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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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45th meeting, 16-19 March 1999

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**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 45th meeting at the Human Rights Building in Strasbourg (Directorate Room), from 16 to 19 March 1999. The meeting was chaired by Mr Carl Henrik EHRENKRONA (Sweden).

2. During the meeting, the DH-PR in particular:

i. began work on drawing up a draft recommendation on the re-examination of certain cases at domestic level following judgments of the European Court of Human Rights and decisions of the Committee of Ministers (item 3 of the agenda);

ii. exchanged views and information on:

- the possible revision of the Committee of Ministers' Rules of Procedure, further to the entry into force of Protocol No. 11 to the European Convention on Human Rights (item 4 of the agenda);

- the question of publication and circulation of the case-law of the Convention organs in the Contracting States (item 5 of the agenda);

iii. elected its Vice-Chair (item 2 of the agenda).

**Item 1 of the agenda: Opening of the meeting and adoption of the agenda**

3. See introduction.

**Item 2 of the agenda: Election of the Vice-Chair**

4. Following the expiry of the term of office of the current Vice-Chair, Mr K. DRZEWICKI (Poland), the DH-PR unanimously elected Mr R. BÖCKER (Netherlands) Vice-Chair of the DH-PR for a one-year term, renewable once.

**Item 3 of the agenda: Preparation of a draft recommendation on reopening or re-examination of certain cases at domestic level following judgments of the European Court of Human Rights and decisions of the Committee of Ministers**

5. Further to the terms of reference assigned by the CDDH on 6 November 1998, of which the Committee of Ministers had taken note at their 653rd meeting (16-17 December 1998), the DH-PR started work on a draft recommendation on the re-examination of certain cases at domestic level following judgments of the European Court of Human Rights and decisions of the Committee of Ministers. The basis for the discussion was provided by document DH-PR (99) 2, which contained preliminary elements for consideration identified by the Secretariat.

6. The DH-PR decided to set up a working group to continue the preparation of the draft recommendation and its explanatory memorandum. The group consisted of six experts: Mr A. KOSONEN (Finland), Mr L-A. SICILIANOS (Greece), Mr R. BÖCKER (Netherlands, Chairman of the working group), Mr A. CIOBANU-DORDEA (Romania), Mr F. SCHÜRMAN (Switzerland) and Ms S. LANGRISH (United Kingdom). It was agreed that other experts could also take part in the group's activities at their government's expense.

7. The working group met twice outside the plenary meeting two times to start work on preparing the draft recommendation, having regard in particular to the elements suggested by the Secretariat in document DH-PR (99) 2 and the conclusions of discussions on this particular item of the agenda.

8. The DH-PR examined the text drawn up by the group and consequently approved the text set out in Appendix III to the present report as a basis for future discussion.

9. Subject to the Bureau of the CDDH authorising the necessary budget appropriations at its meeting on 30 April 1999 in Paris, the working group would meet in Strasbourg on 2 and 3 June 1999 to continue drawing up the draft recommendation and to start work on the draft explanatory memorandum.

10. The draft recommendation and draft explanatory memorandum prepared by the group would be forwarded to members of the DH-PR by the Secretariat in time for the next plenary meeting (7-10 September 1999).

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**Summary of discussions**

*Aim of the recommendation*

11. A great number of experts expressed their approval of the encouragement contained in the introduction to section (f) and added that this was the most important part of the recommendation: the aim was to ensure that all States provided themselves with the means necessary to be able to redress violations established by the European Court of Human Rights.

12. Some experts indicated that they would prefer that section (e) of the text contained in appendix 3 to this report be deleted as it might unnecessary inconvenience the Governments concerned. Other experts indicated that they did not see this as a problem. Finally it was agreed to leave this question to the drafting group.

*Scope of the recommendation*

13. Should the draft recommendation also have a reference to the more general obligations of respondent States to take general measures to prevent new violations? The views expressed by experts on this point varied. Some experts considered that such a mention would be an improvement whereas the majority of experts favoured a recommendation more exclusively oriented towards the question of reopening of proceedings. Among the latter the feeling was that the strength of the recommendation would be enhanced if it was more concentrated on the precise problem dealt with. Eventually there was agreement not to deal with the problem of general measures in the draft recommendation, albeit a mention of them could be made in the preamble in order to make clear that the recommendation did not address this aspect of execution.

14. One expert recalled that the Convention had been set up as a collective guarantee among Governments in order to protect some of the rights in the Universal Declaration. The early character of mainly an inter-governmental guarantee had certainly changed over the years as the applicant had received standing before the Court, received the right to refer cases to the Court under Protocol 9 and had been put on equal footing with the Government for almost all procedural purposes with Protocol N° 11. There was, however, a risk that the

prominent place today held by the applicant might hide the collective guarantee character of the Convention, and thus the respondent government's most important obligation, i.e. to prevent new similar violations from occurring.

15. It was replied that the text of the Convention made it clear that it had not been set up to safeguard collective rights - but the rights of all individuals within the States' jurisdiction. The States had drawn the consequences of this ambition and the situation of the individual in the Strasbourg proceedings had steadily improved, culminating with Protocol N° 11. It was, however, difficult to see how this development could create a conflict between the rights of the individual to have adequate redress and the obligations of governments to ensure that violations found were not repeated. In addition, the Convention was based on a fundamental principle of non-discrimination: it would be a great retreat for human rights if it was left too much to the national authorities whether to redress the situation of the applicants, so that applicant A would receive full redress, whereas applicant B would not. If the Strasbourg organs found a violation, States had the obligation to provide adequate remedies to all applicants.

*Reopening / re-examination*

16. A number of experts pointed out that the recommendation should also deal with re-examination of domestic court decisions, whether in new proceedings or through administrative decisions (e.g. pardon or grace). After an exchange of views the experts decided to base their future work on the basis that the recommendation dealt with re-examination in the broad sense and that this should be clearly reflected in the preamble part of the draft recommendation.

*Criminal cases*

17. Some experts considered that the recommendation should be more exclusively directed at the necessity of reopening of proceedings in criminal matters as it was in these cases that the applicants were exposed to the most severe ongoing negative consequences which could not be remedied only by monetary compensation. Other experts were in favour of the present neutral approach as it was remarked that such severe consequences could also result in, for instance, both civil and administrative proceedings. A consensus emerged in favour of keeping the general formulation whilst possibly adding in the explanatory memorandum a mention of the experts view that it was mainly in criminal cases that the need to have a possibility of re-examination was pressing.

*Mass cases*

18. Some experts also alluded to the major problems which could be caused in case of structural problems as the number of persons affected and thus likely to claim the right to re-examination could be very big so that re-examination would not be a realistic alternative. A mention of this specific problem could also possibly be made in the explanatory report.

*Relation between Articles 41 and 46*

19. A number of experts pointed at the problem posed by Article 41 of the Convention which stated that just satisfaction should be awarded where domestic law only allowed partial reparation to be made. In view of this wording, was there really any room for other measures as part of the execution? In response it was stated that reopening of proceedings was a means to comply with the obligation accepted by the State to abide by the judgment of the European Court. The remark was also made that the conceptual problem probably arose from the fact

that the Court had decided in the *Ringeisen* case (judgment Art. 50 of 22 Juin 1972, series A N° 15) and *De Wilde, Ooms et Versyp* case (judgment Artc. 50 of 10 March 1972, series A N° 14) not to wait with its award of just satisfaction until all new remedies which might have become available after the finding of the violation had been exhausted. As a result the practice had developed that reopening, just as many other individual measures, were often considered at the execution stage before the Committee of Ministers. There was, however, as was also demonstrated in practice, no obstacle for reopening to take place after the Court had decided the merits of the case, at which stage the State was already bound to abide by this judgment, but before it decided the issue of just satisfaction. Several experts nevertheless found the relation between Articles 41 and 46 complex so that it could merit further discussion.

*Links with just satisfaction*

20. Some experts also raised the question of how the size of any just satisfaction awarded by the European Court might influence the decision of whether or not to allow reopening of proceedings. The prevalent view was that this was simply one of the elements to be taken into account by the competent national court when deciding the issue.

21. A number of experts pointed out that in a good number of cases reopening or revision of court judgments could be a necessary measure in order to give effect to the Court's judgment, regardless of wether the Court had afforded the applicant monetary compensation or not.

*Who should be entitled to request reopening?*

22. Experts also addressed the question of who should be entitled to request reopening of proceedings. In this context it was noted that it was not all applicants who sought reopening of proceedings even if they had the right to do so. The general feeling was that this was a complex issue which was best left to the States to deal with. One expert mentioned the special problem caused by the fact that reopening might be costly or require the assistance of a special lawyer authorised to plead before the domestic court concerned.

*Who should decide whether or not to reopen?*

23. Several experts stressed that it had to be the domestic courts which decided whether or not to reopen the proceedings. The obligation accepted by States under the Convention did not include a right on the part of the Committee of Ministers to order a court to reopen proceedings.

*Violations caused by legislation*

24. Some experts pointed at the problems which would arise in case successful reopening required changing the law in force. They doubted that the courts would be willing in such cases to reopen as the national courts could in any event under the existing constitutional system not change the law. Other experts replied that the problem only arose where the violation was really ordered by legislation and that it did not arise when the violation was the result of a certain case-law or the exercise of discretion. Other experts indicated that this example illustrated well the necessity of a flexible approach to re-examination. The result required by the Convention, that is the erasing of the consequences of the violation, would in such instances have to be sought through other means than reopening of the judicial proceedings at issue. The result would in these cases instead have to be achieved through other actions by the competent authorities, e.g. by the granting of a pardon or an executive order to release the applicant (cf the *Van Mechelen* case against the Netherlands).

*The judge's personal assessment of the facts*

25. One expert also stressed the problem of reopening proceedings where the outcome of impugned proceedings was the result of the national judge's personal assessment of the facts. How could one challenge this assessment? In this context the opinion was expressed that as far as grave procedural errors were concerned this was probably not a problem: what was required through the reopening was not a new specific outcome, but a new trial respecting the procedural guarantees set up by the Convention. Thus if the impugned trial had been conducted without allowing the applicant sufficient time to prepare a defence, the Convention requirement was only to ensure a new trial in which this right was guaranteed. The requirement was not that he or she should be acquitted. As illustrated by a number of reopened cases following grave procedural errors, the first conviction could well be upheld in the new fair proceedings. If the violation concerned the merits of the case it was, however, usually difficult to invoke the judge's personal assessment of the facts as a justifiant that he was right in violating the Convention. Here the result required would in general be to erase the consequences of the conviction - be it through reopening or some other measure.

*Right of Third parties*

26. A number of experts pointed at the special problems that could arise in those cases, mainly civil, where the impugned court decision had given rights to a third party. How should these legitimate interests be cared for? The third party was not a party to the Strasbourg proceedings and yet these could have very serious negative consequences for him or her. It was pointed out that in such cases there did exist a possibility, although not a right, to intervene as *amicus curiae* before the European Court. Nevertheless, the experts accepted that the situation of third parties posed serious problems, but that these seemed inherent in the basic conception of the Convention system. One expert mentioned the possibility of the State stepping in and guaranteeing the interests of the third party. Other experts indicated that they believed that reopening would probably not come into play in such cases as the European Court could ensure adequate monetary compensation to the applicant already in the European Court's own judgment, thus rendering reopening unnecessary; it was believed that in most traditional civil cases monetary just satisfaction could provide full redress. Other experts added that the problem might not be so important in many areas of administrative law and in some areas of civil law, such as family law (e.g. regarding visiting rights in respect of children) as in such areas there was never any good faith reliance on the judicial decisions at issue as these were always liable to change if new circumstances developed. The experts eventually considered that if this complex problem was to be addressed, the best solution would be to address it in the explanatory memorandum.

*The conditions for re-examination*

27. The experts also discussed whether or not the criteria set out in subsection (iii) of section (f) was to be a *conditio sine qua non* for reopening or whether it was simply an alternative criteria. On this point there was eventually agreement that criteria (iii) was to be a *conditio sine qua non* for reopening.

28. Some experts considered that the words "very serious" in sub-section (iii) should be deleted, as these words allow for an interpretation which limits the scope of the recommendation to an unacceptable degree. On the other hand, other experts considered that, for the purposes of the draft recommendation, the inclusion of these words were important to ensure that reopening, with all its negative effects for notably legal security, could only come

into play in really deserving cases. No consensus emerged in favour of the deletion of the words in question.

*Degree of precision of the recommendation and of the explanatory memorandum*

29. It was agreed that the issues left open by the working party (see Appendix III) should not be dealt with in the recommendation itself. Some experts warned against dealing in depth with these issues (developments with regard to the rights of third parties, the special emphasis on criminal cases, the question of who shall have the right to request reopening and the problem of mass cases) in the explanatory memorandum, as they were very complex and required substantial explanations. Other experts wondered whether it was at all possible for the DH-PR to deal in depth with these issues in the explanatory memorandum as they were very complex. Other experts considered that the explanatory report should either briefly address all these problems or none of them as they were all equally important. The general feeling was that it could be left to the working party to see to what extent the considerations relating to the above problem areas could be reflected in the explanatory memorandum.

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*Reopening of proceedings: overview of related national legislation and case-law*

30. The DH-PR examined document DH-PR (99) 3, which contained an overview of national legislation and case-law concerning the reopening of proceedings. The document was a revised, corrected version of document DH-PR (98) 1, which had been examined at the previous meeting. The DH-PR invited its members to make a last control of the information concerning their respective countries in order to allow this document to be adopted at the next meeting (September 1999) and to be published.

*Further comments and information on general measures taken by states following judgments of the Court*

31. The DH-PR also examined document DH-PR (99) 4, which was a corrected, albeit still provisional, version of document DH-PR (98) 8 Addendum, which had been examined at the previous meeting. The document contained various additional comments and information provided by the Secretariat concerning general measures taken by states following judgments of the Court.

32. The DH-PR considered that this document, after having been finalised by the Secretariat, could be reconsidered at the next meeting with a view to its adoption and subsequent publication.

**Item 4 of the agenda: The implementation of the judgements of the European Court of Human Rights: preliminary exchange of views on the revision of the Rules of Procedure of the Committee of Ministers concerning Article 54, further to the entry into force of Protocol No. 11**

33. The DH-PR took note of the ad hoc terms of reference given to the CDDH by the Ministers' Deputies at their 653rd meeting (16-17 December 1998, DH-PR (99) 1). The DH-PR noted that according to these terms it has to submit to the CDDH drafting proposals ensuring that the Committee of Ministers' Rules of Procedure reflects the new situation created by the entry into force of Protocol No. 11.

34. After a short introduction in which it was recalled that the aim of the exercise was to revise the rules of procedure of the Committee of Ministers so that they reflect the new requirements of transparency and efficiency inherent in Protocol N° 11 ECHR, the President invited Mr Paul MAHONEY, Deputy Registrar of the European Court of Human Rights to present the new Rules of Court as far as publicity of documents was concerned.

35. Mr Mahoney indicated that the question of publicity was being examined by the Court's bureau and that it was hoped that this examination would result in the publication of a guide on the subject.

36. He recalled that the basic provision on the subject was Article 40 of the Convention which provides that "documents deposited with the Registrar shall be accessible to the public unless the President of the Court decides otherwise." This provision is then supplemented by Rule 33 of the Rules of Court which provides: "Following registration of an application, all documents deposited with the Registry, with the exception of those deposited within the framework of friendly settlement negotiations..., shall be accessible to the public unless the President of the Chamber ... decides otherwise..." The reasons which may prompt the President to decide otherwise are those mentioned in the last phrase of Article 6, para. 1, of the Convention.

37. Mr Mahoney also recalled that these rules only apply to documents deposited after 1.11.1998. Thus, all the documents contained in the files transferred to the new Court by the Commission remain confidential. He thereafter provided the following details.

– In the same manner as before the Commission and the old Court the applicants may request no to have their identity disclosed (Rule 47).

– Before the application is registered, the applicant's identity as well as all documents lodged will remain confidential. The provisional files are thus confidential.

– Who may request confidentiality ? The applicant of course, but also the Government. There is, however, a problem in that governments are not necessarily aware of all applications at the time of their registration. This will be the case only if an interim measure has been indicated, if the judge rapporteur has requested information or if the case has been an urgent notification. The Court has attentively examined the problems which this situation might cause governments, but concluded that a communication of all cases to the government for the sole purpose of allowing the government to express its view on the possible confidentiality of documents deposited would go against the interest of a good administration of justice. Waiting for normal communication would be counter to the purpose of Article 40. Furthermore, the reporting judge always looked through all files before they were made accessible to the public.

– The publicity rules concern all types of documents – thus letters, observations and memorandums. The rules clearly did not concern the Court's internal working documents such as the judge rapporteur's report.

– The Court has not found it feasible to send all public documents to those interested. These must instead go to the Registry in order to consult the documents on the spot and take, at their own expense, photocopies. An exception is made for government agents, who can receive free copies to the extent that their request does not concern too great a number of documents. If the necessary funds are accorded, the Court hopes to be able to set up, within some 18-24 months, an electronic scanning system of all

documents lodged, so that those, which are public, may be made accessible on the internet.

38. Mr Tim LISNEY, Information Manager in the Secretariat of the Committee of Ministers, provided the following information:

– In 1981 the Committee of Ministers decided to adopt a rule imposing a 30-year confidentiality period on all Committee of Ministers documents. In 1994 this rule was changed for all documents except those relating to its activities under the European Convention on Human Rights – at this period in time the reports of the Commission were still to be kept confidential during the whole procedure before the Committee of Ministers.

– For the other documents the new rules implied a confidentiality period of one year. For the records of the Committee's meetings the period was 10 years. The Committee's decisions were also made public 3 days after their adoption and they are today on the internet. As human rights questions in block were excluded from the reform, the Committee's decisions in such questions continued to be subject to the 30-year confidentiality period.

– In 1998 yet another step was taken in that persons requesting access to confidential documents were entitled to have a reasoned reply within a period of 2 months if in fact it was felt necessary to maintain the confidentiality of the documents in question.

– Considering the radical changes which had intervened with the Committee's new confidentiality regulations and Protocol N° 11, it appeared natural to reconsider the rules on the subject also for human rights cases.

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39. During the subsequent exchange of views, some experts wondered whether it was really necessary to amend the existing rules, since its application by the Committee of Ministers had on the whole resulted in satisfactory arrangements for supervising the execution of the Court's judgments. The only aspect which called for revision concerned the rule on confidentiality.

40. Although some other experts felt that no radical changes should be made to the rules of procedure, they nevertheless felt that there was a case for improving the transparency of the Committee of Ministers' practices in certain areas. In particular, consideration might be given to possible amendments clarifying the following aspects:

(i) the position of the applicant at the stage of the execution of the judgment: the possibility of informing him of action taken as a result of his case, etc.; the right of the applicant to submit written declarations concerning: payment of just satisfaction; other individual measures taken to redress the violation; possible general measures, etc.

(ii) practices developed over the years by the Committee of Ministers, such as the adoption of interim resolutions (with possible indications of cases where such resolutions would be necessary); time-limits currently used in supervising the execution of judgments, the calculation of interest for late payments; voting procedure within the Committee of Ministers, etc.;

(iii) measures to be taken in the event of a violation (various arrangements for payment of just satisfaction; general measures; individual measures, including the possibility of reopening or re-examining the case, etc.);

(iv) possible sanctions which might be enforced by the Committee of Ministers (here, the practice established by the Parliamentary Assembly to carry out its monitoring procedure could be used as a guide);

41. The DH-PR took note of these ideas, but considered that it would be premature to start drawing up possible provisions. The Secretariat was requested to prepare a document setting out all practices employed by the Committee of Ministers in supervising the execution of judgments. This document, which should also contain elements to be used as a basis for drawing up provisions, would be sent out to the experts in time for the next meeting.

42. Taking account of this document and the suggestions put forward by the experts during the present meeting, the DH-PR would continue its work at the next meeting (September 1999). At that point, it would decide on the procedure to follow (setting up a working group, appointing a rapporteur, etc.).

43. The DH-PR also took note of the information document prepared by the Directorate of Human Rights after each Human Rights meeting of the Committee of Ministers (document DH-PR (99) 6). It considered that the issuing of this document was an excellent initiative. This type of document was indispensable if governments were to have effective means of finding out about cases concerning other states as well. The document presented ought, in addition with a few minor amendments, also be able to be published so as to inform the general public about the Committee of Ministers' activities.

**Item 5 of the agenda: Publication and circulation of the case-law of the Convention organs in the Contracting States**

44. The DH-PR discussed in succession the questions raised by:

a. the circulation of the case-law of the Court within the public institutions of member states (courts, administrations etc), in particular the appropriate circulation of judgments which a given state has undertaken to comply with as defendant state;

b. the circulation of the case-law of the Court among lawyers and the general public in a given country;

c. the translation of the case-law of the Court into non-official languages.

45. Regarding the first two questions, certain experts provided details of current practice in their countries, while referring particularly to document DH-PR(99)7 prov. which comprised a partial update of the older documents DH-PR(98)3 and 9. The Committee felt that the overview of the situation which could be provided by this document would be useful and invited those experts who had not yet done so to send their information to the Secretariat by 15 May 1999, in order that the document could be supplemented and updated. Several experts pointed out the very wide differences regarding distribution facilities in different countries and the major change in circumstances caused by the Internet.

46. Regarding the third question (translation of the Court's case-law into non-official languages), the fundamental importance of this matter was stressed: if the Convention was to have an impact on the law of member states, it must be accessible in the national language.

Given the growing volume of case-law and the major cost of translation, it was however impossible for everything to be systematically translated. One expert referred to the possibilities of machine translation. Although the quality left something to be desired, the system was rapid and he wondered whether such methods could not be developed by the Council of Europe. Other experts expressed a preference for the translation of carefully prepared summaries since, when a thorough analysis of a case was needed, it was in any case necessary to consult the judgment in an official language.

47. One expert pointed out that the new rules of the Court mentioned nothing regarding the translation of judgments, in contrast to the old draft rules.

48. Several experts noted that it was becoming increasingly difficult to find one's way in the Court case-law, owing to the increased number of decisions and the absence of accessible and satisfactory research tools, such as detailed thematic indexes showing the development of the case-law.

49. A very fruitful exchange of views was then held with a representative of the Court Registry with a view to learning about the current or proposed practices of the new Court, and with a representative of the Human Rights Directorate to learn about the current or proposed activities designed to facilitate translation into the languages of the new member states.

50. Mr S. NAISMITH, Head of the Information and Publications Unit of the Court Registry, explained that the Court had issued a new international call for tenders for the publication of its judgments. This new bilingual publication would contain only selected judgments and decisions and would incorporate key-words and indices. Otherwise, the Court would rely a great deal on the Internet for circulating its case-law. A CD-Rom was to be produced containing the case-law and a powerful research tool.

51. The majority of experts said however that they had had, and were still having, serious problems with the Internet, notably due to the cabling problems in the Council of Europe: difficult connections, extremely slow searches, inopportune disconnections and so on, and it was felt that the Internet could not yet replace the circulation of judgments in print. Only one expert indicated that Internet access worked well in her country, where the Ministry of Justice had created a link between its national site and the Court site. Since most authorities and courts were adequately equipped, the circulation of case-law worked smoothly. Certain experts suggested that a leaflet should be distributed explaining in greater detail how the site functioned and what research opportunities it offered.

52. The experts agreed that the question as to whether the Internet could solve the problem of disseminating judgments would have to remain unanswered. Several experts insisted on the urgency of making the long-awaited CD-Rom available in order to compensate for the shortcomings of the Internet.

53. Another problem was that the Internet version of the judgment was probably only provisional and might contain many errors. It was asked how the circulation of the definitive versions of judgments would be organised through the Internet. Another disadvantage was that the very useful summaries that used to head the judgments of the former Court had now disappeared.

54. Mr Naismith explained that the choice of the Internet as a means of distribution had been motivated by the mass of decisions, some of which were probably of very limited interest, for example the current plethora of Italian cases on the excessive length of proceedings. If this type of case were to be included, it could be expected that the new Court

would deliver between 800 and 1,000 judgments a year in the foreseeable future. This situation raised many problems and one result had been the cancellation of the distribution lists of judgments. The old Court, for example, used to distribute the provisional version of its 150 to 200 judgments a year to 4,000 addressees at a cost of half a million francs a month. Given the great number of decisions of the new Court and the existence of the Internet, it had been decided to reduce this list to some 250 addressees, including of course the experts and permanent delegations. It had not yet been decided whether this distribution would really cover all judgments and decisions. Admittedly, the summaries had disappeared from the provisional versions, but were due to be replaced by new summaries in the final published version of the judgments.

55. Several experts claimed that, despite the problems referred to, they would probably be able to manage. On the other hand, they expressed concern regarding the accessibility of case-law for the general public, or even for lawyers and barristers. Stress was laid on the usefulness of concise publications in the national language explaining the system and containing summaries of the major judgments. In some countries, the competent ministries already produced such publications.

56. Certain experts complained that neither they nor their permanent delegation were informed of Court hearings even if these might concern cases of great interest to them.

57. Mr Naismith replied, with regard to the situation vis-à-vis the public, that the Court was preparing a new information document to be distributed to some 4,000 persons. This document would be much more detailed than the former Commission's information document and would be aimed above all at lawyers. It would be sent in priority to the experts. Regarding information on the activities of the Court, the Registry and more particularly the Press Service were still examining the matter of the rapid circulation of press releases, particularly regarding hearings.

58. Mr M. NEVILLE, Head of the Section for Democratic Stability Programmes of the Directorate of Human Rights, described the different initiatives taken within his department regarding the problem of translations. Basing himself on the information contained in document H(99)5, he referred successively to:

- the translations of judgment summaries together with full translations of the most significant judgments, and their publication in legal journals (Czech Republic, Hungary, Slovakia);

- the publication of books or monographs in the national languages, with appended summaries of the judgments in French and English (these summaries had also been translated into Romania);

- the publication of the "law" sections of a number of Court judgments (Bulgaria, Bosnia and Herzegovina, Estonia, Lithuania, Romania and Russia).

59. Besides these initiatives, Mr Neville referred to other translations made possible by outside funding (Bulgaria, Romania). Lastly, he referred to a project, made possible by a voluntary contribution from a member state, concerning the translation into Russian of the 90 most important judgments of the Court. The English version of these judgments, accompanied by the corresponding summary, were available to other states wishing to translate them into their own language. In conclusion, Mr Neville drew attention to the value of these initiatives which met a real need and stressed the necessity for appropriate funding which currently came mainly from voluntary contributions or outside sources.

60. The DH-PR noted that a document containing the press releases relating to Court judgments and another reproducing the 90 aforementioned judgments were available for the experts who so desired.

61. In order to obtain an overview of the situation in the member States as far as the publication and dissemination of the Court's jurisprudence are concerned and in order to be able to pursue this question it is decided to produce a questionnaire for the members of the DH-PR. The text of the questionnaire is reproduced in Appendix IV to the present report.

62. The experts are invited to send their replies to the Secretariat before 31 May 1999. A document containing a synthesis of the replies and possible Secretariat proposals will be sent out to experts in due time before the 46th meeting (September 1999).

**Item 6 of the agenda: Exchange of views on the Council of Europe Human Rights Commissioner**

63. The DH-PR noted the information contained in document DH-PR (99) 8 regarding the draft mandate for the Council of Europe's Human Rights Commissioner. In order to follow this important dossier the Committee decides to engage a new exchange of views at the next meeting (September 1999).

**Item 7 of the agenda: Other business**

*Other questions relating to the new Court*

64. The DH-PR held an exchange of views with the Deputy Registrar of the Court, Mr P. Mahoney, on the new Court's practice of accepting all cases brought before it by applicants against a state which had ratified Protocol No. 9. It became clear from the exchange of views that the transitional provisions accompanying Protocol No. 11 (which has repealed Protocol No. 9) contained a number of loopholes, which the Court had filled in having regard to the major principles underlying Protocol No.11.

65. A number of experts expressed their surprise that the Court had not interpreted Article 5 (4) of Protocol N° 11 so as to apply the screening procedure earlier provided for by Protocol N° 9 to the applications which had been brought before the Court after the entry into force of Protocol N° 11 by individual applicants only.

66. Mr Mahoney indicated that the question of screening had been very carefully studied by the Court. He recalled that Art 2 (8) of Protocol N° 11 had unambiguously repealed Protocol N° 9. When Article 5 (4) of Protocol N° 11 provided that in accordance with the provisions applicable prior to the entry into force of this Protocol, a case may be referred to the Court this, accordingly, left open whether the reference to the previous provisions included the screening procedure provided for in the repealed Protocol N° 9 or not. What was clear was that the provision in question allowed the applicant to bring his or her application before the Court: under Protocol N° 9 the applicant had effectively been authorised to seize the Court (through the amendment of Article 48 of the old Convention) and it was only after a case had been duly referred that the screening panels under the old system would take their decisions; in fact cases brought by applicants were administratively treated in exactly the same manner as other cases brought before the Court. However, nothing in Protocol N° 11 or the explanatory memorandum expressed a clear intention to keep the screening procedure once a complaint had been brought before the Court (cf notes 120 and 121 of the explanatory report). Also the major aims of Protocol N° 11, i.e. to avoid delays and overlapping

competences and to strengthen the judicial character of the system, went against this procedure. In these circumstances, the Court felt that, without explicit support in the Protocol, it could not retain the procedure. Rule 100 of the Rules of Court, accordingly, only provides for the possibility of a panel of the Grand Chamber deciding whether cases referred by individuals should be examined by the Grand Chamber itself or by a chamber.

67. Following this exchange of views, the experts also reiterated the concerns they had already expressed at the meeting with Mr Naismith, concerning the circulation of the new Court's judgments and the accessibility of information on ongoing proceedings.

*Hudoc Databases*

68. The members of the DH-PR participated in a demonstration of the new data base HUDOC.

**Item 8 of the agenda: Items for the next meeting**

69. The DH-PR decided to inscribe the following items on its agenda for the next meeting:

(i). Preparation of a draft Recommendation on re-examination of certain cases at domestic level following judgments of the European Court of Human Rights and decisions of the Committee of Ministers

(ii). Revision of the Rules of procedure of the Committee of Ministers concerning Article 54, further to the entry into force of Protocol No. 11

(iii). Publication and circulation of the case-law of the Convention organs in the Contracting States

(iv) Information concerning the Council of Europe Human Rights Commissioner

(v) Information from the Court

**Item 9 of the Agenda: Dates of the next meetings**

70. On condition that the necessary budgetary means will be provided by the Bureau of the CDDH which will meet in Paris on 30 April 1999, the DH-PR decided that its working group (cf paragraph 6 above) will hold a meeting in Strasbourg on 2-3 June 1999.

71. The DH-PR decided to hold its 46th meeting on 7-10 September 1999.

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## Appendix I / Annexe I : LIST OF PARTICIPANTS / LISTE DE PARTICIPANTS

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Mme Corinne McGEORGE
Mme Julia TANNER
M. Robert SZYMANSKI

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**Appendix II : AGENDA**

**1. Opening of the meeting and adoption of the agenda**

**2. Election of the Vice-Chairman**

**3. Preparation of a draft Recommendation on reopening or re-examination of certain cases at domestic level following judgments of the European Court of Human Rights and decisions of the Committee of Ministers**

- Terms of reference given by the CDDH to the DH-PR on 6 November 1998 of which the Ministers Deputies took note at their 653rd meeting (16-17 December 1998)
  DH-PR (99) 1

- Preliminary elements for a draft Recommendation (Secretariat memorandum)
  DH-PR (99) 2

- Reopening of proceedings: overview of related national legislation and case-law (former document DH-PR (98) 1: revised text)
  DH-PR (99) 3

- Further comments and information (former document DH-PR (98) 8 Addendum: revised text)
  DH-PR (99) 4

- Extract from the report of the 45th meeting of the CDDH (3-6 November 1998)
  DH-PR (99) 5

- Report of the 44th meeting of the DH-PR (15-18 September 1998)
  DH-PR (98) 11

**4. The implementation of the judgments of the European Court of Human Rights: preliminary exchange of views on the revision of the Rules of procedure of the Committee of Ministers concerning Article 54, further to the entry into force of Protocol No. 11**

- Ad hoc terms of reference given by the Ministers Deputies at their 653rd meeting (16-17 December 1998)
  DH-PR (99) 1

- Extract from the report of the 45th meeting of the CDDH (3-6 November 1998)
  DH-PR (99) 5

- Rules of procedure of the Committee of Ministers

- Rules of procedure of the European Court of Human Rights

- Information document on summaries prepared by the Directorate of Human Rights following each HR meeting of the Committee of Ministers
DH-PR (99) 6

- Reply from the Committee of Ministers to written question raised on 10 September 1998 by a number of members of the Parliamentary Assembly concerning the execution of certain judgments forwarded to, or certain cases pending before the Committee of Ministers
Doc. 8253 Assembly

- Report of the 44th meeting of the DH-PR
(15-18 September 1998)
DH-PR (98) 11

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

- Rules of procedure of the European Court of Human Rights

- Overview of the existing situation (former documents DH-PR (98) 3 and 9: revised texts)
DH-PR (99) 7 prov.

- Report of the 44th meeting of the DH-PR
(15-18 September 1998)
DH-PR (98) 11

- Information document on Hudoc databases

**6. Exchange of views on the Council of Europe Human Rights Commissioner**

- Information document on the draft terms of reference of the Council of Europe Human Rights Commissioner
DH-PR (99) 8

**7. Other business**

**8. Items for the Agenda of the next meeting**

**9. Dates of the next meetings**

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**Appendix III : Preliminary elements for a draft Recommendation concerning the reopening or re-examination of certain cases at domestic level following judgments of the European Court of Human Rights and decisions of the Committee of Ministers**

[Version made by the Working Group of the DH-PR
as a basis for further discussions]

*Elements for drafting the Preamble*

a. Noting that under Article 46 of the Convention the Contracting Parties have accepted the obligation to abide by the final judgment of the Court and that the Committee of Ministers shall supervise its execution,

b. Bearing in mind that in certain circumstances the above-mentioned obligation may entail the adoption of measures, other than just satisfaction awarded by the Court in accordance with Article 41 of the Convention and/or general measures, to remedy the situation caused by the violation of the Convention, so that the applicant is put, as far as possible, in the same situation as he enjoyed prior to the violation (restitutio in integrum);

c. Noting that it has to be decided by the competent authorities of the respondent State what measures are most appropriate to achieve restitutio in integrum, taking into account the means available under the national legal system;

d. Bearing in mind, however, that the practice of the Committee of Ministers in supervising the execution of the Court's judgment has evidenced that in exceptional circumstances reopening of proceedings [in the national courts] or re-examination of the case [by any other authority] has proved the most efficient, if not the only, means of achieving *restitutio in integrum;*

[e. Noting that the absence of such a possibility has put certain Contracting Parties in a difficult position when considering available measures to comply with their obligation under Article 46 of the Convention…]

*Elements for drafting the operative part*

f. The Contracting Parties are encouraged to examine their national legal systems with a view to ensuring that there exist adequate possibilities of reopening of proceedings [in the national courts] or re-examination of the case [by any other authority] in cases where the Court has found a violation of the Convention, in particular where:

(i) the applicant continues to suffer very serious negative consequences because of the outcome of the domestic decision at issue, which are not adequately remedied by just satisfaction and cannot be rectified except by reopening or re-examination

and

(ii) (a) the Court has found the impugned domestic decision contrary to the Convention on its merits; or

(b) procedural errors of such gravity have been established by the Court that they cast a serious doubt on the outcome of the domestic proceedings complained of.

[…]

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*Points for possible consideration in the Explanatory memorandum:*

- Effect of reopening / re-examination on third parties
- Emphasis on criminal cases
- Who requests reopening / re-examination? The applicant? Competent authorities?
- Mass cases
- Just satisfaction / reopening

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## Appendix IV : Questionnaire regarding the dissemination of the Court's case-law

### Introductory remark

Much of the information sought below may well already exist in the document DH-PR (99)7prov. prepared by the Secretariat for the DH-PR's 45th meeting 16-19 March 1999. In case the information provided therein on a certain point is accurate and complete a simple reference to the relevant section of the document is enough.

### A. Distribution to domestic courts and authorities

1.
a) To what extent does the State ensure distribution of the most important European Court of Human Rights judgments to the domestic courts and authorities?

b) In particular, is distribution ensured by the Supreme Courts, the competent government ministries or some other body, e.g. Parliament ?

c) What means of distribution is chosen: access to a database; distribution of paper copies; inclusion of summaries in information bulletins etc...

d) Are judgments concerning the State at issue, and thus binding on the State in contrast to judgments against other States, subject to special distribution rules?

2. If the State has not involved itself in this distribution on a regular basis, how is the European Court of Human Rights case-law made available to the domestic courts and authorities and what means of distribution is chosen?

3. What access do domestic courts and authorities have to the Internet (e.g. do domestic courts and administrative authorities in general have the necessary technical equipment? If so, is access effective (quick access, stable connection, etc.) ?)

4. To what extent are translations made in your country of facts or summaries of the European Court of Human Rights' judgments ?

### Distribution to lawyers and to the public

5.

a) How is the European Court of Human Rights' case-law made available to lawyers and the public in your country ? (in particular what role do bar associations play ?)

b) If distribution is ensured through publications what is the circulation of these publications?

c) What is contained in the publications: full text judgments, extracts or summaries?

d) Are judgments referred to in translation or in the original languages (French or English)?

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