Appendix V

DRAFT CDDH Report on the proposal to introduce a sanction in futile cases

A. Introduction

1. At the 7th meeting of the DH-GDR (30 May – 1 June 2011), the German expert presented a proposal to introduce a pecuniary sanction in futile cases.[1] This proposal would fall within the Deputies' invitation to the CDDH "to advise, setting out … the main practical arguments for and against, on any other possible new procedural rules of practices concerning access to the Court."[2] The present document represents the CDDH's report on the proposal.[3]

2. The German proposal would empower the Court "to charge a fee … where the applicants have repeatedly submitted applications that are manifestly inadmissible and lacking in substance, for such applications are manifestly not due for adjudication before an international court and … place an undue burden on the Court." (To avoid any confusion, this paper will hereafter employ the term "sanction" rather than "fee".)

3. Other details concerning operation of this sanction system included that:
   (i) It would be incumbent upon the judicial formation dealing with an application to assess whether or not to impose a sanction.
   (ii) The sanction would be imposed at the Court's discretion once proceedings had been concluded, which could include doing so in the decision on inadmissibility.
   (iii) The sanction should not be too low, so as to reinforce its educative effect, it should be higher than any general fee; its specific amount would be set at the Court's discretion, taking into account the specific features of the individual case, up to a given maximum amount. (It was not specified who would be competent to set this maximum amount.)
   (iv) The Court would be unable directly to enforce payment of the sanction. The applicant would, however, be informed that no further applications would be processed until the sanction had been paid.
   (v) One could foresee a derogation to the principle that the Court refuse to process further applications brought by applicants who had not paid a sanction, in cases where the further application concerned "core rights" guaranteed by the Convention (e.g. Articles 2, 3 and 4).
   (vi) Should the same applicant, having paid a sanction, subsequently make further applications "lacking in substance," a further, possibly higher sanction could be applied.

B. Arguments in favour of introducing a sanction

4. The following arguments have been advanced in favour of introducing a sanction in futile cases:

[1] See doc. DH-GDR(2011)012.
[2] See doc. CM/Del/Dec(2011)1114/1.5, "other" in this context meaning 'other than a system of fees for applicants to the Court' (see doc. DH-GDR(2011)011 REV.)
[3] See doc. DH-GDR(2011)R7.

(i) Such applications place an undue burden upon the Court: the sanction would seek to reduce this burden. It would provide the Court with a case-management tool, similar to what is available within certain national judicial systems, to deal better with those whose numerous applications use resources without contributing to positive development in the field of human rights, whether for individuals (the applicant) or in general.

(ii) The sanction would have an educative effect on the instant applicant. Even if such a system would not have a massive effect on the number of clearly inadmissible applications, it could nevertheless have a preventive effect on those who make applications without considering whether their applications meet the admissibility criteria. Imposition of the sanction may have a positive effect in any case: applicants who pay will have learnt something about the seriousness of applications; those who do not pay may find that the Court refuses to examine any future applications they may file.

(iii) Once there was general awareness of the practice, it may also have a disciplining influence on the behaviour of other applicants. The system could thus contribute to consolidating the role of the Court, whose current situation, notably its case-load, is in part due to it being seen by many applicants as a fourth-instance court.

(iv) The decision on whether to implement the sanction would be taken by the judicial formation seized of the case and so would involve minimal additional administrative cost. Managing the sanction would not imply additional work for the Court disproportionate to the possible effects, because the Court would have discretion to decide whether to impose the sanction: if it felt that to deliver a quick decision without any sanction would be a better way to manage the case, it could do so.

(v) A sanction system would respond to one of the objections of those opposed to a general fee for applicants, since it would not deter well-founded applications, the Court deciding on its application after having assessed the case. The potential impact on the effectiveness of the right of individual application to the Court would seem minimal, given the conditions under which the sanction is envisaged; it is, in effect, left to the discretion of the judge, as to both its application and its amount.

C. Arguments against introducing a sanction

5. The following arguments have been advanced against the proposal:

(i) A ‘sanctions system’ would not be in conformity with the purpose, spirit and even the letter of the Convention. Each applicant must be presumed to be in good faith when he or she lodges an application. Applicants rarely, if ever, imagine that their cases could be considered as “futile.” Inadmissibility is the sole “sanction” for a clearly ill-founded or even abusive application. Any other sanction would in effect give the appearance of criminalising applicants to the Court, something which should not be envisaged for a judicial human rights protection mechanism. It penalises the applicant before (s)he has even made out a case, even if that case turns out to be inadmissible. It goes against the maxim ‘Justice must not only be done, but must be seen to be done’.

(ii) Even if there may undoubtedly be those who spend their time in abusive litigation, including before the Court, they are very few in number and do not necessarily only submit futile, inadmissible applications, which is a further problem. Most "abusive" applications involve repetitions of or minor variations on previously dismissed applications. At present, once a pattern of such applications has been established – which could involve as few as two Single Judge decisions (the second made under Art. 35(2)(b) ECHR) – further applications were dealt with by the Registry simply informing the applicant that there would be no further judicial examination of their case. In other words, abusive applications were not a major case-processing problem and there may be few opportunities for a judicial formation to consider imposing any sanction.

(iii) The Court rarely uses its existing competence to find applications inadmissible for abuse of the right of individual application (Art. 35(3)(a))[4] and therefore would be unlikely to exercise a power to impose a sanction. Consolidation of its case-law for rejecting futile applications could achieve the same goal as this proposal. The development of this case-law, however, could prevent future futile applications without the need for a complex system of sanctions. An accumulation of efforts aimed at the same goal, on the other hand, would tend to burden the Court with additional tasks, rather than to relieve it.

(iv) Implementation of the proposal could require mobilisation of financial and human resources and place a heavy discretionary burden on the Court when deciding who or what case to 'sanction'. The Court was under the obligation to treat every application in the same way, giving the same weight and consideration to each, and so would be obliged to determine whether and explain why certain applications were lacking in substance; in other words, to distinguish degrees of inadmissibility. It would be obliged to analyse, at least briefly, future applications introduced by the person in question, if only to avoid the situation in which possible violations of core rights would remain unexamined.

(v) It has been suggested that there would have to be the possibility of appealing against imposition of the sanction, which would increase the Court's workload. Any system of pecuniary sanctions would in principle have to be accompanied by the possibility of requesting the re-examination or reduction of the amount of the fine. This would also involve additional resources.

(vi) A sanctions system would create inequality between applicants. It would not affect futile applications made by applicants of solid financial status. The envisaged system could thus appear discriminatory on the basis of financial resources.

(vii) The viability and feasibility of such a system within the Convention, even once amended, would be questionable, difficult and complicated to implement.

D. Other issues raised

[4] See the Court's decisions in the cases of *Bock v. Germany* and *Dudek (VIII) v. Germany*.

6. In addition to the above, the following other issues were raised during discussion:

(i) The proposal should not be considered as an alternative to a general fee, although it could be introduced in addition. It cannot take the place of a fees system or even be introduced as an alternative to fees, since unlike sanctions, the purpose of a possible fees system would be to add quality and uniformity to the introduction of applications.

(ii) Alongside introduction of a sanction for abusive applicants, consideration should also be given to introduction of sanctions for legal representatives who submit futile applications on behalf of their clients, and/ or for States that failed to execute judgments in repetitive cases.

(iii) The effective impact of this proposal on the prevention of futile applications remains to be analysed, on the basis of a possible relevant report that could perhaps be drawn up by the Court itself. From the outset, therefore, a preliminary estimation of the number of such cases and the extent to which they over-load the role of the Court would be appropriate.

(iv) There could also be a study of the possibility that the States Parties be responsible for recovering, possibly on behalf of the Court, the sanctions. In this case, it would no longer be necessary to fix as a rule that the Court refuse to process further applications following non-payment of a sanction.