ADVISORY JURISDICTION OF THE EUROPEAN HUMAN RIGHTS COURT: A PROCEDURE WORTH RETAINING?

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INTRODUCTION

1. The "success story" of the advisory jurisdiction of the Inter-American Court of Human Rights is principally due to the pioneering efforts undertaken by Tom Buergenthal, a distinguished former President of the Court.[1]

2. The same cannot be said of developments in Strasbourg, where the European Court of Human Rights has, as yet, never rendered an advisory opinion despite the possibility of it so doing under Protocol N°2 to the European Convention on Human Rights. This article will therefore attempt to provide an overview of the Protocol's drafting history as well as a few pointers as to why this is so, leaving the reader to speculate as to whether, in the European context, such a procedure is worth retaining. If such advisory jurisdiction is worth retaining,

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1 J.G. Merrills, in 1989 revised version of A.H. Robertson's *Human Rights in the World*, considers that the Inter-American Court of Human Rights advisory opinions "to date constitute its main contribution to a developing human rights jurisprudence in the Americas" (at p. 193). See also T. Buergenthal "The advisory practice of the Inter-American Court of Human Rights" in vol. 79 *AJIL* (1985), pp. 1-27.

what amendments to the European Convention's Protocol N°2 should be envisaged?[2]

AN OVERVIEW OF THE DRAFTING HISTORY

3. The conclusion of Protocol N° 2 was the result of a proposal of the Council of Europe's Parliamentary (then called Consultative) Assembly: Recommendation 232 (1960) on the extension of the competence of the European Court of Human Rights as regards the interpretation of the Convention on Human Rights adopted on 22 January 1960 (30th Sitting).

In this Recommendation, addressed to the Committee of Ministers (the Organisation's executive organ), the Assembly proposed:

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.

4. The Legal Committee of the Assembly had become aware of a number of provisions of uncertain interpretation contained in the Convention and considered whether some suitable measures could not be adopted in order to make it possible to obtain an authoritative interpretation of provisions of the Convention with regard to which such uncertainties arose. It therefore proposed that the Committee of Ministers convene a committee of experts with instructions to con-

2 The text of Protocol N°2 is reproduced in the Appendix to the present article.

clude 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, at that time, no case had yet been brought before the Court (see Report 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 of 24 November 1959).

5. Among the problems of interpretation of a legal character on which the Legal Affairs Committee considered it would be useful to have an authoritative ruling were: whether a simple majority or an absolute majority was required for the election of judges under Article 39 of the Convention; the procedure by which the Committee of Ministers should discharge its obligations under Article 32 of the Convention; the effect of declarations accepting the jurisdiction of the Court as compulsory on condition of reciprocity (i.e. whether the Commission may refer alleged breaches by States which have accepted the Court's jurisdiction); that relating to the procedure for electing new judges in the event of casual vacancies; the extent to which a State's acceptance of the Court's compulsory jurisdiction under Article 46 extended the application of the Convention to its colonial territories under Article 63; the procedure to be followed with respect of Article 54 of the Convention[3]. The Committee mooted the idea that the following could seize the Court of such questions:

- States, to request, for example, the conformity of proposed legislation with the provisions of the Convention;

- the Secretary General of the Council of Europe, who could have the right to consult the Court as depositary of the instruments provided for in the Convention;

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3 In his book *Human Rights in Europe* (1977, 2nd ed.), at pp. 221-222, A.H. Robertson also referred to two other examples: effect of decisions of the Court under Article 50 and the exercise of the powers of the Secretary General under Article 57 (which were in fact mentioned by Mr Robertson in a written communication he presented at a Human Rights Colloquy, subsequently published in *La protection internationale des Droits de l'Homme dans le cadre européen* (1961), pp. 361-375).

- the Committee of Ministers, which might be empowered to ask the Court for an opinion -not on a question of substance- but purely on the detailed application of those provisions of the Convention under which it was entrusted with certain tasks under the existing system of collective guarantee (see above examples concerning application of Articles 32 and 54);

- the Parliamentary Assembly, to seek enlightenment as to the scope of powers conferred upon it under Articles 21 and 39 of the Convention.

6. Finally, the Committee considered it preferable not to grant States or natural or legal persons the right to apply to the Court for an advisory opinion. It explained:

> 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 subject of contentious proceedings, lest the well-balanced system laid down by the Convention for the protection of Human Rights be upset.
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> 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."

7. On the same day the Assembly adopted Recommendation 231, on the uniform interpretation of European treaties, which had also been prepared by its Legal Affairs Committee (Doc. 1062 of 24 November 1959). The proposals in this Recommendation -which were in effect rejected by the Committee of Ministers- included a draft text which provided that a national judicial authority, before rendering a decision which departs from an interpretation of a European Convention rendered on the same matter by a higher court of another Contracting Party, should ask the Strasbourg Court for an advisory opinion. (For the reply of the Committee of Ministers, see Documents of the Assembly, 1961, Document 1257, paragraphs 239-240).

8. By Resolution (60) 20, adopted by the Ministers' Deputies on 15 September 1960, the Committee of Ministers instructed the Committee of Experts on problems relating to the Convention for the Protection of Human Rights and Fundamental Freedoms (DH/Exp) 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".

9. After having discussed this matter at two meetings, in November 1960 and April 1961, the Committee of Experts expressed the view that it would be desirable to confer upon the Court the competence to give advisory opinions. It considered that the right to request an opinion be confined to the Committee of Ministers. It would always be open to the Assembly, the Secretary General and the Commission to submit proposals for a request for an advisory opinion to the Committee of Ministers (doc. DH/Exp (61) 14).

10. At the 100th meeting of the Ministers' Deputies in July 1961, the Committee of Ministers in principle adopted the conclusions of the report and instructed the Committee of Experts to submit a draft Agreement based upon these conclusions.

11. The Committee of Experts thereupon prepared the draft Protocol at its meetings held from 2 to 11 October 1961, from 2 to 10 March 1962 and from 1 to 7 June 1962. On 5 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 Parliamentary (Consultative) Assembly (doc. DH/Exp (62) 6, paragraph 3).

12. In June 1962 the Committee of Experts submitted a Report to the Committee of Ministers containing a draft Agreement conferring on the Court competence to give advisory opinions. (The *Commentary's* publication was authorised by the Committee of Ministers at the 139th meeting of the Ministers' Deputies in March 1965: see doc. H (71) 11).

13. Also in June 1962, just after the transmission of the Report to the Committee of Ministers, the Secretary to the European Commission of Human Rights wrote a letter to the Secretary General in which he transmitted the Commission's views on this subject: ". . .if the member States of the Council of Europe decide to confer this right upon the Court, [i.e. to give advisory opinions], it [the Commission] should be empowered to exercise it directly, that is, without passing by the Committee of Ministers."[4]

14. At their 113th meeting held in September 1962, the Ministers' Deputies agreed 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 as well as additional comments made on the draft text by certain delegations.

15. The Committee of Experts discussed these proposals, together with the additional comments submitted by a number of delegations at a meeting, held from 22 to 27 October 1962. In the course of this

4 While discussions were continuing, the European Court of Human Rights also submitted certain proposals to the Committee of Ministers relating to, *inter alia*, amendment of Articles 40 and 43, the provision of preliminary rulings, as well as advice, at the request of a Government, in relation to draft legislation. The Court's proposals as regards Article 40 were incorporated in the Convention's Fifth Protocol.

meeting, Mr Petrén, 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 by the Ministers' Deputies adopted in September 1962, revised the wording of the final clauses of the draft in the light of that model text.

At the same meeting the Committee of Experts drew up a supplementary Report which it submitted to the Committee of Ministers. This included the final text of the Second Protocol and the comments of the Committee of Experts on the proposals submitted by the Commission, the comments made by some of the Ministers' Deputies, as well as changes made to the draft prepared in June 1962 (see *Further Comments* relating to the draft prepared in October 1962, in doc. H(71)11).

16. At its 118th meeting in February 1963, the Committee of Ministers approved the report and the draft Protocol to the European Convention on Human Rights prepared by the Committee of Experts.

17. Protocol N° 2 was opened for signature on 6 May 1963, at the 32nd session of the Committee of Ministers. It entered into force on 21 September 1970 and has been ratified by all the 31 States Parties to the Convention. The remainig 5 member States will do so in due course..

18. This protocol, which is drafted in restrictive terms, has never been applied.[5]

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5 See the Rules of the Court: Rule 1 (b) and Chapter V (Rules 59 to 67). Cf., Article 64 of the American Convention on Human Rights which stipulates:
"The member States of the Organization may consult the [Inter-American] Court [of Human Rights] regarding the interpretation of this Convention or of other treaties concerning the protection of human rights in the American States. Within their spheres of competence, the organs listed in Chapter X of the Charter of the Organization of American States, as amended by the Protocol of Buenos Aires, may in like manner consult the Court.

INTERGOVERNMENTAL WORK SINCE THE ADOPTION OF PROTOCOL N° 2.

19. At the 237th meeting of the Ministers' Deputies in October 1974 the Committee of Experts on Human Rights was instructed to investigate improvements required in the machinery for implementing the European Convention on Human Rights and to submit concrete proposals to the Committee of Ministers.

Paragraph 32 of the Committee of Experts' report read as follows:

32. The Committee of Experts on Human Rights felt that the present situation with regard to the application of Protocol N° 2 was unsatisfactory, since the competence given to the Court by this Protocol could hardly ever be used. This situation might be overcome either by extending the competence of the Court or simply by terminating Protocol N° 2.

20. Before transmitting to the Committee of Ministers the report on a Council of Europe Short -and Medium- Term Programme in the general field of Human Rights, the Committee of Experts asked the Court and the Commission for their opinions.

21. While the Commission did not express any view on the matter, the Court, for its part, gave the following opinion:

The Court is not unaware of the considerations which led the Governments:

- to encompass its competence to give advisory opinions within narrow bounds;

The Court, at the request of a member State of the Organization, may provide that State with opinions regarding the compatibility of any of its domestic laws with the aforesaid international instruments."
The Inter-American Court of Human Rights has to date rendered 14 opinions: see Council of Europe *Human Rights Information Sheets, passim*; A.H. Robertson and J.G. Merrills *Human Rights in the World* (1990, Manchester U.P.) and press releases issued by the Court in Costa Rica.

- to decline to act on a suggestion which the Court had made with a view to its being given competence "at the request of the Government of a High Contracting Party, . . . (to) render an advisory opinion on any question of interpretation of the Convention which may arise in connection with a draft regulation or decree, a Bill or any projected legislation under examination by its competent authorities".

Those considerations are quite understandable. It will also be noted that the Court of Justice of the Communities has no competence to examine, even in an advisory capacity, the compatibility of draft national legislation or regulations with the requirements of Community law.

In these circumstances, the Court believes that the prudent course would be to let re-examination of the question wait until the Committee of Experts or the Committee of Ministers make their intentions clearer. If they displayed readiness today to make progress in this field, the Court would advise them to prepare an optional, additional Protocol rather than an amending Protocol. Furthermore, the Court should have the possibility of declining to answer -or to give a preliminary ruling- in cases where it considers such a guarded attitude to be necessary to uphold its judicial character and, especially, for the proper exercise of its contentious jurisdiction[6].

In any event, the Court does not see why Protocol N° 2 should be abolished (DH/Exp(74)18, p. 11, paragraph 32 *in fine*): no-one can foretell with certainty that this instrument will always remain a dead letter.

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6 See, in this connection, Article 65, paragraph 1, of the Statute of the International Court of Justice ("may give") and relevant case-law thereunder. See also Article 1, paragraph 1, of Protocol N° 2 ("may give").
As to the "binding nature" of advisory opinions, see A. Drzemczewski *European Human Rights Convention in Domestic Law. A Comparative Study*, 1983, at p. 339 and, more generally, R. Ago "'Binding' Advisory Opinions of the International Court of Justice" in *AJIL* (1991), pp. 439-451.

22. Subsequently, this question was included in the Intergovernmental Work Programme; 1976-80 Medium-Term Plan approved by the Committee of Ministers on 6 May 1976, during its 58th session.

23. At its 3rd meeting, held from 8 to 12 May 1978, the Steering Committee for Human Rights (CDDH) requested one of its subordinate committees, the DH-PR Committee[7]:

a. to examine ways in which the procedure provided for in Protocol N° 2 could be improved; and

b. to consider the possibility of revising Protocol N° 2 so as to empower the European Court of Human Rights to give an advisory opinion, if so requested by a Government, on any draft law or regulation which that Government proposed to adopt, and, if appropriate, to make concrete proposals to the Steering Committee for Human Rights in the form of a draft legal instrument.

24. This question was examined by the DH-PR at its 3rd, 4th and 5th meetings, held from 18 to 21 April 1978, 29 November to 1 December 1978 and 5 to 9 March 1979 respectively.

25. A draft final activity report was thereupon presented to the CDDH which, having adopted the DH-PR's reasoning, transmitted its opinion to the Committee of Ministers. The CDDH was of the view that, in the light of considerations presented to it by the DH-PR, for the time being no amendment should be made to Protocol N°2.

26. At the 307th meeting of the Ministers' Deputies in September 1979, the Committee of Ministers took note of the final activity report of the CDDH and instructed the Secretariat to transmit the report for information to the Commission and Court. It also authorised the publication of the report.

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7 The DH-PR Committee, formerly called "Committee of Experts for the Improvement of the Procedure under the European Convention on Human Rights" is now called "Committee for the Improvement of Procedure for the Protection of Human Rights".

The report's *Explanatory Memorandun* is reproduced hereafter:

C. Explanatory Memorandum

The Committee examined the various suggestions put forward regarding Protocol N°2.

As to the suggestion that Protocol N°2 should simply be terminated, the Committee agreed with the European Court of Human Rights that there appeared to be no good reasons for this. Obviously nobody could predict with certainty that Protocol N°2 will never be used: it might one day enable some questions relating to the interpretation of certain provisions of the European Convention on Human Rights to be referred to the Court for an advisory opinion.

The Committee therefore proceeded to consider whether Protocol N° 2 might be improved by extending the competence of the Court to give advisory opinions.

The present limits of the Court's advisory powers are laid down in Article 1 (2) of Protocol N° 2. They are designed to exclude from such advisory powers any question relating to the content or scope of the rights or freedoms defined in Section I of the Convention and any other question of competence or procedure which might arise before the Commission, the Court and the Committee of Ministers in consequence of proceedings under the Convention. In general the Committee is of the opinion that this exclusion remains desirable to avoid any confusion between proceedings in the presence of the parties where there is a complaint of violation under the terms of the Convention and the very different proceedings of an advisory nature under the Protocol. If no provision were made for such an exclusion, there might be a temptation to side-step, avoid or even neutralise proceedings in the presence of the parties which are and must remain the cornerstone

of the system of collective guarantees introduced by the Convention.

According to the present system, the Committee of Ministers is the only authority competent to ask for an advisory opinion (Article 1(1)).

Against this background the Committee considered the suggestion that the Court should be empowered to give an advisory opinion at the request of the government of a Contracting State, in connection with draft legislation under consideration before the authorities of the State. Several members of the Committee saw difficulties in the way of such an extension of the advisory competence of the Court whether by an amendment of Protocol N° 2 or by a separate Protocol. The proposed procedure would require the Court to give an abstract and general assessment of the compatibility of a draft law with the Convention and not in relation to a concrete case. However, in many cases it is the way in which the law is applied in practice which is important and not the way in which it has been drafted. If the Court had given a favourable opinion on a draft law, this could prejudice the position of the Commission and the Court and prove very embarrassing in the event that a subsequent complaint came before them of an alleged violation of the Convention arising from the way in which the law had been interpreted and applied after it had entered into force. The Court could then be in the position of having to find that some act in implementation of a law constituted a violation of the Convention although the law itself had previously been approved by the Court. This could give rise to considerable misunderstanding and aggravation between the government concerned and the Court.

The procedure could also put other governments which had already introduced similar legislation into an embarrassing position. This is of particular importance at a time when the Council of Europe is trying to encourage the maximum

degree of harmonisation and unification of legislation between member States.

Lastly, since the Court could only give an opinion, the authority of the Court might be impaired if the national legislature was not prepared to comply with that opinion. This would have undesirable repercussions on the Court's authority in the exercise of its jurisdiction under the Convention.

A minority in the Committee did not share the view of the majority of the experts. They drew attention to the following points in particular. When adopting the text of laws, national authorities were often faced with difficult problems regarding interpretation of the Convention. (For instance, should proceedings before the courts of cassation abide by the principle of public hearings as laid down in Article 6(1) of the Convention?) If national governments were vested with power to request the Court for an advisory opinion, such justifiable doubt could be dispelled. Far from being incompatible with the Court's judicial function, such an extended advisory function would be complementary to it, and this was clear from a comparison of the effects of advisory opinions with those of judgments. On the one hand, an advisory opinion would not legally bind the States concerned (not, a fortiori, third States). On the other, approval, under an advisory procedure, of the principles of a national draft Bill would not prevent the Court, when fulfilling its judicial function, from holding that the actual application of such a law would be incompatible with the Convention. Moreover, should the Court deem, in a specific case, that to exercise its advisory function might be prejudicial to its judicial function, it would be free not to respond to a request for an advisory opinion. (See the above opinion delivered by the Court in this connection)[8].

8 See paragraph 21, above.

However, quite apart from the general consideration mentioned above for and against empowering the Court to give advisory opinions on draft legislation, it appeared from the discussion that, for the time being at least, only three member States were positively interested in the proposal. Although it would be possible to have a Protocol which would come into force with very few ratifications, the Committee concluded that in these circumstances it could not recommend proceeding with the project.

D. Conclusions

In the light of the foregoing considerations, the Steering Committee is of the opinion that for the time being no recommendation should be made to the Committee of Ministers for any amendment to Protocol N° 2.

ATTEMPTS AT INVOKING PROTOCOL N° 2

28. As already explained, Protocol N° 2 has to date not been applied; attempts at invoking this Protocol have been rare.

29. The first occasion on which the Committee of Ministers was seized of a proposal to ask for an advisory opinion since the Protocol's entry into force on 21 September 1970 was a request made by the Netherlands Delegation in February 1972 in connection with a projected revision of Netherlands military disciplinary law. On this occasion the "Committee of Ministers decided not to request the European Court of Human Rights for an advisory opinion on the questions proposed by the delegation of the Netherlands, because a number of governments considered that these questions fell within the terms of paragraph 2 of Article 1 and that it would therefore be outside the competence of the Court to give an advisory opinion thereon" (see Parliamentary Assembly Documents, Working Papers, 1972-1973, Vol. I, N°. 3117, at pp. 13-14).

30. At their 357th meeting in March 1983, the Ministers' Deputies had a preliminary exchange of views on a draft question which might be put to the Court under Protocol N° 2.

In order to facilitate this examination and so as to respond to the request made by several delegations, a draft question was prepared by the Secretariat. It read as follows:

Draft question to be put to the Court in accordance with Protocol N° 2 to the European Convention on Human Rights

What is the scope of the supervisory function of the Committee of Ministers according to Article 54 and, in particular,

- is this function limited to supervising the remedying of the violation suffered by the applicant(s) in the particular case or can it also include such general measures as may have to be taken in consequence of a judgment?

- is the Committee of Ministers only competent to take note of the information furnished by the State concerned or does its competence also cover examination of this information?

This matter was not, however, pursued.

31. The text of the Turkish Government's declaration, which had been appended to the country's acceptance of the right of individual petition under Article 25 of the Convention in 1987 (see Human Rights Information Sheet N° 21, pp. 3-12), was also apparently discussed at a meeting of the Ministers' Deputies. During discussions, certain delegations -so it was leaked- proposed that the Court be asked for an opinion on this subject.

Likewise, this matter was not pursued.

RECENT ATTEMPTS AT REDRAFTING THE TEXT

32. Finally, mention can be made of an interesting discussion that took place during the DH-PR's 3rd, 4th and 5th meetings (see paragraph 24 above). At its 3rd meeting, in April 1978, an expert drew the DH-PR Committee's attention to the Court's opinion (see *supra*,

paragraph 21) and urged that Protocol N° 2 be amended in such a way as to authorise the Court to give a consultative opinion at the request of a Government or one of the High Contracting Parties on any question of interpretation of the Convention which arose in respect of a draft order or decree, of a law, bill or proposal for examination by its appropriate authorities. He added that his Government wished to avail itself of this option in the context of legislative work in the course of preparation.

After an exchange of views, the Committee noted that there was no majority in favour of the continuation of this work. Although one Government and one expert were interested in pursuing this proposal, the DH-PR did not pursue the matter in the light of the subsequent statement of the expert who started discussions on this subject "that his Government considers, at the present stage, that it does not seem necessary to empower the European Court of Human Rights to give an advisory opinion at the request of a government". Consequently, the Committee adopted the draft final activity report, the Explanation Memorandum of which is reproduced at paragraph 27 of the present document.

33. The DH-PR's 4th meeting report, of 29 November to 1 December 1978, summarises the views of certain experts as concerns this proposal. An excerpt from this agenda item is reproduced hereafter:

> In response to the question of which States would be interested in such a procedure for advisory opinions, three experts said that their Governments were in favour, considering the definite advantage mainly in being able to ensure that the Convention was being respected before initiating legislation or preparing regulations. Two other experts were firmly opposed. One of them referred to the experience of similar opinions given by its Constitutional Court: the work of parliaments was so delayed that it became necessary to abolish this procedure.
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> Other experts expressed the opinion, mainly in a personal capacity, that their Governments were not interested in the procedure

but that they were prepared to collaborate in the preparation of a Protocol if one or a sufficient number of States desired it.

A series of problems were brought up in the course of the discussion, for example:

- such a procedure would give the Court, a judicial organ, optional jurisdiction to give an advisory opinion when the Court might later be called upon to judge a case relating to the subject matter of the advisory opinion. Such a situation might prove embarassing for the Court;

- it would be difficult to word the question to be put to the Court: was it a question of the compatibility of a draft with the Convention as a whole or with a specific rule of the Convention?

- the Court's function is to interpret the Convention. But the proposal before the Committee would ask the Court to decide on the compatibility of legislation with the Convention;

- it was not clearly distinguished whether the Court's opinion given at the request of a single State would also be authoritative for other Contracting Parties.

34. The last time a discussion was undertaken in relation to the possible revision of Protocol N° 2 was at the DH-PR's 28th meeting, held from 24 to 27 April 1990.

At this meeting most experts, after discussing this topic at some length, were of the view that there was no need to extend the Court's advisory competence *rationae materiae*: the exclusion of substantive questions from the Court's advisory jurisdiction was considered healthy in that this exclusion remains desirable so as to avoid any confusion between a contentious case where a violation of the Convention is alleged and the very different proceedings of a non-binding advisory nature.

35. Similarly, at the same meeting, in so far as the possible extension of the right to apply to the Court for an advisory opinion to the European Commission, the Parliamentary Assembly and/or the Secretary General of the Organisation are concerned, the majority view was that no such revision should be contemplated. A number of experts considered that, so long as the subject-matter upon which the Court could provide advice was limitatively circumscribed, the extension of the right to seek advice to institutions other than the Committee of Ministers would change nothing; indeed, such an extension of competence *rationae personae* might well be a fruitless exercise.

A POSTSCRIPT

36. A major overhaul of the present Convention's supervisory mechanism has just been completed with the adoption, on 11th May 1994, of Protocol N° 11 to the Convention. When the Protocol enters into force, the two-thirds majority requirement for a request of an advisory opinion (Article I, paragraph 3 of Protocol N° 2) will be brought down to that of a simple majority: see new Article 47, paragraph 3, as drafted in Protocol N° 11[9].

37. What is, perhaps, of interest to note is the fact that during negotiations leading up to the adoption of Protocol N° 11, a serious attempt was made again by a number of States to amend the text. For present purposes -and bearing in mind the confidential nature of the very recently completed negotiations- it may be sufficient to indicate that all these attempts were unsuccessful. Among proposals which were discussed was the idea of deleting paragraph 2 of new Article 46 of the Convention (i.e., the present text of paragraph 2 of Article 1 in Protocol N° 2), as well as the deletion of the last limb of this paragraph i.e., the words "or with any other question which the

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9 For a description of changes made, as well as the text of Protocol N° 11, to the Convention, see A. Drzemczewski and J. Meyer-Ladewig "Principal characteristics of the new ECHR control mechanism, as established by Protocol No. 11" in vol. 15 *Human Rights Law Journal* (1994), pp. 81-105, (Also published in Vol. 6 *Revue Universelle des Droits de l'Homme*, (1994), pp. 81-105.

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".

38. And finally, the possibility of not retaining any reference to the Court's advisory competence was also mooted, on the understanding that an amendment of Protocol N° 2 is long overdue.

But as already explained, none of these initiatives saw the light of day.

Appendix

Protocol N°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 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 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 (Strasbourg, 6 May, 1963).

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.