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STEERING COMMITTEE FOR HUMAN RIGHTS
(CDDH)

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

**Draft CDDH collective response to
the Court's Jurisconsult's notes on
the principle of subsidiarity and on
the clarity and consistency of the Court's case-law**

7th meeting
Strasbourg, 30 May – 1 June 2011

**DRAFT CDDH COLLECTIVE RESPONSE TO
THE COURT'S JURISCONSULT'S NOTES ON
THE PRINCIPLE OF SUBSIDIARITY AND ON
THE CLARITY AND CONSISTENCY OF THE COURT'S CASE-LAW**

The CDDH thanks the Jurisconsult of the Court for his initiative in drawing up the two notes on the principle of subsidiarity and on the clarity and consistency of the Court's case law. The quality of the notes was high and they underlined the importance of the principle of subsidiarity and the necessity of a clear and consistent case law for the reform process.

The CDDH welcomes the dialogue with the Court which is enabled by the papers and presents the following comments as a contribution at a technical level to this ongoing dialogue, which it hopes will be continued in the future.

COMMENT ON SUBSIDIARITY

The CDDH welcomes the internal reflection by the Court on its response as to how it can give full effect to the principle of subsidiarity. The CDDH recalls that the principle of subsidiarity implies the sharing of responsibility for the protection of human rights between national authorities and the Court. The primary responsibility falls upon the national authorities to implement the Convention fully, with the Court playing a subsidiary role to intervene only when States have failed properly to discharge this responsibility.

Subsidiarity must operate so that the Court can strike a balance in its workload and focus on those essential applications that relate to the implementation of the Convention. This is all the more important given the Court's backlog of cases. Effective application of the subsidiarity principle is clearly one way of dealing with the growing number of petitions submitted to the Court. However, the significance and importance of the principle of subsidiarity extends beyond considerations of practical efficiency.

The CDDH invites the Court to reflect on giving full weight to the appreciation that all Convention rights must be applied in the domestic context; and that national authorities, including national courts, are in principle in the best position to assess how this should be achieved. This is in keeping with the letter and spirit of the Convention: that the States Parties and their national courts remain the guarantors of respect for the rights that derive from it.

As such the CDDH takes the view that the Court, in ensuring that the Convention is applied, should focus on its role of overall review in the light of the Convention, verifying that the domestic court has taken a decision within the bounds of proper interpretation of the Convention.

In particular, the CDDH does not see the role of the jurisprudence of the Court as an instrument of judicial harmonisation of the way the Convention is applied in

Contracting Parties.

The Court should focus on reviewing whether the domestic judgment itself falls within the (often broad) acceptable bounds of legitimate interpretation and application of the Convention.

The Court should not replace the full extent of the margin of appreciation of the national authorities by its own appreciation. The margin of appreciation is an important tool through which the Court gives effect to the principle of subsidiarity. It implies, among other things, that the Court should give full weight to the considered views of national courts as well as of other national authorities, particularly national parliaments.

The Court should not in principle take into account subsequent developments that were not within the subject matter of the national proceedings; the assessment of facts made by national courts should not be questioned by the Court except where there has been an obvious error, and only in those cases where that error is essential to the application of the Convention.

Furthermore, subsidiarity requires, and the Convention stipulates, that all domestic remedies must have been exhausted before the Court declares an application admissible; this ought to be the case even where several remedies co-exist and a strict interpretation of exhaustion of domestic remedies ought to be applied by the Court to enable the national courts to deal with the matter first.

The jurisdiction of the Court is closely linked to its subsidiary role and stems from the international treaty character of the Convention; it should therefore be interpreted in accordance with the 1969 Vienna Convention. As stated in the Izmir Declaration, adopted on 27 April 2011, the Court should apply fully, consistently and foreseeably all admissibility criteria and the rules regarding the scope of its jurisdiction, *ratione temporis*, *ratione loci*, *ratione personae* and *ratione materiae*. A strict application of these criteria will also have a positive effect on reducing the caseload of the Court by deterring applications which are outside of the scope of its jurisdiction.

The full functioning of subsidiarity necessarily implies a tolerance of (and even welcome for) the fact that Convention rights can be implemented differently by different Contracting Parties, in keeping with their distinct national conditions, provided that they are in fact implemented. This is of obvious importance for those guarantees of the Convention requiring a consideration of interests (Articles 8, 9, 10 and 14); but applies to all the rights guaranteed by the Convention and goes to the heart of the relationship between the Court and the Contracting Parties.

COMMENT ON CLARITY AND CONSISTENCY

The CDDH encourages the Court to give great weight in its judgments to the need for legal certainty. Clarity and consistency of the Court's case-law are essential for the full assumption by Contracting Parties and national courts of their role as guarantors of human rights and for the effectiveness of the subsidiarity principle.

It is important that applicants and national authorities can understand the precise scope of the rights set out in the Convention. Clarity and consistency enables applicants to better assess the chances of success of a possible application; and for national authorities, including courts, which have the primary responsibility for applying Convention rights in concrete cases, to deal with issues first. This implies that the Court should be particularly cautious in departing from its existing case law. Principles established in previous judgments should be followed by the Court in subsequent cases. National authorities, including courts, and applicants should be able to have confidence that the principles established in the Court's case law will be consistently applied by the Court in future cases and will be departed from only in exceptional circumstances.

Judgments should set out clearly how the relevant principles are being applied to the present circumstances and, in those rare cases where the Court decides it is necessary to depart from or develop such principles, the judgment should explain clearly how the principles set out in earlier case law are affected. The clearer and more consistent the case law is, the easier it is for Contracting Parties to consider the conclusions to be drawn from a judgment, even where it does not involve them directly, and the greater the impact of the Court's case law will be.

The need for clarity and consistency in the Court's case law does not of course imply any requirement for uniformity in the way the Convention is implemented in each Contracting Party. In accordance with the principle of subsidiarity, the Convention allows the Contracting Parties a large degree of autonomy as to the way that they implement the Convention within their national systems. A consistent and clear approach to issues of principle within the Court's case law will help Contracting Parties in this task.

The Court might consider more efficient means of internal consultation, in order to minimise the risk of inconsistency in its caselaw.

As a reflection of the need for clarity, the CDDH encourages the Court to publish its range-based guidance on its practices relating to just satisfaction. This would assist applicants, who often make claims that are out of all proportion to the amounts that they can legitimately expect should their application be successful.

If the Court's case law is clear and consistent, national courts can apply the principles found therein to their cases more effectively. This will facilitate the Court taking an approach of overall review that will enable it better to give effect to the principle of subsidiarity.

Finally, it is necessary also to ensure, by way of appropriate and accessible instruments whether in the Rules of Court or through expression of the practice followed in the Court's case-law, the clarity and consistency of the application of rules concerning the Court's procedure, which are an integral part of Convention law.