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DH-GDR(2011)R6 Addendum I

STEERING COMMITTEE FOR HUMAN RIGHTS
(CDDH)

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COMMITTEE OF EXPERTS ON THE REFORM OF THE COURT
(DH-GDR)

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Report of the Consultation with representatives of civil society and national human rights institutions

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6th meeting
Strasbourg, 9-11 February 2011

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Report of the DH-GDR's consultation with representatives of civil society and national human rights institutions[1]

Opening and General Introduction

The Chairperson of the DH-GDR, Mme Anne-Françoise TISSIER (France) opened the consultation, welcoming the participants and underlining the importance of consultation with civil society and national human rights institutions (NHRIs), as called for in the Interlaken Declaration.

She then proceeded, along with Mr Jörg Polakiewicz, Head of the Human Rights Development Department, to gave a general introduction to the work on follow-up to the Interlaken Conference underway in the DH-GDR, the CDDH and the wider Council of Europe.

The representatives of civil society organisations and of the European Group of National Human Rights Institutions then each briefly introduced themselves and the bodies that they represented.

Issue I: a possible new filtering mechanism for the Court

The Chairperson of the CDDH, Mrs Almut WITTLING-VOGEL (Germany) introduced the issue and the work undertaken thus far by the CDDH and DH-GDR.[2]

The Registrar of the Court, Mr Erik FRIBERGH, then provided information on the functioning of the current system of filtering within the Court following entry into force of Protocol No. 14.

Professor Robert WINTEMUTE (ILGA-Europe) agreed that filtering was essential and regretted that some applicants simply tried their luck, treating the Court as an Ombudsman or "fourth instance." The most flexible, simple system would be to allow the Registry to perform the task. It was not necessary for every case to proceed as far as a judge; the Registry could filter out the most ill-advised applications.

Mr Maxim FERSCHTMAN (OSJI) asked whether the over-load was at the level of judges or the Registry – was there any need for more judges? A new filtering mechanism within the Court would deal only with manifestly ill-founded cases, which would be very boring work: not many national judges would want to do only that. The Convention currently established a right to a "reasoned" decision: would a new filtering mechanism give a "reasoned" decision to every applicant?

The Registrar replied that the Registry was currently subject to a greater burden of work than the judges: this was shown by the fact that the judges were able to deal promptly with all the cases that the Registry was able to prepare. Further expansion of

[1] The programme and list of participants can be found at Appendix I.
[2] For further information on this issue, please see document DH-GDR(2011)R6 Addendum II, Appendix IV: Filtering of applications and treatment of repetitive applications.

the Registry, however, would eventually cause the judiciary to reach the limits of its capacity; this point would probably be reached if the Registry grew by 100-200 staff. Requiring a new filtering mechanism to give fully reasoned inadmissibility decisions in every case would impose an enormous additional burden on the Registry.

Mr Vitalie NAGACEVSCHI (Lawyers for Human Rights) agreed that admissibility decisions needed at least a minimum of reasoning to promote better understanding of the admissibility criteria.

Mr Theo BOUTRUCHE (Amnesty International) argued that admissibility decisions should be judicial and that three-judge committees for repetitive cases should not be composed only of "filtering judges," as this would send a wrong signal to States Parties about the importance of these cases.

Mr András KADAR (Hungarian Helsinki Committee) felt that giving reasons for decisions of clear inadmissibility should be relatively easy. In addition, he asked in what proportion of cases did Single Judges disagree with the draft decisions prepared by the Registry?

Mrs Nuala MOLE (AIRE Centre) agreed that admissibility decisions should be judicial. At present Single Judges had a certain distance from the underlying situations; "filtering judges" from the respective jurisdictions would not have this advantage. She disagreed that decisions of manifest inadmissibility were always easily reasoned.

Mrs Inga REINE (Latvia) asked what sort of cases, other than manifestly inadmissible ones, needed filtering? What alternatives to a new filtering mechanism were being considered by the Court?

Mrs Deniz AKCAY (Turkey) noted that the problem was at the level of the Registry, which both directed cases towards Single Judges and drafted the decisions.

The Registrar responded that the Single Judge system was more efficient than that prior to Protocol No. 14 but could not deal with all incoming applications; there was a shortfall of around 1,700 every month. 90,000 applications of the 140,000 backlog had been provisionally identified as clearly inadmissible. There were very few instances of Single Judges disagreeing with draft inadmissibility decisions; those that did occur usually involved the Single Judge being of the view that the case should be considered by a Committee or Chamber. Whatever system was put in place for issuing final decisions, the Registry would still be responsible for drafting them.

Issue II: a possible simplified amendment system for the Convention

The Chairperson of the DH-PS,[3] Mrs Björg THORARENSEN (Iceland), introduced the issue and the work undertaken thus far by the CDDH and DH-PS.[4]

[3] Committee of Experts on a simplified procedure for amendment of certain provisions of the European Convention on Human Rights

[4] For further information, please see document DH-PS(2010)003, Report of the First Meeting of the DH-PS.

Ms Róisín PILLAY (International Commission of Jurists) argued that the purpose of any Statute should be as defined in the Interlaken Declaration: strengthening the effectiveness of the Court by increasing the flexibility of responses to changes in its case-load, whilst maintaining its independence. Other debates, however, had been introduced, including "constitutional balance" within the Council of Europe; these were legitimate debates but should be separate. Any simplified amendment procedure should involve a sufficient role for the Court to both propose and approve. It should also be transparent, with consultation of other Council of Europe organs including the Parliamentary Assembly, as well as civil society and applicants' legal representatives. Moving provisions of the Rules of Court to a Statute would send a bad message by compromising the Court's ability to regulate proceedings; for example, Rule 39 – this could be elevated to the Convention, to underline its importance, but not made subject to a simplified amendment procedure.

Professor Robert WINTEMUTE (ILGA-Europe) observed that the Court of Justice of the European Union already had a three-tier system of texts but the rationale for the distribution of provisions between the Statute and the Rules of Court was unclear. In general, a minimum of rules of court should be contained in a statute, in order to avoid excessive rigidity in the regulation of proceedings.

Mrs Nuala MOLE (AIRE Centre) felt that the unfettered judicial discretion to make rulings on interim measures were very important in limited, relevant circumstances. It should not be regulated by a Statute that could be amended at the instigation of the States Parties, since it was their own acts that were challenged by requests for interim measures. It was difficult for the Court to give reasons for indications of interim measures when it had only a few hours to react; it would help if the respondent States cooperated fully. Many cases involving Rule 39 requests proved in the end to be inadmissible.

The Chairperson of the DH-GDR added that not only interim measures under Rule 39 but also unilateral declarations would benefit from elevated status, the latter as they were insufficiently well-known and understood.

Mr Jakub WOLASIEWICZ (Poland) said that the aim was to produce a better system. Rule 39 should be transferred to the Convention, with provisions giving additional precision in the Statute and subject to a simplified amendment procedure; the essence of Rule 39, however, should not be subject to such a procedure.

Ms Noémie BIENVENU (European Group of National Human Rights Institutions) referred to her organisation's written submission. The European Group acknowledged the need for some flexibility to adjust to new organisational issues the Court would face but considered that any simplified amendment procedure should be only for provisions of an organisational nature. It suggested that the Rules of the Court should be retained with their current scope and that the Court should be left to manage its own affairs, preserving the separation of powers between the executive and the judiciary and the independence of the judiciary.

The Registrar observed that the Court's view was similar to that of the International Commission of Jurists. Only organisational matters from the Convention should be

included in any Statute, as proposed in the Interlaken Declaration, not provisions from the Rules of Court. The Court was in the process of adopting a Rule of Court on the pilot judgment procedure, having received contributions from several member States and other parties; the new rule would be finalised in the near future.

Mrs Deniz AKCAY (Turkey) pointed out that a Statute would not amount to a simplified amendment procedure but would be a treaty some of whose provisions could be subject to such a procedure. There was not yet any final agreement on the contents of a Statute.

The Chairperson of the DH-PS observed that the idea was that Rule 39 not be subject to a simplified amendment procedure. A Statute could contain provisions from Section II of the Convention, but not all of its contents would be subject to a simplified amendment procedure. Interim measures under Rule 39 could be included in a Statute or in the Convention itself, in order to give them a clearer legal basis. There was also a question of conformity of a simplified amendment procedure with national, especially constitutional laws, which may depend on the nature of the provisions subject to it: if purely organisation, there would probably not be any problems; if concerning States Parties' obligations, there may be. The aim was to identify a single simplified amendment procedure. The easiest response to the Interlaken Declaration would be to add a provision establishing a simplified amendment procedure to the Convention, without creating a Statute, but the Committee of Ministers had asked the CDDH to take a wider view.

Issue III: possible introduction of a system of fees for applicants

The Vice-chairperson of the DH-GDR, Mr Frank SCHÜRMANN (Switzerland, introduced the issue and the work undertaken thus far by the CDDH and DH-GDR.[5]

Mr Guiseppe GUARNIERI (Council of Europe Conference of International NGOs) expressed his organisation's strong opposition to this proposal, as stated by the President of the INGO Conference had at Interlaken and reiterated in a resolution unanimously adopted in January 2011. The INGO Conference agreed that there must be a reduction in the number of applications, but this could be achieved by fining Respondent States for findings of violations in repetitive cases and improving provision of information to applicants.

Mrs Nuala MOLE (AIRE Centre) stated that the aim of a fee system would be to discourage manifestly inadmissible applications, not to provide a source of funding for the Court. The expert consultant who had prepared the study examined by the DH-GDR had not consulted national bar associations, etc., only state representatives and Court officials. The "fee system" defined in the study was wider that what could be applied at the Court. The costs of collecting a fee may be greater than the sums received. The Court only undertook means assessment in relation to communicated cases for the purposes of granting legal aid. With a fee system, this would have to be

[5] For further information, please see document DH-GDR(2011)R6 Addendum II, Appendix V: Access to the Court – fees for applicants.

done for all applications, a very complex exercise. The Court had a disparate approach to assessing means that varied from Section to Section.

Mr Alexander KASHUMOV (Access to Information Programme) was very concerned at this proposal. It was understandable from the perspective of the problem of manifestly inadmissible applications but not from that of applicants, who did not imagine their cases to be inadmissible. There was a risk of discrimination between member States on the basis of disparities in national income. Applying to Strasbourg was not an easy step to take; applicants may feat repercussions. In Bulgaria, no court decisions were unreasoned: should applicants be expected to pay for unreasoned decisions from Strasbourg? The Court was more like a national constitutional court, which did not charge a fee, or like a criminal court. Lack of access to the Court risked making rights ineffective.

Ms Margarita ILIEVA (Bulgarian Helsinki Committee) was also opposed to fees. Access to the Court should remain free – not only to the destitute but also to the less well-off, otherwise the burden would be disproportionate. The European Commission could bring infringement proceedings before the Court of Justice: why could the Council of Europe not have a similar system for cases involving general measures, to prevent repetitive applications? Action should be taken in relation to the States Parties, not against applicants.

Mr András KADAR (Hungarian Helsinki Committee) saw a connection between fees and filtering. In most cases, the Single Judge agreed with the Non-judicial Rapporteur – in other words, the Registry made the right decision. This should be formalised but there should be brief explanation of the reasons for the Registry's decision, with the possibility of requesting that it be reviewed. Only then should a fee be demanded. Initial access to the Court should be free, with the Registry then filtering cases, giving reasoned decisions, before a fee was demanded.

Professor Robert WINTEMUTE (ILGA-Europe) offered a personal view. A collapsing Court was of no use to anyone. The response could be: every applicant should pay a €100 deposit, refundable if the application was not entirely inadmissible; and – in order to ensure better execution of judgments in cases involving underlying systemic or structural problems – respondent States should pay a €10,000 fine for every judgment in a repetitive case based on well-established case-law.

Mr Adam BODNAR (Helsinki Foundation for Human Rights) referred to his organisation's written submissions. He was strongly opposed to fees. The Polish government had agreed with his organisation's objections. Twelve successful applicants had stated that had there been a fee, they would not have been able to bring their cases. Under the Polish constitution there were no fees for constitutional complaints. Any lack of exemptions from a court fee may be a violation of the right of access to a Court under Article 6 ECHR.

Mr Jakub WOLASIEWICZ (Poland) agreed that the issues of filtering and fees were connected. Filtering was also connected to the lack of remedies. Introducing penalties for states would be going too far. There was a problem with requests for referrals to the Grand Chamber – perhaps a €10,000 fee could be introduced to allow really serious cases to be referred to the Grand Chamber?

Mr Vitalie NAGACEVSCHI (Lawyers for Human Rights) felt that civil society as a whole was against fees, as he was himself. If there were to be fees, they must take into account the relative standard of living in the State Party in question, as the Court did in relation to awards of just satisfaction. In his country (Moldova), there were no fees for administrative or criminal proceedings, which were most similar in nature to Strasbourg proceedings – which therefore should not involve fees. Accordingly, if fees were to be introduced, applicants whose cases concerned civil or administrative proceedings should be exonerated from them.

Mrs Deniz AKCAY (Turkey) said that any "fee" would be of the nature of a minimal administrative charge. The most important cases were always presented by the best lawyers. It was not the case that the poorest applicants would not have access to the Court. It would be surprising not to have fees for national courts, so it should not be surprising for the Strasbourg Court. The issue was not a philosophical one but a practical proposal to be implemented along with other necessary measures.

Mrs Karinna MOSKALENKO (International Protection Centre) felt that free access to the Court was very important. Some of her organisation's lawyers were very well known and sometimes well paid for their legal work. The overwhelming majority of cases they took to Strasbourg, however, were *pro bono* on behalf of people with no or little income. Around 80% of those who contacted the International Protection Centre were prisoners with no money and difficult access to lawyers and communication with the outside world; sometimes it was difficult for them even to send a letter to the Centre. Such people could not pay a fee: if they were required to, they would not be able to access the Court at all. It would be necessary to have exceptions but introduction of such would make any system unworkable.

Other issues

Mr Polakiewicz, Head of the Human Rights Development Department, introduced the issue of provision of information to potential applicants and the recent proposals made by the Secretary General to the Committee of Ministers.[6]

Mr Martin KUIJER (The Netherlands) introduced the issue of extending the Court's competence to give advisory opinions and the state of discussions in the CDDH and DH-GDR.[7]

Ms Noémie BIENVENU (European Group of National Human Rights Institutions)
The European Group confirmed that it had received a letter from the Secretary General in November 2010 on the issue of provision of information to potential applicants, to which it has replied, expressing its willingness to cooperate with him on this and other issues. A meeting between NHRIs and the Secretary General is expected to take place during the 1st semester of 2011, where this issue would be

[6] For further information, please see document SG/Inf(2010)23, Secretary General's Post-Interlaken Report on providing objective and comprehensive information to applicants to the European Court of Human Rights.
[7] For further information, please see document DH-GDR(2010)019, Advisory opinions: previous discussions in the DH-S-GDR and CDDH.

examined, together with more general issues on the role of NHRIs in the post-Interlaken period.

Mrs Nuala MOLE (AIRE Centre) recalled that the United Kingdom had blocked the introduction of advisory opinions during negotiation of Protocol No. 2, at a time when it was not yet a member of the European Economic Community. Applicants should be able to participate in any advisory opinion proceedings, as well as third parties, as was the case before the EU Court of Justice on account of their involvement in underlying national proceedings. Advisory opinions given at the request of national courts should be binding on the requesting jurisdiction, otherwise the risk of their not being followed would bring the Strasbourg Court into disrepute. There should be restricted access to the procedure. The proposal to extend the competence could be welcomed but the Court should be aware that it would increase its workload in the short-term; any longer-term decrease also depended on the opinions being binding. There should be an urgent procedure for advisory opinions, as was the case for the EU Court of Justice.

Mrs Margerita ILIEVA (Bulgarian Helsinki Committee) argued that advisory opinions should be binding for all States Parties. Last instance courts should be obliged to request them and lower courts should have the possibility of doing so.

Professor Robert WINTEMUTE (ILGA-Europe) observed that such advisory opinions could be useful in decreasing the number of repetitive applications but would not affect the number of manifestly inadmissible applications.

Mr Theo BOUTRUCHE (Amnesty International) referred to the importance of consultation of civil society and the suggestion made by the GT-SUIVI.Interlaken that there be a thematic platform, as proposed by the Secretary General, on the Interlaken process. If so, this should be in addition to the existing procedures of consultation, such as observer status in the CDDH and other bodies, not in replacement.

Closing of the consultation

The Chairperson of the DH-GDR, Mme Anne-Françoise TISSIER (France), thanked all the participants for their attendance and contributions. She then declared the consultation closed.

Appendix

Programme and list of participants

9.30	**Opening and general introduction** by the Chairperson of the DH-GDR, Mrs Anne-Françoise Tissier, and **introduction of the participants**
10.00	**Issue I:** a possible new filtering mechanism for the Court - introduction by Mrs Almut Wittling-Vogel, DH-GDR Rapporteur (5 minutes) - open discussion on Issue I
10.30	**Issue II:** a possible simplified amendment procedure for the Convention - introduction by Mrs Björg Thorarensen, Chairperson of the DH-PS (5 minutes) - open discussion on Issue II
11.00	**Issue III:** possible introduction of system of fees for applicants - introduction by Mr Frank Schürmann, Vice-chairperson of the DH-GDR (5 minutes) - open discussion on Issue III
11.30 – 12.00	*Break*
12.00	**Other issues** - presentation on the issue of information to applicants by Mr Jörg Polakiewicz, Head of the Human Rights Development Department, Council of Europe (5 minutes) - presentation on the issue of advisory opinions by Mr Martin Kuijer, Ministry of Justice of The Netherlands (5 minutes) - open discussion on these and any other issues
12.55	**Summing-up** by the Chairperson of the DH-GDR, Mrs Anne-Françoise Tissier
13.00	**Closing of the consultation**

Name	**Position**	**Organisation**

Adam Bodnar	Secretary of the Board	Helsinki Foundation for Human Rights
Noémie Bienvenu		European Group of National Human Rights Institutions
Arkadiy Buschenko	Chair of the Board	Kharkiv Human Rights Protection Group
Daniela Boteva	Legal expert	Bulgarian Lawyers for Human Rights
Theo Boutrouche		Amnesty International, International Secretariat
Maxim Ferschtman		Open Society Justice Initiative
Giuseppe Guarneri		Council of Europe Conference of INGOs
Margarita Ilieva	Deputy Chairperson & Director of the Legal Programme	Bulgarian Helsinki Committee
András Kádár	Co-Chair	Hungarian Helsinki Committee
Alexander Kashumov	Head of Legal Team	Access to Information Programme
Vanessa Kogan	Executive Director	Stichting Russian Justice Initiative
Kirill Koroteev	Case Consultant	European Human Rights Advocacy Centre
Nuala Mole	Director	Advice on Individual Rights in Europe (AIRE Centre)
Karinna Moskalenko	Director	International Protection Centre
Vitaliy Nagacevschi		Lawyers for Human Rights
Laurent Pettiti	Président du Comité Droits de l'Homme	Conseil des Barreaux européen
Róisín Pillay	Senior Legal Adviser, Europe Programme	International Commission of Jurists
Joanna Sawyer	Litigation Director	Interights
Natalia Taubina	Director	Public Verdict Foundation
Furkat Tishaev	Lawyer	Memorial
Robert Wintemute	Council of Europe Legal Adviser	ILGA-Europe (European Region of the International Lesbian, Gay, Bisexual, Trans and Intersex Association)