearly everybody agreed upon the necessity of taking far reaching measures in order to safeguard an adequately functioning of the supervisory-mechanism on the long term. The support for the merger-concept was nearly unanimous. The same goes for the idea that the role of the Committee of Ministers in dealing with individual complaints should be reduced, or even be abolished.

The Draft Protocol, which is based on the Swiss merger-proposal, is aimed at the establishment of a permanent European Court of Human Rights. This Court can deal with both interstate and individual complaints. Individuals will have the right to bring their case before the Court and may (if the case is admissible) defend it before the Court. The conferment of a locus standi is a logical consequence of the recognition of the right to submit individual petitions, since the Commission, being abolished, cannot decide anymore whether or not a case should be dealt with by the Court. The competence of the Commission and of the Committee of Ministers under the present Convention concerning interstate complaints not dealt with by the Court, is taken over by an ad-hoc Commission (cf. the ad-hoc Conciliation Commission under article 42 of the International Covenant on Civil and Political Rights). The five members of this Commission shall be elected by the State-Parties concerned with the interstate complaint. The names of candidates will be proposed by the Court.

The conditions for admissibility of both interstate and individual complaints before the Court are identical to the existing rules related to the procedure before the Commission. The articles 30, 32, 40 and 45 are also applicable to the ad-hoc Commission under article 28. The abundant jurisprudence on these articles will avoid problems on interpretation of the proposed articles.

The preliminary rulings-proposal.

In order to improve the implementation of the Convention on the national level, the proposed article 27 introduces a preliminary rulings-procedure. This procedure should strengthen the cooperation between national tribunals and the Court in interpreting and applying the Convention. The application of the procedure under article 177 of the EEC-treaty has proved the usefulness of this kind of procedure on the European level.

The history of initiatives to introduce a preliminary rulings-procedure under the Convention goes back to 1961. The subsequent proposals are well described in the Swiss report (see: Human Rights Law Journal, 1985, pp. 114, 115).

The preliminary rulings-procedure, as proposed in article 27 of the Draft Protocol is not meant to be an exact copy of the 177 EEC-treaty-procedure. First of all, there is an important difference in character between the Convention and the EEC-treaty. The former does not need to be interpreted and applied in a strictly uniform way, wheras for the latter uniform interpretation and application is a vital condition. The only uniform interpretation the Convention needs regards the so-called 'minimum-standards'. In cases where the Convention prescribes a minimum level of protection, the interpretation must be uniform. But there is no impediment whatsoever preventing national tribunals to provide for a higher level of protection by interpreting the Convention more extensively. This dynamic interpretation is even one of the main features of the Convention, and this has been established by the Court moreoften (cf. The Sunday Times-case, April 26th, 1979, ECHR series A, vol 46). Thus, a preliminary rulings-procedure enables national tribunals to ask the Court where the 'bottom-line' of protection has to be drawn. Subsequently, the national tribunals may decide to 'upgrade' the 'bottom-line' protection.

The advantages of this operation are clearly to denote:

- national tribunals can secure themselves of an interpretation of a sufficient protection level;
- the case may be dealt with finally by the national tribunals, which leaves the final decision on a national level, which means preservation of the principle of 'domestic remedies';
- because of the preventive character of the preliminary rulings-procedure a great number of contentious cases can be avoided;

- a more frequent use of the preliminary rulings-procedure compels national tribunals to practise the interpretation and application of the Convention, and will make them more familiar with the jurisprudence of the Court; in short: it will reinforce the implementation of the Convention.

The way in which the Court has to deal with preliminary rulings, interstate and individual complaints in relation to the number of judges concerned with the matter should be worked out in the Rules of Procedure of the Court. Besides the proposed article 24, all further rules concerning the attribution of tasks and procedures to be followed should be flexible, and therefore details should be left out of the Protocol.

Commentary on the provisions of the Draft Protocol.

Article I.

This article changes article 19 of the present Convention. Because of the merger of the Commission and the Court in one full-time Court article 19 paragraph a will be deleted.

Article II.

Because of the merger of the Commission and the Court, section III of the present Convention will be deleted (the articles 20 to 37).

The new section III will consist of partly new, partly changed and partly renumbered articles from the present section IV of the Convention.

Article 20: The text of this article is identical to that of the present article 38 ECHR.

Article 21: The text of this article is identical to that of the present article 39 ECHR; in accordance with a decision of the Assembly in July 1974 the words "Consultative Assembly" are changed in "Parliamentary Assembly".

Article 22: The text of this article is identical to that of the present article 40 ECHR, including the change of name of the Assembly. Paragraph 7 is added by virtue of article 9 of the 8th Protocol.

Article 23: The text of this article is identical to that of the present article 41 ECHR, including the addition by virtue of article 10 of the 8th Protocol.

Article 24: The text of this article is identical to that of the present article 43 ECHR, including the addition by virtue of article 11 of the 9th Protocol.

Article 25: The text of this article is comparable with that of the present article 45 ECHR. Because of the merger of Commission and Court, the words "which the High Contracting Parties or the Commission shall refer to it in accordance with Article 48" shall be deleted.

Article 26: The text of this article is identical to that of the present article 46 ECHR.

Article 27: The article gives the national judicial organs the possibility, on the basis of an optional clause, to request the Court to give preliminary rulings. The text of this article is comparable with that of article 177 of the EEC-Treaty. However, there are some important differences:

- a preliminary ruling can only be given on the interpretation of the Convention (compare art. 177 sub a EEC-Treaty);
- there is no obligation for a court or tribunal of a State Party "against whose decisions there is no judicial remedy under national law" to request the Court to give a preliminary ruling, when a question concerning the interpretation of the Convention is raised. There is only a possibility to request the Court for such a ruling. An obligation is not necessary, because the uniformity in interpretation and application of the EEC-Treaty in the national legal orders of the EEC-Member States is not required under the European Convention. The uniformity in interpretation, which the Convention requires is of a different character: the Convention only requires a uniform minimumstandard of the rights set forth in the Convention, to be guaranteed in the national legal orders of the States Parties to the Convention. Those States Parties remain free to guarantee a higher level of protection of the rights, set forth in the Convention.

The main goal of the preliminary rulings of the Court is to give the national judicial organs a guideline for what is understood as the "bottom-line" of the protection of the rights, guaranteed by the Convention. In other words, it is an instrument for preventing a too limited and thereby violative interpretation of the Convention. After the preliminary ruling, the national judicial organ must give the final decision. It affects in no way the 'local remedies' rule.

Article 28: This article contains the regulation of the interstate-complaint-procedure. Such a complaint can only be brought before the Court, if all the States concerned have accepted the compulsory jurisdiction of the Court, in accordance with article 26 of this Protocol, and are willing to refer the case to the Court. Otherwise, an ad-hoc Commission is to be established. The names of candidates shall be proposed by the Court, and the members shall be elected by the States-Parties concerned. This Commission shall act in conformity with articles 30, 32, 40 and 45. In this way the procedure before this Commission is given the same guarantees with regard to the examination of the exhaustion of local remedies, the possibility to reach a friendly settlement, as would have been the case in a procedure before the Court. The report of the ad-hoc Commission shall contain an opinion whether or not there has been a breach of the Convention. This report shall be transmitted to the Committee of Ministers which shall supervise its execution.

The judgments and friendly settlements of the Court shall be implemented in accordance with article 40 of the Protocol.

Article 29: This article contains the regulation of the individual complaint-procedure, on the basis of an optional clause. The text of this article is comparible with that of article 25 ECHR, with the addition that the compulsory jurisdiction of the Court must first be recognized. The recognition of the right, set forth in this article, means that everyone falling under the jurisdiction of the recognizing State can bring his case before the Court.

Article 30: The text of this article is almost identical to that of the present article 26 ECHR. Only the words "the Commission" shall be replaced by "the Court".

Article 31: The text of this article is almost identical to that of the present article 27 ECHR. Only the words "the Commission" shall be replaced by "the Court".

Article 32: The text of the first paragraph is almost identical to that of the present article 28 ECHR. Only the words "the Commission" shall be replaced by "the Court". In conformity with article 4 of the 8th Protocol this article will be supplemented with the text of article 30 ECHR. Also in this paragraph, the words "the Commission" shall be replaced by "the Court". It goes without saying that in case the Court is not able to reach a friendly settlement, the Court will give a judgment. In that case, the articles 35 and following are applicable.

Article 33: The text of this article is almost identical to that of the present article 29 ECHR, as amended by article 5 of the 8th Protocol. The words "the Commission" shall be replaced by "the Court", "article 25" by "article 29" and "article 27" by "article 31".

Article 34: The text of this article is identical to that of article 30 ECHR, as provided for in article 6 of the 8th Protocol.

Article 35: The text of this article is identical to that of the present article 49 ECHR.

Article 36: No further comment.

<u>Articles III - VI.</u>

No further comment.

## ADVISORY OPINIONS

One of the preventive measures, proposed in the Swiss report, p. 113-114, is that of empowering the Court to give advisory opinions on (draft) legislation at the request of States.

As can be seen in the draft protocol, such a competence is not included. The reason is that, according to the opinion of the Netherlands Jurists Committee for Human Rights (N.J.C.M.), the advantages and disadvantages of such a competence are until now insufficiently worked out. It therefore proposes to discuss at this Conference the desirability of such a competence and the advisability of including it in the draft protocol.

The major problems to be discussed at the Conference are:

- is there a need for such a procedure;
- is it compatible with the task of a Court to give rulings in general on the compatibility of (draft) legislation with the Convention;
- what must be the width of the competence (only draft legislation or also existing legislation);
- what are the consequences of such a competence for the national legislative procedures (and the risk of misuse for postponing controversial draft legislation);
- what are the consequences for an individual who wants to file a complaint about legislation, which has already been subject of an advisory opinion;
- what are the consequences of such a competence for the working load of the Court.

# JUSTICE

## MEMORANDUM ON PROCEDURES BEFORE THE EUROPEAN COMMISSION OF HUMAN RIGHTS

While endorsing in general the views and recommendations of such other bodies as INTERIGHTS and the Swiss Delegation, JUSTICE proposes certain specific reforms of the Commission's procedure on the understanding that (a) the existing functions of the Commission and the division of responsibilities between it and the Court will be maintained for the time being and (b) the changes in its structure envisaged in Protocol No. 8 of the Convention will not become operative for many years. This document is thus limited in its scope, so that our suggestions will in the main involve amendments to the existing Rules of Procedure of the Commission. Some of the suggestions made by JUSTICE could be adopted without necessarily affecting any changes in the Rules.

We recognise that the quality of the service provided under the Convention inevitably reflects the amount of money made available for it. Some of our proposals will require an increase in the budget of the Council of Europe, especially that portion of it allocated to human rights and the Convention. This in turn requires a realistic and continuous assessment of performance and needs in order to generate support within member states for proper funding. Many of the JUSTICE proposals which follow do not involve significantly greater costs to the Commission. JUSTICE recognises that at present the resources of the Commission in terms of finance and manpower are wholly inadequate vis-à-vis its caseload. Progress of each case is usually determined by the Rapporteur or the Commission under Rule 42.4 rather than by the pre-set time-limits. The demands and expectations of litigants before the Commission have now reached such a level that reforms in this respect are now urgently required to avoid the machinery of the Commission grinding to a halt.

JUSTICE therefore proposes as follows:

1. <u>Realistic Time Tables</u>

(a) The Rules should be amended to provide for generally applicable and realistic timetables for all business.

(b) Possible limits are, for example, four weeks to answer an inquiry, three months to respond to a submission. A penalty of disallowed legal costs and/or risk of dismissal of application should ensure compliance by an applicant while a respondent government could be put at risk of compensation payable to the applicant, whatever the outcome, or of having the application declared admissible.

(c) The Rules could provide that in every case the Commission should have to consider at a fairly early stage of the proceedings, say within two months of the receipt and registration of the complaint, whether the filing of the complaint should not forthwith be communicated to the respondent government rather than until after it has been decided that there might be a possibility of a violation as at present.

(d) The Commission should produce its report within six months of the date of admissibility, as most of the merits of the case will have been dealt with by that time and clear issues will have emerged.

(e) Friendly settlement proceedings should be commenced as soon as an application has been declared admissible.

2. Less secrecy

Experience of the present working of the Commission suggests that practitioners, litigants and other interested parties feel that the Commission functions behind a veil of secrecy that is inappropriate to a body which is looked to as a protector of human rights.

(a) The Commission should always, for example, disclose to the parties any previous unpublished opinion on which it intends to rely. Ideally, it should publish all its decisions, subject to any requirements by the applicant as to confidentiality.

(b) A draft copy of the Commission's decisions should always be sent to the applicant for comment where it is proposed to declare the application inadmissible without a hearing. As there is no appeal mechanism, this would enable the Commission to revise its decision in the light of the applicant's representations. Alternatively, a system of review of, or appeal against, the Commission's decision should be introduced.

(c) The Commission's proceedings should be conducted in public except for good reason. This would more accurately reflect their quasi-judicial nature.

3. Admissibility

(a) The Commission should have the power, where there is no continual violation, to waive the six month time-limit in cases (i) where a violation of the Convention would appear to have taken place, (ii) which raise points or principles of general significance or (iii) where grave injustice would be caused by the failure at least to examine the application. This would of course require amendment to the Convention.

(b) The Commission should dispense with an oral hearing if it considers that an application is clearly admissible. This is really a formality where the written arguments are repeated orally. Alternatively where the application discloses a good prima facie case, the Commission should proceed straight to an oral hearing and dispense with written pleadings or other intermediate steps. This practice would save time and money and could be accommodated within existing Rule 42.

(c) If there is a factual conflict which has not been resolved by inquiries and submissions, the Commission should delegate to a small group the resolution of the dispute by holding a hearing in the member state, which would provide full facilities, and then report back. Full hearings (of the Commission) would only be retained for the most difficult cases raising important points of interpretation of the Convention. (The suggestions made in sub-paragraphs (b) and (c) above would of course be automatically achieved when Protocol No. 8 is fully implemented).

4. Increasing Access

(a) The Council of Europe should sponsor human rights NGOs to disseminate information and advice about the Convention and its jurisprudence.

(b) Member States should be under an obligation to ensure that official legal education courses contain material about the Convention. Where a member state operates a legal aid scheme it should cover the preparation and presentation of applications and should not be limited to when the application is transmitted to a Government. Where there is no legal aid scheme, the Commission should be able to offer more realistic assistance to applicants.

(c) If the part-time nature of the Commission prevents it from coping with present and projected levels of work then urgent consideration should be given to creating a permanent Commission. Again, however, JUSTICE appreciates that a full implementation of Protocol No. 8 would probably remove some of the present difficulties.

# TOPIC TWO

## THE EUROPEAN CONVENTION AND DOMESTIC LAW AND PROCEDURE

INTRODUCED BY

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# REPORT

## TOPIC TWO: European Convention and Domestic Law and Procedure

Discussion of this topic was based on the responses to the questionnaire distributed to all ICJ European affiliates and national sections (see page 73). This was designed to establish the means by which domestic legal systems protect the Convention rights and freedoms.

The seven replies received were put into tabular and narrative summary form by Prof. Paul Sieghart (see pages 75 and 76). In his introduction to this topic Prof. Sieghart referred to Article 13 of the Convention according to which everyone whose rights and freedoms, as set forth in the Convention, are violated, shall have an effective remedy before a national authority. The Convention however does not prescribe in detail in which way this shall take place and it does not even set up a model. This might be due to the fact that there is a fundamental difference among the European states about the relationship between national law and international law. Some states have a dualistic system, in which international law is not automatically part of the domestic legal system. Before international instruments can be applied by the domestic courts and other domestic authorities they have to be transformed into domestic law by way of the normal legislative procedure of the state in question. On the other hand, in states with a monistic system, international instruments to which these states are party are binding upon them as such instruments automatically become part of the domestic legal system. In addition to this, there are certainly many, other important differences in the ways in which different domestic legal systems handle cases of disputes on human rights. The questionnaire and the answers given to it can not reveal all the problems arising from that fact. Even in well-established legal systems disputes have arisen which later on have given rise to petitions under Article 25 of the Convention many of which have been declared admissible after they have been examined in accordance with Article 27.

The preconditions of course for such examination is that the state concerned has declared that it recognises the competence of the Commission to receive such petition. Declarations to that effect have been lodged by all the states members of The Council of Europe with the exception of Malta and Cyprus, the last two states to recognise were Greece and Turkey.

During discussion on this topic oral statements in response to the questionnaire were made by representatives from the seven states who had previously submitted written replies and also from Switzerland and Finland, which is not yet a member of the Council of Europe.

After some discussion of the implications of the monistic and dualistic approachs to international law, it was suggested that some dualistic states, for example, the United Kingdom, should be encouraged to incorporate the provisions of the Convention into their domestic legal systems. It was pointed out that such incorporation would not affect domestic legislation which affords the individual even greater protection than is given by the Convention.

According to Article 57, States Parties to the Convention, at the request of the Secretary-General of the Council of Europe, shall furnish an explanation of the manner in which their domestic law ensures the effective implementation of any of the provisions of the Convention. Such requests have been made four times, in 1964, 1970, 1975 and 1983. Those requests have referred to specific articles in the Convention and to special topics. The replies given by all States Parties, with few exceptions, were published in 1986. The secretariat of the

Council of Europe has expressed the wish to see comparative studies and critical analyses made of these replies by outside institutions. It was suggested that the ICJ set up a committee to look at the implementation of Article 57 by the organs of the Council of Europe.

## RESOLUTION

Topic Two: The European Convention and Domestic Law and Procedure

The European national sections of the International Commission of Jurists (ICJ) represented at the Conference in Strasbourg from 22 to 24 April 1987;

Draw attention to the obligation accepted by all States Parties under Article 13 of the European Convention on Human Rights (the Convention) to provide an effective remedy before a national authority for violations of the rights and freedoms set forth in the Convention;

Recognise that such remedies are not yet adequately provided in all States Parties;

Call upon all States Parties which have not yet complied with Article 13 to do so, whether by incorporation of the Convention into their domestic law or by other appropriate methods; and

Urge the national sections of the ICJ where necessary to persuade their governments to take action to give effect to this recommendation.

# WORKING DOCUMENTS

# FOR

# TOPIC TWO:

## THE EUROPEAN CONVENTION AND DOMESTIC LAW AND PROCEDURE

# THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND DOMESTIC LAW AND PROCEDURE

## Questionnaire for National Sections

Articles 2 to 12 of the European Convention on Human Rights ("the Convention") define certain rights and freedoms ("the Convention rights and freedoms"). In accordance with Article 1, the State Parties to the Convention are bound to "secure" the Convention rights and freedoms "to everyone within their jurisdiction." Article 13 requires that everyone whose Convention rights or freedoms have been violated "shall have an effective remedy before a national authority."

It is not the purpose of this questionnaire to discover how well the Convention rights and freedoms are in fact protected in your country: there may well be different views about this. Rather, the purpose is to establish the means by which your legal system protects the Convention rights and freedoms, and the procedures available, at the national level, to obtain a remedy for alleged violations.

## QUESTIONS

### A. Constitutional Law

1. Does the Convention itself form part of the constitutional law of your country ? (If so, go to section B.)

2. Does the Constitution of your country contain a list of protected rights and freedoms for individuals ? (If not, go to section B.)

3. Does that list include all the Convention rights and freedoms ? If not, which of them are omitted ?

4. Are there any important differences between the definitions of the Convention rights and freedoms in -

   a) the Convention; and
   b) your Constitution ?

   If so, please describe them.

5. Does your Constitution give these rights and freedoms to every individual "within the jurisdiction" of your State - or, for example, only to its nationals ?

6. Does your Constitution require all the rights and freedoms that it lists to be protected by law ?

**B. Ordinary Law**

1. Are there, in your country, ordinary laws which regulate the full exercise of all the Convention rights and freedoms ? If not, which of them are omitted, or limited or restricted to a greater extent than in the Convention ?

2. Does the Convention itself form part of the ordinary law of your country ?

**C. Remedies**

Assume that an individual in your country claims that one of his or her Convention rights or freedoms has been violated.

1. If the violation constitutes a breach of an ordinary law which regulates the exercise of that right, by what procedures could the individual concerned obtain a remedy for the violation ?

2. If the violation does n o t consititute a breach of any ordinary law, are there any procedures by which the individual concerned can nonetheless obtain a remedy -

   a) if the violation was one of a right protected by the Constitution ?

   b) if the violation was one of a right not protected by the Constitution but protected by the Convention, or more widely protected by the Convention than by the Constitution ?

3. In what circumstances would it be possible for an individual under the jurisdiction of your State to suffer a violation of one of his or her Convention rights or freedoms, but -

   a) to be unable to establish that fact by any procedure within your legal system; or

   b) to be able to establish that fact by some appropriate procedure, but to be unable to obtain an effective remedy for the violation ?

**THE EUROPEAN CONVENTION AND DOMESTIC LAW AND PROCEDURE**
Tabular Summary of Responses from National Sections

| Question: | A.1 | A.2 | A.3 | A.4 | A.5 | A.6 | B.1 | B.2 | C.1 | C.2(a) | C.2(b) | 3(a) | 3(b) |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| Austria | yes | - | - | - | - | - | - | - | - | - | - | - | - |
| FRG | no | yes | largely | some | most | yes | no | yes | judicial | yes | (not if later law overrides ECHR) | | |
| France | no | yes | yes | no | all | yes | yes | no | Conseil d'Etat | yes | yes | deportation; telephone tapping | |
| NL | no | yes | no | no | except voting | no | no | yes | - | yes | yes | only few special cases | |
| Norway | no | yes | no | yes | except voting | no | no | no | various | yes | yes | ? national security | |
| Sweden | no | yes | roughly | some | most | no | yes | no | various | yes | no | - | - |
| UK | no | no | - | - | - | - | most | no | judicial | no | no | (if act not domestically unlawful) | |

**NOTE:** The above is no more than a summary tabulation for comparative purposes. It entirely fails to do justice to the detailed answers provided by several of the National Sections. The headings refer to the numbered questions in the questionnaire.

April 1987

**Topic 2**

## THE EUROPEAN CONVENTION AND DOMESTIC LAW AND PROCEDURE

Narrative Summary of Responses from
National Sections
prepared by Paul Sieghart

Seven sections sent written responses to the questionnaire: two more (Finland and Switzerland) gave oral answers at the Conference itself, since amplified by letter. The responses varied widely in the degree of their detail, but may be summarised as follows. (References are to the numbered questions in the questionnaire.)

### Austria

ECHR has the rank of constitutional law. Accordingly, all the Convention rights and freedoms form part of positive Austrian federal law of the highest rank, so making all the other questions in the questionnaire inapplicable. Since everyone has direct access to the Austrian Constitutional Court on any question of constitutional law, that court is competent, as a court of first and last instance, to rule on any matter concerning any of the Convention rights or freedoms. (The Constitutional Court does not have any appellate jurisdiction from other courts.)

Other courts, being bound to apply constitutional law, likewise have jurisdiction to decide such questions if they are raised before them. Accordingly, if Austria loses a case before the Strasbourg organs, it can only be either because the applicant did not raise the question before the appropriate domestic tribunal, or because the Strasbourg organs come to a different conclusion from that tribunal.

### Federal German Republic

A.1 ECHR does not have the rank of constitutional law.

A.2 The Constitution ("Grundgesetz" = GG) contains a list of protected rights and freedoms for individuals.

A.3 This list does not expressly cover all the Convention rights and freedoms, but in practice any gaps are filled by a liberal interpretation of the rights and freedoms expressly protected.

A.4 There are differences, e.g.:

ECHR 5(1) is decidedly more concrete than GG;

ECHR 5(5) does not require any "fault" as a precondition for compensation;

ECHR 6(1) is wider than GG 19(4), which only protects against acts of public authorities;

ECHR 6(1), second sentence, has more occasions than GG for excluding the public from trials;

ECHR 10(1), second sentence, unlike GG 5(1), makes no exception for legislation;

ECHR 11 extends to all individuals: GG 8 and 9 extend only to German citizens;

the list of prohibited grounds of discrimination in ECHR 14 is wider than that in GG 3(3);

GG 13(3) has narrower exceptions for legislation than ECHR 8(2);

In contrast to ECHR 14, GG 3(3) is not ancillary.

A.5 The rights of assembly (GG 8) and association (GG 9(1)) extend only to German citizens. All others extend to all individuals, and there are yet others, not corresponding to any of the Convention rights or freedoms, which extend to German citizens.

A.6 According to GG 19(4), anyone whose rights are violated by public authorities must have an enforceable legal remedy.

B.1 No, but this is unnecessary since ECHR itself ranks as ordinary law.

B.2 Yes, and there is currently a movement towards giving ECHR the rank of constitutional law through the operation of GG 25.

C.1 Normally by proceedings before the competent civil or administrative courts. After exhaustion of these, proceedings may be available before the Constitutional Court. Failing that, there is Strasbourg.

C.2 (a) See C.1 above.
(b) Likewise, but see also C.3(a) below.

C.3 (a) Since, for the moment, ECHR only has the rank of ordinary law, it may happen that a later ordinary law overrides ECHR as lex posterior. This has already occurred several times, though in the event these cases were resolved in favour of ECHR. This is a further argument for promoting ECHR to constitutional rank.

(b) This can happen if an applicant wins in Strasbourg when he has lost before the domestic courts: that gives him no domestic legal remedy, and he must rely on the good faith of the State to comply with the Strasbourg judgement.

**Finland**

Finland is not a member of the Council of Europe, nor a state party to ECHR. However, if it were at some time in the future to accede to ECHR, the position would be as follows:

A.1 ECHR would not have the rank of constitutional law.

A.2 The Constitution Act of Finland (= FC), dating from 1919, contains a list of protected rights and freedoms for individuals.

A.3 This list does not expressly mention some things such as torture, habeas corpus, fair trial, or publicity of proceedings.

A.4 The list is rather general in nature, and does not go into details.

A.5 The wording of FC only refers to Finnish citizens, but at the level of ordinary legislation these rights are normally extended to all individuals.

A.6 The FC Bill of Rights is basically regarded as a directive to the legislator, and not to the judges administering the law. In everyday legal practice, arguments advanced in a court are only seldom based directly on FC (and even more seldom on human rights law), but rather on ordinary legislation and "general principles" enshrined in the legal tradition. Constitutional rights are therefore mostly implemented through the relevant provisions at the level of ordinary legislation.

B.1 By and large, yes. Finland has ratified the UN Covenant on Civil and Political Rights (with certain reservations). The degree of conformity between Finnish domestic law and the ECHR depends on the interpretation given to such flexible norms as "promptly before the judge" or "trial within a reasonable time". The greatest problems occur in the law concerning arrest and detention.

B.2 On the ratification of a treaty, the relevant legislation is carefully scrutinized, and necessary reforms are made in order to establish conformity between the provisions of the treaty and those of domestic law. It is then possible to adopt the treaty either by a statutory decree or by an enactment of Parliament. If the latter procedure is applied, the provisions of the treaty are in fact technically incorporated into domestic legislation. This is the prevailing legal opinion, but it has not yet been tested in practice. It is another question whether and to what extent the provisions of the treaty are in fact heeded and applied by the judges. The principle jura novit curia does not necessarily work as it should. The treaties are not always made sufficiently accessible to the judges. On the other hand, a certain degree of "judicial dynamism" is also discernible in Finland. There are those who fear that judges might become too adventurous in basing their arguments on human rights law instead of ordinary law.

C.1 By regular legal remedies such as instituting civil or criminal proceedings, or lodging a complaint to the Chancellor of Justice (equivalent to an Attorney General), or the Parliamentary Ombudsman, the Consumer Ombudsman or the Equality Ombudsman, etc.

C.2 (a) In view of the general nature of the Bill of Rights in FC, this situation is difficult to imagine in practice. Constitutional rights normally take effect through ordinary legislation.

(b) If there is a discrepancy between ordinary law and the provisions of a human rights treaty, the latter having been incorporated into domestic law by Parliamentary enactment, the rule lex posterior derogat legi priori will be applied.

C.3 (a) The Finnish legal system provides the necessary means to establish any fact that may be of legal relevance and of sufficient legal interest for the individual suffering a violation of his or her rights.

(b) The facts are normally established for the purpose of rendering the remedies available. In principle, they go hand in hand. However, the effectiveness of legal remedies is to some extent a political question, and there is always room for improvement.

**France**

A.1 ECHR does not have the rank of constitutional law.

A.2 The French Constitution contains a list of protected rights and freedoms for individuals.

A.3 This list includes all the Convention rights and freedoms.

A.4 There are no important differences between the rights and freedoms protected by ECHR and those protected by the Constitution.

A.5 The Constitution gives these rights and freedoms to all individuals.

A.6 The Constitution requires all the rights and freedoms that it lists to be protected by law.

B.1 Ordinary laws regulate the full exercise of all the Convention rights and freedoms.

B.2 ECHR does not itself form part of the ordinary law of France.

C.1 Proceedings before the Conseil d'Etat.

C.2 (a) Yes.
(b) Yes.

C.3 Expulsion in the form of disguised extradition; telephone-tapping.

**The Netherlands**

A.1 ECHR does not form part of the constitutional law of the Netherlands, but effectively enjoys a rank even above the Constitution itself (see B.2 below).

A.2 Since its 1983 revision, the Netherlands Basic Law (= BL) contains such a list.

A.3 Not all the Convention rights and freedoms are included in the BL list. In particular:

BL does not expressly protect a right to life, but BL 114 prohibits capital punishment;

BL 11 guarantees the right to inviolability of the person, but there is no equivalent to ECHR 3;

There is no equivalent to ECHR 4;

BL 15 contains only some of the guarantees in ECHR 5;

BL 112(1) and 113(1) respectively confer exclusive jurisdiction on the judiciary in respect of disputes involving rights and debts under civil law, and criminal offences, but the rest of ECHR 6 is not expressly reflected in BL;

BL 10 protects privacy; BL 11 protects the right to inviolability of the person; BL 12 restricts entry into a home against the will of the occupant; BL 13 protects the privacy of correspondence, and of telephone and telegraph communications; however, BL does not expressly protect the right to family life;

BL 99 provides for conscientious objection to military service;

BL 7 is similar to ECHR 10, but does not guarantee the right to receive and impart information and ideas, nor does it extend to commercial advertising;

The right to marry can be derived from paragraph 5 of Book I of the Civil Code, but is not expressly protected by BL.

A.4 ECHR was used as a model for the opening chapter of BL, and where the rights and freedoms correspond the definitions are very similar.

A.5 Only eligibility for appointment to the public service, and to stand for and vote in elections for general representative bodies, are confined to Dutch nationals. There are provisions for alien residents to stand for, and vote, in elections for municipal councils.

A.6 No.

B.1 No.

B.2 By reason of BL 93, the Netherlands have a monist system: international treaties are therefore directly applicable. By virtue of BL 94, they override conflicting domestic statutes. The Dutch courts consider ECHR 2 to 13 as self-executing; accordingly, they are binding in the Dutch legal order and prevail over domestic statutes - including BL itself - in case of conflict. (In effect, this seems to give ECHR a rank above the Constitution.)

C.1 Not applicable.

C.2 (a) Normally, by proceedings before the competent civil, administrative, or criminal courts, or before some other competent public authority. However, BL 120 precludes the courts from determining that an Act of Parliament constitutes a violation of BL.

(b) As C.2(a), but in this case BL 120 would not apply.

C.3 In general, effective remedies are available for the violation of any Convention right or freedom, with few exceptions - e.g. where international law gives immunity from jurisdiction.

**Norway**

A.1 ECHR does not itself form part of constitutional law.

A.2 In the Constitution (= NC, which originally dates from 11814) there are some protected rights and freedoms for individuals.

A.3 The following are omitted: ECHR 2, 3 (in part), 4, 5 (in part), 6 (in part), 8, 11, and 12 - as well as some of the

Articles of the Additional Protocols, not referred to in the questionnaire.

A.4 There are important differences, for example:

Unlike ECHR 3, NC 96 does not extend to "inhuman or degrading treatment or punishment";

The protection of liberty of the person in NC 99 extends only to criminal procedure, and not to administrative deprivation of liberty;

NC 100 absolutely excludes prior censorship, and is therefore wider than ECHR 10, but it is more limited as regards later sanctions against matter already published;

NC 97 goes further than ECHR 7 in prohibiting all retroactive legislation, and not only in criminal matters;

NC 105, which protects private property, expressly requires "full compensation", unlike Article 1 of the First Protocol to ECHR.

A.5 Only the right to vote is confined to Norwegian nationals; however, freedom of religion may extend only to domiciled persons.

A.6 No, NC is directly applicable by the courts.

B.1 Not expressly, but there is a customary "principle of legality" of constitutional rank which prohibits interference with the individual unless authorised by statute; there is also a principle of interpreting domestic law in harmony with international obligations.

B.2 No: Norway is a dualist country. However, the courts and administrative organs increasingly take account of international norms in their application of domestic legal sources, and there are proposals for clarifying the position of ECHR in domestic law by legislation.

C.1 Recourse to the ordinary courts; administrative complaint to a higher authority; complaint to the Ombudsman, whose jurisdiction is only advisory.

C.2 (a) As C.1

(b) As C.1, to the extent that the court or other authority is willing to have recourse to ECHR as a modifying element for domestic law.

C.3 (a) It is conceivable that in matters affecting national security no effective remedy establishing the fact of a violation might be available.

(b) In certain circumstances, the fact of a violation (as an international wrong) would justify the reopening of a case, even though it was already res judicata.

**Sweden**

A.1 ECHR does not itself form part of Swedish constitutional law.

A.2 The Swedish Constitution (= SC) contains a list of protected rights and freedoms for individuals.

A.3 Yes, roughly.

A.4 The formulations differ considerably, and SC II 12 allows restrictions and limitations by law to a substantially greater extent that ECHR.

A.5 SC II 20 permits restrictions on the guaranteed rights of aliens over a wide range, including the freedoms of expression, information, assembly, association, religion; freedom from search and deprivation of liberty; publicity of court proceedings, etc.

B.1 The rights and freedoms are provided by SC, but may be restricted by ordinary laws.

B.2 No: Sweden has a dualist system and has not incorporated ECHR into its domestic law.

C.1&2 Courts and administrative authorities apply ordinary domestic law, unless this is incompatible with SC. Only if there is uncertainty as to the interpretation of the ordinary law, the court might interpret it in accordance with the State's international obligations. There are also four Ombudsmen who can censure public officials for behaviour incompatible with the rights and freedoms of the individual, but they cannot revise the decisions of courts or other public authorities. A Parliamentary Committee on the Constitution annually examines government decisions from the point of view of their constitutionality.

C.3 Failing any of these remedies, there is only Strasbourg.

**Switzerland**

A Swiss national section has not yet been formed, but the position of Switzerland was reported to be as follows:

A.1 Switzerland is a monist country and, following the consistent practice of the Federal Tribunal, ECHR is considered as self-executing. As a result, ECHR is in effect accorded constitutional rank.

A.2 The Swiss Federal Constitution (= SFC) contains a list of protected rights and freedoms for individuals, which constitute the minimum standard throughout the Federation. In addition, the constitutions of the 26 Cantons all contain their own Bills of Rights. These are essentially the same as those in SFC, but some of them go even further.

A.3 Yes.

A.4 There are differences of wording, but not of substance. In case of doubt, the Swiss courts interpret SFC (and the Cantonal constitutions) so as to conform to ECHR.

A.5 In general, to all persons.

A.6 No, but there is a customary constitutional "principle of legality" requiring any limitation of a constitutional right or freedom to be authorised by a specific legislative act, to be of preponderant public interest, and to respect the principle of proportionality.

B.1 Yes, at both Federal and Cantonal level. There are differences between the Cantons, but minimum standards are set by Federal constitutional and ordinary law. ECHR inspires both the Federal and the Cantonal legislatures in their legislative programmes.

B.2 Effectively, ECHR is regarded as having constitutional rank: see A.1 above.

C.1&2 Proceedings before the appropriate Cantonal or Federal courts, including an appeal to the Federal Tribunal exercising its jurisdiction as a Constitutional Court.

C.3 The Constitutional Court has no power to control federal law.

**United Kingdom**

A.1&2 No; the UK Constitution is unwritten, exists only at the level of ordinary law, and contains no explicit statement of any protected rights or freedoms for individuals.

B.1 The UK has three different legal systems: one for England and Wales, one for Scotland, and one for Northern Ireland. Each of these is made up partly of formal legislation, and partly of principles derived from past judicial decisions ("common law"). Apart from the rights and freedoms protected by Article 8 of the Convention (privacy is not a concept familiar to the laws of the UK), the laws of each of these three jurisdictions protect the Convention rights and freedoms in various ways, though not usually explicitly: most of them are protected by implication, simply because the law does not expressly restrict them. ("If there is no law against it, there is nothing to stop you from doing it.") Broadly speaking, the extent of the protection is much the same as the Convention provides, though on several occasions the European Court of Human Rights has found it inadequate.

B.2 No: the UK has a totally dualist system, and international treaties do not form part of its domestic law unless and until Parliament so legislates.

C.1 By civil proceedings (e.g. an action for damages, or an application for judicial review) before the ordinary courts.

C.2 No.

C.3 (a) Whenever the violation does not constitute an unlawful act under domestic law.

(b) Since international law does not form part of UK domestic law, the UK courts have no means of applying it and there is therefore no procedure whereby such a fact could be established, let alone a remedy be obtained, unless the violation was unlawful under ordinary domestic law.

**May 1987**

# TOPIC THREE

## THE ROLE OF NON-GOVERNMENTAL ORGANISATIONS IN THE COUNCIL OF EUROPE

INTRODUCED BY

MR. P. BOULAY
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CHAIRMAN

PROF. R. LAHTI
PRESIDENT, FINNISH JURISTS FOR HUMAN RIGHTS

RAPPORTEUR

MRS. L. LEVIN
DIRECTOR, JUSTICE (UK)

## REPORT

**TOPIC THREE**: The Role of Non-Governmental Organisations in the Council of Europe

This topic was introduced by Mr. P. Boulay, Representative of the Federation Internationale des Droits de l'Homme, at the Council of Europe. His organisation is Paris based and had 30 affiliated organisations around the world. He broadly outlined how NGOs could be active with the Council of Europe and identified a three-pronged relationship to the workings of the Council. This was linked to three key words - "contract", "conflict" and "confluence".

Implicit in "contract" was that NGOs had a structured relationship with the Council of Europe. They participated in regular sectorial meetings and thus kept up to date on developments in the field of human rights and were able to exchange information and co-ordinate joint action such as promoting new human rights instruments and urging governments to ratify existing conventions. "Conflict" arose from time to time mainly in connection with NGOs' demands for greater consultation, and resentment at the slowness and obscurity of the workings of bureaucracy. On the side of the Council, there was often impatience with the activities of NGOs. But there was no confrontation; on the contrary, this kind of conflict allowed the airing and accommodation of grievances. "Confluence" implied a common meeting place, which facilitated institutionalised collaboration and joint planned action. He urged all NGOs to attend sectoral meetings, either in their own right, if they had consultative status or, if they were national organisations, under the umbrella of their international body.

Some discussion followed on: 

(a) Fact finding and the role of NGOs, and

(b) Observer missions. A suggestion was made relating to formalising the status of observers i.e. formal accreditisation through establishing some official recognition. It was pointed out that the independence of an observer mission was its primary strength, and the credibility and prestige of the mission stemmed from that.

(c) The possibilites of bringing situations pursuant to such fact-finding missions to the notice of the Council of Europe. One of the ways in which this could be done was through the Parliamentary Assembly by lobbying of Members. This might then lead to a direct request or invitation to NGOs for information. It was noted that NGOs were very ignorant of the possiblities and ways in which they could work through the Council of Europe, and there was considerable need to educate NGOs in this respect.

(d) The possibility of NGOs petitioning on behalf of individuals under Article 25 was discussed. This presented a quandary as to whether an NGO was competent to do so and to carry it through. The ICJ could only do this indirectly when a case was brought to its notice through finding known lawyers in particular countries to take up such cases. The Sections were independent and could thus act in any way that they felt competent to do. The only Section which currently had the expertise and structure to take on a case and see it through was JUSTICE. In response to a request, Peter Ashman gave a short resume of one of the cases JUSTICE had taken up, i.e. that of of Robert Weeks. He was 17 years old at the time of his conviction for robbery. His social worker's report indicated that he was immature and unhealthily interested in guns. He was sentenced to life imprisonment. His sentence was upheld on appeal. JUSTICE had submitted this case to the

Commission who subsequently referred it to the Court. The Court found a violation under Article 5(4) in that there were no proper judicial review procedures. Peter Ashman appeared for the applicant in his capacity as the Legal Officer of JUSTICE, and at no time was there any objection raised. Indeed the Registrar's report formally indicated that he was appearing in his official capacity with the organisation concerned. Reference was made to the gradual development of procedural jurisprudence, which was identifiable in Strasbourg whereby

(i) An individual was able to sue a state in an international tribunal, even though the individual was not formally part of the proceedings.

(ii) The Maloney case opened the way for memorials from individuals/organisations who had an interest in the case. This was the first third-party memorial admitted and thus there was a creeping dynamism within the organs of Strasbourg long before the national courts were prepared to do so.

A working paper on the subject of this session had been prepared by Andrew Drzemczewski, who introduced the paper and highlighted certain aspects of it.

Whilst a formal definition of an NGO was cited, there remained some controversy as to the range of attributes which qualify an organisation to be called an NGO.

The importance of the European Convention (then not in force) on 'The Recognition of the Legal Personality of International Non Governmental Organisations' was stressed. This endowed NGOs with a legal legitimacy and allowed for a role for NGOs where the state was not necessarily a member state of the Council of Europe but which related to Council of Europe work. Consultative status allowed for a direct input by NGOs. This was particularly important in the drafting of new instruments as was reflected in the draft

Convention for the Prevention of Torture, the first draft of which was prepared by the ICJ and the Swiss Committee against Torture, at the request of the Legal Committee.

The consultative mechanism with the Council of Europe allowed NGOs to be informed of what was happening within the Council and also to contribute towards its work. National Sections could participate in the sectorial meetings under the aegis of the parent body (i.e. the ICJ, by arrangement) and the only limitation would be the physical problem of accommodating the numbers of people.

The Parliamentary Assembly could serve as an effective means through which NGO initiatives could be channelled, e.g. the draft Conventions on the rights of the child, asylum etc., and National Sections who had an interest in specific topics coming up were invited by the Secretary-General of the ICJ to take up and pursue these in appropriate ways on behalf of the ICJ, and in consultation with the ICJ Secretariat.

The question arose as to what extent the Commission or the Court could take NGO reports into account. There were no procedural points which allowed for this in respect of the Commission, but the new rule of the European Court, No. 37 para. 2, allowed third party interventions at the discretion of the President.

The matter of the preparation of applications was raised, and it was pointed out that the expertise for this varied considerably, and this had indeed been identified as a possible lacuna in the European system.

NGOs in their respective countries were urged to support the provision of legal aid being extended to the preparation of cases. It would also be helpful if domestic legal aid could be extended to cover cases being submitted under the Convention.

Niall MacDermot congratulated Andrew Drzemczewki on his paper and expressed the hope that this might become an official document and be widely circulated. He elaborated on some of the ways in which NGOs could have an input into the work of the Council of Europe and pointed to the function of the Steering Committee on Human Rights on which the ICJ was now an official observer. This was an important forum in which the direction of a new instrument and policy could be influenced as had been shown in respect of the draft Convention against Torture. The Committee was able to invite NGOs for consultation.

Concern was, however, expressed at the secrecy which shrouded the operation of the Council of Europe organs. This compared badly with the UN, where for example the process of drafting conventions was a public procedure and open to the press. The question was raised as to what possibilities existed to monitor the reporting procedure of the Council of Europe. Did Article 57 provide a potential mechanism for doing so? Furthermore, how did it work? Andrew Drzemczewski responded and explained the procedures under this Article. He recognised the problem of secrecy and paid tribute to the Director of the Directorate of Human Rights for his enlightened approach which was extremely helpful. Article 57 had been invoked only four times and only on the first occasion were general reviews called for by the Secretary-General. In 1964 the Secretary-General asked governments to inform him how legislation, courts and administrative practices ensured compatibility of domestic law with international obligations. On the subsequent occasions they were asked only to report on specific issues and the Articles to which these related. The Secretary-General exercises this supervisory function in his personal capacity and on his own behalf. It is not entirely clear by what further procedures these reports are dealt with, although they are published. The last request was in 1983 on the issue of young persons and children placed in the care of institutions following a decision of the administrative or judicial authorities in respect of the implementation of Articles 3,4,5,8,9 and 13. The Secretary-General has currently invited the Centre for Socio-Legal Studies to

(i) make a comparative study of government replies to this request, and

(ii) make a critical evaluation.

The matter of how NGOs could make an input into this still remained. A recommendation in respect of this would be directed to the Secretary-General (See Recommendation 4).

The question of how NGOs could become acquainted with various procedures and have access to public information was raised, and it was pointed out that each Sector within the Council had its own procedures and regrettably it was necessary, in order to have access to information relating to various areas of the Council's work, to make contact at each point. The problem of having an appropriate infrastructure for human rights bodies dealing with cases was recognised and the possibilities for NGOs to serve as part of a human rights infrastructure was discussed. It was noted that the whole matter of information flow, gathering, and exchange, was being vastly advanced through the Human Rights Documentation Centre, which was currently computerising information on Strasbourg jurisprudence, national legislation, ombudsmen etc. Regular meetings with national correspondants were held which facilitated the compilation and classification of public information about their activities, and thus worked towards ensuring the development of the work of human rights agencies.

The relative ignorance and lack of expertise of NGOs was underlined by the reference in the Working Paper to the possibilities under the European Social Charter which allowed for consultation with NGOs on issues of social welfare and economic and social protection of the family but which had never yet been used. NGOs should educate themselves on these measures and, by lobbying for invitations through the Parliamentary Assembly, develop precedents and procedures for eliciting invitations to be consulted by the various bodies and sectors of the Council of Europe.

May 1987

# RESOLUTION

**Topic Three:** The Role of Non-Governmental Organisations in the Council of Europe

## To the President of the Parliamentary Assembly

The European national sections of the International Commission of Jurists (ICJ) represented at the Conference in Strasbourg from 22 to 24 April 1987 respectfully request the President of the Parliamentary Assembly of the Council of Europe to arrange for oral hearings, with the participation of NGOs, to consider the reports on the replies of governments to the Secretary-General's enquiries under Article 57 *.

In particular, such hearings should be held on the report currently pending before the Assembly on the implementation of the European Convention on Human Rights in respect of young persons and children placed in care or in institutions following a decision of the administrative or judicial authorities.

## To the Secretary-General of the Council of Europe

The European national sections of the International Commission of Jurists (ICJ) represented at the Conference in Strasbourg from 22 to 24 April 1987 respectfully submit the following resolution for the attention of the Secretary-General of the Council of Europe

This meeting:

1. hopes that the paper on "The Role of NGOs on Human Rights Matters in the Council of Europe" prepared by Andrew Drzemczewski will become an official document and be widely circulated;

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* "On receipt of a request from the Secretary-General of the Council of Europe any High Contracting Party shall furnish an explanation of the manner in which its internal law ensures the effective implementation of any of the provisions of this Convention."

2. expresses its concern at the secrecy shrouding the operation of Council of Europe organs, which serves to restrict the contribution that could be made by NGOs to the work of the Council. This is particularly disturbing when compared with the public procedures followed at the UN, in which NGOs are able to participate fully;

3. recognises and welcomes the importance of the work of the Human Rights Documentation Centre of the Directorate of Human Rights in creating greater awareness for the promotion and protection of human rights; notes with deep concern the present shortage of competent staff to carry out this work; and urges that adequate resources be made available with the utmost urgency to avoid any disruption of this facility;

4. recognises the value of monitoring and promoting compliance with the European Convention on Human Rights by means additional to individual and inter-state applications, notes the statement of the Secretary-General of the Council of Europe on Article 57 of the Convention made before the Legal Committee of the Consultative Assembly in Oslo on 29 August 1964* and

(a) expresses the hope that the Secretary-General will, under Article 57,

(i) undertake regular periodic reviews of the implementation of the substantive articles of the European Convention on Human Rights in the internal law of States Parties;

(ii) continue his practice of making requests in relation to specific areas; and

(iii) take account in the exercise of this power of specific suggestions by NGOs.

In considering (a)(i), it is noted that most member States of the Council of Europe compile country reports under Article 40 of the International Covenant on Civil and

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* <u>see</u> European Convention on Human Rights: Collected Texts. Martinus Nijhoff Publishers; Lancaster/Dordrecht/Boston; 1987.

Political Rights (ICCPR) which contains articles similar to most of the Convention articles. Such reports could be adapted to the Convention thereby avoiding an unreasonable burden upon governments.

(b) expresses the hope that the Secretary-General will make public any requests he makes under Article 57 at the time he does so.

(c) expresses the hope that the Secretary-General will make available copies of all reports furnished by States Parties under Article 57 when received by him, and that he will invite wide discussion of these reports, in particular among NGOs having expertise in these areas.

To NGOs

The European national sections of the International Commission of Jurists (ICJ) represented at the Conference in Strasbourg from 22 to 24 April 1987:

1. urge international NGOs which have not already done so to seek consultative status with the Council of Europe and to endeavour to participate in its sectorial meetings;

2. urge national sections to acquaint themselves with the provisions of the European Convention on the Recognition of the Legal Personality of International NGOs (24 April 1986)* and encourage their governments to ratify it, if they have not yet done so;

3. encourage and invite national sections to submit to the ICJ a memorandum on the facilities for legal aid existing in their country for the preparation of cases to be submitted to the European Commission;

4. urge national sections who have an interest in topics coming up within the Council of Europe to pursue these, in appropriate ways, on behalf of the ICJ in consultation with the ICJ Secretariat.

* Council of Europe European Treaty Series No. ISBN 92-871-0869-2; May 1986.

# WORKING PAPER

# FOR

# TOPIC THREE:

## THE ROLE OF NON-GOVERNMENTAL ORGANISATIONS IN THE COUNCIL OF EUROPE

WORKING PAPER

# The role of NGOs on human rights matters in the Council of Europe

by Andrew DRZEMCZEWSKI *

## I. Introduction

A working definition of NGOs can be found in the Heidelberg Max Planck Institute's Encyclopedia of Public International Law : "Non-governmental organizations (NGOs) are private organizations (associations, federations, unions, institutes, groups) not established by a government or by intergovernmental agreement which are capable of playing a role in international affairs by virtue of their activities, and whose members enjoy independent voting rights. The members of an NGO may be individuals (private citizens) or bodies corporate. Where the organization's membership or activity is limited to a specific state, one speaks of a national NGO and where they go beyond, of an international NGO". (per H. H.-K. Rechenberg, vol. 9, 1986, p. 276). For the purposes of this paper, discussion will centre on the latter category even though some controversy remains as to whether an NGO has to be international, permanent and non-profit-making.

## II. NGOs and International Law

The work of NGOs was first expressly acknowledged on the international legal plane in Article 71 of the U.N. Charter in 1945. (Article 25 of the Covenant of the League of Nations referred solely to the national Red Cross organisations, despite the abortive attempt of the Council of the League to incorporate all NGOs in this article in 1921-1923.) Article 71 of the U.N. Charter provides that "The Economic and Social Council may make suitable arrangements for consultation with non-governmental organizations which are concerned with matters within its competence". Indeed, without Article 71, it would have been possible to argue that contact between the U.N. Secretariat and institutions other than governmental representations might have violated Article 2 (7) of the Charter which prohibits intervention "in matters which are essentially within the domestic jurisdiction of any State".

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* Directorate of Human Rights, Council of Europe. Any views in this paper are those of the author expressed in his personal capacity.

A number of efforts have been made to provide NGOs with a legal status in international law. Of special note are the efforts of the Union of International Associations (Draft Convention of 1959 submitted to UNESCO) and of the International Law Institute (sessions of 1910 in Paris, 1911 in Madrid, 1923 in Brussels and 1950 in Bath), as well as certain types of ad-hoc "accomodations" (e.g., foreign private law persons participation in international arbitral proceedings : Radio Corporation of American case (U.S., China) U.N. Rep., vol. III, p. 1623 (1935) ; close links between the ILO and NGOs, and the PCIJ's expansive interpretation of Article 66 of its Rules). However, despite their being granted consultative or observer status by intergovernmental organisations (see, e.g., U.N. ECOSOC Resolution 1296 (XLIV) of 23 May 1968 and article by A. Cassese "How could NGOs use U.N. bodies more effectively ?" in vol. I Universal Human Rights (1979), p. 73), NGOs remain legally subordinated to the control of States with the resultant disadvantages this may entail, such as the possibility of financial paralysis or personnel difficulties consequent to the imposition of rigorous exchange controls or restrictions relating to the employment of foreign nationals (a subject further discussed by J.J. Landor-Lederer in International Group Protection (1968), at pp. 410-412).

It is therefore of considerable importance to note the existence of the European Convention on the Recognition of the Legal Personality of International Non-Governmental Organisations which is aimed at facilitating the activities of NGOs at the international level. Article 1 of this Convention provides the conditions which international NGOs (associations, foundations or other private institutions) must satisfy in order to qualify for the advantages conferred therein. NGOs must (a) have a non-profit-making aim of international utility (thereby distinguishing them from most commercial companies and national political parties) ; (b) have been established by an instrument governed by the internal law of a Party (which means that organisations and institutions set up by treaties or other instruments governed by public international law are excluded) ; (c) carry on their activities with effect in at least two States (whether or not these be member States of the Council of Europe) ; and (d) have their statutory office in the territory of a Party and the central management and control in that Party or in another Party (thereby making it possible to avoid any break in continuity in an NGO's personality when its seat changes if a new secretary general or president resides in another country). When these conditions are fulfilled the legal personality and capacity acquired by an NGO, having its statutory office in a contracting State, ensures that the said NGO is recognised as of right in another contracting State, whether or not the latter is a member State of the Council of Europe (see Articles 2 (1) and 7). This Convention, opened for signature on 24 April 1986, will come into force three months after the date on which three member States of the Council of Europe have expressed their consent to be bound by it. To date it has been signed but not as yet ratified by Austria, Belgium, Greece, Portugal, Switzerland and the U.K.

For further discussion on this and related topics see M. Bettati and P.-M Dupuy (editors). Les O.N.G. et le Droit International (1986, Economica), esp. p. 104 and the texts reproduced at pp. 272-291. See also recent European Parliament "Resolution on non-profit making associations in the European Communities" (doc. A2-196/86).

## III. NGOs and the Council of Europe

The Council of Europe, whose Statute was signed in London on 5 May 1949, is an intergovernmental organisation with a membership of 21 European democratic States. The aims of the Organisation are to work for greater European unity, to uphold the principles of parliamentary democracy and human rights, and to improve living conditions and promote human values. Article 3 of the Statute declares that each member State must recognise the principle of the rule of law and guarantee all persons within its jurisdiction the enjoyment of human rights and fundamental freedoms. As early as 1951,in recognition of the importance of NGOs and their contribution to the activities of the Organisation, a resolution was adopted by the Committee of Ministers, the executive organ of the Organisation, providing for consultation with NGOs on matters within the competence of the Council of Europe. This was followed by guidelines for granting consultative status to a group of NGOs in 1954 (inspired principally by the regime set up by ECOSCOC in the U.N.), and the subsequent adoption of rules relating thereto in 1960 which were modified and up-dated by the Committee of Ministers in 1972. At present, Resolution (72) 35 of the Committee of Ministers - which is reproduced in Appendix I - contains rules on the Council of Europe's relations with NGOs, irrespective of whether they enjoy consultative status or not (some NGOs do not desire consultative status: see Report of R. van Schendel in a colloquy organised under the auspices of the Parliamentary Assembly on "The Role of International NGOs in Contemporary Society", Strasbourg, 23-24 February 1983, doc. Coll/ONG (83) 6). At present some 300 NGOs have been granted consultative status and many others participate in diverse activities conducted by the Organisation.

### a) Consultative status

Paragraphs 1 and 2 of Resolution (72) 35 stipulate that the Council of Europe "may establish working relations" with NGOs "by granting them consultative status". "For this purpose the Council of Europe shall draw up a list" of NGOs "particularly representative in the field of their competence." Whereas NGOs have a number of duties (para. 3), this Resolution provides that (para. 4) committees of the Consultative Assembly and committees of experts may "consult" NGOs on "questions of mutual interest" and that the latter "may submit memoranda to the Secretary General who, if he sees fit, shall transmit them to a committee of the Consultative Assembly or a committee of governmental experts". (para 5). It is of interest to note, by way of illustration, that the Draft European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (presently pending before the Committee of Ministers for formal adoption) is largely based on a report (Doc. 5099) drawn up on behalf of the Assembly's Legal Affairs Committee by Mr Berrier and adopted on 30 June 1983. This report contained a draft of the Convention elaborated by the International Commission of Jurists and the Swiss Committee against Torture at the request of the Rapporteur.

Consultation may take the form of an "oral hearing" (see (c) below) or be in writing (para 5).

NGOs possessing consultative status have a Liaison Committee which is designed to facilitate relations with the Council of Europe, through the latter's External Relations Division in the Directorate of Political Affairs. More specifically, as the number of NGOs permanently and directly involved or interested in human rights questions is relatively limited, "sectorial" meetings are regularly organised by the Directorate of Human Rights for NGOs which possess consultative status with the Council of Europe and are specifically interested in human rights questions. These usually take place during sessions of the Parliamentary (Consultative) Assembly. To date 56 have been held.

b) Observer status

Paragraph 5 of the Committee of Ministers Resolution (76) 3 on committee structures, terms of reference and working methods enables non-member states of the Council of Europe, intergovernmental and non-governmental international organisations to obtain observer status. The procedure is rather complicated : see Appendix II. Article 9 of the Rules of Procedure for Council of Europe committees, Appendix 2 to Resolution (76) 3, reads :

"Article 9 - Observers

a. An observer shall have no right to vote.

b. With the Chairman's permission, an observer may make oral or written statements on the subjects under discussion.

c. Proposals made by observers may be put to the vote if sponsored by a committee member".

In addition Article 5 of these Rules (Secrecy of meetings) stipulates "Committee meetings shall be held in private", and Article 6 (Communications to the press) reads : "By unanimous and express agreement of the Committee, the Chairman, or the Secretary General on his behalf, may make suitable communications to the press on the work of the committee."

To date, the following have been admitted as observers to the Steering for Human Rights (CDDH) :

- Canada, as of 1987 ;

- The Holy See (including committees answerable to the CDDH) ;

- The Commission of the European Communities (including committees answerable to the CDDH) ;

- two NGOs, namely Amnesty International, as of 1982, and the International Commission of Jurists, as of 1985, both with respect to specific activities and/or agenda items of the CDDH, determined by the CDDH in each instance.

- Canada and UNESCO also have observers status with the Committee of Experts for the Promotion of Education and Information in the Field of Human Rights, a committee which is answerable to the CDDH.

It can be added that both NGOs mentioned held consultative with the Council of Europe prior to their admission as observers by the Committee of Ministers - through this is certainly not a prerequisite for observer status, - and that the International Commission of Jurists received the first Council of Europe Human Rights Prize awarded by the Committee of Ministers in 1980, and Amnesty International's Medical Section the second Human Rights Prize in 1983.

In a "message" from the Committee of Ministers to steering committees and ad hoc committees of experts back in 1982 on the admission of observers to intergovernmental committees of experts, it was indicated that account had to be taken of two essential criteria : the presence of the observers should be in the interest of the committee and that their presence should not hinder its work. Needless to add, in weighing these two criteria account must be taken of the actual number of observers that can be permitted to participate in the committee's work and the applicants specific expertise.

c) Hearings

Observer status is not the only way in which "outsiders" are able to get involved in committee work within the Organisation. When terms of reference of committees are drawn-up, use is sometimes made of "oral hearings" a formula which permits these committees to benefit from expertise or opinions of other organisations, NGOs or specifically qualified individuals. This forms of consultation does not require the application of the procedure laid down in paragraph 5 of Resolution (76) 3.

## IV. Miscellaneous activities and collaboration in the human rights field

a) General remarks

It is impossible to enumerate all the activities of NGOs and their contribution made to the Council of Europe. For example, Amnesty International has cooperated with the Parliamentary Assembly and its committees on such matters as the declaration on the police, the recognition of the right of conscientious objectors to refuse military service, and the abolition of the death penalty (see also Parliamentary Assembly Resolution 754 (1981) calling for closer cooperation between NGOs and Council of Europe organs). Likewise consultancy work has been carried out by the Strasbourg based International Institute of Human Rights relating to the competence of the European Court of Human Rights to give preliminary rulings at the request of a national Court (doc. DH/Exp. (76) 23 of 22 December 1976; see further Committee of Ministers Resolution (76) 4 on consultants).

Generally speaking, the role of "human rights" NGOs is to promote knowledge and identify problems in the protection and enjoyment of human rights and seek changes in practice and legal norms that further their protection and enjoyment. Here, the role of numerous NGOs and their active participation in work carried out under the auspices of the Council of Europe - be it with respect to migrant workers, refugees, asylum seekers, data protection, equality of sexes, prisoners rights, children's rights or other subjects - is perhaps not as well-known as it ought to be. NGOs have circulated and prepared discussion papers and documents, mobilized public opinion, organised colloquies, seminars and conferences on human rights issues. They have, with or more often without financial assistance, prepared studies and reports, made investigations and conducted detailed research and above all positively contributed to the elaboration of legal instruments directly linked with the Organisation's Programmes of Activities (e.g., European Agreement on the Legal Status of Migrant Workers, 1977, and European Agreement on the Instruction and Education of Nurses, 1967).

For more information consult H. Golsong's article "Les ONG et le Conseil de l'Europe" in Les organisations non-gouvernementales en Suisse (1973, Etudes et Travaux de l'Institut Universitaire de Hautes Etudes Internationales, Geneva), p. 93, and the Council of Europe's Human Rights Information Sheets, passim.

The above overview is but one aspect of the diverse work NGOs pursue : see D. Weissbrodt "The Contribution of International NGOs to the Protection of Human Rights" in Human Rights in International Law. Legal and Policy Issues, vol. II. (T. Meron, editor, 1984, Oxford U.P.), pp. 403-438.

b) Exchange of information

Information has an important preventive and educative function: awareness of human rights case-law before the Strasbourg institutions as well as domestic case-law may prevent (recurrent) violations of human rights. The Human Rights Documentation Centre of the Directorate of Human Rights (HRDC), set up in 1982, has a specific mandate in this respect ; its work is of importance to NGOs for two reasons. When fully operational the HRDC will offer computerised documentation facilities on human rights case-law of the Strasbourg institutions and possibly that of national courts, and it already now centralises and processes documentation, information and research services, offers library facilities, liaises ad co-ordinates its work with other specialist centres and institutions. Secondly, the HRDC is the convenor and provides secretarial assistance to the European Coordinating Committee of HURIDOCS, (Human Rights Information & Documentation System) a branch of a universal network of NGOs, institutes, academics, and activists. Two such meetings are convened per annum in Strasbourg thereby ensuring that the work of human rights agencies develops, and that public information about their activities is properly compiled, classified and disseminated. For further information concerning this latter activity consult B. Stormorken's HURIDOCS Standard Formats for the Recording and Exchange of Information on Human Rights (1985, Martinus Nijhoff).

c) Contribution to international human rights procedures

The contribution of NGOs to international human rights procedures, in particular developments under the European Convention on Human Rights is increasing steadily. Likewise, the indirect lobbying/impact and potential influence of NGOs' work in the legal field as exemplified by their work with respect to the 1981 Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, in force since 1985, should not be underestimated. This being said, it is disappointing to observe that although under Article 27 (2) of the 1961 European Social Charter (in force since 1965) the Sub-committee of the Governmental Social Committee may consult representatives of NGOs having consultative status with the Council of Europe on issues of social welfare and the economic and social protection of the family, this has in fact never yet been done.

With the exception of Cyprus and Malta, all member States of the Council of Europe have accepted the right of individual petition under Article 25 of the European Convention on Human Rights which provides that the European Commission of Human Rights "may receive petitions ... from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation". Although few NGOs claim to be victims of violations of the Convention (see vol. 4 Digest of Strasbourg Case-Law relating to the European Convention on Human Rights (1985, Carl Heymanns, p. 355), they do of course in practice often play a vital role in helping applicants prepare submissions and occasionally represent them in Strasbourg proceedings. C.f. their more 'active' and direct participation in other international human rights fora (see H. Hannum, editor, Guide to International Human Rights Practice (1984, Macmillan Press, passim). NGOs may, in addition, be heard as witnesses or experts and their documents can be examined by the Commission and the Court both in inter-State cases as well as in applications brought under Article 25: see, eg, The Greek Case 1969, Yearbook of the European Convention on Human Rights (1972, Martinus Nijhoff), at pp 146 and 501, and Rules 40, 41 and 43 of the Court's Revised Rules. Whether or not "judicial notice" can be taken of facts and information made available by an NGO which has resort to sources of virtually indisputable accuracy and accessibility and brought to the attention of members of the Commission or Court is more difficult to answer.

Rule 37 (2) of the Revised Rules of the European Court of Human Rights, adopted on 24 November 1982, allows the Court's President, "in the interests of the proper administration of justice" to invite or grant leave "to any person concerned other than the applicant". (The French texts reads: "toute personne intéressée"). The first successful intervention of a "third party" (amicus curiae) under this Rule was made by the Post Office Engineering Union at the instigation and with the help of two NGOs, namely JUSTICE and INTERIGHTS, in the Malone case (Judgment of 2 August 1984). Since then successful NGO "third party" interventions have been made by MIND (National Association for the Mental Health) in the Ashingdale case (Judgement of 28 May 1985), INTERIGHTS (on behalf of the International Press Institute) in the Lingens case (Judgment of 8 July 1986), and JUSTICE in Monnell and Morris (Judgment of 2 March 1987). For further discussion of this important development see A. Lester "Third Parties before the European Court of Human Rights" in Mélanges E.J. Wiarda (F. Matscher and H. Petzold, editors, to be published in 1987, Carl Heymanns). Cf: C. Moyer "The Role of Amicus Curiae in the Inter-American Court of Human Rights" in La Corte Interamericana de Derechos Humanos (Instituto Interamericano de Derechos Humanos, Costa Rica, 1986), pp 103-114.

The texts of the European Convention on Human Rights and its Protocols, declarations and reservations made thereunder, the rules of procedure of both the European Court and Commission, etc, can be found in Collected Texts, European Convention on Human Rights (Bilingual, 1987, Martinus Nijhoff).

## V. Concluding remarks

What are the principal factors which account for the successful participation of NGOs in the Council of Europe? Despite NGOs inadequate and more often than not precarious financial situations, one can detect an intense personal commitment and highly specialist knowledge in certain subjects which civil servants (whether international or national) often just do not possess. This commitment and knowledge can be invaluable when personal contacts are established and interest aroused in a given sector of intergovernmental activity. Also, unlike State representatives, NGOs are not hindered by restrictions which prevent the former from speaking out on specific or delicate human rights issues. Moreover, and paradoxically, the lack of a structured or hierarchical bureaucracy often permits NGOs to react rapidly and with flexibility in the face of new developments. They can raise fresh issues and lobby for new ideas. Many NGOs have established themselves as being trustworthy and well-informed and are often able to persuade a sympathetic Government or policital institution such as the Council of Europe's Parliamentary Assembly, to take initiatives. Indeed, when doing so, they have a potential in influencing international normative activity: they can carry out research, submit specific proposals and drafts in the elaboration of international human rights instruments.

And what about the role of NGOs as observers in the human rights sector of Council of Europe activities? As noted by Peter Willetts in his remarkable study on "The Impact of Promotional Pressure Groups on Global Politics" (in Pressure Groups in the Global System, 1982, Frances Pinter, London, chapter 10 at p. 182), "pressure groups" often mistakenly emphasise their efforts by trying to influence decisions in national capitals rather than focussing pressure on and keeping abreast of work within international governmental organisations: "Such an argument rests heavily on the fact that governmental delegates are supposed to be obeying instructions from their home foreign ministries. In practice instructions are not necessarily very detailed; it is the delegates who themselves have to decide whether to ask for further instructions as the debate progresses; and the instructions may be re-interpreted or even on occasions disobeyed". In such instances, the role of the well-informed NGO observer at a given meeting may be of crucial importance.

Insofar as the Council of Europe is concerned, it would appear that improved reciprocal information and exchange of ideas appears a sine qua non for collaboration in the field of human rights. In this context it is worth noting that back in 1984 the Committee of experts for the Promotion of Education and Information in the Field of Human Rights drew attention to the restricted character of Council of Europe documents and information, which in the field of human rights education and information (and with due consideration of the idea of fostering closer collaboration with NGOs!), may be regarded as being excessively strict bearing in mind Recommendation R (81) 19 of the Committee of Ministers on the access to information held by public authorities as well as the legislation and practice of many member States. It urged a more flexible application of these rules in the human rights field which, in its view, is an area where the principles of a more transparent administration should apply. The need for more openness was again recently stressed by Mr P. Leuprecht, the Council of Europe's Director of Human Rights, during a symposium organised to commemorate 30 years of Austria's membership of the Council of Europe (held in Vienna, 21-22 May 1986): Mr Leuprecht "find[s] it surprising that an Organisation which stands for democracy and human rights and which preaches an open information policy and transparency, in fact practices the opposite" (translated from the German text).

* * *

In March 1987 the UN Committee on Non-Governmental Organisations recommended that a special commission should consider ways to encourage and strengthen the participation of NGOs in the work of the Economic and Social Council and its subsidiary bodies. I therefore put the question: should a similar initiative be taken within the Council of Europe in the human rights field?

APPENDIX I

# COUNCIL OF EUROPE

## COMMITTEE OF MINISTERS

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**RESOLUTION (72) 35**

**ON RELATIONS BETWEEN THE COUNCIL OF EUROPE AND INTERNATIONAL NON-GOVERNMENTAL ORGANISATIONS**

**RULES FOR CONSULTATIVE STATUS**

*(Adopted by the Committee of Ministers on 16 October 1972 at the 214th meeting of the Ministers' Deputies)*

The Committee of Ministers,

Recalling that the aim of the Council of Europe is to achieve a greater unity between its Members for the purpose of safeguarding and realising the ideals and principles which are their common heritage and facilitating their economic and social progress;

Having regard to its resolution on relations with international organisations, both intergovernmental and non-governmental, adopted at its 8th Session in May 1951, whereby "The Committee of Ministers may on behalf of the Council of Europe, make suitable arrangements for consultation with international non-governmental organisations which deal with matters that are within the competence of the Council of Europe";

Having regard to the rules on relations between the Council of Europe and international non-governmental organisations adopted at the 90th meeting of the Committee of Ministers at Deputy level in October 1960;

Considering Recommendation 670 of the Consultative Assembly;

Considering that it is expedient to amend the said rules particularly with regard to the granting of consultative status with the Council of Europe, in order both to simplify the procedure and to extend the range and depth of co-operation between the Council of Europe and international non-governmental organisations,

Adopts the following rules on relations between the Council of Europe and international non-governmental organisations, which will enter into force on 1 January 1973 and replace the rules adopted at the 90th meeting of the Committee of Ministers at Deputy level :

1. The Council of Europe may establish working relations with international non-governmental organisations by granting them consultative status.

2. For this purpose the Council of Europe shall draw up a list of international non-governmental organisations which are particularly representative in the field of their competence and, by their work in a given sector, are capable of contributing to the achievement of that closer unity mentioned in Article 1 of the Statute as the assigned aim of the member States.

3. The organisations concerned shall undertake to :

(*a*) give the maximum publicity to the initiatives or achievements of the Council of Europe in their own field of competence;

(*b*) inform the Secretariat General of those of their activities likely to be of interest to the Council of Europe;

(*c*) furnish information, documents or opinions relating to their own field of competence as requested by the Secretary General;

(*d*) report periodically to the Secretary General on the fulfilment of the obligation set out in sub-paragraph (*a*) above;

(*e*) acquaint the Secretary General with their diary of meetings and admit an observer from the Secretariat to such meetings when so requested by the Secretary General.

4. The committees of the Assembly, the committees of governmental experts and other bodies of the Committee of Ministers, and the Secretary General may consult the organisations on questions of mutual interest.

5. The organisations :

(*a*) may submit memoranda to the Secretary General who, if he sees fit, shall transmit them to a committee of the Consultative Assembly or a committee of governmental experts;

(*b*) may be invited by an Assembly committee to express their views orally or in writing on a question included in that committee's agenda;

(*c*) shall receive the agenda and public documents of the Assembly and be invited to send observers - without the right to speak - to public sittings of the Assembly.

6. The Secretary General shall keep a list of organisations enjoying consultative status with the Council of Europe.

7. Any organisation wishing to be entered on this list shall send to the Secretary General of the Council of Europe an application accompanied by thirty copies of a file (in French or English) containing its Statute, a list of its member organisations, a report on its recent activities and a declaration to the effect that it accepts the principles set out in the Preamble and Article 1 of the Statute of the Council of Europe.[1]

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1. Preamble and Article 1 of the Statute of the Council of Europe :

"The Governments of the Kingdom of Belgium, the Kingdom of Denmark, the French Republic, the Irish Republic, the Italian Republic, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands, the Kingdom of Norway, the Kingdom of Sweden and the United Kingdom of Great Britain and Northern Ireland,

Convinced that the pursuit of peace based upon justice and international co-operation is vital for the preservation of human society and civilisation;

8. Any organisation already on the list may be removed from it by the Secretary General if, in his opinion, it has failed to comply with its obligations under the rules set out in paragraphs 2, 3 and 7 above, or if it is represented twice as a result of affiliation to a larger organisation which is itself on the list. However, the Secretary General shall first inform the organisation in question of his intention to remove it from the list, in order to give it an opportunity to present its observations.

9. Every six months the Secretary General shall inform the Committee of Ministers and the Consultative Assembly of the names of the organisations which he is considering adding to the list or removing from it, together with those items of the relevant files which are necessary for the assessment of each case and his reasons for suggesting they be added to the list or removed from it, having regard to the rules laid down in paragraphs 2, 3 and 7 above; the Secretary General's memorandum concerning the removal of any organisation from the list shall also include any comments submitted by that organisation on the Secretary General's intention. In the absence of any objection as described in paragraph 10 below, the names of organisations that have thus been communicated shall be added to the list or removed from it, as the case may be, six months later.

10. During the six-month period, a member of the Committee of Ministers or three members of the Assembly of at least two different nationalities may request that an examination be made of the file of each organisation whose name has been communicated. In the former case, the examination shall be made and the decision to add the name to the list or to remove it from the list shall be taken by the Committee of Ministers. In the latter case, the Assembly, acting on a report from its competent committee, shall address a recommendation to the Committee of Ministers, which shall take a final decision. If an examination of the file of an organisation is requested both by a member of the Committee of Ministers and by three members of the Assembly of at least two nationalities, the Committee of Ministers shall defer its decision until it has received a recommendation from the Assembly.

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Reaffirming their devotion to the spiritual and moral values which are the common heritage of their peoples and the true source of individual freedom, political liberty and the rule of law, principles which form the basis of all genuine democracy;

Believing that, for the maintenance and further realisation of these ideals and in the interests of economic and social progress, there is need of a closer unity between all like-minded countries of Europe;

Considering that, to respond to this need and to the expressed aspirations of their peoples in this regard, it is necessary forthwith to create an organisation which will bring European States into closer association,

Have, in consequence, decided to set up a Council of Europe consisting of a Committee of Representatives of Governments and of a Consultative Assembly, and have for this purpose adopted the following Statute :

Chapter 1 - Aim of the Council of Europe

Article 1

(*a*) The aim of the Council of Europe is to achieve a greater unity between its Members for the purpose of safeguarding and realising the ideals and principles which are their common heritage and facilitating their economic and social progress.

(*b*) This aim shall be pursued through the organs of the Council by discussion of questions of common concern and by agreements and common action in economic, social, cultural, scientific, legal and administrative matters and in the maintenance and further realisation of human rights and fundamental freedoms.

(*c*) Participation in the Council of Europe shall not affect the collaboration of its Members in the work of the United Nations and of other international organisations or unions to which they are parties.

(*d*) Matters relating to National Defence do not fall within the scope of the Council of Europe."

11. The procedure described above shall not restrict the right of the Committee of Ministers or of the Assembly to initiate any action concerning other non-governmental organisations in pursuance of their respective Rules of Procedure.

12. An organisation whose application has been refused or which has been removed from the list may not submit a fresh application until three years have expired after the decision in question has been taken.

13. The organisations enjoying consultative status with the Council of Europe on the date of the entry into force of these rules shall be entered on the new list of organisations granted consultative status with the Council of Europe referred to in paragraph 2 above, but may be subsequently removed from this list in accordance with these rules.

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## APPENDIX II

Extract from

## RESOLUTION (76) 3

## ON COMMITTEE STRUCTURES, TERMS OF REFERENCE AND WORKING METHODS

. . .

(adopted by the Committee of Ministers on 18 February 1976 at the 254th meeting of the Ministers' Deputies)

### II. Committee structures

*Types of committees*

4. There shall be the following types of committees :

   *a. steering committee* denotes any committee which is answerable directly to the Committee of Ministers and responsible for a substantial portion of the medium-term plan, and to which the governments of all the member states are entitled to designate persons, preferably from among national officials of the highest possible rank ;

   *b. ad hoc committee of experts* denotes any committee (other than a steering committee) answerable directly to the Committee of Ministers ;

   *c. committee of experts* denotes any committee answerable to a steering committee, whose members all member states are entitled to designate ;

   *d. select committee of experts* denotes any committee answerable to a steering committee, whose members only a limited number of member states are entitled to designate ;

   *e. working party* denotes any committee composed of a limited number of members of an existing committee designated by that committee.

*Observers*

5. Any steering committee may, by a unanimous decision, admit or admit to any committee answerable to it, observers from non-member states of the Council of Europe, or from intergovernmental or non-governmental international organisations, provided that :

   i. Any request for admission as an observer shall be forwarded without delay by the Secretary General both to the Permanent Representatives of member states and to the members of the steering committee concerned

   ii. Any government so notified may inform the Secretary General within four weeks of its intention to refer the matter to the Committee of Ministers for decision. This decision shall be taken by a two-thirds majority of all the Representatives entitled to sit on the Committee.

# TOPIC FOUR

## NEW TECHNOLOGIES AND HUMAN RIGHTS

INTRODUCED BY

MR. P. SIEGHART
CHAIRMAN, EXECUTIVE COMMITTEE, JUSTICE (UK)

CHAIRMAN

DR. I. CROMME
MEMBER, BOARD OF ICJ GERMAN SECTION

RAPPORTEUR

MR. D. MARCHAND
MEMBER, EXECUTIVE COMMITTEE, LIBRE JUSTICE (FRANCE)

# REPORT

## TOPIC FOUR: NEW TECHNOLOGIES AND HUMAN RIGHTS *

### Introduction by Paul Sieghart

As a working paper had been distributed prior to the conference only three introductory points were made:

- the difficulty of the subject stemmed from the communication difficulties between the two disciplines - sciences and law. At the beginning of the industrial age it was much easier for the non-scientist to understand the effects and risks of technological acvances, but it is now no longer possible for him to fully comprehend the possible consequences of new technology (examples were given in the field of nuclear power plants, computers and biotechnology, etc.)

- the one-sided aspect of the working paper was stressed; it only emphasised the dangers of the new technologies but there were also many positive aspects which must not be ignored (for example, the production of electricity by nuclear power plants, progress in curing disease, improved communications) as well as all the future benefits still to be realised or not yet even foreseeable.

- it is important not to forget that to a large extent the dangers do not come from the new technologies themselves but from the use mankind makes of them.

### Discussion

- Many developments have taken place in the field of chemical and bacteriological weapons which, as well as spreading disease, sometimes new disease, also threaten life by destroying the environment. Very little is known about these new weapons.

- There was discussion on the influence that new technologies could have on the right to work and on working conditions. Reference was made to organisations such as the ILO and the EEC, which have come to the conclusion that it is necessary to have: dialogue among all concerned to allow for successful introduction on new technology; accelerated and increased training and help in finding other employment for those made redundant by the introduction of new technology; and, above all, distribution of information on the consequences of the introduction of new technology.

- The developments in the fields of transplants and generic engineering were also discussed. In this regard it was held that a guide as to the ethics involved is of utmost importance.

### The need for new rules in this field

It is of great importance to elaborate new rules in the field of new technologies, ie, to formulate new human rights to cope with the situations that are arising and to find the means of protecting them. These would then constitute a new ethical guide.

* A copy of this report in French is available from the ICJ.

Many areas were touched on in discussion, for example, transplant and genetic engineering, the rights of the unborn child, the rights one has over one's own body (euthanasia, birth control, etc.). It is necessary to determine the scope of these new human rights: ie, whether, in any particular instance, the constitution of a new human right is necessary; if so, what its content should be; and finally, how it can be protected.

The question which concerns the ICJ and its sections is how they can most effectively work towards his goal, for example, by organising a colloquium or having the subject as one of the topics of the next ICJ Commission meeting.

## The right to information

Generally, individuals have very little chance of access to information collected by governments about them - often because the government claims the need for secrecy.

It has been held essential, however, that the public have a general right of access to such information, above all because the new technologies involved have by their very nature, an effect on individual and their environment.

Individuals also need to participate in decisions regarding the new technologies, for example, the need for consultations regarding the importance and placement of nuclear power plants.

The usefulness of bringing together the problems encountered at different levels and in different countries in order to create a base for further work was also discussed.

The importance of an exchange of information between those working on the problems connected with the new technologies at both national and international level was stressed as this would avoid unnecessary duplication and waste of resources.

# RESOLUTION

Topic Four: New Technologies and Human Rights

The European national sections of the International Commission of Jurists (ICJ) represented at the Conference in Strasbourg from 22 to 24 April 1987;

1. urge the ICJ to undertake a study on the legality under international law of the possession and use of nuclear weapons, and request it to consider the inclusion of chemical and biological weapons in this study;

2. recognise that work should be done towards the elaboration of a new international Convention expanding and enlarging the information rights protected by Articles 19 of the Universal Declaration of Human Rights and the ICCPR, and Article 10 of the European Convention, especially in the fields of

(a) rights of access to information;
(b) wider opportunities for individuals and groups to communicate with each other ("the right to communicate");
(c) satellite television;

bearing in mind particularly Recommendation No. R(81)19 of the Committee of Ministers of the Member States of the Council of Europe on the Access to Information held by Public Authorities, and that Committee's Declaration on the Freedom of Expression and Information dated 29 April 1982;

3. urge the ICJ to consider applying for observer status on the Council of Europe's Ad Hoc Committee of Experts on Progress in the Biomedical Sciences (CAHBI).

# WORKING PAPER

# FOR

# <u>TOPIC FOUR</u>:

# New Technologies and Human Rights

Working Paper

# NEW TECHNOLOGY AND HUMAN RIGHTS

by Paul Sieghart

For several decades now, there has been mounting concern - and a mounting literature - about the threats posed to human rights by new technology, mainly in the fields of nuclear fission and fusion, informatics, and biotechnology. The purpose of this paper is not to review this literature,[2] nor to explain the technologies concerned to the non-technical reader, but rather to identify some underlying issues, and to try to relate these to the rights declared in the current code of international human rights law.

## Nuclear fission and fusion

The first of the new technologies that has given rise to grave apprehensions is nuclear fission and fusion. There is every reason why it should. The power which it can unleash is vastly greater than anything that mankind has ever handled before: that indeed is one of its attractions for engineers, and for States - either because they are short of indigenous fuels for generating electricity, or for the enhancement of their military potential. But it also increases the risks by the same measure. Those risks fall into three categories: war, catastrophic accidents, and pollution.

As it happens, these risks are not unfamiliar: they have been presented by the chemical industry for well over a century. Until August 1945, it was this industry that produced all the explosives used in warfare. In the immediate aftermath of the Bhopal disaster, far more people died than in the immediate aftermath of Chernobyl. And the toll of slow pollution by sulphur products (acid rain), chlorinated hydrocarbons (DDT, etc.), and heavy metals (lead, cadmium, etc.) is so far still much greater than that resulting from nuclear waste. In these respects, therefore, the risks presented by the new technology of nuclear fission and fusion are not themselves new *in kind*: the

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[1] Chairman, Executive Committee, JUSTICE (British Section, International Commission of Jurists); Chairman, European Human Rights Foundation; Founder and first Vice-Chairman, Council for Science and Society, London; Visiting Professor of Law, King's College, University of London.

[2] A helpful, concise, reasonably comprehensive, balanced and non-technical introduction to the subject can be found in the UN booklet *Human Rights and Scientific and Technological Developments* (New York, 1982).

chemical industry has presented them to us long since, and we should long since have learned to control them. Nonetheless, there are several other respects in which the dangers from nuclear energy differ substantially from those of the large-scale manufacture, distribution, and use of chemicals.

The first is in the military field: we have never before had weapons with destructive powers even remotely comparable with those generated by nuclear ones. Moreover, at least two nations now have arsenals of these weapons which vastly exceed what either of them could conceivably need for the purposes of its own security - however widely that concept may be interpreted - and have adopted a deliberate policy of "deterrence" by threatening to use these against each other in certain contingencies.

If any substantial proportion of either of these arsenals were ever to be detonated, the effects on the human species - and indeed on the biosphere as a whole - *could* be of a kind and degree never before experienced in human history. These effects go far beyond the immediate victims from blast and fire, and those who will die of radiation sickness within a few weeks of exposure.

But so far they have been comparatively little studied. It has long been assumed, for instance, that exposure to radiation from a nuclear explosion would create mutations in the reproductive cells of the survivors which would be passed on to their children, who would therefore suffer from genetic malformations. In fact, however, this has not proved to be the case so far: among the first generation of the descendants of the survivors of Hiroshima and Nagasaki, the rate of such malformations has turned out not to be significantly higher than in the unirradiated population. However, there may still be some reason to fear that later generations might become afflicted in this way through the mechanism of "recessive" genes - that is, if two people with the same damaged gene (which shows no effects in either of them) have children, at least some of these children could be gravely handicapped.

An even more serious threat may arise through climatic disturbances. The detonation of nuclear weapons on any substantial scale, especially over urban or industrial targets, could carry into the upper atmosphere so much smoke, soot, and dust as to obscure the sun for perhaps months, or even years - so creating sub-zero temperatures at the planet's surface which would make it impossible to grow crops. This effect might well not be limited to the hemisphere in which the detonations took place. In such conditions, even if humans were somehow able to keep warm, they would rapidly starve by the million, if not by hundreds of millions. And even if the effect were geographically limited and comparatively short-lived, the loss of only a single season of the Canadian wheat crop could result in widespread starvation in many parts of the globe. This theory - popularly known as "nuclear winter" - now appears to be reasonably well established, and its realisation could amplify the threat from nuclear weapons far beyond even the most pessimistic earlier calculations.[3]

Another difference between nuclear and conventional chemical technology, more important in the context of the peaceful use of nuclear power, arises from the fact that most (though not quite all) polluting chemicals are perceptible by the ordinary human senses of taste and smell, while radioactivity is not: it is therefore more difficult for ordinary people to protect themselves from this threat, which is consequently both more dangerous and more frightening.

A further difference is that plutonium - an explosive many thousands of times more powerful than anything known before - is a necessary by-product of all nuclear fission, even the most peaceful. It is therefore impossible in practice to decouple civilian nuclear technology completely from its military use.

Accordingly, the potential "worst case" destructiveness of nuclear energy - by war, catastrophic explosion, or slow pollution - is quantitatively much greater than that of the more conventional chemical or power industries.

How then does all this threaten the human rights now established by international law? In the case of nuclear warfare, the threat is obviously total and disastrous. Indeed it is difficult to imagine how *any* human rights (and not only the right to life) could be maintained during a nuclear war - and possibly for many years, if not for centuries, after such a holocaust. Doubtless these were the considerations in the minds of the Human Rights Committee, established by the ICCPR, when it declared in 1984 that "the production, testing, possession, deployment and use of nuclear weapons should be prohibited and recognized as crimes against humanity."[4]

Nuclear war apart, however - and subject to one further danger mentioned below - the technology of nuclear fission would seem to threaten our established human rights only in ways which do not differ fundamentally from those presented by the large-scale application of chemical or power technology. Every chemical factory, and every coal or oil fired power station, poses a potential threat if something goes wrong, or if its effluents are not properly managed. These threats are principally to life and health, both established human rights, and to the emerging right (so far only declared in the African

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[3] See *Environmental Consequences of Nuclear War*, vol. 1, "Physical and Atmospheric Effects" (London, 1986); vol. 2, "Ecological and Agricultural Effects" (London, 1985); Sadruddin Aga Khan (ed.), *Nuclear War, Nuclear Proliferation, and their Consequences*, Part III (Oxford, 1986).

[4] General Comment 14(23), *Official Records*, 40th Session of the UN General Assembly, Supplement No. 40 (A/40/40), 162.

Charter) to a general satisfactory environment. But in these respects the threats to human rights from nuclear fission are no different *in kind*.

However, there is one additional threat. This is both subtle and indirect, and arises from the stringent security precautions which any responsible government must necessarily undertake in order to ensure that plutonium can never fall into the wrong hands - such as those of ill-motivated terrorists. Over time, this could lead to an increase in surveillance, and to restrictions on traditional civil rights such as political activity, membership of trades unions, or the right to strike, which could slowly but gravely erode many human rights even in the most open and liberal democracies.[5]

That this fear is not fanciful is well illustrated by the Convention on the Physical Protection of Nuclear Material, adopted by 58 nations within the International Atomic Energy Agency in 1979, which adds a number of offences connected with such material to the list of "crimes under international law".[6]

**"Informatics"**

The second area of new technology which has given rise to increasing apprehension is that resulting from the very rapid progress now being made in the separate electronic technologies of computing and telecommunications, and more particularly in the symbiosis of the two - now collectively known as "information technology" or "informatics".

This technology lies at the opposite end of the spectrum from nuclear fission. It consumes virtually no energy or other scarce resources; it creates virtually no pollution; and, contrary to earlier fears, it is now beginning to become decentralised as the power and sophistication of its products increases, and their sizes and prices fall. Where, only a decade ago, the popular nightmare was of vast central computers operated by small élites of power-holders, today's reality - at least in the developed countries - is a fast growing number of small, cheap, but powerful computers in the hands of schools, small traders, households, and families.

Meanwhile, however, the technology is also making possible increasingly sophisticated methods of visual, auditory, and

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[5] See *Nuclear Power and Human Rights*, ICJ Review, No. 18; JUSTICE, *Plutonium and Liberty* (London, 1978); Roßnagel, A., *Bedroht die Kernenergie unsere Freiheit?* (Munich, 1983); Roßnagel, A., *Radioaktiver Zerfall der Grundrechte?* (Munich, 1984); Zofka, Z., *Terrorismus, Sabotage, Bürgerkrieg* (unpublished, 1986).

[6] See "Guarding nuclear materials and civil liberties", *The Bulletin of the Atomic Scientists*, May 1980, pp. 32 ff.

psychological surveillance of individuals without their knowledge. As in the case of radioactive substances, many of the newer devices are not perceptible to the ordinary human senses.

Here, the principal threat to human rights - apart from the economic effects of automation, with their consequences for employment - lies in the risk to the privacy of individuals, as governments, public authorities, and the larger enterprises in the private sector accumulate more and more data about them, and use these to make decisions which may well be adverse to them. Through this process, it has long been feared, the individual would become increasingly "transparent" to those in power, while they remained "opaque" to the individuals over whom they exercised that power. And indeed, the risk remains. Among recent trends have been schemes for unique personal identity numbers; computer-readable national identity cards; the "matching" by computer of apparently unconnected categories of records - such as social security records and those of private bank accounts - in order to detect frauds and those who perpetrate them; and a steady increase in surveillance by the construction of data profiles, telephone tapping, lie detectors, personality tests, and the like.

However, it is interesting to note that in the period of less than 20 years since this threat first began to be discussed, many countries - pre-eminently in Europe - have already begun to legislate in order to regulate the computerised processing of personal information, and indeed an international convention relating to this - adopted within the Council of Europe, but open to accession by other nations also - has already come into force.[7] At the same time, there has been growing pressure for "freedom of information" legislation which would make governments more transparent to their citizens; several countries have already enacted such laws, and others are actively considering them.

This is much to be welcomed: the main criticism is that such legislation is still rather haphazard, and that we still lack a proper understanding - let alone any coherent plans - for the flow of information within and between our societies.[8] Article 19 of the Universal Declaration and of the International

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[7] Convention for the Protection of Individuals with respect to Automatic Processing of Personal Data; see also the parallel OECD Guidelines Governing the Protection of Privacy and Transborder Flows of Personal Data. However, there seems to have been much less progress in the regulation of technological surveillance, and no sign at all so far of any advance towards the adoption of international standards in this area, such as those recommended in considerable detail at pp. 17-19 of the UN publication cited in Note 2, *supra*.

[8] See *Information Technology and Human Rights*, ICJ Review, No. 26; Sieghart, P. (ed.), *Microchips with Everything* (London, 1982).

Covenant on Civil and Political Rights admittedly protect freedom of expression, both in the direction of *imparting* and in the opposite direction of *seeking* ideas and information of all kinds. But it has little to say, except by implication, about the provision and use of channels for such communication. Classically, the pattern has been one of a small number of channels, such as newspapers and broadcasting networks, controlled by a small number of individuals or groups (and, in the case of broadcasting media, often subject to government licensing), with little opportunity of active access to them by individuals who do not occupy some position of power or influence.

Here, there is special opportunity for further thought and action, as the technology makes possible a great increase in the number of such channels, and in the opportunities for access to them. A reinterpretation and *extension* of the classical freedom of expression under Article 19 is becoming a major priority. This might usefully proceed in the direction of imposing obligations on governments to give their citizens greater opportunities of communicating with each other, and with their public authorities, by the multiplication of available channels - such as, for example, "narrowcasting" by community cable television - and the provision of greater, and non-discriminatory, access to them.[9]

As broadcasting technology improves, especially with the use of satellites, another major problem area will soon become the extent to which governments will continue to be able to regulate, through licensing, the number or the content of broadcasting channels - something which Article 10 of the European Convention on Human Rights still allows them, within limits, to do. This area too is currently receiving close attention.[10]

## Biotechnology

This is by far the most intractable of all the recent technological advances. For a start, we are not dealing here with a single technology, but with a whole cluster. The technique of fertilising a human ovum *in vitro* has no connection at all with the laboratory manipulation of genetic material, which in its turn is entirely distinct from the transplantation of organs from one human being to another - or the maintenance,

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[9] The work of UNESCO on a "right to communicate" - not to be confused with the entirely different project on a "New World Information and Communication Order" - is directed mainly towards this objective.

[10] See, for example, the conclusions of the Vienna Conference of Media Ministers of the Council of Europe in December 1986, called to consider a "Blueprint for TV in the 1990s".

on an elaborate life support machine, of the vestiges of the "life" of someone who is in a terminal coma.

In the context of human rights, the genetic manipulation of non-human organisms is perhaps the simplest of these technologies to analyse. Here, the threats are obvious: once again, they are the familiar ones of warfare, accident and pollution. The nightmare of a new species of pathogen, against which the human species has no natural defences, being accidentally or deliberately released into the biosphere is potentially terrifying, since it could - at all events in theory - result in a world-wide epidemic which could eliminate humanity before there was time to develop an effective vaccine, let alone to evolve natural antibodies by the familiar, but very slow, process of natural selection.

A similar, though more subtle, threat arises over the development of improved varieties of plants. In the past, many of the results of the "green revolution" have been very beneficial in producing plant varieties with higher yields, or a shorter ripening period, or better adaptation to unfavourable environments. But such new varieties have also sometimes proved less resistant to some virus or other pest, and this has on occasions resulted in painful crop failures. However, in such cases the appropriate resistance is often evolved after such an episode by the ordinary mechanisms of natural selection - that is, those individuals within the new variety which have some degree of genetic resistance will survive the attack, and from their descendants in the next generation those with the highest degree of genetic resistance will again be selected for survival and reproduction, and so on. It should be noted, however, that this mechanism depends entirely on the individuals composing the population of the new variety *differing* from each other genetically, so that the population will always contain some individuals with the desirable genes, from whom selection can then take place. In short, those genes must be present somewhere in the population's "genetic pool".

If, however, new and improved plant varieties are produced by "cloning" them from a single cell - as is already beginning to be done - then every individual plant so produced is genetically identical with every other one. If, therefore, these are produced in large numbers, and after some time they are found to lack resistance to some newly introduced or newly evolved pest, there will be no resistant individuals in the population from which selection could take place, since its entire "genetic pool" will be identical. In such circumstances, the resulting crop failures could prove catastrophic, and lead to starvation on a huge scale.

As in the case of nuclear fission, all these are potential threats to the established rights to life and to health, and to the emerging right to a general satisfactory environment.

Turning to human beings, the case of organ transplants is still fairly simple - so long as one is dealing with competent adults and with organs which, though they form part of the human body, do not directly determine an individual's personality. In the case, for example, of a healthy adult wishing to donate one of his or her kidneys in order to save the life of another, the only real question is that of sufficiently informed, and sufficiently free, consent - different only in degree, and not in kind, from the case of blood donors. Again, though one may thoroughly dislike the idea of such activities being conducted for profit by commercial enterprises, and may for that reason support national legislation prohibiting this, that would not be primarily a human rights question - unless, say, one were to find a government secretly conniving at an export trade in kidneys bought for a few dollars from poor and illiterate persons, an activity not different in principle from the suspected connivance of some governments in the international trade in hard drugs.

Matters become a little more complex when the donor is not competent to give a sufficiently informed and free consent - as in the case of children, or the paradigm case of the mortally injured adult, already in a coma and fast approaching death, but still technically alive. Such cases raise many dramatic tensions, but on objective analysis they cannot be said to raise any new problems in the human rights field: in principle, they are no different from those with which physicians and lawyers have wrestled for centuries when dealing with patients who are not competent to give consent to medical interventions. National laws generally provide for consent in such cases to be sought from some third party - a "proxy" - who has no interest that conflicts with the patient's, and in the last resort from a court of law.

But the last example - that of the potential organ donor who is dying, but not yet dead - begins to raise a problem which increasingly manifests itself in other cases. It is the fundamental philosophical problem of human personality: "Who am I?"

Suppose, for example, that microsurgeons might one day find themselves able to transplant an entire living brain from one body to another. (For the foreseeable future, this is still science fiction; but like all the best science fiction it is theoretically possible, and experience has taught that what is theoretically possible has a consistent habit of becoming practically feasible.) Here, we begin to arrive at a *problématique* which has, at all events so far, defied all attempts at rational analysis.

The ancient Greeks may have believed that the human personality resided in the heart, but all the available evidence now leads us to believe that it - or, more precisely, the great majority of the factors which compose it - reside in the brain. Suppose, then, that one transplanted the brain of B into the body of A. "Who" then is the resulting person? To sharpen up the difficulties, suppose that A is (or should it be "was"?) an African, while B is (or was) a European or a Chinese - and/or that A is or was male, while B is or was female. Until one can answer the question "Who is this person?" it does not seem possible even to begin a meaningful discussion of this *problématique* in terms of human rights - or even in terms of the giving of informed and free consent to the operation. How, for example, can A agree to want to acquire B's personality without knowing what it is like to be B - let alone what it would be like to be B in A's body - especially when A's own personality will become extinguished by the operation?

Turning from organ donation at one end of life to the *problématique* presented by the new techniques of human procreation, it quickly becomes apparent that the problems which these techniques present have stubbornly resisted analysis or solution for precisely the same reason as the hypothetical brain transplant - that is, because they raise the same unanswered question: "Who am I?", only this time not because the brain is regarded as the seat of personality, but because the personality of individuals is known to be strongly affected (and in some respects conclusively determined) by their genetic endowment, and their early environment. As in the case of brain transplants, therefore, what we are considering here is the deliberate creation, with the help of the new technologies, of new individuals who cannot be asked beforehand whether they wish to exist at all - and, if they do, whether they wish to have the attributes which the technology will try to give them, such as gender, descent from a purposefully chosen genetic father or mother, gestation by someone who may not be the genetic mother - and, perhaps one day, a high intelligence quotient or a world-breaking sprinter's legs and lungs.

And yet, once one puts the problem in this form, it has a familiar ring. Is this not precisely what mankind has always done when it procreates its species? Parents have never been able to ask their children whether they wished to come into the world, let alone whether they wished to be the individuals they are. They have always taken it for granted that all adults have a right to procreate. Indeed, we are horrified at the notion of forcible sterilization, which is precisely why all the human rights treaties declare an unqualified right of everyone to marry and found a family.

At all events in their original intention, the new techniques of procreation are designed only to facilitate the exercise of this fundamental human right, and to enlarge the opportunities for its enjoyment. Fertilisation *in vitro* - with the opportunity thereafter to implant the embryo either in the genetic mother, or in a surrogate - was developed precisely for the benefit of women otherwise doomed to infertility, just as artificial insemination, by husband or third-party donor, was designed to overcome male infertility. Far from posing a threat to human rights, these techniques were only intended to support them. True, they make it possible to "improve" the desired embryo; at present, only by fertilising several and selecting the one that appears healthiest, but in the foreseeable future perhaps also by a little genetic manipulation in the Petri dish, substituting healthy genes for genetically defective ones. But why should this be seen as an affront to human rights, when it assists the founding of families, and reduces human suffering?

And yet, the development and use of these techniques has raised storms of protest in many countries - and, as so often happens when there is a major public outcry, repeated assertions that they profoundly violate human rights. But just whose human rights are being violated? The artificially fertilised embryo that comes to full term and is born a healthy child has not had his or her rights violated any more than any other baby that did not ask to be born. If its male genetic ancestor was not its mother's lawful husband, then it would be "illegitimate" under many legal systems - and so it might perhaps be (though no such case has yet been decided anywhere) if the woman who gave birth to it was not its genetic mother. But in this respect it is in no different position from many millions of other "illegitimate" individuals all over the world, and all that international human rights law has ever had to say about them is that it is the status of illegitimacy, and the associated stigma and discrimination, which violate their human rights.[11] No one has yet suggested that a State would violate its international human rights obligations by not installing sufficiently strong deterrents against adultery; indeed, we forcefully condemn those few countries still left which execute adulterous wives, by stoning or beheading.

What other candidates then are there for victims of human rights violations in the practice of these techniques? We have only one category left: the embryo that is not allowed to develop into a child, generally called the "discarded" embryo. It is undoubtedly the case that, in order to improve the efficiency of the techniques, more embryos are fertilised than are actually brought to term, and that those which are not will be "discarded" at an early stage - either by not thriving in the womb or, as one practitioner has put it, by being "flushed reverently down the laboratory sink". But in this respect, man is only imitating nature: a very high proportion of all embryos (some researchers have put it at over 90%) spontaneously abort for one reason or another, often before the woman even realises that she has conceived - and are flushed, unconsciously and quite irreverently, down the domestic lavatory pan. The only difference appears to be that in the latter case this may be regarded as "natural" or the work of God; in the former, it is "artificial" - that is, a deliberate human act without natural or divine intervention.

Clearly, there are here some obvious threats to some very important human *values* - some easily foreseeable and others more fanciful. Among the foreseeable ones are, pre-eminently, threats to the structure of the family; but also the commercial exploitation of surrogacy; too many donations by the same sperm donor resulting in too many of his offspring within the same community; and experimentation on embryos.

This last question is the one which presently leads to the most acute differences of view. On the one side, some scientists claim that further progress in this field cannot be made without conducting experiments with live human embryos in their very early stages; that there are good prospects that such progress

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[11] See, for example, the judgment of the European Court of Human Rights in *Marckx v. Belgium*, 2 EHRR 330.

will lead to developments which will be beneficial to humanity in general; that in this early stage the embryos concerned have no perceptions or feelings, bear no visible resemblance to human beings, and are nothing more than minute "blobs of jelly" only visible through a microscope; and that accordingly there can be no moral objection to conducting the experiments. On the other side, it is argued that each of these blobs of jelly is genetically unique, biologically human, and has the potential, if implanted into a human uterus, of growing into a fully-developed human being.

On this issue, it may perhaps be relevant to observe that Article 7 of the International Covenant on Civil and Political Rights requires that "no one shall be subjected without his free consent to medical or scientific experimentation", and it may be difficult to see in the present case who could validly give such a consent on behalf of an embryo - unless it is regarded as being someone's (e.g. the parents') "property", which begs the question by reducing it to the status of an object capable of ownership. In addition, under the internationally accepted principles of medical ethics,[12] experiments on individual human beings are permissible only if the experiment is conducted for the benefit of the particular individual concerned: they are never permissible if they would in fact result in damage or detriment to that individual, however beneficial the results might be to others.

Among the more fanciful threats from this technology are the storage of frozen embryos for indefinite periods, with at least the theoretical possibility of their resuscitation many years after their genetic parents have died, the "cloning" of large numbers of identical individuals, and the creation of chimerae - that is, hybrids between humans and other species. The new techniques (or their further development) may enable such things to be done one day, but they are very much at the margin and it is not immediately obvious why more than a few cranky or ill-motivated individuals would ever wish to put them into practice. At all events, it should not be difficult to regulate or prohibit such marginal activities by national laws: several countries are already on the way to doing this, and the Ad Hoc Committee of Experts on Progress in the Biomedical Sciences of the Council of Europe is hard at work on drafting common principles in this area.[13]

However, apart from those matters, it is at least arguable that the impact of this technology is not fundamentally different from the impact of many other technologies which past societies

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[12] See, for example, the *Declaration of Helsinki* adopted by the World Medical Association in 1964, as amended in 1975 and 1983.

[13] See *Provisional Principles on the Techniques of Human Artificial Procreation and Certain Procedures Carried Out on Embryos in Connection With Those Techniques*; Document CAHBI/INF(86)1, Council of Europe.

have experienced as an assault on their traditional values, but to which they have eventually adapted themselves. In much the same way - though obviously to an immeasurably greater extent - as our ancestors were shocked and disturbed by some of the developments of technology in their time, so we are understandably shocked and disturbed if the traditional act of procreation - which our species has practised throughout its existence, and which has immensely powerful emotional significance for us - is suddenly performed by faceless white-coated scientists in clinical laboratories, squinting down microscopes and manipulating fine needles. Clearly, there is here a potentially gigantic assault on our feelings, our traditional values, and a whole complex of emotions associated with things "which we have always held sacred".

But it is by no means equally clear whether there is a comparable assault on the human rights in the current international code - and if so which, and whose.

## Technology, civilization, traditional values, and human rights

The development of new technologies is as old as human civilization: indeed, it may be said to be a necessary concomitant of the progress of any civilization. Every technology brings profound changes in human societies - as, for example, when mankind first discovered how to plant and harvest crops around 10,000 years ago; when pottery was first invented; when metals first began to be worked; when the Iron Age displaced the Bronze Age; and, more subtly though at least as profoundly, when goods which had for thousands of years been transported overland by horses, mules, and donkeys began to be transported first by canal barges, then by railway trucks, and eventually by heavy goods lorries and aeroplanes.

At every such change, there will be winners and losers. If there are more winners than losers, the technology will become widely adopted, the losers will eventually adapt themselves to it, and in retrospect we shall say that the society has made progress, despite the burden which the losers will have had to bear. For some time, we may lament the loss of the old, but eventually we shall accept the new. The "green" movements have a long ancestry, yet there are not many today who would prefer the reality (as opposed to the fantasy) of nomadic life in a primitive hunting band in the savannah.

In historically more recent times, the pace of change in the development of new technologies has gradually accelerated. The agricultural revolution of the late Middle Ages took several centuries to become established; for the mechanisation of the production of textiles and other staple goods in the nineteenth century, that period was already a great deal shorter; it took the motor vehicle less than fifty years to change the face of most of the world, and the habits of many societies; and the machine-gun, the tank, and the atom bomb have revolutionised warfare three times in less than a century. What is new in our own times is not the mere fact that new technologies are being introduced which will produce profound changes in our societies, but rather that these changes now take place at a much higher rate than in earlier times, and so make the process of adaptation to them more difficult - and, for many, more painful.

The other new factor is the very recent introduction of the international code of human rights law. In the past, those who were adversely affected by social changes following from the introduction of a new technology complained of the abridgement or denial of their "traditional" way of life, or their "traditional" rights. As the changes were absorbed and societies adapted to them, new ways of life and new rights emerged; as, in turn, these were threatened by yet more new technologies, they were again defended as "traditional". But we are apt today to see human rights not so much as a tradition than as something new and revolutionary that has only just been achieved after a great deal of struggle, and we are therefore apt to see them as more fixed, and less open to evolution or adaptation, than those which had been familiar in the past - rather as the architects of the new-fangled "constitutions" of the eighteenth century must have felt about the values which they enshrined, after so much debate and the spilling of so much blood, in those instruments.

Perhaps, therefore, the most interesting - but also the most difficult - questions which this entire cluster of issues raises are the extent to which our modern human rights law enshrines some values that are more lasting than others; the rate at which even those values may evolve with the progress of human civilizations; and the rate at which human rights law may ultimately need to evolve with them.[14]

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[14] See Kirby, M.D., "Human Rights - The Challenge of New Technology", *The Australian Law Journal*, Human Rights Issue 1986.

# APPENDIX A

## Text of the European Convention on Human Rights

## and

## its PROTOCOL No. 8.

# Convention for the Protection of Human Rights and Fundamental Freedoms

The Governments signatory hereto, being Members of the Council of Europe,

Considering the Universal Declaration of Human Rights proclaimed by the General Assembly of the United Nations on 10th December 1948;

Considering that this Declaration aims at securing the universal and effective recognition and observance of the Rights therein declared;

Considering that the aim of the Council of Europe is the achievement of greater unity between its Members and that one of the methods by which that aim is to be pursued is the maintenance and further realisation of Human Rights and Fundamental Freedoms;

Reaffirming their profound belief in those Fundamental Freedoms which are the foundation of justice and peace in the world and are best maintained on the one hand by an effective political democracy and on the other by a common understanding and observance of the Human Rights upon which they depend;

Being resolved, as the Governments of European countries which are likeminded and have a common heritage of political traditions, ideals, freedom and the rule of law, to take the first steps for the collective enforcement of certain of the Rights stated in the Universal Declaration;

Have agreed as follows:

Article 1

The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.

SECTION I

Article 2

(1) Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

(2) Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:

(*a*) in defence of any person from unlawful violence;

(*b*) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;

(*c*) in action lawfully taken for the purpose of quelling a riot or insurrection.

Article 3

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

Article 4

(1) No one shall be held in slavery or servitude.

(2) No one shall be required to perform forced or compulsory labour.

(3) For the purpose of this Article the term "forced or compulsory labour" shall not include:

(*a*) any work required to be done in the ordinary course of detention imposed according to the provisions of Article 5 of this Convention or during conditional release from such detention;

(*b*) any service of a military character or, in case of conscientious objectors in eountries where they are recognised, service exacted instead of compulsory military service;

(*c*) any service exacted in case of an emergency or calamity threatening the life or well-being of the community;

(*d*) any work or service which forms part of normal civic obligations.

Article 5

(1) Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in aceordance with a procedure prescribed by law:

(*a*) the lawful detention of a person after conviction by a competent court;

(*b*) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;

(*c*) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonabel suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

(*d*) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;

(*e*) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;

(*f*) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

(2) Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.

(3) Everyone arrested or detained in accordance with the provisions of paragraph 1 (*c*) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

(4) Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

(5) Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation.

Article 6

(1) In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronouneed publicly but the prcss and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic soeiety, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

(2) Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

(3) Everyone charged with a criminal offence has the following minimum rights:

(*a*) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;

(*b*) to have adequate time and facilities for the preparation of his defence;

(*c*) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

(*d*) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(*e*) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

Article 7

(1) No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.

(2) This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal aecording to the general principles of law recognised by civilised nations.

### Article 8

(1) Everyone has the right to respect for his private and family life, his home and his correspondence.

(2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

### Article 9

(1) Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

(2) Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

### Article 10

(1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

(2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

### Article 11

(1) Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.

(2) No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

### Article 12

Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.

### Article 13

Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

### Article 14

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

### Article 15

(1) In time or war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.

(2) No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision.

(3) Any High Contracting Party availing itself of this right of derogation shall keep the Secretary-General of the Council of Europe fully informed of the measures which it has taken and the reasons therefor. It shall also inform the Secretary-General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed.

### Article 16

Nothing in Articles 10, 11 and 14 shall be regarded as preventing the High Contracting Parties from imposing restrictions on the political activity of aliens.

### Article 17

Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.

### Artiele 18

The restrictions permitted under this Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed.

## SECTION II

### Article 19

To ensure the observance of the engagements undertaken by the High Contracting Parties in the present Convention, there shall be set up:

(1) A European Commission of Human Rights hereinafter referred to as "the Commission";

(2) A European Court of Human Rights, hereinafter referred to as "the Court".

## SECTION III

### Article 20

The Commission shall consist of a number of members equal to that of the High Contracting Parties. No two members of the Commission may be nationals of the same State.

### Article 21

(1) The members of the Commission shall be elected by the Committee of Ministers by an absolute majority of votes, from a list of names drawn up by the Bureau of the Consultative Assembly; each group of the Representatives of the High Contracting Parties in the Consultative Assembly shall put forward three candidates, of whom two at least shall be its nationals.

(2) As far as applicable, the same procedure shall be followed to complete the Commission in the event of other States subsequently becoming Parties to this Convention, and in filling casual vacancies.

### Article 22

(1) The members of the Commission shall be elected for a period of six years. They may be re-elected. However, of the members elected at the first election, the terms or seven members shall expire at the end of three years.

(2) The members whose terms are to expire at the end of the initial period of three years shall be chosen by lot by the Secretary-General of the Council of Europe immediately after the first election has been completed.

(3) A member of the Commission elected to replace a member whose term of office has not expired shall hold office for the remainder of his predecessor's term.

(4) The members of the Commission shall hold office until replaced. After having been replaced, they shall continue to deal with such cases as they already have under consideration.

### Article 23

The members of the Commission shall sit on the Commission in their individual capacity.

### Article 24

Any High Contracting Party may refer to the Commission, through the Secretary-General of the Council of Europe, any alleged breach of the provisions of the Convention by another High Contracting Party.

### Article 25

(1) The Commission may reeeive petitions addressed to the Secretary-General of the Council of Europe from any person, non-governmental organisation or group of individuals claiming to be victim of a violation by one of the High Contracting Parties of the rights set forth in this Convention, provided that the High Contracting Party against which the complaint has been lodged has declared that it recognises the competence of the Commission to receive such petitions. Those of the High Contracting Parties who have made such a declaration undertake not to hinder in any way the effeetive exercise of this right.

(2) Such declarations may be made for a specific period.

(3) The declarations shall be deposited with the Secretary-General of the Council of Europe who shall transmit copies thereof to the High Contracting Parties and publish them.

(4) The Commission shall only exercise the powers provided for in this Article when at least six High Contracting Parties are bound by declarations made in accordance with the preceding paragraphs.

### Article 26

The Commission may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of six months from the date on which the final decision was taken.

### Article 27

(1) The Commission shall not deal with any petition submitted under Article 25 which

(a) is anonymous, or

(b) is substantially the same as a matter which has already been examined by the Commission or has already been submitted to another procedure of international investigation or settlement and if it contains no relevant new information.

(2) The Commission shall consider inadmissible any petition submitted under Article 25 which it considers incompatible with the provisions of the present Convention, manifestly ill-founded, or an abuse of the right of petition.

(3) The Commission shall reject any petition referred to it which it considers inadmissible under Article 26.

### Article 28

In the event of the Commission accepting a petition referred to it:

(a) it shall, with a view to ascertaining the facts, undertake together with the representatives of the parties an examination of the petition and, if need be, an investigation, for the effective conduct of which the States concerned shall furnish all necessary facilities, after an exchange of views with the Commission;

(b) it shall place itself at the disposal of the parties concerned with a view to securing a friendly settlement of the matter on the basis of respect for Human Rights as defined in this Convention.

### Article 29

(1) The Commission shall perform the functions set out in Article 28 by means of a Sub-Commission consisting of seven members of the Commission.

(2) Each of the parties concerned may appoint as members of this Sub-Commission a person of its choice.

(3) The remaining members shall be chosen by lot in accordance with arrangements prescribed in the Rules of Procedure of the Commission.

### Article 30

If the Sub-Commission succeeds in effecting a friendly settlement in accordance with Article 28, it shall draw up a Report which shall be sent to States concerned, to the Committee of Ministers and to the Secretary-General of the Council of Europe for publication. This Report shall be confined to a brief statement of the facts and of the solution reached.

### Article 31

(1) If a solution is not reached, the Commission shall draw up a Report on the facts and state its opinion as to whether the facts found disclose a breach by the State concerned of its obligations under the Convention. The opinions of all the members of the Commission on this point may be stated in the Report.

(2) The Report shall be transmitted to the Committee of Ministers. It shall also be transmitted to the States concerned, who shall not be at liberty to publish it.

(3) In transmitting the Report to the Committee of Ministers the Commission may make such proposals as it thinks fit.

### Article 32

(1) If the question is not referred to the Court in accordance with Article 48 of this Convention within a period of three months from the date of the transmission of the Report to the Committee of Ministers, the Committee of Ministers shall decide by a majority of two-thirds of the members entitled to sit on the Committee whether there has been a violation of the Convention.

(2) In the affirmative case the Committee of Ministers shall prescribe a period during which the High Contracting Party concerned must take the measures required by the decision of the Committee of Ministers.

(3) If the High Contracting Party concerned has not taken satisfactory measures within the prescribed period, the Committee of Ministers shall decide by the majority provided for in paragraph (1) above what effect shall be given to its original decision and shall publish the Report.

(4) The High Contracting Parties undertake to regard as binding on them any decision which the Committee of Ministers may take in application of the preceding paragraphs.

### Article 33

The Commission shall meet in camera.

### Article 34

The Commission shall take its decisions by a majority of the Members present and voting; the Sub-Commission shall take its decisions by a majority of its members.

### Article 35

The Commissions shall meet as the circumstances require. The meetings shall be convened by the Secretary-General of the Council of Europe.

### Article 36

The Commission shall draw up its own rules of procedure.

### Article 37

The secretariat of the Commission shall be provided by the Secretary-General of the Council of Europe.

## SECTION IV

### Article 38

The European Court of Human Rights shall consist of a number of judges equal to that of the Members of the Council of Europe. No two judges may be nationals of the same State.

### Article 39

(1) The members of the Court shall be elected by the Consultative Assembly by a majority of the votes cast from a list of persons nominated by the Members of the Council of Europe; each Member shall nominate three candidates, of whom two at least shall be its nationals.

(2) As far as applieable, the same procedure shall be followed to complete the Court in the event of the admission of new Members of the Council of Europe, and in filling casual vacancies.

(3) The candidates shall be of high moral character and must either possess the qualifications required for appointment to high judicial office or be jurisconsults of recognised competence.

### Article 40

(1) The members of the Court shall be elected for a period of nine years. They may be re-elected. However, of the members elected at the first election the terms of four members shall expire at the end of three years, and the terms of four more members shall expire at the end of six years.

(2) The members whose terms are to expire at the end of the initial periods of three and six years shall be chosen by lot by the Secretary-General immediately after the first election has been completed.

(3) A member of the Court elected to replace a member whose term of office has not expired shall hold office for the remainder of his predecessor's term.

(4) The members of the Court shall hold office until replaced. After having been replaced, they shall continue to deal with such cases as they already have under consideration.

### Article 41

The Court shall elect its President and Vice-President for a period of three years. They may be re-elected.

### Article 42

The members of the Court shall receive for each day of duty a compensation to be determined by the Committee of Ministers.

### Article 43

For the consideration of each case brought before it the Court shall consist of a Chamber composed of seven judges. There shall sit as an ex officio member of the Chamber the judge who is a national of any State party concerned, or, if there is none, a person of its choice who shall sit in the capacity of judge; the names of the other judges shall be ehosen by lot by the President before the opening of the case.

### Article 44

Only the High Contracting Parties and the Commission shall have the right to bring a case before the Court.

### Article 45

The jurisdiction of the Court shall extend to all cases concerning the interpretation and application of the present Convention which the High Contracting Parties or the Commission shall refer to it in accordance with Article 48.

### Article 46

(1) Any of the High Contracting Parties may at any time declare that it recognises as compulsory *ipso facto* and without special agreement the jurisdiction of the Court in all matters concerning the interpretation and application of the present Convention.

(2) The declarations referred to above may be made unconditionally or on condition of reciprocity on the part of several or certain other High Contracting Parties or for a specified period.

(3) These declarations shall be deposited with the Seeretary-General of the Council of Europe who shall transmit copies thereof to the High Contracting Parties.

### Article 47

The Court may only deal with a case after the Commission has acknowledged the failure of efforts for a friendly settlement and within the period of three months provided for in Article 32.

### Article 48

The following may bring a case before the Court, provided that the High Contracting Party concerned, if there is only one, or the High Contracting Parties concerned, if there is more than one, are subject to the compulsory jurisdiction of the Court or, failing that, with the consent of the High Contracting Party concerned, if there is only one, or the High Contracting Parties concerned if there is more than one:

(*a*) the Commission;

(*b*) a High Contracting Party whose national is alleged to be a victim;

(*c*) a High Contracting Party which referred the case to the Commission;

(*d*) a High Contracting Party against which the complaint has been lodged.

Article 49

In the event of dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court.

Article 50

If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party is completely or partially in conflict with the obligations arising from the present Convention, and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party.

Article 51

(1) Reasons shall be given for the judgment of the Court.

(2) If the judgment does not represent in whole or in part the unanimous opinion of the judges, any judge shall be entitled to deliver a separate opinion.

Article 52

The judgment of the Court shall be final.

Article 53

The High Contracting Parties undertake to abide by the decision of the Court in any case to which they are parties.

Article 54

The judgment of the Court shall be transmitted to the Committee of Ministers which shall supervise its execution.

Article 55

The Court shall draw up its own rules and shall determine its own procedure.

Article 56

(1) The first election of the members of the Court shall take place after the declarations by the High Contracting Parties mentioned in Article 46 have reached a total of eight.

(2) No case can be brought before the Court before this election.

## SECTION V

Article 57

On receipt of a request from the Secretary-General of the Council of Europe any High Contracting Party shall furnish an explanation of the manner in which its internal law ensures the effective implementation of any of the provisions of this Convention.

Article 58

The expenses of the Commission and the Court shall be borne by the Council of Europe.

Article 59

The members of the Commission and of the Court shall be entitled, during the discharge of their functions, to the privileges and immunities provided for in Article 40 of the Statute of the Council of Europe and in the agreements made thereunder.

Article 60

Nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a Party.

Article 61

Nothing in this Convention shall prejudice the powers conferred on the Committee of Ministers by the Statute of the Council of Europe.

Article 62

The High Contracting Parties agree that, except by special agreement, they will not avail themselves of treaties, conventions or declarations in force between them for the purpose of submitting, by way of petition, a dispute arising out of the interpretation or application of this Convention to a means of settlement other than those provided for in this Convention.

Article 63

(1) Any State may at the time of its ratification or at any time thereafter declare by notification adressed to the Secretary-General of the Council of Europe that the present Convention shall extend to all or any of the territories for whose international relations it is responsible.

(2) The Convention shall extend to the territory of territories named in the notification as from the thirtieth day after the reeeipt of this notification by the Secretary-General of the Council of Europe.

(3) The provisions of this Convention shall be applied in such territories with due regard, however, to local requirements.

(4) Any State which has made a declaration in accordance with paragraph 1 of this Article may at any time thereafter declare on behalf of one or more of the territories to which the declaration relates that it accepts the competence of the Commission to receive petitions from individuals, non-governmental organisations or groups of individuals in accordance with Article 25 of the present Convention.

### Article 64

(1) Any State may, when signing this Convention or when depositing its instrument of ratification, make a reservation in respect of any particular provision of the Convention to the extent that any law then in force in its territory is not in conformity with the provision. Reservations of a general character shall not be permitted under this Article.

(2) Any reservation made under this Article shall contain a brief statement of the law concerned.

### Article 65

(1) A High Contracting Party may denounce the present Convention only after the expiry of five years from the date on which it became a Party to it and after six months' notice contained in a notification adressed to the Secretary-General of the Council of Europe, who shall inform the other High Contracting Parties.

(2) Such a denunciation shall not have the effect of releasing the High Contracting Party concerned from its obligations under this Convention in respect of any act which, being capable of constituting a violation of such obligations, may have been performed by it before the date at which the denunciation became effective.

(3) Any High Contracting Party which shall cease to be a Member of the Council of Europe shall cease to be a Party to this Convention under the same conditions.

(4) The Convention may be denounced in accordance with the provisions of the preceding paragraphs in respect of any territory to which it has been declared to extend under the terms of Article 63.

### Article 66

(1) This Convention shall be open to the signature of the Members of the Council of Europe. It shall be ratified. Ratifications shall be deposited with the Secretary-General of the Council of Europe.

(2) The present Convention shall come into force after the deposit of ten instruments of ratification.

(3) As regards any signatory ratifying subsequently, the Convention shall come into force at the date of the deposit of its instrument of ratification.

(4) The Secretary-General of the Council of Europe shall notify all the Members of the Council of Europe of the entry into force of the Convention, the names of the High Contracting Parties who have ratified it, and the deposit of all instruments of ratification which may be effected subsequently.

Done at Rome this 4th day of November 1950 in English and French, both texts being equally authentic, in a single copy which shall remain deposited in the archives of the Council of Europe. The Secretary-General shall transmit certified copies to each of the signatories.

# PROTOCOL No. 8
## TO THE CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS
## CONCERNING ACCELERATION OF THE PROCEDURE

«The member States of the Council of Europe, signatories to this Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950 (hereinafter referred to as "the Convention"),

Considering that it is desirable to amend certain provisions of the Convention with a view to improving and in particular to expediting the procedure of the European Commission of Human Rights.

Considering thet it is also advisable to amend certain provisions of the Convention concerning the procedure of the Enropean Court of Human Rights.

Have agreed as follows:

*Article 1*

The existing text of Article 20 of the Convention shall become paragraph 1 of that Article and shall be supplemented by the following four paragraphs:

"2. The Commission shall sit in plenary session. It may, however, set up Chambers, each composed of at least seven members. The Chambers may examine petitions submitted under Article 25 of this Convention which ean be dealt with on the basis of established case law or which raise no serious question affecting the interpretation or application of the Convention. Subject to this restriction and to the provisions of paragraph 5 of this Article, the Chambers shall exercise all the powers conferred on the Commission by the Convention.

The member of the Commission elected in respect of a High Contracting Party against which a petition has been lodged shall have the right to sit on a Chamber to which that petition has been referred."

3. The Commission may set up committees, each composed of at least three members, with the power, exercisable by a unanimous vote, to declare inadmissible or strike from its list of cases a petition submitted under Article 25, when such a decision can be taken without further examination.

4. A Chamber or committee may at any time relinquish jurisdiction in favour of the plenary Commission, which may also order the transfer to it of any petition referred to a Chamber or committee.

5. Only the plenary Commission can exercise the following powers:

a. the examination of applications submitted under Article 24;

b. the bringing of a case before the Court in accordance with Article 48 a;

c. the drawing up of rules of procedure in accordance with Article 36.

*Article 2*

Article 21 of the Convention shall be supplemented by the following third paragraph:

"3. The candidates shall be of high moral character and must either possess the qualifications required for appointment to high judicial office or be persons of recognized competence in national or international law."

*Article 3*

Article 23 of the Convention shall be supplemented by the following sentence:

"During their term of office they shall not hold any position which is incompatible with their independence and impartiality as members of the Commission or the demands of this office."

*Article 4*

The text, with modifications, of Article 28 of the Convention shall become paragraph 1 of that Article and the text, with modifications, of Article 30 shall become paragraph 2. The new text of Article 28 shall read as follows:

Article 28

1. In the event of the Commission accepting a petition referred to it:

a. it shall, with a view to ascertaining the facts, undertake together with the representatives of the parties an examination of the petition and, if need be, an investigation, for the effective conduct of which the States concerned shall furnish all necessary facilities, after an exchange of views with the Commdssion;

b. it shall at the same time place itself at the disposal of the parties concerned with a view to securing a friendly settlement of the matter on the basis of respect for Human Rights as defined in this Convention.

2. If the Commission succeeds in effecting a friendly settlement, it shall draw up a Report which shall be sent to the States concerned, to the Committee of Ministers and to the Secretary General of the Council of Europe for publication. This Report shall be confined to a brief statement of the facts and of the solution reached."

*Article 5*

In the first paragraph of Article 29 of the Convention, the word "unanimously" shall be replaced by the words "by a majority of two-thirds of its members".

*Article 6*

The following provision shall be inserted in the Convention:

Article 30

1. The Commission may at any stage of the proceedings decide to strike a petition out of its list of cases where the circumstances lead to the conclusion that:

a. the applicant does not intend to pursue his petition, or

b. the matter has been resolved, or

c. for any other reason established by the Commission, it is no longer justified to continue the examination of the petition.

However, the Commission shall continue the examination of a petition if respect for Human Rights as defined in this Convention so requires.

2. If the Commission decides to strike a petition out of its list after having accepted it, it shall draw up a Report which shall contain a statement of the facts and the decision striking out the petition together with the reasons therefor. The Report shall be transmitted to the parties, as well as to the Committee of Ministers for information. The Commission may publish it.

3. The Commission may decide to restore a petition to its list of eases if It considers that the circumstances justify such a course."

*Article 7*

In Article 31 of the Convention, paragraph 1 shall read as follows:

"1. If the examination of a petition has not been completed In accordance with Article 28 (paragraph 2), 29 or 30, the Commission shall draw up a Report on the facts and state its opinion as to whether the facts found disclose a breach by the State concerned of its obligations under the Convention. The individual opinions of members of the Commission on this point may be stated in the Report."

*Article 8*

Article 34 of the Convention shall read os follows:

"Subject to the provisions of Articles 20 (paragraph 3) and 29, the Commission shall take its decisions by a majoriy of the members present and voting."

*Article 9*

Article 40 of the Convention shall be supplemented by the following seventh paragraph:

"7. The members of the Court shall sit on the Court in their individual capacity. During their term of office they shall not hold any position which is incompatible with their independence and impartiality as members of the Court or the demands of this office."

*Article 10*

Article 41 of the Convention shall read as follows:

"The Court shall elect its President and one or two Vice-Presidents for a period of three years. They may be re-elected."

*Article 11*

In the first sentence of Article 43 of the Convention, the word "seven" shall be replaced by the word "nine".

*Article 12*

1. This Protocol shall be open for signature by member States of the Council of Europe signatories to the Convention, which may express their conseat to be bound by:

a. signature without reservation as to ratification, acceptance or approval, or

b. signatnre subject to ratification, acceptance or approval, followed by ratification, acceptance or approval.

2. Instruments of ratification, acceptance or approval shall be deposited with the Secretary General of the Council of Europe.

*Article 13*

This Protocol shall enter into force on the first day of the month following the expiration of a period of three months after the date on which all Parties to the Convention have expressed their consent to be bound by the Protocol in accordance with the provisions of Article 12.

*Article 14*

The Secretary General of the Council of Europe shall notify the member States of the Council of:

a. any signature;

b. the deposit of any instrument of ratification, acceptance or approval;

c. the date of entry into force of this Protocol in accordance with Article 13;

d. any other act, notification or communication relating to this Protocol.»

## EXPLANATORY REPORT RELATING TO PROTOCOL No. 8

### 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 recognize 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[2] 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.

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 organization and working of the Convention's supervisory machinery and on 28 September 1983, on the basis of a report[3] 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 finalized 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 Januar 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.

**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 to set 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:

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[1] Paragraph 9 of the communiqué of the 69th session

[2] Of the 21 States Parties to the Convention, only Cyprus, Greece, Malta and Turkey have not yet accepted the right of individual petition.

[3] 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. Text of Recommendation 970 = 4 HRLJ 496 (1983).

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 Commission's 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, ie 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 serous 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 ease 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 desisis 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 repurcussions 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 5a.), 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 5b.), 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 provisions of Articles 29 and 34 of the Convention apply to both the plenary Commission and Chambers (see also paragraph 12 above) ie 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 – reliquishment 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 reliquishment of 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 not 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 paragraph 3 of Article 21 is based on Article 39(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 recognized 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 ot 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 had 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 in so far 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, eg 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. eovers, 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 all 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., eg 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 all the above cases circumscribed by the rule set out in the last sentence of paragraph 1, ie 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-States cases under Article 24 as well as individual petitions submitted unter Article 25.

*Paragraph 2 of Article 30*

**38.** This 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 ont 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 31, 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 all 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 decision*

**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): 2nd 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 transistional 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.» *

* from Human Rights Law Journal; Vol. 6 Part 1; N P Engel, FRG, USA; 1985