COUNCIL OF EUROPE CONSEIL DE L'EUROPE

.
Strasbourg, 25 March 1998
DH-PR(1998)005

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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43rd meeting, 9-12 March 1998

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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 43rd meeting in the Human Rights Building in Strasbourg, from 9-12 March 1998. The meeting was chaired by Mr Martin EATON (United Kingdom).

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

3. During the meeting, the Committee in particular:

i. finalised its exchange of views on the follow-up to comments made by the Steering Committee for Human Rights (CDDH) concerning the implementation of Protocol No. 11 to the European Convention on Human Rights ("the Convention") and decided to submit a number of additional comments to the relevant bodies (item 2 of the agenda);

ii. continued its examination of the questions raised by the reopening of procedures before domestic courts following decisions by the Convention organs (item 3 of the agenda);

iii. continued its examination of questions relating to the publication of the Court's judgments in Contracting States (item 4 of the agenda);

iv. organised its future activities.

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

4. Mr Pierre-Henri IMBERT, Director of Human Rights, impressed on the Committee the great interest attached to its present work. Following the adoption of Protocol No.11, it was important for the intergovernmental experts to examine in detail the questions arising from the implementation of the Court's judgments. He trusted that the Secretariat would be given the necessary human resources to discharge its tasks.

Item 2 of the agenda: Follow-up to comments made by the CDDH concerning the implementation of Protocol No. 11 to the Convention

5. In the light of the comments made in October 1997 by the Steering Committee for Human Rights (document CDDH (97) 41, paragraphs 59-64), the DH-PR conducted a final exchange of views on the comments it had made in September 1997 concerning the "Model" Rules of Procedure drawn up in May 1997 by the Informal Working Party on Protocol No. 11 (document CDDH (97) 22). The comments of the DH-PR are set out in document DH-PR (97) 3.

a. Further discussions on the "Model" Rules of Procedure of the new Court concerning requests for interpretation and revision of judgments

6. By way of introduction, the Chairman pointed out that the corresponding provisions in the existing rules had so far been little used, and he asked those members of the Committee who had experience in this matter to pass it on to the Committee as a whole.

i. Request for interpretation

7. One expert proposed that the three year period laid down in Rule 67 of the "Model" Rules of Procedure for requests for interpretation of a judgment be reduced to one year, that period being sufficient to decide whether a judgment handed down by the Court was sufficiently

clear or not. He also proposed that a panel of judges be made responsible, within the Chamber, for deciding on the admissibility of such requests.

8. Several experts seconded the proposal for a shorter period and for the creation of a panel of judges to examine admissibility. With regard to the time period, several delegations considered that the need for an interpretation of a judgment only became apparent more than a year later, particularly by reason of the legislative changes which were sometimes necessary as the result of a judgment, and which took longer than one year to implement following the Court's decision.

9. Several experts pointed out that, whatever the composition of the committee responsible for assessing the admissibility of a request for interpretation, the interpretation itself must emanate from the Chamber in its totality. These experts recalled that two stages therefore had to be distinguished: first of all, the admissibility of the request is examined; then, if the request is declared admissible, the Chamber interprets the judgment. These two stages are provided for in paragraphs 3 and 4 respectively in Rule 67. According to these experts it might be suggested that a limited number of judges should take part in examining the admissibility of the request (stage covered by paragraph 3) and that all the Chamber's judges should take part in the interpretation stage (paragraph 4). Wherever possible, the judges who had taken part in the decision should be members of the Chamber interpreting the judgment.

10. Some experts proposed that only the President of the Chamber concerned should be given the task of deciding to reject a request for interpretation or revision on the ground that there was no reason to warrant its consideration (Rule 67(3) and 68(3)). However, several experts observed that, given the importance of such requests, which could touch on the merits of the case, it would be inexpedient to entrust this responsibility to the President alone. It was therefore decided to leave the texts as they stood but to suggest to the Court that the functions assigned by these rules to the Chamber should in fact be discharged by a screening committee.

11. Several experts asked how long it had taken for requests for interpretation to be received once the Court had given judgment. The Secretariat informed the Committee that the time elapsing in the few cases where a request for interpretation of the judgment had been made were as follows:

- Ringeisen case: judgment of 22 June 1972 (Series A, No. 15), request for interpretation of 21 December 1972.

- Allenet de Ribemont case: judgment of 10 February 1995 (Series A, No. 308), request for interpretation of 20 July 1995.

- Hentrich case: judgment of 3 July 1995 (Series A, No. 320-A), request for interpretation of 10 July 1996.

12. Thus the first two requests for interpretation had been submitted within a year following the judgment in question, viz: 6 months after the Ringeisen judgment; 5 months and ten days after the Allevet de Ribemont judgment; the third request (Hentrich judgment) had been made 12 months and seven days after judgment was given.

ii. Request for revision

13. The Secretariat informed the Committee that in the Pardo case (judgment of 20 September 1993; Series A, no. 261-B), a request had been made on 8 June 1995 for revision of the judgment given on 20 September 1993. The request had been received on 18 September

1995, ie. two years after the judgment. A case against Sweden (Gustaffsson judgment of 25 April 1996, Collection of Judgments and Decisions 1996-II) was at present pending; it also concerned a request for revision made on 21 October 1996.

14. The experts suggested that the expression "as appropriate" in Rules 67(4) and 68(4) of the "Model" Rules of Procedure should be deleted as being superfluous.

b. Exchange of views on Article 36(1) of the Convention (third-party intervention)

15. The DH-PR held an exchange of views on the new Article 36(1) of the Convention (third-party intervention), according to which "*in all cases before a Chamber of the Grand Chamber, a High Contracting Party one of whose nationals is an applicant shall have the right to submit written comments and to take part in hearings*". One expert stressed that the words "before a Chamber or the Grand Chamber" had been added at the drafting stage in order to make it clear that in any event the procedures before the benches of three judges were not covered.

16. In this connection, the Chairman pointed out that at the CDDH's 43rd meeting (October 1997), one expert had drawn attention to the categorical nature of this wording and that the CDDH had asked the DH-PR to revert to this question as appropriate. According to that expert, the possibility of the State of nationality of the applicant intervening in a case should not be automatic: it should be up to the Court to decide on the expediency of such an intervention and decide whether or not to act upon it.

17. While understanding this approach, which was furthermore adopted in other judicial bodies such as the International Court of Justice or the Court of Justice of the European Communities, the DH-PR considered that the wording of Article 36(1) was clear in respect of the right it accorded to the State of nationality, which reflected the principle of diplomatic protection. It was not for the Court's Rules of Procedure to deprive this Convention provision of its substance along the lines of the proposal by the said expert.

18. By contrast, with regard to Article 36(2) of the Convention, the DH-PR considered that the situation was different. According to that Article, "*The President of the Court may, in the interest of the proper administration of justice, invite any High Contracting Party which is not a party to the proceedings or any person concerned who is not the applicant to submit written comments or take part in hearings*". Here the Court had discretionary power to admit "third-party intervention".

19. According to certain experts, it should be possible for such intervention to be limited by the judges to the period after the decision on admissibility. Another expert, for his part, considered that the possibility of according third-party intervention should also arise during the admissibility stage.

20. Following this exchange of views, the DH-PR decided to submit its various comments to the new Court as matters on which to reflect, it being understood that the Court had discretionary power with regard to third-party intervention, that power being clearly bestowed by Article 36(2) of the Convention.

c. Exchange of views on the flexibility needed by the Court to decide the size of its Chambers (cf. Rule 27(2) of the "Model" Rules of Procedure)

21. With regard to Rule 27(2) of the "Model" Rules of Procedure, the Chairman reminded the meeting that the DH-PR had wanted to word the first sentence as follows: "*Each* [of the four Chambers] *shall consist of seven judges and at least one substitute judge*". Document DH-

PR(97)3, drawn up by the Secretariat and the Chairman in conjunction with the Chairman of the CDDH, explained that the majority of DH-PR experts thought it preferable to replace the word "additional" by the word "substitute", in order to reflect normal Convention practice, whereas others would have preferred to keep the term "additional judge", which appeared to them to offer greater flexibility in the composition of the Chambers. Following discussion, the DH-PR believed that the wording prepared by the Secretariat and the Chairman was satisfactory. It came to the same conclusion with regard to the comments on Rule 27(5) of the "Model" Rules of Procedure (cf document DH-PR(97)3).

d. Other issues concerning the implementation of Protocol No.11

22. Several experts had observations to make in connection with Chapter VIII on legal aid (Rules 78-83 of the "Model" Rules of Procedure).

23. The first point raised concerned the last sentence of Rule 80(1), according to which a declaration requesting the grant of legal aid "*shall be certified by the appropriate domestic authority or authorities*". One expert considered that, in the interest both of the applicant and of the Court itself, the parties should be required to inform the Court which domestic authorities were competent to provide such certification. He pointed out that substantial delays had occurred in his country as a result of applicants' uncertainty concerning the appropriate body to provide that certification. Several experts considered that it could be inferred from the present wording of this Rule that the Court should be informed of the identity of the authorities in question, so that it was unnecessary to amend the text.

24. The DH-PR decided simply to draw the new Court's attention to this question, without suggesting any formal amendment.

25. The second point raised concerned Rule 80(2), according to which "*before making a grant of free legal aid, the High Contracting Party concerned shall be requested to submit its comments in writing*". Several experts considered that this provision was superfluous. They would prefer that the Parties be free to submit or not submit comments, without being systematically asked to do so by the Convention organs. Other experts considered, by contrast, that this provision was useful insofar as it gave the national authorities the opportunity to examine the merits of a request for legal aid. According to these experts, experience had shown that some applicants could have met the costs in question, as was apparent, for example, from information held by the country's tax authorities. So it was important for the government to ascertain that the applicant was genuinely in need of legal aid and send its comments to the Convention organs as appropriate. The DH-PR concluded that the present wording of Rule 80(2) could remain as it stood.

26. Several experts referred to the possibility of granting linguistic assistance to applicants who, without such assistance, would be unable to submit their applications because they were unable to pay for the costs of translating the application into one of the official languages. Several experts added that applicants from certain member states were (as in the case of Iceland) or had been in a situation of *de facto* discrimination, since they were not able to submit their applications in a language acceptable to the Commission, and the latter did not have the necessary staff to translate the applications. Accordingly, two experts suggested that a sub-paragraph (c) should be added to Rule 78 ("*legal aid*") in the "Model" Rules of Procedure of the Court, making it possible in exceptional cases to grant legal aid to an applicant in order to cover the costs of translation involved in his application.

27. While recognising the importance of this problem, several experts believed that, if the problem was to be solved in the framework of the Rules of Procedure, it should be dealt with

outside the chapter concerning legal aid. They proposed that a suitable form of words might possibly be included in Rule 33 ("*official languages*") or Rule 43 ("*content of the application*").

28. Concluding the discussion, the DH-PR believed nonetheless that this was primarily a practical problem which ought to be solved within the Council of Europe Secretariat. [It decided to draw the attention of the Registrar of the European Court of Human Rights to the need for the necessary human resources to be provided so that any application submitted in the language of a member state of the Council of Europe could be translated by the Court Registry. Being aware of the financial implications of this suggestion, the DH-PR thought it necessary also to draw the attention of the Committee of Ministers to this problem, via the CDDH (pending the latter's positive opinion) so that a political decision might be taken to enable the suggestion to be given practical effect. The DH-PR considered that those of its experts who came from countries whose languages were not widely used should make their authorities aware of this problem so that they could bring it up in the Committee of Ministers.

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29. The DH-PR noted the fact that an initial discussion on the Rules of Procedure of the Court was to be held by the newly elected judges from 28 April-2 May 1998. There would be other discussions before Protocol No.11 entered into force on 1 November 1998.

30. Concluding the examination of this item of the agenda, the DH-PR discussed the procedure for communicating the afore-mentioned items to the bodies concerned. It observed that, on 17 December 1997, the Director of Human Rights had sent the following three documents to the Registrar of the European Court of Human Rights, the Secretary to the European Commission of Human Rights, the Clerk of the Parliamentary Assembly, the Secretary General of the Council of Europe and the Secretary to the Committee of Ministers:

- a summary of the discussions and exchanges of views held by the DH-PR from September 1996-September 1997 on the Rules of Procedure of the new Court (document DH-PR(97)5);

- the "Model" Rules of Procedure prepared in May 1997 by the Informal Working Party on Protocol No.11 (document CDDH(97)22);

- the comments on the "Model" Rules of Procedure submitted by the DH-PR in September 1997 (document DH-PR(97)3).

31. The DH-PR noted that the Director of Human Rights, also on 17 December 1997, had formally invited the Registrar of the Strasbourg Court to forward these three texts to the judges at the new Court.

32. With regard to the new elements identified during the present meeting, the DH-PR instructed the Secretariat to set them out in a short document to be drawn up in conjunction with the Chairman. That document would be sent, in the form of an addendum, to the recipients of the three afore-mentioned texts.

33. Furthermore, the DH-PR decided to invite the Registrar of the new Court to take part in an exchange of views with the Committee's members during the Committee's next meeting (September 1998). This exchange would focus on certain aspects of the Rules of Procedure of the new Court (see below, agenda item 6: future activities).

Item 3 of the agenda: Reopening of proceedings at the domestic level following decisions by the Convention organs

34. The Secretariat informed the Committee that two documents on this question were available: document DH-PR(98)2, drawn up by the Secretariat, set out the arguments for and against mechanisms for reopening procedures at the domestic level, and document DH-PR(98)1 gave an overview of existing legislation and case-law. The Secretariat reminded the meeting that a document on this same question had been drawn up by the DH-PR in the early 1980s and was now out of date. The document presented was drawn up on the basis of unofficial information assembled by the Secretariat from unofficial sources, and was subject to amendment and improvement. Furthermore, the law in force in some states had not been presented for lack of sufficient information.

35. The Chairman observed that the Secretariat document clearly showed the range of different approaches in this matter and was such as to enable the necessary conclusions to be drawn. It should be possible, at the end of the discussion, to see whether it was possible to envisage proposing that the Committee of Ministers adopt a recommendation.

36. The Chairman asked each member in turn to verify the accuracy of the information contained in the document. It emerged that the bulk of the information set out in the document was correct, subject to a number of clarifications/amendments. The Chairman invited those delegations who so wished to submit written comments by 30 April 1998. It was particularly important for the representatives of States not covered in the document to supply the relevant information on their practice. A consolidated document based on those comments would be sent to the DH-PR members, who would have an opportunity to make comments in writing. In the absence of such comments, the consolidated document would be regarded as definitive and would be sent to the CDDH, which would decide as appropriate whether it should be published and what action should be taken on this matter.

37. The Chairman then invited the members of the DH-PR to answer the questions set out in the Secretariat's discussion paper DH-PR(98)2 and, in particular, questions (i.) and (ii.) on page 4, concerning whether the reopening of proceedings was a necessary execution measure in some cases of violations of the Convention, and if so, in what types of case; if not, whether reopening was a useful instrument in helping the Convention organs to decide on just satisfaction.

38. Some experts explained that there were arguments both in favour and against the reopening of domestic procedures following a judgment in Strasbourg.

39. According to some experts, such a procedure was likely to complicate the existing legal situation and, particularly in civil cases, to infringe the rights of third parties who were not parties to the proceedings in Strasbourg. One expert said that the problem of third parties, in the event of domestic proceedings being reopened, arose both in civil and in criminal cases. The fate of co-accused persons who had not addressed themselves to the Strasbourg organs would have to be resolved in the framework of reopening proceedings. The same might apply to victims. Reopening proceedings could also have consequences for persons who were not parties to the domestic proceedings but who were in the same situation as the applicant.

40. One expert expressed opposition to any possibility of reopening proceedings, and said that questions of this kind could only be solved by the legislative authority. He reasserted his opposition to any procedure whereby the European Court of Human Rights would become a fourth instance. Several experts had doubts as to the validity of the statements made in paragraph 8 of the discussion paper drawn up by the Secretariat, according to which the reopening of domestic proceedings would help to reduce the case-load on the Court. According to them, on

the contrary, the possibility of reopening proceedings would be such as to increase the number of applicants. One expert added that it was not acceptable to envisage casting doubt on so fundamental a principle as the authority of *res judicata* in order to solve a purely practical problem, namely relieving the workload on the Court. Another expert stressed that the possibility of reopening proceedings was not likely to strengthen the authority of the Court's judgments.

41. One expert emphasised that this possibility of reopening proceedings was genuinely likely to undermine legal certainty and the authority of *res judicata*, in return for a fairly limited advantage. One expert argued that the states should continue to enjoy their margin of discretion concerning the solutions to be applied following the Court's judgments. He added that the problem of the rights acquired by third parties to the proceedings must indeed be borne in mind, and this was particularly important in the context of civil and administrative procedures. The example of withdrawal of planning permission was cited.

42. One expert added that, when a domestic decision was taken in pursuance of a law which the Strasbourg organs had declared to be contrary to the Convention, the problem remained in its entirety and could not be resolved by the opening of domestic proceedings as long as the law which had been declared contrary to the Convention was not amended at the domestic level. He observed that legislative changes could not be adopted immediately following the judgment. Reopening the domestic proceedings before the new law was passed would lead the Court to take the same position as the initial position censured in Strasbourg. With regard to legislative changes, the Chairman stated that, as part of the procedure for incorporating the European Human Rights Convention into United Kingdom law, which was currently in progress, it was foreseen to introduce a mechanism enabling the law to be amended rapidly in order to bring it into line with the case-law of the Strasbourg organs. Several experts expressed interest in such a procedure.

43. According to another expert, there were three arguments against the introduction of such mechanisms for the reopening of domestic proceedings. First of all, since such a procedure was not necessary in every case, it created discrimination between different cases dealt with in Strasbourg. Secondly, it protracted on the domestic level a procedure which had already lasted long enough, first at national level and then at international level. Finally, in those cases where it proved necessary for proceedings to be reopened, the problems could be solved at Committee of Ministers level.

44. In reply to these arguments, one expert made the point that the European Court of Human Rights could not be limited to a monetary quantification of human rights. In the first place, it was wrong to speak of discrimination on the mere ground that reopening the proceedings was not necessary in every case. According to the Court, identical treatment of different situations entailed discrimination. In addition, from the applicant's point of view, reopening of proceedings was the only way in which a real solution could be found to his problems. Lastly, leaving it to the Committee of Ministers to resolve the situation would be an illusion, insofar as the Committee could not demand the impossible and, in particular, could not call for proceedings to be reopened when no such provision existed in domestic law. The same expert also believed that the Committee should broaden the scope of its concerns and address in a more general way, not the reopening of judicial proceedings in the strict sense but the re-examination of certain cases in the light of the Court's judgments and of decisions of the Committee of Ministers, so as to include also the possible review of certain administrative acts and the amendments that were often needed to the legislative texts in question.

45. One expert acknowledged the risk that the Strasbourg Court might become an appeal court; this matter had to be treated with the greatest caution. However, the same expert stressed that there was a risk of injustice if a conviction was still in force while the Court in Strasbourg

had found a violation of the Convention in the particular case. In this connection, one expert stated that in criminal matters reopening proceedings was the only way of really bringing a violation of the Convention to an end (example of the Jersild case).

46. Following these remarks, one expert also emphasised that in some cases reopening proceedings at domestic level remained the best means of guaranteeing the efficacy of decisions handed down in Strasbourg, and domestic law should not exclude the possibility of such a procedure. However, in criminal matters, the problem of lost evidence and preservation of the rights of third parties must be borne in mind. The solutions to these problems had to be examined case by case. One expert also observed that in some cases reopening proceedings was the only way of ensuring that the injustice established in Strasbourg was not perpetuated. In reply to his query concerning the status of document DH-PR (98) 2, the Chairman said that this document was a basis for discussion.

47. One expert argued that reopening procedures, which must remain the exception, could be helpful in cases where the monetary penalty was not sufficient to solve the problem, for example in some quite specific administrative cases when nationality problems arose, and in civil cases when the persons had not had access to a court.

48. The expert of Switzerland said that the procedure for reopening domestic proceedings, as it existed in his country, could be useful in some circumstances and even necessary in exceptional cases. On the basis of the three examples which had already arisen in practice, he pointed out that the present machinery could be such as to pose practical difficulties.

49. One expert inquired as to the basis on which the domestic proceedings were reopened – the judgment of the Court or the interpretation given to that judgment by the Committee of Ministers.

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50. Several experts suggested that the Secretariat should draft a document presenting the various cases which had led to: (i) reopening of the proceedings; (ii) legislative reform, or (iii) revision of the administrative act concerned. The DH-PR endorsed this suggestion and asked the Secretariat to do the requisite research *into both the case-law of the Court and the decisions of the Committee of Ministers*. The document would be in three parts:

1. a list of the cases in question, divided into three categories (administrative, civil and criminal proceedings). In addition to the date on which judgment was given and details of publication, the document would give, where appropriate, the date of the relevant Committee of Ministers decision;

2. comments by the experts;

3. comments by the Secretariat.

51. The DH-PR requested its members to send the Secretariat, before 30 April 1998, details of those cases which they believed should be covered by the aforementioned document, together with any relevant comments. If at all possible, this document should be ready in time for the CDDH meeting (June 1998). It would be examined in depth at the DH-PR's next meeting (September 1998).

52. Furthermore, the Chairman proposed that a drafting group be set up to draft conclusions for the attention of the CDDH. Following the various compromises reached within the Group,

the Chairman drew up preliminary draft conclusions and submitted them to the Committee as a whole. The experts congratulated the Chairman on the difficult and delicate task he had accomplished in producing a text which met with the approval of all the DH-PR's members. The preliminary conclusions, as adopted by the Committee, are set out in Appendix III.

53. Following this detailed discussion, the DH-PR decided to submit to the CDDH for consideration at the latter's next meeting in June 1998:

- the preliminary conclusions appended hereto;

- document DH-PR (98) 1 final (survey of national practice with regard to the reopening of proceedings) incorporating the amendments made by the DH-PR experts (see paragraph 36 above);

- the Secretariat document mentioned in paragraphs 50-51 above.

54. In the light of the guidelines given to it by the CDDH, the DH-PR would continue its examination of this question at its next meeting (September 1998; see below, agenda item 6: future activities).

Item 4 of the agenda: Issues concerning the publication of the judgments of the Court in the Contracting States

55. The Secretariat presented two working papers, one describing the practice of disseminating the case-law of the Strasbourg organs in the States Parties to the Convention (DH-PR(98)3 prov.), and the other inviting the experts to assess this practice and give initial consideration to possible ways of improving it (DH-PR(98)4).

56. The DH-PR thanked the Secretariat for the very useful overview presented. Several experts provided additional information concerning the dissemination of the Strasbourg case-law at national level, as well as corrections and clarifications on the information already contained in this document. The Chairman invited the Committee's members to supply the Secretariat with information by 30 April 1998 for the updating and preparation of a final version of document DH-PR (98) 3 prov.

57. Some experts pointed out that the language situation in their country gave them access, in addition to national publications, to works published in other countries where the same language was spoken. On the other hand, some experts – including several from central and eastern European countries – spoke of difficulties over the translation of texts to be circulated. However, they also reported on current moves to publish selections of the most important judgments and works or translations of comments on human rights case-law.

58. It was noted that the dissemination of legal commentaries could indeed make the case-law more accessible and easier for national bodies to take into account, as well as keeping the general public informed. In one expert's opinion, the State should keep its own organs informed, particularly the courts. On the other hand, the role of the Council of Europe would be to arrange for more general dissemination, particularly among legal professionals. Other speakers drew attention to the fact that states could organise dissemination indirectly, through private initiatives. The role played by non-governmental organisations, especially in certain countries, was also underlined in this connection.

59. The question of dissemination of the Strasbourg case-law arose more particularly with a view to the forthcoming entry into force of Protocol No.11 and the substantial increase in the number of judgments which this reform would probably generate.

60. The experts noted that the creation of Council of Europe Internet sites had markedly improved access to the Court's judgments, to decisions of the Commission and to resolutions of the Committee of Ministers, thus facilitating individual research and the publication of case-law.

61. The official in charge of the Council of Europe Human Rights Information and Documentation Unit, Mr James LAWSON, informed the Committee of significant progress achieved with regard to the availability, on the computer network, of the case-law of the Convention organs. Replying to practical questions raised by the experts, he said that the HUDOC system would be operational in the summer of 1998 and that a CD-ROM was in preparation.

62. Following this exchange of views, the Chairman drew attention to the importance of disseminating the Strasbourg case-law for the purpose of its implementation, both within the respondent State and in other states. The questions raised in the Secretariat's document DH-PR (98) 4 were also discussed. The DH-PR agreed to resume discussion of this item at its next meeting, particularly on the basis of the afore-mentioned document and for the purpose of identifying ways of improving current practice in this matter.

Item 5 of the agenda: Other items on the agenda

63. The DH-PR noted that the Committee of Ministers Rapporteur Group on Human Rights was scheduled to hold a meeting on the afternoon of 11 March 1998. This would be dealing with the proposal for the institution of a Human Rights Commissioner in the Council of Europe. As this item was on the agenda for its present meeting, the DH-PR decided to hold an informal exchange of views. Finding that a number of its members were going to attend the afore-mentioned meeting of the Rapporteur Group, the DH-PR decided to suspend its own meeting for the duration of the other one.

64. For lack of time, the DH-PR decided to postpone until its next meeting the consideration of:

i. the possibility of the Court giving advisory opinions (Chapter VII, Rules 69-77), while observing that no request for an advisory opinion had yet been sent to the Court;

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

Item 6 of the agenda: Date of the next meeting and organisation of future activities

65. The DH-PR decided to hold its 44th meeting from Tuesday 15 to Friday 18 September 1998. It decided to devote this meeting in particular to:

1. an exchange of views with the Registrar of the new Court, focussing especially on certain aspects of the Rules of Procedure of the new Court and on other matters such as:

   a. the possibility of the Court giving advisory opinions

b. the possibility of the Court giving preliminary rulings at the request of domestic courts;

2. a preliminary exchange of views on the possible revision of the Rules of Procedure of the Committee of Ministers in respect of Rule 54, following the entry into force of Protocol no. 11;

3. further discussions of the reopening of proceedings, broadening the subject to cover the re-examination of certain cases at domestic level following judgments of the Court and decisions of the Committee of Ministers;

4. further examination of questions relating to the publication of the Court's judgments in the contracting States.

Item 7 of the agenda: Other business

66. Having learned that the Secretary to the DH-PR, Mr Fredrik SUNDBERG, was unable to attend the present meeting as the result of being hospitalised, the Committee wished him a complete and speedy recovery.

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Appendix I

LIST OF PARTICIPANTS

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* * *

Appendix II

AGENDA

1. Opening of the meeting and adoption of the agenda

2. Follow-up to comments made by the CDDH concerning the implementation of Protocol No. 11 to the European Convention on Human Rights

a. Further discussions on the "Model" Rules of procedure of the new Court concerning requests for interpretation and revision of judgments

b. Exchange of views on Article 36 (1) of the Convention (third party intervention)

c. Exchange of views on the flexibility needed by the Court to decide the size of its Chambers (cf. Rule 27 (2) of the "Model" Rules of procedure)

d. Other issues concerning the implementation of Protocol No. 11

Working documents

- Meeting report of the 42nd meeting of the DH-PR (15-18 September 1997)
  DH-PR (97) 4

- Meeting report of the 43rd meeting of the CDDH (21-24 October 1997)(cf. paras. 59-64)
  CDDH (97) 41

- Summary of the discussions and exchange of views held by the DH-PR from September 1996 to September 1997 on the Rules of procedure of the new Court
  DH-PR (97) 5

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

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

3. Reopening of proceedings at the domestic level following decisions by the Convention organs

Working documents

- Information submitted by the Secretariat
  DH-PR (98) 1 prov.

- Discussion paper prepared by the Secretariat
  DH-PR (98) 2

4. Issues concerning the publication of the judgments of the Court in the Contracting States

Working documents

- Information submitted by the Secretariat
  DH-PR (98) 3 prov.

- Discussion paper prepared by the Secretariat
  DH-PR (98) 4

5. Other items on the agenda
(if time permits)

a. Advisory opinions by the Court

b. Preliminary rulings by the Court upon request of domestic courts

c. Exchange of views on the proposal to create, within the Council of Europe, a Human Rights Commissioner

6. Date of the next meeting and organisation of future activities

7. Other business

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Appendix III

CONCLUSIONS OF THE DH-PR ON REOPENING OF PROCEEDINGS AT THE DOMESTIC LEVEL FOLLOWING DECISIONS BY THE CONVENTION ORGANS

Introduction

At its 43rd meeting (9-12 March 1998), the Committee of Experts for the Improvement of Procedures for the Protection of Human Rights (DH-PR) held an exchange of views on the question of possible reopening of proceedings at the domestic level following decisions of the Convention Organs. At the end of this examination, the DH-PR decided to submit the following conclusions to the Steering Committee for Human Rights (CDDH).

* * *

1. Contracting Parties enjoy a discretion, subject to the control of the Committee of Ministers, as to how they comply with the obligation in Article 53 (future Article 46) of the European Convention on Human Rights ("The Convention") to "abide by the decision of the Court in any case to which they are Parties".

2. The Convention contains no provision imposing an obligation on Contracting Parties to provide in their national law for the reopening of proceedings in cases where the Convention organs have found a breach[1].

3. The Court has held that "... a judgment in which the Court finds a breach imposes on the respondent State a legal obligation to put an end to the breach and make reparation for its consequences in such a way as to restore as far as possible the situation existing before the breach". (case of *Papamichalopoulos v. Greece* [judgment under Article 50] of 31 October 1995, para. 34; series A, Nr. 330-b).

4. The survey of the practice of Contracting Parties in this regard prepared by the Secretariat (DH-PR (98) 1 prov.), as supplemented by the comments of Committee members so far, reveals a wide variation. In a few States there is specific legal provision for the reopening of domestic judicial proceedings following a binding decision of the Convention organs. In others that possibility exists by virtue of general law. In others the situation is unclear, and in others again no such possibility exists. In those States where reopening is possible it has only rarely been invoked, with varying degrees of effectiveness.

5. In discussion a distinction was made between administrative, civil and criminal proceedings:

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1 Some experts considered it necessary to indicate that such an obligation could ensue from the case-law of the Convention Organs

a. Administrative

Where the proceedings are judicial and there is a binding judgment, reopening was considered capable of posing serious problems in certain cases. As regards proceedings which are non-judicial and wholly within the control of the Government (eg. deportation), re-examination and reversal of earlier decisions presents no problem in some States.

b. Civil

Reopening of civil judicial proceedings was considered to present severe difficulties, on grounds inter alia of the principle of legal certainty, the principle of *res judicata* and the effect upon other parties to the domestic proceedings who are not parties to the Convention proceedings. In most, if not all, such cases, financial compensation and/or change in law was likely to be more effective. However, some experts considered that in certain cases, reopening was the only possibility.

c. Criminal

Reopening was again considered often very difficult, on similar grounds of the principle of legal certainty, the principle of *res judicata*, as well as delay and a potential lack of evidence as a result. Some experts, however, considered that, in those cases where the breach found was so serious as to call the conviction into question, reopening could be the only effective way of giving full effect to the Court's judgment. It should be noted that such cases have historically been very rare.

6. Some experts concluded that it was desirable, at least for certain exceptional criminal cases and even others, to have available in national law provision for the possibility of reopening such cases. Others were unconvinced that such a procedure was either necessary, believing that other preferable means of compliance would be available, or desirable, pointing especially to the principle of legal certainty.

7. It was agreed to keep the position under review, in the light of developments in the case-law of the Court of Human Rights and of national courts.