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CABINET

EUROPEAN CONVENTION ON HUMAN RIGHTS

Memorandum by the Secretary of State for the Home Department
and the Secretary of State for Foreign and Commonwealth Affairs

INTRODUCTION

1. The United Kingdom's declarations of acceptance of the optional clauses of the European Convention on Human Rights, which provide for the right of individuals to petition the European Commission of Human Rights and the acceptance by States parties of the compulsory jurisdiction of the European Court of Human Rights, expire on 14 January 1981. This memorandum seeks our colleagues' agreement to announcing that we have decided to renew the declarations for a period of five years.

BACKGROUND

2. In 1966 the United Kingdom accepted, under Article 25, the right of any person, non-governmental organisation or group of individuals to make a complaint direct to the Human Rights Commission in Strasbourg, and, under Article 46, the compulsory jurisdiction of the European Court of Human Rights in all matters concerning the interpretation and application of the Convention. Both articles enable a State to make these acceptances for a specific period. The United Kingdom's initial acceptance in each case was for 3 years and has subsequently been renewed variously for periods of 2, 3 and 5 years.

3. Of 20 States parties to the Convention, 14 (4 indefinitely) - including all the members of the European Community (EC) except France - have accepted the right of individual petition and 17 (3 indefinitely) - including all EC members - the compulsory jurisdiction of the Court. States parties other than France which have not accepted the right of individual petition are: Cyprus, Greece, Malta, Spain and Turkey.

DOMESTIC CONSIDERATIONS

4. Since the United Kingdom accepted the optional clauses there has, in a number of relevant Departments, been growing concern about the dynamic and evolutionary interpretation which the Strasbourg organs (particularly the Commission) have put on the Convention. The effect of this has been to go further towards interfering with the exercise of Parliamentary sovereignty

than could have been foreseen in 1951 when we ratified the Convention. The decisions reached by these organs highlight the extent to which the acceptance of international obligations may often have the unavoidable consequence of limiting the freedom of action of national bodies, whether legislative or judicial. The Convention was designed primarily to check excesses such as had occurred in Europe during the 1930s and 1940s under the authority of national laws. It has, however, been applied in ways which were not within the intentions, so far as they can be discovered, of the drafters of the Convention.

5. Withdrawal of the right of individual petition and from compulsory jurisdiction would not, of course, alter what has already happened and would protect us from difficulty and embarrassment only in future years. The extent of possible future difficulty and embarrassment is, in part because of the relative unpredictability of the interpretative approach already described, impossible to assess at all reliably. Nevertheless, some of the results of earlier cases, and some of the cases which are currently under consideration or in prospect, give ground for anxiety. The areas affected include the interception of communications, immigration and, potentially, nationality, police procedures, penal law and treatment, corporal punishment in State schools and, potentially, military discipline (see Annex).

6. A decision not to renew, however, could only be defended publicly on grounds such as those described in paragraph 4 above. Critics would attack any such argument on the basis that we were paying only lip service to the Convention and avoiding its obligations. We have accepted the optional clauses continuously since 1966. A refusal to renew would be strongly opposed and could not easily be reconciled with our Manifesto commitment to discuss a possible Bill of Rights. It would have potentially severe political consequences in Northern Ireland where critics would represent it as an implicit admission that arrangements there could not be justified in the Strasbourg organs, and make adverse comparisons with the Republic, which has accepted indefinitely the right of individual petition.

INTERNATIONAL RELATIONS AND HUMAN RIGHTS

7. The United Kingdom was one of the principal architects of the Convention and has always taken justifiable pride in its long standing commitment to human rights. The fact that we have accepted the additional commitments inherent in making declarations under Articles 25 and 46 gives us a tactical advantage in our relations with the Communist bloc and other countries, for example in Latin America, who infringe human rights. A decision not to renew the optional clauses, particularly during the impending review of the Helsinki Final Act, would be criticised by our European partners and the United States, and also (for differing reasons) by Eastern Europe. The United Kingdom has been able to defend its position on the corresponding provisions in the United Nations Covenant on Civil and Political Rights (ie non-ratification) by reference to our acceptance of the right of individual petition in the European Convention which covers essentially the same ground and whose organs adopt a more judicial approach in the matters referred to them.

PERIOD OF RENEWAL

8. Renewal could be for a shorter period than five years, but in the absence of convincing arguments such a course would merely raise doubts about the United Kingdom support for human rights. There is also an option of indefinite renewal, which has recently been canvassed in the Press. This option has the attraction of providing conclusive evidence of our support for international measures for protecting human rights and would be seen by some at least as a safeguard for the future. But it is open to the very serious objection that, if in the future we were faced with unacceptable adverse judgments at Strasbourg, the Convention contains no provision for withdrawing from the commitment, and it is uncertain whether it could be withdrawn (even if the declaration itself referred to that possibility). There is also the problem whether it would be politically feasible to withdraw from a commitment which we had once accepted for an indefinite period and in respect of which there would be no natural opportunity for review. Lastly, it may be salutary for the Strasbourg organs not to be in a position where they can count on United Kingdom acceptance into the indefinite future. Only four States (Iceland, Ireland, the Netherlands and Sweden) have made indefinite declarations under Article 25. Renewal for five years seems best and would have the additional advantage of avoiding the need to look at the question again during the run up to the next General Election.

CONCLUSION

9. For the reasons set out above we consider that the arguments, both domestically and internationally, for renewal for five years outweigh the arguments against this course. Accordingly we invite our colleagues to agree that the United Kingdom's acceptance of Articles 25 and 46 should be renewed for a further period of five years from January 1981, and that the decision should be announced in Parliament in reply to an arranged Question.

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Home Office

5 November 1980

ANNEX

Some significant areas affected by earlier cases at Strasbourg and by cases currently under consideration or in prospect

Interception of communications. An adverse judgement in the case of Malone, which relates to telephone tapping in the case of a suspected receiver of stolen goods, could be most damaging.

Immigration and, potentially, nationality. The Commission's decisions pose a real threat to aspects of our policy.

Police procedures. Including dealing with suspected terrorists.

Penal law and treatment. Including sexual offences in Northern Ireland and procedures relating to the control of mentally disordered offenders.

Corporal punishment in State schools.

Military discipline. The Ministry of Defence is concerned about the potential implications of the Convention in the field of military discipline, having regard in particular to the European Court's judgement in the Dutch Soldiers Case (1976). In the worst case an adverse judgement which directly affected the United Kingdom could have a serious impact on the summary powers of commanding officers and this in turn could impair the operational efficiency of the Armed Forces. When the UN Covenant on Civil and Political Rights (which has broadly similar provisions) was ratified by the United Kingdom in 1976 a reservation was entered in respect of military discipline. It would not be legally possible to exempt any particular area of difficulty from the scope of the renewal of our acceptance of the right of individual petition (as has been suggested by the Ministry of Defence).