Council of Europe
Conseil de l'Europe

Strasbourg, 28 September 1998
DH-PR(1998)011

STEERING COMMITTEE FOR HUMAN RIGHTS

(CDDH)

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COMMITTEE OF EXPERTS FOR THE IMPROVEMENT OF PROCEDURES FOR THE PROTECTION OF HUMAN RIGHTS

(DH-PR)

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44th meeting, 15 - 18 September 1998

REPORT

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Introduction

1. The Committee of Experts for the Improvement of Procedures for the Protection of Human Rights (DH-PR) held its 44th meeting in the Human Rights Building in Strasbourg (*Salle de la Direction*), from 15-18 September 1998. The meeting was chaired by Mr. Martin EATON (United Kingdom).

2. The list of participants is in Appendix I. The agenda, as adopted, is in Appendix II. The working papers are also mentioned in that Appendix.

3. During the meeting the Committee in particular:

i. Considered issues raised by the possible re-examination of certain cases at domestic level following judgments of the Court and asked the CDDH to decide whether a draft recommendation should be drawn up on the subject (item 3 of the agenda);

ii. Held an exchange of views on the advisability in the future of an examination of issues relating to the implementation of Court judgments and the possibility of making proposals to the Committee of Ministers for a revision of its Rules of Procedure concerning Article 54 ECHR, following the entry into force of Protocol no 11 (item 6 of the agenda);

iii. Was given information on the state of progress concerning the future Rules of Procedure of the new Court and the terms of reference of the Council of Europe's Human Rights Commissioner (items 2 and 5 of the agenda);

iv. Exchanged views on the possibility of the Court giving advisory opinions and preliminary rulings at the request of domestic courts (item 2 of the agenda), the publication and circulation of Court judgments (item 4 of the agenda) and the state of progress on making access available to the Court's case-law on the HUDOC data base (item 8 of the agenda).

Item 1 of the Agenda : Opening of the meeting and adoption of the Agenda

See introduction.

Item 2 of the Agenda: Exchange of views with the Secretary of the European Commission of Human Rights

4. Mr Michele DE SALVIA, the Secretary of the European Commission of Human Rights, informed the DH-PR of the various issues currently under consideration in the new Court, particularly in the context of the forthcoming adoption of its Rules of Procedure (i). He also discussed with the members of the committee the possibility of the new Court giving advisory opinions (ii) and preliminary rulings at the request of domestic courts (iii).

i. Rules of Procedure of the New Court

5. Mr de Salvia noted that it is foreseen that the Rules of Procedure of the new Court will be adopted on 15 October 1998. The new Court, which has already held two meetings (May and July 1998), has set up two Commissions, one instructed to draw up the Rules of Procedure and the other to deal with budgetary matters. He informed the DH-PR of the questions which were currently being examined by these Commissions, for example, the distribution of the workload amongst the different judges, the working languages which will be used at different stages of the procedure, the question of the possible publication of judgments in the national language, etc. He also provided statistics on the volume of cases which the new Court will be taking on, as well as those questions, currently being examined, concerning the activity of members of the Commission who have been elected judges of the new Court. The members of the DH-PR thanked Mr de Salvia for the information and for the details which he provided during this exchange of views.

6. Appendix III to this report contains further details on this exchange of views.

ii. Possibility of the new Court giving advisory opinions

7. The Committee thought that it would be useful to discuss this subject, particularly bearing in mind articles 47-49 of the ECHR.

8. It was noted that the existing, narrowly drawn, power in Protocol n° 2 to the ECHR, to seek advisory opinions to the Court, has never been used.

9. Reference was made to the practice of the Court of Justice of the European Communities (ECJ) in Luxembourg. However, several experts thought that as far as advisory opinions were concerned, it was not possible to draw an exact parallel between the powers devolved to the Community's highest court and those granted to the Strasbourg court under article 47 of the Convention**.** It was possible to envisage circumstances in which although the European Court of Human Rights had found that it lacked jurisdiction *ratione materiae* or *ratione personae* to hear a case, which should instead be heard by the ECJ, the latter might nevertheless request an advisory opinion from the Strasbourg court when human rights issues were at stake.

10. One expert compared the situation of the Strasbourg court concerning advisory opinions with that of the Inter-American Court of Human Rights. For the latter, this was a very important role, since it heard relatively few cases on their merits. The Strasbourg court's situation was quite different.

11. In conclusion, the DH-PR thought that, while not denying the potential value of the European Court of Human Rights giving advisory opinions in certain cases (for instance when a question of human rights is raised in the practice of the ECJ) there was no current need for new powers in this area. General questions, if not already covered in the extensive case-law, could be raised via individual cases.

iii. Possibility of the new Court giving preliminary rulings at the request of domestic courts

12. The DH-PR continued its discussion on the possibility and potential value of the Court giving preliminary rulings at the request of domestic courts.

13. Several experts raised the issue of whether, in the light of article 35 (2) of the Convention, a case could be brought before the Court after it had already given a preliminary ruling on it. It was considered preferable not to request such rulings and instead to rely on existing case-law.

14. Moreover, in accordance with the subsidiarity principle underlying article 35 of the Convention, the Court only has jurisdiction once domestic courts have had a full opportunity to examine a case. Preliminary rulings run counter to this principle.

15. This was another case where it was difficult to draw a parallel with the practice of the ECJ, since the latter was empowered to give consultative opinions on general issues, whereas the Strasbourg Court in general only ruled on specific cases. In addition, Community law both takes priority over national law and is directly binding on national courts (neither of which is always true for the law of the ECHR).

16. Many experts were also concerned about the delays to domestic proceedings and the extra workload for the new Court of Human Rights which preliminary rulings were likely to bring.

17. In conclusion, the DH-PR thought that although the issue deserved to be regularly reviewed, it did not call for immediate action on the Court's part.

Item 3 of the agenda: Re-examination of certain cases at domestic level following judgments of the Court

18. The DH-PR examined the various documents presented by the Secretariat following the decisions taken at the previous meeting.

19. It first considered the revised version of DH-PR (98) 1, which contained an overview of national legislation regarding the re-examination of cases. The DH-PR noted that this document, which covers most member States, contained very useful information. In order to present a comprehensive overview, the Secretariat was asked to contact the representatives of countries that had not yet supplied information. The Committee also examined DH-PR (98) 8 and Addenda I and II, which contained additional comments and information supplied by the experts and the Secretariat.

20. It emerged from these documents that many member States already had machinery in their domestic law to allow certain particularly serious cases to be re-examined, *inter alia*, especially following decisions of international tribunals. This was particularly so for penal cases for which 26 States allow this possibility.

21. The DH-PR congratulated the Secretariat for its hard work and on the quality of the material produced. It noted that the addendum to DH-PR (98) 8 was intended to cover the Court's judgments since 1959 from the standpoint of the general measures required by the Committee of Ministers to give effect to judgments. The Committee thought that this document, which was unique of its kind, ought to be published after being restructured to make it more suited to an outside audience. It would also contain the comparative study of national practices in DH-PR (98) 1.

22. The DH-PR decided that its members should send the Secretariat any corrections they thought appropriate before 15 October 1998.

23. It also decided to recommend to the CDDH that this publication be regularly updated, particularly regarding the information from the Secretariat. Such a publication, containing very relevant comparative information that was otherwise difficult to obtain, would be a very effective working tool for member states' governments. It would also contribute to the activities currently being undertaken by the Council of Europe's Committee of Ministers to monitor countries' respect for undertakings made when they became parties to the ECHR and members of the Council of Europe.

24. The Secretariat, with the aid of examples taken from Committee of Ministers' practice, explained why, in the Secretariat's opinion, among a wide range of types of domestic machinery for implementing the Court's judgments, member States should have the option of reopening domestic proceedings in those rare, but particularly serious, cases where such a re-examination would be the most appropriate or even the only means doing justice to applicants. This applied to cases where applicants continued to suffer serious consequences, for example, imprisonment, as a result of either a serious procedural error or a decision that violated the Convention.

25. Accordingly, it was suggested by the Secretariat that the possible re-examination would depend on the combination of three elements, the two first being alternative and the third cumulative:

- procedural errors of such gravity have been established by the Strasbourg organs that they cast a serious doubt on the outcome of the domestic proceedings complained of; **or**

- the impugned domestic decision is contrary to the Convention on its merits, e.g. imposing a criminal sanction on account of legitimate exercise of the freedom of expression, and not capable of being changed except by the court itself or another court; **and**

- the person concerned continues to suffer serious consequences because of the outcome of the domestic decision at issue, which are not capable of compensation in monetary terms and cannot be rectified except by a new court decision.

26. It was pointed out by the Secretariat that in the great majority of cases, member States could find ways of complying with the Court's decisions, such as just satisfaction or a pardon, which did not involve re-examining cases or even less reopening proceedings. However, in the rare cases where such a reopening was the best or even the only way of re-establishing an applicant's rights, the country concerned should not be prevented from doing so because its legal system did not provide for such an option.

27. The DH-PR discussed in detail the arguments for and against taking steps to encourage all member States, via a recommendation, to establish machinery that would enable them to re-examine cases, particularly in the criminal field.

28. The discussion followed on from the one held at the Committee's previous meeting (March 1998, DH-PR (98) 5, paragraphs 34-54 and Appendix III). The CDDH had been unable so far to supply the guidelines which the DH-PR had requested because of the extremely heavy agenda at its June 1998 meeting. Certain experts therefore thought that it would be preferable not to continue the discussions on a possible recommendation in the absence of formal terms of reference from the CDDH. However, others considered that in order to decide whether such a recommendation was required, the CDDH would need a clear idea of what the committee of experts thought might be included in such an instrument.

29. Among the arguments against the idea of a recommendation was the fact that member states enjoyed very broad autonomy when choosing their obligations under the Convention**.** They were best placed to decide which of the arsenal of measures available to them in domestic law offered the best solutions for implementing judgments. If there was a general option of reopening proceedings, the notion of *res judicata* would be threatened and the certainty of the law would suffer, whereas it was clear that the reopening issue only concerned very isolated cases. In this context, several experts considered that a recommendation was not necessary and that it could even be harmful. For others, the idea of a recommendation seemed premature, since the number of cases really concerned was not known, and might even conflict with the objective sought. The objective would be better achieved by bilateral contacts, on a case by case basis, between the government concerned and the Secretariat of theCommittee of Ministers dealing with the implementation of court judgments. These experts wanted the Secretariat to present statistics showing the real number of cases requiring reopening before giving consideration to drafting a recommendation.

30. The experts who supported a recommendation draw attention to it "educational" aspects. The primary aim would be to clear away misunderstandings regarding cases which really required re-examination at the domestic level. It would put the emphasis on the problems that could arise in criminal law cases where applicants suffered serious consequences that could not be rectified simply by giving them just satisfaction in the form of financial compensation. The recommendation would encourage member states to examine the possibility of introducing appropriate machinery into their domestic law.

31. The Chairman of the DH-PR noted the different views in the Committee concerning a recommendation. He stressed that at this stage it was a question of supplying the CDDH with sufficient information to enable it to take its own decision and, if appropriate, give the committee of experts a formal mandate to draw up a draft recommendation.

32. He pointed out that such a recommendation would not, in any event, place any obligations on member States; nor was there any question of recommending that the Strasbourg Court become a sort of "fourth instance". The Court did not impose on member States strict or unique methods of implementing its judgments. The idea was rather to suggest to member States that among the options available, they should include the possibility of re-examining cases domestically following Court decisions, or even the possibility of reopening proceedings in the rare cases where such a measure may be deemed appropriate.

33. Finally, this approach had been raised at the European regional Colloquy on the effectiveness of human rights protection (Strasbourg, 2-4 September 1998), in particular in the colloquy's general report. Many non-European participants, including NGOs, were particularly sensitive to this issue. The fact that the Council of Europe's member states gave real effect to the Court's judgments was one of the major achievements of the system established by the Convention and was what gave it credibility.

34. Following the discussion, the DH-PR decided to identify in the course of the meeting a list of elements to be presented to the CDDH. For this purpose, it established an open working group to be chaired by Mr K.DRZEWICKI (Poland), Vice-Chairman of the DH-PR.

35. The DH-PR examined its working group's proposals. In this respect, one expert pointed out that the opinions which he had expressed within the group were not reflected in the proposals. For its part, the DH-PR agreed to draw the CDDH's attention to the three factors which would make it possible to identify situations where re-examination could be an appropriate means of doing justice to an applicant (see paragraph 25 above).

36. In conclusion, the DH-PR asked the CDDH to decide at its 45th meeting (November 1998) whether to give it terms of reference to draw up a draft recommendation on the issue of "*the re-examination of certain cases at domestic level following judgments of the Court.*"

Item 4 of the agenda: Publication and circulation of the case-law of the Convention organs in the Contracting States

37. The DH-PR took note of the documents prepared by the Secretariat, based on information supplied by experts, on the national situations concerning the publication and circulation of the case-law of the Convention bodies (see DH-PR (98) 3 and 9).

38. The DH-PR noted the importance attached to this activity, in so far as the wide-scale circulation of Strasbourg judgments to the relevant domestic authorities or courts was sometimes the main general measure that the governments of the countries concerned could take to implement Court decisions. In appropriate cases, this circulation ought to be accompanied by the necessary explanations, e.g. in the form of a circular letter.

39. Following discussion, it was decided that the members who had not yet supplied information on their national situations and those who wished to supplement or amend the contributions in the aforementioned document could do so before 15 October 1998.

Item 5 of the agenda: Exchange of views on the Council of Europe Human Rights Commissioner

40. Although it was not called on to take decisions on this item of the agenda, the Committee of experts thought that it would be very useful to consider this topic. In

particular, it wanted an update on the situation since its 43rd meeting, in March 1998, during which the experts had attended the meeting of the Committee of Ministers' Rapporteur Group on Human Rights.

41. The Secretariat recalled that at its 44th meeting, (June 1998), the CDDH had produced an opinion on the Commissioner's terms of reference (CDDH (98) 16). The opinion, which included suggestions for possible changes to the terms of reference, had been favourably received by the Committee of Ministers. The latter had decided to submit the Commissioner's terms of reference and the CDDH's opinion to the Parliamentary Assembly for an opinion, and to participants at the Round Table of European Ombudsmen (Malta, 7-9 October 1998) for information. The wording of the Human Rights Commissioner's terms of reference was now available, also on the Internet.

42. The Chairman of the DH-PR, who on behalf of the CDDH had attended the European regional colloquy on the effectiveness of human rights protection fifty years after the universal declaration (Strasbourg, 2-4 September 1998; cf. paragraph 33 above), said that many of those taking part in the Colloquy had shown great interest in the establishment of a Council of Europe Human Rights Commissioner, particularly the NGO representatives who had encouraged the establishment of this institution.

43. Finally, the DH-PR noted that the budgetary implications of establishing the new Commissioner's secretariat were being thoroughly examined, to ensure that this did not adversely affect the resources allocated within the Council of Europe to intergovernmental work on protecting and developing Human Rights.

Item 6 of the agenda: **The implementation of the judgments of the European Court of Human Rights. Preliminary exchange of views on the possible revision of the Rules of procedure of the Commitee of Ministers concerning Article 54, further to the entry into force of Protocole n° 11**

44. Mr Pierre-Henri IMBERT, the Director of Human Rights, introduced this item of the agenda by stressing the importance for the entire Council of Europe's system for protecting human rights of having a machinery for the implementation of Court judgments that was adapted to their growing volume and complexity of the decisions.

45. In particular, the entry into force of Protocol no 11 would help to clarify the Committee of Ministers' responsibilities as the body supervising the implementation of judgments. This new situation constituted a challenge to the Committee of Ministers requiring it to improve the efficiency of its working methods. In this respect, he recalled that the Committee of Ministers had tended to deal with matters on a case by case basis, with countries occasionally focussing excessively on the cases that concerned them, rather than taking an overall view.

46. In this context, Mr Imbert thought it important that each member State's authorities should be up to date with the situation concerning not only the Convention case-law concerning the other countries, but also the execution measures adopted by the other countries. The DH-PR could play a very useful role in circulating

information on this subject. For its part, the DH-PR expressed readiness to take any steps to ensure that the current system for implementing judgments operated in the optimum fashion. In this context, Mr Imbert noted that the Rules of Procedure of the Committee of Ministers that were currently applicable could be the subject of revision with regard to their form, in order to make them more manageable (the current rules were the result of various additions, notes and reservations accumulated over the years), and possibly with regard to their content.

47. He stressed the fact that this last exercise did not call for immediate action, since the Court had not yet adopted its own Rules of Procedure and that the final wording of these could have implications for a possible revision of the Committee of Ministers' Rules of Procedure regarding Article 54. Nevertheless, it would be desirable if the DH-PR could include on the agenda of a future meeting an exchange of views on any improvements it might suggest regarding their substance and form. Within the framework of its existing terms of reference, the Committee of experts could therefore submit to the CDDH a series of suggestions which could in turn be brought to the Committee of Ministers' attention, at an appropriate stage.

48. The DH-PR thanked the Director of Human Rights for his contribution, which highlighted the importance of the implementation stage of judgments. The Convention's protection machinery only really became effective once the judgments were implemented locally.

49. The DH-PR decided that its members, possibly in consultation with the specialists in their permanent delegations in Strasbourg and their national capitals, should send the Secretariat, before 31 December 1998, any suggestions concerning this item of the agenda. In the light of these suggestions, the Committee would continue its discussions at its next meeting (March 1998). Bearing in mind any guidelines it might receive meanwhile from the CDDH, it would then decide on what procedure to adopt when following up this activity.

7. Dates of next meetings

50. The DH-PR decided to hold its 45th meeting from Tuesday 23 to Friday 26 March 1999.

8. Other business

HUDOC data base.

51. The DH-PR exchanged views with Mr James LAWSON, Head of the Human Rights Information Centre, on progress on establishing the HUDOC data base on CD-Rom and on the Internet.

52. He said that it should be possible to consult the base free of charge on the Internet in the very near future (probably November 1998). The opening of the data base would be announced on the home pages of the Council of Europe's Human Rights Internet sites (www.dhdirhr.coe.fr). CD-Roms could be finalised before the end of 1998, though the conditions under which they would be marketed had not yet been decided. The establishment of these data bases did not appear to entail the early

disappearance of the publications on paper of the Strasbourg case-law, and some experts stressed the importance that in addition to the means available through new technology that a traditional printed form also remain available in the future.

53. Regarding the content of the HUDOC data base, Mr Lawson said the aim was to make available to users all the Court's judgments, the Committee of Ministers' resolutions concerning those judgments and the decisions and reports of the Commission.

54. Afterwards, members were given a demonstration of the system, and the DH-pr expressed its appreciation of the system. The Committee thanked Mr Lawson for his explanations and expressed their satisfaction that such a database was being established.

55. Having learnt that Mme JANSSEN (Belgium) was taking part for the last time in the work of the Committee, the Chairman expressed the gratitude of the DH-PR for her excellent contribution to the work of the Committee, as well as for her untiring and effective commitment, over 44 years, to the protection of human rights.

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Appendix I/Annexe I

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*** * ***

Appendix II

AGENDA

1. Opening of the meeting and adoption of the agenda

2. Exchange of views with the Registrar of the new Court

i. Rules of Procedure of the new Court

ii. The possibility of the Court giving advisory opinions

iii. The possibility of the Court giving preliminary rulings at the request of domestic courts

- "Model" Rules of procedure prepared in May 1997 by the informal Working Party on Protocol No. 11
CDDH (97) 22

- Comments on the "Model" Rules of procedure submitted by the DH-PR in September 1997
DH-PR (97) 3

- Further comments on the "Model" Rules of procedure formulated by the DH-PR in March 1998
DH-PR (98) 6

3. Re-examination of certain cases at domestic level following judgments of the Court and decisions of the Committee of Ministers

- Reopening of proceedings: overview of related national legislation and case-law (revised text)
DH-PR (98) 1 rev.

- Collection of changes made by experts to document DH-PR (98) 1 prov.
DH-PR (98) 7 and Addendum

- Comments and information submitted by experts to the Secretariat
DH-PR (98) 8 and Addenda I and II

- Extract from the report of the 44th meeting of the CDDH
(8-12 June 1998)
CDDH (98) 15

- Report of the 43rd meeting of the DH-PR
(9-12 March 1998)
DH-PR (98) 5

4. Publication and circulation of the case-law of the Convention organs in the Contracting States

- Overview of the existing situation (revised text)
DH-PR (98) 3

- Collection of information and comments made by experts to document DH-PR (98) 3 prov.
DH-PR (98) 9

- Extract from the report of the 44th meeting of the CDDH
(8-12 June 1998)
CDDH (98) 15

- Report of the 43rd meeting of the DH-PR
(9-12 March 1998)
DH-PR (98) 5

5. Exchange of views on the Council of Europe Human Rights Commissioner

- Summary note presented to the CDDH by the Chairman of the DH-PR
CDDH (98) 12

- Opinion of the CDDH for the attention of the Committee of Ministers
CDDH (98) 16

6. The implementation of the judgments of the European Court of Human Rights: preliminary exchange of views on the possible revision of the Rules of procedure of the Commitee of Ministers concerning Article 54, further to the entry into force of Protocole n° 11

- Report of the 43rd meeting of the DH-PR
(9-12 March 1998)
DH-PR (98) 5

7. Dates of the next meetings

8. Other business

HUDOC data base

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Appendix III

Exchange of views with the Secretary of the European Commission of Human Rights on the Rules of Procedure and the activities of the new Court

During the exchange of views held by the DH-PR during its 44th meeting (15-18 September 1998) with Mr M. de SALVIA, Secretary of the European Commission on Human Rights, the following points were raised:

Rules of Procedure

- The new Rules of Procedure should normally be adopted on 15 October 1998.

Structure of the New Court

- So far, the new Court has held two plenary meetings. At the first meeting (29 April -2 May 1998) the Court decided to set up two Commissions: one instructed with drawing up the rules of procedure and the other with tabling proposals on budgetary and administrative issues. At the second meeting (23 July - 25 July 1998) the Court elected the Bureau i.e. one president, two vice presidents and two presidents for the chambers.

- The Court will be composed of at least four Chambers each consisting of 7 judges. This means that in principle only 28 of the 40 judges can work at the same time. Various solutions are being examined to provide more flexibility and ensure a fair distribution of work among the 40 judges and of cases among the four Chambers. For example, one option would be to introduce an intermediary structure consisting of 4 sections and that the judges within each section would rotate.

- The Constitution of the Grand Chamber is not yet decided but it is envisaged that the judges will rotate so that they all have the possibility to sit in it.

- With regard to the 10 members of the Commission that were elected to the new Court, the question has to be tackled of whether they can examine the same case first as a member of the Commission and then afterwards as a judge in the new Court. Nothing has been decided for the moment but a possible solution would be to nominate ad hoc judges.

- As regards the examination of cases, the procedure will be similar to that of the present European Commission on Human Rights. A Rapporteur, preferably the national judge, will be appointed to each case and he will communicate the application to the respondent state for observations.

- At this stage, no decision has been taken on friendly settlements since it remains to be answered whether the new Court should be able to give provisional opinions and in such cases, who will be allowed to ask for such opinions.

- -The possibility of the new Court to hold regular meetings with government agents and applicants' lawyers should be considered, in a similar fashion as those organised by the Commission every four years. These had often been useful and even led to changes in the Rules of Procedure of the Commission.

Working languages

- It is possible that the new Court will adopt the Commission's current practice, allowing applicants to send in their observations in the language of their choice among 13 national European languages, which therefore allows them to send in observations within the time-limits set.

- On the other hand, observations from the respondent government have to be in one of the official languages of the Council of Europe.

- This method can however result in a problem of translation where the individual party's lawyer does not understand English or French and the observations have to be translated into his language. This can be very expensive.

- The new Court may adopt a policy of only communicating in the official languages, since the Court's objectives with respect to languages are to simplify the problems and lower the costs.

- A dual system is being considered whereby various (unofficial) languages could be used in the proceedings prior to the decision on admissibility of the case but after that only the official languages can be used.

- Publications will continue to be in both languages, although on some occasions only part of the Court's decisions may be published in the same way as the Commission sometimes does at present.

- However, no decision has yet been taken on whether the judgments should be published in the national language or not, a procedure which can be both difficult and very expensive.

- One opinion is that judgments should only be published in one of the official languages and in the national language. As under the present system, all decisions and judgments will be sent to the governments agents concerned.

Statistics

- It emerged that from January to September 1998 the number of applications has increased from 26% to 27%.

- It would seem that the Commission will leave about 7000 for the new Court of which 400 will have been declared admissible by 1 November 1998 and thus dealt with by the Commission, which envisages 4 to 6 sessions in 1999.

- Among the 7000 cases which will be referred to the new Court, the screening committee of the Grand Chamber will decide after October 1998 which cases will be dealt with by the Grand Chamber.