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DH-GDR(2014)R7 Addendum I

STEERING COMMITTEE FOR HUMAN RIGHTS
(CDDH)

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

**Draft CDDH Report containing conclusions and possible proposals
for action concerning the procedure for the amendment of
the Rules of Court and the possible 'upgrading' to the Convention of
certain provisions of the Rules of Court**

I. INTRODUCTION

1. As specified in the terms of reference of the Committee of Experts on the Reform of the Court (DH-GDR) for the biennium 2014-2015, the Steering Committee for Human Rights (CDDH) was instructed by the Committee of Ministers to prepare a draft report containing “conclusions and possible proposals for action concerning the procedure for the amendment of the Rules of Court and the possible ‘upgrading’ to the Convention of certain provisions of the Rules of Court (deadline: 31 December 2014)”. Work began in Drafting Group G on the Reform of the Court (GT-GDR-G) on the basis of guidance given by the DH-GDR¹ and approved by the CDDH. It was noted in particular that the starting point for the work should be Articles 24 and 25 of the Convention, that it would be necessary to identify objective criteria for distinguishing between provisions of the Rules of Court and that the outcome of the work should present various practical proposals whilst indicating the extent of their feasibility and the existence or not of consensus on them.

2. In the course of its work, the CDDH has taken account of relevant work done by the Committee of Experts on a Simplified Procedure for Amendment of Certain Provisions of the European Convention on Human Rights (DH-PS) while taking care not to duplicate earlier discussions and bearing in mind the difficulties encountered. In the framework of the work of the DH-PS, which led, in June 2012, to the adoption of a CDDH final report on a simplified procedure for amendment of certain provisions of the Convention, the CDDH came notably to the conclusion that some matters, namely interim measures under Rule 39, the pilot judgment procedure under Rule 61, and unilateral declarations should have their normative status enhanced by ‘upgrading’ either into the Convention or into a Statute. The CDDH considered, however, that it would not be opportune to proceed further with the matter, noting, amongst other things, the great complexity of the proposals taken as a whole and the constitutional difficulties with which some member States would be faced if this ‘upgrading’ were to be effected by means of a Statute.²

3. Throughout the work which led to the adoption of this report, the CDDH also took due account of the position of the Court.³ In this connection, the CDDH wishes to stress from the outset that the purpose of its work is not to reduce the autonomy or independence of the Court, but to improve dialogue between the different stakeholders in the Convention system in line with paragraph 12.c)iii) of the Brighton Declaration.⁴ The CDDH is convinced of the importance of allowing the Court to continue to respond flexibly to new circumstances.

¹ See doc. DH-GDR(2013)R5, paragraph 17 and DH-GDR(2014)R6, paragraph 7.

² See document CDDH(2012)R75 Addendum I, paragraphs 32 e) and f) and 33.

³ Dean Spielmann, “The successes of and challenges for the European Court, seen from the inside”, Proceedings of the Oslo Conference on the Long-term Future of the European Court of Human Rights, page 42 : “the CDDH is currently reflecting on the way in which we adopt our Rules. Some States wish to play a role in this field. I can only express my surprise at such demands. While we work tirelessly every day to address the problems posed by repetitive cases, priority cases and the failure to execute certain important judgments, some, instead of solving these crucial problems, raise others, such as this one, which is of no urgency. I see this as a desire to exercise control over our Court which, I feel, is inconsistent with the current challenges. So let us focus on what is essential.” See also the Registrar’s intervention at the 6th meeting of the DH-GDR (doc. DH-GDR(2014)R6, Appendix III).

⁴ Under which “[t]he Conference [...] [w]elcome[d] and encourage[d] open dialogues between the Court and States Parties as a means of developing an enhanced understanding of their respective roles in carrying out their shared responsibility for applying the Convention, including particularly dialogues between the Court and [...] Government Agents and legal experts of the States Parties, particularly on procedural issues and through consultation on proposals to amend the Rules of Court”.

II. THE PROCEDURE FOR THE AMENDMENT OF THE RULES OF COURT

4. The procedure for the amendment of the Rules of Court is based on Article 25 of the Convention, under which “the Plenary Court shall [...] adopt the rules of Court”. Rule 110 of the Rules of Court provides as follows: “Any Rule may be amended upon a motion made after notice where such a motion is carried at the next session of the plenary Court by a majority of all the members of the Court. Notice of such a motion shall be delivered in writing to the Registrar at least one month before the session at which it is to be discussed. On receipt of such a notice of motion, the Registrar shall inform all members of the Court at the earliest possible moment”.

A. Reasons why a revision of the procedure for the amendment of the Rules of Court is envisaged and the objectives pursued in doing so

5. With the exception of the aforementioned Article 25 of the Convention, only Articles 24, under which “the Court shall have a Registry, the functions and organisation of which shall be laid down in the rules of the Court”, and 26, paragraph 5, on the composition of the Grand Chamber, refer to the Rules of Court. However, these Rules today regulate a wide range of issues, some of which do not concern only the internal organisation of the Court and may affect, in a significant manner, the rights and obligations of the parties.

6. The CDDH reviewed the different experiences of the States in relation to dialogue with the Court concerning the successive amendments made to the Rules of Court. This review mainly focused on questions relating to consultation of Government Agents, who have expressed the wish to be consulted on a more regular basis and on a larger number of subjects. It was also noted that, in the event of consultation, the Court does not always transmit to the High Contracting Parties a draft text on the basis of which they could submit comments, nor does it share comments received from one High Contracting Party with the others. It was also suggested that the Court should provide, where applicable, detailed reasons why it does not give effect to the comments and recommendations.

7. Effective dialogue, within the meaning of the aforementioned paragraph 12.c) iii) of the Brighton Declaration, is of especial concern for the CDDH. The CDDH welcomes the consultation process recently initiated by the Court regarding amendments to the Rules of Court with a view to the entry into force of Protocol No. 15 to the Convention and expects this process to be repeated with regard to Protocol No. 16. The CDDH notes, however, that there has been no consistent practice for consultation of the High Contracting Parties.

8. In order to address its concerns, the CDDH considers that the Court should develop the Rules of Court in consultation with the High Contracting Parties. It notes that this type of situation exists with respect to other international courts, in particular the Court of Justice of the European Union, and *mutatis mutandis*, some High Contracting Parties’ own domestic courts. Such consultation need not, however, be necessary in all circumstances, particularly where provisions dealing with purely internal matters are introduced or amended (see section C. below).

9. The CDDH thus expresses the wish that the High Contracting Parties be henceforth systematically involved, in the manner specified below, in the procedure for amendment of the Rules of Court.

B. Proposed characteristics of a new procedure for the amendment of the Rules of Court

10. Regardless of the characteristics of a new procedure for amending the Rules of Court, there is consensus on the fact that the final decision to adopt should continue to fall to the Court, but that the Court should have regard to the States' views.

11. The final choice as to the characteristics of a new procedure for amending the Rules of Court would depend on the modality for its introduction (see section D. below). The CDDH considers that at least a systematisation of the best current practice should be established, notably the Court informing the States of its intention to make any amendment to the Rules of Court and allowing the States an opportunity to submit contributions, although it is noted that this would not answer all of the concerns expressed. That is why the CDDH considered the possible characteristics of a new procedure for amending the Rules. Two distinct procedures were envisaged, namely a new flexible consultation procedure that could be introduced rapidly, and a more inclusive and formalised new procedure that would require an amendment to the Convention (see section D. below).

Basic elements of a new flexible procedure for amending the Rules of Court

12. The most flexible new procedure for amending the Rules of Court could include the following steps, based on the best current practice:

- a) The right of initiative to amend the Rules of Court remains with the Court; the States Parties may suggest to the Court that a certain amendment be made.
- b) Each time the Court intends to amend the Rules of Court, it shall inform the States.
- c) Where the Court deems it appropriate with regard to the relevant criteria (see section C. below) or at the request of States, the Court shall transmit a draft text to the States, and shall allow a period of time for positions to be taken. The Court would retain the discretion to consult any other interested parties, as it sees fit.
- d) States may take individual or collective positions. Depending on the objections raised, a committee of Government Agents may hold a meeting in order to adopt a common position for transmission to the Court.
- e) If States Parties oppose the principle of the proposed amendment, it is expected that the Court would reconsider it.
- f) Where the Court does not give effect to comments submitted, it shall explain the reasons why. These explanations may be given in writing to all consulted parties or, depending on the circumstances, at a meeting organised for that purpose.

13. The CDDH considers that the identification of the circumstances in which this most flexible new procedure should be applied should be regulated through application by the Court of a predetermined selection criterion (for a possible selection criterion, see section C. below). The CDDH considers, however, that, whatever the circumstances, States could have the possibility of asking the Court to be consulted.

Basic elements of a yet more inclusive and formalised new procedure for amending the Rules of Court

14. Depending on how the more flexible new procedure were to operate in practice, the elaboration of a more inclusive and formalised new procedure might be considered, inspired

by that applicable to the Rules of Procedure of the Court of Justice of the European Union.⁵ Its possible characteristics could be as follows:

- a) It would be possible for both the Court and one or more States to propose amendments to the Rules of Court.
- b) The decision on whether or not to pursue a proposal by one or more States would fall to the Committee of Ministers.
- c) The proposal would then be examined by a committee of Government Agents and/ or the CDDH, as well as by the Court in the case of any proposal from one or more States. Other interested parties could be consulted in this framework.
- d) The proposal, possibly amended, would then be submitted to the Committee of Ministers for approval. The CDDH could imagine that the conditions for approval of an amendment proposal would be more stringent than those for deciding to pursue it under sub-paragraph b) above.
- e) The draft amendment as approved by the Committee of Ministers would be examined and, if appropriate, adopted by the Plenary Court.

C. Criterion for identifying amendments suitable to be subject to a new procedure

15. The CDDH agrees that a new procedure for amending the Rules of Court is not necessary in relation to every amendment of the Rules of Court. It therefore sought to identify criteria according to which such a procedure should be implemented. The CDDH considers that the procedure should be applied in each and every case where the amendment affects, in a significant manner, the rights and obligations of the parties. The current practice could be maintained for all other amendments.

16. With respect to the flexible procedure, the examination of the question of whether an amendment requires the new procedure to be implemented would be for the Court, on a case-by-case basis, in accordance with the identified criterion. However, the CDDH considers that, in all cases, States should have the opportunity to ask the Court to be consulted.

17. It would be for the Court to decide whether a proposed amendment is likely to significantly affect the rights and obligations of the parties. In order to illustrate the approach envisaged by the States Parties to this question, the CDDH has put together the following non-exhaustive list of examples, with selected reasons for their inclusion.⁶

- a) Rule 28 (inability to sit, withdrawal or exemption). Amendments to this provision could be relevant in relation to the parties' right to an impartial tribunal.
- b) Rule 29 (ad hoc judges). Amendments to this provision could be relevant in relation to procedural obligations imposed on the States Parties.

⁵ Under Article 253 of the Treaty on the Functioning of the European Union, "[t]he Court of Justice shall establish its Rules of Procedure. Those Rules shall require the approval of the Council". Some experts have suggested that this principle might also be applied in the Convention system.

⁶ In the course of preparing the current report, the CDDH considered drawing up a more extensive, indicative list of rules containing provisions touching upon the rights and obligations of the parties. Given the time and resources available, however, it proved impossible to do this in a sufficiently reliable manner; the fact that the Rules of Court are subject to periodic revision also militated against it.

- c) Rule 34 (use of languages). Amendments to this provision could be relevant in relation to procedural obligations imposed on the parties, including on exercise in practice of the right of individual application.
- d) Rule 39 (interim measures). Amendments to this provision could be relevant in relation to exercise of the right of individual application and to a respondent State's obligation to comply with an interim measure.
- e) Rule 44 (third party intervention). Amendments to this provision could be relevant in relation to procedural obligations attached to the possibility of third party intervention.
- f) Rule 47 (contents of an individual application). Amendments to this provision could be relevant in relation to procedural obligations imposed on the exercise in practice of the right of individual application.
- g) Rule 60 (claims for just satisfaction). Amendments to this provision could be relevant in relation to procedural obligations concerning the possibility of obtaining just satisfaction and thereby to effective protection of Convention rights.
- h) Rule 61 (pilot judgment procedure). Amendments to this provision could be relevant in relation to procedural obligations imposed on the parties and the exercise by those whose cases may have been adjourned of the right of individual application.
- i) Rule 62A (unilateral declaration). Amendments to this provision could be relevant in relation to the exercise in practice of the right of individual application, the States Parties' right to settle a case by such a declaration and the obligation on a respondent State generally first to have offered a friendly settlement to an applicant.
- j) Rule 80 (request for revision of a judgment). Amendments to this provision could be relevant in relation to the parties' right to request that a judgment be revised on factual grounds, and the procedural obligations attaching to exercise of that right.

18. The more formalised procedure would require a careful identification of rules or issues to which it would be applicable.

D. Procedure and possible modalities for the introduction of a new amendment procedure

19. The most flexible new procedure for amending the Rules of Court could be introduced through various modalities. The final choice amongst these will need to be made in consultation with the Court.

- As a minimum, this could be by modification by the Court of its current practice, although most experts consider that this would not fully answer their concerns.
- The Court could announce its intention of modifying its practice by means of an informal agreement between the Court and the High Contracting Parties (the latter presumably in the form of the Committee of Ministers).
- It could also be done by introduction of a new provision into the Rules of Court, for example through an amendment to Rule 110. In this connection, it was suggested that the new provision should also specify that any subsequent amendment relating to this matter would be subject to the consent of the High Contracting Parties.

20. The introduction of a more inclusive and formalised new amendment procedure would mean amending Article 25 of the Convention and clearly specifying in advance all the rules and issues to which the procedure would be applicable. The CDDH agrees that no such amendment of the Convention is envisaged at present, although the question might be reconsidered, if appropriate, in the context of future work on follow-up to the CDDH final report on the longer-term future of the Convention system and the Court⁷.

III. THE POSSIBLE 'UPGRADING' OF CERTAIN ESSENTIAL PRINCIPLES FOUND IN THE RULES OF COURT

21. As already noted in the work of the DH-PS, the aim of 'upgrading', i.e. enhancing the normative status of certain essential principles found in the Rules of Court through their inclusion in the text of the Convention itself, would be to ensure that a more explicit legal basis in the Convention is provided for these principles. The intention would be not to diminish the Court's independence to adopt rules governing procedure, with technical aspects related to these principles continuing to appear in the Rules.

A. Criterion for identifying the essential principles that should be 'upgraded' and selection of principles on that basis

22. In accordance with the aim pursued, the CDDH considers that the criteria to identify essential principles which should possibly be 'upgraded' should be whether the principle in question sets out a right or an obligation that does not have a more explicit legal basis in the Convention, and contains an element which may be considered a main characteristic of the Convention mechanism. The CDDH has made an indicative selection on the basis of this criterion. In addition to interim measures (Rule 39), the pilot judgment procedure (Rule 61) and unilateral declarations (Rule 62A)⁸, the CDDH considers that requests for interpretation and revision of a judgment (Rules 79 and 80) and the principle of legal aid (Chapter XI) should also be 'upgraded', were such an exercise to be pursued in the future.

B. Procedure and possible modalities for 'upgrading'

23. The terms of reference of the DH-GDR suggest only one possible modality for 'upgrading', namely "possible 'upgrading' to the Convention". This would obviously require amendment of the Convention. As previously noted by the CDDH in relation to the question of a new procedure for amending the Rules of Court, this amendment of the Convention could be envisaged, if necessary, in the context of future work on follow-up to the CDDH final report on the long-term future of the Convention system and the Court.

C. The interest in proceeding to upgrade certain principles

24. Some experts' position on 'upgrading' would depend on the final outcome of work on a new procedure for amending the Rules of Court. These experts consider that if there were a new procedure involving all the stakeholders in the Convention system, any form of 'upgrading' would no longer be necessary.

⁷ Drafting Group F on the Reform of the Court (GT-GDR-F) is currently working on this.

⁸ These three specific issues had already been identified in the work of the DH-PS as being suitable for 'upgrading' (see doc. CDDH(2012)R75 Addendum I, paragraph 9 and Annexe IV).

25. Another group of experts was in favour of ‘upgrading’ regardless of the outcome of work on a new amendment procedure, in order to ensure fulfilment of the aim identified in paragraph 21 above.

26. A further group expressed its reluctance about ‘upgrading’, regardless of the outcome of work on a new amendment procedure, insofar as it saw no practical interest in this exercise and had doubts as to its feasibility.