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STEERING COMMITTEE FOR HUMAN RIGHTS
(CDDH)

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# CDDH report on the question of whether or not to amend the Convention to enable the appointment of additional judges to the Court

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I. INTRODUCTION

1. The Declaration adopted at the High-level Conference on the future of the European Court of Human Rights, organised in Brighton in 2012 by the United Kingdom chairmanship of the Committee of Ministers, noted that "to enable the Court to decide in a reasonable time the applications pending before its Chambers, it may be necessary in the future to appoint additional judges to the Court; further notes that these judges may need to have a different term of office and/or a different range of functions from the existing judges of the Court" and invited the Committee of Ministers "to decide by the end of 2013 whether or not to proceed to amend the Convention to enable the appointment of such judges following a unanimous decision of the Committee of Ministers acting on information received from the Court" (para. 20.e)).

2. The Committee of Ministers subsequently instructed the Steering Committee for Human Rights (CDDH) "to submit conclusions and possible proposals for action in response to this invitation". The deadline for this work was fixed at 31 December 2013.[1] The CDDH conferred the task on the Committee of experts on the reform of the Court (DH-GDR) and work was begin within the Drafting Group "E" on the reform of the Court (GT-GDR-E).

3. The present debate concerning the question of additional judges has its origins in the discussions that took place before the Interlaken Conference, organised in 2010 by the Swiss Chairmanship of the Committee of Ministers. These discussions were reflected in para. 6.c)ii) of the Interlaken Declaration, which recommended, "with regard to filtering mechanisms, … to the Committee of Ministers to examine the setting up of a filtering mechanism within the Court going beyond the single judge procedure and the procedure provided for in i)."[2] Furthermore, para. 7.c)i) of the Interlaken Declaration had called upon "the Committee of Ministers to consider whether repetitive cases could be handled by judges responsible for filtering". As a result, the CDDH was in 2011 given terms of reference to elaborate "specific proposals for measures requiring amendment of the Convention, including proposals, with different options, on a filtering mechanism within the European Court of Human Rights …"

4. Before the end of 2011, in the context of the work leading to the CDDH Report on measures requiring amendment of the Convention,[3] the Court's Registry provided information on developments concerning the number of pending applications, indicating that it now expected to resolve the backlog of clearly inadmissible cases by the end of 2015. The Court's new structures and working methods for filtering, put in place since June 2010 following the entry into force of Protocol No. 14, had in fact had an impact greater than the already considerable one originally foreseen. The Court also attributed the increase in the number of decisions to the restructuring of the Registry, in particular the effective co-operation between the single judges and the non-judicial rapporteurs, the creation of a filtering section devoted to applications brought against countries concerning which there were the largest numbers of applications found inadmissible, and to improvements made to working methods, most especially by the filtering section. The Registry then envisaged not only the possibility of dealing with most newly arriving, clearly inadmissible applications within a period of at most a few months after their receipt, but also, by extending the new working methods to the entire

[1] The initial deadline of 15 October 2013, set by the decisions of the Ministerial Session in May 2012, was extended to 31 December 2013 by the Ministers' Deputies at their 1159th meeting (16 January 2013).
[2] Sub-paragraph (i) recommends that "the Court put in place, in the short term, a mechanism within the existing bench likely to ensure effective filtering".
[3] See doc. CDDH(2012)R74 Addendum I, of which the Ministers' Deputies rook note at their 1135th meeting (23 February 2012); see in particular paragraphs 33 to 42 and Appendix IV, Section I.

Registry, the possibility between 2012 and 2015 of gradually resolving all the applications currently pending before a single judge.

5. In June 2013, during an exchange of views with the CDDH, the President of the Court, Mr Dean Spielmann, recalled that "the results for 2012 had been excellent and that the number of pending cases, which, in September 2011, had reached over 160,000, had fallen to just over 128,000 by the end of 2012" and indicated that "we are half way through 2013 and the very good results of last year have been confirmed".[4] The Registry also presented to the Ministers Deputies its results for the first six months of 2013. During this period, the Court allocated 35,500 new applications to a judicial formation and disposed of almost 50,000 applications, which represented an increase of 25% as compared with 2012. The number of applications on which judgment had been delivered had increased by 129% and the number of application communicated to Governments by 32%. Furthermore, the Registry indicated that on 1 July 2013, 41,600 applications were pending before single judges and that those making up the backlog, in the sense of the Brighton Declaration,[5] being 34,000, would be dealt with by the end of 2015. According to the Registry, the aim had already been achieved for many States, for example Poland, Romania and Turkey. As regards Russia, the backlog will disappear during the course of 2014 and as regards France and Germany, already this autumn. It was also indicated that, insofar as the Court will soon have dealt with the backlog of single judge cases, the number of decided cases will necessarily decrease and the focus of the Court's work will shift from single judge and repetitive cases to priority and normal cases.[6] The factual analysis that preceded the Brighton Conference, which had led to the conclusion that the introduction of a new filtering mechanism was not necessary, thus remains unchanged. It should also be noted that some thought at the time that the bottleneck was probably situated at the level of the Registry.

## II. PREVIOUS CDDH WORK ON THE ISSUE

6. The Registry's information concerning the number of pending applications and the Court's expectations for the future treatment of clearly inadmissible applications (see para. 4 above) had implications for the CDDH's work in 2011. Discussion of filtering revealed a growing concern that a more important question may in fact be the growth in the Court's backlog of Committee and Chamber cases. The initial emphasis put by the CDDH on possible measures to increase the Court's filtering capacity was therefore shifted towards possible measures to increase the Court's general case-processing capacity.

### *Previous CDDH work aimed at increasing the general case-processing capacity of the Court*

7. Concerning the increase in the Court's general case-processing capacity, in particular of Committee and Chamber cases, two proposals were made by the CDDH during its previous work.[7]

[4] See doc. CDDH(2013) R78, Appendix IX.
[5] See the Brighton Declaration, Section D., paragraph 20. h).
[6] See the intervention of Mr Erik FRIBERGH, Court Registrar, at the GT-REF.ECHR meeting on 9 July 2013. It can also be noted that on 24 October 2013, the Registrar issued a press release again confirming the trend and indicating that on 1 October 2013, there were 38,200 cases pending before a Single Judge, with the total number of pending cases being 111,350.
[7] See doc. CDDH(2012)R74, Appendix IX, Section I), paragraphs 12-23.

8. The first proposal consisted in establishing a group of 'temporary judges', which would allow reinforcement, when necessary, of the general capacity of the Court to take decisions on the treatment of cases.[8] The CDDH considered that such judges should:

a. satisfy the criteria for office of Article 21 of the Convention;
b. be nominated by the High Contracting Parties and, possibly, approved or elected to the pool by the Parliamentary Assembly;
c. be appointed from the pool by the President of the Court for limited periods of time as and when needed to achieve a balance between incoming applications and disposal decisions (subject to the Court's budgetary envelope);
d. when appointed, discharge most of the functions of regular judges, other than sitting on the Grand Chamber or Plenary Court;
e. when appointed, be considered as elected in respect of the High Contracting Party that had nominated them.

9. For the CDDH, an alternative proposal would be to introduce a new category of judge (originally proposed as a new filtering mechanism), which would deal exclusively with repetitive cases and with single judge cases.[9] This would enable the regular judges to devote more time to chamber cases. The number of judges would vary according to the Court's needs and their term of office would be considerably shorter than that of the regular judges. These judges would have to possess the qualifications required for appointment to judicial office and be subject to the same requirements as the regular judges with regard to independence and impartiality. However, since the essential nature of their work would not require that they "possess the qualifications required for appointment to high judicial office or be jurisconsults of recognised competence," as is required of regular judges by Article 21(1) of the Convention, they could be at an earlier stage in their career and their remuneration could be lower. The judges could be elected by the Parliamentary Assembly or by the Court itself from a list of candidates submitted by the Member States. It would be in the Court's discretion how the three-judge committees will be composed, e.g. two regular judges sitting with one new judge or one regular judge sitting with two new judges.

### *Previous CDDH work on a new filtering mechanism*

10. The CDDH had envisaged two situations in which it may prove necessary to have recourse to additional judges: if the expected results concerning the treatment of cases pending before single judges were not achieved, or if the time taken by the Court to deal with other cases became too long. As to the first situation, the positive tendencies in the treatment of clearly inadmissible applications have now been confirmed. As regards the second, however, some considered even then that, whatever the effects of the single judge system and the related internal reforms of the Court, the time taken by the Court to deal with other cases had already become too long; this does not necessarily imply, however, that these States had thus concluded that the moment had arrived to introduce additional judges.

11. In this context, the CDDH had retained three possible options for a filtering mechanism,[10] namely: (i) authorising experienced Registry lawyers to take final decisions with regard to clearly inadmissible cases; (ii) entrusting filtering to a new category of judge,[11] whose main function, however, would be to deal with repetitive cases (see para. 9 above); and

[8] Concerning the advantages and disadvantages of such a proposal, see doc. CDDH(2012)R74, Appendix IX, Section I), paras. 12-20.
[9] Concerning the advantages and disadvantages of such a proposal, see doc. CDDH(2012)R74, Appendix IX, Section I), paras. 12-20.
[10] See doc. CDDH(2012)R74, Appendix IX, Section I), paragraphs 24-45.
[11] Concerning the advantages and disadvantages of such a proposal, see paragraphs 29, 36 and 37.

(iii) a combined option,[12] giving specific members of the Registry competence to deal with certain categories of applications that have been provisionally identified as clearly inadmissible and creating a new category of filtering judge for the others.[13] In the two options involving a new category of judge, the CDDH had considered that these judges could also sit on committees of three judges to deal with repetitive applications.[14]

12. The CDDH recalls that views were clearly divided on whether to introduce any form of additional judge, for whatever purpose, with various arguments having been presented for and against the different proposals.

***Previous CDDH work on the issue of the number of cases pending before Committees of the Court (repetitive cases)***

13. The CDDH has recently transmitted to the Committee of Ministers two reports touching upon the issue of repetitive cases, one containing conclusions and possible proposals for action on ways to resolve the large number of applications arising from systemic issues identified by the Court.[15] It can be noted that amongst the various proposals made in this report, that of introducing additional judges in order to address the backlog of this category of case does not appear. This does not mean that the CDDH now considers this proposal no longer to be of value or relevance as a potential means of confronting this challenge. It is rather a case of the various initiatives and proposals examined were of quite different degree and had structural and budgetary consequences that were clearly less significant than those of the proposal to introduce additional judges; in particular, they did not imply amendment of the Convention, which is not the case for the latter. As a consequence, it is clear that, in this context, other, less radical approaches should be further explored or even exhausted before concluding on the necessity of introducing additional judges.

14. That said, it can be noted that the Registrar considered that the work of the Court will in the near future shift from single judge cases and repetitive cases to priority and normal cases (see paragraph 5 above). In the face of such a situation in constant evolution, the question of which type of case would be most appropriate for treatment by additional judges will remain fundamental to any future debate. For the time being, it remains a question on which there is no consensus.

## III. CONCLUSIONS AND POSSIBLE PROPOSALS FOR ACTION

15. The CDDH's work on the question of whether or not to amend the Convention to enable the appointment of additional judges to the Court leads it to the following three findings:

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[12] Concerning the advantages and disadvantages of such a proposal, see paragraphs 29, 39 and 40.

[13] Article 35(1) of the Convention sets out the admissibility criteria concerning exhaustion of domestic remedies and the six-month rule; article 35(2) of the Convention excludes applications that are anonymous or that have previously been examined by the Court or already submitted to another international body. Article 35(3) of the Convention excludes applications that are incompatible with the Convention, manifestly ill-founded or an abuse of the right of individual application, or which imply no significant disadvantage for the applicant.

[14] "Repetitive applications" means those that are dealt with by committees of three judges in accordance with well-established case-law of the Court (see Article 28 of the Convention).

[15] See doc. CDDH(2013)R78 Addendum III. The other report, less relevant in the present context, was on the advisability and modalities of a 'representative application procedure' (see doc. CDDH(2013)R77 Addendum IV).

- The tendencies identified during preparation of the earlier report have been confirmed (see paragraphs 4 and 5 above).

- The CDDH notes that there is no consensus on this issue, as regards either the necessity of appointing additional judges or the competences that such judges could exercise.

- Any measure to increase the Court's capacity, whether for filtering or the treatment of cases in general, will clearly have budgetary consequences. The CDDH does not consider it possible to envisage the necessary increases in the current circumstances.

16. The CDDH thus concludes that, in the present circumstances, there is no basis for amending the Convention in order to allow the appointment of additional judges to the Court. It may nevertheless prove justified to re-examine this issue in future, on the basis of objective elements.