Strasbourg, 11 March 1959

SECRET
CDH/Misc (59) 23

Or. Fr.

EUROPEAN COURT OF HUMAN RIGHTS

Summary report of the sitting 33
held by the Court on Monday, 23 February 1959 (morning) 55
(prepared by the Secretariat)

(translation made in 1972)

Diverse questions
(in particular, the seat of the Court and advisory opinions)

Lord McNair, the oldest member, took the Chair at 10.25 in the presence of all the judges except Mr. Balladore Pallieri and Mr. McGonigal.

THE PRESIDENT called Mr. Modinos.

Mr. MODINOS drew attention to document H (59) 1, on the election of judges, and stated the administrative and financial measures taken by the Committee of Ministers. He then explained the preparatory document drafted by the Directorate of Human Rights on the Court's Rules and procedure (doc. CDH (59) 1).(1) This was not a preliminary draft of the Rules but merely a list of questions to be discussed.

(1) Note to the Registry (1972): See pp. ... et seqq. above.

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At its first session the European Commission of Human Rights had examined the Convention and had inferred a number of rules of procedure from it. After a broad exchange of views on certain principles it had set up a working party, which had submitted to the Plenary Commission draft Rules of Procedure based on a preliminary draft prepared by the Secretariat. The Plenary Commission had adopted the draft at its second session, with a number of amendments.

In document CDH (59) 1 the Directorate of Human Rights made frequent references to the draft Rules of the Court of the European Communities ("The Luxembourg Court"). However, those Rules had not yet been approved by the Councils of Ministers, which meant that they were not yet in their final form and so should not be ~~made~~ published for the time being. Document CDH (59) 1 also referred in places to the European Movement's drafts of July 1949, which included a draft Statute for the European Court of Human Rights. As regards the Statute and Rules of the International Court of Justice, the experience of the European Commission of Human Rights seemed to prove that if they were to be taken over as they stood the result would be too rigid. Moreover, the Court had to take account of the numerous differences between its powers and duties and those of the Commission. On the other hand, the relations between the Commission and the Court would have to be defined, since the former could bring cases before the latter. It was true that the Commission had not mentioned this subject in its own Rules, for at the time (April 1959) the constitution of the Court still appeared remote. But the Commission was now very much aware of the matter.

After pointing out that one of the most delicate problems for the Court would be to differentiate between procedural and statutory rules,

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he proposed that the Court should adjourn, so that the judges would have time to study the preparatory document.

Mr. ROLIN said that the Court had an enormous task before it: it had to decide not only on its organisation but also on its procedure. In the circumstances would it not be better to set up one or two small committees to make proposals as the work advanced? The plenary Court was unlikely to achieve anything if, without a rapporteur or previous discussion in committee, it had to examine one by one the problems which would arise. On one point, however, the Court could perhaps come to a decision without further delay, i.e. on the question of its seat. It was of course free to decide where this should be but it could not lose sight of the location of other European organisations. He personally advocated Strasbourg. Above all the Court should show that it did not intend to waste time on empty questions of national prestige. Finally, he agreed with the adjournment suggested by Mr. Modinos.

THE PRESIDENT asked if the Court was willing to take an immediate decision on the subject of its seat.

Agreed.

THE PRESIDENT then asked members to state their preferences for the Court's seat.

Mr. VAN ASBECK proposed that the Court should establish its seat in Strasbourg, subject to the right to exercise its functions elsewhere in special circumstances.

Mr. VERDROSS supported Mr. van Asbeck's proposal.

Mr. ROLIN presumed that his colleagues, like himself, had first thought of The Hague. However, the European Court of Human Rights was not a world-wide

body not had it world-wide functions. Furthermore, it would be sitting intermittently, and not continuously. If therefore it were to go to the Hague - assuming adequate premises to be available there - public opinion might perhaps view this as an unfortunate display of ambition or rivalry. It was therefore better to abandon the idea.

Once this alternative had been rejected, several considerations, such as the cause of Franco-German rapprochement, told in favour of Strasbourg. It was true that it was sometimes held against Strasbourg that it did not offer European institutions all the facilities that might be desired, particularly as regards the press, radio, etc. These objections, however, did not apply in the present case: the Court had no need of noisy publicity, quite the contrary. Of course it could meet elsewhere in certain exceptional circumstances specified in its Rules.

Mr. VAN ASBECK asked if the Rules should mention the city of Strasbourg as such or merely as the headquarters of the Council of Europe.

Mr. ROLIN preferred to speak merely of "Strasbourg", though the Court was of course free to re-examine the question if the Council should transfer its headquarters to another city. Reasons which in certain circumstances might justify a move by the Consultative Assembly or the Committee of Ministers could very well be quite irrelevant as far as the Court was concerned.

Mr. CASSIN said that the European Court, as a regional court, should avoid all possibility of confusion with the International Court of Justice, which was a world court. The International Court was known to

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public opinion as the "Hague Court". Consequently the European Court would be committing a psychological error if it were to choose the same seat as the International Court of Justice, particularly since other continents might some day also possess their regional courts. The European Court should choose a different city so as to demonstrate its independence. On another point he was nearer to Mr. Van Asbeck than to Mr. Rolin, seeing that he thought it was necessary to add the words "at the seat of the Council of Europe". The inclusion of these words, however, would not mean that any transfer of the Council's headquarters would automatically mean a transfer of the seat of the Court.

Mr. VAN ASBECK drew attention to the provisions of Rule 22 of the European Commission of Human Rights.

Mr. ROLIN feared that the wording of that Rule was ambiguous. What would happen if the seat of the Council of Europe were changed? Would the European Commission have to reconsider its choice of seat or would the seat be automatically transferred to the new headquarters of the Council of Europe? In the former case the words "seat of the Council of Europe" were without effect; in the latter the word "Strasbourg" was superfluous. It would therefore be better simply to say "at Strasbourg".

THE PRESIDENT, on the other hand, thought that the Court should operate at the seat of the Council of Europe. It was relatively unimportant whether or not the name "Strasbourg" was added. He had however one reservation, which the Court would not need to include in its Rules: in the distant future the Council's political activities might come to be very extensive. In such a case it might be wise for the

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Court to sit elsewhere so as to avoid all political influence and noisy publicity. The Supreme Court of Switzerland, for example, sat at Lausanne, not at Berne, the Federal capital. This was not to suggest that the Court should separate itself from the other organs of the Council of Europe; it was merely necessary to bear in mind the possibility of separation. For the moment the Court could state the principle that its seat would be the same as that of the Council of Europe.

This principle was agreed.

THE PRESIDENT then consulted the Court on the wording of the Rule dealing with its seat, and reminded it that Mr. Rolin would prefer the words "at the seat of the Council of Europe" to be deleted.

Mr. ROSS agreed with Mr. Rolin that Rule 22 of the European Commission of Human Rights was somewhat ambiguous. It would however be more logical not to mention Strasbourg than to omit the words "at the seat of the Council of Europe", which at all events should be kept. Like the President, he thought that the Court would be free to change its Rules on this point if necessary.

Mr. CASSIN was inclined to keep the existing wording of Rule 22 of the European Commission of Human Rights.

It was true that the Commission, as a conciliation body, had perhaps a greater interest than the Court in keeping close to the "political authorities" of the Council of Europe. Nevertheless, even for the Court the wording of Rule 22 had two advantages: firstly, the name of a town struck the public imagination more than that of a legal institution;

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secondly, the ties between the Court and the Council of Europe ought not to be forgotten. The Commission's Rule 22 had the advantage of expressing these two ideas together.

If the Council were to move its headquarters the Court would have the right and indeed the duty to re-examine the question. One point it would consider would be the negative advantages of following the "political authorities" and those of remaining free from pressures in a place where it might have acquired a certain prestige. More than any other, the European Court had to make an impact on public opinion if it was to develop deep roots. For public opinion the "Hague Court" meant much more than the "Permanent Court of International Justice" or the "International Court of Justice". The Court could therefore take over the provisions of the Commission's Rule 22 although for different reasons.

Mr. WOLD wondered if the Court could fix its seat anywhere except where the Secretariat of the Council of Europe operated, but he agreed with Mr. Rolin in mentioning Strasbourg alone.

Mr. ROLIN drew attention to two points. Firstly, the President of the Consultative Assembly, Mr. Dehousse, had expressed the wish that the Council of Europe should transfer its seat to Paris. Personally he thought it would be deplorable for a European Court to sit in a large metropolis like Paris where it would be submerged in movements of opinion of all kinds. Secondly, though it had to be recognised that for the time being the Court was vitally dependent on the Secretariat General of the Council of Europe, it was to confer certain independent functions, as members of its Registry, on a number of Secretariat officials, who might combine these functions with their other duties. It was not the Secretariat General as a whole which would constitute the Court's Registry. In the circumstances the Court would do better to identify

itself from the beginning as the "Strasbourg Court". If the Council of Europe were to move the matter could be reconsidered later.

THE PRESIDENT asked Mr. Modinos to state the Secretariat's opinion.

Mr. MODINOS pointed out that the Court would not be in full-time session, even though it was a permanent body. It could be assumed that it would meet for about twenty or thirty days each year. It was therefore impossible to contemplate setting up a Registry on the same scale as that of the International Court of Justice. It was even to be expected that the Registrar would perform other duties at the same time, e.g. those of Director of Human Rights and Head of the Secretariat of the European Commission of Human Rights. From the point of view of the Secretariat's organisation there was thus a strong argument in favour of the Court's seat being the same as that of the Council of Europe.

THE PRESIDENT observed that there was general agreement on the principle that, at least for the time being, the Court should sit at the seat of the Council of Europe. There only remained the question of wording. It would be prudent to adjourn this question to the next sitting on account of its importance. There was another small question of drafting, or rather translation: the English text of Rule 22 of the European Commission of Human Rights was not entirely in line with the French text. It should read "when it thinks fit" rather than "if it thinks fit".

Mr. ROLIN agreed with the President's last observation, which however raised a difficult question: was it for the plenary Court or for the Chambers established under Article 43 of the Convention to decide whether a meeting should be held away from Strasbourg?

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THE PRESIDENT proposed saying, for example, "when the Court in plenary session thinks fit".

Mr. ROLIN said that here was one of the main difficulties facing the Court. Unlike the European Commission of Human Rights, the Court, as contemplated in the Convention, would not meet in plenary session except every three years to elect its President and Vice-President. It was almost impossible to convene fifteen judges to decide whether seven of them should meet at Strasbourg or elsewhere (e.g. to hear witnesses). It would be better to trust to the wisdom of the Chambers. It was very desirable that the Court should come to the conclusion that the Convention ought to be amended on several points.(1) It would be harmful to the Court's prestige, for example, if neither the President nor the Vice-President formed part of a Chamber for the simple reason that they had not been chosen by lot.

Mr. ROSS suggested taking over as it stood Rule 22 of the European Commission of Human Rights, interpreted in the light of Article 43 of the Convention, which provided, "For the consideration of each case brought before it, the Court shall consist of a Chamber composed of seven judges ...". If the Rules were silent the solution would thus follow directly from the Convention, the matter being decided by the Chambers.

THE PRESIDENT agreed with Mr. Rolin and Mr. Ross. He was in favour of a Rule based on the Commission's Rule 22, subject to the slight change in the English wording which he had already suggested.

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(1) Note by the Registry (1973): Mr. Rolin did in fact draft shortly afterwards three proposed recommendations in that sense (see pp. ... , ... and .. below).

He also suggested that a resolution should be adopted to the effect that it was for the Court, sitting as a Chamber, to decide in each case whether there were grounds for sitting elsewhere than at Strasbourg. Such a resolution would not actually form part of the Rules.

Mr. MODINOS said that there was a general and a particular problem. The former concerned the possible transfer of the Court's seat, and here it was obvious that the decision could only be taken by the plenary Court. However, the latter problem, that of the possibility of investigating cases outside Strasbourg, was a matter for the Chamber concerned. The Sub-Commission of seven members which had examined the Greek Government's first application against the British Government had conducted its enquiry in Cyprus without referring the matter to the plenary Commission.

THE PRESIDENT proposed that the Court should adjourn to its next sitting the drafting of the Rule concerning its seat. Meanwhile, it could hold a discussion on general matters and would then study the preparatory document drawn up by the Directorate of Human Rights.

Agreed.

Mr. MODINOS said that among the general questions to be decided was whether the Court had jurisdiction to give advisory opinions. Article 58 of the European Movement's draft Statute gave the Court this jurisdiction. Could it not be provided, without violating the Convention, that, like the International Court of Justice, the Court would act as an advisory body or arbitration tribunal if the parties (who would on this hypothesis be Member States of the Council of Europe) agreed to its doing so? Like every other body, the European Court of Human Rights

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was in danger of withering away if not fed. It was clear that the two applications by the Greek Government against the British Government would not be brought before it. There were currently at most two individual applications pending before the European Commission of Human Rights which had any chance of coming before the Court at a later date.

Mr. HOLMBÄCK proposed that the Court should limit itself to a preliminary discussion at the current sitting, as the judges had not yet had time to read the documents. He would like to familiarise himself with the "travaux préparatoires": did they throw any light on the meaning and scope of Article 55 of the Convention? ( )

Mr. ROSS thought that Mr. Modinos had raised a very important problem which the Court ought to think about before coming to a decision. At first sight however it would appear dangerous for the Court to assume it possessed advisory jurisdiction. Of course its jurisdiction depended upon the consent of the parties. But if two parties agreed to bring a dispute before the Court why should they be content to ask for an opinion rather than a decision? The Contracting Parties to the Convention did not need opinions. The position at the International Court of Justice was different: only the various organs of the United Nations were entitled to request that Court to give advisory opinions (Article 96 of the Charter of the United Nations).

THE PRESIDENT asked Mr. Modinos if the "travaux préparatoires", particularly those on Articles 48 and 55, shed any light on the question. In particular did Article 55 mean anything more than simply rules of procedure when it referred to rules and procedure?

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(Note by the Registry (1973): See II. ... below (CDH/Misc (59)1))

Mr. MODINOS replied that the documents relating to the preparatory work on the Convention were as a rule not very informative. There was however a difference in wording between Article 36 of the Convention (the Commission's rules of procedure) and Article 55 (the rules and procedure of the Court). This difference and the almost complete absence of statutory rules in the Convention seemed to suggest that the Court enjoyed great freedom of action as far as its rules and procedure were concerned.

Mr. ROLIN said that the reference to "rules and procedure" in Article 55 of the Convention was to be understood in the same way as in the draft rules of the Luxembourg Court, i.e. as referring to two different things: firstly the internal organisation of the Court and secondly its procedure, which was its external aspect, affecting mainly the parties.

He agreed with Mr. Ross as regards advisory opinions. It would adversely affect the Court's authority if it were to add advisory jurisdiction to its contentious jurisdiction. Of course he shared Mr. Modinos' concern that the Court's activity should be regular to be satisfactory. However, the Court must surely be aware that it was not for itself to solve the problem; it had to conform strictly to the powers conferred on it by the Convention. At first sight however it was not clear that it would be right to disclaim jurisdiction if the Committee of Ministers were to invite it to give an opinion. Personally he thought it should refuse such a request: if it complied it would not be able to refuse to do the same for the Consultative Assembly, and the Committee of Ministers would certainly not appreciate that. If the

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Member States of the Council of Europe wished to confer advisory jurisdiction on the Court there was nothing to prevent their altering its statute to that effect. On the other hand it would be dangerous for the Court to arrogate such jurisdiction to itself in its own Rules.

There was another very delicate question which required interpretation of Article 48 of the Convention. What would happen if a dispute arose between State A, which had accepted the compulsory jurisdiction of the Court (e.g. Belgium or the Federal Republic of Germany), and State B which, without having signed the declaration provided for in Article 46 of the Convention, intended to bring State A before the Court? As a rule, international instruments similar to the Convention contained an express or implied condition of reciprocity in such matters. There would be no reciprocity if any State was able to take proceedings against another before the Court. Such a possibility would not be compatible with Article 48.

Mr. MODINOS stated that the question of advisory opinions had already arisen on two occasions in connection with the European Commission of Human Rights. First, when the Consultative Assembly had made suggestions to the Committee of Ministers on the protection of minorities, some States had thought that the Convention on Human Rights provided sufficient safeguards in this field, while others had expressed a different point of view. The Committee of Ministers had then asked him whether the European Commission of Human Rights could be invited to give an opinion on the subject. After consulting the President, Mr. Waldock, he had replied in the negative. The second precedent, which was also negative, had arisen when the question of the Saar was being examined by the Council of Europe.

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With regard to the possibility of submitting to the Court legal disputes other than those relating to the interpretation and application of the Convention, the Consultative Assembly had adopted in 1952 a recommendation advocating the establishment of a European Court of Justice to decide disputes arising between member States. The governments of member States had not accepted the proposal. The European Convention for the Peaceful Settlement of Disputes, concluded in 1957, conferred jurisdiction on the International Court of Justice. But what would happen if two governments agreed to submit to the Court a dispute not falling under the Convention?

Mr. VAN ASBECK understood Mr. Modinos' concern that the Court should not "wither away". There was however another danger, namely that the Court, which was a new and in some ways revolutionary institution, might use its Rules, which had not the legal force of a Convention, to arrogate to itself jurisdiction which would be unwelcome to some governments. The Rules could not be the source of jurisdiction not provided for in the Convention.

He agreed with Mr. Rolin that Article 48 of the Convention was ambiguous. However, if one examined the article in the light of the intentions behind the Convention it seemed that a case could be brought before the Court either on a unilateral application, provided that both States concerned had accepted the Court's compulsory jurisdiction, or, failing that, if they had both given their express consent.

Mr. VERDROSS agreed with Mr. Van Asbeck, Mr. Rolin and Mr. Ross that the jurisdiction of an international body depended on the convention by which it had been established. Its rules of procedure were on a lower level: their relationship to the convention was similar to that

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between government regulations and acts of parliament. Another point was that the Statute of the International Court of Justice drew a clear distinction between its contentious and its advisory jurisdiction, whereas the European Convention on Human Rights spoke only of the former kind of jurisdiction.

Mr. CASSIN did not attach very great importance to the difference in wording between Article 36 ("rules of procedure") and Article 55 ("rules and procedure") of the Convention. The Rules of Procedure of the European Commission of Human Rights, like those of the Luxembourg Court, fell into two parts, the first relating to the organisation and working of the Commission and the second to its procedure.

As regards Article 48 of the Convention his experience led him to support the view adopted by Mr. Rolin, Mr. Van Asbeck and Mr. Verdross. A court could not widen its jurisdiction by making rules. This principle was fundamental in domestic law and even more so in international law. The Court would destroy itself if it exceeded the powers conferred on it by the Convention. It could of course unofficially submit to the member States suggestions for the alteration of its statutes. One such suggestion might be directed to ending the paradox of a Court which practically never met in plenary session; another might relate to advisory opinions.

When a case arose the Court would have to decide whether the matter had been properly brought before it by a State. At first sight a country which had not accepted the Court's compulsory jurisdiction could not by unilateral application bring a case against another country which had accepted that jurisdiction. This would seem to follow from the wording of Article 48 of the Convention.

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Mr. MODINOS drew attention to the fact that Article 48 had to be interpreted in the light of Article 46 (1) and (2). Under Article 46 (2) the Contracting Parties could make an express condition of reciprocity. Everything would thus depend on the wording of the declaration accepting the Court's jurisdiction.

Mr. ROSS had a brief comment to make on Article 55 of the Convention, more particularly on the difference between "rules" and "procedure". If one studied the systems of the various international courts one generally found a document called the "rules" ("règlement" in French) and divided into two parts, the first of which related to the court's organisation and working, i.e. questions of a purely internal nature, and the second to its procedure, i.e. its relations with the parties. This seemed a very natural division and one which should be adopted by the European Court of Human Rights.

Mr. VAN ASBECK was also doubtful whether there was an important difference between Articles 36 and 55 of the Convention.

Mr. HOLMBÄCK agreed with Mr. Ross on the meaning of the word "procedure", but what was meant by "rules"? In the Statute of the International Court of Justice the chapter on procedure came after Chapters 1 and 2, respectively entitled "Organization of the Court" and "Competence of the Court".

Mr. ROLIN replied that the word "rules" was an approximate English translation of the French word "règlement".

Mr. ROSS observed that the Convention left many questions unsolved, such as the manner in which the President of the Court was to be elected, and the organisation of the Registry, etc..

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THE PRESIDENT asked Mr. Holmbäck what conclusions he drew from the distinction between "rules" and "procedure".

Mr. HOLMBÄCK said that he had not yet come to any definite conclusion and therefore wished to obtain information on the "travaux préparatoires" on the Convention.

THE PRESIDENT consulted the Court as to whether it could give advisory opinions. Such a possibility was never merely implied: it had to be expressly provided for. There were a number of international and national courts entitled to give advisory opinions but in each case the power was conferred on them by an express provision.

Mr. WOLD said that the Norwegian Constitution gave the Supreme Court advisory jurisdiction, which however was rarely used.

The Court agreed with the President's opinion.

Mr. ROLIN wished to correct an error which was very widespread in Council of Europe circles. This was the belief that the member States could widen the jurisdiction of the Court by means of conventions without regard to its existing status as defined in the European Convention of Human Rights. His view was that, if two or more member States decided to submit to the Court a dispute not covered by the Convention, the Court should disclaim jurisdiction, for it could only deal with disputes relating to the interpretation and application of the Convention. Like every other Court, it was bound by its statutes, which therefore would have to be amended if there was a desire that it should be able to deal with other types of disputes. (1)

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(1) Note by the Registry (1973): See the draft recommendation reproduced on page ... below.

Mr. VERDROSS drew attention to the fact that various treaties gave certain powers to the presidents of international courts, e.g. that of appointing arbitrators or conciliators. He wondered whether this might not be the case with the European Court of Human Rights.

Mr. CASSIN said that the question raised by Mr. Verdross had been studied by the Commission of Human Rights of the United Nations, which had gone into the question of whether the International Court of Justice or its President could appoint arbitrators or conciliators. This was however an administrative or prerogative right which had nothing to do with the Court's ~~jurisdiction as such~~ as a judicial body. He was in favour of such a right but thought it much more difficult to enlarge the Court's judicial or related jurisdiction (advisory opinions). He was not against the member States opening the Court's doors more widely, but it was for them to do it, not the Court itself.

THE PRESIDENT agreed that one could not compare a president's power to appoint arbitrators with a Court's jurisdiction to give advisory opinions. The Court's jurisdiction rested on the consent of the parties.

THE COURT decided to start its next sitting on Tuesday, 24 February at 10 a.m. In the meantime the judges would make themselves familiar with the preparatory document (CDH (59) 1) drawn up by the Directorate of Human Rights.

The sitting ended about 1 p.m.