COUNCIL OF EUROPE CONSEIL DE L'EUROPE

.
Strasbourg, 27 September 1996
DH-PR(1996)001

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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40th meeting, 16 - 18 September 1996

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REPORT

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Item 1 of the agenda: Opening of the meeting

1. The Committee of Experts for the improvement of procedures for the protection of Human Rights (DH-PR) held its 40th meeting from 16-18 September 1996 at the Human Rights Building in Strasbourg, with Mr Karel DE VEY MESTDAGH (Netherlands) in the Chair. The list of participants appears in Appendix I.

Item 2 of the agenda: Election of the vice-President

2. The DH-PR elected by acclamation Mr Martin EATON (United Kingdom) as Chairman of the DH-PR.

Item 3 of the agenda: Adoption of the agenda and order of business

3. The agenda as adopted appears in Appendix II.

Item 4 of the agenda: State of ratification of Protocol No.11.

4. The DH-PR made a survey of the state of signatures and ratifications of Protocol No. 11, which revealed that the following countries could ratify this Protocol in 1996: Belgium, Ireland, Italy, Netherlands, Poland, Portugal, Spain and "the former Yugoslav Republic of Macedonia". The following plan to ratify it in 1997: Moldova, Russia and Ukraine. In Turkey the ratification procedure has been started (the question is presently being examined by the Government) but the date of ratification cannot yet be ascertained. Albania and San Marino were not represented so no further information was available for these countries. The detailed information is shown in Appendix III.

Item 5 of the agenda: Invitation to the informal working party on Protocol no. 11 to the European Convention on Human Rights

5. In accordance with the wish expressed by the Steering Committee for Human Rights (CDDH (96) 21, item 18 of the agenda), the Chairman of the DH-PR had invited the Informal Working Party to participate at its meeting in order to hold an exchange of views on the implementation of Protocol No. 11 to the European Convention on Human Rights.

6. At the meeting the Informal Working Party was represented by Mr H.-C. KRÜGER, Mr P.-H. IMBERT, and Mr A. DRZEMCZEWSKI. Mr KRÜGER gave a short speech on the work completed to date by this Working Party (see Appendix IV).

Item 6 of the agenda: Discussion on the implementation of Protocol No.11 to the European Convention on Human Rights

7. In accordance with the wishes expressed by the Steering Committee for Human Rights (CDDH (96) 21, item 18 of the agenda), the DH-PR also discussed the various problems associated with the implementation of Protocol No 11. The experts discussed questions 1 to 15 referred to under item 6 of the agenda (see Appendix II). They decided to resume consideration of questions 16 to 20, as well as any other issues in this area, at their next meeting. The main purpose of their exchange of views was to enable the informal working party and the judges of the new Court to take into consideration, as far as deemed useful, the experience and views of the government experts. The discussions were considered to be interesting and fruitful and are summarised in Appendix IV of this report.

Item 7 of the agenda: Other business

The experts noted that the CDDH was going to review the terms of reference of the DH-PR before the end of 1996 and signalled their wish to continue their current work, particularly regarding the implementation of Protocol No 11, within the framework of the current terms of reference.

Item 8 of the agenda: Date of the next meeting

It was decided to hold the next meeting in one of the first three weeks of March 1997. The Secretariat would inform the experts as soon as a precise date could be fixed.

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APPENDICES

A P P E N D I X I / A N N E X E I : PROVISIONAL LIST OF PARTICIPANTS
LISTE PROVISOIRE DES PARTICIPANTS

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EUROPEAN COMMISSION/COMMISSION EUROPEENNE
Apologised/excusé

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OBSERVERS/OBSERVATEURS
Apologised/excusé

CANADA
Apologised/excusé

HOLY SEE/SAINT-SIEGE
Apologised/excusé

UNITED STATES OF AMERICA/ETATS-UNIS D'AMERIQUE
Apologised/excusé

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SECRETARIAT:

Directorate of Human Rights/Direction des Droits de l'Homme

Mr. P-H. IMBERT, Director of Human Rights/Directeur des Droits de l'Homme

Mr F. SUNDBERG, Principal Administrator, Administrateur Principal

* * *

Informal working party / Groupe informel de travail

Mr. P-H. IMBERT, Director of Human Rights/Directeur des Droits de l'Homme

Mr H.C. KRÜGER, Secretary to the European Commission of Human Rights/Secrétaire de la Commission européenne des Droits de l'Homme

Mr A. DRZEMCZEWSKI, Head of Secretary General's Monitoring Unit/Responsable de l'Unité de "monitoring" du Secrétaire Général

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A P P E N D I X II : AGENDA

1. Opening of the meeting

2. Election of the vice-President

3. Adoption of the agenda and order of business

4. State of ratification of Protocol No. 11

5. Invitation of the informal working party on Protocol no.11 to the European Convention on Human Rights

6. Discussion on the implementation of Protocol No. 11 to the European Convention on Human Rights

Working documents

- the new text of the Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols (inclusive of changes envisaged when Protocol No. 11 will come into force) [DH-PR (94) 10]

- Protocol No.11 to the European Convention on Human Rights and explanatory report

- Proposals by the United Kingdom for the improvement of the mechanism of the ECHR

- "Non-paper" on work undertaken by the informal working party on Protocol No.11 to the European Convention on Human Rights

- Rules of Procedure of the European Commission of Human Rights (as in force on 28 June 1993)

- Rules of Court A (as in force at 1 February 1994) and Rules of Court B (not yet in force)

- Resolution 1082 (1996) of the Parliamentary Assembly on the procedure for examining candidatures for the election of judges to the European Court of Human Rights

- Recommendation 1295 (1996) of the Parliamentary Assembly on the procedure for examining candidatures for the election of judges to the European Court of Human Rights

- Letter of 5 September 1996 from the Chairman of the Ministers' Deputies to the President of the Parliamentary Assembly

- 8th International Colloquy on the European Convention on Human Rights, Budapest, 20-23 September 1995

Issues for discussion

1. **Role of the Registry**
   Protocol No 11: Article 25

Commission rules 12-14
Court rules 11-14

2. **Legal secretaries**
Protocol No 11: Article 25

3. **Language problems**
Protocol No 11: no provision
Commission rule 30
Court rule A27/B28

4. **Role of the Judge Rapporteur**
Protocol No 11: no provision
Commission rules 20/21, 47-49, 51 and 54

5. **Committee questions**
Protocol No 11: Articles 27 and 28
Commission rules 7(3), 10, 20-22, 27-29 and 47(2c)

6. **Election of judges**
Protocol No. 11: Articles 21 and 22
Paper of the United Kingdom (CDDH-BU(96) 2)

7. **Legal aid**
Protocol No 11: no provision
Commission rules: Addendum to the Rules of Procedure (Legal Aid)
Court rules: Addendum (Rules on legal aid to applicants)

8. **Admissibility of applications**
Protocol No 11: Article 35
Commission rules 45-52
Court rule A48/B50

9. **Chamber questions**
Protocol No 11: Articles 27, 29 and 41
Commission rules 1-11, 24-26 and 49
Court rules 21-25 and A35/B37

10. **Fact finding**
Protocol No 11: Article 38
Commission rules 15(2), 45-47, 53(2) and 54(2)
Court rules 15 and A41/B43

11. **Procedure of friendly settlement**
Protocol No 11: Articles 38 and 39
Commission rules 53(1b), 57(1c) an 58

12. **(Public) hearings**
Protocol No 11: Article 40(1)
Commission rules 37-42 and 53(3)
Court rules 18, A38-40-/B40-42 and A45-47/B47-49

13. **Access to documents**

Protocol No 11: Article 40(2)
Court rule A56/B58

14. **Relinquishment**
Protocol No 11: Articles 30 and 31
Court rule A51/B53

15. **Decisions and judgments**
Protocols No 11: Articles 42 and 44-46
Commission rules 57-62
Court rules A52-58/B54-60

16. **Panel questions**
Protocol No 11: Article 43
Court rule B26

17. **Grand Chamber questions**
Protocol No 11: Articles 27, 30,31, 43 and 44
Court rules B35(2) and (3)

18. **Third party intervention**
Protocol No 11: Article 36
Court rule A37(2)/B39(2)

19. **Inter-State cases**
Protocol No 11: Article 33

20. **Provisional measures**
Commission rule 46

7. <u>Other business</u>

8. <u>Date of the next meeting</u>

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A P P E N D I X III

States:	Date of Signature:	Information:
Albania	13.7.95	(Absent)
Andorra	10.11.94	Ratification on 22.1.96
Austria	11.5.94	Ratification on 3.8.95
Belgium	11.5.94	The ratification bill has been approved by the Senate and is now pending before the House of Representatives. Ratification is expected by the end of 1996.
Bulgaria	11.5.94	Ratification on 3.11.94
Cyprus	11.5.94	Ratification on 28.6.95
Czech Republic	11.5.94	Ratification on 28.4.95
Denmark	11.5.94	Ratification on 18.7.96
Estonia	11.5.94	Ratification on 16.4.96
Finland	11.5.94	Ratification on 12.1.96
France	11.5.94	Ratification on 3.4.96
Germany	11.5.94	Ratification on 2.10.95
Greece	11.5.94	(Absent)
Hungary	11.5.94	Ratification on 26.4.95
Iceland	11.5.94	Ratification on 29.6.95
Ireland	11.5.94	The ratification bill will be sent to Parliament before the end of this year. Ratification is expected by the end of 1996 or early 1997.
Italy	21.12.94	The ratification bill was approved by the Committee of Ministers on 12.7.96 and is now pending before Parliament. Ratification is expected by the end of 1996.
Latvia	10.2.95	The ratification bill has not yet been approved by the Government.
Liechtenstein	11.5.94	Ratification on 14.11.95
Lithuania	11.5.94	Ratification on 20.6.95
Luxembourg	11.5.94	Ratification on 10.9.96
Malta	11.5.94	Ratification on 11.5.95
Moldova	13.7.95	A governmental Committee is examining the harmonisation of the national legislation with the Convention and its Protocols, including the question of the ratification of Protocol No. 11. This work is expected to be finished in Spring 1997.
Netherlands	11.5.94	The ratification bill has passed the Second Chamber of Parliament and is presently pending before the Senate. Ratification is expected by the end of 1996.
Norway	11.5.94	Ratification on 24.7.95

Poland	11.5.94	The ratification bill has been submitted to Parliament and iwll be discussed in the lower house in September 1996. Ratification is expected by the end of 1996 or early 1997.
Portugal	11.5.94	Ratification is expected in September 1996.
Romania	11.5.94	Ratification on 11.8.95
Russia	28.2.96	The question of ratification of the Convention and its Protocols, including Protocol No. 11 is presently being examined by an interministerial working group. Ratification is expected by the end of 1997.
San Marino	11.5.94	(Absent)
Slovakia	11.5.94	Ratification on 28.9.94
Slovenia	11.5.94	Ratification on 28.6.94
Spain	11.5.94	The ratification bill is now pending before Parliament. Ratification is expected by the end of 1996.
Sweden	11.5.94	Ratification on 21.4.95
Switzerland	11.5.94	Ratification on 13.7.95
"the formerYugoslav Republic of Macedonia"	9.11.95	The ratification of Protocol No. 11 is currently being considered by a ministerial working group and the issue will be put before the Government in the near future. Ratification could take place by the end of 1996.
Turkey	11.5.94	The ratification bill is being studied by the Government
Ukraine	9.11.95	The question of ratification of the Convention as well as its Protocols, including Protocol No. 11, is presently being studied by a special working group set up by the Ministry of Justice. Ratification is expected in Spring 1997.
United Kingdom	11.5.94	Ratification on 9.12.94

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APPENDIX IV : Agenda item 5 : Invitation to the Informal Working Party on Protocol No.11 to the European Convention on Human Rights

1. Mr Krüger, whom the DH-PR had invited to address it, described the informal working party's work on Protocol No.11.

He stated that the meeting with the DH-PR was very valuable in particular as it allowed the informal working party to share the experience and the reflections of the governmental experts.

2. He indicated that the working party had only an advisory function. It had only been able to meet three times and as a result, progress was slow.

So far the main areas of reflection had been:

a) The new Court's administrative organisation
(merger of the Commission secretariat and the present Court's registry).

The informal working party contemplated five chambers, each composed of eight judges. The chambers would be set up for a three-year period so that they may follow the cases submitted to them until the final judgment.

The Chambers would be composed in such a way as to be representative of the different European regions, as is the case with the Chambers of the Court today.

b) The new Court's functional organisation and the division of responsibilities between the judges and the registry

In view of the great number of applications, the judges could hardly be involved in the initial stages of the proceedings. The plan was to transpose to the Registry of the new Court the present practice of the Commission, in which it's Secretariat played an important and efficient role as a filter in the course of the lodging and registration of applications.

By way of illustration, the Commission had received 10,000 petitions in 1995, but only 2,500 had been registered after the secretariat had explained the admissibility requirements. A petition was, however, always registered if the applicant insisted that this be done. He stressed that it was important not to give applicants the impression that the Secretariat was placing obstacles in the way for their access to the Commission.

c) Proposed Rules of the new Court

A draft was being prepared.

d) Budget implications of setting up the new institution

The Informal Working Party was also examining the budgetary implications of the different organisation alternatives for the Registry of the new Court.

3. In reply to questions from the experts, Mr Krüger stated that:

a) as regards the detailed functioning of the Commission's Secretariat, there existed a series of written instructions from the Secretary to the secretariat, adopted pursuant to Article 13 of the Rules of the Commission; these instructions were presently being updated and

put into order; relations between the Secretary and the President of the Commission were not governed by written instructions but based on dialogue and trust;

b) as regards the legal secretaries, the present thinking in the informal working party was that these should be selected for specific cases from the ordinary lawyers of the Registry; they should not be special officials; if it was contemplated to provide the judges with personal legal secretaries, there would have to be appropriate provisions in the budget; in any event, recruitment of such legal secretaries would have to follow the general recruitment procedure;

c) at present around 60 lawyers were working in the Court's Registry and the Commission's Secretariat; in addition there were a number of temporaries recruited to tackle specific problems, such as the Italian length-of-proceedings cases;

d) as regards the judge-rapporteurs the Informal Working Party considered that these would not necessarily have to be the national judges, despite the document-translation problems which might result (the judge rapporteur having to be able to read the whole file)

Agenda item 6: Discussion on the implementation of Protocol No.11 to the European Convention on Human Rights (ECHR)

1. Role of the Registry

1. The experts took the view that their discussion of the new Court's working methods must be based on the assumption that a large proportion of the new Court's work will resemble the work which the Commission's Secretariat currently performs when examining the admissibility of applications. Although the Registry of the new Court would not be empowered to reject an application, it would have a highly important role as a preliminary filter for incoming cases. A number of experts said that it was accordingly important to specify in the new Rules of the Court the respective roles of the judges and the Registry at the very early procedural stages. More detailed rules regarding the treatment of provisional files could inter alia be of assistance to the Registry in its contacts with applicants. One expert observed that the present rules of Court were not very detailed on this matter and in particular that Rule 14 (5) merely mentioned the possibility to issue general instructions for the work of the Registry. The Commission had a similar Rule, Rule 13 of the Commission's Rules of Procedures. It appeared that certain general instructions had been issued by both organs, but that more clarity could be achieved.

2. Various experts pointed out the value of the system of provisional files: to the extent that applicants had to submit a complete file already at this stage, it was possible for subsequent proceedings to be conducted more speedily.

3. In order to optimise the future system, the following proposals were advanced:

a) clarify the respective roles of the Court and the governments with regard to the assistance to be given the to applicants in order to help them take the initial steps in the lodging of an application (general information on the procedure to be followed, making forms available, translation of documents, etc.);

b) continue using the present application form, which had proved extremely useful.

c) avoid as far as possible, communicating cases to the governments until the applicants have provided all the necessary and available documentation in support of their petitions (one expert indicated that a better preparation of the files concerning his country could lead to a diminution of communicated cases by 20%);

d) on the model of present practice of the United Nations Committee on Human Rights introduce a system whereby, in appropriate cases, applications are initially communicated to the government for observations on admissibility only (and not on the merits);

2. Legal Secretaries

4. The importance of having legal secretaries from all Contracting States was underlined by many experts.

5. Several experts expressed the view that the legal secretaries should be chosen principally from the Council of Europe staff members presently working in the Commission's Secretariat and in the Court's Registry, as proposed by the Informal Working Party.

6. Certain experts felt that it would be useful to have outside legal secretaries attached to the judge of his or her country.

7. Some experts suggested in addition that the legal secretaries be recruited on a temporary basis (e.g. for six years as the judges) as such legal secretaries would be able to provide up to date expertise on the legal system of his or her country. This could prove to be an advantage as the new system provides for permanent judges who will not be in as good a position as the present judges to follow the developments of the legal system of their country. One expert emphasised that such legal secretaries would, when they returned home after expiration of their contracts, be able to provide their countries with valuable expertise on the Convention and its case law.

8. One expert suggested that the judges should themselves be entrusted with the recruitment of their legal secretaries, perhaps on the basis of a list of qualified persons drawn up by the State concerned. The expert also wondered whether it would be possible to appoint these secretaries on an honorary basis or, if they were to be renumerated whether that remuneration should be administered by the judges or by the Council of Europe.

9. A number of experts underlined all the different problems, inter alia as far as the distribution of responsibilities is concerned, which would result if two categories of lawyers were created within the new Registry.

10. Several experts stressed that the recruitment of temporary legal secretaries would have to follow the ordinary selection procedures established by the Council of Europe.

11. There appeared to be general agreement that the new Court had to receive the necessary legal staff, library facilities and access to national databases to enable it to conduct efficient comparative law research. Certain experts suggested this was an area where temporary legal staff could be effectively used in order to ensure the necessary flux of information.

3. Language problems

12. Several experts noted the fundamental problems relating to access to justice and equality of arms which are caused by the present language situation in the Council of Europe. In fact the member States represent today more than 30 different languages and in many of the States the knowledge of French and English is insufficient to ensure the effective implementation of the Convention: the lodging of complaints and the participation in the Strasbourg proceedings become difficult; the access to the caselaw of the Court, and accordingly also the possibility for national authorities to take it into account, become limited.

13. The problem exists also for the Convention organs. Today the Secretariat of the Commission uses only one of the Council of Europe's official languages on account of the mass of cases which are brought before it whereas the Court can still continue to work with both.

14. The Icelandic expert pointed out that no-one in the Commission's Secretariat was familiar with her country's language and that this was a genuine obstacle for applicants: the Commission required in particular that the applicants should translate into a language understood by the Commission all the documents relating to the domestic proceedings (judgments, decisions etc). Another of the experts said that a number of "small countries" would soon be in a similar situation and a solution to the problem would therefore have to be found.

15. Another expert stressed the practical problems which result from the Commission's practice of requiring the Government to submit its observations both in one of the official languages and in the national language, whereas applicants are authorised to submit their observations only in the national language. He proposed that, at least to the extent that the applicant has received legal aid from the Council of Europe, it be required that he accept to have the proceedings conducted in one of the official languages.

16. Other experts considered, however, that it was better to have the proceedings in the national language, entrusting the new Court with the task of making the translations which may be deemed useful.

17. Certain experts observed that the present Rules of Court grant the President of the Court the power to allow an applicant to present his case himself, without the assistance of a lawyer, and also to use another language than one of the two official ones (Rule 30). They noted that the present practice of the Court is restrictive, notably in so far as an applicant, who has received permission to plead in his own language is not provided with a translation of the other interventions made into his or her languages, and expressed the wish that it may be loosened.

18. One expert noted that if the translations are made the responsibility of the parties, it will be for the Respondent Government to assume the costs if the applicant wins the case, whereas if the translations are made by the new Court these costs will stay on the Council of Europe. He also underlined the inconsistency of accepting the existence of language problems during the proceedings, inter alia by authorising the applicant plead in his or her own language, while rendering the judgment in French or English.

19. Other experts stressed nevertheless that the proceedings under the Convention were international proceedings and that one could not impose the same requirements on them as those imposed in domestic proceedings.

20. A number of solutions were suggested:

a) increasing the number of working languages;
b) using the applicant's mother tongue at least in the early stages of the proceedings;
c) not compelling governments to submit memorials in one of the official languages;

d) ensuring, where the applicant has been given permission to use his mother tongue, the translations of the different elements of the file and in particular the translation/interpretation of all statements made during the oral hearing;
e) having translation costs covered by legal aid, if need be;
f) publishing judgments in the official working languages as well as in other languages in particular that of the Respondent State and, where necessary, also in the applicant's language.

21. Summing up, the Chair pointed out the high financial cost of this type of reform and that the cost would to a large extent, whether directly or indirectly, be charged to states.

4. Role of the judge rapporteur

22. The experts while noting that the present Court had chosen to work without a judge rapporteur system appeared to agree that the introduction of such a system was a necessity in view of the new Court's case-load.

23. A judge rapporteur system had, however, to be implemented with flexibility taking into account the requirements of the various stages of the procedure before the new Court. The system might not be the same before the Committees, the Chambers and the Grand Chambers.

24. There was agreement that the judge rapporteur was a necessity before the Committees. Certain experts noted, however, that the procedure before the Chambers, and in particular the Grand Chamber, could be more copied on than that of the present Court; one could inter alia envisage to entrust the preparation of the cases at this level to working parties. Other experts considered it useful to have judge rapporteurs also at these stages of the proceedings.

25. The experts also discussed whether the judge-rapporteur should be the "national judge" or a judge other than the "national judge", and whether his or her name should be public.

26. Most experts stressed the advantages of choosing the "national judge", in particular as a result of his or her familiarity with the relevant law, which should make it possible to deal with applications more speedily; especially if the national judge was to be assisted by legal secretaries from the Respondent State. They found, however that systematically having the "national judge" as judge-rapporteur was unrealistic because of the undue, if not unhuman, workload which some of them would have.

27. Most experts were of the view that the choice of the national judge as judge rapporteur could not affect the independence or impartiality of the Court. Some experts, however, expressed more or less strong doubts as to what effects such as practice would have on the confidence which applicants were entitled to have in the system.

28. Some experts thought that the judge-rapporteur's name should not be made public. Other experts thought that it was important in the interests of transparency to reveal the identity of the judge rapporteur as soon as the application had been submitted, as in certain supreme courts. The Secretariat wondered whether the latter approach would not be viewed an implicit recognition of the predominant role played by a single judge, the judge rapporteur, and thus be capable of diminishing the authority of the new Court in difficult cases. The Secretariat recalled on this point the practice of the European Court of Justice, which does not even allow for dissenting opinions, and the recent discussions in the press about the individual merits of the judges behind the present Court's judgments in certain controversial cases.

29. The experts also noted the practical problems which had to be resolved in order to appoint judge rapporteurs, especially before the Committees, in such a way that they could effectively attend all the cases for which they were responsible. It was noted that the Commission's Committee system worked well in this respect and might usefully be adopted by the new Court. If this system were adopted, it would in general appear possible to have the national judge, or at least a judge familiar with the legal system in question and the language of the file, as rapporteur before the Committees of the new Court. If the case subsequently required further consideration some experts thought that it would be advisable to change the judge rapporteur in order not to allow him or her to have too great an influence on the case. Other experts thought it more efficient to have the same rapporteur throughout the proceedings.

5. Questions relating to the committees

30. The Chairman said that the committees, as provided for in Protocol No 11, should not pose many problems for the new Court, to the extent that they would be organised according to the current system of Commission committees established under Protocol No 8. This system was working well and had helped to improve substantially the Commission's productivity.

31. Certain experts asked whether it was necessary to deal with a case in a Committee even if the judge rapporteur thought that the case should be dealt with by a Chamber; the need to have as efficient a procedure as possible seemed to suggest that such cases go directly before the Chamber.

32. Other experts addressed the issue of the length of the terms of office of the members of the Committees and suggested that these be the same as those proposed by the informal working party or the members of the Chambers, i.e. 3 years.

33. The experts also observed that, presently, all proposals in Committee cases are read by all members of the Commission, and that each member can propose that a Committee case be dealt with by a Chamber or by the Plenary Commission instead. It was proposed that this practice be taken over by the new Court.

34. The experts also considered the issue of the publication and dissemination of the committees' decisions and of the grounds for declaring certain applications inadmissible.

35. Many experts stated that they received all the admissibility decisions and noted that this was undoubtedly useful in order to get a picture of the kind of complaints which were lodged against specific countries although this information was not always easily accessible in the absence of tables of contents or indexes. They hoped that the new Court would continue and develop this practice. Certain experts nevertheless thought that it would be useful to ask the governments whether they wished to continue to receive all these decisions or only part of them.

36. The experts seized the occasion in order to express their deep regret that the Court had to stop sending out its judgments for budgetary reasons, although this distribution was essential for the implementation of the Convention.

37. Several experts also regretted the almost total absence of reasons for many inadmissibility decisions taken by committees. Applicants were entitled to know why their applications had been rejected. Moreover, better reasons could have an obvious legal interest in order to maintain a coherent body of case-law. The saving of time, the main argument advanced to justify the present practice, was not considered sufficient to offset these disadvantages. The

experts therefore hoped that the committees of the new Court would give more detailed reasons for their decisions.

6. Election of judges

38. The discussion mainly focused on the pre-selection procedure of judges by the Committee of Ministers, as suggested by the United Kingdom in its proposals for the improvement of the mechanism of the ECHR (see doc. GR-H(96)5) and on the hearings of the candidates proposed by the Parliamentary Assembly (see Resolution 1082 (1996), under 5).

The pre-selection procedures by the Committee of Ministers

39. The experts noted that since the European Convention on Human Rights does not provide a basis for pre-selection procedures by the Committee of Ministers, such procedures could only take place on an informal basis. This practice was, however, already established by the Committee of Ministers. Many experts felt that a semi-official pre-selection procedure by the Committee of Ministers could lead to an overload of scrutiny procedures, i.e. at national level, pre-selection procedure by the Committee of Ministers and hearings by the Parliamentary Assembly. However, a practice of exchanging informally within the Committee of Ministers the names of possible candidates was considered to be valuable.

40. In this context the question was raised whether the Committee of Ministers could take into consideration certain issues relating to the composition of the Court, in particular gender balance and a balance with regard to the legal professions of nominees. As to gender balance most experts were of the opinion that competence should be the first selection criterium, although it would be desirable that the Court were composed of more women. Furthermore, most experts considered a balance with regard to the legal professions of the judges to be desirable; in particular the need for (former) law-practitioners was mentioned.

The selection procedure by the parliamentary Assembly

41. The experts expressed their concern as to the practical organisation of the hearings by the Parliamentary Assembly. Depending on the length of the interviews (15 or 30 minutes), it would take 2 to 4 days to hear all the candidates (3 candidates times 40 member states = 120 candidates). This would of course imply substantial costs.

42. Furthermore, certain experts were of the opinion that the holding of interviews by the Parliamentary Assembly would entail the risk that the selection procedure would become a political matter on account of increased lobbying and political campaigning.

43. Moreover, the usefulness of the interviews was questioned. If the interviews were to be short (15 to 30 minutes), it was doubted whether the Parliamentary Assembly could get a well-formed impression of the candidates. In this context it was noted that the current practice was that the first nominee on the list was elected, and that, accordingly, valuable time would be spent on hearing candidates two and three on the list. Furthermore, to the extent that the Assembly wished to test the legal qualifications of the nominees, the adequacy of the interviews was doubted since most parliamentarians do not have a legal background.

44. Certain experts suggested that in order to avoid these problems, the Representative of the country concerned could be heard on the candidates proposed, instead of the candidates themselves. An alternative would be that interviews be held by a group of jurists appointed by the Court, the Commission or the Directorate of Human Rights.

45. As a more general conclusion, most experts were concerned about the problems which could arise if both the Parliamentary Assembly as well as the Committee of Ministers were to intervene too much in the selection procedure. Many member States already had difficulties finding three equally highly qualified candidates. If a candidate fulfilled the formal requirements set by the Convention, it was felt that it would create great problems if this candidate were to be rejected and the member State advised to put forward any other candidate.

46. Furthermore it was suggested, taking into account that Protocol No. 11 will enter into force one year after the final ratification, to invite the member states to forward lists of candidates for the election of a judge before the final ratification of Protocol No. 11, so that the election procedures can be started well in advance. This would avoid the problem that the Court will not have a quorum to discuss the new Rules of Procedure during the year after the final ratification.

7. Legal Aid

47. At the Chair's request, the Secretariat briefly explained certain problems which had arisen in this field:

a) Applicants who had been granted legal aid by the Council of Europe sometimes had difficulties to finding a lawyer; the letters which the Commission sent to domestic Bars asking them to help the applicant find a lawyer had had disappointing results as replies tended to be late or non-existent.

b) The sums granted for legal aid are the same for all States. For lawyers from certain countries the sums granted were paltry, while for lawyers from other countries they represented more sizeable amounts. This situation is often considered as unsatisfactory.

c) Legal aid can only be granted at the moment the application is communicated to the Government. Since it is often impossible to have national legal assistance to file a complaint before the Commission, no legal assistance is available in this often crucial initial phase of registration of applications.

The problems of finding a lawyer

48. One expert observed that the Commission's practice of only calling on the national bar association in order to find a lawyer for the applicant excluded, as a matter of fact, those lawyers who were not members of the bar and the members of other legal professions, whereas Article 4 of the Addendum to the Rules of Court foresees also the possibility of representation through a solicitor or professor of law or a professionally qualified person of similar status. He underlined how important it appeared to be that the Rules of Court of the new Court did not limit the possibility to be represented by other qualified persons than barristers. Other experts noted that one should effectively not neglect the contributions, made by such organisations as "avocats sans frontières", "Liberty", "Justice" or "Article XIX" or by law professors or various legal practitioners.

49. The experts suggested that the new Court's Registry in collaboration with the contracting states' authorities draw up and keep updated lists of lawyers and other qualified persons from different States who are prepared to assist applicants in proceedings before the new Court, though right of audience before the Court should never depend on being on this list.

50. Lastly, certain experts underlined that it would be worth holding an information day for lawyers, in Strasbourg, when Protocol No. 11 came into force, on the model of the one held in Strasbourg in 1987.

On whether the legal aid system should be differentiated between the States

51. Several experts opposed a legal aid system differentiated between the States. They in particular mentioned the costs of such a system, the fact that there were rewards other than financial rewards in presenting a case in Strasbourg and that the present system pursued in a way a legitimate aim in that especially applicants from the least rich countries benefitted from the system.

52. Some of the experts stated that they were in favour of the differentiated approach, in particular in view of the factual inequality created by the present system as far as access to justice is concerned: in fact, it could be much more difficult for a detained person to obtain adequate legal aid with the amounts awarded by the Council of Europe in a rich and expensive country than in a less rich and less expensive country.

Absence of legal aid for drawing up and submitting an application

53. Several experts opposed the extension of legal aid to the period prior to the communication of the application: such an extension would become very expensive whereas the vast majority of applications filed were inadmissible for various reasons.

Other issues

54. Some experts noted, inter alia, that they had the impression that the threshold of maximal incomes accepted by the Commission to award legal aid was higher than that applied by the national authorities. Some experts also regretted that the governments were not informed in advance about the sums awarded by the Commission and the Court.

8. Admissibility of Applications

55. Some experts considered whether it would not be wise for the new Court to adopt a clear rule of procedure compelling the States to specify any grounds of inadmissibility at the initial stage of proceedings.

56. One expert raised the question whether Protocol No 11 made it impossible for a Party to "appeal" an adverse decision on admissibility by a Chamber to the Grand Chamber under the new Article 43. He stated that this Article only referred to "judgments", whereas the new Article 29 appeared to indicate that admissibility questions should be decided by way of a "decision"; this distinction was also suggested by the new Article 45.

57. A number of experts underlined that admissibility questions could be of such great importance that they had to be decided by the Grand Chamber; an example of such a question was the applicability of Article 6 of the Convention to Constitutional Court proceedings. In this context it was noted that the new Article 35, para. 4, stated that cases could be declared inadmissible at any stage of the proceedings. It was also noted that the new Article 29 did not expressly state that admissibility decisions had to be taken by way of a decision in the formal sense. The new Court could well decide to have these decisions in the form of a judgment.

58. Some experts pointed at the probably hypothetical nature of the problem as most important admissibility questions would be joined with the merits and result in a judgment which could be appealed to the Grand Chamber pursuant to the new Article 43. In most other cases the Chamber could propriu motu relinquish jurisdiction in favour of the Grand Chamber pursuant to the new Article 30.

59. A number of other experts were of the view that this matter had been definitively dealt with by the Protocol itself and that, in principle, a finding of inadmissibility was not referrable to the Grand Chamber.

60. The Chair concluded that it was not possible to solve these questions of interpretation in this forum but that they had to be left to the New Court.

9. Issues relating to Chambers

61. The experts were not in favour of any specialisation within the new Court and that its composition and organisation be such that the unity and coherence of its case law could be guaranteed.

62. Many experts stressed that, in this perspective, it was important that all judges deal with all cases, and that it would, accordingly, raise problems to have for example a chamber specialised on Article 6. Other experts added that it would likewise create serious problems if all cases against a specific country were to be brought before the same chamber (e.g. because the national judge was on that chamber). Certain experts also pointed at the problems which could arise with specialised chambers and an unspecialised Grand Chamber.

63. There also appeared to be a consensus in favour of retaining a balanced regional composition of each chamber along the lines established by the present Rules of Court. One expert noted that in establishing the regions consideration might be given to the possibility of defining them in accordance with the different legal systems in operation in Europe, if such could still be identified.

64. Several experts stressed the importance of having a case in the same chamber, before the same judges, from start to end and noted the ensuing impossibility of having short mandate periods for the chambers. Most experts appeared to consider that a 3 year mandate period, as proposed by the working party, would be appropriate.

65. Certain experts proposed that, in order to ensure an even distribution of workload, chambers be composed in such a way as to combine the judges from the States with the highest case-load with those from the States with the lowest case load.

66. The experts supported the idea of adding a substitute judge to the 7 chamber judges. Certain experts stated that it might be necessary to have more than one substitute judge; such a system could solve the problem of a mobile national judge, increase sensitivity of the chambers in hard cases and provide better assurances that the same judges hear a case all the way through. A number of 3 substitutes appeared more appropriate to some experts. The experts noted that, if the new Court chose to have more substitute judges it would not be possible to keep the 5 chambers proposed by the informal working party.

67. The experts observed that it would not be an easy task to devise a viable system to comply with the Convention requirement that the national judge should sit ex officio in the chamber bearing in mind all the other requirements on the new Court. The possibility of having

"mobile" national judges was evoked by some experts in order to solve this problem. Other experts suggested that the new Court should examine the possibility of having ad hoc judges nominated on a permanent basis to replace the national judge.

68. Certain experts questioned whether all judges should really be used for chamber work, and whether some could not be used for other tasks, such as legal research, representation etc...

69. The experts noted the major organisational problems confronting the new Court if it were to adhere to the principle that the same judges should hear a case from beginning to end, if the same national judge had always to be part of the chamber considering the case, if it would be necessary to have, at the same time, or at short intervals, Grand Chamber meetings, meetings of several chambers and committees in order to keep up with case-load.

70. Besides looking at experience of present organs, in particular the Commission, one expert also proposed that the new Court look at the experience of the European Court of Justice and, in particular the Court of First Instance, as this organ worked simultaneously in a number of different compositions

10. Establishment of the facts

71. The experts noted that it was clear that the new Court would take over the present Commission's duty of establishing the facts and that the new judges would, inter alia, have to be willing and able, as the present members of the Commission, to go on fact finding missions to different countries. They also noted that, considering the Convention's ever wider geographical scope, it took more and more time and money to carry out on site investigations. The same held true for the hearing of witnesses.

72. Certain experts added that existing fact finding resources appeared insufficient and had to be improved. Independent fact finding by the new Court ought, however, not be very frequent as the new Court would, like the Commission today, in all probability be able to rely on the fact findings made by the national courts and authorities and the complementary informations submitted, inter alia, by the agents of the governments in the course of the pleadings in Strasbourg. In this context, several experts pointed out that the government agents had a duty to assist the Convention organs in the establishment of the facts

73. A number of experts pointed at the necessity that the Chambers avail themselves of the opportunity to request written observations from the parties both on the facts and the law of the cases brought before them, in accordance with the practice already established by the Commission. They also indicated that the Chambers could find inspiration in the present Court practice of providing the parties, shortly before the hearing, with written questions regarding the specific matters which remained unclear for the hearing. The latter system could be especially valuable before the Grand Chamber which is the body which most resemble the Court of today.

74. Several experts noted that the necessity of fact finding was intimately linked to the scope and contents of the underlying national proceedings. If these had adequately addressed also the Convention issues, it was likely that the facts would be well established when the case came before the new Court; national authorities here had a great responsibility.

11. Friendly Settlements

Procedure of the new Court

75. The experts found that the basic idea behind Protocol No 11 was that the new Court should, just as the present Commission, play an active role so as to facilitate the conclusion of friendly settlements. Some experts suggested that, accordingly, the new Court should provide in its Rules for the possibility of actually going to the State concerned in order to assist in the friendly settlement negotiations in appropriate cases.

76. There was agreement that the possibility to reach a friendly settlement depended to a great degree on 3 conditions: the possibility to conduct negotiations confidentially, the availability of a provisional indication by the Commission as to its conclusions on the merits and finally the possibility of having a neutral statement on the question of violation.

77. Some experts noted that friendly settlements were nevertheless sometimes reached through informal negotiations between the parties, who announced the settlement to the Commission only once it had been reached. They observed that Protocol No 11 did not appear opposed to the continuation of this practice.

78. As regards the provisional opinion rendered by the Commission, a number of experts stated that this opinion was very useful in order to induce the national authorities concerned, including the budget departments, to agree to the friendly settlement proposed.

79. It was noted that the Commission's power to give provisional opinions and to communicate these to the parties is regulated in Articles 55 and 58 of the Commission's Rules of Procedure. A number of experts stated that it would appear appropriate to insert similar provisions in the new Rules of Court.

80. Other experts expressed, however, more or less serious doubts with regard to the new Court's competence to take over the Commission's practice of provisional opinions, as the Court was a fully judicial body which had to comply with the requirements of Article 6, notably those concerning impartiality and fair trial.

81. A number of experts thought that Article 6 did not constitute an obstacle in this respect as the power to guide the parties was inherent in any court. In support of this proposition references were made to the practices of a number of national courts inter alia the Finnish and German courts and to certain interventions made in the course of the 8th Colloquy in Budapest (e.g. that of professor Frowein). In particular it was noted that the new Court could refrain from giving provisional opinions in complicated cases where there was a risk that the final decision would be different from the provisional.

Publicity and friendly settlements

82. Several experts indicated that in order to facilitate the conclusion of friendly settlements and in order to ensure that these settlements simplify as much as possible the procedure before the new Court, it would be appropriate that the provisional opinion of the new Court be given before the public hearing. After a public admissibility procedure, including a public hearing, it might well be much more difficult to reach a friendly settlement than at an earlier procedural stage.

83. One expert also wondered whether a lot of publicity in the admissibility stage could not be used so as to create virulent press campaigns, infringing the independence of the Court.

Control of the proper execution of friendly settlements

84. It was noted that after the entry into force of Protocol No 11, there would no longer be any control of execution of friendly settlements: friendly settlements are according to the new Article 39 to be confirmed by the new Court by way of a decision, whereas only judgments are to be transmitted to the Committee of Ministers for control of execution under the new Article 46.

85. The Secretariat, raised the question of how the proper execution of friendly settlements were to be ensured in the future, in particular where they comprised an engagement to take general, legislative or other, measures such as in the Skoogstöm settlement before the Court (see the judgment of the Court of 2 October 1984, Series A No. 83) or the Sargin and Yagci settlement before the Committee of Ministers (see Resolution DH(93)59 of 14 December 1993).

86. Some experts noted that the change only related to case presently decided by the Committee of Ministers and by the Court as it was only such friendly settlements which were presently subject to execution control. Friendly settlements before the Commission had never been subjected to any such control.

87. Certain experts pointed at the possibility that the new Court itself undertakes to control the proper implementation of friendly settlements and provides in its rules for the reopening of the case if the engagements entered into are not respected.

88. Others considered that no control of execution was necessary as you could trust that a State which had freely undertaken certain obligations would also comply with these.

89. One expert noted that while reopening of proceedings might be adequate to control payment of just satisfaction, it nevertheless seemed to have a number of shortcomings as regards the control of general measures. The expert observed that such measures might require considerable time to be implemented and might well be outside governmental control (falling under the competence of the Parliament or the courts): What should the new Court do if after a number of years the reforms promised had still not been carried out, perhaps without any bad will on the part of the Government? Would reopening of the case serve a purpose?

90. The expert proposed that the Registrar of the new Court, or certain judges, perhaps those in charge of the research department, could, invoking implicit powers under the new Article 39, request the Government concerned to supply regular information regarding the implementation of friendly settlements. This information could thereafter be included in the Court's annual report. Another possibility could be to engage the Secretary General who could use his powers under Article 57 to request regular information on the state of execution of friendly settlements, which information could then also be published in the form of reports.

12. Public hearings

Increase in number of hearings

91. The experts noted that the system instituted by Protocol No. 11 was an entirely judicial system and that, accordingly, the Commission's practice with regard to public hearings was not transposable to the new Court. Several considerations could in fact imply a considerable increase of public hearings:

a) the question of an oral hearing will be raised in all cases which are presently communicated to the governments by the Commission (in 1995 1.052 were communicated);

b) it was unlikely that the Court will not apply Article 6 of the Convention and its case-law on the subject of its own functioning; several experts stressed in fact that public hearings were inherent in judicial procedure before the new Court;

c) in addition, the Court will deliver judgments which are binding on the contracting States, and several experts consequently thought it essential that the respondent Government be able to present its arguments/position at a public hearing;

d) in general, it is difficult to refuse a public hearing when a party requested one, especially when the party had fought for justice for several years before reaching Strasbourg;

e) in complicated cases, a public hearing could save time.

Possibility to limit the number of hearings

92. In view, however, of the large number of applications expected, it will probably be a physical impossibility to have hearings in all cases, and quite a few experts said there would have to be a filter.

93. Certain experts referred to the fact that a lot of cases could be of less importance, although they implied violations of the Convention. The experience with Italian length of procedure cases went in this direction. One could wonder whether a public hearing in each case of this kind was necessary. In view of the costs and practical inconveniences caused by travelling to Strasbourg, several experts considered it likely that a certain number of applicants will not consider it necessary to request a public hearing in cases where it follows from the Court's case-law that in any case a violation will be found.

94. The following solutions were suggested:

a) to consider that the procedure before the Court is similar to a constitutional procedure eluding the strict requirements of Article 6; in most cases such a rule will render a public hearing unnecessary as most applicants will have benefitted from public hearings before domestic courts;

b) if possible, to hold hearings on admissibility and merits at the same time;

c) to establish rules of presumption: either a negative presumption that there will be no hearing, except if one of the parties request one and the necessity of the hearing is established, or a positive presumption that a hearing will be held unless a party objects and the new Court finds a hearing manifestly unnecessary;

d) different presumptions might be applied depending on the procedural stage an application has reached: a hearing might in principle be foreseen in all cases before the Grand Chamber, whereas before chambers the parties might be required to request a hearing and establish its necessity; the experts were almost unanimously of the opinion that it was hardly conceivable to hold public hearings before Committees; one expert, however, wondered whether it was really possible to exclude the possibility of hearings before Committees in such a categorical way;

e) some experts indicated that the Court should keep the right to order a hearing even if the two parties renounced this right;

f) One expert proposed that the new Court could draw its inspiration from the Court of Justice's practice as far as the procedure under Article 177 is concerned; the Court of Justice takes into consideration the procedural rules applicable before the domestic courts which have

seized the Court (Article 104 of the Rules) and has empowered itself to decide on the case file appeals against the decisions of the Court of First Instance unless one party rejects on the ground that the written procedure has not provided the party with the possibility to fully defend his position (Article 120 of the Rules).

13. Access to documents

95. The question was raised whether Article 40, paragraph 2, of Protocol No. 11 implied that the contracting States are under the obligation to make accessible to the public all the documents which exist in a certain case. It was noted that such an obligation cannot be derived from this Article as it is merely a statement on how the Court should operate. Nevertheless, if documents deposited with the Registrar are accessible to the public, it appeared necessary that the national law be interpreted so that the documents concerned should also be open to the public in the contracting State concerned.

96. It was noted that under the present system the Commission files contain much more documents than the Court files. Therefore, it was desirable that under the future system the President of the Court would be very careful in deciding which documents should be accessible to the public and which documents should remain confidential, especially in criminal and immigration cases. It was suggested that the Registry of the new Court should ask, or that Governments and applicants should be requested to indicate from the very outset, whether any of the documents submitted should be confidential.

97. The discussion also covered the possibility that a party hand out confidential submissions or documents to the press in order to put pressure on the new Court or the other party. Several experts noted, however, that fear for abuse of the press should not restrict the right to freedom of expression and the freedom to receive and impart information. Nevertheless, some experts suggested that the new Court could include in its Rules of Procedure a possibility to sanction clear abuses of the publicity principle applying before it.

14. Relinquishment

98. Since, according to Article 30 of Protocol No. 11, relinquishment from a Chamber to the Grand Chamber is subject to the approval of the parties a number of experts suggested, that immediately after the decision on admissibility, the parties should indicate whether they would object to relinquishment or not in order to avoid that they get a right of veto vis-à-vis the Chamber. Certain experts expressed the hope that the new Court would resist the temptation to introduce presumptions in the Rules of Court in this area, limiting the scope of the difficult compromise reached by the drafters (e.g. a presumption that a party having objected to relinquishment will have accepted not to "appeal").

99. The question was raised whether the Grand Chamber could refer a whole case or parts of a case back to the Chamber if the Grand Chamber considered that no serious question affecting the interpretation of the Convention or the Protocols thereto were raised or considered that the resolution of a question before a Chamber would not have a result inconsistent with a judgment previously delivered by the Court. As far as the whole case was concerned it was noted that such a situation would be hard to imagine taking into account that seven judges had taken the decision of relinquishment. Most experts thought, however, that specific parts of a case, e.g. the question of just satisfaction, might be referred back to a Chamber and that the new Rules of Court should provide at least for this possibility.

100. It was noted that according to Rule 51 of the Court relinquishment is obligatory where the resolution of a question might have a result inconsistent with a judgment previously delivered by the Court, while under Article 30 of Protocol No. 11 relinquishment on this ground is a discretionary power. Certain experts suggested that under the new Rules of the Court relinquishment on this ground should remain obligatory. Other experts were, however, of the opinion that this was not possible as the new Rules of the Court had to reflect the compromise between the single Court idea reflected in Article 30 and the two-tier idea reflected in Article 43, and that, accordingly there was not much room for interpretation in the Rules of Court on this point.

15. Decisions and judgments

Language of judgment

101. It was noted that it would be a very positive development if judgments were not only drafted in the official languages of the Council of Europe, i.e. English and French, but also in the language of the respondent State, which hopefully would be the same as that of the applicant. In this context several experts welcomed the Committee of Ministers' new practice of ensuring, in the context of its execution control, that the judgments of the Court and the reports of the Commission are published in the language of the respondent State. This practice has helped to make the Strasbourg case-law more easily available both to the authorities concerned and to the public and constitutes an important step towards increased access to justice. One expert noted, however, that a translations effected by the Council of Europe might provide a better guarantee of neutrality.

Necessity to read out judgments in open court

102. The question was raised whether it was necessary that, in view of the enormous increase of judgments (in 1995 the Commission had adopted approximately 600 reports) under the future system, the President of the Court should read out all the judgments in open Court since this would take a considerable time. Therefore, it was suggested that the text of a judgment should only be sent out to the parties. It was, however, noted that the democratic principle of a public process could not be set aside and several experts suggested that only the operative provisions of the judgment were read out in open as in the European Court of Justice.

103. Furthermore it was questioned, with reference to Article 44, paragraph 2 of Protocol 11, whether judgments should be read out in open Court as long as they are not final.

104. In this context it was proposed that judgments were send out to the State concerned some time (perhaps a week) before judgments were read out in open Court, since otherwise some state authorities could be approached by the press before the judgment reached them through the official channels.

Reasons

105. The question was put whether the wording "reasons shall be given" (Article 45, paragraph 1) also applies to decisions of the panel and friendly settlements. Several experts stated that it had been the understanding, when Protocol 11 was drafted, that panel decisions needed not be reasoned and that the wording of Article 45 was deliberate. One expert also suggested that Article 45 excluded friendly settlement decisions from the reasoning obligations.