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DH-GDR(2011)R6 Addendum II

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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Draft elements for the CDDH Interim Activity Report

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6th meeting
Strasbourg, 9-11 February 2011

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Draft elements for the CDDH Interim Activity Report[1]

A. Introduction

The CDDH's ad hoc terms of reference require it to submit an interim activity report on specific proposals for measures requiring amendment of the Convention to the Committee of Ministers by 15 April 2011. These should include proposals, with different options, for a filtering mechanism within the European Court of Human Rights and proposals for making it possible to simplify amendment of the Convention's provisions on organisational issues.[2]

The present document contains draft text for (i) the general introductory parts of the CDDH Interim Activity Report and (ii) elements, including conclusions, that relate to relevant work undertaken by the DH-GDR. This work has mainly covered the following issues:

- a new filtering mechanism;
- the possible introduction of a system of fees for applicants.[3]

Primary responsibility for work on the issue of a simplified procedure for amendment of certain provision of the Convention was conferred by the Committee of Ministers on a separate Committee of Experts, the DH-PS. Work on this issue is not therefore reflected in the present document.

[1] Adopted by the DH-GDR at its 6th meeting (09-11 February 2011).

[2] See doc. CDDH(2010)002, "Decisions of the Committee of Ministers on the action to be taken following the Interlaken Declaration and Terms of Reference of the CDDH and subordinate bodies involved in follow-up work to the Declaration."

[3] It should be recalled that the CDDH, in its Final Report on measures that result from the Interlaken Declaration that do not require amendment of the Convention, had already addressed the question of possible introduction of a system of fees for applicants (indeed, it was mentioned also in the First Report on implementation of the Interlaken Declaration, doc. CDDH(2010)010 Add. I, paras. 8-9 and Appendix II). In the Final Report, it noted that "one aspect, yet to be resolved, is whether introduction of a fee would require amendment of the Convention or whether it could be done under the current provisions or, for example, by way of amendment of the Rules of Court" and expressed its intention "to continue its examination of the issue of fees in 2011" (see doc. CDDH(2010)013 Add. I, paras. 13-14).

B. Draft elements for the CDDH Interim Activity Report

"I. INTRODUCTION

1. The Committee of Ministers has asked the CDDH to submit to it by 15 April 2011 an interim activity report on specific proposals for measures requiring amendment of the Convention, including proposals, with different options, for a filtering mechanism within the European Court of Human Rights and proposals for making it possible to simplify amendment of the Convention's provisions on organisational issues.[4]

2. The CDDH has been working on reform of the Convention system since 1999, before the Rome Conference of 2000. This work can be divided into three phases: the first, from 2000-2004, culminated in the reform package that included Protocol No. 14; the second, from 2004-2009, involved review of implementation of the reform package Recommendations and follow-up to the Report of the Group of Wise Persons and culminated in the CDDH's Activity Report and its Opinion on the issues to be addressed at the Interlaken Conference; and the third, current phase concerns follow-up to and implementation of the Interlaken Declaration.

3. The Interlaken Conference and Declaration have had a significant, positive impact on the CDDH's work, which has also been facilitated by the entry into force of Protocol No. 14. Certain issues currently under examination had arisen in the past but for various reasons, including uncertainty as to timeliness and political will, were not examined in detail, with debate limited to preliminary statements of position.

4. Whilst the main issues on the CDDH's agenda remain often complex and sensitive, the new, post-Interlaken environment has allowed the CDDH to make progress. It is thus able, in the present report, to describe how its work has advanced since the Interlaken Conference, to present the broad outlines of the possible measures under examination and to describe how it intends to proceed to fulfilment of its terms of reference by presentation of a Final Report by 15 April 2012.

5. The present report is the third that the CDDH has presented since the Interlaken Conference of 18-19 February 2010, following its First Report (presented in June 2010) and Final Report (presented in November 2010) on proposals for measures that result from the Interlaken Conference and that do not require amendment of the Convention. As these two earlier reports made clear, the CDDH has, in accordance with its mandate, been examining since the outset proposals for measures requiring amendment of the Convention in parallel with those that do not.

6. Work has in the first place taken place in two subordinate committees of experts, the DH-PS (on a simplified procedure for amendment of certain provisions of the Convention) and the DH-GDR (on the reform of the Court, in practice dealing with all other relevant issues).[5] The CDDH has received extensive, detailed

[4] See doc. CDDH(2010)002, "Decisions of the Committee of Ministers on the action to be taken following the Interlaken Declaration and Terms of Reference of the CDDH and subordinate bodies involved in follow-up work to the Declaration." The CDDH's ad hoc terms of reference can be found at Appendix I.

[5] The meeting schedule can be found at Appendix II.

information from the Registry concerning, in particular, the Court's implementation of Protocol No. 14, notably the new single judge and three-judge committee procedures. Further to both the call made in the Interlaken Declaration and the CDDH's ad hoc terms of reference, the DH-GDR held a consultation with representatives of civil society and national human rights institutions in Strasbourg on 9 February 2011, at which the issues contained in the present report, amongst others, were discussed.[6]

7. The CDDH notes that this report will in practice be submitted shortly before the Interlaken Follow-up Conference being organised by the Turkish Chairmanship of the Committee of Ministers in Izmir, Turkey on 26-27 April 2011.

II. CONTEXT

8. Whilst it is hoped that the entry into force of Protocol No. 14 on 1 July 2010 will offer some respite, it remains the case that, on account of its caseload, the situation of the European Court of Human Rights has continued to deteriorate since the Interlaken Conference. As of 31 December 2010, a total of 139,650 applications were pending before a judicial formation, an increase of 17% over the course of the year. Despite constant resources, the Court had again increased its output of decisions and judgments, thereby resolving a total of 41,183 cases, 16% more than during the previous year. The growth in the number of applications pending thus once again outstripped that in the Court's output, in both number and rate. The ratio of inadmissibility decisions to judgments stood at almost 15:1, as against almost 14:1 in 2009. At current rates of output (and assuming, artificially, that no new applications were to arrive), it would take almost 20 years for the Court to dispose of all the applications currently pending before Chambers and Committees and just under two-and-a-half years for those before single judges, *ceteris paribus*.[7]

9. Recalling that the Court was established by the High Contracting Parties to ensure the observance of their engagements thereunder, the Convention system as currently established enshrines two fundamental principles to be respected in the search for solutions to the problem of the Court's case-load. The first is the right of individual petition, which is a unique characteristic of the Convention system as an international human rights protection mechanism and to which the States Parties reaffirmed their commitment in the Interlaken Declaration. The second is the judicialisation of the complaint resolution mechanism, as instituted by Protocol No. 11. Together, they give every individual who duly submits a complaint the right to determination of their case by an international judge.

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[6] The programme and list of participants for this event can be found at Appendix III.

[7] This calculation is based on the Court's figures for 2010. At the end of this period, there were 51,250 cases pending before chambers and committees and 88,400 before single judges; during this period, 2,607 judgments and 38,576 decisions were delivered. Given that the – presumably more efficient – single judge system has been fully in force for only half of this period, one can presume that the output of inadmissibility decisions will to some extent increase yet further for the year 2011; and that as a result, the time needed to dispose of cases currently pending before single judges will decrease (again, artificially assuming that no new manifestly inadmissible applications arrive).

10. The CDDH is currently examining three main proposals, which can broadly be described as follows:

- a new filtering mechanism within the Court going beyond the existing single judge procedure;
- the introduction of a system of fees for applicants to the Court;
- [the introduction of a simplified procedure for amendment of certain provisions of the Convention, one of the possible modalities for which could be a Statute for the Court *(to be completed by the DH-PS)*.]

III. PROPOSALS

i. A new filtering mechanism within the Court[8]

11. "Filtering" here refers to the issuing of decisions in cases that are manifestly inadmissible (i.e. those which are currently issued by Single Judges). It does not refer to the initial stage of triage by the Registry, whereby applications are provisionally allocated to different judicial formations according to their apparent characteristics.. The idea of a new filtering mechanism going beyond Protocol No. 14 would be to install a new mechanism that could at least decide on inadmissible cases.

12. As was foreseen at the time of adoption of Protocol No. 14, the measures it contains, although necessary, will not be sufficient in the face of the Court's increasing case-load. In accordance with its terms of reference, the CDDH has begun working on proposals, with different options, for a filtering mechanism within the Court, on the understanding that final decisions on implementation of any of these proposals would depend on a detailed assessment of the effects of implementation of the Single Judge procedure following the entry into force of Protocol No. 14. For various reasons, however, not all CDDH members are convinced that the necessity of a new filtering mechanism has been established.

13. The main point of discussion during examination of possible proposals in the CDDH concerns the question of who should be responsible for filtering. One suggestion is that certain Registry lawyers be given the competence to reject all or some clearly inadmissible cases. Although not required to satisfy all the requirements of article 21 ECHR, they would possess the requisite qualities and competences to be immediately operational. This approach would thus be the most flexible. The obvious disadvantage would be that some or all decisions on inadmissibility would not be taken by judges, an arguably retrogressive step from the judicialisation of the control mechanism instituted by Protocol No. 11.

14. A second suggestion is that filtering be entrusted to a new category of judge, devoted primarily, if not exclusively, to this task. This approach would retain the judicial character of decision making within the ECHR control mechanism, whilst liberating the time of existing, regular judges for work on *prima facie* admissible cases.

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[8] It should be noted that this section of the present report is based on the information available to the DH-GDR when it adopted a draft report on the issue at its 5th meeting (1-3 December 2010). This section of the present report is based on a summary of the earlier draft report, which can be found in full at Appendix IV.

15. A third suggestion, inspired by the *ad litem* judge system that exists at the International Criminal Tribunal for the former Yugoslavia (ICTY), is that the Court be reinforced with temporary judges. This suggestion arose recently in the CDDH's discussions and has not yet been examined in detail.

16. There would appear to be certain similarities between these latter two proposals, as well as important differences. Both involve a separate category of judge appointed for a limited period and for a specific purpose, with the aim of enhancing the relevant court's judicial capacity. On the other hand, ICTY *ad litem* judges are primarily intended to discharge the same function as permanent judges (although they may also act as reserve judges) and are required to have the same qualifications. In both cases, such judges would not be immediately operational and there may be a risk of diverging practices.

17. Additionally, it has been suggested that the mechanism could combine two or more of the above suggestions.

18. The Interlaken Declaration also called upon the Committee of Ministers to consider whether repetitive cases could be handled by judges responsible for filtering. The CDDH has taken this question more widely, asking whether any new filtering mechanism could also deal with repetitive cases. Broadly speaking, the view is that a mechanism composed of judges could also deal with them; should Registry lawyers be involved, however, they could not.

19. A proper assessment of the cost-effectiveness of each of these options, once they have been more clearly defined, will be crucial to final decisions on which to retain. Furthermore, there is an inevitable budgetary cost involved in reducing the backlog, whether by simply increasing the number of Registry staff or also adopting a new filtering mechanism consisting of new judges, bearing in mind that for output to increase, each new judge would have to be assisted by additional Registry staff.

20. The question of whether and to what extent an increase in the staff of the Registry would contribute to alleviating the problem should be explored, on the basis of an analysis of the Court's overall current resources, working methods and output, since the Registry is already responsible for triage of applications and the preparation of draft decisions for single judges.

21. These aspects, in more detail and along with others, are addressed in the CDDH's report on the issues of filtering of applications and treatment of repetitive applications (see Appendix I).

ii. A simplified procedure for amendment of certain Convention provisions

. *(To be completed by the DH-PS)*

iii. Introduction of a system of fees for applicants to the Court

a. Although not explicitly mentioned in the Interlaken Declaration, the CDDH has been examining this issue in connection with the Declaration's call upon the

Committee of Ministers, *"[w]ith regard to access to the Court, … to consider any additional measure which might contribute to a sound administration of justice and to examine in particular under what conditions new procedural rules or practices could be envisaged, without deterring well-founded applications."*

b. The CDDH's earlier discussions on this issue were reflected in its initial report, previously submitted to the Committee of Ministers as part of its First Report on Implementation of the Interlaken Declaration.[9] This report examined various aspects of the matter, both practical and of principle. The CDDH's discussions had revealed a wide divergence of view on this suggestion, including on the philosophical and practical arguments underpinning it. It had noted that any system would entail at least some risk of deterring well-founded applications. The cost of administering any system of fees was also considered to be a key factor.

c. Following the CDDH's initial report, an expert consultant, Mr Julien Lhuillier of the University of Lausanne, was commissioned to prepare a study on the various systems in certain member States requiring applicants to superior courts to pay a fee or other sum. This study sought to identify national systems sharing certain characteristics that could inspire a possible model system that might be applicable by the Strasbourg Court. The CDDH has examined the study in the light of the questions set out at the end of its initial report.

d. In the light of the outcome of the Izmir Conference and subject to any decisions taken at the Ministerial Session of 11 May 2011, the CDDH could proceed to examine the question of fees, taking into account the expert study, including the criteria suggested by the Registry as set out therein, and the CDDH's earlier report on the issue.[10] This approach could involve outlining one (or more) model systems, with variants where necessary, which could then be submitted to the Court and, if necessary, other expert bodies in order to evaluate the likely costs of its/ their implementation and operation.

iv. Other issues

. *[To be completed by the CDDH, notably in relation to the question of advisory opinions .]*

III. CONCLUSIONS

e. The CDDH has made significant progress on several major issues since the Interlaken Conference. It anticipates that, once it has concluded its detailed technical examination of these issues and received expected further information from other sources, it will be able to arrive at consensus on proposals to be submitted to the Committee of Ministers in its Final Report by 15 April 2012.

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[9] See doc. CDDH(2010)010 Addendum I, Appendix I, "Access to the Court – fees for applicants", reproduced at Appendix V to the present report.

[10] See the CDDH First Report on implementation of the Interlaken Declaration, doc. CDDH(2010)010 Add. I, Appendix I.

f. As regards the issue of a new filtering mechanism, there are questions of principle concerning its necessity and who could be responsible for taking inadmissibility decisions, whether Registry lawyers or a new category of judges. The CDDH expects that its assessment of the cost-effectiveness of each option will be relevant in forming final opinions on this question. Nevertheless, possible political decisions on the question of principle, including its budgetary aspect, may ultimately be necessary.

g. Concerning the issue of introducing a system of fees for applicants, there is a question of principle concerning its possible impact on the right of individual petition or the right to a judicial decision. The CDDH expects that detailed elaboration of possible models and an estimation of the costs of their implementation and operation should help its members reach final conclusions on whether or not a system of fees for applicants could and should be introduced. Again, a political decision on the question of principle may ultimately be necessary.

h. *[To be completed by the DH-PS]*

i. The CDDH looks forward to the forthcoming Izmir Conference and the contribution that it will make to further progress in its work on implementation of the Interlaken Declaration, including any possible subsequent further modification of its terms of reference.

Appendix I

Initial ad hoc terms of reference for the Steering Committee for Human Rights (CDDH) to consider the relevant parts of the Interlaken Declaration

1. Name of Committee: Steering Committee for Human Rights (CDDH)

2. Source: Committee of Ministers

3. Duration: These terms of reference shall expire on 31 December 2010 and 15 April 2012

4. Terms of reference:

Subject to more specific guidance which may be given by the Committee of Ministers at any time, consider all the relevant parts of the Interlaken Declaration.

In particular:

(a) to elaborate specific proposals for measures that result from the Interlaken Declaration and that do not require amendment of the European Convention of Human Rights, if necessary, additional to those it has already submitted to the Committee of Ministers;

This part of the terms of reference shall be executed through the presentation of a final report to the Committee of Ministers by 31 December 2010;

(b) to elaborate specific proposals for measures requiring amendment of the Convention, including proposals**,** with different options**,** for a filtering mechanism within the European Court of Human Rights and proposals for making it possible to simplify amendment of the Convention's provisions on organisational issues;

This part of the terms of reference shall be executed through the presentation of a final report to the Committee of Ministers by 15 April 2012; an interim activity report shall be submitted by 15 April 2011.

(c) Work on items (a) and (b) shall be pursued in parallel.

In the execution of these terms of reference, the CDDH may commission and conduct the necessary studies and consultations with other bodies, in particular the Court, as well as civil society representatives. It may assign appropriate tasks to its subordinate structures. The Court and its Registry may at all stages contribute to the execution of these terms of reference.

The CDDH shall keep itself informed of action being taken or envisaged by other actors involved in the implementation of the Interlaken Declaration and, if appropriate, may present its views thereon to the Committee of Ministers. In this context, it shall also take into account the first effects of the entry into force of the new procedures foreseen by Protocol No. 14.

The CDDH shall regularly report on progress of work and present its proposals to the Committee of Ministers as and when they are finalised. A first report shall be submitted before the end of June 2010. The Committee of Ministers shall provide the CDDH with the necessary guidance.

Appendix II

Schedule of meetings of the CDDH and relevant subordinate bodies[11]

5th DH-GDR meeting[12]	1-3 December 2010
6th DH-GDR meeting[13]	9-11 February 2011
2nd DH-PS meeting[14]	9-11 March 2011
72nd CDDH meeting[15]	29 March – 1 April 2011

[11] Meetings since adoption of the CDDH Final Report on 23 November 2011 (doc. CDDH(2010)013 Add. I).
[12] For further details, see the meeting report, doc. DH-GDR(2010)021.
[13] For further details, see the meeting report, doc. DH-GDR(2011)R6.
[14] For further details, see the meeting report, doc. …
[15] For further details, see the meeting report, doc. …

Appendix III

DH-GDR Consultation with representatives of civil society and national human rights institutions:
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)

Appendix IV

Filtering of applications and treatment of repetitive applications

The terms of reference for the Steering Committee for Human Rights state that CDDH – as a follow-up to the Interlaken Declaration – shall elaborate specific proposals for a filtering mechanism within the European Court of Human Rights. The aim of the present report thus is to present to CDDH different options for the structure and working methods of a new filtering mechanism.

The wish to make filtering more efficient has been a characteristic of all recent reform discussions. Protocol No.14 introduced the single judge procedure with the aim of rendering the filtering task more efficient. From the moment Protocol No. 14 was adopted, however, calls for more far-reaching approaches were made. In its Report of 2001, the Group of Wise Persons proposed setting up a new judicial filtering committee as a long-term solution to the ever-increasing number of inadmissible applications. This idea was taken up by the Court's President in his Memorandum in preparation of the Interlaken Conference. It is now part of the Interlaken Declaration.

The report aims to present the main issues arising in discussions so far. Where alternative approaches have been suggested, the report presents these in turn, along with suggested advantages and disadvantages for each.

The present document represents the CDDH's interim report (presented as part of its overall interim activity report) on its examination of this issue and, in accordance with its ad hoc terms of reference, is not intended to present final proposals from amongst which the Committee of Ministers could select a single measure for implementation. This is because (i) certain possible options, notably that concerning ad litem judges and the possibility of combining other options, have only recently become apparent and need further clarification, and (ii) views remain divided over whether or not the Registry could become responsible for giving final decisions on certain categories of inadmissible applications. In addition, the preliminary question of whether or not any new filtering mechanism is needed cannot be answered until the Court has given its assessment of the effects of the first year of entry into force of Protocol No. 14 and in particular the single judge procedure that it introduced. Not only would this assessment be necessary to show whether further measures are required, its detail may help to clarify the necessary scale of such measures. Finally, it will be important to analyse the cost-effectiveness of the different options retained before the CDDH can express its final preferences or recommendations, on the basis of which the Committee of Ministers could make political choices.

Once the Court has presented its assessment, the CDDH will begin elaborating specific, detailed proposals, with different options, to be presented to the Committee of Ministers by 15 April 2012 as part of its final activity report, in accordance with its ad hoc terms of reference.

I. What is filtering and why is it important?

1. Filtering is the task of finally disposing of applications that are clearly inadmissible, thereby eliminating them from the Court's docket and leaving only those applications that raise substantive issues. Filtering is not to be confused with the task of triage, which is currently performed by the Registry and consists of an initial screening of applications and their provisional assignment to the different judicial formations (chamber, committee, single judge).

2. Filtering is an unavoidable part of the Court's work. It must be done in any system. Moreover, new ways of filtering cannot reduce the number of applications the Court has to deal with. The aim is that they would allow the Court to deal more efficiently with its case-load. Bearing in mind that inadmissible applications represent 90 % of applications received by the Court and 65 % of pending applications,[16] a more efficient processing of inadmissible applications would allow the Court to concentrate on the substantive issues before it.

II. How filtering is done in the present framework

3. Since Protocol No. 14 came into force, filtering is now primarily the task of the single judge formation of the Court. The single judge formation is established by Article 26(1) ECHR and its competences defined by Article 27, which reads as follows:

> "1. A single judge may declare inadmissible or strike out of the Court's list an application submitted under Article 34, where such a decision can be taken without further examination.
>
> 2. The decision shall be final.
>
> 3. If the single judge does not declare an application inadmissible or strike it out, that judge shall forward it to a committee or to a Chamber for further examination."

4. It can be noted in passing that Single Judges may only declare inadmissible or strike out applications in certain circumstances, namely (i) where the application was submitted under Article 34 (i.e. "individual applications," as opposed to "inter-State cases" submitted under Article 33) and (ii) where this can be done "without further examination." As regards applications submitted under Article 34, where the decision to declare inadmissible or to strike out cannot be taken without further examination, it may only be taken by a three-judge committee (under Article 28(1)(a)), a Chamber (under Article 29(1)) or, potentially, the Grand Chamber (under Article 31).

5. The President of the Court designated 20 judges to act as single judges from the date of entry into force of Protocol No. 14 (1 June 2010) for a period of one year. These judges were drawn evenly from each of the Court's five Sections. The States for which each judge shall be responsible were also determined, with a certain degree of flexibility allowed subject always to the rule in the Convention itself that a single judge can never decide a case taken against the State in respect of which he/she has been elected. Although single judges will in many cases not be able to read the case file, being unfamiliar with the language in which the application was submitted, they will have a certain level of knowledge of the legal system out of which the application has arisen, since they will already have decided, in the course of their

[16] The former figure represents …- to be revised on the basis of an analysis of figures from 1998 – 2010; the latter is the proportion of pending cases that have been provisionally identified by the Registry as inadmissible.

Section work, cases against such States. The group of 20 judges includes some of the longest-serving judges as well as some of the most recent arrivals on the bench of the Court. For most States, one single judge is sufficient. The exceptions are Russia (5 single judges), Turkey (4), Romania (3), Ukraine (3) and Poland (2).

6. Each single judge is paired with one or more non-judicial rapporteurs (NJR) from the Registry. For some, this will be a full-time role, whereas others will continue to work also on committee and Chamber cases. The President appointed approximately 60 of these from among the permanent, experienced legal staff of the Registry (from grade A2 to grade A5). Where possible, there will be rotation in NJR appointments (in most cases after 12 months). For the States with the most applications, NJRs over see a team of assistant lawyers working on SJ cases, roughly proportionate in size to the number of applications pending against that State.[17] Protocol No. 14 has not changed the role of the Registry during initial stages of the procedure, i.e. triage and the drafting of the inadmissibility decision, which is done as it was previously for committee cases under Protocol No. 11.

7. The SJ/NJR tandem is the engine of the procedure. The former relies on the latter to provide a summary and analysis of the pertinent facts and the Convention issues. Case notes and draft decisions are presented to the SJ in batches at regular intervals. The batch can contain dozens of cases, even hundreds if similar, simple cases have been grouped together where possible. The SJ will contact the NJR directly to obtain any clarification or additional information deemed necessary in order to be able to reject a case as inadmissible. The SJ normally has a two-week period to consider the drafts presented. If more time is needed, the case will be adjourned.

8. The SJ indicates consent by signing the cover page of the document (approval sheet), which sets out the reference numbers of all applications presented for decision. The approval sheet will be permanently archived by the Court, all other papers on the case being destroyed one year later, in keeping with the Court's general practice in this regard. Once the SJ has taken his/her decision, the applicants concerned will receive a standard letter from the Court, signed by the NJR and indicating the name of the SJ who took the decision, the date and the ground(s). If the SJ disagrees with the NJR's proposal, on the other hand, he/she will indicate where the case should be dealt with – committee or Chamber.

9. It has been suggested that a new filtering mechanism could consist of a special section of the Court, composed of a limited number (3-5) of already-elected judges, serving on a rotating basis. This section could take decisions on admissibility in a single-member formation (as is currently the case for single-judge decisions on clearly inadmissible applications). Such a proposal has been described as a "rotating pool of judges."

10. This would appear to correspond more to paragraph 6.c.i of the Interlaken Declaration than to paragraph 6.c.ii. (see paragraph 15 and footnote 8 above); in effect, it presupposes that there is no need for amendment of the Convention. It would therefore not seem to correspond to the CDDH's terms of reference for making proposals for a new filtering mechanism. Indeed, it is noted that the Court is examining the possibility of reducing the number of single judges to five and that these five would work full-time, for a fixed period, on filtering, which would seem to amount to a "rotating pool." Given paragraph 6.c.i. of the Interlaken Declaration, this should be encouraged.

III. Do we need or want a new filtering mechanism going beyond Protocol No. 14?

[17] Assistant lawyers are employed on fixed-term contracts under which they work exclusively on inadmissible applications.

11. Even at the time of adoption of Protocol No. 14, it was foreseen that the measures it contained, although necessary, would not be sufficient in the face of the Court's increasing case-load. The Explanatory Report to Protocol No. 14 predicted that "it is very likely that the numbers of individual applications to the Court will continue to increase, up to a point where the other measures set out in this protocol may well prove insufficient to prevent the Convention system from becoming totally paralysed, unable to fulfil its central mission of providing legal protection of human rights at the European level, rendering the right of individual application illusory in practice."[18] More recently, the Secretary General of the Council of Europe has stated that "Protocol 14 is of course very important but not at all sufficient, additional measures have to be taken in Interlaken and the ideas that Interlaken present must be followed up."[19] The President of the Court spoke to identical effect during his recent exchange of views with the CDDH.[20] Indeed, since Protocol No. 14 was adopted, the Court's case-load has not only continued to increase but has done so ever faster.

12. A new filtering mechanism would enhance the Court's capability to deal efficiently with inadmissible applications and thus enable equilibrium between the rates of receipt and disposal to be achieved, allowing the regular judges to devote their attention to admissible cases.[21] It has been suggested that freeing regular judges from work on inadmissible applications would make the post of judge more attractive, with a beneficial effect on the quality of candidates. Bearing in mind that judicial time spent as single judges on inadmissibility decisions is time taken away from cases meriting a more detailed examination – even though the Court is also confronted with an overload of these – allowing judges more time for work on judgments could reduce the risk of divergent case-law, improving the quality of their decisions and judgments.

13. For example, at the end of 2005 – the first year for which relevant figures are publicly available – **89,900** applications were pending, 45,500 applications having been lodged during that year and 28,565 decisions taken, of which *27,613* were to declare the application inadmissible or strike it out. Four years later, at the end of 2009 – the latest full year for which figures are available – **119,300** applications were pending before a judicial formation, 57,100 applications having been allocated to a judicial formation during that year and 35,460 decisions taken, *33,065* of which were to declare the application inadmissible or to strike it out.[22]

14. It can also be noted that the Registry has calculated that, with 80 assistant lawyers preparing decisions in approximately 400 SJ cases each per year, and with 20 SJ who devote approximately 25 % of their time to work on SJ cases (or with 5 SJ who work almost full-time on SJ cases, as may be the case in future), the Court would be able to produce some 32,000 SJ decisions. This should be set against the fact that, at the end of September 2010, 88,500[23] cases were pending before the SJ formation.[24] In other words, even without the constant influx of new cases, it would take well over two-and-a-half years for the Court to clear this

[18] See para. 78, commenting on Article 12 of Protocol No. 14.
[19] See the Secretary General's speech on "New Realities: Reform of the Council of Europe," delivered to the Ministers' Deputies at their meeting on 20 January 2010.
[20] See doc. CDDH(2010)013.
[21] [Detailed information on the pending cases allocated to a judicial formation other than the single judge – to be added prior to adoption by the CDDH.]
[22] See the Court's Annual Reports, available on its website. It should be noted that the basis on which the Court publishes various statistics has changed over time. In particular, the previously used figures for "applications pending before a judicial formation" and "applications allocated to a judicial formation" would be slightly lower than those currently given for "applications pending" and "applications lodged," respectively, for any given year. The above data are thus given for illustrative purposes only.
[23] Figure to be updated at the March – April 2011 CDDH meeting
[24] The figure for pending cases is taken from the latest information available on the Court's web-site.

back-log. Moreover, at the end of September 2010, 46,400 new applications had been filed in 2010. It is thus evident that there will be more than 32,000 incoming clearly inadmissible cases in one year.

15. These figures help explain the Court's position that "the current situation is manifestly unsustainable" and its view that if there is one thing that can be said now about the effects of the changes brought about by Protocol No. 14, they will not be enough: further measures are necessary.[25] This is the case even though the Court itself has estimated that Protocol No. 14, in particular the single-judge procedure, could increase the efficiency of the Court by 20-25%.[26] Several experts have expressed their agreement with the Court's position.

16. Not all experts, however, are persuaded that the necessity of a new filtering mechanism has been firmly established. Several experts believe that the benefits of the new system need first to be evaluated before a decision on whether to establish a new filtering mechanism can be taken; in this respect, reference has been made to paragraph 6.b. of the Interlaken Declaration, which "stresses the interest for a thorough analysis of the Court's practice relating to applications declared inadmissible." Some have suggested that the main limitation on the Court's production of inadmissibility decisions lies not with judicial capacity but rather with that of the Registry; strengthening the Registry would thus contribute to more effective and efficient filtering. Furthermore, it was noted that it may be easier – assuming an increase in budgetary allocations for the Court would be easier to achieve than amendment of the Convention – to increase the number of Registry lawyers than the number of judges working on filtering. Others, however, felt that simply increasing the number of Registry lawyers will not suffice to allow the Court to deal with the work-load of inadmissible applications.

17. Nevertheless, given that the CDDH's ad hoc terms of reference require it to elaborate specific proposals at this stage (see below), many of those experts who remained unpersuaded of the need for a new filtering mechanism would nevertheless be prepared to proceed on the basis that proposals be elaborated with the proviso that the time is not yet ripe to take decisions on implementation.

IV. Interlaken Declaration and the CDDH's ad hoc terms of reference

18. Paragraph 6.c.ii. of the Interlaken Declaration "recommends, 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." (emphasis added).[27]

19. The Interlaken Declaration therefore invited the Committee of Ministers "to issue terms of reference to the competent bodies with a view to preparing, by June 2012, specific proposals for measures requiring amendment of the Convention; these terms of reference should include proposals for a filtering mechanism within the Court […]".

[25] See e.g. the Registry's presentation to the 4th DH-GDR meeting (doc DH-GDR(2010)017, Appendix III and the Registrar's comments at the CL-CEDH "liaison committee" meeting on 14/10/10.
[26] See the Explanatory Report to Protocol No. 14bis, para. 3, which refers to the statement of the President of the Court to the meeting of the Committee of Ministers' Liaison Committee with the European Court of Human Rights (CL-CEDH) on 14 October 2008.
[27] Sub-paragraph i. states that "[The Conference … recommends, with regard to filtering mechanisms,] to the Court to put in place, in the short term, a mechanism within the existing bench likely to ensure effective filtering."

20. Accordingly, the terms of reference for the Steering Committee for Human Rights state that CDDH shall "elaborate specific proposals for measures requiring amendment of the Convention, including proposals**,** with different options**,** for a filtering mechanism within the European Court of Human Rights […].This part of the terms of reference shall be executed through the presentation of a final report to the Committee of Ministers by 15 April 2012; an interim activity report shall be submitted by 15 April 2011"[28] (emphasis added).

21. The main task of [CDDH and its sub-group] DH-GDR thus consists in making concrete suggestions to the Committee of Ministers for a new filtering mechanism that would go beyond Protocol No. 14 and require amendment of the Convention. The present report represents a first step in the process of developing a model for a new filtering mechanism. It identifies the points that a concrete proposal will have to cover and sets out different options for some of these points.

V. Filtering by whom – different models

22. During the course of the DH-GDR's work, various models have been proposed to deal with the problem of filtering. Perhaps the most important difference concerns the question of who would be responsible for filtering. The main options, some of which may have variants, appear to be the following. It has also been suggested to combine different options, including with a view to maximising the cost-effectiveness of a new mechanism.

a. The Registry

23. Several states have suggested that certain senior Registry lawyers be given the competence to reject all or some clearly inadmissible cases. One specific proposal would give the task to all or some of those Registry members that currently act as non-judicial rapporteurs, as defined in Article 24(2) ECHR, and thus already oversee the preparation of inadmissibility decisions for submission to a single judge.

24. The advantages that have been suggested for this approach are that Registry lawyers are independent of the [States] parties and well-qualified with the necessary knowledge and experience to make such decisions. More particularly, allowing non-judicial rapporteurs to be responsible not only for submitting a draft decision to a single judge but also for approving and issuing it would avoid an additional decision-making level that in reality provides little in terms of legal guarantees but which delays the process and makes it more expensive. Registry lawyers could be expected to be entirely operational straight away, which would not be the case for other options. In short, this approach would be the most flexible and cost-effective one and most likely to provide a substantive increase in the Court's effectiveness and capacity.

25. The obvious disadvantage would be that decisions on inadmissibility would no longer be taken by judges, which would represent a step backwards from the judicialisation of decision-making by the Convention's control mechanism, as instituted by Protocol No. 11. With this option, the final decision on whether or not a particular case would receive judicial treatment would rest with the Registry. It has been suggested, however, that this draw-back could be overcome if the members of the Registry selected to be responsible for filtering were to be appointed judges with competence limited to this task.

26. Whether or not decisions on admissibility should be taken by members of the Registry, there would be interest in exploring, on the basis of an analysis of the overall current resources, working methods and output of the Court, whether an increase in the staff of the

[28] See doc. CDDH(2010)001.

Registry would contribute to alleviating the problem, since the Registry is already responsible for triage of applications and the preparation of draft decisions for single judges.

b. Ad litem judges

27. A proposal whereby filtering would, at least in part, be undertaken judges selected from existing lists of *ad hoc* judges submitted by States was discussed and rejected by the CDDH.[29]

28. The CDDH did, however, express "interest in further examining the possibility of having recourse to additional judges with a status similar to that of *ad litem* judges of the International Criminal Tribunal for the former Yugoslavia" (ICTY).[30]

29. *Ad litem* judges were introduced into the ICTY system by UN Security Council Resolution 1329 (2000), which noted in its preamble "the need to establish a pool of *ad litem* judges in the [ICTY] and to increase the number of judges […] in order to enable the International Tribunals to expedite the conclusion of their work at the earliest possible date". *Ad litem* judges exercise most of the powers enjoyed by permanent judges with respect to adjudication of cases and benefit from the same terms and conditions of service *mutatis mutandis* and the same privileges and immunities, exemptions and facilities.[31] The qualifications required are identical to those required of permanent judges and similar to the criteria for office set out in Article 21 ECHR.[32] They are elected for a term of four years (with eligibility for re-election) by the General Assembly from amongst lists established by the Security Council of candidates nominated by States.[33] They are appointed by the United Nations' Secretary General, at the request of the ICTY President, to serve in trial chambers for one or more trials for a cumulative period of up to but not including three years.[34] They may also be appointed as reserve judges.[35] In either event, they may also adjudicate in pre-trial proceedings in cases other than those for which have been appointed.[36]

30. There would appear to be certain similarities between this proposal and that which follows, as well as important differences. Both involve a separate category of judge appointed for a limited period (assuming the "flexible" model – see Section IX below) and for a specific purpose, with the aim of enhancing the relevant court's judicial capacity. On the other hand, ICTY *ad litem* judges are primarily intended to discharge the same function as permanent judges (although they may also act as reserve judges) and are required to have the same qualifications.

c. A new type of judge

31. It has been suggested that filtering should be entrusted to a new category of judge. 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 impartiality. Their term of office would be considerably shorter than that of the regular judges. 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

[29] The CDDH felt that such a rule for ad hoc judges, as defined by Article 26(4) ECHR, "was not consistent with their purpose under the Convention or compatible with their professional profile" (see doc. CDDH(2010)013).
[30] See doc. CDDH(2010)013.
[31] Idem the Updated Statute for the ICTY, Article 13 *quater*.
[32] Idem, Article 13.
[33] See Article 13 *ter*.
[34] Idem para. 13 *ter* §2.
[35] Idem para. 12 §5.
[36] Idem para. 13 *quater* §§ 1(d) & 3(c).

recognised competence," as is required of regular judges by Article 21(1) ECHR, they could be at an earlier stage in their career than should be the case for regular judges. Furthermore, their mode of election would differ from that of regular judges to ensure a quick selection process which takes into account the needs of the Court. The judges could be selected by the Court itself from a list of candidates submitted by States, possibly after the Parliamentary Assembly has approved the list. Alternatively, the Parliamentary Assembly could select the judges after having consulted the Court. The number of judges for the filtering mechanism could be fixed, but another option that would have to be explored is to have varying numbers of judges that would be appointed according to the Court's needs.

32. This approach would enhance the Court's capacity while maintaining the principle of a judicial decision for every application. The new judges would take over work of the judges of the existing bench, thus allowing them more working time for admissible applications. As the inadmissibility decision taken by any filtering mechanism would be final and the last decision in the applicant's case, it is important for the applicant to have a judicial decision. The introduction of a judicial filtering body would allow every applicant exercising his/ her right under art. 34 ECHR to receive a judicial decision. The Convention system would thus demonstrate an equal approach to every application lodged.

33. Possible disadvantages include the fact that a new category of judge would not be immediately operational. There may be a risk of diverging case-law on admissibility between the filtering judges and the regular judges. Concerns have also been expressed about the possible budgetary consequences of this approach (see further under Section XII below).

VI. Competence of a new filtering mechanism

a. "Single judge cases"

34. There appears to be broad agreement that the competence of any new filtering mechanism would correspond at least to that of single judges under Article 27 ECHR as amended by Protocol No. 14. The filtering mechanism could thus declare applications inadmissible or strike them out of the Court's list of cases where such decision can be taken without further examination. This implies that the filtering mechanism will take inadmissibility decisions only in clear-cut cases, where the inadmissibility of the application is manifest from the outset (cf. § 67 of the Explanatory Report for Protocol No. 14).

35. The competence of the filtering mechanism would thus also cover the new admissibility criterion introduced by Protocol No. 14 (Article 35(3)(b) ECHR, as amended by Protocol No. 14). Given the timetable for implementation of the Interlaken Declaration, the filtering mechanism will in any case not be established before 1 June 2012. At that moment, the transitional rule contained in Article 20(2) of Protocol No. 14, according to which the application of the new admissibility criterion is reserved to Chambers and the Grand Chamber in the two years following the entry into force of the protocol, will expire. After two years of operation, the Court's interpretation of the new admissibility criterion will be sufficiently well-established to allow not only single judges but also the new filtering mechanism to apply Article 35(3)(b) ECHR.

36. Concerning applications that are inadmissible because they are manifestly ill-founded, it could be examined whether the filtering mechanism's competence should extend only to certain categories of manifestly ill-founded applications.[37]

[37] The Registry has in the meantime informed the DH-GDR that 63 % of all inadmissible committee/single-judge cases are manifestly ill-founded.

b. Repetitive cases

37. In the discussions held in preparation of the Interlaken conference the idea was brought up that in case a new filtering mechanism was created, the mechanism could also be assigned the task of handling repetitive applications.

38. The Interlaken Declaration thus calls upon the Committee of Ministers "to consider whether repetitive cases could be handled by judges responsible for filtering".

39. The main task of DH-GDR and CDDH consists in identifying arguments for and against the extension of the filtering mechanism's competence for repetitive applications. Discussions on this point in [CDDH and its sub-group] DH-GDR are at a preliminary stage. The present paper gives a brief summary of arguments for and against an extension of competences and highlights areas in which further information is required. Very briefly, a few ideas on the way filtering judges could handle repetitive applications are sketched.

40. Assigning filtering judges with the task of handling repetitive applications could further increase the Court's case-processing capacity. However, it seems to be common ground – even among those that favour assigning filtering tasks to the Registry – that Registry staff should not decide on repetitive applications and issue judgements on the merits. It also seems to be generally thought that decisions on repetitive cases should be taken by three-judge committees.

41. Certain delegations feared that letting filtering judges decide on repetitive applications would send the wrong signal to respondent States who might get the impression that the issue concerned is considered as low priority by the Court. In addition, it could be objected as a matter of principle that only regular judges should be able to issue judgments (in contrast to admissibility decisions). Similarly, it has been suggested that judgments would be delivered by persons without the necessary status vis-à-vis national supreme or constitutional courts, which could make such a system difficult to accept. Since there would be fewer filtering judges than States parties, it would not be possible to have judgments in repetitive cases delivered by a panel including the judge elected with respect to the Respondent State in all cases (as is already, in fact, the case under Protocol No. 14). The necessity of additional capacity with regard to repetitive applications has also been questioned, given that Protocol No. 14 opens up the possibility of three-judge-committees deciding on repetitive applications.

42. Some of these disadvantages would not apply to all the alternative approaches mentioned in Section V above; for instance, the ad litem judges. Furthermore, possible solutions to some of these problems have been suggested: for example, that three-judge committees be composed of two regular judges and one filtering judge. As noted by the CDDH, "the answer would depend on who was responsible for filtering and what sort of mechanism was involved."[38]

VII. Role of the registry

43. The establishment of a new filtering mechanism would not put into question the primary responsibility of the Registry for the triage of applications. The Registry would continue to screen all incoming applications and provisionally assign them to the various judicial formations (chamber, committee, single judge, filtering mechanism). The Registry would also continue to prepare the decisions, as is currently the case.

[38] See doc. CDDH(2010)013.

44. In the model in which the filtering process as a whole is put into the hands of the Registry (see paras. … above), the Registry's role in the filtering mechanism naturally would be all-encompassing. In this case, the Registry would function as a filter which receives all incoming applications and, exclusively following their own assessment, forwards only a part of these to the judges of the Court.

VIII. Legal basis and coming into function/creation – selection of judges

45. There is general agreement that the creation of a new filtering mechanism, in the sense of para. 6.c.ii. of the Interlaken Declaration, would require amendment of the Convention. Organisational provisions could be included in a Statute.

IX. Static or flexible system

46. The new filtering mechanism can be conceived as a static mechanism or as a flexible one: certain options suggest greater inherent flexibility than others. In a static scheme, the filtering mechanism would be composed of a predetermined number of persons and would decide in predetermined cases. In a flexible scheme, the mechanism would be used only when and in so far as it is necessary. As under the single-judge system today, there could, for instance, be several (additional) persons working on cases of high-count countries, whereas the filtering for low-count countries could be left to the regular judges of the existing bench. The number of persons involved would vary according to the Court's needs, and the categories of cases assigned to the filtering mechanism could change over time (this would depend on who is responsible for filtering – see above). In a flexible scheme, the filtering mechanism would be operational only at times when there actually is a need for additional filtering capacity. The filtering mechanism will function according to need. It has been suggested, however, that for the options involving ad litem and a new type of judges, this flexibility would be constrained in practice by the terms of office of the judges appointed.

X. Remedies

47. Decisions of the filtering mechanism should be final. Providing for a legal remedy would run counter to the intention of streamlining and accelerating the filtering process. In addition, it would disturb the parallelism between the filtering mechanism and single judges whose decisions are final (Article 27(2) ECHR as revised by Protocol No. 14).

48. Possible mechanisms could be examined in order to maintain a close conformity with the Court's case-law on admissibility.

XI. Not a two-tier system

49. There appears to be general agreement that a reproduction of the former two-tier system (Court/Commission) must by all means be avoided. The new filtering mechanism would be part of the Court. It would – unlike the Commission – not be a judicial body which decides whether a case is forwarded to a Chamber or not. It would do the work the single judge does in the present system.

50. To ensure conformity with the Court's case-law, a regular judge of the Court could preside over the filtering mechanism for a set period. He would be the liaison body between the Court as it exists today and the filtering mechanism. He would not act as a filtering judge, but would offer advice and assistance to the filtering judges and would have the task of

ensuring coherence of the decisions issued by the filtering mechanism. He would be a member of the Court's Conflicts Resolution Board and would work closely with Jurisconsult to ensure conformity of the filtering mechanism's approach with that of the Court concerning admissibility issues. A mentoring program connecting filtering judges with experienced regular judges could be an alternative or an additional means that could contribute to conformity with the Court's case-law.

XII. Budget

51. All delegations were aware of the inevitable cost, even if limited in time, of the reduction of the backlog, whether one simply increased the number of Registry staff or adopted a new filtering mechanism consisting of new judges, bearing in mind that each one would have to be assisted by new Registry staff.

52. As noted above, concerns have been expressed at the possible budgetary consequences of creating a new category of judge. On the other hand, it has been suggested that as the number of such filtering judges would be low compared to that of regular judges and as their remuneration would correspond to that of experienced Registry staff rather than to that of regular judges, the budgetary consequences of this approach would be limited.

53. A proper assessment of the cost-effectiveness of each option will therefore form a part of the Committee's future work on the issue of filtering. This cannot, however, be undertaken at the present time, until the various options have been more clearly defined. As with the question of necessity, however, it should form a precondition to any final decisions on which options could or should be retained.

Appendix V

Access to the Court – fees for applicants

1. The declaration adopted at the High Level Conference on the Future of the Court in Interlaken in February 2010 states in section A ("Right of individual petition"):

> 1. The Conference reaffirms the fundamental importance of the right of individual petition as a cornerstone of the Convention system which guarantees that alleged violations that have not been effectively dealt with by national authorities can be brought before the Court.
>
> 2. With regard to the high number of inadmissible applications, the Conference invites the Committee of Ministers to consider measures that would enable the Court to concentrate on its essential role of guarantor of human rights and to adjudicate well-founded cases with the necessary speed, in particular those alleging serious violations of human rights.
>
> 3. With regard to access to the Court, the Conference calls upon the Committee of Ministers to consider any additional measure which might contribute to a sound administration of justice and to examine in particular under what conditions new procedural rules or practices could be envisaged, without deterring well-founded applications.

2. Around 90% of the applications received by the Court are clearly inadmissible. At present, an applicant to the European Court of Human Rights is not obliged to pay any application fee or deposit upon making their application, nor is there any penalty where an applicant makes an application that is entirely without merit or clearly inadmissible. Reflecting the practice of high-level courts in many member states, it has been suggested that some form of fee, deposit or penalty for applicants could be introduced to deter inadmissible applications. The objective of doing so would not be to raise revenue for the Court. However, it is clearly important that the amount of money received through any such scheme and the resources saved through any consequent reduction in inadmissible applications must together outweigh the cost of administering a scheme.

3. Preliminary discussions in the CDDH and its sub-group the DH-GDR have revealed a wide divergence of view on this suggestion, including on the philosophical and practical arguments underpinning it. This paper therefore sets out some possible models for a fee, deposit or penalty for applicants to the Court, and a brief analysis of the arguments in favour of and against introducing such a system. It also notes some of the further work that would be required to develop a full proposal.

4. Proposals have been made for other ways in which to regulate access to the Court. These ideas are beyond the scope of this paper.

5. The Interlaken Declaration also seeks to reduce the volume of inadmissible applications by calling upon States Parties and the Court to provide better information to potential applicants and their representatives about applications procedures and admissibility criteria. The Declaration also recommends that the establishment in the Court of a more extensive filtering mechanism for clearly inadmissible cases should be considered. The CDDH and its sub-groups continue to work on these issues.

6. Different views have been expressed in the CDDH on whether or not fees should be introduced as a modality for regulating access to the Court. The CDDH is, however, willing to continue considering the question, should the Committee of Ministers so wish. It therefore invites the Committee of Ministers to indicate whether or not it wishes this issue to be further considered.

Models for a fee, deposit or penalty system

7. Under most models, an applicant to the Court would be required to pay a sum of money before their application is considered. This would *prima facie* be required from every applicant.

8. The amount of money required could be set absolutely regardless of the applicant's location, or by reference to the relative value of money in the applicant's state of origin or in the state(s) against which the application is made. Some consider that varying the amount of money in this way is discriminatory. However, others contend that a uniform amount of money across Europe would disadvantage applicants from states with lower relative incomes or weaker currencies.

9. In the event that the amount of money were linked to the applicant's state of origin, arrangements may need to be made for unusual circumstances, such as:

(a) an applicant who is a national of (one of) the member state(s) against whom they seek to make an application, but who is (or claims to be) resident in another state; or

(b) an applicant who is not resident within the territory of the Council of Europe.

10. A system could allow for the amount of money to be reduced or waived entirely if the applicant is unable to afford it. The ability to pay could be assessed in many ways, such as whether the applicant:

(a) is entitled to certain state benefits in their state of origin;

(b) would be entitled to free legal representation or to remission from court fees in their state of origin; or

(c) has an income that is below a certain proportion of the median income in their state of origin.

Any assessment in this way would need to be supported by evidence, and may require a system of appeal.

11. A system could also allow for the amount of money to be reduced or waived entirely in respect of certain types of proceedings; for example, many national systems recognise cases relating to the custody of children as a special case. Alternatively or additionally, a system could also allow for the requirement to pay to be waived where the applicant is deprived of their liberty, whether for a criminal offence or for immigration reasons.

12. As a further alternative, the amount of money could be sought only in respect of certain types of proceedings, or from certain types of applicants. For example, some national systems link the amount of money to the value of the proceedings, or require payment only from businesses. However, an approach of this nature would not appear to be consonant with the intention of reducing inadmissible applications, as opposed to raising funds for the Court.

13. A system would need to permit urgent applications to be made, particularly where an indication under Rule 39 of the Rules of the Court is sought.

14. The amount of money paid by the applicant could be refunded in certain circumstances, such as:

(a) if their application is not declared clearly inadmissible by a single judge;

(b) if their application is declared admissible; or

(c) if their application results in the finding (or acceptance) of one or more violations.

Where the money is refunded in this way, particularly in situation (a), it could have more of the character of a deposit than a fee. The money could be refunded either by the Court (especially in situations (a) and (b)), or by the respondent state(s) (especially in situation (c), in which case it would form part of the costs awarded).

15. There are alternative models under which an amount of money would not be requested at the time that an application is made. For example, an applicant whose application is considered by a Registry lawyer to be entirely without merit or clearly inadmissible could be advised of this, and invited to withdraw their application; the applicant could however opt for their application to be judicially considered upon the payment of a sum of money that would be refunded if a Judge of the Court disagrees with the Registry lawyer's assessment. It is however questionable whether such a system would help to reduce the number of inadmissible applications received by the Court.

16. A second alternative would be for a fee to be charged to an applicant whose case is declared clearly inadmissible by a single judge. However, given that the applicant at this point would have no further incentive to engage with the Court, it is questionable whether it would usually be possible to collect such a fee. The "jeopardy" posed by such a fee, particularly if set at such a level to be a real discouragement to inadmissible applications, could also be a greater disincentive to well-founded applications than an initial payment.

17. A variation on this latter approach would be to levy such a fee against the legal representative (if any) of a person, and not to permit that representative to present further applications until the fee if paid. However, if no fee were then levied upon unrepresented applicants, this could result in many applicants simply not declaring

that they are legally represented until their application has passed the point at which this fee could be levied.

Advantages of a fee, deposit or penalty system

18. People tend to value less something that they receive for free. The right of individual application to the Court is an important feature of the system for the protection of human rights in Europe; it therefore has a great moral value. The intention of any fee, deposit or penalty system would be to place on the right of application a financial value to reflect its moral value, and to ensure that applicants therefore appreciate the significance of an application to the Court. In this way, applicants would be discouraged from abusing the right of application, or treating it frivolously.

19. It has been suggested that many inadmissible applications to the Court arise from a perception that, as an application is free, an applicant has nothing to lose by making their application. It has also been suggested that the potential gain of a sum of money is a motivating factor for some applicants to the Court, especially if they stand no personal risk in applying. A fee, deposit or penalty would discourage applicants whose application to the Court is purely speculative.

20. In this way, applicants without a well-founded case whose interest in applying to the Court is based purely on financial considerations could be discouraged. Applicants could also be encouraged to pay greater attention to advice whether their application has merit before they send their application to the Court. The payment of a sum of money upon application is well-accepted in national legal systems for these reasons as part of the good administration of justice.

Disadvantages of a fee, deposit or penalty system

21. The free availability of individual application to the Court is considered by some to be one of its key features, reflecting the Court's accessibility to all regardless of means or situation. For some, the objection to a fee, deposit or penalty is therefore one of principle.

22. There would however remain with any system the risk, however small, that it would deter well-founded applications, even with fee reduction criteria, refund arrangements and other easements: there might be considered always to be applicants with well-founded applications for whom the financial risk or administrative difficulty would be too great.

23. It would be a challenging task to set and maintain the level of a fee or deposit. This is particularly true if the amount differs between member states, as variations in the cost of living and the exchange rate of currencies would need to be considered and quantified. Similarly, if a system to reduce or waive fees were established, it could be difficult to establish financial thresholds and evidence requirements that operate equitably across all member states or, if set separately for each member state, that do not particularly disadvantage applicants from certain member states. The administration of such a system could also be challenging: while it would be difficult for a centralised administration in Strasbourg to assess and verify evidence of an

inability to pay, some applicants would equally be unwilling to be required to engage with their national authorities to provide this evidence, especially where their application is against their own state.

24. The payment system for a fee or deposit could also present administrative issues; the Registry has however indicated that it would be willing to explore feasible approaches to administration. Cross-border transactions, particularly for member states that do not use the Euro, tend to be expensive and difficult to arrange. States could themselves provide arrangements for the collection of fees in the national currency and the certification of their payment for an application, but this could present a barrier to applicants who are unwilling to engage directly with their national authorities in making their application. Alternatively, the Court could itself provide a means by which fees could be paid in the national currency in each member state.

25. Collectively, there would be a risk that a fee or deposit system could cost more to administer than would be justified by its benefits, and more than the money received and the resources saved from a reduction in inadmissible applications.

Further considerations

26. If the Committee of Ministers indicates that it wishes further examination to be given to this subject, the CDDH expects that the following questions may be among those that would need to be resolved, in addition to the issues noted above:

(a) Would the introduction of a fee, deposit or penalty require the amendment of the Convention?

(b) Who should set the amount of a fee or deposit and, if relevant, the criteria and evidence requirements for its remission? How often should this be reviewed?

(c) To whom should the fee or deposit be paid, and how would this be certified?

(d) Should the money raised from fees, unreturned deposits or penalties be retained directly by the Court, or should it be returned to the general budget of the Council of Europe? Alternatively, should a proportion be paid to the state(s) against whom an unsuccessful application was made?

(e) What happens to an application where the applicant refuses to pay an application fee or deposit?

27. The CDDH considers that it would be useful to obtain, in parallel with any future work on the issue, the best possible information on why decisions are taken to declare applications inadmissible without further consideration and on what effect a fee or deposit would have. The CDDH also notes that expert assistance in quantifying, in both financial and workload terms, the costs and benefits of any preferred model for a fee or deposit would also be useful.