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The Reform of the Control Mechanism of the European Convention for the
Protection of Human Rights and Fundamental Freedoms

- The New Permanent European Court of Human Rights -

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ABBREVIATIONS

ECPHR - European Convention for the Protection of Human Rights and Fundamental Freedoms

Court - European Court of Human Rights

Commission - European Commission of Human Rights

Protocol 11 - Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, restructuring the control machinery established thereby

New Article - article of the ECPHR, introduced by Protocol 11

Explanatory Report - Explanatory Report to Protocol

THE REFORM IN THE CONTROL MACHINERY OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS
THE NEW PERMANENT EUROPEAN COURT OF HUMAN RIGHTS

1. Genesis of the Reform

- 1.1. Universal and regional factors in the development of the ECPHR
- 1.2. ECPHR - A qualitatively new international legal protection of human rights
- 1.3. Assessment of control and implementation of the ECPHR.
- 1.4. Evolutionary perfection of the control machinery of the ECPHR.
- 1.5. Reform through Protocol 11.
 - 1.5.1. Development of the idea of a "merger" of the Commission and the Court
 - 1.5.2. Factors influencing the reform
 - 1.5.3. General assessment of the reform
 - 1.5.4. Significance of the reform for the countries of Central and Eastern Europe

2. International Legal Personality of the Court

- 2.1. International legal force of Protocol 11
 - 2.1.1. Entry into force
- 2.2. International legal personality of the Court
- 2.3. The Court - new subject under international law

3. The Registry of the Court

- 3.1. Administrative independence of the Court
- 3.2. Status and functions of legal secretaries

4. Composition of the Court

- 4.1. Judges
 - 4.1.1. Criteria for office
 - 4.1.2. Election of judges
 - 4.1.3. Terms of office
 - 4.1.4. Age restrictions
- 4.2. Plenary Court

- 4.3. Committees of three judges
- 4.4. Chambers of the Court
- 4.5. Grand Chamber of the Court
- 4.6. Budget of the Court
- 5. Procedure
 - 5.1. Individual and inter-State applications
 - 5.2. Applicant's correspondence with the Registry of the Court prior to registration of the application
 - 5.3 Judge-rapporteur
 - 5.4. Committee of three judges
 - 5.5. Chambers of the Court
 - 5.6. Decision on admissibility
 - 5.6.1. Criteria of admissibility
 - 5.6.1.1. The six-month rule
 - 5.6.1.2. Exhaustion of domestic remedies
 - 5.7. Case investigation procedure
 - 5.8. Friendly settlement
 - 5.9. Discussion on the merits
 - 5.9.1. Third-party intervention
 - 5.9.2. Striking out applications
 - 5.9.3. Openness of the procedure
 - 5.10. Interim Measures
 - 5.11. Decisions and judgements
 - 5.11.1. Decisions of the Court
 - 5.11.1.1. Decisions on inadmissibility of the application
 - 5.11.1.2. Decisions to strike out an application
 - 5.11.1.3. Decisions on friendly settlement
 - 5.11.1.4. Advisory opinions
 - 5.11.2. Judgements of the Court on the merits of a

case

5.12. Compulsory jurisdiction

5.13. Role of the Committee of Ministers of the Council
of Europe

5.13.1. Role of the Secretary General of the
Council of Europe

5.14. Language issues

5.15. Legal aid

5.16. Preparatory stage

THE REFORM OF THE CONTROL MECHANISM OF THE EUROPEAN CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS

THE NEW PERMANENT EUROPEAN COURT OF HUMAN RIGHTS

1. GENESIS OF THE REFORM

Universal and regional protection of human rights have gone hand in hand in the process of the establishment and development of the ECPHR. Thanks to their stronger, compared to the other UN-member states, political, economic, social and cultural domination, the European states have proved more efficient in developing and implementing the human rights proclaimed and regulated by treaty by the UN. International judicial protection of human rights provided by the ECPHR is a qualitatively new step in the development of this sphere of international law.

The present institutionalized control system of the ECPHR combines political (Committee of Ministers of the Council of Europe) and judicial structures (the Court and the Commission). These have shown sufficient flexibility to meet not only the requirement of legal protection of human rights but also political requirements of the States Parties, especially in complex and delicate cases. In addition the ECPHR provides for a critical interaction between the case law practice of the Commission and the Court and for its improvement. Confidence in these bodies, both on the part of the State Parties to the ECPHR and on the part of individual applicants and their prestige have been constantly growing. Strasbourg jurisprudence has greatly influenced the national law of the States parties to the ECPHR.

A backlog of applications necessitated a number of improvements in the control machinery. These were both of a structural and a procedural nature and were aimed at improving the work both of the Court and of the Commission. The present control system, albeit some shortcomings, has been operating quite successfully and may boast some remarkable achievements. They were the result of the work of the members of the Commission, the Court and their Secretariats. Thus the European regional system of international legal protection of human rights has emerged as the most efficient in the world.

Protocol 11, opened for signing by the Council of Europe member States on May 11, 1994, envisages radical changes in the control machinery of the ECPHR. It provides for terminating the activities of the present control bodies - the Commission and the Court, and for setting up a Permanent Court of Human Rights. The Committee of Ministers no longer takes part in deciding cases. The jurisdiction of the Court will be binding for the States parties to the ECPHR as well as the right to individual application.

The reform is a political and legal challenge for united democratic Europe in which protection of human rights is still vulnerable. The new Court and the States parties to the ECPHR should seek to retain this high level of jurisdiction and do everything possible to improve the protection of human rights. This will determine the success of the reform.

In drafting Protocol 11 its authors sought to establish a new control system capable of meeting present needs and future challenges. The problem of the reform was perceived as being of great importance and scope. The legislative process was influenced by a number of factors. One was the extension of the operation of the ECPHR to the Eastern part of the European continent. This resulted in the emergence of new geographical and political realities expected to give rise to new legal, political and procedural problems. This will probably impart new dimensions in the interpretation and implementation of the Convention. The extent of these changes is difficult to project. But be as it may, the authors of Protocol 11 were guided by their striving to strengthen the legal aspects in jurisdiction and exclude the political element (represented by

the Committee of Ministers) and to ensure the mandatory jurisdiction of the Court and the right to individual application, these principles also covering the new East European states which are becoming or will become parties to the Convention.

Along with these factors of a prevailing legal-political significance, there were also a number of others, mainly of a qualitative nature, which also influenced the process of the reform. These are the growing number of applications and pending cases, the large number (almost 80) of members of the Commission and the Court, etc.

Following years of discussions, a political compromise was reached in favour of the most radical version of the reform. Probably that is why Protocol 11 bears the signs of a difficultly achieved political compromise which, moreover, had to be reached against time. Drafted under the pressure of time, today this Protocol is a legal and political reality. It would not be realistic to expect its amendment before its entry into force which will probably take place at the turn of the century. The most appropriate approach now is concentrate on the solution of problems in the implementation of Protocol 11 so as to make the best out of its provisions. A number of compromise formulations, emerging as weak points in the text of the Protocol, could be mended by flexible interpretations both in the Rules of the Court and in its practice.

The new Permanent European Court of Human Rights the jurisdiction of which will be free of political elements, will no doubt consolidate the all-European legal space established by the ECPHR now also including the countries of Central and Eastern Europe which have become parties to the ECPHR. Independent judicial control exercised in Strasbourg is an important legal guarantee of the irreversibility of democratic reforms in Eastern Europe and at the same time gives an impetus to their development in compliance with all-European criteria underlying the so-called "Strasbourg Law". It has a strong positive effect on the protection of human rights in the national law of the countries in this part of the Continent. Their national law should be harmonized with ECPHR standards. Strasbourg law encourages better awareness of equality between citizens and the state apparatus. It makes representatives of state institutions realize that they may be controlled by a supranational legal institution. The legal consciousness inherited from totalitarian times in the Eastern part of the continent changes with the realization that in Strasbourg jurisdiction the State has no influence over judgment on claims lodged against it. Therefore it would not be an overstatement to claim that the ECPHR and the Permanent Court form one of the mainstays of the legal protection of human rights in the East European countries. But they still remain a somewhat unknown phenomenon in the legal realities in these States. That is why additional efforts are necessary to overcome this situation.

The reform also entails some risks stemming from the inclusion of the East European states in the Strasbourg system. One of these refers to the preservation of the present high criteria in implementing the Convention. These should remain but it should not be forgotten that the East European states are only at the beginning of a long and difficult process of democratization in the conditions of market economy. The problem here is whether the reformed Strasbourg system of purely legal control of obligations under the ECPHR will prove flexible enough to meet possible serious difficulties experienced by the East European states in implementing the Convention.

From a more general point of view, the practical importance of the accession of the East European countries to the ECPHR may be seen as a first stage in their integration in already existing democratic European institutions. It is a qualitatively new stage in the development of integration between the European states in the humanitarian sphere. The ECPHR is an unprecedented international law document in its definition of the rights it protects as "common heritage" of all European states - parties to the ECPHR and as an all-

European achievement based not only on common values but also on common heritage of political traditions and ideas.

2. INTERNATIONAL LEGAL PERSONALITY OF THE COURT

In its essence Protocol 11 is an international legal treaty amending the content of the ECPHR. As its main purpose is to regulate the statute of the new Permanent Court, it is a constituent act of a new subject of international law - the Permanent Court.

The Protocol does not provide for the making of reservations and actually excludes them.

Protocol 11 is supplemented by an appendix with the headings of articles to be inserted into the text of the ECPHR and to the protocols thereto. These headings have been added for the sake of a better understanding of the text and have no legal force. The Explanatory Report attached to Protocol 11 was discussed and approved with the Protocol by the states which took part in its drafting. But it, too, has no legal force. The Explanatory Report lacks the characteristic features of an international treaty and is not subject to approval by the states binding themselves to Protocol 11. Moreover, it can hardly serve as an authoritative interpretation of the text of Protocol 11 as such an intention has been expressed neither by the authors of the Protocol nor in any other document. In other words, the Explanatory Report does not provide binding solutions which the Court should take into account in drafting its rules. The Explanatory Report, however, may serve for the better understanding of Protocol 11. Protocol 11 will enter into force a year after all Parties to the Convention have expressed their consent to be bound by it (Article 4). From that moment on the Court starts exercising its functions and the amendments to the ECPHR take effect. The accession of new states will take place only on the basis of the new text.

Until the new Court starts operating, the Court and the Commission will continue exercising their functions. They will work in the conditions of a constantly growing number of applications. These bodies and the Council of Europe are taking all measures to guarantee the efficiency of the Strasbourg bodies, regardless of the imminent termination of their activities.

The States which took part in the negotiations and drafting of the protocol pledged to ratify it as soon as possible. Delays are due above all to the complex nature of the respective parliamentary procedures in some of the States. The new members of the Council of Europe which have not taken part in the drafting of Protocol 11 have bound themselves to accede to the Protocol. This was a major political requirement in joining the Council of Europe.

The specific nature of the Court as an international legal institution is determined by its basic function. And this is to ensure the observance of the engagements undertaken under the ECPHR (new article 19). It outlines the framework of its international legal personality.

The Court is a materialization of the idea of collective control and implementation of obligations under the ECPHR. It is a principal part of the public law order established by the ECPHR in the field of human rights in Europe. It excludes all other international procedures for interpreting and implementing the ECPHR (new Article 62).

The Court is an independent, international and supranational institution. Its international legal personality differs from that of the Council of Europe and the other international organizations.

The new permanent Court is also a new subject of international law. It is not a mere amalgamation of the former control bodies under the ECPHR - the Commission and the Court. The new Court is authorized to make its own decisions regarding its organization, functioning and jurisdiction.

At the same time, however, it is also the successor of the former control bodies. Though not identical to them it will take over all their powers and

obligations including pending cases in order to guarantee continuity in the control functions of the ECPHR.

The new Court should be perceived as bound to the present legal practice of the Commission and the Court. It is part of the existing complex control system operating on the basis of the ECPHR and will take over the rights and obligations of the two control bodies it succeeds. It is as bound to the former jurisprudence of the Commission and the Court as the other participants in this system, like the States parties to the Convention, for instance. In as far as the jurisprudence of the Commission and the Court has become an integral part of the Strasbourg system of public order, this system should also be followed by the new Court, taking over both the formal and the non-formal obligations of the former bodies.

Another characteristic feature of the independent legal personality of the new Court is its independent will formulated by the bodies of the Court in compliance with their powers. The will of the Court finds expression in its decisions.

The independence of the new Court, both in respect to its internal and in respect to its external relations, is also an important sign of its international personality. It finds expression both in the collective independence of the Court as a body and in the individual independence of the members of the Court. The independence of the Court is also guaranteed by the privileges and immunity enjoyed by its judges and administrative staff. The independence of the Court makes it possible for it to dispose of its own budget and to pursue an independent administration policy. The efficiency of the Court should not be restricted by financial or administrative dependence on other bodies of the Council of Europe. But some objective factors, such as limited financial resources, may set the framework within which the Court will have to decide its own problems, including those related to its jurisdiction and procedure.

The supranational powers vested in the new Court restrict to a certain extent the sovereignty of the individual states. But we should not forget that the provisions of the ECPHR leave a considerable margin of appreciation within the framework of which the protection of human rights on the part of the State is brought in conformity with the State's own concrete potentials.

3. REGISTRY OF THE COURT

The Registry is the administrative body of the new Court. The functions and the structure of the Registry will be laid down in the future rules of the Court. This problem is regulated quite generally and insufficiently in the respective text of Protocol 11.

New Article 25 simply states that the Court shall have a Registry. It also says that it will have a Registrar and one or more Deputy Registrars elected by the plenary Court (new Article 26). The Explanatory Report explains that the Court's Registry is provided for by the Secretary General of the Council of Europe.

Article 25 of Protocol 11 specifies that the Court shall be assisted by legal secretaries. The Explanatory Report further explains that the purpose of this provision is to ensure that members of the Court can, if they wish, be assisted by legal secretaries. These are assistants who may be appointed upon the proposal of the judges. They must have the necessary qualifications and practical experience to carry out the duties assigned to them by the judges.

Protocol 11 increases the independence of the Registry of the new Court from the Council of Europe. Under Protocol 11 the Registry is part of the new Court. Its structure and functions will be regulated by internal laws which the new Court will establish by adopting its Rules. The new amended text of the ECPHR makes no mention of a need of any administrative link between the Registry of the Court and the Council of Europe. And this is one of the important

differences from the former legal regime. Under the latter, though their functions were actually completely independent, the Secretariats of the Commission and the Court were closely bound to the Council of Europe in administrative terms and terms of employment.

The new Court will have the legal power to determine the functions and the parameters of the Registry and to dispose of its own budget. We may presume that availing itself of this greater freedom of the provided by Protocol 11 in regulating the status and the functions of the Registry, the Court will draw on positive experience gained in the many-year practice of the Secretariats of the Commission and the Court in their interaction with the Council of Europe. Thus, for instance, the members of the Registry of the new Court should enjoy the same status as the other members of the Secretariat of the Council of Europe. The Court should accurately formulate its Registry's relations with the Council of Europe in administrative terms and terms of employment. It should also decide whether the officials of the Registry will be only employees of the Court or also employees of the Council of Europe. Most probably the Court will not change the positive practice of of the Registry working under the directives and supervision the Court - by the President or by the Registrar of the Registry.

The considerable freedom given to the Court in regulating matters concerning the Registry at its convenience may, on the one hand, be considered a flexible approach. On the other hand, it should be borne in mind that the one-year period given for the constitution of the Court and the drafting and approval of its rules is too short, especially against the backdrop of the growing number of applications lodged in Strasbourg which requires maximum continuity between the old and new permanent Court. That is why the new Court should be constituted without delay and adopt its rules of procedure.

The generally formulated provision on legal secretaries leaves a number of matters unregulated, matters concerning their status, functions and relations with the Registry. Article 25 creates the impression that their status and functions differ from those of the Registry, in other words that these are two different categories of legal associates of the Court.

The new Court may discard or adopt the special system of legal secretaries. Its new rules may stipulate that the members of the Court be assisted only by law clerks of the Registry. This will be a continuation of the successful former practice of the Commission and the Court. This is possible because new Article 25 does not define the term "legal secretary". It could apply to any assistant of the Registry

The Explanatory Report draws a clear distinction between two categories of assistants but it is not binding in respect to the Court. The Court may decide that the term legal secretary shall apply to the law clerks of the Registry assisting the Court but not being personally and permanently attached to individual judges. Such a decision would guarantee equal working conditions for all judges and eliminate the possibility of the setting up "separate offices" for each separate judge which may result in their being placed on an unequal footing in terms of staff competence as well as in the complete subordination of the legal secretaries to the individual judges to whom they are attached. This decision would give all judges access to qualified jurists of all legal systems. Most judges will continue to work on cases of many states and access to different legal experts would be more efficient than the permanent services of a lawyer familiar with a single legal system. But this decision would also require conditions enabling judges to keep abreast of the development of law and legal practices in their countries. This may be achieved through the setting up of a library or a sophisticated information system.

However, the Court may also decide to introduce the system of legal secretaries to provide individual and legal services parallel to those of the Registry of the Court.

In this case it will have to determine the functions of this type of associates. Since the Registry will take care of the administrative servicing of the judges, the functions of the legal secretaries should be limited only to case work. Their assistance would help judges work better and more efficiently on cases on which they are not rapporteurs and to not enjoy the services of the law clerks of the Registry. In its Rules the Court should also regulate the selection, appointment, terms in office, and administration of legal advisers and their relations with the Registry. They should be appointed by a procedure regulated in the Rules of the Court as is the case with all other associates of the Registry. It would be useful for their term in office to coincide with that of the judge to whom they are attached.

It should also be decided whether legal secretaries should be jurists acquainted with the legal system of the State which the judge they are attached to comes from. This is hardly necessary in all cases and especially when the judge comes from a State from which there are relatively few complaints in Strasbourg. Therefore it would be expedient for the competition in appointing legal advisers to be international whenever necessary. In addition, it is important to give a chance to members of the Secretariat of the Commission, of the Registry of the Court and of the Directorate of Human Rights with the Council of Europe to apply for the posts of legal secretaries even when they have permanent contracts with the Council of Europe.

Legal secretaries will naturally be considered personal assistants of individual judges and will work under their personal supervision. But their status and their remuneration will have to correspond to those of the associates of the Registry and the Council of Europe.

4. STRUCTURE OF THE COURT

4.1. Judges

The number of judges in the new Court will be equal to that of States parties to the ECPHR (new Article 20). This implies that only countries which have ratified Protocol 11 may have judges in the Court. This right is not granted to all Council of Europe member states as was the practice so far. The condition that no two judges may be nationals of the same State has been removed. This makes it possible for the State parties to the ECPHR to put forward the name of a judge who is a national of another State party to the ECPHR rather than a judge from a State which has not ratified the ECPHR.

The proposal to decrease the number of judges was not approved during the debates on Protocol 11. It involves an important political issue and is actually inapplicable. The Council of Europe member States have reached a consensus in principle for each of them to have a representative in the control body of the ECPHR. The smaller states attach particular importance to this agreement as they fear being deprived of the opportunity to take part in the development of the jurisprudence of the Court.

New Article 21 regulates the criteria for office. They do not differ from the former criteria. But the Council of Europe may formulate additional criteria regarding the professional training of potential candidate judges to be included in the lists submitted by the governments. This is necessitated by the extensive supranational powers of the new permanent Court.

One basic criterion is the candidate's special qualification in the field of the ECPHR. It covers both practical experience in this field and theoretical knowledge of the ECPHR and international law without which the implementation and development of jurisprudence would be impossible. In selecting the members of the new Court it is of paramount importance to preserve the present high level of jurisprudence of the Strasbourg control bodies and to prevent a possible initial deterioration in this field. Knowledge of languages is also of particular importance for future judges. It would be best for them to speak the

two main languages of the Council of Europe - English and French and if possible other European languages as well. The importance of command of several languages has been evidenced in the work of the Commission so far. Work in the Commission is carried out in the two basic languages of the Council of Europe but members of the Commission work on cases filed from other states without translation i.e. using the documentation in its original language.

During their term of office the judges will not engage in any activity incompatible with their independence, impartiality or with the demands of full-time office. Engagement in activities incompatible with the above mentioned requirements means that the judges should be able to perform all duties related to their membership in the new permanent Court. In other words they cannot engage in activities incompatible with their full-time office. The new Rules of the Court should accurately regulate the possibilities for the judges to engage in other activities beyond the scope of their official duties for or without remuneration. This refers, for example, to research and lecturing by the judges.

Another problem, which should also be taken into account, refers to those members of the Commission who have been elected judges in the new Court during the transition period starting from the moment of the final ratification of Protocol 11 and continuing for one year after the Protocol's entry into force. During that period they would actually have two types of duties.

The permanent nature of the Court will considerably professionalize the work of the judges. This is one of the positive differences from the present work of the members of the Commission and the Court. The post of judge in the new permanent Court of Human Rights in Strasbourg may prove quite attractive.

Protocol 11 does not provide for any changes in the former procedure of election of judges (new Article 22). Under the this procedure the state presenting the candidatures had great influence in determining the candidate judges. Most probably the system of considering candidatures for judges and their selection will be changed so as to take into account the specialized opinion of the other states represented in the bodies of the Council of Europe. The professional merits of the judges is of consequence for all countries, parties to the ECPHR.

It is of paramount importance for the election of judges to take place as soon as possible after the filing of the final ratification of Protocol 11. Article 4 of the Protocol says that the election of new judges may take place from the date on which all parties to the ECPHR have expressed their consent to be bound by the Protocol. Actually, there is an urgent need to proceed to the election of judges after that date. Protocol 11 enters into force and the new Court is established a year after the date of the filing of the final ratification. Experience has shown that this is but a brief period as the election procedure takes not less than several months. One can hardly expect all states to present lists with their candidates immediately after the final ratification which is highly desirable and for which the Council of Europe should make the respective political decisions. The Court will be ready to assume its duties upon the expiry of the one-year period only if its judges are elected much before Protocol 11's entry into force. And this is of paramount importance as after Protocol 11 enters into force the new Court will be solely responsible for all new applications, as well as for examining applications pending before the Commission and not declared admissible at the date of the entry into force of Protocol 11 (Article 5, paragraph 2 of Protocol 11). In addition, the new Court will have to take over the functions of the old Court in respect to pending procedures and in respect to cases referred to it by the Commission in the first year after the entry into force of Protocol 11 (Article 5, paragraph 4 of Protocol 11).

Judges will be elected for a period of 6 years (new Article 23, paragraph 1). This period is shorter than the previous one of nine years. The term of office of half of the judges will expire at the end of three years. If the

number of judges is uneven, one half of the judges will be interpreted as one half minus one.

The shortening of the term of office of judges from nine to six years may attract criticism. It threatens the independence of the judges in respect to the State that has nominated them, especially if they are seeking re-election. Moreover, a longer term of office would enhance the efficiency and the consistency of the Court. A six-year term seems rather brief also proceeding from the fact that by accepting the post of judge at the Court of Human Rights, a judge actually interrupts his career in his home country. Therefore it is desirable for judges to be re-elected. But the experience of the Commission has shown that this rule has exceptions. Re-election of judges is not always guaranteed.

Judges whose terms of office expire at the end of the initial period of three years will be chosen by lot by the Secretary General of the Council of Europe immediately after their election. In order to ensure that as far as possible, the terms of the office of one half of the judges are renewed every three years, the Parliamentary Assembly of the Council of Europe may decide before proceeding to any subsequent election, that the term or terms of office of one or more judges to be elected shall be for a period other than six years but not more than nine and not less than three years. In cases where more than one term of office is involved and where the Parliamentary Assembly applies the preceding paragraph, the allocation of the term of office will be effected by a drawing of lots by the Secretary General of the Council of Europe immediately after the election. A judge elected to replace a judge whose term of office has not expired will hold office for the remainder of his predecessor's term.

The terms of office of judges will expire when they reach 70 (New Article 23). The regulations of the former control bodies provided a similar age limit. It was introduced as it exists in most legal systems.

New Article 23, paragraph 7 provides for judges to hold office until replaced. They will, however, continue to deal with cases they already have under consideration. But it remains for the Rules of the new Court to regulate under what circumstances a judge can continue to deal with a case upon reaching the age of 70. This age limit should be borne in mind by the States when nominating candidate judges. They should be at an age allowing for re-election and not admitting an interruption of a term due to age limit.

4.2. Plenary Court

The Plenary Court comprises all judges (New Article 26). The functions of the Plenary Court are to consider and settle organizational issues. These include:

- a) election of President and one or two Vice-Presidents for a period of three years;
- b) setting up Chambers constituted for a fixed period of time;
- c) election of Presidents of the Chambers of the Court. This function is particularly important as it contributes to the full legitimization of the Presidents of the Chambers of the Court by the Plenary Court. Thus they are vested with greater prestige than if elected only by the Chambers;
- d) adopt the Rules of the Court.

In addition the Plenary Court may, at the request of the Committee of Ministers, give advisory opinions on legal questions.

4.3. Committees of three judges

In order to filter registered applications which may easily be declared inadmissible, the Court will sit in committees of three judges (New Article 27, paragraph 1). The committees will be set up for a fixed period of time. In other words, they will have a limited mandate (new Article 27, paragraph 1). The recommendation in the Explanatory Report for the three-judge committees to have

no quorum is quite adequate. The Chambers may appoint substitute members so that the committee may always sit with the required composition of judges. It is not obligatory for the judge elected in respect to the State concerned to sit in the committee. The constitution of the committees will follow the present successful practice of constitution of the committees by the Commission.

Under new Article 28, three-judge committees will have the power:

- a) to declare individual applications inadmissible;
- b) strike out an individual application of its list of cases.

The decisions of the committees will have legal force and be final.

However, two mandatory conditions will have to be met for their decisions to enter into force:

- a) the decisions have to be unanimous. This requirement is a guarantee against flaws in the filtering functions of the three-judge committees;
- b) the decisions may be adopted without additional discussions.

The filtering functions of the three-judge committees are objectively motivated and necessary. In performing its supervisory role, the Court is forced to take into account both the growing number of applications and the relatively limited funds at its disposal. Therefore, the setting up of three-judge committees modelled on the present practice of the Commission may be considered the optimum solution.

The filtering functions of the committees will have a two-fold effect which will have a positive influence on the entire control work of the Court:

- a) the committees will give the Chambers time to consider more important cases;
- b) the committees will reduce the time for considering and deciding cases on applications which are obviously inadmissible.

It would be advisable to preserve the former practice of the Commission for all proposals on cases considered by the committees to be read by all members of the Commission, and for each member to be able to propose the examination of a case, assigned to a committee, by the chambers of the Commission or by its plenary.

The formulation of the decisions of the committees may be considerably simpler than that of the decisions of the Chambers. In this respect the new Court may draw on the former practice of the Commission. The reasoning of the decisions of the committees may be standardized and quite general. The laconic formulation of the decisions of the three-judge committees, however, does not mean that it will consider applications superficially. The decisions will be formulated briefly as the applicant will have already been informed in greater detail of the reasons for the inadmissibility of his complaint by the Registry in the course of preliminary correspondence. Examination of applications by the committees should be as thorough as in the Chambers.

Committees may be constituted on an annual basis. Their members may be determined by drawing of lots. Protocol 11 provides for the committees to be set up by the Chambers which means that each Chamber may be divided into two three-member committees, one member remaining as a reserve to substitute a member of the committee whenever necessary.

This procedure differs from the respective former procedure of the Commission which involves a balanced replacement of the composition of the committees making it possible to maintain equal standards between all committees in decision making. The members of the committees are selected among all members of the Commission and are interchangeable. The rules of the new Court may also adopt this practice. Thus, for instance, the Plenary Court may select the members of the committees from among all judges of the Court. The thus formed three-judge committee will be moved for approval by the Chambers which formally elect them in compliance with the requirements of New Article 27, paragraph 1.

The successful functioning of the three-judge committees will make it possible for the Court to cope with the growing number of complaints.

4.4. Chambers of the Court

Protocol 11 provides for the Court to consider cases brought before it in Chambers of seven judges (New Article 27, paragraph 1). The Chambers will be set up by the Plenary Court (New Article 26.b.). The Plenary Court will also elect the Presidents of the Chambers who may be re-elected (New Article 26. c.). The possibility that a judge may be a member of two Chambers is not excluded.

The judge elected in respect to the State Party concerned will sit as an ex officio member of the Chamber (New Article 27, paragraph 2). If there happens to be none or if he is unable to sit, a person of its choice will sit in the capacity of judge.

The ex officio membership of the national judge of the State Party concerned in the application does not mean that he is called upon to defend the State Party. His presence is necessitated above all by the fact that he is best acquainted with the domestic law of the State Party against which the complaint has been lodged.

There are two ways to ensure the presence of national judges in the Chambers.

One is to refer all cases involving the State Party of the judge to his Chamber. This may lead to the overloading some chambers including national judges of State Parties attracting a great number of complaints. It may also result in an unbalanced geographical specialization of the chambers which is probably inevitable. This may be prevented by the distribution of some judges from countries attracting a large number of complaints on a quantitative basis so as to achieve an equal distribution of cases among the Chambers. If this qualitative approach fails to prevent a "geographical" specialization of the Chambers, the balance may be restored by providing for consultations between the Chambers or for relinquishment of important cases to the Grand Chamber. Deputy members of the judges may also be appointed in the Chamber, following the practice of the former Court, who will sit in the chambers without the right to vote. They will broaden the basis of discussions and the decision-making process.

Another way is to distribute applications evenly among the Chambers, regardless of whether there is a judge of the State Party concerned in the Chamber or not. If it turns out that there is no national judge of the State Party concerned in the Chamber to which the respective case has been referred, such a judge may be included in its composition for the examination of that case.

May be it should be regretted that the solution provided by Article 20, paragraph 2 of the ECPHR was not adopted. This article stipulates that the member of the Commission elected in respect to the country against which a petition has been lodged has the right but is not obliged to sit on a Chamber to which that petition has been referred. The national judge is free to decide whether to exercise this right or not. Moreover, he is not obliged to motivate his decision.

If the Court opts for the second alternative, i.e. for an equal distribution of cases among the Chambers regardless of whether the respective national judge is sitting in them or not, than national judges will have to shuttle between different Chambers of the Court considering cases involving the State that nominated him. This will naturally be difficult but not impossible.

It would be best for the Chambers to be elected for a term of three years, as was the former practice.

When setting up the Chambers, care should be taken to ensure that they have representatives of all principal legal systems of the State Parties and that their composition presents the geographical diversity of all State Parties of the ECPHR in a balanced way. An insufficiently representative and balanced

composition of a Chamber may result in a growing temptation to refer cases to the Grand Chamber.

But obviously such representativeness is difficult to achieve in Chambers comprising only seven judges. In drafting Protocol 11 its authors apparently prioritized on enhancing the efficiency of the work of the Court. A Chamber of seven is excellent for discussions and efficient work. Moreover, smaller chambers make it possible to set up a larger number of chambers within the framework of the Court which would increase the efficiency of the Court as a whole. From the psychological point of view, the smaller number of judges in the Chambers increases the authority of the committee of five judges called upon to examine the decisions of the Chambers and decide whether they should be referred for re-hearing to the Grand Chamber.

The Chambers have the right to decide on the admissibility and merits of individual applications. They will also decide on the admissibility and merits of inter-State applications unless the Court decides otherwise in exceptional cases (new Article 29). Decision of admissibility and merits are as a rule made separately. Exceptions are possible only when the State Party against which the petition has been lodged does not object to declaring the case admissible. Reasons will be given for declaring applications admissible or inadmissible (new Article 45, Para. 1).

New Article 31 provides for relinquishment of jurisdiction in favour of the Grand Chamber. However, it does not oblige a Chamber to relinquish jurisdiction. It is up to each Chamber to decide whether to relinquish jurisdiction in favour of the Grand Chamber or not. This also refers to cases in which it intends to change the case-law of the Court. That is why it would be advisable for the rules of the new Court to oblige the Chamber to relinquish a case when it raises a serious questions concerning the interpretation of the Convention or when the decision of the Chamber is inconsistent with a previous decision of the Court. The purpose is to ensure consistency of the Court's case law.

The achievement of this purpose is impeded by the right to veto of the parties to the case. The parties may object to the Chamber's relinquishment of their case in favour of the Grand Chamber and thus frustrate the hearing of the case by the Grand Chamber (New Article 30). This provision is designed to ensure the possibility of a re-hearing of a case when this is the wish of the parties to the case. The procedure of relinquishment can be resorted to at any time prior to the passing of judgment by the Chamber. This relinquishment of jurisdiction results in a single-instance examination of the case as there is no first instance decision on it. Under these circumstances proceedings at the Grand Chamber may be considered only a continuation of the proceedings in the Chamber. Therefore, the parties' right to veto actually ensures a two-instance hearing of the case.

However, this right to veto may prevent judgment on the case by the Grand Chamber even when this is necessary to ensure consistency in the Court's jurisprudence. This may happen if following a veto by the parties to the case and the passing of judgement by a Chambers, the parties to the case to not send it for re-hearing at the Grand Chamber in compliance with new Article 43. Obviously the parties cannot be expected to feel responsible for guaranteeing the quality and prestige of jurisdiction of the Court. The responsibility for this lies with the Court itself.

In assessing the present situation, it should be borne in mind that it is the result of a political compromise aimed a preserving the balance achieved between the States on providing possibilities for an obligatory re-hearing of the case by the Grand Chamber. An elimination of the right to veto would threaten the right to re-hearing because when the Chamber relinquishes jurisdiction in favour of the Grand Chamber, the judgment of the latter is final. The right to veto makes it possible for the parties to the case to demand

a first judgement by the Chamber followed by a re-hearing by the Grand Chamber. The implementation of the political assignment of adopting Protocol 11 as soon as possible and the need at the same time to preserve the compromise achieved on obligatory ensuring of re-hearing at a second level by the Grand Chamber resulted in the present formulation of New Article 30 which is naturally not flawless. But such are political realities ensuing from many other similar compromise solutions achieved in international law.

We can only hope that parties to cases would refrain from unwarranted exercise of their right to veto. But there are no legal guarantees ensuring this type of conduct. One possible solution is for the two sides to be asked already at the stage of initial communication whether they would object to a possible relinquishment by the Chamber of jurisdiction in favour of the Grand Assembly if necessary. It may be presumed that the parties would not object in principle to this. But if they do, the Chamber may decide quickly, providing summary reasoning as required by new Article 45. Because it should be borne in mind that the right to veto will also result in considerable delays in jurisdiction.

4.5. Grand Chamber of the Court

The Grand Chamber is the highest judicial authority in the new system of the permanent Court. Its setting up fully complies with normal judicial practice as it is necessary to have a special procedure for cases which are difficult or refer to possible controversies with former court decisions. Referral of a case to the Grand Chamber does not fully perform the role of a second instance, as there is no first-instance judgement to be challenged. But it is a step in the direction of the advocates of the two-tier system as it makes it possible for important questions referring to interpretations of the ECPHR to be decided not by Chambers of seven judges but by an extended panel.

The Grand Chamber will be set up by the Plenary Court (New Article 26.b.). Its President will also be elected by the Plenary Court and may be re-elected. The Grand Chamber will comprise 17 judges.

The powers of the Grand Chamber may be grouped as follows (new Article 31): 1. to determine inter-State applications submitted under Article 33; 2. to decide on individual applications lodged proceeding from New Article 34; 3. to decide on cases referred to it by the Chambers relinquishing jurisdiction in its favour in compliance with new Article 30; 4. to decide cases which have been referred to it in compliance with New Article 43 which stipulates that within a period of three months from the date of the judgement of the Chamber, any party to the case may, in exceptional cases, request that the case be referred to the Grand Chamber; 5. to consider requests for advisory opinions submitted under New Article 47 which stipulates that at the request of the Committee of Ministers of the Council of Europe, the Court may give advisory opinions on legal questions concerning the interpretation of the Convention and the Protocols thereto.

Protocol 11 does not fix the term of the Grand Chamber. Here it would be advisable to follow the practice of the former Court to set up a Grand Chamber for each new case, i.e. for the Grand Chamber not to have a permanent composition.

One of the main advantages of this approach is that it would help establish an atmosphere of solidarity and a collective spirit in the Court. It would prevent the setting up of an elite group of "first class" judges sitting in the Grand Chamber. The election of a permanent composition of the Grand Chamber for a longer period of time would obviously disturb equality among judges and introduce a certain hierarchy among them. Situations will emerge when some judges will have to re-hear decisions of members of the same judicial institutions who have the same rank.

Some of the members of the Grand Chamber shall sit *ex officio* (New Article 27). These are the judge elected in respect to the State Party concerned, the

President of the Court, the Vice-Presidents and Presidents of the Chambers (New Article 27, paragraph 3).

Protocol 11 does not regulate how the other members of the Grand Chamber will be elected. Here it would be advisable for the composition of the Grand Assembly to be well-balanced and representative of the Court. It should include judges of all Chambers as well as representatives of the different legal systems in the States Parties to the ECPHR. Judges could be elected from lists dividing the members of the Court in several groups which should be represented in the Grand Chamber.

A major legal problem here is the provision that the President of the Chamber which considered an application first and national judges are ex-officio members of the of the Grand Chamber. The referral of a case under Article 43 to the Grand Chamber is in its essence a appellate procedure within the framework of one and the same court. But the right to fair trial underlying Article 6 of the ECPHR requires that judges sitting in the court of first instance do not sit in the second, appellate instance. From this point of view, the present situation is hardly justifiable by the following arguments.

The first is that the sitting of the President of the Chamber is necessary to ensure consistency in the Court's case law. The second is that a hearing by the Grand Chamber is considered a continuation of the hearing by the Chamber and not new case law. The third argument is that the procedure before the Grand National Assembly, though appellate, is not considered discredited by the sitting of two of its seventeen judges in the first instance. It is believed that from the practical point of view it would be a greater problem to appoint a new ad hoc national judge than to include the national judge who took part in the hearing of the case in the Chamber. Some argue that in a panel of 17 judges two do not play an extremely important role in deciding the outcome of the case. The weakness of this argument is that justice must be seen to be done.

The above legal arguments alone can hardly explain the legal essence of the referral of cases to the Grand Chamber and to what extent the presence of two judges of the first instance meets the criteria of Article 6 paragraph 1 of the ECPHR. Here it is important to realize that this international law provision is the result of one of the most difficult compromises in drafting Protocol 11. It was one of many and the adoption of the entire package of political compromises resulted in the successful completion of diplomatic negotiations on the reform of the Strasbourg control bodies. The compromise was between two almost diametrically opposed stands. One maintained the need to set up a two-instance judicial system and the other that the new Court should be a single-instance one. The compromise was found in the concept of a two-tier structure of a single-instance court. Therefore, though not perfect, this legislative solution should be considered an international legal reality similar to many others in contemporary international law.

The two judges who sat in the Chamber may decline participation in the hearing of the case in the Grand Chamber claiming they do not feel impartial. Their refusal would correspond to a universally accepted judicial practice. This, however need not happen always.

The procedure before the Grand Chamber is opened by a panel of five judges which under New Article 43 is authorized to accept requests for referral of cases raising a serious question affecting the interpretation or application of the ECPHR or the Protocols thereto or a serious issue of general importance (new Article 43, paragraph 2). A case rejected by the panel cannot be heard by the Grand Chamber. The filtering role of the five-member panel prevents the Grand Chamber from being engaged in minor cases and thus enhances its efficiency. The five-member panel is elected by the Grand Chamber. The possibility of referral of cases to the Grand Chamber are restricted which makes it possible to hear a greater number of cases.

The panel of five judges will approve requests for re-hearing a case by the Grand Chamber only in the presence of two conditions. The case must either raise serious questions affecting the interpretation of the Convention and the protocols thereto, or an important question of a general nature. A serious issue considered to be of general importance could involve an important political question, for instance.

4.6. Expenditure on the Court

The quality of the jurisdiction of the Court and its independence depend, to a great extent, on the size of the budget of the Court, the way it is determined and utilized. The expenditures of the Court will be borne by the Council of Europe (new Article 50). The ECPHR formally vests considerable powers in the Committee of Ministers of the Council of Europe in determining the budget. The ECPHR is also a means for exercising control over the budget of the Court. As was the case so far, the Committee of Ministers' responsibility for the efficient operation of the Court will continue to also find expression in determining the size and the main parameters of the budget of the Court. The expenditures shall be borne by all Council of Europe member states, including by those which have still not ratified the ECPHR.

In its rules the Court will be able to regulate in greater detail its powers in disposing of its own budget. As was the practice so far, it will address reasoned requests to the Council of Europe on the size of the allocations in its budget. Following the adoption of the budget, the Court should be able to dispose of it on its own. This is an important condition in guaranteeing the Court's independence.

5. PROCEDURE OF THE COURT

5.1. Individual applications and inter-state cases

The procedure of lodging individual applications to the Court is regulated in new Article 34 which stipulates that the Court may receive applications from any person, non-governmental organization or group of individuals claiming to be victim of a violation by one of the States parties to the ECPHR of the rights set forth in the ECPHR and the protocols thereto.

Protocol 11 does not provide for any specimen form of the application. As was the case so far, applications will be formulated freely and sent to the Registry of the Court in Strasbourg. They should be signed by the applicant or his representative. The date of receipt will be considered date of lodging of the application. It would be advisable for the Court to continue the former positive practice of the Commission of accepting urgent complaints by telex, cable or even over the phone provided these are later confirmed in written form. A "provisional file" will be opened upon the receipt of each letter of application before the Court. The Registry will communicate with the applicants in order to deal with any matters requiring clarification and will, help him formulate his complaint by completing a special form. Only then will an application be officially registered. The applicant may lodge his application himself or through his representative and may be represented during the procedure before the Court. Protocol 11 makes the right to individual applications binding for all States Parties to the ECPHR.

New Article 33 regulates the right to inter-State applications stating that each State Party to the ECPHR may refer to the Court any alleged breach of the provisions of the ECPHR or the protocols thereto by another State Party to the Convention.

5.2. The Registry's communication with the applicant prior to registration of application

It would be advisable for the Registry of the new Court to continue the practice of the Secretariat of the Commission of communicating with applicants in order to deal with any matters requiring clarification before the registration of an application. During that period the Court will not be obliged to decide on an application. A preliminary file will be opened for each application but it may be closed if the applicant withdraws his application. In this case it would not be necessary for the Court to undertake any preliminary formal action. An application will be registered formally only after the applicant completes and forwards to the Registry a special form and gives clear indication of his wish to proceed with the claim in Court. An application will be registered and given a file number on when it meets all conditions for registration and the applicant insists on its registration.

5.3. Judge-rapporteur.

Protocol 11 does not regulate the status and the powers of the judge rapporteur. But it is almost certain that in its rules the new permanent Court will adopt the former practice of the Commission to designate judge rapporteurs. Thus, immediately upon being assigned an individual application, a Chamber will appoint a judge rapporteur on the case. In his work the judge rapporteur will be assisted by the Registry. A judge rapporteur will have the following functions:

- to study the case and prepare a report to the Court on the admissibility of the application and propose the procedure to be pursued further on;
- to maintain contact between the parties to the case whenever this is necessary;
- to seek a possible friendly settlement after an application is declared admissible.

Appointment of judge rapporteurs would make it possible for the Court to evenly distribute cases among the judges. It will also ensure a better preparation of the report on the case. In it the judge rapporteur who has carefully studied the case file, will make a more comprehensive analysis of the documentation.

5.4. Three-judge committees

A judge rapporteur may decide to refer individual applications that are patently inadmissible to a three-judge committee. The latter may by unanimous vote declare the application inadmissible or strike it out when this can be decided without further examination. Such decisions will have to be taken unanimously. They will be considered final and will wind up proceedings on the case. The proceedings of the three-judge committees will be in written form.

If a three-judge committee fails to reach an unanimous decision on a case, it will refer it to a Chamber which under new Article 29 of the ECPHR has the power to decide both on the admissibility and on the merits of an application.

The judge rapporteur may however, also decide to refer an application directly to one of the Chambers of the Court.

5.5. Chambers of the Court

The Chamber of the Court will decide on the admissibility and merits both of individual and inter-State applications.

A Chamber may relinquish jurisdiction in favour of the Grand Chamber. This may take place at any time before it has rendered its judgement on the application. The reasons of relinquishment of jurisdiction may be as follows (new Article 30):

- when the pending case raises a serious question affecting the interpretation of the ECPHR or the protocols thereto;
- when a resolution of a question before it might have a result inconsistent with a judgement previously delivered by the Court.

Relinquishment of jurisdiction is not mandatory. The Chamber will inform the parties to the case of its intention to relinquish jurisdiction in favour of the Grand Chamber. This should take place before the Chamber has formed a firm stand on the case. A decision for relinquishment does not necessarily have to be reasoned. At this early stage of examination of the case it would be extremely difficult for the Chamber to provide a thorough and detailed reasoning of its decision to relinquish jurisdiction.

The parties to the case have the right to veto relinquishment of jurisdiction decisions. This is designed to ensure the possibility of a re-hearing by the new and extended panel of the Grand Chamber of a judgment already delivered by the Chamber.

5.6. Decisions on the admissibility of applications

New Article 29 introduces separate procedures in deciding on the admissibility and merits of a case. It stipulates explicitly that decisions on admissibility shall be taken separately.

This separation of admissibility and merits decisions into two procedures should not lead to superfluous repetition and a drawing out of the as it is long procedure on applications. It should be borne in mind that before complaining in Strasbourg the applicant has covered the long procedure of his national legal system. That is why, whenever possible, the Court should combine decisions on admissibility and merits. This has been provided for in new Article 29, paragraph 3. Therefore it would be advisable for the new Court to avoid repeated hearing of the parties to the case - once to decide on the admissibility and once on the merits of the case. A separate decision on admissibility has to be reasoned. When adopting this decision the Chamber may hold a preliminary vote on the merits of the case. It may then advise the parties of the results of its vote. The results of this vote are important for the parties especially when they are considering whether to seek a friendly settlement of the dispute.

5.6.1. Admissibility criteria

New Article 35 lists the same criteria of admissibility as the former Articles 26 and 27 of the ECPHR.

The Court may deal with a matter only after all domestic remedies have been exhausted, according to the generally recognized rules of international law, and within a period of six months from the date on which the final decision was taken by the final national instance.

The Court does not consider individual applications that are anonymous or substantially the same as a matter that has already been examined by the Court or has already been submitted to another procedure of international investigation or settlement and contains no relevant new information. The Court shall declare inadmissible all individual applications which it considers incompatible with the provisions of the ECPHR or the protocols thereto. The Court shall declare inadmissible any individual claims that are manifestly ill-founded, or an abuse of the right of application. The Court will be able to reject an application at any stage of the proceedings.

5.7. Examination of the case

Having declared an application admissible, the Court will decide on the procedure it will follow. New Article 38 envisages two possibilities for the Court. One is to pursue the examination of the case in order to establish the facts. The other is to place itself at the disposal of the parties concerned with a view of securing a friendly settlement of the matter on the basis of respect for human rights as defined in the ECPHR and the protocols thereto (new Article 38, paragraph 1.b.). New Article 38 shows preference for neither of the two possibilities of procedure by the Court. The Court may pursue both possibilities in parallel. This refers in particular to the so-called inter-

State applications. Serious negotiations to reach a friendly settlement of the dispute will require a suspension of the investigation.

After an application is declared admissible, examination of the case before the Court will continue jointly with the representatives of the parties. The procedure is competitive (contradictory), new Article 38 obliges the parties to furnish all necessary facilities for the effective conduct of the examination. This refers to all stages of the examination. If the Court deems it necessary to conduct an investigation than the parties to the case are obliged to furnish all necessary facilities.

The Court may at any time require of the parties to the case information to establish the facts of the application. The parties to the case are obliged to answer such requests. They may present their submissions by means of a written procedure or by oral procedure when an applicant is heard at a sitting of the Court.

The Court may also resort to other forms of investigation such as interrogation of witnesses and on-site inspections. The hearing of witnesses usually takes place in the presence of representatives of both parties. They are also given an opportunity to put questions to the witnesses and even to subject them to cross-examination, according to the Anglo-Saxon tradition. But if the Court deems it necessary it may interrogate witnesses on its own.

5.8. Friendly settlement

Having declared an application admissible, the Court places itself at the disposal of the parties concerned with a view of securing a friendly settlement of the dispute (new Article 38, paragraph 1.b.) The proceedings are confidential. A case may be terminated by a friendly settlement at any stage of the proceedings before the Court. If a friendly settlement is effected the Court will strike the case out of its list by means of a decision. This decision shall be confined to a brief statement of facts and of the solution reached.

In its essence, a friendly settlement is the achievement of understanding and agreement between the parties. This is effected both by mutual concessions and by their recognition as legally binding by means of decisions of the Court. The advantages of this procedure are two-fold. First, the parties to the case reach an agreement which eliminates the need of the dispute to be settled by a third party - the Court. Agreement is achieved on the basis of compromise acceptable for both sides. Secondly, there is no winner and loser in the case as neither of the parties has been condemned by the Court and the reputation of both parties remains untarnished. The agreement underlying the friendly settlement is to the advantage of both sides as it speeds up proceedings thus saving funds.

Friendly settlement negotiations are conducted with the mediation of a judge assisted by the Registry of the Court. The parties may also call upon the services of the Registry of the Court to help them in their negotiations.

The Court does not necessarily have to restrict itself to the role of a passive mediator during the negotiations. Thus, for instance, drawing on its former experience, it may formulate proposals for achieving friendly settlement offering them to the parties to the case.

Indication of a provisional opinion on the outcome of the trial (new Article 29, paragraph 3) is useful for both parties. It encourages Governments to approach negotiations on the reaching of friendly settlement with due seriousness. This is important for them as usually they have to justify their actions before Parliament and the public. Indication of a provisional opinion on the decision of a case on the merit is of particular importance in cases which have no precedent in the practice of the Court. That is why information that the examination of a case may reveal violations on the part of the State increases the readiness of their governments to reach friendly settlement. This indication

is also useful for the applicant as it often corrects his unrealistic notion of the outcome of the trial.

5.9. Examination on the merits

New Article 43 stipulates that a case is examined by on the merits by a Chamber and only in exceptional cases by the Grand Chamber.

Protocol 11 provides for a possible intervention of a third party. Under new Article 36, paragraph 2, the President of the Court may, in the interest of the proper administration of justice, invite a third party to the proceedings to submit written comments or take part in the hearings. This third party could be any State Party to the ECPHR which is not party to the proceedings, or any person concerned who is not applicant. In constituting a third party it should be borne in mind that states and persons involved as a third party in the proceedings do not become parties to the case. A State Party to the ECPHR one of whose nationals is applicant shall have the right to submit written comments and to take part in the hearings (New Article 36, paragraph 1). This can take place only if the application is lodged against another State Party to the ECPHR.

The new Court may strike both individual and inter-State applications off its list of cases. This may take place at any stage of the proceedings before the Court. This is done under the following circumstances:

- when the applicant does not intend to pursue his application;
- when the matter has already been resolved;
- when for any other reason the Court establishes that it is no longer justified to continue the examination of the application.

However, even in the presence of all these circumstances, the Court may decide to continue the examination of the application if respect of human rights as defined in the Convention and the protocols requires thereto. The Court may decide to restore an application to its list of cases if it considers that the circumstances justify such a course.

The hearings of the new Court shall be public, unless under exceptional circumstances the Court decides otherwise. This reservation is inevitable as some of the matters examined are extremely delicate and the publication of information on them may harm the interests of the parties to the case and impede settlement. Documents deposited at the Registry shall also be accessible to the public and the final judgment of the Court shall be published (new Article 44, paragraph 3). It is most important for the Court's decisions to be accessible to the jurists and public across Europe. Access to the judgments of the Court should be considered a fundamental right of all persons. It is imperative to take measures to circulate the judgments of the Court at reasonable prices and in different languages, including through computer networks.

5.10. Imposition of interim measures.

The right of the Court to impose interim measures will continue to play an important role in the efficient protection of human rights. It should be regretted that an amending protocol of such a fundamental character as Protocol 11 does not regulate the powers of the Court to impose interim measures. These powers of the Court should be regulated by its rules.

It is advisable for the new Court to extend the scope of interim measures to situations going beyond the framework of those reaching the limit set by Article 3 of the Convention, i.e. amounting to torture or to inhuman or degrading treatment or punishment. Thus, for instance, interim measures could be applied in cases affecting children and their families in which the keeping of deadlines results in the passage of irreversible judicial decisions - such as adoption of children by a new family under circumstances in which the real parents are unable to attend the proceedings. In addition, decisions to impose interim measures could outline concrete measures to be implemented by the Governments pending the final settlement of the case.

5.11. Decisions and judgements of the Court

Decisions and judgments by which the Court terminates proceedings fall into two main groups proceeding from their legal consequences. The first group covers those decisions of the Court which wind up a case but are of no legal consequence for the State Party against which the application has been lodged. This group covers decisions on inadmissibility of the application, the striking out of applications by the Court Registry, friendly settlement of disputes, and advisory opinion of the Court. The second group includes decisions in which the Court decides a case on the merits. The ECPHR defines them as judgments and they entail certain international legal obligations of the states concerned.

Judgments of the Court on the merits of an application are passed both by the Chambers and by the Grand Chamber. These judgments are final. The ECPHR provides no opportunities for their appeal. However, the rules of the new Court may draw on the provisions of the rules of the former Court making it possible for parties to a case to ask the Court for an interpretation of a judgment and apply for a second institution of proceedings on the case.

The judgment of the Court comprises of two parts. The first determines whether there is a violation perpetrated by the State against which the application has been lodged and the second whether this State owes the applicant a compensation. Judgments have to be reasoned (new Article 45, paragraph 1). A detailed reasoning of the Court's judgments is of paramount importance. It is on this reasoning and legal arguments that the quality of a judgment and its effect on the State and its bodies depends. That is why the question of reasoning is closely related to the efficiency of the judgments of the Court. The appointment of judges on a full-time basis in the new permanent Court will enhance their personal contribution in the formulation of judgments and their reasoning. If a judgment does not represent, in whole or in part, the unanimous opinion of the judges, any judge is entitled to deliver a separate opinion (new Article 45, paragraph 2). The separate opinion is enclosed to the judgment but does not influence its legal force. The separate opinion of a judge may comply with or run counter to the judgment. A judge may simply declare disagreement with the judgment. The final judgments of the Court will be published (new Article 44, paragraph 3). It remains for the rules of the Court to regulate which documents, apart from the final judgments of the Court, will be published and in which new official languages the judgments will be published. Judgments will be of high effectiveness only when they are accessible to the jurists of all States Parties to the ECPHR. If the judgments of the Court are not published in the national languages of the States Parties to the ECPHR then access to them will be extremely limited and this will inevitably affect the efficiency of the implementation of the ECPHR.

5.12. Binding force of the judgments

The final judgments of the Court are binding (new Article 46, paragraph 1). The State Parties undertake to abide by the final judgment of the Court in any case to which they are parties. By essence, these judgments are international law obligations. A judgment by the Court includes two main types of international law obligations. The first refers to the payment of a just compensation. The second stem from the establishment of a violation of the ECPHR. The implementation of the former poses the least problems as it is a formal obligation of the state as violator of the law to pay damages to the applicant.

One consequence of a judgment establishing that a State has violated the ECPHR is that this State can no longer maintain that its conduct is lawful. The ECPHR does not provide for a direct effect of the judgments of the Court on the national law of the State Parties to the ECPHR. The efficiency of a judgment greatly depends on the behavior of the state that has violated the law. A

greater efficiency could be achieved by a clearer formulation of judgments, i.e. in their complementation by concrete instructions to the states that have violated the law of what measures they should take.

5.13. Role of the Committee of Ministers of the Council of Europe

New Article 46 provides for retaining an important power of the Committee of Ministers - its power to supervise the execution of final judgments of the Court. This power is an expression of the idea of collective guarantees of the implementation of the duty of a State Party to respect the final judgment of the Court on any case to which it is party. Thus the purely judicial new control system of the ECPHR is complemented by the powers of the executive body of the Council of Europe to control the execution of its judgments.

Another measure aimed at guaranteeing the implementation of the ECPHR as a whole and the judgments of the Court in particular is the power vested in the Secretary General of the Council of Europe to address inquiries to all States on their national law guarantees of the efficient implementation of the provisions of the ECPHR. The States are obliged to answer the inquiries of the Secretary General of the Council of Europe (new Article 52). So far the Secretary General has but rarely availed himself of this power. The Secretary General could adopt a more active stand and send inquiries to the States, especially referring to those spheres in which the Court has established lasting and solid case law.

5.14. Language issues

Protocol 11 does not regulate language issues. It is, however, advisable for these matters to be regulated in a way guaranteeing the rights of applicants and the efficiency of the work of the new Court. It is necessary to preserve the possibility of the applicant's participation in the whole procedure in his own language.

It would be most efficient to continue the practice of the Commission for documents on the case to be filed in only one of the official languages - English or French. This raises extremely high requirements before the members of the Court in respect to their command of languages as they will be forced to use both official languages. The continuation of the practice of the Commission not to translate the documents filed by the parties to the case but to use them in the original language would also have a positive effect. Translations will be done only under exceptional circumstances.

It is important for the budget of the Council of Europe to allocate funds for solving language problems. This would be only just in respect to countries whose official language is not English or French.

5.15. Legal aid

The procedure of the new Court will remain free of charge for the applicants. It is advisable for an applicant to be represented by a lawyer. He may be rendered legal aid if he does not have the funds necessary for hiring a lawyer. This shall take place from the moment it becomes necessary to exchange arguments between him and the State against which he has lodged a complaint. Funds to this end will be provided for in the budget of the new Court.

5.16. Preparatory stage

The one year preparatory period starts the moment all Parties to the Convention ratify Protocol 11. This will be a period in which extremely important activities such as the drafting of the rules of the new Court, the election of judges and the setting up of a Registry will have to be completed. These preparatory activities should show respect for the autonomy of the future Court in taking decisions. But they are important because they would facilitate the work of the new Court.

Upon the entering of the Protocol into force, parallel to the activities of the Court, the Commission will continue to exist and operate with its powers restricted by new Article 5 within a period of one year thereafter. It is necessary for its members to fully preserve their status within the framework of this one-year period so that they may perform their functions unobstructed. If during that period any members of the Commission drop out of its composition, they will be replaced by others elected in compliance with the former rules. All new applications addressed to the Court from the date of the entry into force of Protocol 11 shall be examined by the Court. It will also examine applications pending before the Commission which have not been declared admissible at the date of entry into force of Protocol 11. In the one year period following the entry into force of Protocol 11, the Commission will continue to deal with the cases which have been declared admissible prior to that date. When the Commission adopts a report in compliance with former Article 31, the procedure applied in respect to this report shall be the one in force before the entry into force of Protocol 11. A similar procedure should also be applied to applications on which the Commission has adopted a report in compliance with Article 31 prior to the entry into force of Protocol 11 but has not decided on their referral to the Court.

Cases pending before the Court which have not been decided at the date of entry into force of Protocol 11 shall be submitted to the Grand Chamber of the Court which shall examine them according to the provisions of this Protocol (Article 5, paragraph 5 of Protocol 11).

Cases pending before the Committee of Ministers which have not been decided under former Article 32 of the ECPHR at the date of entry into force of Protocol 11 shall be completed by the Committee of Ministers acting in accordance with that Article.

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