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CDDH(2012)R74 **Addendum III**

STEERING COMMITTEE FOR HUMAN RIGHTS
(CDDH)

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CDDH Contribution to the Ministerial Conference organised by the United Kingdom Chairmanship of the Committee of Ministers

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74th meeting
Strasbourg, 07 – 10 February 2012

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CDDH Contribution to the Ministerial Conference organised by the United Kingdom Chairmanship of the Committee of Ministers[1]

A. INTRODUCTION

I. The role of the Steering Committee for Human Rights

1. The United Kingdom Chairmanship of the Committee of Ministers is organising a Ministerial Conference on reform of the European Court of Human Rights ("the Court") in Brighton, United Kingdom on 18-20 April 2012. The conference is expected to agree on a package of reform measures by means of a Declaration. The Declaration will provide the basis for decisions of the Committee of Ministers, to be adopted at its Ministerial Session on 14 May 2012. These measures are expected to include proposals for reform which will require amendments of the Convention.

2. The Steering Committee for Human Rights ("the CDDH") has been asked to provide a written contribution to this Ministerial Conference.

3. The CDDH has been closely involved in the process of reform of the European Convention on Human Rights ("the Convention") and the Court for many years, notably since the 2000 Rome Conference. In December 2009, it gave an Opinion on the issues to be covered by the Interlaken Conference.[2] Subsequently, it has contributed to the process initiated by the Interlaken Conference and continued by the Izmir Conference, by adopting a series of reports on reform issues, including a Final Report on measures that do not require amendment of the Convention.[3] As part of this Interlaken Process, it has, most recently and alongside the present document, adopted a Final Report on specific proposals for measures requiring amendment of the Convention.[4] For the overall picture of the CDDH's position on reform of the Court and Convention system, the present document should be read alongside these two Final Reports.

II. The structure and content of the CDDH's Contribution

4. This Contribution should be understood in the context of the CDDH's vision of the purpose of the Convention system. The Convention exists to protect human rights. It is the shared responsibility of States and the Court to give full effect to the Convention in respect of the principle of subsidiarity. To this end, States must fulfil their obligations to respect the rights guaranteed by the Convention, and effectively resolve violations at national level; when the Court has found a violation, States must implement the Court's judgment fully and rapidly. The function of the Court is to act as a safeguard for violations that have not been remedied at national level, in

[1] The present document contains the text as adopted by the CDDH at its 74th meeting (7-10 February 2012).
[2] See doc. CDDH(2009)019 Addendum I.
[3] See doc. CDDH(2012)R74 Addendum II.
[4] See doc. CDDH(2012)R74 Addendum I.

accordance with its subsidiary jurisdiction to interpret and apply the Convention. It should be able to give its response within a reasonable time and must take a clear and consistent interpretative line.

5. The Contribution is structured around the following five themes, which the United Kingdom intends to address in the draft Declaration that should be adopted at the Conference:

- national implementation of the Convention, including execution of Court judgments;
- the role of the Court and its relations with national authorities, to strengthen subsidiarity;
- the clarity and consistency of Court judgments and the nomination of candidates for judge at the Court;
- the efficiency and effectiveness of the Court;
- long-term thinking on the Court and the Convention.

In addition, the UK Chairmanship intends to provide the Court with political support from the Committee of Ministers for the measures it is already taking to prioritise and better manage its workload, and to provide a wide margin of appreciation to member States' authorities in its judgments.[5] The contents of this Contribution take account of the Declarations adopted at the High-level Interlaken and Izmir Conferences. They are also informed by the earlier CDDH reports mentioned in paragraph 3 above, and the documents and sources cited therein,[6] along with the report of the Wilton Park Conference "2020 Vision for the European Court of Human Rights", held under the UK Chairmanship on 17-19 November 2011.[7]

6. This contribution also deals with general issues affecting the scope of reform proposals, such as the right of individual petition and budgetary issues. Together with the five themes mentioned in paragraph 5 above, the contribution covers all reform measures already contained in the Interlaken and Izmir Declarations and also introduces several new ones, which the CDDH has not yet examined in detail. To avoid unnecessary repetition of the two Final Reports, the contribution deals with some measures in less detail, while others are examined more extensively (e.g.

[5] See the "Priorities of the UK Chairmanship" at https://wcd.coe.int/com.instranet.InstraServlet?Index=no&command=com.instranet.CmdBlobGet&InstranetImage=1955617&SecMode=1&DocId=1809496&Usage=2

[6] The CDDH recalls in particular the various relevant events held by successive Committee of Ministers' Chairmanships, including the High-level Seminar on reform of the European human rights system (Norwegian Chairmanship, 18 October 2004); the Workshop on improvement of domestic remedies with particular emphasis on cases of unreasonable length of proceedings (Polish Chairmanship, 28 April 2005), along with the subsequent seminars organised by the Polish authorities in Warsaw; the Colloquy on future developments of the Court in the light of the Wise Persons' Report (San Marinese Chairmanship, 22-23 March 2007); the Regional Conference on the role of Supreme Courts in the domestic implementation of the Convention (Serbian Chairmanship, 20-21 September 2007); the Seminar on the role of government agents in ensuring effective human rights protection (Slovak Chairmanship, 3-4 April 2008); the Colloquy "Towards stronger implementation of the Convention at national level" (Swedish Chairmanship, 9-10 June 2008); the Round Table on the right to trial within a reasonable time and short-term reform of the European Court of Human Rights (Slovenian Chairmanship, 21-22 September 2009); the Conference on strengthening subsidiarity: integrating the Court's case-law into national law and judicial practice (Chairmanship of "the former Yugoslav Republic of Macedonia", 1-2 October 2010); and the International Conference on the role of prevention in encouragement and protection of human rights (Ukrainian Chairmanship, 20-21 September 2011).

[7] http://www.wiltonpark.org.uk/en/reports/?view=Report&id=712127982

national implementation of the Convention and execution of the Court's judgments, the long-term future of the Court and the right of individual petition). The respective lengths of chapters in this contribution should not be seen as reflecting a CDDH position on the relative importance or weight to be attached to the five themes of the eventual Declaration or the reform process as a whole. Decisions will have to be taken at the political level. The Contribution also reflects a desire to bear in mind a long-term vision for the Court and Convention system when examining short- and medium-term proposals.

B. PROPOSALS RELATING TO THE CONFERENCE THEMES

7. The CDDH's Final Report on specific proposals for measures requiring amendment of the Convention ("the Final Report") sets out proposals for reform measures that would require amendment of the Convention. This section of the Contribution presents those measures, along with other proposals, in relation to the five themes identified for the Ministerial Conference. The UK Ministerial Conference should further examine and, as appropriate, endorse those proposals, along with additional elements from amongst the other measures outlined below.

I. National implementation of the Convention and execution of Court judgments[8]

8. The follow-up to the Interlaken and Izmir Declarations has devoted much attention to the Convention's Strasbourg-based control mechanism. Effective implementation of the Convention at national level remains a significant challenge for the system. Apart from being a legal obligation incumbent on all States Parties to the Convention and fundamental to the principle of subsidiarity, stronger national implementation would contribute greatly to relieving the Court's case-load, including notably of repetitive cases. Between 2000 and 2010, the Committee of Ministers addressed seven recommendations to member States on national implementation.[9] These recommendations are also sources of inspiration for the execution of Court's judgments.

9. The following proposals requiring action primarily by member States – most of which appeared also in the Interlaken and Izmir Declarations, whose implementation is currently under preliminary review, but many of which remain relevant and urgent – should be further considered:

[8] See also Sections B, D and F of the Interlaken Declaration Action Plan and Sections B, E and H of the Izmir Declaration Follow-up Plan.

[9] Namely Recommendations No. R (2000) 2 on the re-examination or reopening of certain cases at domestic level following judgments of the European Court of Human Rights, Rec (2002) 13 on the publication and dissemination in the member states of the text of the European Convention on Human Rights and of the case-law of the European Court of Human Rights, Rec (2004) 4 on the European Convention on Human Rights in university education and professional training, Rec (2004) 5 on the verification of the compatibility of draft laws, existing laws and administrative practice with the standards laid down in the European Convention on Human Rights, Rec (2004) 6 on the improvement of domestic remedies, CM/Rec (2008) 2 on efficient domestic capacity for rapid execution of judgments of the European Court of Human Rights and CM/Rec (2010) 3 on effective remedies for excessive length of proceedings.

(i) increasing national authorities' awareness of Convention standards and ensuring their application;[10]

(ii) ensuring that training for public officials involved in the judicial system and law enforcement includes information on the Convention and the Court's case-law;[11]

(iii) ensuring the existence of national human rights institutions,[12] which can play a role in legal education and public information campaigns – also a responsibility of governments – as well as monitoring and reporting on national compliance with Court judgments;

(iv) improving the provision of information on the Convention – notably the scope of its protection, the jurisdiction of the Court and the admissibility criteria – to potential applicants;[13]

(v) introducing systematic review of the Convention-compatibility of draft legislation, with reasoned government certification.[14] In this connection, the CDDH takes note of the Parliamentary Assembly's recommendation that national parliaments carefully examine whether draft legislation is compatible with Convention requirements;[15]

(vi) introducing new domestic legal remedies, whether of specific or general nature.[16] The recent proposal for a general domestic remedy[17] as well as the possibility of drawing up non-binding Committee of Ministers' instruments in relation to specific areas in which existing domestic remedies are ineffective, as mentioned in the Final Report on non-amendment measures, should be further examined in the near future, notably on the basis of the CDDH's forthcoming review of national implementation of relevant parts of the Interlaken and Izmir Declarations;

(vii) ensuring review of the implementation of recommendations adopted by the Committee of Ministers to help States Parties to fulfil their obligations,[18] with this review also being potentially relevant to the pursuit of other of these proposals;

(viii) ensuring full and rapid execution of Court judgments (see further below);

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[10] See also para. B.4.a. of the Interlaken Declaration Action Plan.
[11] See also para. B.1.c. of the Izmir Declaration Follow-up Plan.
[12] Such institutions should satisfy the Paris Principles relating to the Status of National Institutions: see United Nations General Assembly Resolution 48/134 of 20 December 1993.
[13] See also para. C.6.a. of the Interlaken Declaration Action Plan and, further, the Secretary General's report, doc. SG/Inf(2010)23final.
[14] See also para. B.4.a. of the Interlaken Declaration Action Plan.
[15] See Parliamentary Assembly Resolution 1856(2012) on guaranteeing the authority and effectiveness of the European Convention on Human Rights, para. 3.
[16] See also para. B.1.b. of the Izmir Declaration Follow-up Plan.
[17] See doc. DH-GDR(2011)028. The Committee of experts on the reform of the Court (DH-GDR) decided that the proposal did not fall to be examined in detail in the context of its Final Report, since it did not imply amendment of the Convention.
[18] See also para. B.4.f. of the Interlaken Declaration Action Plan.

(ix) taking into account the Court's developing case-law with minimal formality, with a view to considering the conclusions to be drawn from Court judgments finding violations of the Convention by another State Party;[19]

(x) contributing to translation into the national language(s) of the Court's judgments and Practical Guide on Admissibility Criteria;[20]

(xi) contributing to the Human Rights Trust Fund.[21]

10. The Council of Europe should continue in its crucial role of assisting and encouraging improved national implementation of the Convention, in accordance with the principle of subsidiarity, as well as through the process of supervision of execution of Court judgments.

11. The Council of Europe's technical co-operation programmes should be strengthened, in particular through:

(i) increased funding;

(ii) improved targeting and co-ordination of other existing Council of Europe mechanisms, activities and programmes;[22]

(iii) closer co-operation between the Council of Europe and the European Union in defining priorities for and implementing joint programmes;

(iv) a more country-specific approach, linking specific programmes to the execution of Court judgments (including notably pilot or other judgments revealing structural or systemic problems);

(v) considering making co-operation programmes obligatory in certain circumstances (e.g. in connection with the execution of specific Court judgments).

12. Under Articles 46 and 39 of the Convention respectively, the Committee of Ministers supervises the execution of judgments and that of friendly settlements, in accordance with the principle of subsidiarity. The Committee of Ministers has recently reformed its procedures through introduction of a new "twin-track" approach, in order to improve the prioritisation of cases subject to its supervision.[23] Further developments in the Committee of Ministers' supervision activities relate to the introduction of effective domestic remedies; the prompt presentation, where required,

[19] See also para. B.4.c. of the Interlaken Declaration Action Plan.
[20] See also para. B.1.d. of the Izmir Declaration Follow-up Plan.
[21] See also para. B.1.e. of the Izmir Declaration Follow-up Plan. For further details of the Human Rights Trust Fund, see http://www.coe.int/t/dghl/humanrightstrustfund/default_en.asp.
[22] See also para. B.5 of the Interlaken Declaration Action Plan.
[23] According to the "twin-track" approach, all cases are examined under the standard procedure unless, because of its specific nature, a case warrants consideration under an enhanced procedure. See further docs. CM/Inf/DH(2010)37 and CM/Inf/DH(2010)45 final.

of action plans on the execution of specific judgments; and targeted assistance activities including legal advice, training and information sharing.

13. The Conference could invite the Committee of Ministers to consider the following proposals that have been made in different contexts[24] to enhance further its authority and competence, including:

(i) more discussion of strategic/ systemic issues;

(ii) accelerating the execution of pilot judgments;

(iii) inviting the relevant minister to participate in the Committee of Ministers when supervising the execution of specific judgments;

(iv) greater application of pressure, including possibly in the form of sanctions, on States that do not execute judgments, including notably those relating to repetitive cases and serious violations of the Convention;

(v) a co-operative approach involving all relevant parts of the Council of Europe in order to present possible options to a State Party required to remedy a structural problem revealed by a Court judgment;

(vi) continuing to increase transparency of the process, to facilitate exchange of information with national human rights institutions and civil society in relation to structural problems and general measures aimed at ensuring non-repetition of violations;

(vii) the Committee of Ministers making full use of its political role in developing human rights standards and procedures, in order to create stronger relations with the Court.

14. Other proposals relating to execution of Court judgments which the Conference could consider addressing include:

(i) encouraging effective parliamentary oversight of execution of judgments;[25]

(ii) closer involvement of the Parliamentary Assembly, including notably through its direct relations with the Committee of Ministers, its immediate contacts with national parliaments responsible for passing relevant legislation and, on its own account or through its relations with national parliaments, in calling specific governments to account on fulfilment of their responsibilities concerning execution of Court judgments;

(iii) closer involvement of the Commissioner for Human Rights;

[24] Including at the Wilton Park Conference.
[25] See Parliamentary Assembly Resolution 1823 (2011) on national parliaments: guarantors of human rights in Europe, para. 6.5; also Resolution 1856 (2012) on guaranteeing the authority and effectiveness of the ECHR, para. 4.

(iv) greater involvement of other Council of Europe monitoring mechanisms (e.g. Commission for the Prevention of Torture, possibly amongst others) in supporting the Committee of Ministers' supervisory activities;

(v) government consultation of national human rights institutions and civil society in relation to action plans on general measures;

(vi) setting up a body or office to assist member States in implementing the Convention and finding relevant technical assistance, including in relation to execution of judgments.

15. Finally, the CDDH's terms of reference for the 2012-2013 biennium require it to prepare a draft report for the Committee of Ministers containing (a) an analysis of the responses given by member States in their national reports on measures taken to implement relevant parts of the Interlaken Declaration, and (b) recommendations for follow-up. Work pursuant to these terms of reference will also contribute to enhancing implementation of the Convention at national level.

II. The role of the Court and its relations with national authorities[26]

16. The Interlaken Declaration invited the Court to "take fully into account its subsidiary role in the interpretation and application of the Convention". In response, the Jurisconsult of the Court, with the approval of the Court itself, issued a Note on the Principle of Subsidiarity.[27] The CDDH has adopted a Collective Response to the Jurisconsult's Note, which was sent to the Court's Registrar. This Collective Response may also usefully inform preparations for the UK Ministerial Conference and is therefore appended to the present Contribution.[28]

17. As reflected in both the Interlaken and Izmir Declarations, the role of the Court and its relations with national authorities have become important issues in discussions on the future of the Court and the Convention system. This has led to various proposals:

(i) allowing the Court to give advisory opinions on request by the highest national courts in cases revealing potential systemic or structural problems, or concerning the compatibility of domestic law with the Convention. For further details of this proposal and the CDDH's position thereon, see the Final Report;[29]

(ii) introducing a new admissibility criterion, relating to cases properly considered by national courts. Again, for further details of this proposal and the CDDH's analysis thereof, see the Final Report;[30]

(iii) introducing a procedure whereby the Court would send back to the relevant national court cases that were well-founded but had not been properly

[26] See also Section E of the Interlaken Declaration Action Plan.
[27] See doc. # 3188076, 8 July 2010.
[28] See the Appendix.
[29] See doc. CDDH(2012)R74 Addendum I and its Appendix V.
[30] See doc. CDDH(2012)R74 Addendum I and its Appendix III Section 5.

examined by national courts. The CDDH has not examined this proposal in detail;

(iv) introducing provisions into the Court's rules that would allow respondent Governments to ask for a separate decision on admissibility whenever they can demonstrate a particular interest in having the Court rule on the effectiveness of a given domestic remedy, especially in order to avoid the risk of repetitive cases;[31]

(v) the Court developing its case-law to require that Convention rights have been raised formally in domestic proceedings, particularly when the applicant was at that stage legally represented;[32]

(vi) that the Court in principle should not take into account subsequent developments that were not within the subject matter of the national proceedings.

18. Another issue raised in the Izmir Declaration was that of indications of interim measures made by the Court to States under Rule 39 of the Rules of Court.[33] The Izmir Declaration recalled that the Court was "not an immigration appeals tribunal or a court of fourth instance" and emphasised that "the treatment of requests for interim measures must take place in full conformity with the principle of subsidiarity". It went on to stress "the importance of States Parties providing national remedies, where necessary with suspensive effect, which operate effectively and fairly and provide a proper and timely examination of the issue of risk in accordance with the Convention and in light of the Court's case-law". The CDDH expects to examine this latter aspect further on the basis of the national reports on implementation of relevant parts of the Interlaken and Izmir Declarations.

19. The Izmir Declaration also expressed the "expectation that the implementation of the approach outlined [therein] would lead to a significant reduction in the number of interim measures granted by the Court, and to the speedy resolution of those applications in which they are, exceptionally, applied, with progress achieved within one year [i.e. by April 2012]. The Committee of Ministers is invited to revert to the question in one year's time". The latest figures from the Court show that between 2010 and 2011, there was a very large decrease in the number of requests granted, from 1,440 to 342. Information has not been available, however, concerning the length of proceedings in cases in which the Court applied interim measures, although the Court Registrar has recently provided information that the number of applications pending in which Rule 39 has been applied had fallen from 1,553 in August 2011 to 702 in January 2012.[34]

20. The CDDH notes with interest the Court's recent development of setting clear time limits for the introduction of any effective remedies to prevent repetitive applications, which also assists the ongoing execution process.

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[31] See doc. DH-GDR(2012)003, "French views on enhancing the subsidiarity principle".
[32] Ibid.
[33] See also the Izmir Declaration Follow-up Plan, Section A.
[34] See doc. DD(2012)21, speaking notes of the Registrar at the meeting of the GT-SUIVI.Interlaken, 10/01/12.

21. The CDDH considers that the Government Agents are a very important element in the Convention system. They not only participate in proceedings before the Court but also, in some States, are responsible for co-ordinating the process of implementation of the Court's judgments or play a central role in transferring and adapting Convention standards into domestic law and practice. They are also key interlocutors in the dialogue between the Court and national authorities. In this respect, the CDDH welcomes the Court's recent involvement of Government Agents in the process of drafting new Rules of Court.

III. The clarity and consistency of judgments and nomination of candidates for judge[35]

22. The Interlaken Declaration "stress[ed] the importance of ensuring the clarity and consistency of the Court's case-law" and invited the Court to "apply uniformly and rigorously the criteria concerning admissibility and jurisdiction". In response, the Jurisconsult of the Court, with the approval of the Court itself, issued a Note on Clarity and Consistency of the Court's Case-law.[36] The CDDH's Collective Response, mentioned in paragraph 16 above, may usefully inform preparations for the UK Ministerial Conference and is therefore appended to the present Contribution.[37]

23. The clarity and consistency of judgments is of primary importance also for their efficient execution, in particular in cases relating to important structural problems.

24. The authority and credibility of the Court depend in large part on the quality of its judges, which in turn depends primarily on the quality of the candidates that are presented by States Parties to the Parliamentary Assembly for election. The CDDH has prepared a draft non-binding Committee of Ministers' instrument on the selection of candidates for the post of judge at the Court, accompanied by an explanatory memorandum containing examples of good practice.[38] This draft now falls to be examined and, if appropriate, adopted by the Committee of Ministers. The CDDH invites the Conference to call upon member States to take account of the Guidelines on the selection of candidates for the post of judge at the Court, once these are adopted by the Committee of Ministers.

25. The CDDH notes that the Committee of Ministers has already decided to review the functioning of the Advisory Panel after an initial three-year period.[39] It might also invite the Parliamentary Assembly to discuss how the work of the Panel can best interact with the Parliamentary Assembly's procedures.

IV. The efficiency and effectiveness of the Court[40]

[35] See also Paragraph (4) of the Interlaken Declaration, Section E of the Interlaken Declaration Action Plan and Section F of the Izmir Declaration Follow-up Plan.
[36] See doc. # 3197955, 8 July 2010.
[37] See the Appendix.
[38] See doc. CDDH(2012)R74 Addendum IV.
[39] See doc. CM/Del/Dec(2010)1097bis/1.2bE.
[40] See also Sections A, C, D and E of the Interlaken Declaration Action Plan and Sections A and C of the Izmir Declaration Follow-up Plan.

26. The Court is, and has for several years been, confronted with an enormous workload. This has resulted in very large numbers of cases pending before all of the Court's primary judicial formations[41] and, for certain categories of case, very long periods of time spent waiting for final determination. This is mainly due, on the one hand, to the very large number of applications made, and on the other, to budgetary, structural and procedural factors affecting the Court's handling of those applications, as well as to its working methods. The Final Report proposes measures both to obtain a reduction in the number of clearly inadmissible applications and to improve the effectiveness of the Court's treatment of applications. In this regard, the CDDH welcomes the recent, significant improvement achieved by the Court concerning clearly inadmissible applications.

27. The CDDH notes from the outset that the potential scope of proposals concerning the efficiency and effectiveness of the Court is closely linked to the right of individual petition. It further notes that many of these proposals also appear to have budgetary consequences, which would require examination. For further consideration of these issues, see especially Section D below.

28. The Final Report considers various proposals intended to regulate access to the Court. These include:

(i) introducing a system of fees for applicants to the Court;

(ii) making legal representation compulsory for applicants from the outset of proceedings;

(iii) introducing a sanction in futile, abusive cases;

(iv) amending the "significant disadvantage" admissibility criterion, which would increase the number of cases to be declared inadmissible under Article 35 (3) (b) of the Convention;

(v) introducing a new admissibility criterion relating to cases properly considered by national courts.[42]

29. The Final Report also considers various proposals intended to address in various ways the very large numbers of applications pending before the Court. These include:

(i) introducing a new filtering mechanism which would increase the Court's case-processing capacity, either by giving certain Registry lawyers competence to make decisions in clearly inadmissible cases or recruiting a new category of judge within the Court to deal with them, or a combination of both; with, in the case of the options involving a new category of judge, such judges also being competent to sit on Committees;

[41] In other words Single Judges, Committees and Chambers, the Grand Chamber having jurisdiction only on relinquishment of a case by a Chamber or its referral following a Chamber judgment.
[42] See also para. 17(ii) above.

(ii) establishing a pool of temporary judges who could be appointed for relatively short periods and would help discharge most of the functions of regular judges;

(iii) introducing a "sunset clause" for applications not addressed within a reasonable time;

(iv) conferring on the Court a discretion to decide which cases to consider.

30. For details of all these proposals and the CDDH's analysis thereof, see the Final Report.[43]

31. An important contributing factor to the relative period of time a case may spend pending before a judicial formation is the priority category to which it is allocated by the Registry under the Court's recently introduced priority policy.[44] The priority policy has done much to allow the Court to focus on the most important and serious cases (i.e. categories I, II and III), but with the effect of increasing numbers of cases pending in categories IV (lowest category Chamber cases: potentially well-founded applications based on Articles other than 2, 3, 4 or 5 (1) of the Convention) and, especially, V (repetitive, Committee cases). The proposals mentioned in paragraph 29 above would seek to redress this effect.

32. The question of collective complaints or class actions has been mentioned in the past, notably at the 2009 Bled Round Table.[45] The issue has not, however, since been examined by the CDDH, even to the extent of being clearly defined. The CDDH also notes that the Court, in addition to the pilot judgment procedure, has in some recent cases collected related complaints together for the purpose of treating them all in a single judgment.[46] It considers that this practice may merit further study. The Court's recent approach to an influx of several thousand similar individual applications against one State party is also of interest. The Court, noting the need for presentation of applications to be co-ordinated at national level by a limited number of representatives and therefore encouraging the relevant trade unions to re-submit grouped applications, has stated its intention to register only applications lodged through one of the trade unions concerned and then to identify one or more applications to be examined as a matter of priority as leading cases.[47]

33. It is necessary to distinguish between, on the one hand, measures intended to achieve a balance between the number of new, incoming applications and the numbers of decisions delivered by the Court and, on the other, measures to deal with the

[43] See doc. CDDH(2012)R74 Addendum I and its Appendices III and IV, respectively.
[44] For further details of the Court's Priority Policy, see http://www.echr.coe.int/NR/rdonlyres/DB6EDF5E-6661-4EF6-992E-F8C4ACC62F31/0/Priority_policyPublic_communication_EN.pdf
[45] "The right to trial within a reasonable time and short-term reform of the European Court of Human Rights", Round table organised by the Slovenian chairmanship of the Committee of Ministers, Bled, Slovenia, 21-22 September 2009. The issue also arose more recently at the Wilton Park Conference.
[46] E.g. *Gaglione a.o. v. Italy*, App. nos. 45867/07 a.o., judgment of 21 December 2010, in which 475 cases concerning excessive length of domestic judicial proceedings were determined in a single judgment; *Lopatyuk a.o. v. Ukraine*, App. nos. 903/05 a.o., judgment of 17 January 2008, in which 121 cases concerning non-enforcement of domestic court judgments were determined in a single judgment.
[47] See the press release issued by the Registrar of the Court, doc. ECHR 009 (2011), 11 January 2012.

existing backlog of cases, that is cases which have not been decided upon within a reasonable time. As far as the existing backlog is concerned, particular measures should be considered as soon as possible. In this context, the Committee of Ministers could engage with the Court on how to deal with this situation.

V. Long-term thinking on the Court and the Convention[48]

34. Even if there is no clear vision at this stage of the future nature and role of the Court, it should be dealing with a far smaller case-load and delivering fewer judgments. One view is that this can be achieved without changing the role of the Court, notably by significantly improving national implementation of the Convention. Another proposal for achieving it would be for the Court in future to focus its efforts on serious or widespread violations, systemic and structural problems and important questions of interpretation and application of the Convention. The term "constitutional" has in the past been used to describe such a court, but may not be appropriate and would in any case need further clarification in this context; however that may be, the term clearly points towards something whose functioning would be radically different from that of the current Court.

35. The recent Wilton Park Conference was intended as an opportunity to reflect in greater detail on the future nature and role of the Court. Amongst ideas that have arisen, both there and in other contexts, are the following:

(i) giving the Court discretion to choose which cases to consider, with the result that an application would not be considered unless the Court made a positive decision to do so (see further in the Final Report[49]): although possibly for implementation in the longer-term, this idea could also be examined alongside others that imply significant amendments;

(ii) the Court no longer awarding just satisfaction;

(iii) a Court with fewer judges than High Contracting Parties, elected not on behalf of a certain State, but exclusively on the basis of their professional competencies, and perhaps with the introduction of Advocates General.

36. The Court's existing priority policy and the "significant disadvantage" admissibility criterion introduced by Protocol No. 14 already have the effect of focussing the Court's attention towards certain types of case and away from others. However that may be, it is broadly agreed that any fundamental change of the Court's role first requires effective national implementation of the Convention.

37. Nevertheless, whilst fundamental reform of the Court may be for the longer-term, it is important to begin reflecting already now upon the process for arriving at the necessary decisions. The Ministerial Conference could take decisions to this effect.

[48] See also Sections A and G of the Interlaken Declaration Action Plan and Section G of the Izmir Declaration Follow-up Plan and para. 5. of its "Implementation" section.
[49] See doc. CDDH(2012)R74 Addendum I and its Appendix IV Section 3.

38. Reflections towards a long-term vision of the control system should also address the issue of a simplified procedure for amending certain provisions of the Convention relating to organisational issues.[50] Work on a simplified amendment procedure has included examination of the possibility of introducing a Statute for the Court, as one means of introducing a simplified amendment procedure. The CDDH's relevant committee of experts is considering, amongst other things, the constitutional implications of the proposals. The committee of experts' terms of reference will terminate on 31 May 2012, following which the CDDH will report on the issue to the Committee of Ministers.

39. In this context, the CDDH has addressed questions relating to the balance of law-making powers between Convention organs, with many in the subordinate committee expressing interest in a wide-ranging examination of the normative status of the Rules of Court. The CDDH has, however, concluded that this latter task could not be successfully accomplished under current time and budgetary constraints. It has therefore been proposed that further, detailed examination of these issues would have to take place in future in a separate body with appropriate terms of reference.

C. ACCESSION OF THE EUROPEAN UNION TO THE CONVENTION[51]

40. The future role of the Court cannot be considered in isolation. Accession by the EU to the Convention will enhance coherent application of human rights all over Europe, as consistently called for by the CDDH since the 2000 Rome Conference, ensure full legal protection for all individuals and foster a harmonious development of the case-law of the Courts in Luxembourg and Strasbourg.

41. At its extraordinary meeting on 12-14 October 2011, the CDDH transmitted a report on the elaboration of legal instruments for the accession of the EU to the Convention, including revised draft instruments elaborated by an informal group of experts in co-operation with the EU, to the Committee of Ministers for consideration and further guidance.

42. The CDDH invites the Conference to call for a swift and successful conclusion to the work on EU accession.

D. GENERAL ISSUES AFFECTING THE SCOPE OF REFORM PROPOSALS

I. The right of individual petition and requirement that all decisions be made by a judge[52]

[50] See also Section G of the Interlaken Declaration Action Plan and Section G of the Izmir Declaration Follow-up Plan.
[51] See also Section I of the Izmir Declaration Follow-up Plan.
[52] See also Section A of the Interlaken Declaration Action Plan and of the Izmir Declaration Follow-up Plan.

43. During its examination of the various proposals requiring amendment of the Convention, the CDDH has repeatedly been confronted with certain principles that appear to set limits to their scope, notably the right of individual petition (or application) and the requirement that all decisions be of a judge.[53]

44. The right of individual petition, as enshrined in Article 34 of the Convention, gives the right to bring an application before the Court to every person, non-governmental organisation or group of individuals claiming to be a victim of a violation of the Convention, regardless of the substantive merits or procedural propriety of that application.[54] The Court has described the right of individual petition as "a key component of the machinery for protecting the rights" set forth in the Convention,[55] which was recognised also in the Interlaken and Izmir Declarations. It has been suggested that extreme caution should be exercised in proposing limitations to the right of individual petition.

45. The requirement that all decisions be made by a judge is often considered an integral part of the right of individual petition. Whether this requirement is in itself a right under the Convention or not, it is a feature of the current Convention system, deriving from Articles 27 to 29 of the Convention, which foresee the decision of a judge for every application. However that may be, the Convention's requirement that such a decision be made is not in practice always realised.

46. At the same time, the right of individual petition and the requirement that all decisions be made by a judge are relevant to the Court's case-load and to its capacity to deal with incoming cases within a reasonable time. Only a minimum of practical requirements (essentially, completion of an application form and its submission, along with supporting documents) is placed upon the making of an application, which must in turn lead to determination by a judge of the Court. This has the effect that the Court can be made aware of human rights violations affecting a large number of victims and given the opportunity, in accordance with its subsidiary role, to provide a remedy. The other side of the coin is that, along with other factors, it has resulted in a very large number of applications being made, the majority of which prove clearly inadmissible, whilst at the same time the number of non-urgent, potentially well-founded cases that have been awaiting a decision for many years continues to increase.

47. The Court is obliged to render a decision of a judge on each and every one of these applications, even those with no substantive connection to Convention rights or which fail to satisfy the basic admissibility requirements of timeliness and exhaustion of domestic remedies. The Single Judge procedure introduced by Protocol No. 14 and other developments in the Court's internal structure and working methods have allowed considerable increases in the Court's capacity to issue decisions on clearly

[53] These considerations were raised, for example, in connection with the introduction of a system of fees for applicants, compulsory legal representation, a sanction in futile, abusive cases, giving certain Registry lawyers competence to issue decisions in clearly inadmissible cases or introducing a "sunset clause".

[54] The figure of 800 million, being the combined population of all States Parties to the Convention, is often cited as representing the number of individuals who could bring applications.

[55] *Mamatkulov & Askarov v Turkey*, app. nos. 46827/99 & 46951/99, Grand Chamber judgment of 04/02/05.

inadmissible applications, with the Court expecting to resolve the backlog of such cases by 2015.

48. The requirement for a judicial decision in every case is also relevant to repetitive cases, which fall to be decided by three-judge Committees applying well-established case-law of the Court. In most such cases, the requirements for resolving or remedying the violation are clear, on the basis of earlier judgments. With the Court consequently giving low priority to such cases, there were, as of 31 January 2012, 14,550 (an increase of 10,450, or 255%, since the beginning of 2011) of them pending before it.

49. It must be underlined that deficient national implementation of the Convention continues to contribute to the Court's case-load. Indeed, in the case of repetitive cases, it is axiomatic that the existence of such cases reflects a national failure to protect rights, remedy violations and, sometimes, execute Court judgments. Provision of effective domestic remedies, which could include general remedies, would thus help reduce the burden on the Court. It has also been suggested that a lack of confidence in domestic human rights protection mechanisms may contribute to applications being inappropriately made to the Court.

50. The primary responsibility for implementation of the Convention falls to the States, including by establishing effective remedies at national level that allow the finding of a violation and, if necessary, its redress. The Court's priority should thus be to deal rapidly and efficiently with admissible cases that raise new or serious Convention issues. Inadmissible and repetitive cases should be handled in a way that has minimum impact on the Court's time and resources. On the other hand, it has been argued that the correct response to the Court's case-load is not to introduce restrictions on the right of individual petition and/ or the requirement that all decisions be made by a judge, but to reinforce further national implementation of the Convention, including effective execution of judgments, and to increase the Court's case-processing capacity, including through the provision of additional resources.

51. In the light of the foregoing analysis, the CDDH invites the Ministerial Conference to consider the role of the right of individual petition in the context of reflections about the long-term future of the Court, which is linked to the requirement for a decision of a judge.

II. Budgetary issues

52. As noted above, certain proposals have unavoidable budgetary consequences, in particular those involving recruitment of additional judges (whether for filtering or general case-processing) and/ or Registry staff (including as necessary to achieve the Court's projection of eliminating the backlog of clearly inadmissible cases by 2015). Indeed, it is unclear whether or to what extent the backlog of pending cases, before whatever judicial formation, can be resolved without additional resources.

53. Should additional judges be introduced, it would be necessary then either to decide to which of the Court's judicial formations they be allocated, or to leave that decision to the Court, according to its own assessment of its needs. This choice may have consequences for the potential competences given to such additional judges, and

their competences may in turn be relevant to the appropriate level of remuneration and thus the budgetary consequences.

54. The Court's decisions and judgments are, to a greater or lesser extent, prepared by and thus dependent on the work of its Registry. It is generally accepted that the Registry is currently operating to its maximum capacity, at least under current working methods. Whether or not additional judges are introduced, it would be difficult, therefore, to achieve any significant increase in the Court's case-processing capacity without increasing the staff of the Registry. This would, of course, have budgetary consequences, unless all such reinforcements came in the form of secondments – which may not be feasible or even desirable. That said, the experience of the filtering section, even if in part due to its reinforcement by seconded national judges, shows that there may be scope for further improvements in efficiency. The Court can only be encouraged to continue to show creativity and determination in its ongoing efforts to identify and implement such improvements.

55. It is clear that the developments in the capacity of the Court and the Registry would necessarily have effects on the Committee of Ministers' capacity to supervise adequately execution. That could, as a result, imply reinforcement of the Execution Department.

III. Final remarks on the right of individual petition and budgetary issues

56. In the current circumstances, it should be noted that the Court has real difficulties in doing everything that the Convention requires of it. Improved implementation of the Convention at national level, increasingly effective procedures and working methods within the Court and the full effects of Protocol No. 14 will significantly alleviate these difficulties. Beyond these measures, the CDDH notes that most currently foreseen reform proposals requiring amendment of the Convention would appear to have budgetary consequences and/ or consequences for the role and nature of the Court.

Appendix

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

1. 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.

2. The CDDH welcomes the dialogue with the Court which is enabled by the notes 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.

I. Comment on subsidiarity

3. 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.

4. 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.

5. 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.

6. 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.

7. 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.

8. 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.

9. The Court should not substitute its own assessment for that of national authorities, made within the proper margin of 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.

10. 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. Neither should the Court in principle take into account subsequent developments that were not within the subject matter of the national proceedings.

11. Whilst the Court is competent to verify the compatibility of national law with the provisions of the Convention, it should not in principle interpret national law.

12. 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.

13. 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 on the Law of Treaties. 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.

14. 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.

II. Comment on the clarity and consistency of the Court's case-law

15. 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.

16. 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.

17. 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.

18. 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.

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

20. 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.

21. 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.

22. 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.