COUNCIL OF EUROPE CONSEIL DE L'EUROPE

.
Strasbourg, 14 September 1999
DH-PR(1999)018

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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46th meeting, 7 – 10 September 1999

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REPORT

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Introduction

1. The Committee of Experts for the Improvement of Procedures for the Protection of Human Rights (DH-PR) held its 46th meeting at the Human Rights Building in Strasbourg (Directorate Room), from 7 to 10 September 1999. The meeting was chaired by Mr Carl Henrik EHRENKRONA (Sweden). The list of participants appears in Appendix I. The agenda as adopted appears in Appendix II.

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

i. finalised the preparation of a draft recommendation, together with a draft explanatory report, on the re-examination or the re-opening of certain cases at domestic level following judgments of the European Court of Human Rights (item 3 of the agenda and Appendix III);

ii. held an exchange of views and information with a representative of the Registry of the European Court of Human Rights on the recent developments of the Court's case-load and procedure (item 2 of the agenda);

iii. held an exchange of views on the possible content and the procedure to follow for a revision of the Committee of Ministers' Rules of Procedure, further to the entry into force of Protocol No. 11 to the European Convention on Human Rights (item 4 of the agenda).

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

3. See introduction.

Item 2 of the agenda: Exchange of views with a member of the Registry of the European Court of Human Rights, in particular on developments concerning the Court's Rules of procedure

4. The Deputy to the Registrar of the European Court of Human Rights, Mr W. STRASSER, informed the Committee of the growing number of cases submitted to the Court and of the arrangements which the Registry had made to cope therewith. He expressed the Court's preoccupation over the budgetary restrictions with which the Organisation is confronted, especially at this moment in time when the Court is in particular need of strengthening its structures and human resources.

5. In the ensuing exchange of views reference was in particular made to the importance of ensuring that the Convention and the Court's case-law are considered part of the Contracting Parties' domestic law : this would most likely reduce the number of applications to the Court in Strasbourg, and, for those cases which could not be resolved at a national level, it would allow the Court to base its examination on well-reasoned national decisions, something which would facilitate its work. With the same aim, encouraging friendly settlements could also lighten the workload of the Court. Finally, efficient execution would also help to prevent the repetition of violations already established.

Agenda item 3: Preparation of a draft recommendation on reopening or re-examining certain cases at domestic level after judgments of the European Court of Human Rights or decisions of the Committee of Ministers

6. The DH-PR continued its work of preparing the draft recommendation concerning the re-examination and reopening of certain cases at domestic level following decisions of the Court and the Committee of Ministers. The November 1998 terms of reference from the CDDH will be found in document DH-PR(99)1. The experts found, however, that the reference to the decisions of the Committee of Ministers in the title and the text is no longer necessary. The judicial functions of the Committee of Ministers under the former Article 32 of the Convention will in all likelihood have ceased by the time this recommendation is adopted. This being said, it is understood that the principles of this recommendation will apply also to such cases, should any still be examined at that time. The DH-PR decided to include this information in a footnote at the beginning of the draft recommendation.

7. The basis for the discussion was the draft recommendation and draft explanatory memorandum which the DH-PR working group had produced at its meeting in Strasbourg on 2 and 3 June 1999 (document GT-DH-PR(99)1, Appendices IV and V).

Examination of the draft recommendation *(document GT-DH-PR(99)1, Appendix IV)*

8. The chair of the working group, Mr R. BÖCKER (Netherlands), said that while the text was very similar to the one used as a discussion basis at the 45th DH-PR meeting, in March 1999, the working group had decided to delete one or two phrases which had appeared in square brackets and to give greater prominence to *restitutio in integrum*, i.e. ensuring that the injured party was put in the same position as he or she was before the violation. The text pointed out that it was for the national authorities to decide which measures were appropriate in order to reach this result.

9. On this question, some of the experts thought that there might be a contradiction if the text were to state, on the one hand, that the Parties had such a discretion while on the other hand re-examination or reopening were described as mandatory in some cases as being the only way of achieving *restitutio in integrum*. In reply, it was explained that it was a fact of international law that the State's margin of discretion could become so narrow that only one specific action could ensure respect for the obligation of result imposed on the State.

10. Some experts thought there should not be any organic link between the first two paragraphs in the preamble and suggested a text which avoided creating such a link. In their view, the exceptional measures to be taken in some cases were not required of Contracting Parties under Article 46 ECHR to abide by the judgments of the Court.

11. The expert from Turkey, with the support of the experts from France and Spain, expressed the wish that his proposal for an alternative text for the second paragraph of the preamble appears in the meeting report. It reads as follows:

"Bearing in mind that certain circumstances may entail the adoption of measures, other than just satisfaction awarded by the Court in accordance with Article 41 of the Convention to remedy the situation caused by the violation of the Convention, so that the injured party is put, as far as possible, in the same situation as he/she enjoyed prior to the violation (*restitutio in integrum*)."

12. The majority of experts preferred however to maintain the wording proposed by the Working Group for the first two paragraphs of the preamble.

13. Another expert said that the text sometimes seemed to use the terms "reopening"/"re-examination" and "*restitutio in integrum"* interchangeably. In his view the text should confine itself to the first two as being the subject of the draft recommendation. In reply, it was explained that the different terms were an attempt to spell out the logic of the draft recommendation: the final aim was to achieve, as far as possible, *restitutio in integrum* in certain particularly serious cases, reopening or re-examination of the cases being the most appropriate way of accomplishing that.

14. Some of the experts wondered whether the preamble should not expressly include a particularly relevant passage from the Papamichalopoulos judgment of 31 October 1995, in which the Court held:

> "*… 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" (Papamichalopoulos v. Greece case of 31 October 1995, paragraph 34, Series A, No.330-B).*

15. Others thought it preferable to refer to it only in the explanatory memorandum, as the working group had suggested (see paragraph 20 below).

16. After this examination, the DH-PR adopted the draft recommendation as reproduced in Appendix III to this report.

Examination of the draft explanatory memorandum *(document GT-DH-PR(99)1, Appendix V)*

17. The DH-PR considered the elements put forward by the working group for the draft explanatory memorandum. These are reproduced in Appendix V to the report GT-DH-PR (99) 1. All references below refer to this text.

18. With regard to terminology, the DH-PR decided to refer systematically first to re-examination of the case, this being the generic term and then to re-opening of the proceedings, the latter referring only to the re-examination of judicial proceedings. It was also deemed necessary to introduce this change to the title of the draft recommendation. In addition, the DH-PR decided to replace the term "applicant" by "injured party" to reflect the real situation of the individual concerned, namely that of an applicant who has won his or her case.

19. Paragraphs 1, 5 and 8 of the text presented by the Working Group were adopted with only stylistic changes.

20. As regards paragraph 2 of this text, which contained in particular a quotation from the above-mentioned *Papamichalopoulos* judgment (see paragraphs 14 and 15 above), certain experts expressed concern about this reference : the Papamichalopoulos case did not concern a question of re-examination. They also expressed doubts with regard to the other case mentioned in the paragraph, the *Socialist Party* case, indicating that the case only dealt with a very specific situation and did not set out any general principles. Many other experts considered, however, that these references were relevant : the citation from the *Papamichalopoulos* judgment only expressed a very firmly established principle of

international law which the Court could not neglect ; although the Socialist Party case dealt with a specific situation, it clearly confirmed the principle of *restitutio in integrum*, which had furthermore been applied by the Committee of Ministers in a good number of other resolutions. One expert suggested that the Convention system contained such a specific definition of the principle of *restitutio in integrum* that it was not proper to refer to this principle in its general wording. After this debate, the DH-PR decided to retain the reference to the *Papamichalopoulos* case, but to delete that to the Socialist Party case and instead make a more general reference to the application of the principle of *restitutio in integrum* in the Committee of Ministers' resolutions.

21. Several experts found paragraph 3 proposed by the Working Party redundant, but the majority were of the view that this paragraph contained some valuable information as to why the recommendation was being elaborated. The DH-PR decided to maintain the essence of this paragraph but to add the new text as a last element in paragraph 2.

22 . In order to take into account the specific situations of common law countries it was decided to change the words « *ordinary legislation* » in paragraph 4 to « *existing law* ».

23. As regards paragraphs 6 and 7, the DH-PR found it more logical to inverse their order. The experts went on to have a lengthy discussion as to the appropriate meaning of the terms « *re-examination* » and « *reopening* ». Agreement emerged that re-examination was the generic term. The working group's proposal to consider reopening as a special case of re-examination involving a reconsideration of all the aspects of a case, was, however, eventually abandoned in favour of a definition according to which this term is reserved for judicial proceedings. This new definition thereafter led the DH-PR to make certain changes in paragraph 6 of the text proposed by the Working Party.

24. The DH-PR slightly altered the wording of paragraph 10, so as to make clearer the idea that, apart from serious criminal law situations, the recommendation covers all other situations in which it seems apparent that the need to guarantee the individual's rights and the execution of the Court's judgment take precedence over the need to respect the principles underlying legal certainty, notwithstanding the importance of these principles.

25. Several experts thought that it was necessary to qualify the examples given in paragraph 12, sub-paragraph (ii), by adding at the end of the text that, as the text of the recommendation indicated, such shortcomings should be of sufficient gravity to cast serious doubts on the result of domestic proceedings. This proposal was accepted.

26. Other experts stressed that paragraph 12 should either dispense with examples, or contain others, in order to avoid giving an incomplete impression of the nature of the problems that the recommendation seeks to cover. In particular, they suggested adding a reference to the problems that would be caused by procedural shortcomings related to the composition, independence or subjective impartiality of the domestic court. In addition, one expert proposed adding an example about violations of freedom of association (Art. 11 ECHR). However, the DH-PR considered it preferable to limit itself to the examples chosen by the Working Group, as the addition of new examples, especially those concerning the procedural shortcomings referred to, required lengthy explanations. Once again, the DH-PR stressed that the examples mentioned in the sub-paragraph were merely illustrations, as was appropriate for an explanatory memorandum. These cases should not be considered as the only examples, or the most important.

27. Following this discussion, the expert from Turkey, with the support of the expert from France, expressed the wish that his proposal for an alternative text for paragraph 12 of the

explanatory memorandum, without examples, should appear in the meeting report. The text of the expert from Turkey reads as follows:

“Sub-paragraph (ii) is intended to indicate, in the cases where the above-mentioned conditions are met, the kind of violations in which re-examination or reopening of the case will be of particular importance”.

28. The DH-PR agreed to remove paragraph 14 from the draft explanatory memorandum. There was no great need for this text and it produced an unnecessary doubt regarding the willingness of the States to implement the Court's judgments.

29. The experts also agreed to remove the word "expressly" in paragraph 15. Many experts felt that there should be more emphasis placed on the right of the injured parties to submit themselves requests to the court or other organ competent to grant *restitutio in integrum*. Leaving this initiative to prosecutor or some other authority, which had perhaps been the injured party's opponent in the domestic proceedings, entailed the risk of obtaining results that did not take sufficient account of the injured party’s interests. However, other experts felt that it was necessary to respect the States' different traditions in this area and that such a right was not indispensible to ensure that the interests of the injured parties were protected. Some experts thought that it was not necessary to consider this issue in the explanatory memorandum. After discussion, the experts agreed, however, to strengthen the text by replacing the expression "would suggest” with “implies”.

30. With regard to the "mass cases" mentioned in paragraph 16, the experts agreed to add a phrase at the end of the paragraph, indicating that other measures, apart from re-opening, may be necessary to comply with the Court's judgments. One expert mentioned amnesty as an example. Others referred to general measures such as legislative changes.

31. Paragraph 17 gave rise to discussion, since some legal systems are not familiar with the notion of "good faith third parties". Moreover, some experts stressed that the third parties affected by a re-opening were not necessarily parties to the contested proceedings. The example was given of a person who purchased in good faith certain confiscated goods. Various solutions were proposed and it was eventually decided to delete the reference to the impugned domestic proceedings and to note at the end of the first sentence that the rights to be taken into account were above all those that had been obtained in good faith.

32. A number of experts also asked whether it was appropriate in an explanatory memorandum to give indications regarding the case where domestic law did not deal with the rights of third parties. The DH-PR agreed to remove these indications.

33. Paragraph 18 of the Working Party’s text gave rise to a number of criticisms in that some experts considered that the question of re-examination should not arise if there had been just satisfaction. It was pointed out, however, that in practice the majority of cases of re-examination took place after the Court had decided the question of just satisfaction and that the whole idea behind the recommendation was that certain violations could not be adequately compensated by a simple finding of violation or a sum of money. Some experts feared that the first sentence could give the idea that re-examination was an alternative to the just satisfaction. They stressed that just satisfaction must remain the rule, and that re-examination should continue to be an exceptional measure. Accordingly, they suggested its deletion. Other experts thought that the first sentence contained nothing new and could for that reason be deleted. The DH-PR agreed to remove the sentence.

34. Following this examination, the DH-PR adopted the text of the draft explanatory memorandum as it is presented in Appendix III to the present report.

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35. Before leaving the item, the DH-PR decided to submit to the CDDH, for possible adoption and transmission to the Committee of Ministers, the texts of the draft recommendation and explanatory memorandum reproduced in Appendix III. Herewith, the DH-PR considers that it has fulfilled the mission given to it by the CDDH. It notes that the Secretariat will transmit the present report in time for the 47th meeting of the CDDH (30 November – 3 December 1999), at which meeting these texts could be examined. The Chairman of the DH-PR will participate at this meeting and will, if necessary, present the texts and furnish the CDDH with any clarifications which might be called for.

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

36. Pursuant to the ad hoc terms of reference given to the CDDH by the Ministers' Deputies in December 1998 (see document DH-PR (99)1), the DH-PR undertook preliminary work for a revision of the rules adopted by the Committee of Ministers concerning Article 54, further to the entry into force of Protocol N° 11. Taking account of the time spent at the current meeting in examining item 3 of the agenda, the DH-PR decided to devote part of its next meeting (April 2000) to consideration of the present item, whilst bearing in mind the fact that the terms of reference were due to expire on 31 December 2000. At this point, an exchange of views was held on the possible content of the revision and on the procedure to be followed to this end.

Possible content of the revision

37. The DH-PR took note of the document by the Secretariat outlining the practice of the Committee of Ministers with regard to control of execution of the Court's judgments (DH-PR (99) 13). On this matter, the Greek expert expressed the strong reluctance of the authorities of his country with regard to this document, as the text accorded a disproportionate place -a long appendix- to a case concerning his country. Whilst accepting that this case is important, the expert believed that this should be done in an appropriate manner in the body of the text (not in the appendix, which should be removed), and that other relevant examples should also be mentioned. The DH-PR decided to adopt this approach, while expressing its preference for a text that would develop the narrative section without a need to increase the number of appendices.

38. The Secretariat noted these observations, which would be taken into due account during the preparation of the consolidated text that could serve as a basis for future discussions (see below: procedure to be followed).

39. With regard to the possible content of the revision that the DH-PR had been invited to submit to the CDDH, a number of points were raised in addition to those already mentioned at the 45th meeting (see DH-PR (99) 9, agenda item 4, paragraph 40). It was agreed that all the points raised at the 45th and 46th meetings would form the subject-matter of an in-depth discussion at the DH-PR's 47th meeting (April 2000), on the basis of a consolidated document to be prepared by the Secretariat.

40. The following additional points in particular were raised at the present meeting:

- the problem of the very considerable number of cases before the Committee of Ministers; the need to identify what would facilitate their handling;

- definition of modalities of payment of the just satisfaction and of default interest;

- arrangements to inform the injured party about follow-up to be given to his or her case within the Committee of Ministers;

- transparency on the part of the Committee of Ministers concerning its activities on execution of the Court's judgments; for the moment, confidentiality remains the rule, although, on the one hand, the Committee had decided to move towards transparency in other areas of its work, and on the other hand, Protocol N° 11 emphasised disclosure of proceedings;

- the introduction of greater clarity in the use of interim resolutions, which were currently used for a variety of purposes, e.g. to respond to public interest, to provide guidance to governments on the manner of fulfilling their obligations or to express the Committee of Ministers' criticisms.

Procedure to be followed

41. The DH-PR decided to direct the Secretariat, in co-operation with the Chair, to draw up a consolidated document containing preliminary points for discussion during elaboration of a draft revised version of the Rules of the Committee of Ministers at the DH-PR's 47th meeting (12-14 April 2000). At that date, the DH-PR would decide on the composition of a planned working group to continue preparation of the draft text. At its 48th meeting (beginning of September 2000), the DH-PR would complete this text and submit it to the CDDH for possible adoption at the latter's 49th meeting (3-6 October 2000). The DH-PR was aware of the relatively short time period available to it. It would do everything possible to ensure that the CDDH could fulfil the terms of reference in good time, i.e., by 31 December 2000.

Items 5, 6 and 7 of the agenda: **Publication and circulation of the case-law of the Convention organs in the Contracting States**

Exchange of views on the Council of Europe Human Rights Commissioner

Other business:
- Other questions relating to the new Court
- Hudoc Databases

42. In view of lack of time, the examination of these items was postponed to the next meeting.

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

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

(i). Continuation of the revision of the Rules of procedure of the Committee of Ministers, further to the entry into force of Protocol No. 11 ECHR

(ii). Publication and circulation of the practice of the Convention organs in the Contracting States

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

(iv) Information concerning development in the functioning of the new European Court of Human Rights.

Item 9 of the Agenda: Dates of the next meetings

44. Subject to approval of the CDDH, the DH-PR decided on the following dates for its next meetings:

- 47th meeting: 12 – 14 April 2000.
- Meeting of a Working Group : [… June 2000]
- 48th meeting : 6-8 September 2000

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Appendix I / Annexe I

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EUROPEAN COMMISSION/COMMISSION EUROPEENNE
Apologised/Excusé

* * *

OBSERVERS/OBSERVATEURS

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* * *

AMNESTY INTERNATIONAL

INTERNATIONAL COMMISSION OF JURISTS/COMMISSION INTERNATIONALE DE JURISTES

INTERNATIONAL FEDERATION OF HUMAN RIGHTS (FIDH)
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Mr Wolfgang STRASSER, Deputy to the Registrar of the European Court of Human Rights/Adjoint au Greffier de la Cour européenne des Droits de l'Homme

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Mme Martine CARALY
Mme Josette YOESLE-BLANC

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Appendix II

AGENDA

1. Opening of the meeting and adoption of the agenda

- Draft agenda
DH-PR (99) OJ 2

2. [Exchange of views with the Registrar of the European Court of Human Rights, in particular on the developpements concerning the Rules of procedure of the Court]

- Rules of procedure of the European Court of Human Rights

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

- Terms of reference given by the CDDH to the DH-PR on 6 November1998, of which the Ministers Deputies took note at their 653rd meeting
(16-17 December 1998)
DH-PR (99) 1

- Report of the 45th meeting of the meeting of the DH-PR
(16-19 March 1999)
DH-PR (99) 9

- Report of the meeting of the Working Group of the DH-PR

- Reopening of proceedings : overview of related national legislation and case-law (new document, July 1999)
DH-PR (99) 10

- Extract of the report of the 46th meeting of the CDDH
(22-25 June 1999)
DH-PR (99) 11

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

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

- Rules of procedure of the Committee of Ministers

- Report of the 45th meeting of the DH-PR
(16-19 March 1999)
DH-PR (99) 9

- Information documents prepared by the Directorate of Human Rights for each HR meeting of the Committee of Ministers
  DH-PR (99) 12

- Secretariat memorandum on the practices of the Committee of Ministers concerning the control of the implementation of the judgements of the Court
  DH-PR (99) 13

- Secretariat document on general measures
  DH-PR (99) 14

- Rules of procedure of the European Court of Human Rights

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

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

- Rules of procedure of the European Court of Human Rights

- Report of the 45th meeting of the DH-PR
  (16-19 March 1999)
  DH-PR (99) 9

- Overview of the existing situation
  (new document, July 1999)
  DH-PR (99) 15

- Translation of the case-law of the European Cour of Human Rights into languages of the new member States and countries seeking membership of the Council of Europe
  H (99) 5 (english only)

- Information document on Hudoc databases

6. Informations on the Council of Europe Human Rights Commissioner

- Terms of reference of the Council of Europe Human Rights Commissioner

7. Other business

- Secretariat memorandum on the issue of the just satisfaction
  DH-PR (99) 16

8. Items for the Agenda of the next meeting

9. Dates of the next meetings

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Appendix III

Draft Recommendation and draft explanatory memorandum concerning the re-examination or reopening of certain cases at domestic level following judgments of the European Court of Human Rights[1]

[Text adopted by the DH-PR at its 46th meeting (7-10 September 1999)]

Preamble

a. Noting that under Article 46 of the Convention on Human Rights and Fundamental Freedoms ("the Convention") the Contracting Parties have accepted the obligation to abide by the final judgment of the European Court of Human Rights ("the Court") in any case to which they are parties and that the Committee of Ministers shall supervise its execution;

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

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

d. Bearing in mind, however, that the practice of the Committee of Ministers in supervising the execution of the Court's judgments shows that in exceptional circumstances the re-examination of a case or a reopening of proceedings has proved the most efficient, if not the only, means of achieving *restitutio in integrum;*

Operative part

1. In the light of these considerations the Contracting Parties are invited to ensure that there exist at national level adequate possibilities to achieve, as far as possible, *restitutio in integrum*;

2. The Contracting Parties are, in particular, encouraged to examine their national legal systems with a view to ensuring that there exist adequate possibilities of re-examination of the case, including reopening of proceedings, in instances where the Court has found a violation of the Convention, especially where:

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

[1] Considering that the judicial functions of the Committee of Ministers under the former Article 32 of the Convention will in all likelihood have ceased when this recommendation is adopted, no mention of the Committee of Ministers decisions is made. It is understood, however, that the principles of this recommendation will apply also to such cases, should any still be examined at that time.

(ii) the judgment of the Court leads to the conclusion that

(a) the impugned domestic decision is on the merits contrary to the Convention, or

(b) the violation found is based on procedural errors or shortcomings of such gravity that a serious doubt is cast on the outcome of the domestic proceedings complained of.

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DRAFT EXPLANATORY MEMORANDUM

Introduction

1. The Contracting Parties to the Convention enjoy a discretion, subject to the supervision of the Committee of Ministers, as to how they comply with the obligation in Article 46 of the Convention "to abide by the final judgment of the Court in any case to which they are parties."

2. The Court has held: "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" (see inter alia the Court's judgment in the *Papamichalopoulos case against Greece* of 31 October 1995, paragraph 34, Series A 330-B). The Court was here expressing the well-known international law principle of *restitutio in integrum*, which has also frequently been applied by the Committee of Ministers in its resolutions. In this context, the need to improve the possibilities under national legal systems to ensure *restitutio in integrum* for the injured party has become increasingly apparent.

3. Although the Convention contains no provision imposing an obligation on Contracting Parties to provide in their national law for the re-examination or reopening of proceedings, the existence of such possibilities have, in special circumstances, proven to be important, and indeed in some cases the only, means to achieve *restitutio in integrum*. An increasing number of States have adopted special legislation providing for the possibility of such re-examination or reopening. In other States this possibility has been developed by the courts and national authorities under existing law.

4. The present recommendation is a consequence of these developments. It invites all Contracting Parties to ensure that their legal systems contain the necessary possibilities to achieve, as far as possible, *restitutio in integrum*, and, in particular, provide adequate possibilities for re-examining cases, including reopening proceedings.

5. As regards the terms, the recommendation uses "re-examination" as the generic term. The term "reopening of proceedings" denotes the reopening of court proceedings, as a specific means of re-examination. Violations of the Convention may be remedied by different measures ranging from administrative re-examination of a case (e.g. granting a residence permit previously refused) to the full reopening of judicial proceedings (e.g. in cases of criminal convictions).

6. The recommendation applies primarily to judicial proceedings where existing law may pose the greatest obstacles to new proceedings. The recommendation is, however, also

applicable to administrative or other measures or proceedings, although such legal obstacles will usually be less important in these areas.

7. There follow, first, specific comments relating to the two operative paragraphs of the recommendation and, secondly, more general comments on questions not explicitly dealt with in the recommendation.

Comments on the operative provisions

8. Paragraph 1 sets out the basic principle behind the recommendation that all victims of violations of the Convention should be entitled, as far as possible, to an effective *restitutio in integrum*. The Contracting Parties should, accordingly, review their legal systems with a view to ensuring that the necessary possibilities exist.

9. Paragraph 2 encourages States which have not already done so, to provide for the possibility of re-examining cases, including reopening of domestic proceedings, in order to give full effect to the judgments of the Court. The paragraph also sets out those circumstances in which re-examination or reopening is of special importance, in some instances perhaps the only means, to achieve *restitutio in integrum*.

10. The practice of the Convention organs has demonstrated that it is primarily in the field of criminal law that the re-examination of a case, including the reopening of proceedings, is of the greatest importance. The recommendation is, however, not limited to criminal law, but covers any category of cases, in particular those satisfying the criteria enumerated in sub-paragraphs (i) and (ii). The purpose of these additional criteria is to identify those exceptional situations in which the objectives of securing the rights of the individual and the effective implementation of the Court's judgments prevail over the principles underlying the doctrine of *res judicata*, in particular that of legal certainty, notwithstanding the undoubted importance of these principles.

Sub-paragraph (i) is intended to cover the situation in which the injured party continues to suffer very serious negative consequences, not capable of being remedied by just satisfaction, because of the outcome of domestic proceedings. It applies in particular to persons who have been sentenced to lengthy prison sentences and who are still in prison when the Convention organs examine the "case". It applies, however, also in other areas, for example, when a person is unjustifiably denied certain civil or political rights (in particular in case of loss of, or non-recognition of legal capacity or personality, bankruptcy declarations or prohibitions of political activity), if a person is expelled in violation of his or her right to family life or if a child has been unjustifiedly forbidden contacts with his or her parents. It is understood that there must exist a direct causal link between the violation found and the continuing suffering of the injured party.

12. Sub-paragraph (ii) is intended to indicate, in the cases where the above-mentioned conditions are met, the kind of violations in which re-examination of the case or reopening of the proceedings will be of particular importance. Examples of situations aimed at under item (a) are criminal convictions violating Article 10 because the statements characterised as criminal by the national authorities constitute legitimate exercise of the injured party's freedom of expression or violating Article 9 because the behaviour characterised as criminal is a legitimate exercise of freedom of religion. Examples of situations aimed at under item (b) are where the injured party did not have the time and facilities to prepare his or her defence in criminal proceedings, where the conviction was based on statements extracted under torture or on material which the injured party had no possibility of verifying, or where in civil proceedings the parties were not treated with due respect for the principle of equality of arms.

Any such shortcomings must, as appears from the text of the recommendation itself, be of such a gravity that serious doubt is cast on the outcome of the domestic proceedings.

Other considerations

13. The recommendation does not deal with the problem of who ought to be empowered to ask for reopening or re-examination. Considering that the basic aim of the recommendation is to ensure an adequate protection of the victims of certain grave violations of the Convention found by the Court, the logic of the system implies that the individuals concerned should have the right to submit the necessary requests to the competent court or other domestic organ. Considering the different traditions of the Contracting Parties, no provision to this effect has, however, been included in the recommendation.

14. The recommendation does not address the special problem of "mass cases", i.e. cases in which a certain structural deficiency leads to a great number of violations of the Convention. In such cases it is in principle best left to the State concerned to decide whether or not reopening or re-examination are realistic solutions or, whether other measures are appropriate.

15. When drafting the recommendation it was recognised that reopening or re-examination could pose problems for third parties, in particular when these have acquired rights in good faith. This problem exists, however, already in the application of the ordinary domestic rules for re-examination of cases or reopening of the proceedings. The solutions applied in these cases ought to be applicable, at least *mutatis mutandis*, also to cases where re-examination or reopening was ordered in order to give effect to judgments of the Court.

16. In cases of re-examination or reopening, in which the Court has awarded some just satisfaction, the question of whether, and if so, how it should be taken into account will be within the discretion to the competent domestic courts or authorities taking into account the specific circumstances of each case.

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