CONSEIL DE L'EUROPE

CONVENTION DE SAUVEGARDE DES DROITS DE L'HOMME ET DES LIBERTÉS FONDAMENTALES

RECUEIL DES TRAVAUX PRÉPARATOIRES

du

PROTOCOLE N° 2

à la Convention attribuant
à la Cour européenne des Droits de l'homme
la compétence de donner des avis consultatifs

STRASBOURG
1966
TRAVAUX PREPARATOIRES

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

WORK OF THE CONSULTATIVE ASSEMBLY
August 1959 - January 1960
1. Extract from the Minutes of the meeting of Sub-Committee No. XII (Human Rights) of the Legal Committee - 3rd July 1959 (AS/Jur/XII/11 PV 1 of 25th August 1959).

2. Legal Committee memorandum by the Secretariat General (AS/Jur (11) 8 of 16th July 1959).


5. Extract from the Minutes of the Legal Committee meeting of 13th-14th November 1959 (AS/Jur (11) PV 5 of 24th November 1959).


CONSULTATIVE ASSEMBLY

LEGAL COMMITTEE

Sub-Committee No. 12
(Human Rights)

MINUTES
of the meeting held at 10 a.m.
on 3rd July 1959
at the Belgian Senate, Brussels

Representatives present
Mr. LANNUNG in the Chair
MM. ALYOT, VAN MEEUWEN, SCHOLEFIELD-ALLEN, TONCIC

Substitute present
Mr. WAHL (for Mr. MENDE)

Also present
Mr. MATTHEW

4. Other business

The Counsellor in the Office of the Clerk raised the possibility of conferring on the European Court of Human Rights the competence to interpret the Convention by giving advisory opinions. In this connection, he recalled that the Convention on Human Rights raised difficulties of interpretation such as...
the procedure to be followed to elect new members of the Court, when new members were admitted to the Council of Europe, or when seats became vacant - a problem at present being studied by the Legal Committee.

The representative of the Directorate of Human Rights said the matter had already been raised with the Court. It considered that such an extension of its competence could only take place by formal agreement between the Contracting Parties to the Convention on Human Rights. The Court would no doubt, after drawing up its Rules of Procedure, make known its wishes as regards the scope of its own competence; therefore he thought it would be preferable to await the Court's opinion so that, if need be, any proposals of this nature could be grouped together in one instrument.

It was decided that the Secretariat General would draft a memorandum on the subject for consideration at the next meeting of the Legal Committee.
At the meeting of Sub-Committee No. 12 held in Brussels on 3rd July, the Secretariat was instructed to prepare for the Legal Committee a memorandum setting out in writing certain suggestions which had been made orally at the meeting for the extension of the competence of the Court of Human Rights.

The question of the extension of the competence of the Court for the purpose of giving advisory opinions on the interpretation of European treaties is dealt with in Professor Wahl’s Report, which has been examined in detail by Sub-Committee No. 11. The present paper is therefore limited to a separate question, namely the competence of the Court to interpret the European Convention on Human Rights.

A limited power to interpret the Convention is already conferred on the Court by the Convention itself. Article 45 reads as follows:

"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 40."

It will be seen from this text that the jurisdiction of the Court to interpret the Convention is limited to cases which the High Contracting Parties or the Commission have referred to the Court.

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Court under Article 48, i.e., cases of alleged violation of the Convention by a High Contracting Party. The jurisdiction of the Court therefore does not extend to matters which arise independently of an alleged violation.

It is for consideration, consequently, whether the Court should not be given a general jurisdiction to interpret the Convention, which would therefore include matters arising out of the application of the Convention but not resulting from contentious proceedings brought under Article 48.

To what sort of matters would this apply?

The following are examples of problems which have actually arisen or have been thought likely to arise and about which the interpretation of the Convention is not clear:

1. whether a simple majority or an absolute majority is required for the election of the judges under Article 39. (This problem formed the subject of a debate and note in the Assembly before the election took place in January 1959).

2. which States have the right to put forward candidates in the event of the admission of new members and of casual vacancies, under Article 39 (2). (This problem is now under examination by the Legal Committee).

3. what are the duties of the Secretary General under Article 57, with particular reference to unsatisfactory information from a High Contracting Party as to the manner in which its internal law ensures the effective implementation of the Convention.

4. what are the duties of the Secretary General in relation to information he has received about derogations under Article 15. (This problem has been discussed both by the Committee of Ministers and by the Standing Committee of the Assembly).

5. whether an individual applicant has the right to see the report which the Commission must submit to the Committee of Ministers under Article 31, if a friendly settlement is not reached. (This problem may arise in the near future).

6. whether the Commission may refer to the Court under Article 48 an alleged breach of the Convention by a State which, under Article 46, has accepted its jurisdiction as compulsory, on condition of reciprocity.
7. whether the term of office of a judge elected as the result of the admission of a new member State should be of nine years, under Article 40 (1), or whether it should be co-terminous with that of his colleagues.

8. if a State accepts the compulsory jurisdiction of the Court under Article 46 and then extends the application of the Convention to its colonial territories under Article 63, whether the jurisdiction of the Court then extends to matters arising in the colonial territories.

(These last three problems were discussed, but not resolved, by the Committee of Legal Experts which met in Rome on the eve of the signature of the Convention.)

It is clear, then, that there are a number of problems in the interpretation of the Convention on which it might be useful to have an authoritative ruling. Nor is the above list exhaustive. It is for consideration whether the Court of Human Rights should not be empowered to give advisory opinions on problems of this sort if they are submitted to it in accordance with an agreed procedure.

It may be thought better not to give the Contracting Parties the right to ask for advisory opinions on matters of this sort. Those who are already empowered to make a "jurisdictional" application to either the Commission or the Court of Human Rights should perhaps not be empowered to apply to that Court for an advisory opinion. Indeed, experience has shown that if a natural or a legal person has the choice of instituting judicial proceedings or requesting an opinion, he will select the procedure that seems more likely to favour his own cause. Thus, requests for an opinion have been submitted to the German Constitutional Court, on questions which, in substance, constituted a dispute between two organs of the Federal Republic. Such a procedure is not always conducive to the proper administration of justice, since an advisory opinion does not provide for a full hearing, which is the main feature of normal court procedure. For this reason, it might be preferable not to grant to States, or to natural or legal persons the right to apply to the Court for an advisory opinion on a matter which could become the object of contentious proceedings, lest the well-balanced system laid down by the Convention for the protection of Human Rights be upset.
It might, however, be thought desirable to allow States to request an advisory opinion in certain circumstances, for example on the conformity of proposed legislation with the provisions of the Convention.

Apart from such cases, it would seem desirable to grant the right to request advisory opinions to organs which cannot appear before the Court of Human Rights under the present system. This applies, for instance, to the Secretary General of the Council of Europe, who might have the right to consult the Court, first of all by virtue of his duties under Article 57 and, secondly, as depository of the instruments provided for in the Convention.

Furthermore, the Committee of Ministers might be empowered to ask the Court for an opinion - not on a question of substance, namely the violation of the Convention by one of the Contracting States - but purely on the detailed application of those provisions of the Convention under which the Committee of Ministers is entrusted with certain tasks under the existing system of collective guarantee. For instance, it is conceivable that the Committee of Ministers might seek the Court's opinion on the interpretation of Article 32, with particular reference to the procedure to be followed by the Committee when discharging its responsibilities under that article. The same might apply to Article 54 of the Convention.

Lastly, there is the possibility of a request for an opinion being made by the Consultative Assembly. Here likewise the Court might enlighten the Assembly as to the scope of the powers conferred upon it under the Convention on Human Rights, for instance, in regard to the election of members of the Commission (Article 21) and of the Court (Article 39). However, the possibility should probably be ruled out of the Consultative Assembly being empowered to request a "consultative opinion" on a specific situation which might be brought before the Commission and the Court by the jurisdictional procedure forming part of the existing system of collective protection.
CONSULTATIVE ASSEMBLY
LEGAL COMMITTEE

MINUTES
of the meeting held at 10 a.m.
on Friday, 21st August 1959
at the Paris Office, 55 avenue Kléber

Present
MM. IANNUNG (Chairman), ABDESSELAM, ALBERT-SOREL, ALYOT,
ELMGREN, HARM, HEDLUND, LENIHAN, LINDEN, MATHEW, van MEEUWEN,
MARK (for Mr. STRASSER), PIERSON (for Mr. van REMOORTEL),
SCHMAL, STRAY, SCHOLEFIELD-ALLEN, TONCIC.

11. Second Protocol to the Convention for the Protection of
Human Rights and Fundamental Freedoms, conferring upon
the European Court of Human Rights competence to give
advisory opinion

(b) Consideration of memorandum prepared by the
Secretariat General on the extension of the com-
petence of the European Court of Human Rights

On the proposal of the Chairman, it was agreed to appoint
Mr. Wahl Rapporteur for this question, which would be considered
at a later meeting.
LEGAL COMMITTEE

Draft Report
on the extension of the competence
of the European Court of Human Rights
as regards the interpretation
of the Convention on Human Rights,
(Rapporteur: Mr. Wahl)

I. Draft Recommendation presented by the Legal Committee

The Assembly,

Considering that, as explained in the attached Report
of the Legal Committee, the Convention on Human Rights contains
a number of provisions which are capable of varying interpretation,

Considering that it is desirable that in cases of doubt
an authoritative interpretation should be given by some suitably
qualified body,

Considering that the Court of Human Rights is best
qualified for the purpose,

RECOMMENDS TO THE COMMITTEE OF MINISTERS:
1. that it should convene a Committee of Experts with instructions to conclude an agreement that would confer on the European Court of Human Rights, in addition to its present competence defined in Article 45 of the Convention, the competence to interpret the Convention on Human Rights, when a doubt has arisen of a legal character, even though no case has been brought;

2. that it should submit the draft agreement prepared by the Committee of Experts to the Assembly for an opinion before signature by Member Governments.

II. Explanatory Memorandum by the Rapporteur

In the course of its study of the question of the uniform interpretation of European Treaties, on which the Legal Committee has presented a separate report to the Assembly (Doc. 1062), the Committee considered also the question whether it was not desirable to confer on the Court of Human Rights competence to discharge an additional function: the general competence to interpret the Convention on Human Rights itself.

The Interpretation of the Convention on Human Rights

A limited power to interpret the Convention is already conferred on the Court by the Convention itself, Article 45 reads as follows:

"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."

It will be seen from this text that the jurisdiction of the Court to interpret the Convention is limited to cases which the High Contracting Parties or the Commission have referred to the Court under Article 48 of the Convention on Human Rights, i.e. cases of alleged violation of the Convention by a High Contracting Party. The jurisdiction of the Court therefore does not extend to matters which arise independently of an alleged violation.

It is for consideration, consequently, whether the Court should not be given a general jurisdiction to interpret the Convention, which would therefore include matters arising out of the application of the Convention but not resulting from contentious proceedings brought under Article 48.
If the Court is given jurisdiction to give an authoritative interpretation on matters of this sort, it is important to keep it within proper limits. Its new competence should be limited to questions of a legal character. There are no doubt gaps in the Convention which will need to be filled; some of them require legal decisions and might well be left to the Court, but others are of a political character and we should put the Court in a false position if we asked it to take political decisions. An example of this is the power of the Secretary General under Article 57 of the Convention to ask a member State to furnish explanations as to the manner in which its internal law ensures the effective implementation of any provision of the Convention. The question in what circumstances the Secretary General should exercise this power is basically political, and therefore not one for the Court.

Another reason why the powers of the Court to interpret the Convention should not be extended too widely is that there is an advantage in letting some problems be settled by the natural processes of political evolution rather than by the legal interpretation of written texts. (This applies with particular force to the Statute of the Council of Europe). An example arising under the Convention of Human Rights is afforded by Article 15. This authorises Contracting Parties in certain circumstances to take measures derogating from their obligations under the Convention; they are required to inform the Secretary General of the Council of Europe of the measures taken and the reasons therefor, but nothing is said about his communicating this information to anyone else. This is clearly a gap in the provisions of the Convention. The problem has, however, been satisfactorily settled by a decision of the Committee of Ministers that the Secretary General should inform the other Contracting Parties and the Commission(1) and by action on a Recommendation of the Assembly that he should also inform the President of the Assembly, who then informs the Standing Committee.(2)

Within the limits thus laid down, there are a certain number of problems of interpretation of a legal character on which it would be useful to have an authoritative ruling. The following are just two examples of problems of a legal character about which the interpretation of the Convention is not clear:

1. Resolution (56) 16 of the Committee of Ministers.
2. Recommendation 103 of October 1956.
1. Whether a simple majority or an absolute majority is required for the election of the judges under Article 39. (This problem formed the subject of a debate and vote in the Assembly before the election took place in January 1959).

2. The procedure by which the Committee of Ministers should discharge its obligations under Article 32 of the Convention. This provides that if the Commission is unable to bring about a friendly settlement, and if the matter is not referred to the Court, then the Committee of Ministers shall decide by a two-thirds majority whether a violation has occurred. The Convention is silent on the procedure to be used by the Committee. Two obvious questions are: if the case results from an individual petition, is the individual (or his representative) to be heard? And, when the Committee is considering the Report of the Commission on Human Rights is the Commission to be represented at the discussion?

There are of course other cases of doubt which may arise. (1) Committee is of opinion that, no; that the Court of Human Rights has been set up, and that it contains a number of very distinguished jurists, it would be appropriate to confer on the Court the competence of giving an authoritative interpretation of disputed provisions of this sort.

Once this principle is admitted, the question arises: what procedure should be followed in order to seize the Court of such questions?

It may be thought better not to give the Contracting Parties the right to ask for advisory opinions on matters of this sort. Those who are already empowered to institute contentious proceedings before either the Commission or the Court should perhaps not be empowered to apply to that Court for an advisory opinion. Indeed, experience has shown that if a natural or a

(1) Other examples which may be mentioned are:
(a) Whether the Commission may refer to the Court under Article 46 an alleged breach of the Convention by a State which, under Article 46, has accepted its jurisdiction as compulsory on condition of reciprocity.
(b) Whether the term of office of a judge elected as the result of the admission of a new Member State should be of nine years, under Article 40 (1), or whether it should be coterminous with that of his colleagues.
(c) If a State accepts the compulsory jurisdiction of the Court under Article 46 and then extends the application of the Convention to its colonial territories under Article 63, whether the jurisdiction of the Court then extends to matters arising in the colonial territories. (It should be observed that paragraph 4 of Article 63 relates to the extension to colonial territories of the declarations provided for in Article 25 of the Convention, but not of those provided for in Article 46).
legal person has the choice of instituting judicial proceedings or requesting an opinion, he will select the procedure that seems more likely to favour his own cause. Thus, requests for an opinion have been submitted to the German Constitutional Court, on questions which, in substance, constituted a dispute between two organs of the Federal Republic. Such a procedure is not always conducive to the proper administration of justice, since an advisory opinion does not provide for a full hearing, which is the main feature of normal court procedure. For this reason, it might be preferable not to grant to States, or to natural or legal persons the right to apply to the Court for an advisory opinion on a matter which could become the object of contentious proceedings, lest the well-balanced system laid down by the Convention for the protection of Human Rights be upset.

It might, however, be thought desirable to allow States to request an advisory opinion in certain circumstances, for example on the conformity of proposed legislation with the provisions of the Convention.

Apart from such cases, it would seem desirable to grant the right to request advisory opinions to organs which cannot appear before the Court of Human Rights under the present system. This applies, for instance, to the Secretary General of the Council of Europe, who might have the right to consult the Court as depository of the instruments provided for in the Convention.

Furthermore, the Committee of Ministers might be empowered to ask the Court for an opinion - not on a question of substance, namely the violation of the Convention by one of the Contracting States - but purely on the detailed application of those provisions of the Convention under which the Committee of Ministers is entrusted with certain tasks under the existing system of collective guarantee. For instance, as already mentioned, the Committee of Ministers might seek the Court's opinion on the interpretation of Article 32, with particular reference to the procedure to be followed by the Committee when discharging its responsibilities under that Article. The same might apply to Article 54 of the Convention.

Lastly, there is the possibility of a request for an opinion being made by the Consultative Assembly. Here likewise the Court might enlighten the Assembly as to the scope of the powers conferred upon it under the Convention on Human Rights, for instance, in regard to the election of members of the Commission (Article 21) and of the Court (Article 59). However, the possibility should probably be ruled out of the Consultative
Assembly being empowered to request a "consultative opinion" on a specific situation which might be brought before the Commission and the Court by the jurisdictional procedure forming part of the existing system of collective protection.

Your Committee is therefore of opinion that it would be desirable to conclude a further Agreement or Protocol which would confer on the Court the competence to give advisory opinions on the interpretation of the Convention at the request of the Committee of Ministers, the Consultative Assembly and the Secretary General; and possibly also at the request of a Contracting Party provided that this is limited to matters which might not subsequently form the subject of contentious proceedings before the Court.

The draft Recommendation set out above is intended to present this proposal of your Committee to the Committee of Ministers. The Committee was, of course, aware that this proposal required further detailed examination, particularly as regards the procedure to be used for putting it into effect. It was of opinion, however, that such examination could be better carried out by a Committee of Experts representing member Governments than by a Parliamentary Committee. The ideas contained in the Committee's suggestions are therefore not necessarily in their final form and the recommendation seeks to make it clear that it will be for the experts, whom the Committee of Ministers is asked to convene, to undertake such further study as may be necessary and possibly revise the Committee's suggestions before they are submitted to the Governments for final approval.

In conclusion, it should be observed that in the Court of Human Rights the Council has a judicial organ of very high quality and great potentialities. The proposals made in this report for extending its competence are very modest. The plan to invest it with jurisdiction to interpret European treaties contained in Doc. 1062 goes a little further, but still represents only a limited step in extending the competence of the Court. It should not be forgotten, however, that once the Court has begun to hear cases and to establish its authority - as undoubtedly it will - the possibility may well be envisaged of turning it into a European Court of Justice competent to deal with other matters, including perhaps disputes of a juridical nature between member States, as proposed by the Assembly in 1951. This however is a long-term prospective, compared with which your Committee's present proposals are only a modest beginning.
CONSULTATIVE ASSEMBLY
LEGAL COMMITTEE

MINUTES

of the meeting held on Friday 13th and Saturday 14th November 1959
at the Paris Office, 55 avenue Kléber

Present

MM. LANNUNG (Chairman), ADBESSELAM, ALBERT SOREL, SCHOLEFIELD-ALLEN, ALYOT, ELMGREN, HARM, HEDLUND, JANNUZZI, KUPREVI, LINDEN, MATHEW, van MEEUWEN, PIERSO (for Mr van REMOORTEL), PINTON (for Mr KALB), SCHMAL, STRUYE, TONCIC.

Also present

Mr LEGARET

5. Extension of the Competence of the European Court of Human Rights

Mr. Robertson, introducing Mr. Wahl's report, said that the main concern of the Rapporteur was to meet the difficulties which could arise owing to the fact that, in the absence of a dispute, there was no organ which had competence to interpret doubtful points arising under the European Convention on Human Rights, such as the procedure for the election of judges, the procedure by which the Committee of Ministers discharges its functions under Article 32, etc. It had seemed to Mr. Wahl that it would be desirable that the European Court of Human Rights should be given the competence to interpret the Convention and that it could do so at the request of the Assembly, the Committee of Ministers or the Secretary General. As regards the latter a comparison could be drawn with the Secretary General
of the United Nations who could request the opinion of the Hague Court on questions arising under the Charter of the United Nations.

Mr. Modinos proposed that, in this connection, it would be appropriate to bring before the Assembly a new recommendation inviting Member States which have not yet done so to accept the compulsory jurisdiction of the Court. Speaking as a lawyer, he did not understand why some Member States did not accept that jurisdiction, since it was preferable to have a case judged by a court of independent judges instead of by a political body of foreign ministers.

The Report was adopted unanimously.

As regards the proposal made by Mr. Modinos, the Chairman suggested that the Secretariat should prepare a draft for consideration by Mr. Wahl, and by the Committee at its next meeting in January.

This was agreed.
REPORT

on the extension of the competence of the European Court of Human Rights as regards the interpretation of the Convention on Human Rights (1)

(Rapporteur: M. WAHL)

I. Draft Recommendation presented by the Legal Committee (2)

The Assembly,

Considering that, as explained in the attached Report of the Legal Committee, the Convention on Human Rights contains a number of provisions which are capable of varying interpretation,

Considering that it is desirable that in cases of doubt an authoritative interpretation should be given by some suitably qualified body,

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(1) Question related to the question introduced on 22nd October 1957 by the tabling of a motion for a recommendation on the establishment of a European Supreme Court (Doc. 737). Question placed on the Assembly's register and referred to the Legal Committee on 23rd October 1957 (see 19th Sitting of the 9th Session).

(2) Adopted unanimously by the Committee.

Members of the Committee: M. Lannung (Chairman); MM. Azara, Wahl (Vice-Chairmen); MM. Abdesselam, Albert-Sorel, Scholefield-Allen, Alyot, Bournias, Codacci-Pisanelli, Elmgren, Harm, Hedlund, Jannuzzi, Jonasson, Kalb (Alternate: M. Pinton), Kershaw, Küçürek, Lenihan, Linden, Maris, Mathew, van Meeuwen, Mende, van Remoortel (Alternate: M. Pierson), Schmal, Strasser, Stray, Struye, Toncic.

N.B. The names of those who voted are underlined.
Considering that the Court of Human Rights is best qualified for the purpose,

RECOMMENDS TO THE COMMITTEE OF MINISTERS:

1. that it should convene a Committee of Experts with instructions to conclude an agreement that would confer on the European Court of Human Rights, in addition to its present competence defined in Article 45 of the Convention, the competence to interpret the Convention on Human Rights, when a doubt has arisen of a legal character, even though no case has been brought;

2. that it should submit the draft Agreement prepared by the Committee of Experts to the Assembly for an opinion before signature by member Governments.

II. Explanatory Memorandum by the Rapporteur

In the course of its study of the question of the uniform interpretation of European Treaties, on which the Legal Committee has presented a separate report to the Assembly (Doc. 1062) the Committee considered also the question whether it was not desirable to confer on the Court of Human Rights competence to discharge an additional function: the general competence to interpret the Convention on Human Rights itself.

The Interpretation of the Convention on Human Rights

A limited power to interpret the Convention is already conferred on the Court by the Convention itself. Article 45 reads as follows:

"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".

It will be seen from this text that the jurisdiction of the Court to interpret the Convention is limited to cases which the High Contracting Parties or the Commission have referred to the Court under Article 48 of the Convention on Human Rights, i.e. cases of alleged violation of the Convention by a High Contracting Party. The jurisdiction of the Court therefore does not extend to matters which arise independently of an alleged violation.
It is for consideration, consequently, whether the Court should not be given a general jurisdiction to interpret the Convention, which would therefore include matters arising out of the application of the Convention but not resulting from contentious proceedings brought under Article 48.

If the Court is given jurisdiction to give an authoritative interpretation on matters of this sort, it is important to keep it within proper limits. Its new competence should be limited to questions of a legal character. There are no doubt gaps in the Convention which will need to be filled; some of them require legal decisions and might well be left to the Court, but others are of a political character and we should put the Court in a false position if we asked it to take political decisions. An example of this is the power of the Secretary General under Article 57 of the Convention to ask a member State to furnish explanations as to the manner in which its internal law ensures the effective implementation of any provision of the Convention. The question in what circumstances the Secretary General should exercise this power is basically political, and therefore not one for the Court.

Another reason why the powers of the Court to interpret the Convention should not be extended too widely is that there is an advantage in letting some problems be settled by the natural processes of political evolution rather than by the legal interpretation of written texts. (This applies with particular force to the Statute of the Council of Europe). An example arising under the Convention on Human Rights is afforded by Article 15. This authorises Contracting Parties in certain circumstances to take measures derogating from their obligations under the Convention; they are required to inform the Secretary General of the Council of Europe of the measures taken and the reasons therefor, but nothing is said about his communicating this information to anyone else. This is clearly a gap in the provisions of the Convention. The problem has, however, been satisfactorily settled by a decision of the Committee of Ministers that the Secretary General should inform the other Contracting Parties and the Commission(1) and by action on a Recommendation of the Assembly that he should also inform the President of the Assembly, who then informs the Standing Committee(2).

(1) Resolution (56) of the Committee of Ministers.
(2) Recommendation 103 of October 1956.
Within the limits thus laid down, there are a certain number of problems of interpretation of a legal character on which it would be useful to have an authoritative ruling. The following are just two examples of problems of a legal character about which the interpretation of the Convention is not clear:

1. Whether a simple majority or an absolute majority is required for the election of the judges under Article 39. (This problem formed the subject of a debate and vote in the Assembly before the election took place in January 1959).

2. The procedure by which the Committee of Ministers should discharge its obligations under Article 32 of the Convention. This provides that if the Commission is unable to bring about a friendly settlement, and if the matter is not referred to the Court, then the Committee of Ministers shall decide by a two-thirds majority whether a violation has occurred. The Convention is silent on the procedure to be used by the Committee. Two obvious questions are: if the case results from an individual petition, is the individual (or his representative) to be heard? And, when the Committee is considering the Report of the Commission on Human Rights is the Commission to be represented at the discussion?

There are of course some cases of doubt which may arise. The Committee is of opinion that, now that the Court of Human Rights has been set up, and that it contains a number of very distinguished jurists, it would be appropriate to confer on the Court the competence of giving an authoritative interpretation of disputed provisions of this sort.

(1) Other examples which may be mentioned are:

(a) Whether the Commission may refer to the Court under Article 48 an alleged breach of the Convention by a State which, under Article 46, has accepted its jurisdiction as compulsory on condition of reciprocity.

(b) Whether the term of office of a judge elected as the result of the admission of a new member State should be of nine years, under Article 40 (1), or whether it should be co-terminous with that of his colleagues.

(c) If a State accepts the compulsory jurisdiction of the Court under Article 46 and then extends the application of the Convention to its colonial territories under Article 63, whether the jurisdiction of the Court then extends to matters arising in the colonial territories. (It should be observed that para. 4 of Article 63 relates to the extension to colonial territories of the declarations provided for in Article 25 of the Convention, but not of those provided for in Article 46.)
Once this principle is admitted, the question arises: what procedure should be followed in order to seize the Court of such questions?

It may be thought better not to give the Contracting Parties the right to ask for advisory opinions on matters of this sort. Those who are already empowered to institute contentious proceedings before either the Commission or the Court should perhaps not be empowered to apply to that Court for an advisory opinion. Indeed, experience has shown that if a natural or a legal person has the choice of instituting judicial proceedings or requesting an opinion, he will select the procedure that seems more likely to favour his own cause. Thus, requests for an opinion have been submitted to the German Constitutional Court, on questions which, in substance, constituted a dispute between two organs of the Federal Republic. Such a procedure is not always conducive to the proper administration of justice, since an advisory opinion does not provide for a full hearing, which is the main feature of normal court procedure. For this reason, it might be preferable not to grant to States, or to natural or legal persons the right to apply to the Court for an advisory opinion on a matter which could become the object of contentious proceedings, lest the well-balanced system laid down by the Convention for the protection of Human Rights be upset.

It might, however, be thought desirable to allow States to request an advisory opinion in certain circumstances, for example on the conformity of proposed legislation with the provisions of the Convention.

Apart from such cases, it would seem desirable to grant the right to request advisory opinions to organs which cannot appear before the Court of Human Rights under the present system. This applies, for instance, to the Secretary General of the Council of Europe, who might have the right to consult the Court as depository of the instruments provided for in the Convention.

Furthermore, the Committee of Ministers might be empowered to ask the Court for an opinion - not on a question of substance, namely the violation of the Convention by one of the Contracting States - but purely on the detailed application of those provisions of the Convention under which the Committee of Ministers is entrusted with certain tasks under the existing system of collective guarantee. For instance, as already mentioned, the Committee of Ministers might seek the Court's opinion on the
interpretation of Article 32, with particular reference to the procedure to be followed by the Committee when discharging its responsibilities under that Article. The same might apply to Article 54 of the Convention.

Lastly, there is the possibility of a request for an opinion being made by the Consultative Assembly. Here likewise the Court might enlighten the Assembly as to the scope of the powers conferred upon it under the Convention on Human Rights, for instance, in regard to the election of members of the Commission (Article 21) and of the Court (Article 39). However, the possibility should probably be ruled out of the Consultative Assembly being empowered to request a "consultative opinion" on a specific situation which might be brought before the Commission and the Court by the jurisdictional procedure forming part of the existing system of collective protection.

Your Committee is therefore of opinion that it would be desirable to conclude a further Agreement or Protocol which would confer on the Court the competence to give advisory opinions on the interpretation of the Convention at the request of the Committee of Ministers, the Consultative Assembly and the Secretary General; and possibly also at the request of a Contracting Party provided that this is limited to matters which might not subsequently form the subject of contentious proceedings before the Court.

The draft Recommendation set out above is intended to present this proposal of your Committee to the Committee of Ministers. The Committee was, of course, aware that this proposal required further detailed examination, particularly as regards the procedure to be used to putting it into effect. It was of opinion, however, that such examination could be better carried out by a Committee of Experts representing member Governments than by a Parliamentary Committee. The ideas contained in the Committee's suggestions are therefore not necessarily in their final form and the recommendation seeks to make it clear that it will be for the experts, whom the Committee of Ministers is asked to convene, to undertake such further study as may be necessary and possibly revise the Committee's suggestions before they are submitted to the Governments for final approval.

In conclusion, it should be observed that in the Court of Human Rights the Council has a judicial organ of very high quality and great potentialities. The proposals made in this report for extending its competence are very modest.
The plan to invest it with jurisdiction to interpret European treaties contained in Doc. 1062 goes a little further, but still represents only a limited step in extending the competence of the Court. It should not be forgotten, however, that once the Court has begun to hear cases and to establish its authority – as undoubtedly it will – the possibility may well be envisaged of turning it into a European Court of Justice competent to deal with other matters, including perhaps disputes of a juridical nature between member States, as proposed by the Assembly in 1951. This however is a long-term prospective, compared with which your Committee's present proposals are only a modest beginning.
8. Extension of the competence of the European Court of Human Rights

(Debate on the Reports of the Legal Committee, Docs. 1061 and 1082, and votes on the draft Recommendation and draft Order)

THE PRESIDENT (Translation). - The next item in the Orders of the Day is the debate on the reports of the Legal Committee on the extension of the competence of the European Court of Human Rights.

The Legal Committee has presented two reports to the Assembly:

First, a report on the extension of the competence of the Court, as regards the interpretation of the Convention on Human Rights, Doc. 1061;

Secondly, a report on the recognition of the compulsory jurisdiction of the European Court of Human Rights as provided for in Article 46 of the Convention, Doc. 1082.

I propose that these two reports be considered in turn.

I first call M. Wahl, Rapporteur of the Legal Committee, to present his first report on the extension of the competence of the Court as regards the interpretation of the Convention on Human Rights, Doc. 1061.
M. WAHL (Federal Republic of Germany) (Translation). - I propose to be brief as possible, Mr. President.

A political body like the Council of Europe, that is set up under international treaty, is inevitably faced with a number of problems in the course of its work for which no provision is made under the Treaty.

These problems are of various kinds. There are firstly political problems, whose solution requires the agreement of the Contracting Parties. There are also problems of method, for instance, what procedure to adopt in certain characteristic situations. These problems are gradually worked out by those who act on behalf of the organisation concerned. You will no doubt recall, for instance, the appreciable extension of the activities of the United Nations as a result of the famous Resolution: "Unite for peace" and the strengthening of the powers of its Secretary-General.

There are also gaps in the Statute of the Council of Europe which could be filled by purely juridical means since they are genuinely legal problems. In such cases there is no reason why provisions of the Statute should not be defined or even supplemented by the normal procedures of international law for interpreting treaties.

For these difficulties it should be possible to refer to the European Court. The Legal Committee considers that such an extension of the Court's competence should be approached with very great caution, so as not to compromise the solution of the other two categories of problems. It was this consideration that decided the Committee not to formulate specific proposals.

Nevertheless, it is hoped that the Committee's Recommendation will make it easier for the Committee of Ministers to appeal to the European Court. To illustrate the different kinds of problems, I have quoted in my report examples of previous cases. But of course which category a case falls into is always a matter of discussion. None the less there are unquestionably times when recourse to the European Court would overcome the difficulty.

What is true of the statutory texts of the Council of Europe is equally true of the European Convention on Human Rights. This has several times given rise to problems of interpretation of a...
legal character, where an extension of the authoritative role of the European Court, on the basis of the distinctions I have just outlined, would be very useful.

THE PRESIDENT (Translation). - Does anyone wish to speak?

The Assembly will now vote on the draft Recommendation in Document 1061.

It reads as follows:

"The Assembly,

Considering that the Convention on Human Rights contains a number of provisions which are capable of varying interpretation;

Considering that it is desirable that in cases of doubt an authoritative interpretation should be given by some suitably qualified body;

Considering that the Court of Human Rights is best qualified for the purpose,

Recommends to the Committee of Ministers:

1. that it should convene a Committee of Experts with instructions to conclude an agreement that would confer on the European Court of Human Rights, in addition to its present competence to interpret the Convention on Human Rights, when a doubt has arisen of a legal character, even though no case has been brought;

2. that it should submit the draft Agreement prepared by the Committee of Experts to the Assembly for an opinion before signature by member Governments."

Under Rules 34 and 35 of the Rules of Procedure, the vote on a draft Recommendation considered as a whole must be taken by roll-call; the majority required being two-thirds of the votes cast, comprising at least one-third of the Representatives to the Assembly.

However, if the Assembly were unanimous and there were no objections to this draft Recommendation, we might save the time required for a roll-call.

Are there any objections to the draft Recommendation in Document 1061?

Are there any abstentions?

I therefore declare the draft Recommendation in Document 1061 adopted unanimously.

The Recommendation will be published as No. 232.
RECOMMENDATION 232 (1960)(1)

on the extension of the competence of the European Court of Human Rights as regards the interpretation of the Convention on Human Rights

The Assembly,

Considering that the Convention on Human Rights contains a number of provisions which are capable of varying interpretation;

Considering that it is desirable that in cases of doubt an authoritative interpretation should be given by some suitably qualified body;

Considering that the Court of Human Rights is best qualified for the purpose,

Recommends to the Committee of Ministers:

1. that it should convene a Committee of Experts with instructions to conclude an agreement that would confer on the European Court of Human Rights, in addition to its present competence defined in Article 45 of the Convention, the competence to interpret the Convention on Human Rights, when a doubt has arisen of a legal character, even though no case has been brought;

2. that it should submit the draft Agreement prepared by the Committee of Experts to the Assembly for an opinion before signature by member Governments.

(1) Assembly Debate on 22nd January 1960 (30th Sitting) (see Doc. 1061, Report of the Legal Committee).

Text adopted by the Assembly on 22nd January 1960 (30th Sitting).
CHAPTER II

WORK OF THE COMMITTEE OF MINISTERS

February 1960 to September 1960
1. Extract from the Conclusions of the 82nd meeting of the Ministers' Deputies: 16th to 23rd February 1960.


3. Extract from the Conclusions of the 83rd meeting of the Ministers' Deputies: 22nd to 25th March 1960.

4. Extract from the Conclusions of the 87th meeting of the Ministers' Deputies: 23rd to 27th May 1960.

5. Extract from the Conclusions of the 88th meeting of the Ministers' Deputies: 20th to 22nd June 1960.

6. Extract from the Conclusions of the 89th meeting of the Ministers' Deputies: 13th to 16th September 1960.
CONCLUSIONS
OF THE 82ND MEETING OF THE MINISTERS' DEPUTIES
held in Strasbourg from 16th to 23rd February 1960
(Doc. Committee of Ministers, 1960 I p. 14)

Point II B

(k) Human Rights - Extension of the competence of the European Court concerning interpretation of the Convention - Proposal to convene a Committee of Experts - Recommendation 232

The Deputies instructed the Directorate of Human Rights to prepare a memorandum stating the views of the Assembly regarding the proposals made in the above-mentioned Recommendation and describing the procedure followed by the International Court of Justice at The Hague with regard to requests for an advisory opinion sent to that Court.

They agreed to resume consideration of the Recommendation at their next meeting.
HUMAN RIGHTS

Recommendation 232

Extension of the competence of the European Court

Memorandum by the Directorate of Human Rights

1. Article 45 of the European Convention on Human Rights states that

"The jurisdiction of the Court shall extend to all cases concerning the interpretation and application of the present Convention which the High Contracting Parties shall refer to it in accordance with Article 48."

A case may be brought before the Court only when:

- a dispute arises over the interpretation or application of the Convention;

- the Contracting Party concerned is subject to the compulsory jurisdiction of the Court or has accepted its jurisdiction ad hoc;
- the matter is referred to the Court by the Commission, by the Contracting Party of which the applicant is a national, by the Contracting Party which brought the case before the Commission or by the Contracting Party against whom the application is directed.

Only in such cases and under the above conditions can the European Court exercise its jurisdiction in accordance with the guarantee system, provided by the Convention.

2. By adopting Recommendation 232, the Assembly suggests that it would be appropriate, after the Court had been constituted, to extend its competence, which only existed at present in regard to the hearing of disputes, by conferring upon it the power to give advisory opinions.

The Rapporteur for this subject in the Assembly, Mr. Wahl, a professor of international law has given in his report several examples of situations which he believes justify the extension of the Court's powers in this way. He maintains that legal problems may arise in connection with the application of the Convention even though there are no contentious proceedings between two or more Contracting Parties (Cf. Mr. Wahl's Report, Doc. AS 1061).

3. The Assembly's proposal is no doubt based on the powers conferred on the Permanent Court of International Justice and the International Court of Justice which, in addition to hearing disputed cases, have the power to give advisory opinions.
Article 96 of the United Nations Charter reads as follows:

"1. The General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question.

2. Other organs of the United Nations and specialised agencies, which may at any time be so authorised by the General Assembly, may also request advisory opinions of the Court on questions arising within the scope of their activities".

Article 65 of the Statute of the International Court of Justice states that:

"1. The Court may give an advisory opinion on any legal question at the request of whatever body may be authorised by or in accordance with the Charter of the United Nations to make such a request.

2. Questions upon which the advisory opinion of the Court is asked shall be laid before the Court by means of a written request containing an exact statement of the question upon which an opinion is required, and accompanied by all documents likely to throw light upon the question". (1)

4. The records show that both the Permanent Court and the International Court have frequently been called upon to give advisory opinions.

From 1922 to 1940, the Permanent Court of International Justice delivered 31 judgments and 26 legal opinions.

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(1) The competence of the Permanent Court was defined in Article 14 of the League of Nations Covenant and Articles 65 to 68 of its Statute.
The International Court of Justice, between 1946 (its inauguration was on 18th April 1946) and 1st July 1959, delivered 10 advisory opinions and is now preparing a further opinion. During that period the number of disputes referred to it was 32.

The following are among the most important points on which advisory opinions have been given:

- the frontiers of Czechoslovakia and Poland (6th December 1923); Serbia and Albania (4th September 1924); Turkey and Irak (21st November 1925);

- jurisdiction of the Danube Commission (8th December 1927);

- requirements for the admission of new members to the United Nations Organisation (28th May 1948),

- the interpretation of the peace treaties with Bulgaria, Hungary and Rumania (18th July 1950);

- reservations in respect of the Convention on Genocide (25th May 1951);

- the effects of decisions rendered by the United Nations Administrative Tribunal (13th April 1954).

6. It should be borne in mind that the International Court of Justice is "the principal judicial organ of the United Nations" (Article 92 of the Charter) and is "open to the States" parties to its Statute (Article 35 of the Statute).
Its general jurisdiction extends accordingly to "all legal disputes", which explains the number and variety of the matters referred to it for an advisory opinion.

In the case of the European Court, however, the Assembly's Recommendation is confined to legal questions arising out of the operation of the Convention on Human Rights.

It is not sought to empower the Court to give advisory opinions on any matter referred to it by Member States of the Council but only on those questions which are within the scope of the Convention and which do not constitute disputes.

7. It should be noted, lastly, that the Assembly's Recommendation asks for a committee of governmental experts to be convened to draft an agreement whereby only the Contracting Parties to the Convention would recognise the power of the European Court to deliver advisory opinions.

Should the Assembly's request be granted, the Committee of Experts will be called upon to define the Court's competence in this matter and to establish the procedure to be followed. They will discuss the points of law raised by the Recommendation.

If the terms of Recommendation 232 have met with reticence in certain quarters, it is because reference is made only to doubts as to the "interpretation" of the Convention and of "provisions which are capable of varying interpretation", as well as to the Court's "competence to interpret the Convention on Human Rights ... even though no case has been brought".
The problem might perhaps appear simpler if the recommendation were merely to ask that the Court be authorised to deliver advisory opinions on "any legal question" arising out of the application of the Convention. This is the expression used in Article 96 of the United Nations Charter and Article 65 of the Statute of the International Court of Justice and its use in the Recommendation would doubtless do much to simplify the experts' task.
CONCLUSIONS

OF THE 83RD MEETING OF THE MINISTERS' DEPUTIES

held in Strasbourg from 22nd to 25th March 1960

(Doc. Committee of Ministers, 1960 I p. 28)

VIII. HUMAN RIGHTS - (Concl. (60) 83, point II B (k) and (m)

(a) Extension of the competence of the European Court -
Proposal to convene a Committee of Experts -
Recommendation 232 (CM (60) 36)

The Director of Human Rights made a statement on the implications of Assembly Recommendation 232 on the extension of the competence of the European Court of Human Rights. In this Recommendation the Assembly requests the Committee of Ministers to appoint a Committee of Experts to draw up an agreement whereby, in addition to its present competence, as set out in Article 45 of the Convention, the Court will be empowered to give advisory opinions on the interpretation of the Convention, even though no case has been brought.

The Austrian, Danish, French, German, Greek and Luxembourg Representatives were in favour of forming the suggested Committee of Experts.

The Belgian Representative also supported it, but requested that its terms of reference be formulated with care. In his view, the additional competence conferred on the Court should be limited to legal questions relating to the Convention.

The Representative of the United Kingdom was in favour of appointing the Committee of Experts but said that his Government's agreement implied no modification of its earlier position with regard to Article 46 of the Convention.

The Deputies decided to resume consideration of this question at their first meeting after the end of the first part of the Assembly's 12th Session.
CONCLUSIONS
OF THE 87TH MEETING OF THE MINISTERS' DEPUTIES
held in Strasbourg from 23rd to 27th May 1960
(Doc. Committee of Ministers, 1960 I p. 71)

VII. HUMAN RIGHTS

(a) Extension of the competence of the European Court -
Proposal to convene a Committee of Experts -
Recommendation 232 - (CM (60) 36 and Concl. (60) 83,
Point VIII (a))

Having heard the Director of Human Rights, and after a
broad exchange of views on the advisability of convening a
Committee of Experts instructed, as proposed in Recommendation
232 of the Consultative Assembly, to draw up an Agreement by
virtue of which the European Court, in addition to its present
powers as defined in Article 45 of the Convention, would be
competent, in the absence of any dispute, to render advisory
opinions on the interpretation of the Convention, the Deputies
decided to postpone their decision to their 88th Meeting.

In the course of the discussion the delegations of the
following Governments declared themselves in favour of convening
the Committee of Experts suggested by Recommendation 232, subject
to precise definition of its terms of reference: Austria, Belgium,
Denmark, France, Federal Republic of Germany, Greece, Iceland,
Luxembourg, Turkey and United Kingdom.

The Irish Representative was also in favour of convening
such a committee, on the understanding that its terms of
reference should not be restricted to the study of the points
raised in Recommendation 232 but would extend to other matters
relating to the Human Rights Convention.

The Netherlands, Norwegian and Swedish delegations were
opposed to the appointment of this Committee of Experts.
CONCLUSIONS

OF THE 88TH MEETING OF THE MINISTERS' DEPUTIES
held in Strasbourg from 20th to 22nd June 1960
(Doc. Committee of Ministers, 1960 I p. 77)


VII. HUMAN RIGHTS - (Concl. (60) 87, point VII)

(a) Extension of the competence of the European Court -
Proposal to convene a Committee of Experts -
Recommendation 232 - (CM (60) 36)

Resuming consideration of Recommendation 232, the Deputies
examined a draft Resolution submitted by the Secretariat concern­
ing the setting up of a Committee of Experts and the terms of
reference to be assigned to it.

The Deputies did not consider it desirable to appoint two
experts to participate at the expense of the Council of Europe
in the work of that Committee, the setting up of which has in
principle been agreed upon. They will decide at their 89th
meeting on the precise terms of the Resolution to be adopted in
which the Committee's terms of reference will be specified.
CONCLUSIONS
OF THE 89TH MEETING OF THE MINISTERS' DEPUTIES
held in Strasbourg from 13th to 16th September 1960

X. HUMAN RIGHTS - (Concl. (60) 88, point VII)

(a) Extension of the competence of the European Court -
Proposal to convene a Committee of Experts -
Recommendation 232 - (CM (60) 36)

The Deputies adopted the following Resolution:

Resolution (60) 20 (adopted on 15th September 1960)

The Committee of Ministers,

Having regard to Recommendation 232 (1960) of the
Consultative Assembly concerning the conferring on the European
Court of Human Rights of the competence, in the absence of any
dispute, to render advisory opinions on the interpretation of
the European Convention on Human Rights;

Having regard to Resolution (60) 6 concerning the convening
of a committee of governmental experts to study problems relating
to the European Convention on Human Rights,

Instructs the said committee:

to determine whether it is desirable to conclude an agree-
ment on the basis of the proposals made in Recommendation 232
(1960) of the Consultative Assembly.

The Irish, Italian and Netherlands Representatives abstained.
The Secretary General said he planned to convene the Committee of
Experts in question from 7th to 12th November 1960.
CHAPTER III

WORK OF THE COMMITTEE OF EXPERTS ON HUMAN RIGHTS

November 1960 to May 1961
1. Letter No. H 14.920 sent on 30th September 1960 by the Secretary General to the Ministers for Foreign Affairs of Member Countries convening the Committee of Experts on Human Rights.

2. Memorandum on the proceedings of the Committee's first meeting held in Strasbour from 7th to 11th November 1960 (DH/Exp (60) 26 of 17th November 1960).


4. Memorandum of the Human Rights Directorate on two points of the proceedings at the Committee's first meeting (DH/Exp (61) 1 of 22nd March 1961).


6. Proposals relating to the reports made by: the Netherlands Expert (DH/Exp (61) 4); the Secretariat (DH/Exp (61) 6); the Greek Expert (DH/Exp (61) 7); the Austrian Expert (DH/Exp (61) 8); the United Kingdom Expert (DH/Exp (61) 9); the Italian Expert (DH/Exp (61) 10); the German Expert (DH/Exp (61) 11).


Letter No. H 14.920 sent by the Secretary General to the Ministers for Foreign Affairs of Member Countries convening the Committee of Experts on Human Rights

30th September 1960

Your Excellency,

In conformity with Resolutions (60) 6 and (60) 20, copies of which are enclosed, adopted by the Ministers’ Deputies during their 83rd Meeting from 22nd to 25th March 1960 /Concl. (60) 83, Item VIII (b) / and 89th Meeting from 13th to 16th September 1960 /Concl. (60) 89, Item X (a) / respectively, I have the honour to convene the Committee of Experts on problems relating to the European Convention on Human Rights to a meeting to be held at the Council of Europe in Strasbourg from 7th November at 3 p.m. until 12th November 1960.

Under the terms of the aforementioned Resolutions the Committee’s task will be:

(1) to study problems relating to the European Convention on Human Rights;

(ii) to determine the desirability of concluding an agreement on the basis of the proposals made in Recommendation 232 (1960) of the Consultative Assembly.

The travel and subsistence expenses of one expert for each member country will be borne by the Council of Europe. The rules governing the reimbursement of such expenses are as follows:

"1. Cash advances in French francs may not exceed the amount due in respect of the subsistence allowance, travelling expenses being reimbursed later in the currency in which they were incurred.

2. Supplements, sleepers, etc. will only be considered if the appropriate vouchers are submitted with the request for reimbursement."

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[Signature]
In connection with this meeting I am transmitting to your Department, under separate cover, copies of the following working documents:

(a) a memorandum for the Experts prepared by the Directorate of Human Rights \DH/Exp (60) 1;

(b) Recommendation 234 (1960) of the Consultative Assembly;

(c) Report on the Second Protocol to the Convention on Human Rights drafted for the Legal Committee of the Assembly by Mr. Hermod Lannung (Doc. 1057);

(d) Resolution (60) 6 of the Committee of Ministers;

(e) the translation of a memorandum by the Austrian Government on the proposed Second Protocol \DH/Exp (60) 2;

(f) Recommendation 232 (1960) of the Consultative Assembly;

(g) Report prepared by Mr. Wahl for the Legal Committee of the Assembly on the extension of the competence of the European Court of Human Rights as regards the interpretation of the Convention on Human Rights (Doc. 1061);

(h) Resolution (60) 20 of the Committee of Ministers.

I should be grateful if you would kindly let me know the name(s) of the expert or experts whom your Government proposes to send to this meeting.

I remain,

Your Excellency's obedient Servant,

Lodovico Benvenuti
Secretary-General

Enclosures: Res. (60) 6
(60) 20
Strasbourg, 17th November 1960

COMMITTEE OF EXPERTS ON PROBLEMS RELATING TO THE CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS

DESIRABILITY OF CONCLUDING AN AGREEMENT TO CONFER ADVISORY POWERS ON THE EUROPEAN COURT OF HUMAN RIGHTS

(Memorandum by the Human Rights Directorate on the proceedings at the Committee's first meeting held in Strasbourg from 7th to 11th November 1960)

I. INTRODUCTION

1. The Committee of Governmental Experts convened in accordance with Resolution (60) 6 of the Committee of Ministers met at the Council of Europe from 7th to 11th November 1960, with Mr. Ugo CALDARELLA (Italy) in the Chair. The list of those present is appended.

2. Resolutions (60) 6 and 20 of the Committee of Ministers assign to the Committee a two-fold task:

- to study general problems relating to the European Convention on Human Rights; and, more specifically,

- to determine whether it is desirable to conclude an agreement on the basis of the proposals made in Recommendation 232 (1960) of the Consultative Assembly.

A 58.351
3. The present memorandum constitutes a record of the Committee's proceedings at the present meeting with regard to its second task. The work in connection with its first task will be the subject of a separate memorandum.

4. It was decided to hold the next meeting at the Council of Europe from 24th to 29th April 1961, subject to the approval of the Secretary General.

II. COMMENTS

5. The Committee took as a working basis the Assembly's Recommendation 232 (1960) and the accompanying explanatory memorandum presented by the Rapporteur, Mr. Wahl, on behalf of the Legal Committee (Doc. 1061).

6. It seemed to the Committee that the desirability of empowering the Court to render advisory opinions on the interpretation of the Convention and its Protocols depended on the limits ascribed to such powers. In the Committee's view they should be restricted in three respects:

   (1) The subject of the opinions

7. The Committee held firstly that the Court ought to be empowered to give opinions on legal questions only.

       The notion of "legal questions" is derived from Articles 96 of the United Nations' Charter, 65 of the Statute of the International Court of Justice, 82 and 83 of the Rules of that Court.

       Most experts thought that when it was asked for advisory opinions the Court might be called upon to define this term.

       It was agreed, however, that the Court could not give opinions on matters of policy, this being the prerogative of Contracting Parties or the Committee of Ministers.

       Nor could the Court make use of its powers of interpretation to fill up gaps in the text of the Convention and its Protocols. Its competence should not extend to any question which would entail adding rules to the provisions of the Convention and Protocols, unless such rules are a simple consequence thereof.
The enactment of new rules can result only from an agreement between all the Contracting Parties.

8. All the experts agreed that the Court should not have power to render advisory opinions on the substance of the Convention.

The differences of opinion in the Committee revolved around the manner in which this should be stated.

Certain experts preferred to say that the Court might not consider requests for an interpretation relating to matters which of their nature might give rise to proceedings before any of the bodies set up by the Convention (Commission and Court) or concerned with its application (Committee of Ministers).

Others thought that this was not sufficient and suggested excluding in addition any questions relating to the definition, scope or safeguard of the rights and freedoms enumerated in the Convention and its Protocols.

Others again recommended the less elastic provision that opinions might not be rendered on questions relating to any of the rules laid down in Section I of the Convention or the first three Articles of the Protocol.

(2) Bodies and institutions entitled to seek the Court's opinion

(a) The Committee of Ministers:

9. All the experts were agreed that the Committee of Ministers ought to be entitled to seek the Court's advisory opinion on any matters complying with the above conditions.

10. Most of the experts were of the opinion that the Committee of Ministers alone should be entitled to apply to the Court for an advisory opinion, whilst the Contracting Parties, the Consultative Assembly, the Commission and the Secretary General should not have the right to do so.

(b) The Contracting Parties:

11. The meeting was practically unanimous that Contracting Parties should not be entitled to apply to the Court for an opinion, although one expert thought that they should be able to do so in certain circumstances.
(c) The Consultative Assembly:

12. With regard to the Consultative Assembly, there were two points of view:

- According to some experts, the Consultative Assembly should not be entitled to apply to the Court for an opinion;

- Other experts thought that the Assembly should be able to seek an opinion on any legal point arising in connection with the exercise of its functions under the terms of the Convention.

Nevertheless, the Committee as a whole found that the Assembly was entitled, by virtue of Article 23(a) of the Statute of the Council of Europe, to make recommendations on matters within the aim and scope of the Council of Europe, and that therefore it might recommend that the Committee of Ministers seek the Court's opinion on any given point; in this case, it would be for the Committee of Ministers, after discussing such a recommendation, to decide what action should be taken on it.

(d) The Commission:

13. With regard to the Commission, the Committee was practically unanimous that it should not be entitled to apply to the Court for an opinion.

(e) The Secretary General:

14. With regard to the Secretary General, two points of view were expressed:

- According to the majority of experts, the Secretary General should not be empowered to apply to the Court;

- Some experts thought, however, that the Secretary General should be able to seek the Court's opinion on legal points arising strictly out of the exercise of his functions under the terms of the Convention.

The Committee found that, in any event, the Secretary General was entitled to recommend to the Committee of Ministers that the Court's advisory opinion be sought on certain matters; in this case it would be for the Committee of Ministers to decide what action was to be taken on his recommendation.
(3) Effects of the Court's opinion

The Committee considered that the Court's opinions and the interpretations they contained should be in no way binding on the Contracting Parties, on the Committee of Ministers or on any other authority.

In this way, the powers of interpretation conferred on the Court would not interfere with the right of the Contracting Parties to establish an authoritative interpretation of the Convention by formal agreement among themselves.

III. PRELIMINARY DRAFT CONCLUSIONS PROVISIONALLY ADOPTED

16. At the end of its discussions, the Committee provisionally adopted three alternative conclusions which will serve as a basis for further discussion:

17. Alternative A

The Committee considers that it is desirable to conclude an agreement empowering the European Court of Human Rights to render advisory opinions on the interpretation of the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols and authorising the Committee of Ministers to seek opinions on legal questions which are not of a nature to give rise to proceedings before any of the bodies set up by the Convention or concerned with its application.

18. Alternative B

... on legal questions which are not of a nature to give rise to proceedings before any of the bodies set up by the Conventions or concerned with its application and which do not require an interpretation relating to the definition, scope or safeguard of the rights and freedoms set out in the Convention and its Protocols.

19. Alternative C

... on legal questions unrelated to any of the rules laid down in Section I of the Convention and Articles 1 to 3 of the Protocol.
APPENDIX

COMMITTEE OF EXPERTS ON PROBLEMS RELATING TO THE CONVENTION ON HUMAN RIGHTS

List of experts present
(7th to 12th November. 1960)

<table>
<thead>
<tr>
<th>Country</th>
<th>Name</th>
<th>Position and Details</th>
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<tr>
<td>AUSTRIA</td>
<td>Mr. W. PAHR</td>
<td>Ministerial Commissioner, Constitutional Department</td>
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<td>Federal Chancellery</td>
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<td>VIENNA</td>
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<td>BELGIUM</td>
<td>Mr. Anthony GOMREE</td>
<td>Magistrate attached to the Ministry of Justice</td>
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<td>BRUSSELS</td>
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<tr>
<td>DENMARK</td>
<td>Mr. Niels MADSEN</td>
<td>Head of Department, Ministry of Justice</td>
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<td>COPENHAGEN</td>
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<tr>
<td>FRANCE</td>
<td>Mr. GODARD</td>
<td>Assistant Director in the Ministry of the Interior</td>
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<td>PARIS</td>
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<td>FEDERAL REPUBLIC OF GERMANY</td>
<td>Mr. BERTRAM</td>
<td>Counsellor, Ministry of Justice</td>
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<td>BONN</td>
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<td>Mr. HEUSELER</td>
<td>First Secretary, Ministry of Foreign Affairs</td>
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<td>BONN</td>
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<td>GREECE</td>
<td>Mr. Phaidon VEGLERIS</td>
<td>Faculty of Law, University of Athens, 7, rue Zalacosta</td>
</tr>
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<td></td>
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<td>ATHENS</td>
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<tr>
<td>ICELAND</td>
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<td>not represented</td>
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</table>
IRELAND
Mr. MORRISSEY
Legal Adviser, Dept. of External Affairs, DUBLIN

Mr. OLDEN
Administrative Officer, Dept. of Justice, DUBLIN

ITALY
Mr. Ugo CALDARERA (Chairman)
Judge of the Court of Appeal, Adviser, Legal Department, Ministry of Foreign Affairs, ROME

Mr. Marco VIANELLO-CHIODO
Attache, Ministry of Foreign Affairs, ROME

LUXEMBOURG
Mr. Eugène MULLER
Administrative Secretary, Ministry of Justice, LUXEMBOURG

NETHERLANDS
Mr. H.G. SCHERMERS
Assistant Legal Adviser, Ministry of Foreign Affairs, THE HAGUE

NORWAY
...........
not represented

SWEDEN
Mr. L. KELLBERG
Head Legal Affairs Division, Ministry of Foreign Affairs, STOCKHOLM

TURKEY
Mr. Ilhan UNAT
Faculty of Political Science, University of Ankara, ANKARA

UNITED KINGDOM
Mr. P.L. BUSCHE-FOX
Assistant Legal Adviser, Foreign Office, LONDON
Strasbourg, 24th April 1961

DESIABILITY OF CONCLUDING AN AGREEMENT TO CONFER ADVISORY POWERS ON THE EUROPEAN COURT OF HUMAN RIGHTS

Draft conclusions by the Greek Government expert

Draft Alternative D

"..... empowering the European Court of Human Rights to render advisory opinions, at the request of ......, on questions concerning the interpretation of the Convention on Human Rights, other than those relating to the scope or safeguard of the rights set out in the Convention and its Protocols."
Committee of Experts
on problems relating to the Convention
for the Protection of Human Rights and
Fundamental Freedoms

DESIRABILITY OF CONCLUDING AN AGREEMENT
TO CONFER ADVISORY POWERS ON THE
EUROPEAN COURT OF HUMAN RIGHTS

(Memorandum by the Human Rights Directorate)

The Human Rights Directorate wishes to draw the attention of the Committee of Experts to two delicate points in para. 7 of Memorandum DH/Exp (60) 26 (p. 2-3) on the proceedings at the Committee's first meeting, held to consider the desirability of conferring advisory powers on the Court.

The first of these points concerns limiting the advisory competence of the Court to legal questions; the second, refusing the Court competence to "fill lacunae".

1. Limitation of advisory competence to legal questions

Paragraph 7 of the Memorandum states:

"The Committee held that the Court ought to be empowered to give opinions on legal questions only.

The notion of 'legal questions' is derived from Articles 96 of the United Nations Charter, 65 of the Statute of the International Court of Justice, and 82 and 83 of the Rules of that Court."
Most Experts thought that when it was asked for advisory opinions, the Court might be called upon to define this term."

(a) In view of the jurisprudence of the International Court of Justice, relating to the provisions quoted in the Memorandum, it might be asked whether a question concerning the interpretation of a Convention should not be considered as being of necessity a legal one. In the advisory opinion given on 28th May 1948 on the conditions governing the admission of a State to membership in the United Nations, the International Court of Justice decided as follows (Reports of Judgments 1947-1948, page 61):

"... Understood in this light, the question, in its two parts, is and can only be a purely legal one. To determine the meaning of a treaty provision - to determine, as in this case, the character (exhaustive or otherwise) of the conditions for admission stated therein - is a problem of interpretation and consequently a legal one.

It has, nevertheless, been contended that the question put must be regarded as a political one and that, for this reason, it falls outside the jurisdiction of the Court. The Court cannot attribute a political character to a request which, framed in abstract terms, invites it to undertake an essentially judicial task, the interpretation of a treaty provision. It is not concerned with the motives which may have inspired this request, nor with the considerations which, in the concrete cases submitted for examination to the Security Council, formed the subject of an exchange of views which took place in that body. It is the duty of the Court to envisage the question submitted to it, only in the abstract form which has been given to it; nothing which is said in the present opinion refers, either directly or indirectly, to concrete cases or to particular circumstances."

The Court confirmed this reported decision in the advisory opinion rendered on 3rd March 1950 on the competence of the General Assembly to admit a State to the United Nations (Reports of Judgments 1950, pages 6-7):

"The Court, says the advisory opinion, notes that the General Assembly has requested it to give a legal interpretation of paragraph 2 of Article 4 (of the
Charter). As the Court already stated ... (ICJ Reports 1947-1948, page 61), it 'cannot attribute a political character to a request which, framed in abstract terms, invites it to undertake an essentially judicial task, the interpretation of a treaty provision'."

The Committee of Experts seems to have considered that matters concerning the interpretation of the Convention might not fall within the competence of the Court, either because they were political matters or because they were matters of policy.

The question to be considered is whether this point of view is in keeping with the position adopted by the International Court of Justice in the two opinions cited above (1).

(b) Should the Committee specify whether the Court would be competent to give opinions solely on abstract legal questions or on any legal question, abstract or otherwise?

Article 14 of the Covenant of the League of Nations contained the following two provisions relating to the competence of the PCIJ:

(1) Compare:

1. Article 36 (2) of the Statute of the International Court of Justice:

"The States parties to the present Statute may, at any time, declare that they recognise as compulsory ipso facto and without special agreement in relation to any other State accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning:

(a) the interpretation of a treaty ... "

2. Article 1 of the European Convention for the Peaceful Settlement of Disputes:

"The High Contracting Parties shall submit to the judgment of the International Court of Justice all international legal disputes which may arise between them including, in particular, those concerning: (a) the interpretation of a treaty; ... "
"The Court shall be competent to hear and determine any dispute of an international character which the Parties thereto submit to it. The Court may also give an advisory opinion upon any dispute or question referred to it by the Council or by the Assembly."

Article 96 of the Charter of the United Nations, signed in San Francisco on 24th June 1945, substituted the expression "legal question" for the words "question" and "dispute".

1. The General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question.

2. Other organs of the United Nations and specialised agencies, which may at any time be so authorised by the General Assembly, may also request advisory opinions of the Court on legal questions arising within the scope of their activities."

Doctrinal controversies exist as to whether the concept "legal question" has a wider or narrower significance than "dispute or question".

In the advisory opinion given on 28th May 1948, the International Court of Justice decided as follows (Reports 1947-1948, page 61):

"It has also been contended that the Court should not deal with the question couched in abstract terms. According to Article 96 of the Charter and Article 65 of the Statute, the Court will give an advisory opinion on any legal question, abstract or otherwise." (1)

2. Incompetence of the Court to "fill lacunae"

Paragraph 7 of the said Memorandum also states:

(1) In an individual opinion accompanying the advisory opinion of the Court of 28th May 1948, Judge Azevedo considered that the Court should give advisory opinions only on "abstract" questions, thus dispensing with "advisory arbitration", that is to say the settling of a legal dispute by an opinion and sometimes without the consent of the interested parties.

(See his individual opinion, Reports 1947-1948, pages 73-74).
"Nor could the Court make use of its powers of interpretation to fill up gaps in the text of the Convention and its Protocols. Its competence should not extend to any question which would entail adding rules to the provisions of the Convention and Protocols, unless such rules are a simple consequence thereof.

The enactment of new rules can result only from an agreement between all the Contracting Parties."

In a recent work entitled "Les problèmes des lacunes en droit international" (Paris, 1959), L. Siorat, after enquiring how far a Court is competent to fill lacunae in international law, concludes as follows (page 251):

"It is apparent from an analysis of leading cases that a judge will refuse to give a decision where to remedy certain deficiencies in the regulations, would, in his opinion, mean exceeding his competence. In the exercise of his functions, he may encounter two categories of deficiencies: those which do not prevent him from giving a decision; those which oblige him to refuse to give a decision.

The first category includes the obscurities, logical inadequacies and silences (or gaps) in law; the second, inadequacies with regard to social matters. In other words, a judge is empowered not only to interpret the rules of law (to elucidate obscurities and make up logical deficiencies) but also to fill in the gaps; the possibility of remedying the deficiencies which exist with regard to social matters is not part of ordinary law governing judicial functions.

But this competence, it should be remembered - and this too becomes apparent from an analysis of jurisprudence - does not derive from any specific statutory provision, but merely from the nature of his functions. As regards the recognised competence of a judge to fill lacunae, we may, therefore, conclude that: the competence of a judge to fill lacunae is not expressly stated in the document appointing him to office, but is conferred on him as a necessary consequence, as being essential to the performance of his duties (formula taken from the advisory opinion of the ICJ; Reparation for injuries suffered in the service of the United Nations, 1949, page 179). (1)

(1) For the theory of implicit powers and functional competence, see, particularly, P. Reuter, Institutions Internationales, Paris 1955, pages 312-316.
Strasbourg, 25th April 1961

Desirability of concluding an agreement to confer advisory powers on the European Court of Human Rights

DRAFT REPORT

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

Recommendation 232 (1960) of the Consultative Assembly advocates conferring "on the European Court of Human Rights, in addition to its present competence defined in Article 45 of the Convention, the competence to interpret the Convention on Human Rights, when a doubt has arisen of a legal character, even though no case has been brought".

The Committee discussed this matter at two meetings held under the Chairmanship of Mr. Ugo Caldarera, from 7th to 11th November 1960 and from 24th to 29th April 1961.

The Experts did not feel called upon at this stage to prepare a draft agreement conferring advisory powers on the Court, since their terms of reference were confined to the expression of an opinion on the desirability or otherwise of concluding such an agreement.
Bearing this in mind, and in the light of their discussions, the Committee agreed unanimously that it was desirable to conclude an agreement conferring on the European Court of Human Rights the power to give advisory opinions on matters relating to the Convention on Human Rights and its Protocols subject to the conditions set out below.

The Committee agreed with the Consultative Assembly that there were legal points of a somewhat technical character relating to the application or interpretation of the Convention on which it would be desirable to have the Court's opinion, for example, questions relating to the judge's term of office, procedure for the election of judges, notification of Notes Verbales of derogation, etc.

The following examples define the sphere in which the Court should exercise its advisory powers:

1. Requests for an opinion would be concerned solely with legal questions . . . .

- Alternative A
  "which are not of a nature to give rise to proceedings before any of the bodies to which the Convention refers".

- Alternative B
  "which are not of a nature to give rise to proceedings before any of the bodies competent under the terms of the Convention".

- Alternative C
  Add to A or B
  "and which do not require an interpretation relating to the definition, scope or safeguard of the rights and freedoms set out in the Convention and its Protocols".

- Alternative D
  "other than those relating to rules laid down in 'Section I of the Convention or Articles 1 to 3 of the First Protocol".

- Alternative E
  "other than those relating to the substance or safeguard of the rights and freedoms enumerated in the Convention and its Protocols".
2. Only the Committee of Ministers would be entitled to seek the opinion of the Court. The Contracting Parties, the Consultative Assembly, the European Commission of Human Rights and the Secretariat General could, however, if they wished, seek the Court's opinion through the Committee of Ministers.

3. Advisory opinions rendered by the Court would not be binding.
Desirability of concluding an agreement
to confer advisory powers on the
European Court of Human Rights

Proposal by the Expert of the Netherlands

Replace item 2 at the bottom of page 2 of document DH/Exp (61) 2
by the following:-

2. Only the Committee of Ministers would be entitled to
seek the opinion of the Court.

Under Articles 23 and 29 of the Statute of the Council
of Europe and Article 4 of the Rules of Procedure of the
Committee of Ministers, the members of the Council, the
Consultative Assembly and the Secretary General can put
a proposal to ask an advisory opinion on the agenda of
the Committee of Ministers for their consideration.
(The Committee considers desirable that such possibility
should also be given to the European Commission of
Human Rights).
CONSIDERATION OF THE ADVISABILITY
OF CONCLUDING AN AGREEMENT GRANTING CONSULTATIVE POWERS
TO THE EUROPEAN COURT OF HUMAN RIGHTS

Secretariat Proposal

"The Committee of Experts considers that it is desirable to conclude an agreement granting the European Court of Human Rights the power to express consultative opinions on any questions of a legal nature regarding the Convention on Human Rights and the Protocols thereto at the request of the Committee of Ministers.

The Committee of Experts points out that requests for opinion must relate only to legal questions which because of their nature cannot be submitted to the organs [to which the Convention refers] or [having jurisdiction under the Convention]."
Strasbourg, 28th April 1961

COMMITTEE OF EXPERTS
ON PROBLEMS RELATING TO THE CONVENTION FOR THE
PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS

Desirability of concluding an agreement
to confer advisory powers on the
European Court of Human Rights

Memorandum on Document DH/Exp (61) 2
by the delegate for Greece

General comments

As what is required of us by the Committee of Ministers
is a short report giving the substance of the Committee's views
on Recommendation 232 (1960), I hardly think it necessary to
include in it all our various attempts at drafting an Article
on the advisory powers of the Court, giving word for word all
the variants between which we ultimately failed to decide.
A report of that kind, presenting the Committee of Ministers
with all our tentative efforts rather than the basic ideas we
agreed upon, would not, I feel, altogether be what is expected
of us.

The best plan seems to be to submit a continuous report,
not split up by including the five drafts we considered, some
of which, in any case, differed very little from one another
Such a report would distinguish between the main points, on
which we were agreed, the secondary points and those concerned
merely with the actual drafting of the final text.

A 61.883
TN 4013/EMG/HRG

Restricted
Detailed comments

(a) (Page 1, para. 4). The statement that "the Experts did not feel called upon at this stage to prepare a draft agreement ..." could be omitted. All that is needed is a positive statement as to what the Committee understood was required of it with regard to Recommendation 232 (1960).

(b) (Page 2, para. 1). No mention should be made here of the Protocols, as the Committee was unanimously of the opinion that practically none of their provisions - at least of those that have so far been signed - could be referred to the Courts for an advisory opinion as to their interpretation.

(c) (Page 2, para. 2). The phrase "legal points of a somewhat technical character" was not actually used during the Committee's discussions and is one, moreover, likely to give rise to considerable difficulty. It would be preferable to omit it.

Lastly, we should avoid introducing the main substance of the report in an indirect way, by means of reference to matters only adduced as examples.

Suggestions

The question of what matters the Committee thinks might be referred to the Court for an advisory opinion, requires consideration from two separate aspects.

In the first place - and here the Committee was, I think, unanimous - the Court must not be asked for an advisory opinion on any matter likely to be referred to it through legal channels in the form of a case for litigation in the sense of Articles 31, 32, 47, et seq. of the Convention. The reason for this is that the Court must not be put in the position of having to prejudge an issue on which it may subsequently be called actually to pronounce judgment, by being asked for an advisory opinion first.
The other aspect to be considered is how this restriction, which we all agree to be necessary, can be formulated so as to prevent it being interpreted in a wider sense than is intended. Here two points of view emerged. One was that the matters which might not be referred to the Court for an advisory opinion should be covered by a general and comprehensive formula, such as the exclusion of questions relating to the substance of the rights and freedoms safeguarded by any Convention that may be in force at any given moment. The other was that it would be better merely to list those sections of the texts at present in force which might not be referred to the Court for an advisory opinion on their interpretation.

The advantage of the first method is that it would enable the restrictions to cover any future Conventions or Protocols adopted to supplement the lists of rights and freedoms given in the present ones.

In any case, what I personally am anxious to ensure is that the report should distinguish clearly between the general principle on which we are all agreed — namely, that the Court must not be asked for an advisory opinion in connection with matters on which it may later be called upon to pronounce judgment — and the method or formula by which this is made clear. One method, of course, would be for the text finally adopted to refer merely to "matters" or "legal matters" which are not of such a kind as to become the subject of litigation before the Court, leaving the Court itself, in its wisdom, to interpret this clause as it deems fit.

Lastly, it might be worthwhile to state briefly the Committee's reasons for taking the view that only the Committee of Ministers should have the right to ask the Court for an advisory opinion.
Committee of Experts
On Problems Relating to the Convention for the Protection of Human Rights and Fundamental Freedoms

Desirability of concluding an agreement to confer advisory powers on the European Court of Human Rights

Amendment to Doc. DH/Exp. (61) 2 by the Austrian Government expert

1. Replace on page 2 in paragraph 1 the words "on matters relating to" by the words "concerning the interpretation of".

2. Replace the third and following paragraph of page 2 by the following wording: "In the view of these examples the Committee was of the opinion, that the Court should exercise its advisory powers within the following limitations:

   (1) Advisory opinions should be given only on legal questions other than those relating to the substance of the rights and freedoms defined in the Convention and its Protocols."
Strasbourg, 26th April 1961

CONFIDENTIAL
DH/Exp (61) 9
Or. Eng.

COMMITTEE OF EXPERTS
ON PROBLEMS RELATING TO THE CONVENTION FOR THE
PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS

Desirability of concluding an agreement
to confer advisory powers on the
European Court of Human Rights

Proposal by the Expert of the United Kingdom

Substitute for the paragraph beginning "The following examples ..." the following:

"The Committee considered, however, that requests for an advisory opinion of the Court should be limited to questions of this character, and should not concern questions of substance arising under the Convention and its Protocols, e.g., questions relating to the nature and scope of the rights and freedoms set out therein, of the obligations of States thereunder, or matters which, under the Convention or its Protocols, are for the Commission, the Court, or the Committee of Ministers to determine."
Desirability of concluding an agreement to confer advisory powers on the European Court of Human Rights

Amendment to Doc. DH/Exp (61) 2 proposed by the Chairman of the Committee, the Italian Government Expert

Replace pages 2 and 3 by the following text:

Bearing this in mind, and in the light of their discussions, the Committee agreed unanimously that it was desirable to conclude an agreement conferring on the European Court of Human Rights the power to give advisory opinions on matters relating to the Convention on Human Rights and its Protocols, in addition to the field of jurisdiction that is proper to it.

The Committee was in any case of the opinion that care must be taken to avoid prejudicing the right of those who under the Convention applied to the bodies provided by it for justice to be rendered. At the same time, care must be taken to avoid committing the Court to any interpretation on points which might be or might become a subject of dispute. With this in mind, it is necessary to circumscribe the subjects regarding which advisory opinions may be sought from the Court, and also to make clear what bodies are entitled to request such opinions.
In view of the above the Committee considered that:

(a) Only the Committee of Ministers shall be entitled to request such opinions from the Court. It will, however, be permissible for Contracting States, the Consultative Assembly, the European Commission on Human Rights, and the Secretariat, if they consider that such opinions should be sought from the Court, to request them through the Committee of Ministers. The latter should naturally have the right to consider the advisability of such requests for opinions, from both the political and the legal point of view;

(b) The opinion must be of a legal nature, that is to say it must be in respect of some relationship that is or can be settled by legal provision (in particular by the Convention);

(c) The opinion must bear upon definite cases and must not formulate abstract hypotheses in order to avoid committing the jurisdictional activity of the Court or the normative power of the organs of the Council of Europe;

(d) The opinion must be concerned with legal questions which by their nature are not likely to give rise to proceedings before any of the bodies competent under the terms of the Convention, nor to require an interpretation relating to the definition, scope or safeguard of the rights and freedoms set forth in the Convention and its Protocols, other than any questions of procedure which might affect the substance of a case;

(e) Advisory Opinions given by the Court would not be binding.
Strasbourg, 27th April 1961

CONFIDENTIAL
DH/Exp (61) 11
Or. Fr.

COMMITTEE OF EXPERTS
ON PROBLEMS RELATING TO THE CONVENTION FOR THE
PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS

Desirability of concluding an agreement
to confer advisory powers on the
European Court of Human Rights

Amendment to Document DH/Exp (61) 2
proposed by the Expert of the
Federal Republic of Germany

1. On page 2, paragraph 1: after the words "European Court
of Human Rights" insert the phrase "meeting in plenary session".

2. On page 2, paragraph 2: replace the word "technical" by
the word "procedural".

3. Replace the third paragraph on page 2 and the subsequent
paragraph numbered 1, by the following text: "Having regard
to these examples, the Committee considered that requests
for an advisory opinion could be submitted to the Court only
on legal questions other than those relating to the substance
on the rights and freedoms enumerated in the Convention and
its Protocols."

A 61.962
TN 4034/LT/DMM
Strasbourg, 28th April 1961

CONFIDENTIAL
DH/Exp (61) 13
Or. Fr.

COMMITTEE OF EXPERTS
ON PROBLEMS RELATING TO THE CONVENTION FOR THE
PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS

Desirability of concluding an agreement
to confer advisory powers on the
European Court of Human Rights

DRAFT REPORT
prepared by the Drafting Committee

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

Recommendation 232 (1960) of the Consultative Assembly advocates conferring "on the European Court of Human Rights, in addition to its present competence defined in Article 45 of the Convention, the competence to interpret the Convention on Human Rights, when a doubt has arisen, of a legal character, even though no case has been brought".

The Committee discussed this matter at two meetings held under the Chairmanship of Mr. Ugo Caldarera, from 7th to 11th November 1960 and from 24th to 29th April 1961.
2. The Committee of Experts agreed that it was desirable to confer advisory powers on the European Court of Human Rights, on the understanding that such powers in no way impeded the fulfilment of the Court's chief function of rendering judgments.

It would indeed be useful if the organs concerned with the application of the Convention on Human Rights could ask the Court for a ruling on the interpretation of any clauses of the Convention or its complementary texts which define the functions of those organs or their reciprocal relations.

The Experts thought that it was also important, however, that the Court should never be placed in the difficult position of having to give a ruling directly or indirectly on any point that was likely to become one of the main issues in a case subsequently referred to it under Articles 45 to 48 of the Convention.

The Committee was further in agreement that the Court should not be empowered to give advisory opinions upon any questions concerned with the substance of the Convention or the Protocols, e.g. questions concerning the nature and scope of the rights and freedoms defined therein or of the obligations of States in respect of these rights and freedoms.

In particular, advisory opinions should not be given by the Court in relation to any such matters which, by the terms of the Convention, are for the Commission or the Committee of Ministers to determine.

4. It was evident, moreover, that the questions on which an advisory opinion may be sought were understood to be "legal questions", in the sense in which that term was used in international conventions on similar subjects. The term excluded on the one hand anything outside the interpretation of the established texts, stopping short of any additions, improvements or amendments that might modify their substance, and on the other hand any questions of which the terms, or the answer given, might imply the assessment of any kind of political expediency.

5. Only the Committee of Ministers would be entitled to seek opinions.

The Consultative Assembly and the Secretary General could do so through the Committee of Ministers. The same possibility should be open to the European Commission of Human Rights. The Committee of Ministers would then decide whether the point at issue warranted referring it to the Court for an opinion.
HUMAN RIGHTS

Extension of the Powers of the European Court
Recommendation 232

Report of the Committee of Experts

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

Recommendation 232 (1960) of the Consultative Assembly proposes conferring "on the European Court of Human Rights, in addition to its present competence defined in Article 45 of the Convention, the competence to interpret the Convention on Human Rights, when a doubt has arisen of a legal character even though no case has been brought".

The Committee, after discussing this matter at two meetings held under the Chairmanship of Mr. Ugo Caldarera, from 7th to 11th November 1960 and from 24th to 29th April 1961, came to the following conclusions:
1. The Committee of Experts considers it desirable to confer advisory powers on the European Court of Human Rights, on the understanding that the exercise of those powers shall in no way impede the essential function of the Court - viz: its judicial function.

It would be of advantage that the bodies envisaged by the Convention for the Protection of Human Rights should have the benefit of the Court's expert opinion on the meaning of the Convention and of any text supplementary thereto, in so far as they define the functions of those bodies and the relationship between them.

It is also necessary, however, to ensure that the Court shall never be placed in the difficult position of being required, as the result of a request for its opinion, to make a direct or indirect pronouncement on a legal point with which it might subsequently have to deal as a main consideration in some case brought before it under Article 45 to 48 of the Convention.

2. The Committee considers that the Court should not be empowered to give advisory opinions on questions of substance such as whose relating to the nature and scope of the rights and freedoms enumerated in the Convention and its Protocols, or to the obligations of States in relation to those rights and freedoms.

In particular, the Court should not give an advisory opinion on any question which, under the terms of the Convention, is for the Commission or the Committee of Ministers to decide.

3. Obviously the questions on which a request for an advisory opinion can be based must be understood as limited to "legal questions" in the meaning given to that term in similar international conventions. This rules out, on the one hand, questions which would go beyond the mere interpretation of the text and tend by additions, improvements or corrections to modify its substance; and, on the other hand, questions whose terms or whose solution would in any way involve matters of policy.

4. The right to make a request to the Court for an advisory opinion should be confined to the Committee of Ministers.

It would always be open to the Consultative Assembly and the Secretary General to submit proposals for a request for an
advisory opinion to the Committee of Ministers. The same possibility should be contemplated for the European Commission on Human Rights.

The Committee of Ministers would consider whether the content of the proposal was such that it could be submitted to the Court, and would decide as to the expediency of so submitting it.

5. Several delegations considered that when exercising its advisory powers, the Court should meet in plenary session.
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<td>Mr. W. PAHR</td>
<td>Ministerial Commissioner, Constitutional Department Federal Chancellery VIENNA</td>
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<td>Mr. Anthony GOMREE</td>
<td>Magistrate attached to the Ministry of Justice BRUSSELS</td>
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<td>Mr. Jacques FRADIN</td>
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<td>Denmark</td>
<td>Mr. Niels MADSEN</td>
<td>Head of Department Ministry of Justice COPENHAGEN</td>
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<td>Head of Section Ministry of Justice COPENHAGEN</td>
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<td>Mr. GODARD</td>
<td>Assistant Director in the Ministry of Interior PARIS</td>
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<td>Mr. BERTRAM</td>
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<td>Mr. HEUSELER</td>
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<td>Ireland</td>
<td>Mr. MORRISSEY</td>
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<td>Mr. OLDEN</td>
<td>Administrative Officer, Department of Justice, Dublin</td>
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<tr>
<td>Italy</td>
<td>Mr. Ugo CALDARERA (Chairman)</td>
<td>Judge of the Court of Appeal, Adviser, Legal Department, Ministry of Foreign Affairs, Rome</td>
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<td>Mr. Marco VIANELLO-CHIODO</td>
<td>Attaché, Ministry of Foreign Affairs, Rome</td>
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<td>Assistant Legal Advisor, Ministry of Foreign Affairs, The Hague</td>
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<td>Norway</td>
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<td>Sir Samuel HOARE</td>
<td>Assistant Under-Secretary Home Office, London</td>
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APPENDIX II

WORKING PAPERS

1. Doc. 1061:
   Report of 24th November 1959 drawn up by Mr. WAHL on behalf of the Legal Committee of the Consultative Assembly.


4. Doc. DH/EXP (60) 26:
   Memorandum of 18th November 1960 by the Human Rights Directorate on the proceedings of the Committee's first meeting in Strasbourg from 7th to 11th November 1960.

5. Doc. DH/EXP (61) 1:
   Memorandum of 22nd March 1961 by the Human Rights Directorate on two points in Doc. DH/EXP (60) 26.
CHAPTER IV

WORK OF THE EUROPEAN COURT OF HUMAN RIGHTS

May 1961 to October 1961
1. Resolution proposed by Mr. H. Rolin relating to a revision of the Convention.

2. Draft amendment to the Convention submitted by Mr. Rolin (CDH/Misc (61) 1 of 2nd May 1961).

3. Draft amendment to the Convention submitted by Lord McNair (CDH/Misc (61) 5 of 17th May 1961).

4. Sub-amendments to the "Draft amendments to the Convention submitted by Mr. Rolin" submitted by Baron F.M. van Asbeck (CDH/Misc (61) 4 of 17th May 1961).


6. Lord McNair's comments upon the proposal for improving the functioning of the Court (CDH (61) 4 of 5th October 1961).

EUROPEAN COURT OF HUMAN RIGHTS

Proposal by Judge Rolin regarding amendment of the Convention

Proposal 2

The Court,

Noting that from time to time consideration has been given to granting it either advisory or jurisdictional powers not consonant with the interpretation or application of the Convention for the Protection of Human Rights,

Draws the attention of the Committee of Ministers and the Consultative Assembly to the fact that under the terms of Article 45 of the Convention it is precluded from complying with such requests without the legally established consent of all the States which are Parties to the Convention,

Expresses the wish that, should an extension of the powers of the European Court of Human Rights eventually appear to be desirable, Article 45 of the Convention be amended accordingly.
Article 45

The Article might be supplemented as follows:

"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, and to all questions regarding which its opinion shall be sought by the Committee of Ministers or by the Consultative Assembly with the unanimous consent of the Committee of Ministers."

Justification

Note

This is the point raised in the second Recommendation presented by Mr. Rolin to the Court at its first meeting. It has often been suggested that the competence of the Court might be extended further than the consideration of definite cases that are brought before it under the conditions provided for in the Convention. Without committing oneself regarding these suggestions, it would appear reasonable to remove the obstacle that at present prevents any organ of the Council of Europe from seeking a ruling from the Court on some difficult point of interpretation of the Statute or regarding some other legal question.
Advisory opinions

I think that we should propose an article empowering (not compelling) the Court to give an advisory opinion on a legal question, but I doubt whether we can go far on this matter until the Ministers have decided what they want to do, and who are to become entitled to request the Court to give opinions.
Extract from Doc. CDH/Misc (61) 4
17th May 1961

EUROPEAN COURT OF HUMAN RIGHTS

Suggested sub-amendments to the
"Draft amendment to the Convention submitted
by Mr. ROLIN (Doc. CDH/Misc (61) 1 of 2nd May 1961)"
submitted by Baron P.M. van Asbeck

3. Article 45 supplemented: add, at the end, the words:
"or by the Commission in the case provided for in Article 57 of
the Convention".

(See No. 4 below)

4. Article 57, Addendum: this paragraph to read as follows:

"(2) If it appears from information received by the
Secretary General or transmitted to him by the
Registrar of the Court, that in any Member State
of the Council of Europe a legal decision has
been rendered in the highest Court, which appears
to either to be dubious the Secretary General
shall bring it before the Commission after the
expiry of the six months' period laid down in
Article 26 of the Convention.

(3) The Commission shall examine the question and
subsequently submit it with its opinion to the
Court for judgment if the High Contracting Party
concerned has accepted the compulsory jurisdiction
of the Court, or for a consultative opinion in the
case of non-acceptance."

Reasons for the above

Paragraph 3

I would prefer that the Court should not be asked to give a
decision until it has been informed of the views of the Commission,
embodied in an Opinion after the latter has examined the question.

I therefore propose that the option, provided for by
Mr. Rolin, of bringing a matter before the Court be made an
obligation, and that the Court should be allowed to give a
decision in all cases; that is to say by a judgment in the case
described by Mr. Rolin or by a consultative Opinion if the
Contracting Party has not accepted the compulsory jurisdiction
of the Court.
Extract from Doc. CDH (61) 2 Final
30th September 1961

EUROPEAN COURT OF HUMAN RIGHTS

Proposals for improving
the functioning of the Court

Report of the Working Party
(The Hague, 23rd to 25th May 1961)

1. Under Resolution (60) 6 a Committee of Experts was formed with instructions "to study problems relating to the European Convention on Human Rights". The Court, at its 5th Plenary Session (5th and 6th April 1961) felt that it might take advantage of the existence of that Committee by laying before it certain proposals for amendments to the Convention, particularly the clauses governing the functioning of the Court. It was agreed that the same occasion might usefully be taken to reconsider some of the Rules of Court which had given rise to criticism.

2. A Working Party consisting, apart from the President, Lord McNair, of MM. van Asbeck, Rolin, McGonigal and Mosler, was consequently instructed to make proposals for consideration by the Court at the 6th Plenary Session.

The Working Party met at The Hague on 23rd May 1961 under the Chairmanship of Mr. van Asbeck and on 24th and 25th May under that of Lord McNair.

3. In the course of its proceedings the Working Party took into consideration the report prepared by the Committee of Experts for the Committee of Ministers, concerning the advisory powers of the Court (DH/Exp (61) 14), the proposed amendments to the Convention submitted by the Commission to the Committee of Ministers (DH (61) 5) and certain suggestions emanating from members.

4. In accordance with its instructions, the Working Party gave its attention mainly to those provisions of the Convention and of the Rules of Court which relate to the functioning of
the Court and which, in the light of experience, appear to call for improvement. Its conclusions on this subject will be found in Section A of this report.

x  x  x

Article 45

Add to the present text three further paragraphs reading as follows:

"2. The Court may render an advisory opinion on any legal question submitted to it by the Committee of Ministers, the Consultative Assembly or the Secretary General of the Council of Europe.

3. The Registrar shall give notice of any request for an advisory opinion to each High Contracting Party and to the organs empowered by paragraph 2 of this Article to submit such request to the Court, and shall inform them of the time-limit fixed by the President within which the Court will be prepared to receive written statements and, where necessary, of the date of the public sitting when the Court will hear oral statements.

4. The Court, sitting in plenary session, shall deliver its advisory opinion in open court."

Reasons

It has been repeatedly suggested that consideration should be given to the desirability of conferring "advisory powers" upon the Court, in addition to its present powers.

Without wishing to make any immediate pronouncement on the various suggestions made in this connection, and particularly on the Report addressed by the Committee of Experts to the Committee of Ministers (CM (61) 91) the Working Party considers that the above-mentioned draft is a valid proposal. It is based on Article 65 of the Statute of the International Court of Justice, and would in no way impede the exercise of the powers vested in the Court under the existing provisions of the Convention.
I have the following remarks to make. I am looking at the Report of the Working Party de novo, and not as a member of that Party.

**Article 45**

I suggest that we should not preclude ourselves from sometimes dispensing with a public hearing. Advocates usually repeat what has already been said in their written statements. It is possible that we may receive a large number of requests for advisory opinions and that some of them could easily be answered on the basis of the written statements, thus reducing the cost and accelerating the delivery of the opinion.
Extract from CDH (61) PV 2
20th February 1962

EUROPEAN COURT OF HUMAN RIGHTS

Sixth Plenary Session

MINUTES

of the Session held in Strasbourg

from 23rd to 25th October 1961

Present: Lord McNAIR, President, Mr. R. CASSIN, Vice-President,
MM. F.M. van ASBECK, HOLMÖCK, VERDROSS, MARIDAKIS, ROLIN,
RODENBOURG, ROSS, WOLD, BAILAIILORE PALLIERI, ARNALDS, MOSLER,
APIK, ZEKIA, MODINOS, Registrar, GOLSONG, Deputy Registrar.

Article 45 of the Convention

At the request of the President, Mr. Modinos called
attention to the Report (Document CDH (61) 2 final, Appendix I)
drawn up by the Committee of Experts on the desirability of
the Governments concluding an agreement to confer advisory
powers on the Court. He added that the Committee of Ministers
had approved the Report and had instructed the Committee of
Experts to prepare a draft agreement on the basis of the Opinion
contained therein. Hence, in his view, the proposal for an
amendment to Article 45 of the Convention was superseded and it
only remained to be seen whether the Court had any comments to
make on the Experts' Report.

After discussion and on a proposal by MM. Holmöck, Rolin
and Ross, the Court decided to make no proposal on the question
of advisory powers. It instructed Mr. Modinos to call the
attention of the Committee of Experts:

(i) to the provisions governing the advisory competence
of the International Court of Justice (Article 69
of its Statute);

(ii) to the fact that, in the Court's opinion, it could
not exercise advisory powers unless it had the assent
of all the Parties signatory to the Convention.
CHAPTER V

WORK OF THE COMMITTEE OF EXPERTS ON HUMAN RIGHTS

September 1961 to July 1962
1. Extract from the Conclusions of the 100th meeting of the Ministers' Deputies (3rd-8th July 1961).


5. Letter No. H.3255 sent on 23rd February 1962 to the members of the Committee of Experts by the Registrar of the Court.


13. Draft report to the Committee of Ministers (DH/Exp (62) 6 of 8th May 1962) and letter no. 5100 of 10th May 1962, sending this document to the Committee of Experts and suggesting some amendments.


17. Proposed amendments presented by the Secretariat (DH/Exp/Misc (62) 16 of 5th June 1962).


19. Note from the Secretary General prepared by the Directorate of Human Rights (CM (62) 147 Rev. of 26th July 1962).
CONCLUSIONS
OF THE 100TH MEETING OF THE MINISTERS' DEPUTIES
3rd to 8th July 1961

HUMAN RIGHTS - Point IX

(e) Extension of the competence of the European Court of Human Rights - Recommendation 272
(Doc. CM (61) 91)

The Deputies examined the Report of the Committee of Experts set up under Resolution (60) 6 and instructed by Resolution (60) 20 to determine whether it is desirable to conclude an agreement on the basis of the proposals made in Recommendation 232 of the Assembly (Doc. CM (61) 91). The main proposal was to confer "on the European Court of Human Rights, in addition to its present competence defined in Article 45 of the Convention, the competence to interpret the Convention on Human Rights, when a doubt has arisen of a legal character, even though no case has been brought."

The Deputies expressed themselves in favour of the considerations set forth in the Report of the Committee of Experts and instructed that Committee to draft an agreement on the basis of the Report.

The Norwegian Representative abstained.

The French Representative said that he could not straightway agree to the Court's being able to issue advisory opinions on the interpretation of the Convention as a whole. The task of the Committee of Experts should be limited to looking out those few procedural articles for the interpretation of which the opinion of the Court might be sought without giving rise to political or legal difficulties.
Strasbourg, 12th September 1961

CONFIDENTIAL
DH/Exp (61) 17
Or. Fr.

COMMITTEE OF EXPERTS
ON PROBLEMS RELATING TO THE EUROPEAN CONVENTION
ON HUMAN RIGHTS AND
FUNDAMENTAL FREEDOMS

ADVISORY FUNCTIONS OF THE
EUROPEAN COURT OF HUMAN RIGHTS

COMPARATIVE TEXTS

A 64.823
TN 6132/LT/AEG
A. TEXTS RELATING TO THE ADVISORY FUNCTIONS OF THE EUROPEAN COURT OF HUMAN RIGHTS DRAWN UP BY THE EUROPEAN MOVEMENT IN 1949

I. Draft Convention

Article 10 (f)

"The Commission may, if it thinks fit, invite the Court to give an advisory opinion."

II. Draft Statute for the Court

Article 58

"(a) The Court may give an advisory opinion on any matter relating to the Convention on Human Rights at the request of the European Human Rights Commission.

(b) Questions upon which the advisory opinion of the Court is asked shall be laid before the Court by means of a written request containing an exact statement of the question upon which an opinion is required, and accompanied by all documents likely to throw light upon the question."

Article 59

"(a) The Registrar shall forthwith give notice of the request for an advisory opinion to all States appearing to be immediately concerned or interested.

(b) The Registrar shall also, by means of a special and direct communication, notify any State appearing to be immediately concerned or interested, or international organisation considered by the Court, or, should it not be sitting, by the President, as likely to be able to furnish information on the question, that the Court will be prepared to receive, within a time limit to be fixed by the President, written statements, or to hear, at a public sitting to be held for the purpose, oral statements relating to the question."
(c) Should any State immediately concerned or interested have failed to receive the special communication referred to in paragraph (b) of this Article, such State may express a desire to submit a written statement or to be heard: and the Court will decide.

(d) States and organisations having presented written or oral statements or both shall be permitted to comment on the statements made by other States or organisations in the form, to the extent, and within the time limits which the Court, or, should it not be sitting, the President, shall decide in each particular case. Accordingly the Registrar shall in due time communicate any such written statements to States and organisations having submitted similar statements.

Article 60

"The Court shall deliver its advisory opinions in open Court, notice having been given to the Secretary General and to those parties who appear to the Court to be immediately concerned."

Article 61

"In the exercise of its advisory functions, the Court shall further be guided by the provisions of this Statute which apply in contentious cases to the extent to which it recognises them to be applicable."
B. ADVISORY FUNCTIONS OF THE INTERNATIONAL COURT OF JUSTICE

I. Charter of the United Nations signed on 26th June 1945 at San Francisco

Article 96

"1. The General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question.

2. Other organs of the United Nations and specialised agencies, which may at any time be so authorised by the General Assembly, may also request advisory opinions of the Court on legal questions arising within the scope of their activities."

II. Statute of the International Court of Justice signed on 26th June 1945 at San Francisco

Article 65

"1. The Court may give an advisory opinion on any legal question at the request of whatever body may be authorised by, or in accordance with, the Charter of the United Nations to make such a request.

2. Questions upon which the advisory opinion of the Court is asked shall be laid before the Court by means of a written request containing an exact statement of the question upon which an opinion is required, and accompanied by all documents likely to throw light upon the question."
Article 66

1. The Registrar shall forthwith give notice of the request for an advisory opinion to all States entitled to appear before the Court.

2. The Registrar shall also, by means of a special and direct communication, notify any State entitled to appear before the Court or international organisation considered by the Court, or, should it not be sitting, by the President, as likely to be able to furnish information on the question; that the Court will be prepared to receive, within a time-limit to be fixed by the President, written statements, or to hear, at a public sitting to be held for the purpose, oral statements relating to the question.

3. Should any such State entitled to appear before the Court have failed to receive the special communication referred to in paragraph 2 of this Article, such State may express a desire to submit a written statement or to be heard; and the Court will decide.

4. States and organisations having presented written or oral statements or both shall be permitted to comment on the statements made by other States or organisations in the form, to the extent and within the time-limits which the Court, or, should it not be sitting, the President, shall decide in each particular case. Accordingly, the Registrar shall in due time communicate any such written statements to States and organisations having submitted similar statements."

Article 67

"The Court shall deliver its advisory opinions in open Court, notice having been given to the Secretary General and to the representatives of members of the United Nations, of other States and of international organisations immediately concerned."

Article 68

"In the exercise of its advisory functions, the Court shall further be guided by the provisions of the present Statute which apply in contentious cases to the extent to which it recognises them to be applicable."
III. Rules of Court adopted on 6th May 1946

Article 82

"1. In proceedings in regard to advisory opinions, the Court shall, in addition to the provisions of Article 96 of the Charter and Chapter IV of the Statute, apply the provisions of the Articles which follow. It shall also be guided by the provisions of these Rules which apply in contentious cases to the extent to which it recognises them to be applicable; for this purpose, it shall above all consider whether the request for the advisory opinion relates to a legal question actually pending between two or more States.

2. If the Court is of the opinion that a request for an advisory opinion necessitates an early answer, it shall take the necessary steps to accelerate the procedure."

Article 83

"If the advisory opinion is requested upon a legal question actually pending between two or more States, Article 31 of the Statute shall apply, as also the provisions of these Rules concerning the application of that Article."

Article 84

"1. Advisory opinions shall be given after deliberation by the Court. They shall mention the number of judges constituting the majority.

2. Any judge may, if he so desires, attach his individual opinion to the advisory opinion of the Court, whether he dissents from the majority or not, or a bare statement of his dissent."
Article 85

"1. The Registrar will, in due time, inform the Secretary General of the United Nations and the appropriate organ of the institution, if any, which requested the advisory opinion, as to the date and the hour fixed for the sitting to be held for the reading of the opinion.

2. One original copy of the advisory opinion, duly signed and sealed, shall be placed in the Archives of the Court and another shall be sent to the Secretariat of the United Nations. Certified copies shall be sent by the Registrar to members of the United Nations and to the States, specialised agencies and public international organisations directly concerned."
C. SPECIAL FUNCTIONS OF THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES (Opinions)

I. Treaty constituting the European Coal and Steel Community signed at Paris on 18th April 1951

Article 95

"In all cases not expressly provided for in the present Treaty in which a decision or a recommendation of the High Authority appears necessary to fulfil, in the operation of the Common Market for coal and steel and in accordance with the provisions of Article 5 above, one of the purposes of the Community as defined in Articles 2, 3 and 4, such decision or recommendation may be taken subject to the unanimous concurrence of the Council and after consultation with the Consultative Committee.

The same decision or recommendation, taken in the same manner, shall fix any sanctions to be applied.

If, following the expiration of the transition period provided for by the Convention containing the transitional provisions, unforeseen difficulties which are brought out by experience in the means of application of the present Treaty, or a profound change in the economic or technical conditions which affects the common coal and steel market directly, should make necessary an adaptation of the rules concerning the exercise by the High Authority of the powers which are conferred upon it, appropriate modifications may be made provided that they do not modify the provisions of Articles 2, 3 and 4, or the relationship among the powers of the High Authority and the other institutions of the Community.

These modifications will be proposed jointly by the High Authority and the Council acting by a five-sixths majority. They shall then be submitted to the opinion of the Court. In its examination, the Court may look into all elements of law and fact. If the Court should recognise that they conform to the provisions of the preceding paragraph, such proposals shall be transmitted to the Assembly. They will enter into force if they are approved by the Assembly acting by a majority of three-quarters of the members present and voting comprising two-thirds of the total membership."
II. Treaty establishing the European Economic Community signed at Rome on 25th March 1957

Article 228

"1. Where this Treaty provides for the conclusion of agreements between the Community and one or more States or an international organisation, such agreements shall be negotiated by the Commission. Subject to the powers conferred upon the Commission in this field, such agreements shall be concluded by the Council after the Assembly has been consulted in the cases provided for by this Treaty.

The Council, the Commission or a member State may, as a preliminary, obtain the opinion of the Court of Justice as to the compatibility of the contemplated agreements with the provisions of the Treaty. An agreement which is the subject of a negative opinion of the Court of Justice may only enter into force under the conditions laid down, according to the case concerned, in Article 236.

2. Agreements concluded under the conditions laid down above shall be binding on the institutions of the Community and on member States."

III. Rules of Procedure of the Court of Justice of the European Communities adopted at Luxembourg on 3rd March 1959

(Official Gazette of the European Communities, 18th January 1960)

Article 106, paragraph 1

"If a request for a preliminary opinion in accordance with Article 228 of the EEC Treaty is submitted by the Council, it shall be notified to the Commission. If such a request is submitted by the Commission, it shall be notified to the Council and the member States. If such a request is submitted by a member State, it shall be notified to the Council, the Commission and the other member States."
The President shall lay down the time-limit within which the institutions and member States to whom the request is notified may submit written observations.

Paragraph 2

The opinion may relate to the compatibility of the contemplated agreement with the provisions of the EEC Treaty as well as to the power of the Community or of one of its institutions to conclude such agreement.

**Article 107, Paragraph 1**

"As soon as the request for a preliminary opinion referred to in the preceding Article has been submitted, the President shall appoint a judge to take charge of the enquiry.

Paragraph 2

The Court shall give a reasoned opinion in camera, the advocates-general having been heard.

Paragraph 3

The opinion, signed by the President, the judges having taken part in the deliberations and the Registrar, shall be notified to the Council, the Commission and the member States."

**Article 108**

"When the Court is asked for an opinion in pursuance of Article 95 (4) of the EEC Treaty, the request shall be submitted jointly by the High Authority and the Special Council of Ministers.

The opinion shall be given under the conditions laid down in the preceding Article. It shall be notified to the High Authority, the Special Council of Ministers and the European Parliamentary Assembly."
COMMITTEE OF EXPERTS
ON PROBLEMS RELATING TO THE EUROPEAN CONVENTION
ON HUMAN RIGHTS AND
FUNDAMENTAL FREEDOMS

ADVISORY FUNCTIONS OF THE
EUROPEAN COURT OF HUMAN RIGHTS

COMPARATIVE TEXTS

(Continuation)
I. CONVENTION ON RELATIONS BETWEEN THE THREE POWERS AND THE FEDERAL REPUBLIC OF GERMANY, SIGNED IN PARIS ON 23rd OCTOBER 1954

ANNEX B: CHARTER OF THE ARBITRATION TRIBUNAL

Article 25

"1. The Tribunal may, at the joint request of the Governments of the Three Powers and of the Federal Government, give an advisory opinion on any matter arising out of the Convention or the present Charter or the related Conventions, with the exception of those questions with which it would not have been competent to deal if they had been referred to it in the form of a dispute.

2. The Tribunal may, at the request of an authority referred to in paragraph 2 of Article 9 of the present Charter or at the request of the presiding member of such an authority, give an advisory opinion on the competence of such authority.

3. Advisory opinions shall not be binding".

II. AGREEMENT ON THE GERMAN EXTERNAL DEBTS, SIGNED IN LONDON ON 27th FEBRUARY 1953

Article 28, para. 11:

"At the request of any Contracting Party, the Tribunal may give an advisory opinion on the interpretation of application of this Agreement (excluding Article 34). This advisory opinion shall not be binding".
Strasbourg, 19th September 1961

CONFIDENTIAL

DH/Exp (61) 23
Or. Fr.

COMMITTEE OF EXPERTS
ON PROBLEMS RELATING TO THE EUROPEAN CONVENTION
ON HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS

Advisory functions of the
European Court of Human Rights

Preliminary Draft Protocol
drawn up by the Directorate of Human Rights
PRELIMINARY DRAFT PROTOCOL
TO THE CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS
AND FUNDAMENTAL FREEDOMS RELATING TO THE CONSULTATIVE
FUNCTIONS OF THE EUROPEAN COURT OF HUMAN RIGHTS

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

Having regard to the provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms signed at Rome on 4th November, 1950 (hereinafter referred to as "the Convention") and in particular Article 19 instituting, among other bodies, a European Court of Human Rights (hereinafter referred to as "the Court");

Whereas it is advisable to confer on the Court competence to give advisory opinions in certain circumstances;

Have agreed as follows:

Article 1

1. The Court may give an advisory opinion on legal questions concerning the interpretation of the Convention.

2. The advisory competence of the Court shall not extend to questions which, by their purport, are liable to entail recourse to the organs referred to in the Convention, in particular questions concerning the nature and scope of the rights and freedoms defined in the Convention and its protocols.

Article 2

1. The right to request advisory opinions of the Court shall lie with the Committee of Ministers.

2. The Consultative Assembly, the European Commission of Human Rights and the Secretary General may propose to the Committee of Ministers that an advisory opinion should be sought.

Article 3

The Committee of Ministers shall submit a written request to the Court containing an exact statement of the question upon which an opinion is required, and accompanied by all documents likely to throw light upon the question.
Article 4

For consideration of requests for an advisory opinion, the Court shall sit in plenary session.

Article 5

The Court shall decide whether it is competent in a given matter.

Article 6

If a member State of the Council, the Consultative Assembly, the European Commission of Human Rights or the Secretary General expresses the wish to submit a written statement or to be heard through a representative, the Court shall give a ruling.

Article 7

1. The opinion of the Court shall be a reasoned opinion.

2. If the opinion as a whole, or a part thereof, does not represent the unanimous opinion of the Court, any judge may, if he so desires, attach his individual opinion thereto.

Article 8

1. The opinion of the Court shall be communicated to the Committee of Ministers.

2. It shall also be communicated to the President of the Consultative Assembly, the President of the European Commission of Human Rights and the Secretary General.

Article 9

The High Contracting Parties shall consider Article 1 to 8 of this Protocol as additional Articles to the Convention and its Protocols.

Article 10

1. This Protocol shall be open for signature by the members of the Council of Europe, signatories to the Convention, who may become Parties to it by:
(a) signature without reservation in respect of ratification or by

(b) signature in respect of ratification followed by ratification.

The instruments of ratification shall be deposited with the Secretary General of the Council of Europe.

2. This Protocol shall enter into force as soon as ten members of the Council of Europe shall, in accordance with paragraph 1, have signed it without reservation in respect of ratification or shall have ratified it.

3. The Secretary General of the Council of Europe shall notify members of the Council of:

(a) the names of signatories and the deposit of any instrument of ratification;

(b) the date of the entry into force of this Protocol.
Strasbourg, 18th January, 1962

Confidential
DH/Exp (61) 36
Or. Fr.

COMMITTEE OF EXPERTS ON PROBLEMS RELATING TO
THE CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS
AND FUNDAMENTAL FREEDOMS

PREPARATION OF AN AGREEMENT GRANTING
CONSULTATIVE COMPETENCE TO THE EUROPEAN
COURT OF HUMAN RIGHTS

(Memorandum by the Directorate of Human Rights
on the 3rd meeting held by the Committee at
Strasbourg from 2nd to 11th October 1961)
I. INTRODUCTION

1. The Committee of Experts on problems relating to the European Convention on Human Rights held its third meeting at the Council of Europe from 2nd to 11th October 1961.

The Chair was taken on 3rd and 4th October 1961 by the Chairman, Mr. Ugo CALDARERA, Judge of the Rome Court of Appeal and Legal Adviser to the Italian Ministry for Foreign Affairs, and subsequently until 11th October (Mr. Caldaerea having been obliged to absent himself for health reasons), by Sir Samuel Hoare, Vice-Chairman, formally Assistant Under-Secretary of the British Home Office and United Kingdom Government Expert.

Secretarial services were provided by the Human Rights Directorate.

2. The Agenda for the meeting included five items:

(a) Proposal to conclude a second Protocol to the Convention recognising six rights and liberties not yet guaranteed in the Convention and first Protocol. (Resolution (60) 6).

(b) Proposal to include in the second Protocol a provision relating to the rights of minorities. (Resolution (61) 15).

(c) Proposal to grant consultative competence to the European Court of Human Rights. (Resolution (6) 20 and point IX (e) of the Conclusions of the 100th meeting of the Ministers' Deputies held from 2nd to 8th July 1961).

(d) Proposal to set up an International Institute of Human Rights at Strasbourg. (Resolution (61) 16).

(e) Proposed amendments to the Convention submitted by the European Commission of Human Rights. (Point IX (d) of the Conclusions of the 100th meeting of the Ministers' Deputies held from 2nd to 8th July 1961).

The Committee examined the first (a) and third (c) items.
3. This Memorandum summarises the Committee's discussions relative to an Agreement conferring advisory powers on the Court.

The Committee agreed to continue its study of the question at its next meeting, the date for which would be fixed later by the Secretary-General.

4. The Committee's work on the proposed Second Protocol to the Convention is reported on in Doc. DH/Exp (61) 35.

5. The following are appended:
   - list of members present (Appendix I)
   - list of working papers (Appendix II).

II. SUMMARY OF DISCUSSIONS

6. The Committee had time for no more than a preliminary exchange of views.

7. The discussion was devoted to the following two points:
   A. the general form of the Agreement;
   B. the text of the provision delimiting the Court's competence ratione materiae.

A. General form of the Agreement:

8. The Committee first discussed what general form the Agreement should take.

Some members asked if the Agreement should form a further Protocol to the Convention. According to some experts the proper procedure for conferring new powers upon a body set up by the Convention was to make suitable amendments to that instrument.

No decision was taken on this point.
B. Text of the provision delimiting the Court's competence "ratione materiae":

9. The Committee then held an exchange of views on the drafting of the clause which would specify what questions could be submitted to the Court for its advisory opinion.

Discussions were based on the Article 1 of the preliminary draft prepared by the Directorate of Human Rights (Doc. DH/Exp (61) 23, page 1), reading as follows:

"1. The Court may give an advisory opinion on legal questions concerning the interpretation of the Convention."

"2. The advisory competence of the Court shall not extend to questions which, by their purport, are liable to entail recourse to the organs referred to in the Convention, in particular questions concerning the nature and scope of the rights and freedoms defined in the Convention and its protocols."

Paragraph 1 of Article 1 of the Draft

10. It was thought that the term "legal" served no purpose, since a question concerning the interpretation of a Convention should be considered as being of necessity a legal one. (Cf. Doc. DH/Exp (61) 1, pages 1-3).

Conversely, it was said that the use of this term would underline the Committee's desire (stated in its Report to the Committee of Ministers) to exclude any question whose terms or whose solution would in any way involve matters of policy (cf. CM (61) 91, page 2, para. 3).

Paragraph 2 of Article 1 of the Draft

11. The Committee found that a question of method was raised first of all, i.e. whether, when deciding on the limits of the Court's competence "ratione materiae", it was preferable in the text of the provision to define the categories of questions to be excluded in general terms or by means of specific reference to articles or parts of articles in the Convention and Protocols.

Most of the experts themselves in favour of a text which would define in general terms the categories of questions to be excluded from the advisory competence of the Court. Several possible wordings were suggested.
12. The Committee began with an examination of Article 1, paragraph 2, of the preliminary draft and various alternatives excluding in substance any questions which are of a nature to give rise to proceedings before the bodies set up by the Convention:

(a) Text derived from alternative A envisaged by the Committee at its first meeting (Doc. DH/Exp (60) 26, page 5):

"The advisory competence of the Court shall not extend to questions which are of a nature to give rise to proceedings before the bodies set up by the Convention or concerned with its application."

(b) Text derived from Alternative B envisaged by the Committee at its first meeting (Doc. DH/Exp (6) 26, page 5):

"The advisory competence of the Court shall not extend to questions which are of a nature to give rise to proceedings before the bodies set up by the Convention or concerned with its application, or which require an interpretation relating to the definition, scope or safeguard of the rights and freedoms set out in the Convention and its protocols."

(c) Text proposed by one expert:

"The advisory competence of the Court shall not extend to questions which are of a nature to give rise to proceedings otherwise provided for in the Convention and Protocols."

(d) Text proposed by another expert:

"The advisory competence of the Court shall not extend to questions which are of a nature to give rise to proceedings before the Commission, Committee of Ministers or the Court, in the application of Articles 24, 25, 32 and 45 of the Convention. It was objected that all these proposed texts were insufficiently restrictive."

For instance, they would allow the Court to receive requests for advisory opinions involving the interpretation of those provisions of the Convention which define conditions for admissibility of applications lodged with the Commission. Although such questions could not give rise to proceedings before the bodies set up by the Convention, they could.
the terms of the Convention, be the subject of rulings by those bodies when applications were referred to them. It is essential that the advisory powers of the Court should in no way interfere with the Commission, Committee of Ministers or Court when those bodies are exercising the functions conferred upon them by Articles 24, 25, 32 and 45 of the Convention. It was also felt that the term "give rise to proceedings" might be interpreted as relating only to future proceedings; it was, however, equally desirable to exclude questions in relation to which proceedings were in progress or had been terminated, and also questions arising in those cases which cannot be brought before the Court.

13. The Committee also considered whether paragraph 2 of its Report to the Committee of Ministers (Doc. CM (61) 91, page 2) might provide the basis for a text. This paragraph is as follows:

"The Committee considers that the Court should not be empowered to give advisory opinions on questions of substance such as those relating to the nature and scope of the rights and freedoms enumerated in the Convention and its Protocols, or to the obligations of States in relation to those rights and freedoms.

In particular, the Court should not give an advisory opinion on any question which, under the terms of the Convention, is for the Commission or the Committee of Ministers to decide."

Some experts feared that a text in these terms might allow of far too restrictive an interpretation of the advisory powers of the Court.

It might be asked, they pointed out, whether the expression "obligation of States in relation to those rights and freedoms" applied only to their obligation to respect the rights set forth in the Convention, or to all their obligations under the Convention and Protocols, and, in particular, to those arising out of institutional rules set forth in the Convention (e.g.: Articles 28, 32, 57, etc.).

Moreover, it seemed to these experts that the expression "question which, under the terms of the Convention, is for the Commission or the Committee of Ministers to decide" might be applied to questions which, in the Committee's opinion, should rather be capable of submission to the Court for its opinion.
Article 39, paragraph 2 of the Convention, concerning the election of judges, was mentioned as an example of a question involving difficulties in interpretation. It was in pursuance of Article 39 that the Committee of Ministers was engaged in deciding how these difficulties should be resolved. According to the text based upon paragraph 2 of the report, questions involving just such difficulties would be excluded from the field of application of the advisory powers of the Court, since they would be for the Committee of Ministers to decide, under the terms of the Convention. That did not seem to be what the Committee desired. On the other hand some experts were of the opinion that, while some drafting changes might be necessary to meet these objections, the above-quoted paragraph from the Committee's report could form the basis of an acceptable text.

It was suggested that the Committee should settle upon a text which would in substance exclude "questions capable of being dealt with by application of Articles 25 and 26 of the Convention".

It was noted here that reference to Article 25 of the Convention might give rise to certain difficulties. Unlike Article 25, Article 26 did not specify that the alleged breach must necessarily result from violation of a right set forth in the Convention. It might therefore be inferred that the Commission was competent to hear complaints lodged by States against violations of the institutional rules established by the Convention, for example, the rules enunciated in Article 57.

It was also thought that not only questions which might be dealt with by application of Articles 25 and 26 should be excluded from the advisory competence of the Court, but also questions which, in relation to those referred to the Commission, might be preliminary or ancillary but nevertheless be questions of substance.

No decisions were taken on the different texts.
APPENDIX I

LIST OF MEMBERS OF THE COMMITTEE PRESENT AT THE THIRD MEETING

List of experts present
(2nd to 11th October 1961)

<table>
<thead>
<tr>
<th>Country</th>
<th>Name</th>
<th>Position</th>
<th>Location</th>
</tr>
</thead>
<tbody>
<tr>
<td>AUSTRIA</td>
<td>Mr. W. PAHR</td>
<td>Ministerial Commissioner, Constitutional Department, Federal Chancellery,</td>
<td>VIENNA</td>
</tr>
<tr>
<td>BELGIUM</td>
<td>Mr. A. GOMREE</td>
<td>Magistrate attached to the Ministry of Justice,</td>
<td>BRUSSELS</td>
</tr>
<tr>
<td></td>
<td>Mr. J. FRADIN</td>
<td>Administrative Secretary, Ministry of Justice,</td>
<td>BRUSSELS</td>
</tr>
<tr>
<td>DENMARK</td>
<td>Mr. N. MADSEN</td>
<td>Head of Department, Ministry of Justice,</td>
<td>COPENHAGEN</td>
</tr>
<tr>
<td>FRANCE</td>
<td>Mr. P. GODARD</td>
<td>Assistant Director in the Ministry of Interior,</td>
<td>PARIS</td>
</tr>
<tr>
<td>FEDERAL REPUBLIC OF GERMANY</td>
<td>Mr. W. BERTRAM</td>
<td>Counsellor, Ministry of Justice,</td>
<td>BONN</td>
</tr>
<tr>
<td></td>
<td>Mr. K. BREULL</td>
<td>Counsellor, Ministry of Interior,</td>
<td>BONN</td>
</tr>
<tr>
<td></td>
<td>Mr. H. HEUSELER</td>
<td>First Secretary, Ministry of Foreign Affairs,</td>
<td>BONN</td>
</tr>
</tbody>
</table>
GREECE  Mr. P. VEGLERIS  Professor at the Faculty of Law, University of Athens, 7, rue Zalacosta, ATHENS

ICELAND  ...............  not represented

IRLAND  Mr. D.P. WALDRON  Assistant Legal Adviser, Department of External Affairs, DUBLIN

Mr. J. OLDEN  Administrative Officer, Department of Justice, DUBLIN

ITALY  Mr. Ugo CALDARERA (Chairman)  Judge of the Court of Appeal at Rome, Adviser, Legal Department, Ministry of Foreign Affairs, ROME

Mr. L. GIOVENC0  Head of Division, Ministry of Interior, ROME

Mr. M. VIANELLO-CHIODO  Second Secretary, Embassy of Italy, VIENNA

LUXEMBOURG  Mr. E. MULLER  Administrative Secretary, Ministry of Justice, LUXEMBOURG

NETHERLANDS  Mr. H.G. SCHERMERS  Assistant Legal Adviser, Ministry of Foreign Affairs, THE HAGUE
Appendix I

NORWAY  Mr. U. UNDERLAND  First Secretary, Legal Department, Ministry of Foreign Affairs, OSLO

SWEDEN  Mr. C. LIDGARD  First Secretary, Ministry of Foreign Affairs, STOCKHOLM

TURKEY  Mr. I. UNAT  Docent at the Faculty of Political Science, University of Ankara, ANKARA

UNITED KINGDOM  Sir S. HOARE (Vice-Chairman)  Formerly Assistant Under-Secretary, Home Office, LONDON


APPENDIX II

Working papers relating to the preparation of an Agreement granting consultative competence to the European Court of Human Rights

1. Doc. 1061:
Report of 24th November 1959 prepared by Mr. Wahl on behalf of the Legal Committee of the Consultative Assembly.


4. Resolution (60) 20 adopted by the Committee of Ministers at its 89th meeting held from 13th to 16th September 1960.

5. Doc. DH/Exp (60) 26:
Memorandum dated 18th November 1960 prepared by the Directorate of Human Rights on the work of the Committee at its first meeting held at Strasbourg from 7th to 11th November 1960.

6. Doc. DH/Exp (61) 1:
Memorandum of 22nd March 1961 prepared by the Directorate of Human Rights concerning two points in Doc. DH/Exp (60) 23.

7. Doc. CM (61) 91:

8. Doc. CM/DEL/Concl. (61) 100:
Conclusions of the 100th meeting of the Ministers' Delegates held at Strasbourg from 2nd to 8th July 1961 (point IXe).

9. Doc. DH/EXP (61) 17:
Comparative texts.

10. Doc. DH/EXP (61) 23:
Sir,

I have the honour to inform you that, at its 6th plenary session in Strasbourg from 23rd to 25th October 1961, the European Court of Human Rights took note of the report drawn up by your Committee on the desirability of concluding an agreement conferring advisory powers on the Court (Doc. CM (61) 91).

I am directed by the Court to draw the attention of your Committee:

1. to the provisions governing the advisory powers of the International Court of Justice (Article 68 of the Statute);

2. to the fact that, in the Court's view, it could exercise advisory powers only by agreement with all Contracting Parties to the Convention.

I remain, Sir,

Your obedient Servant,

P. MODINOS
Registrar

Strasbourg, 23rd February 1962
Strasbourg, 27th February 1962

COMMITTEE OF EXPERTS ON PROBLEMS RELATING TO
THE CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS
AND FUNDAMENTAL FREEDOMS

PREPARATION OF AN AGREEMENT GRANTING
CONSULTATIVE COMPETENCE TO THE EUROPEAN
COURT OF HUMAN RIGHTS

Comparison of the report of the Legal
Committee (Doc. 1061) with the report
of the Committee of Experts (Doc. CM (61) 91)

(Memorandum of the Secretariat General
prepared by the Directorate of Human Rights)
I. MATTERS ON WHICH OPINIONS COULD BE GIVEN

1. PRINCIPLES

Legal Committee

The Consultative jurisdiction of the Court would include matters arising out of the application of the Convention but not resulting from contentious proceedings brought under Article 48.

Committee of Experts

The Committee considers that the Court should not be empowered to give advisory opinions on questions of substance such as those relating to the nature and scope of the rights and freedoms enumerated in the Convention and its Protocols, or to the obligations of States in relation to those rights and freedoms.

In particular, the Court should not give an advisory opinion on any question which, under the terms of the Convention, is for the Commission or the Committee of Ministers to decide.

2. REASONS

Legal Committee

The Committee of Experts considers it desirable to confer advisory powers on the European Court of Human Rights, on the understanding that the exercise of these powers shall in no way impede the essential function of the Court — viz: its judicial function.

It would be of advantage that the bodies envisaged by the Convention for the Protection of Human Rights should have the benefit of the Court's expert opinion on the meaning...
of the Convention and of any text supplementary thereto, in so far as they define the functions of those bodies and the relationship between them.

It is also necessary, however, to ensure that the Court shall never be placed in the difficult position of being required, as the result of a request for its opinion, to make a direct or indirect pronouncement on a legal point with which it might subsequently have to deal as a main consideration in some case brought before it under Article 45 to 48 of the Convention.

3. LEGAL CHARACTER OF SUCH MATTERS

Legal Committee

If the Court is given jurisdiction to give an authoritative interpretation on matters of this sort, it is important to keep it within proper limits. Its new competence should be limited to questions of a legal character.

There are no doubt gaps in the Convention which will need to be filled; some of them require legal decisions and might well be left to the Court, but others are of a political character and we should put the Court in a false position if we asked it to take political decisions. An example of this is the power of the Secretary General under Article 57 of the

Committee of Experts

Obviously the questions on which a request for an advisory opinion can be based must be understood as limited to "legal questions" in the meaning given to that term in similar international conventions.

This rules out, on the one hand, questions which would go beyond the mere interpretation of the texts and tend by additions, improvements or corrections to modify its substance; and, on the other hand, questions whose terms or whose solution would in any way involve matters of policy.
Convention to ask a member State to furnish explanations as to the manner in which its internal law ensures the effective implementation of any provision of the Convention. The question in what circumstances the Secretary General should exercise this power is basically political, and therefore not one for the Court.

Another reason why the power of the Court to interpret the Convention should not be extended too widely is that there is an advantage in letting some problems be settled by the natural processes of political evolution rather than by the legal interpretation of written texts. (This applies with particular force to the Statute of the Council of Europe). An example arising under the Convention on Human Rights is afforded by Article 15. This authorises Contracting Parties in certain circumstances to take measures derogating from their obligations under the Convention; they are required to inform the Secretary General of the Council of Europe of the measures taken and the reasons therefor, but nothing is said about his communicating this information to anyone else. This is clearly a gap in the provisions of the Convention. The problem has, however, been satisfactorily settled by a decision of the Committee of Ministers that the Secretary General should inform the other Contracting Parties and
the Commission (1) and by
action on a Recommendation of
the Assembly that he should
also inform the President of
the Assembly, who then informs
the Standing Committee(2).
Article 39:

Whether a simple majority or an absolute majority is required for the election of the judges under Article 39. (This problem formed the subject of a debate and vote in the Assembly before the election took place in January 1959)?

Article 40:

Whether the term of office of a judge elected as the result of the admission of a new member State should be of nine years, under Article 40 (1), or whether it should be co-terminous with that of his colleagues?

Article 48:

Whether the Commission may refer to the Court under Article 48 an alleged breach of the Convention by a State which, under Article 46 has accepted its jurisdiction as compulsory on condition of reciprocity?

Article 63:

If a State accepts the compulsory jurisdiction of the Court under Article 46 and then extends the application of the Convention to its colonial territories under Article 63, whether the jurisdiction of the Court then extends to matters arising in the colonial territories. (It should be observed that para. 4 of Article 63 related to the extension to colonial territories of the declarations provided for in Article 25 of the Convention, but not of those provided for in Article 46).
II. AUTHORITIES COMPETENT TO REQUEST SUCH OPINIONS

1. COMMITTEE OF MINISTERS

Legal Committee

The Committee of Ministers might be empowered to ask the Court for an opinion - not on a question of substance, namely the violation of the Convention by one of the Contracting States - but purely on the detailed application of those provisions of the Convention under which the Committee of Ministers is entrusted with certain tasks under the existing system of collective guarantee. For instance, as already mentioned, the Committee of Ministers might seek the Court's opinion on the interpretation of Article 32, with particular reference to the procedure to be followed by the Committee when discharging its responsibilities under that Article. The same might apply to Article 54 of the Convention.

Committee of Experts

The right to make a request to the Court for an advisory opinion should be confined to the Committee of Ministers.

2. OTHER AUTHORITIES

Legal Committee

1. Likewise the Court might enlighten the Assembly as to the scope of the powers conferred upon it under the Convention on Human Rights, for instance, in regard to the election of members of the Commission (Article 21) and of the Court (Article 39). However, the possibility should probably be ruled out of the

Committee of Experts

It would always be open to the Consultative Assembly and the Secretary General to submit proposals for a request for an advisory opinion to the Committee of Ministers. The same possibility should be contemplated for the European Commission on Human Rights.
Consultative Assembly being empowered to request a "consultative opinion" on a specific situation which might be brought before the Commission and the Court by the jurisdictional procedure forming part of the existing system of collective protection.

2. The Secretary General of the Council of Europe might have the right to consult the Court as depository of the instruments provided for in the Convention.

3. It may be thought better not to give the Contracting Parties the right to ask for advisory opinions. Those who are already empowered to institute contentious proceedings before either the Commission or the Court should perhaps not be empowered to apply to that Court for an advisory opinion. Indeed, experience has shown that if a natural or a legal person has the choice of instituting judicial proceedings or requesting an opinion, he will select the procedure that seems more likely to favour his own cause. Thus, requests for an opinion have been submitted to the German Constitutional Court, or questions which, in substance, constituted a dispute between two organs of the Federal Republic. Such a procedure is not always conducive to the proper administration of justice, since an advisory opinion does not provide for a full hearing, which is the main feature of normal court procedure. For this reason, it

The Committee of Ministers would consider whether the content of the proposal was such that it could be submitted to the Court, and would decide as to the expediency of so submitting it.
might be preferable not to
grant to States, or to natural
or legal persons the right to
apply to the Court for an advisory
opinion on a matter which could
become the object of contentious
proceedings, lest the well-
balanced system laid down by the
Convention for the protection of
Human Rights be upset.

It might, however, be thought
desirable to allow States to
request an advisory opinion in
certain circumstances, for example
on the conformity of proposed
legislation with the provisions of
the Convention.

III. ORGANISATION AND WORKING OF THE COURT

MEETING IN PLENARY SESSION

Legal Committee

Committee of Experts

Several delegations con-
sidered that when exercising
its advisory powers, the
Court should meet in plenary
session.
Strasbourg, 3rd March 1961

ADVISORY FUNCTIONS OF THE COURT

Preliminary draft proposed by the delegate of Greece

Advisory functions of the Court

Article 1

1. The Court may give or: emit an advisory opinion on the subjects and under the conditions specified below.

2. Its opinion shall be given exclusively or: only on legal questions which, by their nature, are not liable to arise in the course of or: be presented in support of action provided for in the Convention. In particular, questions concerning the content and scope of the rights and freedoms protected by or: defined in the Convention and its Protocols may not be referred for an opinion.

3. The right to request advisory opinions shall lie with the Committee of Ministers or: Requests for opinion shall be brought before the Court by the Committee of Ministers, Applications shall be accompanied by all documents of use in establishing the bounds of or: in defining the question put to the Court or: delete.

Article 2

1. The Court shall decide whether it is competent in a given matter or: The Court shall decide whether the request for opinion of which it has been seized falls within its advisory competence.

2. It shall also decide whether to accede to a wish expressed by a Member State of the Council, the Consultative Assembly, the Commission or the Secretary General, to submit or: to present a written statement or to be heard through a representative or: delegate.
Article 3

1. The Court shall give its opinion in plenary session. It shall give reasons for its opinions.

2. If the opinion as a whole, or a part thereof, does not represent the unanimous opinion of the Court, any judge may, if he so desires, attach his individual opinion thereto.

Article 4

1. The opinion of the Court shall be communicated to the Committee of Ministers.

2. It shall also be communicated to the President of the Consultative Assembly, the President of the European Commission of Human Rights and the Secretary General.

Arts. 5 and 6, identical to Arts. 9 and 10 of the preliminary draft of the Directorate of Human Rights, subject to amendment of the second paragraph of Article 10 to bring it into line with point 2 of letter H. 3255 by Mr. Modinos. Item IV. Pink folder. Principal papers.
First proposal by the Working Party

Draft Article:

1. The Court may give advisory opinions on legal questions concerning the interpretation of the Convention.

2. The power conferred on the Court by paragraph 1 of this Article shall not extend to

   (a) any question relating to the content or scope of the rights or freedoms defined in Section 1 of the Convention or in any Protocol thereto or otherwise affecting the obligations of the High Contracting Parties under the Convention or under any such Protocol;

   (b) any question concerning the competence or procedure of the Court or of the Commission or of a Sub-Committee or of the Committee of Ministers which any of these organs would have jurisdiction to decide in the course of any proceedings taken under (... provided for in ...) the Convention.
Strasbourg, 6th March 1962  

COMMITTEE OF EXPERTS ON  
PROBLEMS RELATING TO THE CONVENTION FOR THE  
PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL  
FREEDOMS  

Draft Agreement assigning to  
the European Court of Human Rights  
competence to give advisory opinions.  
(text proposed by the Working Party)  

"The Governments signatory hereto, being members of the  
Council of Europe,  
Having regard to the provisions of the Convention for  
the Protection of Human Rights and Fundamental Freedoms signed  
at Rome on 4th November, 1950 (hereinafter referred to as  
"the Convention") and in particular Article 19 instituting,  
among other bodies, a European Court of Human Rights (hereinafter  
referred to as "the Court");  
Considering that it would be of advantage if the Court  
had conferred upon it competence to give advisory opinions in  
certain circumstances;  
Have agreed as follows:
Article 1

(1) The Court may, on the request of the Committee of Ministers, give advisory opinions on legal questions concerning the interpretation of the Convention and the Protocols thereto, within the limitations set out in the paragraphs 2 and 3 of this Article.

(2) The power of the Court shall not extend to

(a) any question relating to the content or scope of the rights or freedoms defined in Section 1 of the Convention or in any Protocol thereto, or any question which, by its nature, could be subject to the jurisdiction of the Court;

(b) any question concerning the competence or procedure of the Court or of the Commission or of a Sub-Commission or of the Committee of Ministers which any of these organs would have jurisdiction to decide in the course of any proceedings taken in accordance with the provisions of the Convention.

(3) The Committee of Ministers alone shall have the right to request advisory opinions of the Court.

Article 2

The Court shall decide whether a request for an advisory opinion submitted by the Committee of Ministers is within its competence as defined by this Agreement.

Article 3

For consideration of requests for an advisory opinion, the Court shall sit in plenary session.
Article 4

(1) Reasons shall be given for the advisory opinion of the Court.

(2) If the advisory opinion 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 5

The advisory opinion of the Court shall be communicated to the Committee of Ministers.

Article 6

The powers of the Court under Article 55 of the Convention shall extend to the drawing up of such rules and the determination of such procedure as the Court may think necessary for the purposes of this Agreement.

Article 7

(1) This Agreement shall be open for signature by the members of the Council of Europe, signatories to the Convention, who may become Parties to it by:

(a) signature without reservation in respect of ratification or by

(b) signature with reservation in respect of ratification followed by ratification.

The instruments of ratification shall be deposited with the Secretary General of the Council of Europe.

(2) This Agreement shall enter into force as soon as all States Parties to the Convention shall, in accordance with paragraph 1, have signed it without reservation in respect of ratification or shall have ratified it.
Article 7 (continued)

(3) The Secretary General of the Council of Europe shall notify members of the Council of:

(a) the names of signatories and the deposit of any instrument of ratification;

(b) the date of the entry into force of this Agreement.
Draft Agreement conferring on the European Court of Human Rights the power to give advisory opinions

Text proposed by the Secretariat

Article 1

1. The Court may give an advisory opinion on legal questions concerning the interpretation of the Convention and its Protocols, within the limits set out in the following paragraphs.

2. The Court shall not be competent to give an advisory opinion on:

   (a) questions relating to the content or scope of the rights and freedoms defined in Section I of the Convention or in its Protocols;

   (b) questions which, by their nature, may be submitted to the jurisdiction of the Court;

   (c) Alternative A:

      procedural matters in which the Commission, the Court or the Committee of Ministers have jurisdiction under the terms of the Convention;

      Alternative B:

      procedural questions within the competence of the Commission, the Court or the Committee of Ministers.

3. The Committee of Ministers shall alone be entitled to apply to the Court for an advisory opinion.
Draft Agreement conferring on the European Court of Human Rights the power to give advisory opinions

Proposal by the French Representative

Article 1

1. The Court may give advisory opinions on legal questions concerning the interpretation of the Convention and its Protocols, within the limits defined in the following paragraphs.

2. The Court shall not be competent to give an advisory opinion on:

   (a) questions relating to the content or scope of the rights and freedoms defined in Section I of the Convention or in its Protocols;

   (b) questions which the Committee of Ministers, the Court or the Commission may have to consider in relation to an application lodged in pursuance of the Convention.

3. The Committee of Ministers shall alone be entitled to apply to the Court for an advisory opinion.
Strasbourg, 8th March 1962

CONFIDENTIAL

DH/Exp/Misc (62) 10

COMMITTEE OF EXPERTS ON PROBLEMS RELATING TO THE
CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND
FUNDAMENTAL FREEDOMS

Draft Agreement assigning to the European Court of
Human Rights competence to give advisory opinions

(Draft Report to the Committee of Ministers
prepared by the Secretariat)
INTRODUCTION

1. In the report which it prepared in April 1961, the Committee examined whether it would be advisable to confer upon the European Court of Human Rights competence in certain circumstances to give advisory opinions (Doc. CM (61) 91).

2. At its meeting in July 1961, the Committee of Ministers approved the conclusions of this report and instructed the Committee of Experts to draw up a draft Agreement based upon it.

3. The Committee of Experts met for this purpose from 2nd to 11th October 1961 and from 2nd to 10th March 1962. On 5th March 1961 a wide exchange of views was held on the matter at a joint meeting of members of the Committee and of the Legal Committee of the Consultative Assembly.

4. The Committee herewith submits to the Committee of Ministers the report prepared at its meeting in March 1962.

5. The report contains the following:

   (a) a draft Agreement assigning to the European Court of Human Rights competence to give advisory opinions.

   (b) a brief commentary on the different Articles of the draft.

   (c) three appendices:

      - the report drawn up by the Committee in April 1961 (Appendix I)

      - a list of members of the Committee who took part in the meetings in October 1961 and March 1962 (Appendix II)

      - a list of Working Papers (Appendix III)

6. It will be for the Committee of Ministers to take a decision with regard to the draft Agreement.
DRAFT AGREEMENT ASSIGNING TO THE EUROPEAN COURT OF HUMAN RIGHTS COMPETENCE TO GIVE ADVISORY OPINIONS

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

Having regard to the provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms signed at Rome on 4th November, 1950 (hereinafter referred to as "the Convention") and in particular Article 19 instituting, among other bodies, a European Court of Human Rights (hereinafter referred to as "the Court");

Considering that it would be of advantage if the Court were to have conferred upon it competence to give advisory opinions subject to certain conditions;

Have agreed as follows:

Article 1  (1) The Court may at the request of the Committee of Ministers, give advisory opinions on legal questions concerning the interpretation of the Convention and the Protocols thereto, within the limitations set out in the following paragraph.

(2) The competence of the Court shall not extend to any question relating to the content or scope of the rights or freedoms defined in Section 1 of the Convention and the Protocols thereto, or to any other question which the Commission, the Court or the Committee of Ministers might have to consider in consequence of any such proceedings as could be instituted in accordance with the Convention.

Article 2  The Court shall decide whether a request for an advisory opinion submitted by the Committee of Ministers is within its consultative competence as defined in Article 1 of this Agreement.

Article 3  (1) For the consideration of requests for an advisory opinion, the Court shall sit in plenary session.

(2) Reasons shall be given for the advisory opinion of the Court.
(3) If the advisory opinion 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 4

The advisory opinion of the Court shall be communicated to the Committee of Ministers.

Article 5

The powers of the Court under Article 55 of the Convention shall extend to the drawing up of such rules and the determination of such procedure as the Court may think necessary for the purposes of this Agreement.

Article 6

(1) This Agreement shall be open for signature by the Members of the Council of Europe, signatories to the Convention, who may become Parties to it by:

(a) signature without reservation in respect of ratification; or

(b) signature with reservation in respect of ratification followed by ratification.

The instruments of ratification shall be deposited with the Secretary General of the Council of Europe.

(2) This Agreement shall enter into force as soon as all States Parties to the Convention shall, in accordance with paragraph 1, have signed it without reservation in respect of ratification or shall have ratified it.

(3) The Secretary General of the Council of Europe shall notify Members of the Council of:

(a) the names of signatories and the deposit of any instrument of ratification;

(b) the date of the entry into force of this Agreement.
COMMENTARY

Title

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

2. The draft includes a preamble and six Articles.

Preamble

3. The preamble calls for no special comment.

Article 1

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

5. Paragraph 1 stipulates in principle that the Court may give advisory opinions on legal questions concerning the interpretation of the European Convention on Human Rights and the Protocols thereto and that such advisory opinions can only be given on receipt of a request from the Committee of Ministers.

The questions on which such opinions may be given must therefore have a legal character. The term "legal questions" is to be understood in the sense expressed in Articles 96 of the United Nations Charter, 65 of the Statute of the International Court of Justice and 82 and 83 of the Rules of Court of the International Court of Justice.

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

6. The Court may exercise its consultative competence only within the limitations set out in paragraph 2 of Article 1. The object of these limitations is to prevent exercise of the consultative competence of the Court from interfering with the Court's primary function, which is judiciary.

The limitations are:
7. Under paragraph 2, the Court may not give an opinion:

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

(b) on any question which the Commission, Court or Committee of Ministers might have to consider following on the institution of proceedings provided for by the Convention.

8. The Commission, the Court or the Committee of Ministers may, following on the institution of proceedings, have to consider other questions than those concerning the content or scope of rights and freedoms:

First of all, the Committee intended to rule out all questions of merit which, while having a bearing on the obligations imposed by the Convention upon Contracting Parties, do not concern the content or scope of the rights and freedoms.

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

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

Finally, according to Article 24 of the Convention, any Contracting Party may refer to the Commission "any alleged breach" of the provisions of the Convention by another Contracting Party.

Owing to the general terms in which this provision is cast, it would be possible for the bodies provided for by the Convention to have to consider breaches of the Convention which do not necessarily result from a violation of the rights and freedoms defined in Section 1 of the Convention and the Protocols, namely, violations of Articles 25, para. 1, and 57.
The Committee also intended to rule out certain questions of procedure or of competence which might be brought before one of the bodies provided for by the Convention following on the institution of proceedings.

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

9. It should be observed, however, that no questions are excluded from the advisory competence of the Court which might be brought before the Commission, the Court or the Committee of Ministers during proceeding provided for by the Convention.

The only questions ruled out are those which may arise following on the institution of proceedings provided for by the Convention, that is, those which are closely bound up with such proceedings and have a direct bearing upon them.

10. Paragraph 1 also provides that the Committee of Ministers shall have the right to request advisory opinions of the Court and this, combined with Article 2, precludes the possibility of this competence being exercised in any other way.

The Consultative Assembly, the European Commission of Human Rights and the Secretary General may submit proposals for requests for opinion to the Committee of Ministers. In such cases it would be for the Committee of Ministers to decide whether the proposed requests for opinion lie within the Court's consultative competence as defined in paragraphs 1 and 2. The Committee of Ministers would also have the right to judge of the desirability of referring such proposals to the Court.

11. It has been asked whether the text of the Agreement should not include a provision determining the majority required for decisions by the Committee of Ministers on requests for advisory opinion of the Court.

The Committee found it preferable not to make any provision of this nature in the Agreement. It held that it was for the Committee of Ministers to decide what rule it would adopt in this matter.

In this connection the following observations were made:

that Article 32 of the Convention provides for a two-thirds majority of members entitled to sit on the Committee in a vote to decide whether there has
been a violation of the Convention and, after this initial decision is taken, whether the High Contracting Party concerned has taken satisfactory measures within the prescribed period;

that, according to Article 20 (d) of the Statute of the Council of Europe, all resolutions of the Committee of Ministers, other than those mentioned in the first three paragraphs of Article 20, require a two-thirds majority of the representatives casting a vote and a majority of the representatives entitled to sit on the Committee.

Article 2

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

This provision is patterned after Article 49 of the Convention, stating that "in the event of disputes as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court".

Thus, the Court has both the right and the obligation to refuse a request for advisory opinion which the Committee of Ministers has asked it to give if it finds, for example, that the request does not concern a legal question or does concern the content or scope of rights and freedoms or might be brought before the Commission, Court or Committee of Ministers following on the institution of proceedings.

Article 3

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

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

The Committee is now considering an amendment to Article 43 which has been submitted by the Court, to the effect that the Court should sit in plenary session for the consideration of cases as well.
14. Paragraph 2 states that reasons shall be given for the advisory opinion of the Court.

This provision is based on Article 51, para. 1 of the Convention, stipulating that reasons shall be given for the judgments of the Court (cf. also Article 107, para. 2 of the Rules of Court of the Court of Justice of the European Communities).

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

This paragraph is based on Article 51, para. 2 of the Convention and Article 84, para. 2 of the Rules of Court of the International Court of Justice.

Article 4

16. This Article provides that the opinion of the Court shall be communicated to the Committee of Ministers.

As the Committee of Ministers has sole authority to request an advisory opinion, it is to this body that the opinion should be addressed.

Moreover, in pursuance of Article 54 of the Convention the Court is required to communicate its judgments to the Committee of Ministers.

Article 5

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

According to Article 55, the Court has the power to draw up its own regulations and determine its own procedure within the limits of its jurisdiction.

Under Article 5, the Court may also exercise this power, as and when it deems necessary, within the framework of its consultative competence.
Article 6

18. This Article contains the final clauses.

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

Alternative measures are provided with a view to speeding up the entry into force of the Agreement; they are based on similar clauses included in recent instruments concluded by the Council of Europe (Article 7 of the Agreement on the exchange of war cripples, signed on 13th December 1955; Article 5 of the Second Protocol to the General Agreement on Privileges and Immunities, signed on 15th December 1956; Article 8 of the European Agreement on Regulations governing the movement of persons, signed on 13th December 1957; Article 6 of the European Arrangement on the exchange of television programmes, signed on 15th December 1958; Article 7 of the European Agreement on the exchange of therapeutic substances, signed on 15th December 1958; Article 8 of the European Agreement on the abolition of visas for refugees, signed on 20th April 1959; Article 5 of the Agreement for the temporary importation of medical and surgical equipment, signed on 28th April 1960; Article 7 of the European Arrangement for the protection of television broadcasts, signed on 22nd June 1960; Article 9 of the Fourth Protocol to the General Agreement on Privileges and Immunities, signed on 16th December 1961).

19. Paragraph 2 fixes the moment of entry into force of the Agreement.

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

20. Paragraph 3 concerns the notifications which must be made by the Secretary General and needs no special comment.
APPENDIX I

HUMAN RIGHTS

Extension of the Powers of the European Court
Recommendation 232

Report of the Committee of Experts

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

Recommendation 232 (1960) of the Consultative Assembly proposes conferring "on the European Court of Human Rights, in addition to its present competence defined in Article 45 of the Convention, the competence to interpret the Convention on Human Rights, when a doubt has arisen of a legal character even though no case has been brought".

The Committee, after discussing this matter at two meetings held under the Chairmanship of Mr. Ugo Caldorera, from 7th to 11th November 1960 and from 24th to 29th April 1961, came to the following conclusions:

1. The Committee of Experts considers it desirable to confer advisory powers on the European Court of Human Rights, on the understanding that the exercise of those powers shall in no way impede the essential function of the Court—viz: its judicial function.

It would be of advantage that the bodies envisaged by the Convention for the Protection of Human Rights should have the benefit of the Court's expert opinion on the meaning of the Convention and of any text supplementary thereto, in so far they define the functions of those bodies and the relationship between them.
It is also necessary, however, to ensure that the Court shall never be placed in the difficult position of being required, as the result of a request for its opinion, to make a direct or indirect pronouncement on a legal point with which it might subsequently have to deal as a main consideration in some case brought before it under Articles 45 to 48 of the Convention.

2. The Committee considers that the Court should not be empowered to give advisory opinions on questions of substance such as those relating to the nature and scope of the rights and freedoms enumerated in the Convention and its Protocols, or to the obligations of States in relation to those rights and freedoms.

   In particular, the Court should not give an advisory opinion on any question which, under the terms of the Convention, is for the Commission or the Committee of Ministers to decide.

3. Obviously the questions on which a request for an advisory opinion can be based must be understood as limited to "legal questions" in the meaning given to that term in similar international conventions. This rules out, on the one hand, questions which would go beyond the mere interpretation of the text and tend by additions, improvements or corrections to modify its substance; and, on the other hand, questions whose terms or whose solution would in any way involve matters of policy.

4. The right to make a request to the Court for an advisory opinion should be confined to the Committee of Ministers.

   It would always be open to the Consultative Assembly and the Secretary General to submit proposals for a request for an advisory opinion to the Committee of Ministers. The same possibility should be contemplated for the European Commission of Human Rights.

   The Committee of Ministers would consider whether the content of the proposal was such that it could be submitted to the Court, and would decide as to the expediency of so submitting it.

5. Several delegations considered that when exercising its advisory powers, the Court should meet in plenary session.
APPENDIX II

List of members of the Committee present at the meetings of October 1961 and March 1962

AUSTRIA
Mr. W. PAHR
Ministerial Commissioner, Constitutional Department, Federal Chancellery
VIENNA

BELGIUM
Mr. H. BUCKINX
Director-General, Ministry of Justice, BRUSSELS

Mr. A. GOMREE
Magistrate attached to the Ministry of Justice, BRUSSELS

Mr. J. FRADIN
Administrative Secretary, Ministry of Justice, BRUSSELS

DENMARK
Mr. N. MADSEN
Head of Department, Ministry of Justice, COPENHAGEN

FRANCE
Mr. P. GODARD
Assistant Director in the Ministry of Interior, PARIS

FEDERAL REPUBLIC OF GERMANY
Mr. W. BERTRAM
Counsellor, Ministry of Justice, BONN

Mr. K. BREULL
Counsellor, Ministry of Interior, BONN

Mr. H. HEUSELER
First Secretary, Ministry of Foreign Affairs, BONN

Mr. W. PAULY
First Secretary, Ministry of Foreign Affairs, BONN

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<tr>
<th>Country</th>
<th>Name</th>
<th>Position and Affiliation</th>
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<tbody>
<tr>
<td>Greece</td>
<td>Mr. P. Vegliris</td>
<td>Professor at the Faculty of Law, University of Athens, Athens</td>
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<tr>
<td>Iceland</td>
<td>Not represented</td>
<td></td>
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<tr>
<td>Ireland</td>
<td>Mr. D.P. Waldron</td>
<td>Assistant Legal Adviser, Department of External Affairs, Dublin</td>
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<td></td>
<td>Mr. J. Olden</td>
<td>Administrative Officer, Department of Justice, Dublin</td>
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<td>Italy</td>
<td>Mr. Ugo Caldarella (Chairman)</td>
<td>Deputy Attorney-General, Rome Court of Cassation, Adviser, Legal Department, Ministry of Foreign Affairs, Rome</td>
</tr>
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<td></td>
<td>Mr. L. Giovenco</td>
<td>Head of Division, Ministry of Interior, Rome</td>
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<td></td>
<td>Mr. E. Maseilli</td>
<td>Magistrate seconded to the Ministry of Justice, Rome</td>
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<td>Mr. N. Vianello-Chiodo</td>
<td>Second Secretary, Embassy of Italy, Vienna</td>
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<td>Luxembourg</td>
<td>Mr. E. Muller</td>
<td>Administrative Secretary, Ministry of Justice, Luxembourg</td>
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<tr>
<td>Netherlands</td>
<td>Mr. H.G. Schermers</td>
<td>Assistant Legal Adviser, Ministry of Foreign Affairs, Hague</td>
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<tr>
<td>Country</td>
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<tr>
<td>NORWAY</td>
<td>Mr. U. UNDERLAND</td>
<td>First Secretary, Legal Department, Ministry of Foreign Affairs, OSLO</td>
</tr>
<tr>
<td>SWEDEN</td>
<td>Mr. C. LIDGARD</td>
<td>First Secretary, Ministry of Foreign Affairs, STOCKHOLM</td>
</tr>
<tr>
<td>TURKEY</td>
<td>Mr. I. UNAT</td>
<td>Docent at the Faculty of Political Science, University of Ankara, ANKARA</td>
</tr>
<tr>
<td>UNITED KINGDOM</td>
<td>Sir S. HOARE</td>
<td>Formerly Assistant Under-Secretary, Home Office, LONDON</td>
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<td>(Vice-Chairman)</td>
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APPENDIX III

Working Papers

PART I: PRINCIPAL PAPERS

1. Doc. 1061:
   Report dated 24th November 1959 presented by
   Mr. Wahl on behalf of the Legal Committee of
   the Consultative Assembly.

2. Recommendation 232 (60) adopted by the Consultative
   Assembly on 22nd January 1960.

3. Resolution (60) 20 adopted by the Committee of
   Ministers at their 89th meeting held from
   13th to 16th September 1960.

4. Doc. CM (61) 91:

5. Doc. CM/Del/Concl. (61) 100
   Conclusions of the 100th meeting of the
   Ministers' Deputies held at Strasbourg from
   2nd to 8th July 1961 /Point IX (e)/

6. Doc. DH/Exp (61) 36:
   Memorandum by the Directorate of Human Rights
   on the third meeting of the Committee from
   2nd to 11th October 1961.

7. Doc. DH/Exp (62) 5:
   Comparison of the Legal Committee's Report (Doc. 1061)
   with the Report of the Committee of Experts
   (Doc. CM (61) 91)
PART II: SUPPLEMENTARY PAPERS

1. Official Report of debates held during the afternoon Sitting of the Consultative Assembly on 22nd January 1960 (Third Part of the Eleventh Ordinary Session, Volume III, pp. 876 and 878)

2. Doc. DH/Exp (60) 26:
   Memorandum, dated 18th November 1960, by the Directorate of Human Rights on the proceedings at the Committee's first meeting at Strasbourg from 7th to 11th November 1960.

3. Doc. DH/Exp (61) 1:
   Memorandum, dated 22nd March 1961, by the Directorate of Human Rights on two points in Doc. DH/Exp (60) 26.

4. Doc. DH/Exp (61) 2:
   Draft report of the Committee of Experts.

5. Doc. DH/Exp (61) 4:
   Proposal by the Netherlands expert.

6. Doc. DH/Exp (61) 6:
   Proposal by the Secretariat-General.

7. Doc. DH/Exp (61) 7:
   Memorandum by the Greek expert.

8. Doc. DH/Exp (61) 8:
   Proposal by the Austrian expert.

9. Doc. DH/Exp (61) 9:
   Proposal by the United Kingdom Export.

10. Doc. DH/Exp (61) 10:
    Proposal by the Italian Expert.
11. Doc. DH/Exp (61) 11:
Proposal by the Expert of the Federal Republic of Germany.

12. Doc. DH/Exp (61) 13:
Draft report produced by a Drafting Committee of the Committee of Experts.

13. Doc. DH/Exp (61) 17:
Comparative texts.

14. Doc. DH/Exp (61) 23:
Text of a preliminary draft Protocol drawn up by the Directorate of Human Rights.

15. Doc. DH/Exp/Misc (62) 1:
Proposal by the United Kingdom Expert.

16. Doc. DH/Exp/Misc (62) 2:
Proposal by the Greek Expert.

17. Doc. DH/Exp/Misc (62) 4:
First proposal by the Working Party.

18. Doc. DH/Exp/Misc (62) 5:
Draft agreement submitted by the Working Party.

19. Doc. DH/Exp/Misc (62) 6:
Proposal by the Secretariat.

20. Doc. DH/Exp/Misc (62) 7:
Working Party proposal

Draft adopted by the Committee.
Sir,

I have the honour to enclose your Committee's draft report on the conferring of advisory powers on the European Court of Human Rights (Doc. DH/Exp (62) 6 provisional).

Should you have any comments to make on this document I should be obliged if you would send them to me before 15th April next.

I wonder whether paragraph 8 of the commentary concerning the voting on the proposal to request an advisory opinion might not be re-worded in such a way as to bring out the fact that a large majority of the members of your Committee are in favour of the two-thirds majority rule.

In my opinion, the new wording might be as follows:

"The Legal Committee raised the question whether the Agreement should not include a provision stipulating that decisions by the Committee of Ministers to request an advisory opinion shall be taken by a majority of two-thirds of the members entitled to sit on the Committee. The Legal Committee were in favour of such a majority which is that provided for in Article 32 of the Convention.

Although this opinion was shared by many experts, the Committee considered it inadvisable to insert a provision on this matter which would be binding upon the executive organ of the Council of Europe. They felt that it was for the Committee of Ministers itself to decide what rule it would adopt in this connection."

I should be grateful if you would kindly inform me, at your earliest convenience, of your views on this proposed amendment.

I remain, Sir,

Your obedient Servant,

P. MODINOS
Strasbourg, 8th May 1962

COMMITTEE OF EXPERTS ON PROBLEMS RELATING TO THE
CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND
FUNDAMENTAL FREEDOMS

Draft Agreement assigning to the European Court of
Human Rights competence to give advisory opinions

(Draft Report to the Committee of Ministers)
1. In the report which it prepared in April 1961, the Committee of Experts expressed the view that it would be desirable to confer upon the European Court of Human Rights competence to give, subject to certain conditions, advisory opinions (Doc. CM (61) 91).

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

3. The Committee of Experts prepared the draft at its meetings held from 2nd to 11th October 1961 and from 2nd to 10th March 1962.

On 5th March 1962 a wide exchange of views was held on the matter at a joint meeting of members of this Committee and the Legal Committee of the Consultative Assembly.

4. The Committee has the honour to submit herewith to the Committee of Ministers the report prepared at its meeting in March 1962.

5. This report contains:
   
   (a) a draft Agreement assigning to the European Court of Human Rights competence to give advisory opinions.
   
   (b) a brief commentary on the different Articles of the draft.
   
   (c) three appendices:
   
   - the report drawn up by the Committee in April 1961 (Appendix I)
   
   - a list of members of the Committee who took part in the meetings in October 1961 and March 1962 (Appendix II)
   
   - a list of working papers (Appendix III)
DRAFT AGREEMENT ASSIGNING TO THE EUROPEAN COURT OF HUMAN RIGHTS COMPETENCE TO GIVE ADVISORY OPINIONS

"The Governments signatory hereto, being members of the Council of Europe,

Having regard to the provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms signed at Rome on 4th November 1950 (hereinafter referred to as "the Convention") and in particular Article 19 instituting, among other bodies, a European Court of Human Rights (hereinafter referred to as "the Court");

Considering that it would be of advantage if the Court were to have conferred upon it competence to give advisory opinions subject to certain conditions;

Have agreed as follows:

Article 1 (1) The Court may, at the request of the Committee of Ministers, give advisory opinions on legal questions concerning the interpretation of the Convention and the Protocols thereto, within the limitations set out in the following paragraph.

(2) The competence of the Court shall not extend to any question relating to the content or scope of the rights or freedoms defined in Section 1 of the Convention and the Protocols thereto, or to any other question which the Commission, the Court or the Committee of Ministers might have to consider in consequence of any such proceedings as could be instituted in accordance with the Convention.

Article 2 The Court shall decide whether a request for an advisory opinion submitted by the Committee of Ministers is within its consultative competence as defined in Article 1 of this Agreement.

Article 3 (1) For the consideration of requests for an advisory opinion, the Court shall sit in plenary session.
(2) Reasons shall be given for the advisory opinion of the Court.

(3) If the advisory opinion 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 4**  
The advisory opinion of the Court shall be communicated to the Committee of Ministers.

**Article 5**  
The powers of the Court under Article 55 of the Convention shall extend to the drawing up of such rules and the determination of such procedure as the Court may think necessary for the purposes of this Agreement.

**Article 6**

(1) This Agreement shall be open for signature by the Members of the Council of Europe, signatories to the Convention, who may become Parties to it by:

(a) signature without reservation in respect of ratification; or

(b) signature with reservation in respect of ratification followed by ratification.

The instruments of ratification shall be deposited with the Secretary General of the Council of Europe.

(2) This Agreement shall enter into force as soon as all States Parties to the Convention shall, in accordance with paragraph 1, have signed it without reservation in respect of ratification or shall have ratified it.

(3) The Secretary General of the Council of Europe shall notify members of the Council of:

(a) the names of signatories and the deposit of any instrument of ratification;

(b) the date of the entry into force of this Agreement.
Title

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

2. The draft includes a preamble and six Articles.

Preamble

3. The preamble calls for no comment.

Article 1

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

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

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

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

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

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

8. The question arose whether the text of the Agreement should not contain a provision determining the voting requirements for decisions of the Committee of Ministers on requests for advisory opinions of the Court.

The Committee found it preferable not to make any provision of this nature in the Agreement. It considered that it was for the Committee of Ministers to decide what rules it would adopt in this matter.

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

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

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

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

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

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

In the first place the Committee intended to exclude all questions of substance which, while they do not concern the content or scope of the rights and freedoms, involve obligations on the Contracting Parties.
Thus, Article 25, paragraph 1 of the Convention in fine provides that Contracting Parties which have recognised the right of individual application undertake not to hinder in any way the effective exercise of this right.

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

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

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

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

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

The questions which are excluded are those which the Commission, the Court or the Committee of Ministers might have to consider in consequence of the institution of proceedings provided for in the Convention whether such proceedings are past, present, future or merely hypothetical.
Article 2

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

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

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

Article 3

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

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

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

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

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

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

This paragraph is based upon Article 51, paragraph 2, of the Convention and Article 57 of the Statute of the International Court of Justice and also on Article 84, paragraph 2 of the Rules of Court of the International Court of Justice.
16. **Article 4** This Article provides that an advisory opinion of the Court shall be communicated to the Committee of Ministers and calls for no observations.

**Article 5**

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

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

The Court will also be able, by virtue of Article 5 of this Agreement, to exercise such power as regards its consultative competence if it thinks it necessary.

**Article 6**

18. This Article contains the final clauses.

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

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

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(1) Article 7 of the Agreement on the exchange of war cripples, signed on 13th December 1955; Article 5 of the Second Protocol to the General Agreement on Privileges and Immunities, signed on 15th December 1956; Article 8 of the European Agreement on Regulations governing the movement of persons, signed on 13th December 1957; Article 6 of the European Arrangement on the exchange of television programmes, signed on 15th December 1958; Article 7 of the European Agreement on the exchange of therapeutic substances, signed on 15th December 1958; Article 8 of the European Agreement on the abolition of visas for refugees, signed on 20th April 1959; Article 5 of the Agreement for the temporary importation of medical and surgical equipment, signed on 28th April 1960; Article 7 of the European Arrangement for the protection of television broadcasts, signed on 22nd June 1960; Article 9 of the Fourth Protocol to the General Agreement on Privileges and Immunities, signed on 16th December 1961.
19. **Paragraph 2** provides that this Agreement shall enter into force as soon as all States Parties to the Convention shall have signed it without reserve in respect of ratification or shall have ratified it.

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

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

Report prepared by the Committee of Experts in April 1961 (Doc. CM (61) 91)

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

Recommendation 232 (1960) of the Consultative Assembly proposes conferring "on the European Court of Human Rights, in addition to its present competence defined in Article 45 of the Convention, the competence to interpret the Convention on Human Rights, when a doubt has arisen of a legal character even though no case has been brought".

The Committee, after discussing this matter at two meetings held under the Chairmanship of Mr. Ugo Caldarera, from 7th to 11th November 1960 and from 24th to 29th April 1961, came to the following conclusions:

1. The Committee of Experts considers it desirable to confer advisory powers on the European Court of Human Rights, on the understanding that the exercise of those powers shall in no way impede the essential function of the Court - viz: its judicial function.

It would be of advantage that the bodies envisaged by the Convention for the Protection of Human Rights should have the benefit of the Court's expert opinion on the meaning of the Convention and of any text supplementary thereto, in so far as they define the functions of those bodies and the relationship between them.

It is also necessary, however, to ensure that the Court shall never be placed in the difficult position of being required, as the result of a request for its opinion, to make a direct or indirect pronouncement on a legal point with which it might subsequently have to deal as a main consideration in some case brought before it under Articles 45 to 48 of the Convention.
2. The Committee considers that the Court should not be empowered to give advisory opinions on questions of substance such as those relating to the nature and scope of the rights and freedoms enumerated in the Convention and its Protocols, or to the obligations of States in relation to those rights and freedoms.

In particular, the Court should not give an advisory opinion on any question which, under the terms of the Convention, is for the Commission or the Committee of Ministers to decide.

3. Obviously the questions on which a request for an advisory opinion can be based must be understood as limited to "legal questions" in the meaning given to that term in similar international conventions. This rules out, on the one hand, questions which would go beyond the mere interpretation of the text and tend by additions, improvements or corrections to modify its substance; and, on the other hand, questions whose terms or whose solution would in any way involve matters of policy.

4. The right to make a request to the Court for an advisory opinion should be confined to the Committee of Ministers.

It would always be open to the Consultative Assembly and the Secretary General to submit proposals for a request for an advisory opinion to the Committee of Ministers. The same possibility should be contemplated for the European Commission of Human Rights.

The Committee of Ministers would consider whether the content of the proposal was such that it could be submitted to the Court, and would decide as to the expediency of so submitting it.

5. Several delegations considered that when exercising its advisory powers, the Court should meet in plenary session.
APPENDIX II

List of members of the Committee present at the meetings of October 1961 and March 1962

<table>
<thead>
<tr>
<th>Country</th>
<th>Name</th>
<th>Position and Details</th>
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<tbody>
<tr>
<td>AUSTRIA</td>
<td>Mr. W. PAHR</td>
<td>Ministerial Commissioner, Constitutional Department, Federal Chancellery, VIENNA</td>
</tr>
<tr>
<td>BELGIUM</td>
<td>Mr. H. BUCKINX</td>
<td>Director-General, Ministry of Justice, BRUSSELS</td>
</tr>
<tr>
<td></td>
<td>Mr. A. GOMREE</td>
<td>Magistrate attached to the Ministry of Justice, BRUSSELS</td>
</tr>
<tr>
<td></td>
<td>Mr. J. FRADIN</td>
<td>Administrative Secretary, Ministry of Justice, BRUSSELS</td>
</tr>
<tr>
<td>CYPRUS</td>
<td>not represented</td>
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<tr>
<td>DENMARK</td>
<td>Mr. N. MADSEN</td>
<td>Head of Department, Ministry of Justice, COPENHAGEN</td>
</tr>
<tr>
<td>FRANCE</td>
<td>Mr. P. GODARD</td>
<td>Assistant Director of trans-frontier traffic and aliens at the &quot;Direction de la Reglementation&quot; of the Ministry of Interior, PARIS</td>
</tr>
<tr>
<td>FEDERAL REPUBLIC OF GERMANY</td>
<td>Mr. W. BERTRAM</td>
<td>Counsellor, Ministry of Justice, BONN</td>
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<td></td>
<td>Mr. K. BREULL</td>
<td>Counsellor, Ministry of Interior, BONN</td>
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<tr>
<td>Country</td>
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<tr>
<td>FEDERAL REPUBLIC OF GERMANY</td>
<td>Mr. H. HEUSELER</td>
<td>First Secretary, Ministry of Foreign Affairs, BONN</td>
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<tr>
<td></td>
<td>Mr. W. PAULY</td>
<td>First Secretary, Ministry of Foreign Affairs, BONN</td>
</tr>
<tr>
<td>GREECE</td>
<td>Mr. P. VEGLERIS</td>
<td>Professor at the Faculty of Law, University of Athens, 7 rue Zalacosta, ATHENS</td>
</tr>
<tr>
<td>ICELAND</td>
<td></td>
<td>not represented</td>
</tr>
<tr>
<td>IRELAND</td>
<td>Mr. D.P. WALDRON</td>
<td>Assistant Legal Adviser, Department of External Affairs, DUBLIN</td>
</tr>
<tr>
<td></td>
<td>Mr. J. OLSEN</td>
<td>Administrative Officer, Department of Justice, DUBLIN</td>
</tr>
<tr>
<td>ITALY</td>
<td>Mr. Ugo CALDARERA (Chairman)</td>
<td>Deputy Attorney-General, Rome Court of Cassation, Adviser, Legal Department, Ministry of Foreign Affairs, ROME</td>
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<td></td>
<td>Mr. L. GIOVENCO</td>
<td>Head of Division, Ministry of Interior, ROME</td>
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<td></td>
<td>Mr. E. MASELLI</td>
<td>Magistrate seconded to the Ministry of Justice, ROME</td>
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<td>Mr. M. VIANELLO-CHIODO</td>
<td>Second Secretary, Embassy of Italy, VIENNA</td>
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<tr>
<td>LUXEMBOURG</td>
<td>Mr. E. MULLER</td>
<td>Administrative Secretary, Ministry of Justice, LUXEMBOURG</td>
</tr>
<tr>
<td>Country</td>
<td>Name</td>
<td>Position and Affiliation</td>
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<tr>
<td>NETHERLANDS</td>
<td>Mr. H.G. SCHERMERS</td>
<td>Assistant Legal Adviser, Ministry of Foreign Affairs, THE HAGUE</td>
</tr>
<tr>
<td>NORWAY</td>
<td>Mr. U. UNDERLAND</td>
<td>First Secretary, Legal Department, Ministry of Foreign Affairs, OSLO</td>
</tr>
<tr>
<td>SWEDEN</td>
<td>Mr. C. LIDGARD</td>
<td>First Secretary, Ministry of Foreign Affairs, STOCKHOLM</td>
</tr>
<tr>
<td>TURKEY</td>
<td>Mr. I. UNAT</td>
<td>Legal Adviser to the Ministry of Foreign Affairs, Docent at the Faculty of Political Science, University of Ankara, ANKARA</td>
</tr>
<tr>
<td>UNITED KINGDOM</td>
<td>Sir S. HOARE</td>
<td>Formerly Assistant Under-Secretary, Home Office, LONDON</td>
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<td></td>
<td>(Vice-Chairman)</td>
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APPENDIX III

Working Papers

PART I: PRINCIPAL PAPERS

1. Doc. 1061:
   Report dated 24th November 1959 presented by Mr. Wahl on behalf of the Legal Committee of the Consultative Assembly.

2. Recommendation 232 (60) adopted by the Consultative Assembly on 22nd January 1960.

3. Resolution (60) 20 adopted by the Committee of Ministers at their 89th meeting held from 13th to 16th September 1960.

4. Doc. CM (61) 91:

5. Doc. CM/De1/Concl. (61) 100
   Conclusions of the 100th meeting of the Ministers' Deputies held at Strasbourg from 2nd to 8th July 1961 / point IX (c) /

6. Doc. DH/Exp (61) 36:
   Memorandum by the Directorate of Human Rights on the third meeting of the Committee from 2nd to 11th October 1961.

7. Doc. DH/Exp (62) 5:
   Comparison of the Legal Committee's Report (Doc. 1061) with the Report of the Committee of Experts (Doc. CM (61) 91).
PART II: SUPPLEMENTARY PAPERS

1. **Official Report** of debates held during the afternoon sitting of the Consultative Assembly on 22nd January 1960 (Third Part of the Eleventh Ordinary Session, Volume III, pp 876 and 878).

2. **Doc. DH/Exp (60) 26**: Memorandum, dated 18th November 1960, by the Directorate of Human Rights on the proceedings at the Committee's first meeting at Strasbourg from 7th to 11th November 1960.


5. **Doc. DH/Exp (61) 4**: Proposal by the Netherlands expert.

6. **Doc. DH/Exp (61) 6**: Proposal by the Secretariat General.

7. **Doc. DH/Exp (61) 7**: Memorandum by the Greek expert.

8. **Doc. DH/Exp (61) 8**: Proposal by the Austrian expert.

9. **Doc. DH/Exp (61) 9**: Proposal by the United Kingdom expert.

10. **Doc. DH/Exp (61) 10**: Proposal by the Italian expert.
11. Doc. DH/Exp (61) 11:
Proposal by the Expert of the Federal Republic of Germany.

12. Doc. DH/Exp (61) 13:
Draft report produced by a Drafting Committee of the Committee of Experts.

13. Doc. DH/Exp (61) 17:
Comparative texts.

14. Doc. DH/Exp (61) 23:
Text of a preliminary draft Protocol drawn up by the Directorate of Human Rights.

15. Doc. DH/Exp/Misc (62) 1:
Proposal by the United Kingdom expert.

16. Doc. DH/Exp/Misc (62) 2:
Proposal by the Greek expert.

17. Doc. DH/Exp/Misc (62) 4:
First proposal by the Working Party.

18. Doc. DH/Exp/Misc (62) 5:
Draft agreement submitted by the Working Party.

19. Doc. DH/Exp/Misc (62) 6:
Proposal by the Secretariat.

20. Doc. DH/Exp/Misc (62) 7:
Working Party proposal.

21. Doc. DH/Exp/Misc (62) 8 Revised
Draft provisionally adopted by the Committee.
Strasbourg, 8th May 1962

Confidential
DH/EXP (62) 12
Or. Fr.

COMMITTEE OF EXPERTS
ON PROBLEMS RELATING TO THE CONVENTION
FOR THE PROTECTION OF HUMAN RIGHTS
AND FUNDAMENTAL FREEDOMS

Draft Agreement assigning to the European Court
of Human Rights competence to give advisory opinions

Comments by members of the Committee of Experts
on the draft Report to the Committee of Ministers
(Doc. DH/EXP (62) 6)
I. GENERAL COMMENTS

Comments by the Greek Expert

The text of the draft Agreement drawn up at our last meeting and the explanatory memorandum both confirm and even strengthen the impression with which several members of the Committee (the majority perhaps) were left at the end of that meeting. By taking too many precautions against requests for opinions on points of law which the Court might later have to settle in connection with a specific case referred to it, we are running the risk that the restrictions with which Article 1 of the draft is now overloaded will empty the Court's advisory powers. At all events, these precautions now rule out the Court's competence in the very situations in which its opinion would be of the most value.

It might therefore be useful to devote one or two sittings at our next meeting to reconsidering the draft Agreement and perhaps rediscussing the principle of conferring advisory powers on the Court. It would certainly be worthwhile to discover whether the restrictive attitude which prevailed in the Committee was the result of considered caution or the effect of deep distrust of the very principle of the Court having advisory powers.

II. COMMENTS ON THE TEXT OF THE DRAFT AGREEMENT

Article 4

Comments by the Greek Expert

Article 4 of the draft is too short and, which is more serious, too insubstantial to form a separate Article. It might be better incorporated in Article 3 as paragraph 4.
Article 5:

Comments by the Greek Expert

The wording of Article 5 is still unsatisfactory. The expression "the powers of the Court...shall extend" is more suited to a descriptive text and the article as a whole is unbalanced. Would it not be simpler to say:

"The Court may exercise the powers conferred on it by Article 55 to draw up rules of procedure for the application of this Agreement."

III. COMMENTS ON THE DRAFT COMMENTARY (1)

Paragraph 8

1. Text

The paragraph is worded as follows:

"The question arose whether the text of the Agreement should not contain a provision determining the voting requirements for decisions of the Committee of Ministers on requests for advisory opinions of the Court.

The Committee found it preferable not to make any provision of this nature in the Agreement. It considered that it was for the Committee of Ministers to decide what rules it would adopt in this matter."

2. Secretariat Proposal

In letter H/5100 of 5th April 1962 the Secretariat proposed re-wording the text to bring out the fact that a large majority of the members of the Committee were in favour of the two-thirds majority rule. The following wording was proposed:

(1) This document is concerned with remarks on the content of the commentary only and not with criticisms of drafting.
"The Legal Committee raised the question whether the Agreement should not include a provision stipulating that decisions by the Committee of Ministers to request an advisory opinion shall be taken by a majority of two-thirds of the members entitled to sit on the Committee. The Legal Committee were in favour of such a majority, which is that provided for in Article 32 of the Convention.

Although this opinion was shared by many, the Committee of Experts considered it inadvisable to insert a provision on this matter which would be binding upon the executive organ of the Council of Europe. They felt that it was for the Committee of Ministers itself to decide what rule it would adopt in this connection."

3. Comments by the Austrian Government

Austria is not in a position to agree to the amendments proposed by the Secretariat since the experts felt that the matter was one which concerned not Human Rights, but procedure in the Committee of Ministers, which was fixed by the Statute.

4. Comments by the Belgian Expert

... I fully approve the amendment proposed by the Secretariat to paragraph 8 of the commentary.

5. Comments by the representative of the Federal Republic of Germany

... I fully approve the amendment proposed by the Secretariat.

6. Comments by the French Expert

After stating the question as proposed by the Secretariat in paragraph 1 of their amendment, it seems preferable to me simply to say that the Committee does not consider itself entitled to express an opinion on this point. This would mean omitting the opening phrase of paragraph 2 of the amendment: "Although this opinion was shared by many ...".
7. Comments by the Greek Expert

(a) The idea of re-wording this paragraph to bring out the fact that a majority of the experts favoured making an exception to the unanimity rule for decisions by the Committee of Ministers to seek the opinion of the Court, seems to me to correspond to the views expressed by a number of experts and approved, at least implicitly, by the others. It is also true that at the close of our discussion we preferred not to include a provision to this effect in the draft Agreement.

I venture to suggest that the prevailing attitude of the Committee might best be reflected by rewording the Secretariat's proposed amendment to paragraph 8 in letter H/5100 (page 1) as follows:

"The Committee of Experts shared the Legal Committee's view that decisions of the Committee of Ministers to request an opinion of the European Court should not be subject to the unanimity rule established by Article 20 of the Statute of the Council of Europe. In the experts' view, a large majority, such as two-thirds of the members entitled to sit on the Committee, might be accepted as sufficient. This solution, which is supported by Article 32 of the Convention, would be all the more acceptable since, according to Article 1 paragraph 1 of the experts' draft, the Committee of Ministers alone is entitled to submit a request for an opinion to the Court."

The second paragraph of the Secretariat's suggestion for paragraph 8 might be worded as follows (a drafting amendment only):

"The Committee considered, however, that this was a matter which concerned the procedure of the Committee of Ministers and that any initiative or decision on the rule to be established should, accordingly, be left to that body."

(b) The above was certainly the general feeling at our last meeting, but, on reflection, I wonder whether our conclusion, by erring on the side of overscrupulousness, does not merely succeed in complicating matters. While the inclusion of a provision in the Agreement itself fixing the majority required in the Committee of Ministers would have settled the question one way or the other, the reference of the matter to the Committee of Ministers for a decision amounts, if I am not mistaken, to asking it to institute further procedure for amending the Statute or concluding a special agreement, neither of which would be really feasible.

./.
3. Comments by the Chairman of the Committee, the Italian Expert

I am in favour of the amendment proposed by the Secretariat.

I suggest however omitting the last words of the first paragraph: "which is that provided for in Article 32 of the Convention" since that provision applies to something quite different.

9. Comments by the Luxembourg Representative

I support the Secretariat proposal.

10. Comments by the Netherlands Representative

I prefer the text proposed by the Secretariat. I should, however, omit from the second paragraph the words: "which would be binding upon the executive organ of the Council of Europe". In my view our Report is merely advisory and in no way binds the Committee of Ministers.

Furthermore, the Report might be completed by defining in paragraph 5 what would be the legal position if the Committee of Ministers did not take a decision on the majority required.

However, if there are no other comments on this point, I have no wish to hold up the adoption of the Report merely to incorporate these amendments.

11. Comments by the Norwegian Representative

I support the amendment proposed by the Secretariat.

12. Comments by the Swedish Representative

I have no objection to the amendment proposed by the Secretariat.

13. Comments by the United Kingdom Representative

I have no objection to paragraph 5 of the Report being amended in the sense suggested by the Secretariat, but as a matter of drafting I should prefer a paragraph in the following terms and based in part upon the present text:

./.
"The question was considered whether the text of the Agreement should not contain a provision determining the voting requirements for decisions of the Committee of Ministers on requests for advisory opinions of the Court. The Legal Committee of the Consultative Assembly was of the opinion that such decisions should be taken by a majority of two-thirds of the members entitled to sit on the Committee, which is the majority provided for in Article 32 of the Convention.

Although this opinion was shared by many experts, the Committee considered it inadvisable to insert a provision on this matter which would be binding upon the executive organ of the Council of Europe. They felt that it was for the Committee of Ministers itself to decide what rule it would adopt in this connection."

14. Conclusions

On 3th May 1962 the Secretariat had received comments on paragraph 3 from eleven experts.

(a) Nine experts agreed in principle to rewording the paragraph to show that a majority in the Committee had come out in favour of the two-thirds majority rule (Belgium, Germany, Greece, Italy, Luxembourg, the Netherlands, Norway, Sweden, United Kingdom).

While five of these experts approve the text proposed by the Secretariat four suggest a slightly different wording.

(b) Two experts think that the Report should not state the Committee's views on this matter (Austria and France).
Advisory competence of the European Court of Human Rights

Proposal by the Working Party

Article 1

(1) The Court may, at the request of the Committee of Ministers, give advisory opinions on legal questions concerning the interpretation of the Convention and the Protocols thereto.

(2) Such opinions shall not deal with any question relating to the content or scope of the rights or freedoms defined in Section 1 of the Convention and the Protocols thereto, or with any other question which the Commission, the Court or the Committee of Ministers might have to consider in consequence of any such proceedings as could be instituted in accordance with the Convention.
Add to para. 8 the following:

One or two experts, however, considered the question of a vote in the Committee of Ministers as part of the procedure giving effect to the advisory competence conferred on the Court, and thought it consequently necessary to determine, by a statutory provision, the majority required for this vote. They concluded that there was nothing to prevent the Committee inserting a provision on this point in the draft Agreement, the Committee of Ministers being naturally at liberty to adopt, reject or amend it, in the same way as the rest of the draft Agreement.
Add to para. 11 of the Commentary, the following:

"Several experts expressed the opinion that, the principle of the attribution of advisory competence to the Court having been recognised, its entire significance should not be removed by defining too restrictively the legal questions on which an opinion may be asked.

They considered that the solution adopted by the majority of the experts and reproduced in Article 1 (2) of the draft Agreement should stop at the words "... and the Protocols thereto". The addition of the sentence which follows to the effect that the competence of the Court shall not extend "to any other question which the Commission, the Court, or the Committee of Ministers might have to consider in consequence of any such proceedings as could be instituted in accordance with the Convention" has the effect of excluding from the advisory competence all or almost all that remains beyond the interpretation of the articles of the Convention setting forth the rights and freedoms. Thus no opinion could be requested either on the questions concerning the limits of the respective powers of the Commission and of the Committee of Ministers as regards the application of the Convention or on those concerning the conditions of admissibility of an application lodged with these organs or any other procedural difficulty.

If, under the terms of the draft prepared by the experts (Article 3, (1)), the Court is required to express its opinions in plenary session, it is apparently because a certain practical importance is attached to this function and because the matters on which it may be exercised are defined."
Paragraph 8 of the Commentary to read as follows:

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

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

Most of the experts shared this opinion.

Some experts considered that the question of voting in the Committee of Ministers was part of the procedure for putting into operation the advisory competence conferred on the Court and that the majority required for this vote should therefore be the subject of a statutory provision. They concluded that there was nothing to prevent the Committee inserting in the Draft Agreement a provision on this point, which the Committee of Ministers would be free to adopt, reject or amend in the same way as the rest of the Agreement.

The majority thought it preferable not to include such a provision in the Agreement. They considered that it was for the Committee of Ministers itself to determine what rules it would adopt in the matter."
Strasbourg, 15th June 1962.

COMMITTEE OF EXPERTS ON PROBLEMS RELATING TO THE
CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND
FUNDAMENTAL FREEDOMS

Draft Agreement conferring upon the European Court
of Human Rights competence to give advisory opinions

(Report to the Committee of Ministers)
INTRODUCTION

1. In the report which it prepared in April 1961, the Committee of Experts expressed the view that it would be desirable to confer upon the European Court of Human Rights competence to give, subject to certain conditions, advisory opinions (Doc. CM (61) 91).

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

3. The Committee of Experts prepared the draft at its meetings held from 2nd to 11th October 1961, from 2nd to 10th March 1962 and from 1st to 7th June 1962.

On 5th March 1962, a wide exchange of views was held on the matter at a joint meeting of members of the Committee of Experts and the Legal Committee of the Consultative Assembly.

4. The Committee of Experts has the honour to submit herewith to the Committee of Ministers the report prepared at its meeting in June 1962.

5. This report contains:

(a) a draft Agreement conferring upon the European Court of Human Rights competence to give advisory opinions.

(b) a brief commentary on the different Articles of the draft.

(c) three appendices:

- the report drawn up by the Committee in April 1961 (Appendix I)

- a list of members of the Committee who took part in the meetings in October 1961, March 1962 (Appendix II) and June 1962

- a list of working papers (Appendix III).
DRAFT AGREEMENT CONFERRING UPON THE EUROPEAN COURT OF HUMAN RIGHTS COMPETENCE TO GIVE ADVISORY OPINIONS

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

Having regard to the provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms signed at Rome on 4th November 1950 (hereinafter referred to as "the Convention") and in particular Article 19 instituting, among other bodies, a European Court of Human Rights (hereinafter referred to as "the Court");

Considering that it would be of advantage if the Court were to have conferred upon it competence to give advisory opinions subject to certain conditions;

Have agreed as follows:

Article 1

(1) The Court may, at the request of the Committee of Ministers, give advisory opinions on legal questions concerning the interpretation of the Convention and the Protocols thereto.

(2) Such opinions shall not deal with any question relating to the content or scope of the rights or freedoms defined in Section 1 of the Convention and in the Protocols thereto, or with any other question which the Commission, the Court or the Committee of Ministers might have to consider in consequence of any such proceedings as could be instituted in accordance with the Convention.

Article 2

The Court shall decide whether a request for an advisory opinion submitted by the Committee of Ministers is within its consultative competence as defined in Article 1 of this Agreement.

Article 3

(1) For the consideration of requests for an advisory opinion, the Court shall sit in plenary session.

(2) Reasons shall be given for the advisory opinion of the Court.
(3) If the advisory opinion does not represent in whole or in part the unanimous opinion of the judges, any judge shall be entitled to deliver a separate opinion.

(4) The advisory opinion of the Court shall be communicated to the Committee of Ministers.

Article 4

The powers of the Court under Article 55 of the Convention shall extend to the drawing up of such rules and the determination of such procedure as the Court may think necessary for the purposes of this Agreement.

Article 5

(1) This Agreement shall be open to the signature of the Members of the Council of Europe, signatories to the Convention, who may become Parties to it by:

(a) signature without reservation in respect of ratification; or

(b) signature with reservation in respect of ratification followed by ratification.

The instruments of ratification shall be deposited with the Secretary General of the Council of Europe.

(2) This Agreement shall enter into force as soon as all States Parties to the Convention shall, in accordance with paragraph 1, have signed it without reservation in respect of ratification or shall have ratified it.

(3) The Secretary General of the Council of Europe shall notify Members of the Council of:

(a) the names of signatories and the deposit of any instrument of ratification;

(b) the date of the entry into force of this Agreement.

COMMENTARY

Title

1. The following title has been given to the draft Agreement of which the Committee recommends the adoption: "(Draft) Agreement conferring upon the European Court of Human Rights competence to give advisory opinions".
2. The draft includes a preamble and five Articles.

Preamble

3. The preamble calls for no comment.

Article 1

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

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

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

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

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

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

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

8. The question was considered whether the text of the Agreement should not contain a provision determining what vote should be required for decisions of the Committee of Ministers on requests for advisory opinions from the Court.
The Legal Committee was of the opinion that such decisions should be taken by a majority of two-thirds of the members entitled to sit on the Committee (which is the majority provided for in Article 32 of the Convention) rather than by a unanimous vote.

Most of the experts shared this opinion.

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

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

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

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

The Committee found it preferable not to make any provision of this nature in the Agreement. It considered that it was for the Committee of Ministers to decide what rules it would adopt in this matter.

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

(a) on any question regarding the content or the scope of the rights and freedoms defined in Section 1 of the Convention and the Protocols thereto; or
(b) any other question which the Commission, Court or Committee of Ministers might have to consider in consequence of any such proceedings as could be instituted in accordance with the Convention.

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

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

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

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

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

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

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

Thus, for example, the consultative competence of the Court does not extend to questions regarding the conditions of admissibility of applications before the Commission, which are defined in Articles 26 and 27 of the Convention.
The Committee has employed the phrase in French "par suite de l'introduction d'un recours" ("in consequence of proceedings") rather than the phrase "à l'occasion de l'introduction d'un recours" ("in the course of proceedings") because it considered that the latter phrase was too wide.

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

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

Article 2

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

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

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

Article 3

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

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

The Committee considered that the power conferred on the Court to give advisory opinions was such an important one that it ought to be exercised by the Court sitting in plenary session.
14. Paragraph 2 states that reasons shall be given for the advisory opinion of the Court.

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

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

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

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

Article 4

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

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

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

Article 5

18. This Article contains the final clauses.

Paragraph 1 provides that States signatories to the Convention may become Parties to the Agreement either by signature without reservation in respect of ratification, or by signature with reservation in respect of ratification followed by ratification.
This formula, which is intended to make it possible to speed up the entry into force of the Agreement, is based on similar clauses included in recent instruments concluded by the Council of Europe (1).

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

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

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

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

Report prepared by the Committee of Experts in April 1961 (Doc. CM (61) 91)

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

Recommendation 232 (1960) of the Consultative Assembly proposes conferring "on the European Court of Human Rights, in addition to its present competence defined in Article 45 of the Convention, the competence to interpret the Convention on Human Rights, when a doubt has arisen of a legal character even though no case has been brought".

The Committee, after discussing this matter at two meetings held under the Chairmanship of Mr. Ugo Caldarera, from 7th to 11th November 1960 and from 24th to 29th April 1961, came to the following conclusions:

1. The Committee of Experts considers it desirable to confer advisory powers on the European Court of Human Rights, on the understanding that the exercise of those powers shall in no way impede the essential function of the Court - viz: its judicial function.

    It would be of advantage that the bodies envisaged by the Convention for the protection of Human Rights should have the benefit of the Court's expert opinion on the meaning of the Convention and of any text supplementary thereto, insofar as they define the functions of those bodies and the relationship between them.

    It is also necessary, however, to ensure that the Court shall never be placed in the difficult position of being required, as the result of a request for its opinion, to
make a direct or indirect pronouncement on a legal point with which it might subsequently have to deal as a main consideration in some case brought before it under Articles 45 to 48 of the Convention.

2. The Committee considers that the Court should not be empowered to give advisory opinions on questions of substance such as those relating to the nature and scope of the rights and freedoms enumerated in the Convention and its Protocols, or to the obligations of States in relation to those rights and freedoms.

In particular, the Court should not give an advisory opinion on any question which, under the terms of the Convention, is for the Commission or the Committee of Ministers to decide.

3. Obviously the questions on which a request for an advisory opinion can be based must be understood as limited to "legal questions" in the meaning given to that term in similar international conventions. This rules out, on the one hand, questions which would go beyond the mere interpretation of the text and tend by additions, improvements or corrections to modify its substance; and, on the other hand, questions whose terms or whose solution would in any way involve matters of policy.

4. The right to make a request to the Court for an advisory opinion should be confined to the Committee of Ministers.

It would always be open to the Consultative Assembly and the Secretary General to submit proposals for a request for an advisory opinion to the Committee of Ministers. The same possibility should be contemplated for the European Commission of Human Rights.

The Committee of Ministers would consider whether the content of the proposal was such that it could be submitted to the Court, and would decide as to the expediency of so submitting it.

5. Several delegations considered that when exercising its advisory powers, the Court should meet in plenary session.
**APPENDIX II**

List of members of the Committee present at the meetings of October 1961, March 1962 and June 1962

<table>
<thead>
<tr>
<th>Country</th>
<th>Name</th>
<th>Position and Department</th>
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<tbody>
<tr>
<td>AUSTRIA</td>
<td>Mr. W. PAHR</td>
<td>Ministerial Commissioner, Constitutional Department, Federal Chancellery, VIENNA.</td>
</tr>
<tr>
<td>BELGIUM</td>
<td>Mr. H. BUCKINX</td>
<td>Director-General, Ministry of Justice, BRUSSELS.</td>
</tr>
<tr>
<td></td>
<td>Mr. A. GOMREE</td>
<td>Magistrate attached to the Ministry of Justice, BRUSSELS.</td>
</tr>
<tr>
<td></td>
<td>Mr. J. PRADIN</td>
<td>Administrative Secretary, Ministry of Justice, BRUSSELS.</td>
</tr>
<tr>
<td>CYPRUS</td>
<td>not represented</td>
<td></td>
</tr>
<tr>
<td>DENMARK</td>
<td>Mr. N. MADSEN</td>
<td>Head of Department, Ministry of Justice, COPENHAGEN.</td>
</tr>
<tr>
<td></td>
<td>Mr. F. WEBER</td>
<td>Head of Section, Ministry of Justice, COPENHAGEN.</td>
</tr>
<tr>
<td>FRANCE</td>
<td>Mr. P. GODARD</td>
<td>Assistant Director of trans-frontier traffic and aliens at the &quot;Direction de la Reglementation&quot; of the Ministry of Interior, PARIS.</td>
</tr>
<tr>
<td>FEDERAL REPUBLIC OF GERMANY</td>
<td>Mr. W. BERTRAM</td>
<td>Counsellor, Ministry of Justice, BONN.</td>
</tr>
<tr>
<td></td>
<td>Mr. K. BREVILL</td>
<td>Counsellor, Ministry of Interior, BONN.</td>
</tr>
</tbody>
</table>
FEDERAL REPUBLIC OF GERMANY

Mr. H. HEUSLER
First Secretary, Ministry of Foreign Affairs, Bonn

Mr. W. PAULY
First Secretary, Ministry of Foreign Affairs, Bonn

GREECE

Mr. P. VEGLERIS
Professor at the Faculty of Law, University of Athens, 7 rue Zalacosta, Athens

ICELAND

not represented

IRELAND

Mr. D.P. WALDRON
First Secretary, Department of External Affairs, Dublin

Mr. J. OLDEN
Administrative Officer, Department of Justice, Dublin

ITALY

Mr. Ugo CALDARERA (Chairman)
Deputy Attorney-General at the Court of Cassation, Adviser, Legal Department Ministry of Foreign Affairs, Rome

Mr. L. GIOVENCOD Head of Division Ministry of Interior, Rome

Mr. E. MASELLI
Magistrate seconded to the Ministry of Justice, Rome

Mr. M. VIANELLO-CHIODO
Second Secretary, Embassy of Italy, Vienna

LUXEMBOURG

Mr. E. MULLER
Administrative Secretary, Ministry of Justice, Luxembourg
<table>
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<tr>
<th>Country</th>
<th>Name</th>
<th>Position</th>
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<tbody>
<tr>
<td>NETHERLANDS</td>
<td>Mr. H. G. SCHERMERS</td>
<td>Assistant Legal Adviser, Ministry of Foreign Affairs, THE HAGUE.</td>
</tr>
<tr>
<td>NORWAY</td>
<td>Mr. U. UNDERLAND</td>
<td>First Secretary, Legal Department, Ministry of Foreign Affairs, OSLO</td>
</tr>
<tr>
<td>SWEDEN</td>
<td>Mr. C. LIDGARD</td>
<td>First Secretary, Ministry of Foreign Affairs, STOCKHOLM</td>
</tr>
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<td></td>
<td>Mr. L. MYRSTEN</td>
<td>First Secretary, Ministry of Foreign Affairs, STOCKHOLM</td>
</tr>
<tr>
<td>TURKEY</td>
<td>Mr. I. UNAT</td>
<td>Legal Adviser to the Ministry of Foreign Affairs, Docent at the Faculty of Political Science, University of Ankara, ANKARA</td>
</tr>
<tr>
<td>UNITED KINGDOM</td>
<td>Sir S. HOARE</td>
<td>Formerly Assistant Under-Secretary, Home Office, LONDON</td>
</tr>
</tbody>
</table>

(Vice-Chairman)
APPENDIX III

Working Papers

PART I: PRINCIPAL PAPERS

1. Doc. 1061:

   Report dated 24th November 1959 presented by Mr. Wahl on behalf of the Legal Committee of the Consultative Assembly.

2. Recommendation 232 (60) adopted by the Consultative Assembly on 22nd January 1960.

3. Resolution (60) 20 adopted by the Committee of Ministers at their 89th meeting held from 13th to 16th September 1960.

4. Doc. CM (61) 91:


5. Doc. CM/De1/Concl. (61) 100

   Conclusions of the 100th meeting of the Ministers' Deputies held at Strasbourg from 2nd to 8th July 1961 /point IX (c)/

6. Doc. DH/Exp (61) 36:

   Memorandum by the Directorate of Human Rights on the third meeting of the Committee from 2nd to 11th October 1961.

7. Doc. DH/Exp (62) 5:

   Comparison of the Legal Committee's Report (Doc. 1061) with the Report of the Committee of Experts (Doc. CM (61) 91).

8. Doc. DH/Exp (62) 6

   Draft report to the Committee of Ministers prepared by the Committee at its fourth meeting held from 2nd to 10th March 1962.
PART II: SUPPLEMENTARY PAPERS


2. Doc. DH/Exp (60) 26:
   Memorandum, dated 18th November 1960, by the Directorate of Human Rights on the proceedings at the Committee's first meeting at Strasbourg from 7th to 11th November 1960.

3. Doc. DH/Exp (61) 1:
   Memorandum, dated 22nd March 1961, by the Directorate of Human Rights on two points in Doc. DH/Exp (60) 26.

4. Doc. DH/Exp (61) 2:
   Draft report of the Committee of Experts.

5. Doc. DH/Exp (61) 4:
   Proposal by the Netherlands Expert.

6. Doc. DH/Exp (61) 6:
   Proposal by the Secretariat.

7. Doc. DH/Exp (61) 7:
   Memorandum by the Greek Expert.

8. Doc. DH/Exp (61) 8:
   Proposal by the Austrian Expert.

9. Doc. DH/Exp (61) 9:
   Proposal by the United Kingdom Expert.

10. Doc. DH/Exp (61) 10:
    Proposal by the Italian Expert.
11. Doc. DH/Exp (61) 11:
Proposal by the Expert of the Federal Republic of Germany.

12. Doc. DH/Exp (61) 13:
Draft report produced by a Drafting Committee of the Committee of Experts.

13. Doc. DH/Exp (61) 17:
Comparative texts.

14. Doc. DH/Exp (61) 23:
Text of a preliminary draft Protocol drawn up by the Directorate of Human Rights.

15. Doc. DH/Exp/Misc (62) 1:
Proposal by the United Kingdom Expert.

16. Doc. DH/Exp/Misc (62) 2:
Proposal by the Greek Expert.

17. Doc. DH/Exp/Misc (62) 4:
Proposal by a Working Party.

18. Doc. DH/Exp/Misc (62) 5:
Draft Agreement submitted by a Working Party.

19. Doc. DH/Exp/Misc (62) 6:
Proposal by the Secretariat.

20. Doc. DH/Exp/Misc (62) 7:
Proposal of a Working Party.

21. Doc. DH/Exp/Misc (62) 8 revised
Draft provisionally adopted by the Committee.
Appendix III

22. Copy of the letter H/5100 sent on 5th April 1962 of the Directorate of Human Rights to the members of the Committee.

23. Doc. DH/Exp (62) 12. Comments of members of the Committee on the draft Report to the Committee of Ministers.


Strasbourg, 26th July 1962

Confidential
CM (62) 147 Revised
Or. Fr.

HUMAN RIGHTS

Extension of the competence of the European Court of Human Rights

Note from the Secretariat General prepared by the Directorate of Human Rights
Outline of the facts

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

Recommendation 232 (1960) of the Consultative Assembly proposes conferring "on the European Court of Human Rights, in addition to its present competence defined in Article 45 of the Convention, the competence to interpret the Convention on Human Rights, when a doubt has arisen of a legal character even though no case has been brought".

2. In the report which it prepared in April 1961, the Committee of Experts expressed the view that it would be desirable to confer upon the European Court of Human Rights competence to give, subject to certain conditions, advisory opinions [Doc. CM (61) 917].

3. At its meeting in July 1961 the Committee of Ministers in principle adopted the conclusions of the above-mentioned report and instructed the Committee of Experts to submit a draft Agreement based upon these conclusions [Concl. (61) 100, item IX (e)].

4. The Committee of Experts prepared the draft at its meetings held from 2nd to 11th October 1961, from 2nd to 10th March 1962 and from 1st to 7th June 1962.

On 5th March 1962 a wide exchange of views was held on the matter at a joint meeting of members of the Committee of Experts and the Legal Committee of the Consultative Assembly.

5. The report of the Committee of Experts is found in Chapter C of this document; it contains:

(i) a draft Agreement conferring upon the European Court of Human Rights competence to give advisory opinions (pp. 5 and 6);

(ii) a brief commentary on the different articles of the draft (pp. 7 to 12);
(iii) three appendices:

- the report drawn up by the Committee in April 1961 (Appendix I) - (pp. 13 and 14);

- a list of members of the Committee who took part in the meetings in October 1961, March 1962 and June 1962 (Appendix II) - (pp. 15 to 17);

- a list of working papers (Appendix III) - (pp. 18 to 21).

6. After the close of the meeting in June 1962, at which the Committee of Experts had drawn up its report, the European Commission of Human Rights, by its Secretary, sent to the Secretary General of the Council of Europe a request that the right to ask the Court for an advisory opinion should not be restricted to the Committee of Ministers alone, as proposed by the Committee of Experts, but should be granted also to the European Commission of Human Rights. The Commission's observations on this subject are given in Chapter D (pp. 22 to 25) of this document.
B.

Decision to be taken by the Committee of Ministers

This document calls for a decision to be made by the Committee of Ministers on the following:

(i) the draft Agreement conferring upon the European Court of Human Rights competence to give advisory opinions, which text has been prepared by the Committee of Experts on problems relating to the Convention on Human Rights. The draft Agreement is found on pages 5 and 6 of this document.

(ii) the request of the European Commission of Human Rights that the right to ask the Court for an advisory opinion should not be restricted to the Committee of Experts, but should be granted also to the Commission.

If the Committee of Ministers wish to accede to the request of the Commission, the following insertions in the above-mentioned draft Agreement will suffice:

- in Article 1, after the words "Committee of Ministers", the words "or the European Commission of Human Rights";
- in Article 2, after the words "Committee of Ministers", the words "or by the European Commission of Human Rights";
- in Article 3, paragraph 4: after the words "Committee of Ministers", the words "and to the European Commission of Human Rights, when the request for the advisory opinion was presented by that body".

On the other hand, should the Committee of Ministers feel doubtful about making a decision on the request of the Commission, it might seek the opinion of the Committee of Experts which prepared the draft Agreement.
C.

Report of the Committee of Experts

on problems relating to the
European Convention on Human Rights
on the draft Agreement conferring upon the
European Court of Human Rights competence
to give advisory opinions
DRAFT AGREEMENT CONFERRING UPON THE EUROPEAN COURT OF HUMAN RIGHTS COMPETENCE TO GIVE ADVISORY OPINIONS

"The Governments signatory hereto, being members of the Council of Europe,

Having regard to the provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms signed at Rome on 4th November 1950 (hereinafter referred to as "the Convention") and in particular Article 19 instituting, among other bodies, a European Court of Human Rights (hereinafter referred to as "the Court");

Considering that it would be of advantage if the Court were to have conferred upon it competence to give advisory opinions subject to certain conditions;

Have agreed as follows:

Article 1

(1) The Court may, at the request of the Committee of Ministers, give advisory opinions on legal questions concerning the interpretation of the Convention and the Protocols thereto.

(2) Such opinions shall not deal with any question relating to the content or scope of the rights or freedoms defined in Section 1 of the Convention and in the Protocols thereto, or with any other question which the Commission, the Court or the Committee of Ministers might have to consider in consequence of any such proceedings as could be instituted in accordance with the Convention.

Article 2

The Court shall decide whether a request for an advisory opinion submitted by the Committee of Ministers is within its consultative competence as defined in Article 1 of this Agreement.

Article 3

(1) For the consideration of requests for an advisory opinion, the Court shall sit in plenary session.

(2) Reasons shall be given for the advisory opinion of the Court.
(3) If the advisory opinion does not represent in whole or in part the unanimous opinion of the judges, any judge shall be entitled to deliver a separate opinion.

(4) The advisory opinion of the Court shall be communicated to the Committee of Ministers.

Article 4

The powers of the Court under Article 55 of the Convention shall extend to the drawing up of such rules and the determination of such procedure as the Court may think necessary for the purposes of this Agreement.

Article 5

(1) This Agreement shall be open to the signature of the members of the Council of Europe, signatories to the Convention, who may become Parties to it by:

(a) signature without reservation in respect of ratification; or

(b) signature with reservation in respect of ratification followed by ratification.

The instruments of ratification shall be deposited with the Secretary General of the Council of Europe.

(2) This Agreement shall enter into force as soon as all States Parties to the Convention shall, in accordance with paragraph 1, have signed it without reservation in respect of ratification or shall have ratified it.

(3) The Secretary General of the Council of Europe shall notify members of the Council of:

(a) the names of signatories and the deposit of any instrument of ratification;

(b) the date of the entry into force of this Agreement.
Title

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

2. The draft includes a preamble and five Articles.

Preamble

3. The preamble calls for no comment.

Article 1

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

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

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

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

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

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

The Committee of Ministers would also be in a position to judge of the desirability of referring any such proposal to the Court.
8. The question was considered whether the text of the Agreement should not contain a provision determining what vote should be required for decisions of the Committee of Ministers on requests for advisory opinions from the Court.

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

Most of the experts shared this opinion.

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

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

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

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

The Committee found it preferable not to make any provision of this nature in the Agreement. It considered that it was for the Committee of Ministers to decide what rules it would adopt in this matter.

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

(a) on any question regarding the content or the scope of the rights and freedoms defined in Section 1 of the Convention and the Protocols thereto; or
(b) any other question which the Commission, Court or Committee of Ministers might have to consider in consequence of any such proceedings as could be instituted in accordance with the Convention.

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

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

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

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

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

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

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

Thus, for example, the consultative competence of the Court does not extend to questions regarding the conditions of admissibility of applications before the Commission, which are defined in Articles 26 and 27 of the Convention.
The Committee has employed the phrase in French "par suite de l'introduction d'un recours" ("in consequence of proceedings") rather than the phrase "à l'occasion de l'introduction d'un recours" ("in the course of proceedings") because it considered that the latter phrase was too wide.

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

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

**Article 2**

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

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

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

**Article 3**

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

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

The Committee considered that the power conferred on the Court to give advisory opinions was such an important one that it ought to be exercised by the Court sitting in plenary session.
14. Paragraph 2 states that reasons shall be given for the advisory opinion of the Court.

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

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

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

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

**Article 4**

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

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

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

**Article 5**

18. This Article contains the final clauses.

Paragraph 1 provides that States signatories to the Convention may become Parties to the Agreement either by signature without reservation in respect of ratification, or by signature with reservation in respect of ratification followed by ratification.
This formula, which is intended to make it possible to speed up the entry into force of the Agreement, is based on similar clauses included in recent instruments concluded by the Council of Europe (1).

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

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

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

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

Report prepared by the Committee of Experts in April 1961 (Doc. CM (61) 91)

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

Recommendation 232 (1960) of the Consultative Assembly proposes conferring "on the European Court of Human Rights, in addition to its present competence defined in Article 45 of the Convention, the competence to interpret the Convention on Human Rights, when a doubt has arisen of a legal character even though no case has been brought".

The Committee, after discussing this matter at two meetings held under the Chairmanship of Mr. Ugo Caldarera, from 7th to 11th November 1960 and from 24th to 29th April 1961, came to the following conclusions:

1. The Committee of Experts considers it desirable to confer advisory powers on the European Court of Human Rights, on the understanding that the exercise of those powers shall in no way impede the essential function of the Court - viz: its judicial function.

It would be of advantage that the bodies envisaged by the Convention for the Protection of Human Rights should have the benefit of the Court's expert opinion on the meaning of the Convention and of any text supplementary thereto, in so far as they define the functions of those bodies and the relationship between them.

It is also necessary, however, to ensure that the Court shall never be placed in the difficult position of being required, as the result of a request for its opinion, to make a direct or indirect pronouncement on a legal point with which it might subsequently have to deal as a main consideration in some case brought before it under Articles 45 to 48 of the Convention.
2. The Committee considers that the Court should not be empowered to give advisory opinions on questions of substance such as those relating to the nature and scope of the rights and freedoms enumerated in the Convention and its Protocols, or to the obligations of States in relation to those rights and freedoms.

In particular, the Court should not give an advisory opinion on any question which, under the terms of the Convention, is for the Commission or the Committee of Ministers to decide.

3. Obviously the questions on which a request for an advisory opinion can be based must be understood as limited to "legal questions" in the meaning given to that term in similar international conventions. This rules out, on the one hand, questions which would go beyond the mere interpretation of the text and tend by additions, improvements or corrections to modify its substance; and, on the other hand, questions whose terms or whose solution would in any way involve matters of policy.

4. The right to make a request to the Court for an advisory opinion should be confined to the Committee of Ministers.

It would always be open to the Consultative Assembly and the Secretary General to submit proposals for a request for an advisory opinion to the Committee of Ministers. The same possibility should be contemplated for the European Commission of Human Rights.

The Committee of Ministers would consider whether the content of the proposal was such that it could be submitted to the Court, and would decide as to the expediency of so submitting it.

5. Several delegations considered that when exercising its advisory powers, the Court should meet in plenary session.
APPENDIX II

List of members of the Committee present at the meetings of October 1961, March 1962 and June 1962

AUSTRIA
Mr. W. PAHR
Ministerial Commissioner, Constitutional Department, Federal Chancellery, VIENNA

BELGIUM
Mr. H. BUCKINX
Director-General, Ministry of Justice, BRUSSELS

Mr. A. GOMREE
Magistrate attached to the Ministry of Justice, BRUSSELS

Mr. J. FRADIN
Administrative Secretary, Ministry of Justice, BRUSSELS

CYPRUS
not represented

DENMARK
Mr. N. MADSEN
Head of Department, Ministry of Justice, COPENHAGEN

Mr. F. WEBER
Head of Section, Ministry of Justice, COPENHAGEN

FRANCE
Mr. P. GODARD
Assistant Director of trans-frontier traffic and aliens at the "Direction de la Reglementation" of the Ministry of Interior, PARIS

FEDERAL REPUBLIC OF GERMANY
Mr. W. BERTRAM
Counsellor, Ministry of Justice, BONN

Mr. K. BREULL
Counsellor, Ministry of Interior, BONN
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<th>Country</th>
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<th>Position/Role</th>
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<tr>
<td>FEDERAL REPUBLIC OF</td>
<td>Mr. H. HEUSELER</td>
<td>First Secretary, Ministry of Foreign Affairs, Bonn</td>
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<td>Mr. W. PAULY</td>
<td>First Secretary, Ministry of Foreign Affairs, Bonn</td>
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<tr>
<td>GREECE</td>
<td>Mr. P. VEGLERIS</td>
<td>Professor at the Faculty of Law, University of Athens, 7 rue Zalacosta, Athens</td>
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<tr>
<td>ICELAND</td>
<td>not represented</td>
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<td>IRELAND</td>
<td>Mr. D.P. WALDRON</td>
<td>First Secretary, Department of External Affairs, Dublin</td>
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<td></td>
<td>Mr. J. OLDEN</td>
<td>Administrative Officer, Department of Justice, Dublin</td>
</tr>
<tr>
<td>ITALY</td>
<td>Mr. Ugo CALDARERA (Chairman)</td>
<td>Deputy Attorney-General at the Court of Cassation, Adviser, Legal Department, Ministry of Foreign Affairs, Rome</td>
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<td></td>
<td>Mr. L. GIOVENCO</td>
<td>Head of Division, Ministry of Interior, Rome</td>
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<td></td>
<td>Mr. E. MASELLI</td>
<td>Magistrate seconded to the Ministry of Justice, Rome</td>
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<td>Mr. M. VIANELLO-CHIODO</td>
<td>Second Secretary, Embassy of Italy, Vienna</td>
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<tr>
<td>LUXEMBOURG</td>
<td>Mr. E. MULLER</td>
<td>Administrative Secretary, Ministry of Justice, Luxembourg</td>
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<td>Country</td>
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<td>Position and Affiliation</td>
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<tr>
<td>NETHERLANDS</td>
<td>Mr. H.G. SCHERMERS</td>
<td>Assistant Legal Adviser, Ministry of Foreign Affairs, THE HAGUE</td>
</tr>
<tr>
<td>NORWAY</td>
<td>Mr. U. UNDERLAND</td>
<td>First Secretary, Legal Department, Ministry of Foreign Affairs, OSLO</td>
</tr>
<tr>
<td>SWEDEN</td>
<td>Mr. C. LIDGARD</td>
<td>First Secretary, Ministry of Foreign Affairs, STOCKHOLM</td>
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<td>Mr. L. MYRSTEN</td>
<td>First Secretary, Ministry of Foreign Affairs, STOCKHOLM</td>
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<tr>
<td>TURKEY</td>
<td>Mr. I. UNAT</td>
<td>Legal Adviser to the Ministry of Foreign Affairs, Docent at the Faculty of Political Science, University of Ankara, ANKARA</td>
</tr>
<tr>
<td>UNITED KINGDOM</td>
<td>Sir S. HOARE</td>
<td>Formerly Assistant Under-Secretary, Home Office, LONDON.</td>
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<td>(Vice-Chairman)</td>
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APPENDIX III

Working Papers

PART I: PRINCIPAL PAPERS

1. Doc. 1061:
Report dated 24th November 1959 presented by Mr. Wahl on behalf of the Legal Committee of the Consultative Assembly.


3. Resolution (60) 20 adopted by the Committee of Ministers at their 89th meeting held from 13th to 16th September 1960.

4. Doc. CM (61) 91:

5. Doc. CM/De1/Concl. (61) 100
Conclusions of the 100th meeting of the Ministers' Deputies held at Strasbourg from 2nd to 8th July 1961 (point IX (e)).

6. Doc. DH/Exp (61) 36
Memorandum by the Directorate of Human Rights on the third meeting of the Committee from 2nd to 11th October 1961.

7. Doc. DH/Exp (62) 5:
Comparison of the Legal Committee's Report (Doc. 1061) with the Report of the Committee of Experts (Doc. CM (61) 91).

8. Doc. DH/Exp (62) 6:
Draft report to the Committee of Ministers prepared by the Committee at its fourth meeting held from 2nd to 10th March 1962.
PART II: SUPPLEMENTARY PAPERS


2. Doc. DH/Exp (60) 26:
   Memorandum, dated 18th November 1960, by the Directorate of Human Rights on the proceedings at the Committee's first meeting at Strasbourg from 7th to 11th November 1960.

3. Doc. DH/Exp (61) 1:
   Memorandum, dated 22nd March 1961, by the Directorate of Human Rights on two points in Doc. DH/Exp (60) 26.

4. Doc. DH/Exp (61) 2:
   Draft report of the Committee of Experts.

5. Doc. DH/Exp (61) 4:
   Proposal by the Netherlands Expert.

6. Doc. DH/Exp (61) 5:
   Proposal by the Secretariat.

7. Doc. DH/Exp (61) 7:
   Memorandum by the Greek Expert.

8. Doc. DH/Exp (61) 8:
   Proposal by the Austrian Expert.

9. Doc. DH/Exp (61) 9:
   Proposal by the United Kingdom Expert.

10. Doc. DH/Exp (61) 10:
    Proposal by the Italian Expert.
11. Doc. DH/Exp (61) 11:
Proposal by the Expert of the Federal Republic of Germany.

12. Doc. DH/Exp (61) 13:
Draft report produced by a Drafting Committee of the Committee of Experts.

13. Doc. DH/Exp (61) 17:
Comparative texts.

14. Doc. DH/Exp (61) 23:
Text of a preliminary draft Protocol drawn up by the Directorate of Human Rights.

15. Doc. DH/Exp/Misc (62) 1:
Proposal by the United Kingdom Expert.

16. Doc. DH/Exp/Misc (62) 2:
Proposal by the Greek Expert.

17. Doc. DH/Exp/Misc (62) 4:
Proposal by a Working Party.

18. Doc. DH/Exp/Misc (62) 5:
Draft Agreement submitted by a Working Party.

19. Doc. DH/Exp/Misc (62) 6:
Proposal by the Secretariat.

20. Doc. DH/Exp/Misc (62) 7:
Proposal of a Working Party.

21. Doc. DH/Exp/Misc (62) 8 Revised
Draft provisionally adopted by the Committee.
22. Copy of the letter H.5100 sent on 5th April 1962 of the Directorate of Human Rights to the members of the Committee.

23. Doc. DH/Exp (62) 12:
   Comments of members of the Committee on the draft report to the Committee of Ministers.

24. Doc. DH/Exp/Misc. (62) 12:
   Proposal by a Working Party.

25. Doc. DH/Exp/Misc. (62) 13:
   Proposal of the Greek Expert.

26. Doc. DH/Exp/Misc. (62) 16:
   Proposal of the Secretariat.
Observations by the European Commission of Human Rights on the draft Agreement prepared by the Committee of Experts
Letter from the Secretary of the
European Commission of Human Rights to the Deputy
Secretary General of the Council of Europe

Subject: Advisory powers of the Court

Strasbourg, 12th June 1962

Sir,

Some months ago you informed the European Commission of Human Rights, in your capacity as Director of Human Rights, that the Committee of Experts on problems relating to the Convention on Human Rights was drafting an agreement to confer upon the Court competence to give advisory opinions. At that time you told the Commission that the Committee of Experts was departing from the proposals of the Consultative-Assembly (Recommendation 232) in that it was planning to reserve the right to seize the Court of requests for advisory opinions to the Committee of Ministers alone, acting either on its own initiative or at the request of the Commission, Assembly or Secretary General.

At its 34th plenary session (7th-11th May 1962), the Commission was enabled through your courtesy to be officially informed of the report which the Committee of Experts adopted upon completing its work on this question (Doc. DH/Exp (62) 6). It observed on this occasion that the Experts had not altered the procedure which you had described earlier in connection with this point.

After a long discussion, the Commission instructed me to inform you as follows:

Although it continues to have some doubts as to the utility of being granted the right to solicit the Court's opinion - chiefly in consideration of the "physical" limitations set forth in Article 1, para. 2 of the draft agreement - the Commission believes that if the member States of the Council of Europe decide to confer this right upon the Court, it should be empowered to exercise it directly, that is, without passing by the Committee of Ministers.

Mr. Polys MODINOS,
Deputy Secretary General
of the Council of Europe,
STRASBOURG
According to the commentary appended to the present text of the draft, any requests for advisory opinions which the Commission, as well as the Consultative Assembly and the Secretary General, might wish to submit to the Court, would be subject to a double check by the Committee of Ministers, first as regards their "legality", in a sense, and then as regards their desirability (Doc. DH/Exp (62) 6, pages 4-5).

The Commission does not clearly see the justification for such an examination for "legality". Unlike the Committee of Ministers, it is endowed with judicial and quasi-judicial powers, and holds that it is in itself qualified to judge whether, in any given case, the proposed agreement sanctions consultation of the Court. Moreover, Article 2 of the draft stipulates that "the Court shall decide whether a request for an advisory opinion... is within its competence...", which would appear to provide sufficient security, at least in respect of requests emanating from the Commission. In addition, the Commission recalls, by way of comparison, that before bringing a dispute before the Court in application of Article 48 (a) of the Convention, it ensures that all the legal conditions posed by Articles 45, 47 and 48 are complied with, and it further recalls that, as stated in 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".

The Commission concedes that a simple examination as to desirability would be more plausible. It wishes to observe, however, that it already carries out a series of measures which, by their very nature, constantly cause it to weigh its responsibilities and the advisability of its actions. The right provided for in Article 48 (a) of the Convention seems to the Commission to offer a particularly relevant example of this: the Commission decided not to bring the Nielsen case before the Court, although there was no purely legal obstacle to its doing so.

In a more general context, the Commission is inclined to think that Article 1, para. 1 of the draft is not very consistent with the spirit and general structure of the Convention, which set up the Commission as an independent international body, as the Court, moreover, confirmed in its first decision. At no point in the texts now in force does the Committee of Ministers act as a "go-between" between the Commission and the Court. The Commission would be sorry to
see one of the dominant characteristics of the protective mechanism instituted by the Convention lose its force – the very same mechanism which Article 1, para. 2 of the draft seeks to preserve in all other respects.

Convinced that you will give these different considerations all the importance which it attaches to them, the Commission trusts that you will accordingly, take the most appropriate action.

I remain, Sir,

Your obedient Servant,

A.B. McNulty
Secretary of the European Commission of Human Rights
CHAPTER VI

WORK OF THE COMMITTEE OF EXPERTS ON HUMAN RIGHTS

September 1962 - October 1962
1. Point XI (a) of the Conclusions of the 113th meeting of the Ministers' Deputies (10th-18th September 1962).

2. Letter No. H/13.295 of 26th September 1962 to the members of the Committee of Experts referring to the draft Agreement and asking them to express an opinion on the proposals submitted by the Commission and on the observations of certain delegations made at the 113th meeting of the Ministers' Deputies.


CONCLUSIONS
OF THE 113TH MEETING OF THE MINISTERS' DEPUTIES
held at Strasbourg from 10th to 18th September 1962

(Extract)

XI. HUMAN RIGHTS

(a) Extension of the competence of the European Court -
Recommendation 232 - Report of the Committee of
Experts (Concl. (61) 100, point IX (e) and CM (62) 147 rev.)

The Deputies discussed the draft Agreement submitted to them
by the Committee of Experts in accordance with its terms of
reference (CM (62) 147 rev.).

The Representative of Austria said his government could
approve the draft text. He nevertheless suggested that Article 5,
paragraph 2 of the draft should be amended so that the Agreement
could enter into force as soon as ten States Parties to the
European Convention on Human Rights had become Parties to the
Agreement.

The Representative of Denmark said his government could
accept the draft text. He made the following comments, however:

(a) it would be desirable for it to be more clearly
specified in Article 1 of the Agreement what legal
questions could form the subject of advisory
opinions;

(b) it might be preferable that the provisions of the
Agreement be embodied in the European Convention
on Human Rights in the form of additional articles
to the Convention;

(c) it would be advisable to consider whether the wording
of the provisions of the Agreement should not be
reviewed in the light of the other provisions which
the European Court recently proposed for insertion
in the Convention (Articles 54 bis and 54 ter).

The Representative of Turkey expressed his approval of the
draft text prepared by the Committee of Experts. He agreed with
the opinion expressed by the majority of the Experts not to
embody in the Agreement provisions relating to voting rules to be adopted in the matter by the Committee of Ministers. He added that the proposals of the Commission seemed to him incompatible with the object aimed at by the authors of the draft Agreement in reserving to the Committee of Ministers alone the right to ask the Court for an advisory opinion. The recognition of the exclusive competence of the Committee of Ministers was justified by the fact that the Committee was the only Council of Europe body which represented the signatory States. It was also the body most qualified for determining, from a political point of view, whether a request for an opinion should be addressed to the Court.

The Representative of the United Kingdom thought that it was preferable to embody in the Agreement a provision expressly stating that the resolution of the Committee of Ministers to ask the Court for an opinion was adopted by a two-thirds majority of the representatives entitled to sit on the Committee.

The Deputies resolved to refer the draft Agreement to the Committee of Experts which would have as terms of reference to give its views on the proposals submitted by the Commission and the comments made at the meeting by the representatives of Austria, Denmark, Turkey and the United Kingdom.

In the light of the opinion of the Committee of Experts, the Deputies will resume consideration of the draft Agreement at a future meeting.
Letter No. H/13.295 to the members of the Committee of Experts on Human Rights

Strasbourg, 26th September 1962

Sir,

I have the honour to transmit to you under separate cover various documents relating to the draft Agreement conferring on the European Court of Human Rights the power to give advisory opinions.

After the close of your Committee's last meeting, the European Commission of Human Rights sent the Secretary General of the Council of Europe a letter proposing that the said draft Agreement should confer on it, as on the Committee of Ministers, the right to ask the Court for an advisory opinion (Doc. CM (62) 147 Rev., pp. 23-25).

The Ministers' Deputies, having taken note of these proposals, agreed at their 113th meeting to refer the draft Agreement to your Committee, whose task it was to express an opinion on the proposals submitted by the Commission and on the observations of certain delegations (Point XI (a) of the Conclusions of the 113th meeting of the Ministers' Deputies).

At the same meeting the Ministers' Deputies approved the model final clauses for Council of Europe agreements and conventions (Point V of the Conclusions of the 113th meeting of the Ministers' Deputies - Doc. SG (62) 4). The question now arises as to whether the wording of the final clauses of the Agreement drafted by your Committee should not be revised in the light of these model clauses.

A memorandum prepared by the Human Rights Directorate sets out for each article of the draft Agreement the various points which your Committee will have to examine (Doc. DH/Exp (62) 26).

I remain, Sir,

Your obedient Servant,

(for the Director of Human Rights)

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

The member States of the Council of Europe signatory hereto

Having regard to the provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms signed at Rome on 4th November 1950 (hereinafter referred to as "the Convention") and in particular Article 19 instituting, among other bodies, a European Court of Human Rights (hereinafter referred to as "the Court");

Whereas it is expedient to confer upon the Court competence to give advisory opinions subject to certain conditions;

Have agreed as follows:

Article 1

1. The Court may, at the request of the Committee of Ministers, give advisory opinions on legal questions concerning the interpretation of the Convention and the Protocols thereto.
2. Such opinions shall not deal with any question relating to the content or scope of the rights or freedoms defined in Section 1 of the Convention and in the Protocols there to, or with any other question which the Commission, the Court or the Committee of Ministers might have to consider in consequence of any such proceedings as could be instituted in accordance with the Convention.

3. Resolutions of the Committee of Ministers to request an opinion of the Court shall require a two-thirds majority vote of the representatives entitled to sit on the Committee.

**Article 2**

The Court shall decide whether a request for an advisory opinion submitted by the Committee of Ministers is within its consultative competence as defined in Article 1 of this Agreement.

**Article 3**

1. For the consideration of requests for an advisory opinion, the Court shall sit in plenary session.

2. Reasons shall be given for advisory opinions of the Court.

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

4. Advisory opinions of the Court shall be communicated to the Committee of Ministers.

**Article 4**

The powers of the Court under Article 55 of the Convention shall extend to the drawing up of such rules and the determination of such procedure as the Court may think necessary for the purposes of this Protocol.

**Article 5**

1. This Protocol shall be open to signature by member States of the Council of Europe, signatories to the Convention, who may become Parties to it by:

   (a) signature with reservation in respect of ratification or acceptance;

   (b) signature with reservation in respect of ratification or acceptance, followed by ratification or acceptance.
Instruments of ratification or acceptance shall be deposited with the Secretary General of the Council of Europe.

2. This Protocol shall enter into force as soon as all States Parties to the Convention shall have become Parties to the Protocol, in accordance with the provisions of paragraph 1.

3. From the date of its entry into force this Protocol shall be considered an integral part of the Convention.

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

(a) any signature without reservation in respect of ratification or acceptance;

(b) any signature with reservation in respect of ratification or acceptance;

(c) the deposit of any instrument of ratification or acceptance;

(d) the date of entry into force of this Protocol in accordance with paragraph 2.

In witness whereof the undersigned, being duly authorised thereto, have signed this Protocol.


Done at .................................., this ............. in French and English, both texts being equally authoritative, in a single copy which shall remain deposited in the archives of the Council of Europe. The Secretary General of the Council of Europe shall transmit certified copies to each of the signatory States.
HUMAN RIGHTS

Extension of the competence of the European Court of Human Rights

REPORT OF THE COMMITTEE OF EXPERTS TO THE COMMITTEE OF MINISTERS
INTRODUCTION

1. At their meeting in June 1962, the Committee of Experts adopted the text of a draft Agreement conferring upon the European Court of Human Rights competence to give advisory opinions (Doc. CM (62) 147 revised, pages 5-12).

2. After that meeting, the European Commission of Human Rights sent to the Secretary General of the Council of Europe a letter proposing that the draft Agreement should confer on the Commission, as on the Committee of Ministers, the right to request advisory opinions from the Court (Doc. CM (62) 147 revised, pages 23-25).

   The Ministers' Deputies agreed at their 113th meeting, held in September 1962, to send the draft Agreement back to the Committee of Experts with new instructions to give an opinion on the proposals put forward by the Commission and on the comments of certain delegations. (Point XI (a) of the Conclusions of the 113th meeting of the Ministers' Deputies).

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

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

   In addition, the Committee of Experts, after noting the model text for final clauses adopted in September 1962 by the Ministers' Deputies (Point V of the Conclusions of the 113th meeting; Doc. SG (62) 4), revised the wording of the final clauses of the draft in the light of that model text.

5. At the same meeting the Committee of Experts drew up this Report, which it has the honour to submit to the Ministers.

6. The Report contains:

   A. A revised draft Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, conferring upon the European Court of
Human Rights competence to give advisory opinions. (The parts underlined indicate the changes made to the draft prepared in June 1962).

B. A short commentary on:
- the proposals submitted by the Commission;
- the comments made by some of the Ministers' Deputies;
- the changes made to the draft prepared in June 1962.

C. Two appendices:

Appendix I - Document DH/Exp (62) 26 containing the various proposals and comments relating to the draft prepared by the Committee in June 1962.

Appendix II - Names of members who attended the meeting in October 1962.
A. PROTOCOL TO THE CONVENTION FOR THE PROTECTION
OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS,
CONFERRING UPON THE EUROPEAN COURT
OF HUMAN RIGHTS COMPETENCE
TO GIVE ADVISORY OPINIONS

"The member States of the Council of Europe signatory
thereof:

Having regard to the provisions of the Convention for
the Protection of Human Rights and Fundamental Freedoms
signed at Rome on 4th November 1950 (hereinafter referred to
as 'the Convention'), and in particular Article 19 instituting,
among other bodies, a European Court of Human Rights (hereinafter referred to as 'the Court');

Considering that it is expedient to confer upon the Court
competence to give advisory opinions subject to certain
conditions;

Have agreed as follows:

Article 1

1. The Court may, at the request of the Committee of Ministers,
give advisory opinions on legal questions concerning the inter-
pretation of the Convention and the Protocols thereto.

2. Such opinions shall not deal with any question relating to
the content or scope of the rights or freedoms defined in
Section 1 of the Convention and in the Protocols thereto, or
with any other question which the Commission, the Court or the
Committee of Ministers might have to consider in consequence of
any such proceedings as could be instituted in accordance with
the Convention.

3. Decisions of the Committee of Ministers to request an
advisory opinion of the Court shall require a two-thirds
majority vote of the representatives entitled to sit on the
Committee.
Article 2

The Court shall decide whether a request for an advisory opinion submitted by the Committee of Ministers is within its consultative competence as defined in Article 1 of this Protocol.

Article 3

1. For the consideration of requests for advisory opinion, the Court shall sit in plenary session.

2. Reasons shall be given for advisory opinions of the Court.

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

4. Advisory opinions of the Court shall be communicated to the Committee of Ministers.

Article 4

The powers of the Court under Article 55 of the Convention shall extend to the drawing up of such rules and the determination of such procedure as the Court may think necessary for the purpose of this Protocol.

Article 5

1. This Protocol shall be open to signature by member States of the Council of Europe, signatories to the Convention, who may become Parties to it by:

(a) signature without reservation in respect of ratification or acceptance;

(b) signature with reservation in respect of ratification or acceptance, followed by ratification or acceptance.

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

2. This Protocol shall enter into force as soon as all States Parties to the Convention shall have become Parties to the Protocol, in accordance with the provisions of paragraph 1 of this Article.
3. From the date of the entry into force of this Protocol, Articles 1 to 4 shall be considered an integral part of the Convention.

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

(a) any signature without reservation in respect of ratification or acceptance;

(b) any signature with reservation in respect of ratification or acceptance;

(c) the deposit of any instrument of ratification or acceptance;

(d) the date of entry into force of this Protocol in accordance with paragraph 2 of this Article.

In witness whereof the undersigned, being duly authorised thereto, have signed this Protocol.

Done at ...................... this ...................... in English and French, both texts being equally authoritative, in a single copy which shall remain deposited in the archives of the Council of Europe. The Secretary General of the Council of Europe shall transmit certified copies to each of the signatory States.
B. COMMENTARY

General remarks

1. The Committee of Experts first considered whether the wording of the draft Protocol should not be reviewed in the light of the latest proposals presented by the European Court of Human Rights (CM (62) 78) to the effect that two new Articles, Articles 54 (bis) and 54 (ter), be incorporated in the Convention.

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

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

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

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

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

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

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

   The Committee of Experts was anxious to ensure that after the entry into force of the present Protocol, a State could not become a Party to the Convention without at the same time becoming a Party to the Protocol.
A number of experts thought that to this end it would be preferable to amend the text of the Convention.

Title

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

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

Preamble

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

Article 1 paragraph 1

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

6. Some experts expressed the view that the Commission's proposals could be adopted. One of them made the following declaration on this point: (1) "There is no disadvantage in granting the Commission, concurrently with the Committee of Ministers, the power to request opinions of the Court. In fact, none of the principles laid down in the Human Rights Convention, or deriving from that instrument, imply that the right to request opinions on the interpretation of the Convention must be reserved to a single organ, in this

(1) This Expert asked that his declaration should appear in extenso in this report.
case the Committee of Ministers. Moreover, since the Commission is an essential part of the machinery set up by the Convention, it would be a logical extension of the idea which has inspired the granting of advisory competence to the Court that the right to invoke such competence should not be refused to the Commission or subjected to what appears to be the prior approval of the Committee of Ministers.

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

**Article 1 paragraph 2**

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

8. The Danish Expert said that his Government agreed with the limitations provided in Article 1 of the draft Protocol and did not wish to extend the scope of that Article. He explained that the comments of the Danish Representative at the meeting of the Ministers' Deputies (Conclusions of 113th Meeting, Point Xla) were directed towards obtaining an opinion from the Committee of Experts on the value of conferring such limited powers upon the Court.

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

**Article 1 paragraph 3**

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

**Article 2**

10. For the reasons set forth in paragraph 2 of this commentary the word "Agreement" has been replaced by the word "Protocol".
Article 3
11. No comment.

Article 4
12. See comment in paragraph 10 of this commentary.

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

Article 5 paragraph 2
14. The Austrian Expert made some comments on paragraph 2 of Article 5.

The Committee of Experts considered that, for the reasons set forth at paragraph 19 in the Commentary to the draft Agreement (Doc. CM (62) 147 revised), the present Protocol should not enter into force until all the States Parties to the Convention become Parties to this Protocol.

Article 5 paragraph 3
15. The reasons why the Committee decided to insert a third paragraph have already been set out in paragraph 2 of this commentary.
GENERAL COMMENTS BY THE DANISH REPRESENTATIVE

1. The representative of Denmark thought it would be advisable to consider whether the wording of the Agreement should not be reviewed in the light of the other provisions which the Court had recently proposed for insertion in the Convention (Articles 54 bis and 54 ter).

Conclusions of the 113th Meeting of the Ministers' Deputies, point XI (a)

2. The Danish representative thought it would be preferable if the provisions of the Agreement were embodied in the Convention in the form of additional Articles.

Conclusions of the 113th Meeting of the Ministers' Deputies, point XI (a)
P R E A M B L E

"The Governments signatory hereto, being members of the Council of Europe,

Having regard to the provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms signed at Rome on 4th November 1950 (hereinafter referred to as 'the Convention') and in particular Article 19 instituting, among other bodies, a European Court of Human Rights (hereinafter referred to as 'the Court');

Considering that it would be of advantage if the Court were to have conferred upon it competence to give advisory opinions subject to certain conditions;

Have agreed as follows:"

Comment by the Secretariat:

The Secretariat, referring to the model final clauses adopted by the Ministers' Deputies at their 113th Meeting, proposes that paragraph 1 of the Preamble be worded as follows:

"The member States of the Council of Europe signatory hereto

Having regard to ....... ".

Conclusions of the 113th Meeting of the Ministers' Deputies, point V
Doc. SG (62) 4, p. 2
ARTICLE I

I. Paragraph 1

"The Court may, at the request of the Committee of Ministers, give advisory opinions on legal questions concerning the interpretation of the Convention and the Protocols thereto."

Comment by the Commission

The Commission proposes the insertion, after the words "Committee of Ministers" of the words "or of the European Commission of Human Rights".

Explanatory Memorandum

Although it continues to have some doubts as to the utility of being granted the right to solicit the Court's opinion, chiefly in consideration of the "physical" limitations set forth in Article 1, para. 2 of the draft Agreement, the Commission believes that if the member States of the Council of Europe decide to confer this right upon the Court, it should be empowered to exercise it directly, that is, without passing through the Committee of Ministers.

According to the commentary appended to the present text of the draft, any requests for advisory opinions which the Commission, as well as the Consultative Assembly and the Secretary General might wish to submit to the Court, would be subject to a double check by the Committee of Ministers, first as regards their "legality", in a sense, and then as regards their desirability.

The Commission does not clearly see the justification for such an examination for "legality". Unlike the Committee of Ministers, it is endowed with judicial and quasi-judicial powers, and holds that it is in itself qualified to judge whether, in any case, the proposed agreement sanctions consultation of the Court. Moreover, Article 2 of the draft stipulates that "the Court shall decide whether a request for an advisory opinion ... is within its competence ...", which would appear to provide sufficient security, at least in respect of requests emanating from the Commission. In addition, the Commission recalls, by way of comparison, that before bringing a dispute before the Court by application of
Article 48 (a) of the Convention, it ensures that all the legal conditions posed by Articles 45, 47 and 48 are complied with, and it further recalls that, as stated in 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."

The Commission concedes that a simple examination as to desirability would be more plausible. It wishes to observe, however, that it already carries out a series of measures which, by their very nature, constantly cause it to weigh its responsibilities and the advisability of its actions. The right provided for in Article 48 (a) of the Convention seems to the Commission to offer a particularly relevant example of this: the Commission decided not to bring the Nielsen case before the Court, although there was no purely legal obstacle to its doing so.

In a more general context, the Commission is inclined to think that Article 1, para. 1, of the draft is not very consistent with the spirit and general structure of the Convention, which set up the Commission as an independent international body, as the Court, moreover, confirmed in its first decision. At no point in the texts now in force does the Committee of Ministers act as a "go-between" between the Commission and the Court. The Commission would be sorry to see one of the dominant characteristics of the protective mechanism instituted by the Convention lose its force - the very same mechanism which Article 1, para. 2, of the draft seeks to preserve in all other respects.

Comment by the Netherlands representative on the Commission's proposals

The Netherlands Government was not prepared to agree to the Commission's request.

It took the view that the insertion in the draft Agreement of a provision requiring a two-thirds majority for a decision by the Committee of Ministers to request the Court for an advisory opinion would give at least partial satisfaction to the Commission (see infra).

Note Verbale by the Netherlands Delegation, 19th September 1962
Comment by the Turkish representative on the Commission's proposals

The Turkish Government considered the Commission's proposals incompatible with the object of the authors of the draft Agreement in reserving to the Committee of Ministers alone the right to ask the Court for an advisory opinion. The recognition of the exclusive competence of the Committee of Ministers was justified by the fact that it was the only Council of Europe body which represented the Signatory States. It was also the body most qualified to decide, from a political point of view, whether a request for an opinion should be addressed to the Court.

Conclusions of the 113th Meeting of the Ministers' Deputies, point XI (a)

II. Paragraph 2

"Such opinions shall not deal with any question relating to the content or scope of the rights or freedoms defined in Section 1 of the Convention and in the Protocols thereto, or with any other question which the Commission, the Court or the Committee of Ministers might have to consider in consequence of any such proceedings as could be instituted in accordance with the Convention."

Comment by the representative of Denmark

The representative of Denmark thought it would be desirable to define more clearly in Article I of the Agreement the legal questions on which advisory opinions could be sought.

Conclusions of the 113th Meeting of the Ministers' Deputies, point XI (a)
III. Point 8 of the Commentary

Comment by the Turkish representative

The Turkish representative agreed with the opinion expressed by the majority of the Experts that the Agreement should not contain any provisions regarding the voting rules to be adopted in the matter by the Committee of Ministers.

Conclusions of the 113th Meeting of the Ministers' Deputies, point XI (a)

Comment by the Netherlands and United Kingdom representatives

The Netherlands and United Kingdom representatives thought it was preferable to embody in the Agreement a provision expressly stating that the Resolution of the Committee of Ministers to ask the Court for an opinion should be adopted by a two-thirds majority of the representatives entitled to sit on the Committee.

Note Verbale by the Netherlands Delegation, 19th September 1962.

Conclusions of the 113th Meeting of the Ministers' Deputies, point XI (a)
ARTICLE 2

"The Court shall decide whether a request for an advisory opinion submitted by the Committee of Ministers is within its consultative competence, as defined in Article 1 of this Agreement."

Comment by the Commission

The Commission proposed the insertion, after the words "Committee of Ministers" of the words "or by the European Commission of Human Rights".

Doc. CM (62) 147 rev., p. 23-25
ARTICLE 3

I. Paragraph 1

"For the consideration of requests for an advisory opinion, the Court shall sit in plenary session."

No comment.

II. Paragraph 2

"Reasons shall be given for the advisory opinion of the Court."

No comment.

III. Paragraph 3

"If the advisory opinion does not represent in whole or in part the unanimous opinion of the judges, any judge shall be entitled to deliver a separate opinion."

No comment.

IV. Paragraph 4

"The advisory opinion of the Court shall be communicated to the Committee of Ministers."

Comment by the Secretariat

Should the Commission's proposed amendments to Articles 1 and 2 be adopted, it would be necessary to decide whether, after the words "Committee of Ministers" the words "and to the European Commission of Human Rights, should the request for an advisory opinion have been submitted by that body" should be inserted.
ARTICLE 4

"The powers of the Court under Article 55 of the Convention shall extend to the drawing up of such rules and the determination of such procedure as the Court may think necessary for the purposes of this Agreement."

No comment.
ARTICLE 5

I. Paragraph 1

"This Agreement shall be open to the signature of the members of the Council of Europe, signatories to the Convention, who may become Parties to it by:

(a) signature without reservation in respect of ratification;

or

(b) signature with reservation in respect of ratification followed by ratification.

The instruments of ratification shall be deposited with the Secretary General of the Council of Europe."

Comment by the Secretariat

Referring to the model final clauses adopted by the Ministers' Deputies at their 113th Meeting, the Secretariat proposes that this paragraph be worded as follows:

"This Agreement shall be open to signature by the member States of the Council of Europe, who may become Parties to it either by:

(a) signature without reservation in respect of ratification or acceptance;

or

(b) signature with reservation in respect of ratification or acceptance, followed by ratification or acceptance.

Instruments of ratification or acceptance shall be deposited with the Secretary General of the Council of Europe."

Conclusions of the 113th Meeting of the Ministers' Deputies, point V
Doc. SG (62) 4, p.2.
II. Paragraph 2

"This Agreement shall enter into force as soon as all States Parties to the Convention shall, in accordance with paragraph 1, have signed it without reservation in respect of ratification or shall have ratified it."

Comment by the Austrian representative

The Austrian representative suggested that Article 5, paragraph 2, be amended so that the Agreement could come into force as soon as ten States Parties to the Convention had become Parties to the Agreement.

Conclusions of the 113th Meeting of the Ministers' Deputies, point XJ (a)

Comment by the Secretariat

Referring to the model final clauses adopted by the Ministers' Deputies at their 113th Meeting, the Secretariat proposes that this paragraph be re-worded as follows:

(a) Should the Austrian proposal be rejected:

"This Agreement shall enter into force as soon as all States Parties to the Convention shall have become Parties to the Agreement, in accordance with the provisions of paragraph 1."

(b) Should the Austrian proposal be adopted:

"This Agreement shall enter into force one month after the date on which ten States Parties to the Convention shall have become Parties to the Agreement, in accordance with the provisions of paragraph 1.

As regards any member States who shall subsequently sign the Agreement without reservation in respect of ratification or acceptance, or who shall ratify or accept it, the Agreement shall enter into force one month after the date of such signature or after the date of deposit of the instrument of ratification or acceptance."

Conclusions of the 113th Meeting of the Ministers' Deputies, point V
Doc. SG (62) 4, p. 2
III. Paragraph 3

"The Secretary General of the Council of Europe shall notify members of the Council of:

(a) the names of signatories and the deposit of any instrument of ratification;

(b) the date of the entry into force of this Agreement."

Comments by the Secretariat

Referring to the model final clauses adopted by the Ministers' Deputies at their 113th Meeting, the Secretariat proposes that this paragraph be worded as follows:

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

(a) any signature without reservation in respect of ratification or acceptance;

(b) any signature with reservation in respect of ratification or acceptance;

(c) the deposit of any instrument of ratification or acceptance;

(d) the date of entry into force of this Agreement in accordance with paragraph 2."

Conclusions of the 113th Meeting of the Ministers' Deputies, point V
Doc. SG (62) 4, p. 4
ADDITION OF THE FINAL CLAUSE

Comment by the Secretariat

Referring to the model final clauses adopted by the Ministers' Deputies at their 113th Meeting, the Secretariat proposes that the following clause be added to the draft:

"In witness whereof the undersigned, being duly authorised thereto, have signed this Agreement.

Done at ....................... , this ....................... in French and English, both texte being equally authoritative, in a single copy which shall remain deposited in the archives of the Council of Europe. The Secretary General of the Council of Europe shall transmit certified copies to each of the signatory and acceding States."

Conclusions of the 113th Meeting of the Ministers' Deputies, point V
Doc. SG (62) 4, p. 5
## APPENDIX II

**LIST OF MEMBERS WHO TOOK PART AT THE MEETING HELD IN OCTOBER 1962**

<table>
<thead>
<tr>
<th>Country</th>
<th>Name</th>
<th>Position</th>
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<tbody>
<tr>
<td>AUSTRIA</td>
<td>Mr. W. PAHR</td>
<td>Ministerial Commissioner Constitutional Department</td>
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<td>Federal Chancellery</td>
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<td>VIENNA</td>
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<td>BELGIUM</td>
<td>Mr. A. GOMREE</td>
<td>Deputy Magistrate Ministry of Justice</td>
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<td>BRUSSELS</td>
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<td>CYPRUS</td>
<td>............</td>
<td>not represented</td>
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<tr>
<td>DENMARK</td>
<td>Mr. F. WEBER</td>
<td>Head of Section Ministry of Justice</td>
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<td></td>
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<td>COPENHAGEN</td>
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<tr>
<td>FRANCE</td>
<td>Mr. P. GODARD</td>
<td>Assistant Director of trans-frontier traffic and aliens at the</td>
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<td>&quot;Direction de la Réglementation&quot; of the Ministry of Interior PARIS</td>
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<tr>
<td>FEDERAL REPUBLIC OF GERMANY</td>
<td>Mr. W. BERTRAM</td>
<td>Counsellor Ministry of Justice</td>
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<td>Country</td>
<td>Name</td>
<td>Position and Details</td>
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<td>FEDERAL REPUBLIC OF GERMANY</td>
<td>Mr. W. PAULY</td>
<td>First Secretary, Ministry of Foreign Affairs, Bonn</td>
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<tr>
<td>GREECE</td>
<td>Mr. P. VEGLERIS</td>
<td>Professor at the Faculty of Law, University of Athens 7 rue Zalacosta, Athens</td>
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<tr>
<td>ICELAND</td>
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<td>not represented</td>
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<td>IRELAND</td>
<td>Mr. D.P. WALDRON</td>
<td>First Secretary, Department of External Affairs, Dublin</td>
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<tr>
<td>ITALY</td>
<td>Mr. Ugo CALDARERA (Chairman)</td>
<td>Deputy Attorney-General at the Court of Cassation, Adviser, Legal Department Ministry of Foreign Affairs, Rome</td>
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<td>Mr. E. MASELLI</td>
<td>Magistrate seconded to the Ministry of Justice, Rome</td>
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<td>LUXEMBOURG</td>
<td>Mr. E. MULLER</td>
<td>Administrative Secretary, Ministry of Justice, Luxembourg</td>
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<tr>
<td>NETHERLANDS</td>
<td>Mr. H.G. SCHERMERS</td>
<td>Assistant Legal Adviser, Ministry of Foreign Affairs, The Hague</td>
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<tr>
<td>NORWAY</td>
<td>Mr. U. UNDERLAND</td>
<td>First Secretary, Legal Department, Ministry of Foreign Affairs, Oslo</td>
</tr>
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Appendix II

SWEDEN
Mr. C. LIDGARD
First Secretary
Ministry of Foreign Affairs
STOCKHOLM

TURKEY
Mr. I. UNAT
Legal Adviser to the Ministry of Foreign Affairs
Docent at the Faculty of Political Science
University of Ankara, ANKARA

UNITED KINGDOM
Sir S. HOARE
Former Assistant Under-Secretary
Home Office
LONDON
CHAPTER VII

DECISIONS OF THE COMMITTEE OF MINISTERS

February - April 1963
1. Extract from the Conclusions of the 118th meeting of the Ministers' Deputies (11th-15th February 1963).

2. Extract from the Conclusions of the 120th meeting of the Ministers' Deputies (3rd April 1963).


4. Letter No. J.3565 of 14th May 1963 from the Secretary General to the Ministers for Foreign Affairs of Member Countries, transmitting certified copies of Protocol No. 2.
XI. HUMAN RIGHTS

(b) Extension of the powers of the European Court -
Recommendation 232 - Resolution (60) 20 -
(Concl. (62) 113, point XI (a) & CM (63) 2)

The Deputies approved the report and the draft Protocol to the Convention on Human Rights prepared by the Committee of Experts set up by Resolution (60) 6 in accordance with the terms of reference conferred on it by Resolution (60) 20. The draft Protocol empowers the European Court of Human Rights to give advisory opinions.

The representative of France said his government were not in a position to approve the draft text in question.

It was agreed that the Protocol would be opened to signature by member Governments at the 32nd session of the Committee of Ministers in May 1963.

In order not to delay the signing of the Protocol and having regard to the fact that it is largely based on the proposals embodied in Recommendation 232, it was deemed preferable not to submit the text before signature to the Assembly for an opinion as requested by the latter in Recommendation 232.
CONCLUSIONS
OF THE 120TH MEETING OF THE MINISTERS' DEPUTIES
held in Strasbourg on 3rd April 1963

II. HUMAN RIGHTS

2. Signature by the Governments of Member States of the Council of Europe of:
   (ii) Protocol to the Convention on the Protection of Human Rights and Fundamental Freedoms conferring on the European Court of Human Rights the power to give advisory opinions (Concl. (63) 118, Point XI (b) CM (63) 2

The Deputies agreed to suggest that the Ministers open the Protocol for signature by Member Governments at their 32nd session.

Governments stated their position with regard to the signature of the Protocol as follows:

The Federal Republic of Germany, Italy, Luxembourg, Norway, Sweden and Turkey would sign it on 6th May, subject to ratification or approval.

Denmark and the United Kingdom would sign it on 6th May without reservation as to ratification.

Ireland and the Netherlands hoped to be able to sign on 6th May.

Austria and Iceland would probably sign it at a later date.

France would not sign the Protocol.
III. (b) Second Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms conferring on the European Court of Human Rights the power to give advisory opinions

This Protocol was signed by the Governments of Denmark and of the United Kingdom without reservation as to ratification or acceptance.

It was signed subject to ratification or acceptance by the Governments of Austria, the Federal Republic of Germany, Ireland, Italy, Luxembourg, the Netherlands, Norway, Sweden and Turkey.
Letter No. J/3565 to the Ministers for Foreign Affairs of Member Countries

J/3565

Strasbourg, 14th May 1963

Your Excellency,

I have the honour to send you herewith certified copy of the following Protocols:

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

- Protocol No. 3 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending Articles 29, 30 and 34 of the Convention,

which have been signed at Strasbourg on 6th May 1963, at the 32nd Session of the Committee of Ministers by the Representatives of the Governments of Austria, Denmark, the Federal Republic of Germany, Ireland, Italy, Luxembourg, the Netherlands, Norway, Sweden, Turkey and the United Kingdom of Great Britain and Northern Ireland. These two Protocols have been signed without reservation of ratification by Denmark and the United Kingdom, and with reservation by the other signatory countries.

I should be most grateful if you would also bear in mind Resolutions (51) 30 B and (61) 6 of the Committee of Ministers on the ratification of Council of Europe Conventions. Copies of these Resolutions are enclosed herewith.

This notification is communicated to you in accordance with Article 5 of the Protocol No. 2 and with Article 4 of the Protocol No. 3.

Single copies of the Protocols will be sent to your Department shortly.

I remain,

Your Excellency's obedient Servant,

Encl.

Lodovico BENVENUTI
Secretary General
RATIFICATION OF COUNCIL OF EUROPE CONVENTIONS

RESOLUTION (51) 30 B

Powers of the Committee of Ministers
(Article 15 of the Statute)
(Adopted by the Committee of Ministers on 3rd May 1951)

The conclusions of the Committee of Ministers may, where appropriate, take the form of a convention or agreement. In such a case the following provisions shall apply:

1. the convention or agreement shall be submitted by the Secretary General to all Members for ratification;

2. each Member undertakes that within one year of such submission, or, where this is impossible owing to exceptional circumstances, within eighteen months, the question of ratification of the convention or agreement shall be brought before the competent authority or authorities in its country;

3. the instruments of ratification shall be deposited with the Secretary General;

4. the convention or agreement shall be binding only on such Members as have ratified it.

RESOLUTION (61) 6
(Adopted by the Ministers' Deputies on 27th February 1961)

The Committee of Ministers,

Having considered Recommendations 249 and 268 on the ratification of Council of Europe Conventions;

Recalling its own Resolution (51) 30 B of 3rd May 1951 on this subject;
Resolves as follows:

At the beginning of each year, each Member will make a report to the Committee of Ministers, indicating:

(a) which conventions, agreements or protocols concluded within the framework of the Council of Europe it has ratified;

(b) the steps it has taken towards the ratification of other conventions, agreements or protocols;

(c) where considered possible and appropriate, the reasons why any conventions, agreements or protocols have not been submitted for ratification within a period of eighteen months after signature.
CHAPTER VIII

FINAL TEXT OF PROTOCOL NO. 2 TO THE CONVENTION
FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS,
CONFERRING UPON THE EUROPEAN COURT OF HUMAN RIGHTS
COMPETENCE TO GIVE ADVISORY OPINIONS
PROTOCOL No. 2

to the Convention for the Protection of Human Rights
and Fundamental Freedoms, conferring upon
the European Court of Human Rights
competence to give advisory opinions
The member States of the Council of Europe signatory hereto:

Having regard to the provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms signed at Rome on 4th November 1950 (hereinafter referred to as "the Convention") and, in particular, Article 19 instituting, among other bodies, a European Court of Human Rights (hereinafter referred to as "the Court");

Considering that it is expedient to confer upon the Court competence to give advisory opinions subject to certain conditions;

Have agreed as follows:

ARTICLE 1

1. The Court may, at the request of the Committee of Ministers, give advisory opinions on legal questions concerning the interpretation of the Convention and the Protocols thereto.

2. Such opinions shall not deal with any question relating to the content or scope of the rights or freedoms defined in Section 1 of the Convention and in the Protocols thereto, or with any other question which the Commission, the Court or the Committee of Ministers might have to consider in consequence of any such proceedings as could be instituted in accordance with the Convention.

3. Decisions of the Committee of Ministers to request an advisory opinion of the Court shall require a two-thirds majority vote of the representatives entitled to sit on the Committee.

ARTICLE 2

The Court shall decide whether a request for an advisory opinion submitted by the Committee of Ministers is within its consultative competence as defined in Article 1 of this Protocol.

ARTICLE 3

1. For the consideration of requests for an advisory opinion, the Court shall sit in plenary session.

2. Reasons shall be given for advisory opinions of the Court.
3. If the advisory opinion does not represent in whole or in part the unanimous opinion of the judges, any judge shall be entitled to deliver a separate opinion.

4. Advisory opinions of the Court shall be communicated to the Committee of Ministers.

ARTICLE 4

The powers of the Court under Article 55 of the Convention shall extend to the drawing up of such rules and the determination of such procedure as the Court may think necessary for the purpose of this Protocol.

ARTICLE 5

1. This Protocol shall be open to signature by member States of the Council of Europe, signatories to the Convention, who may become Parties to it by:

   (a) signature without reservation in respect of ratification or acceptance;
   
   (b) signature with reservation in respect of ratification or acceptance, followed by ratification or acceptance.

   Instruments of ratification or acceptance shall be deposited with the Secretary-General of the Council of Europe.

2. This Protocol shall enter into force as soon as all States Parties to the Convention shall have become Parties to the Protocol, in accordance with the provisions of paragraph 1 of this Article.

3. From the date of the entry into force of this Protocol, Articles 1 to 4 shall be considered an integral part of the Convention.

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

   (a) any signature without reservation in respect of ratification or acceptance;
   
   (b) any signature with reservation in respect of ratification or acceptance;
   
   (c) the deposit of any instrument of ratification or acceptance;
   
   (d) the date of entry into force of this Protocol in accordance with paragraph 2 of this Article.
In witness whereof, the undersigned, being duly authorised thereto, have signed this Protocol.

Done at Strasbourg, this 6th day of May 1963, in English and in French, both texts being equally authoritative, 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 signatory States.

For the Government of the Republic of Austria:

with reservation in respect of ratification or acceptance

KREISKY

For the Government of the Kingdom of Belgium:

with reservation in respect of ratification or acceptance

Strasbourg, 5th June 1963

René COENE

For the Government of the Republic of Cyprus:

For the Government of the Kingdom of Denmark:

Kjeld PHILIP
For the Government of the French Republic:

For the Government of the Federal Republic of Germany:
with reservation in respect of ratification or acceptance
CARSTENS

For the Government of the Kingdom of Greece:

For the Government of the Icelandic Republic

For the Government of Ireland
with reservation in respect of ratification or acceptance
Proinsias MAC ACGÁIN

For the Government of the Italian Republic
with reservation in respect of ratification or acceptance
Edoardo MARTINO
For the Government of the Grand Duchy of Luxembourg:

with reservation in respect of ratification or acceptance

E. Schaüs

For the Government of the Kingdom of the Netherlands:

with reservation in respect of ratification or acceptance

H. R. van Houten

For the Government of the Kingdom of Norway:

with reservation in respect of ratification or acceptance

Halvard Lange

For the Government of the Kingdom of Sweden:

with reservation in respect of ratification or acceptance

Gunnar Lange
For the Government of the Turkish Republic:

with reservation in respect of ratification or acceptance

Zeki KUNERALP

For the Government of the United Kingdom of Great Britain and Northern Ireland:

Edward HEATH