Strasbourg, 8 October 2010

COUNCIL OF EUROPE CONSEIL DE L'EUROPE

DH-PS(2010)003

STEERING COMMITTEE FOR HUMAN RIGHTS
(CDDH)

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COMMITTEE OF EXPERTS ON A SIMPLIFIED PROCEDURE FOR AMENDMENT OF CERTAIN PROVISIONS OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS
(DH-PS)

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Meeting Report

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1st meeting
6 – 8 October 2010
Strasbourg

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Summary

The Committee, at its 1st meeting, in particular:

- exchanged views on its terms of reference and the conclusions of the GT-SUIVI.Interlaken and clarified and prioritised its objectives;
- heard a statement by Mr Erik FRIBERGH, Registrar of the Court;
- in accordance with its first objective, began considering which provisions of Section II ECHR could be subject to a simplified amendment procedure (see Appendix III);
- in accordance with its second objective, began considering which other provisions or matters from outside the ECHR could be "upgraded" into a possible future Statute;
- in the light of the foregoing, began considering which modality should be preferred for introducing a simplified amendment procedure;
- organised its future work and took note of its calendar of meetings.

Item 1: Opening of the meeting, adoption of the agenda and order of business

1. The Committee of experts on a simplified procedure for amendment of certain provisions of the European Convention of Human Rights (DH-PS) held its first meeting in Strasbourg from 6-8 October 2010 with Mrs Björg THORARENSEN (Iceland) in the chair. The list of participants appears at Appendix I. The agenda, as adopted, appears at Appendix II.

Item 2: Terms of reference

2. The Committee held an exchange of views on the terms of reference received from the Ministers' Deputies on 7 July and took note of the outcome of the discussion concerning the simplified amendment procedure during the GT-SUIVI.Interlaken meeting of 29 June 2010 concerning the approach to future work on the issue.[1]

3. In the light of the foregoing, the Committee considered that its three objectives were, in order of priority, (i) the simplification of the amendment procedure for certain provisions currently found in the Convention, (ii) enhancing the normative status ("upgrading") of other provisions or matters currently found outside the Convention and (iii) modification of certain of these provisions or matters, if necessary. The substantive rights and freedoms contained in the Convention and its additional Protocols should not be addressed.

4. Concerning the scope of provisions that should be subject to a simplified amendment procedure, a majority of participants were in favour of pursuing the broader approach left open to it by the GT-SUIVI.Interlaken, to include also provisions other than those found in the Convention itself.

5. The Committee also heard an intervention from Mr Erik Fribergh, Registrar of the Court, who presented a Court paper on a simplified amendment procedure.[2] He pointed out in particular that:

- the issue was particularly important and the presented paper was discussed and approved by the whole Court;
- in the Interlaken Declaration, the States reiterated their commitment to the Convention, the Court and the right of individual application; this should be borne in mind when discussing the issue of a simplified amendment procedure;
- from the Court's perspective, the main point of the exercise ahead should be simplification of amendment procedure for certain provisions with the aim of providing more flexibility to respond to new factual circumstances in the future, as opposed to codification of some other provisions;
- focus should be put on the question of what Convention provisions should be subject to a simplified amendment procedure despite the possible

[1] For both the terms of reference and the relevant extract from the synopsis of the GT-SUIVI.Interlaken meeting, see doc. DH-PS(2010)001.
[2] Court's document: Interlaken Follow-up: Simplified Procedure for Amending the Convention (Idea of a Court Statute).

broader interpretation of the terms of reference given to the CDDH by the Committee of Ministers;

- regulation of interim measures (Rule 39 of the Rules of Court) should not be done through a possible Statute as this could give rise to the risk, in concrete cases, of incompatibility with requirements of Article 34 of the Convention; a possible regulation could be done through introducing a provision of the Convention as such;
- codification of the pilot judgment procedure was premature at this stage; this issue was under consideration in the Court now, which included consultation process with the member States; it would therefore be advisable to wait for the outcome;
- from the Court's point of view, its power to adopt the Rules of Court does not contain an element of instability, as it has been suggested by some.

6. Mr Fribergh also suggested that administrative autonomy of the Court which had been mentioned in the Interlaken Declaration and which was under discussion between the Court and the Council of Europe could be included in a possible Statute of the Court in the future.

Item 3: The scope of provisions which should be subject to a new amendment procedure

7. The Committee considered that the first issue to be discussed and specified was the scope of provisions that should be subject to a simplified amendment procedure. For the sake of clarity of discussion and efficient working methods, it decided to postpone to a later meeting consideration of the question of whether there was a need to modify any of the provisions identified.

8. The Committee then examined each of the provisions of Section II of the Convention in turn. The outcome of these discussions is reflected in a table which appears at Appendix III. Part I of the table specifies provisions on which there is a provisional consensus that they should be subject to amendment by a simplified procedure, Part II contains provisions on which there was no consensus on whether they should be subject to amendment by a simplified procedure and Part III contains those provisions on which there was a provisional consensus that they should not be subject to amendment by a simplified procedure. The table, which sets out important provisos concerning its content and purpose, will form the basis of further discussions at a future meeting, when the Committee will seek to determine exhaustively which provisions should be subject to a simplified amendment procedure and which should not.

9. The Committee observed that making certain provisions or other matters not found in the Convention subject to a new amendment procedure would not represent simplification of the amendment procedure for these elements and thus would not correspond to the first priority of its work. In accordance with its secondary objective, therefore, it turned its consideration to the question of whether certain provisions or other matters not found in the Convention should have their status "upgraded" in order to clarify the legal basis of the Court's competence to act in the relevant areas. In doing so, it could also assess whether such elements should be made subject to the new amendment procedure. As well as the question of whether or not there was a

need also to modify these provisions, the Committee postponed the question of specifying the text into which they should be upgraded, i.e. whether to a possible Statute or to the Convention.

10. As regards provisions from the Rules of Court, the Committee decided to prefer the approach of assessing whether or not there was any need to "upgrade" specific provisions in order to clarify the legal basis of the Court's competence to act in the relevant areas, rather than an approach of presuming that all of the Rules of Court could be "upgraded" and then identifying which specific provisions strictly concerning the internal functioning of the Court should be excluded.

11. As regards "upgrading," the Committee's preliminary discussions came to the following provisional outcome:

- **Rule 39 of the Rules of Court concerning interim measures:**[3] the great majority of experts were in favour of "upgrading" Rule 39. Some considered that the Court's competence and the obligatory effect of Rule 39 indications were not expressly set out in the Convention and that upgrading would thus clarify legitimacy. Several of those who expressed an opinion did not consider that it should be subject to the new ("simplified") amendment procedure. One expert was opposed to "upgrading" Rule 39 on the basis that it was a procedural tool giving effect to Article 34 ECHR and so part of the right of individual petition, a keystone of the Convention system. Mr John DARCY of the Registry questioned whether there was anything in Rule 39 itself that could be "upgraded," noting that the obligation to comply with an indication of interim measures under Rule 39 was instead made explicit through the case-law of the Grand Chamber interpreting the applicant's assertable right under Article 34.

- **Unilateral declarations:** the Committee agreed that unilateral declarations would benefit in visibility and transparency by inclusion in a text explicitly endorsed by the States parties to the Convention, even if they were uncomplicated, widely used and perfectly well understood by the States parties; one expert felt that the matter could also be made subject to the new ("simplified") amendment procedure. Experts considered that most applicants and their representatives, however, were less familiar and comfortable with unilateral declarations and would thus benefit from the greater visibility and transparency resulting from "upgrading." Mr Darcy of the Registry noted that unilateral declarations were a relatively recent development and that it might be advisable to allow more time before codifying the practice, potentially by transfer to the Convention alongside friendly settlements. Others observed that "upgrading" did not exclude more elaborate provisions governing

[3] Rule 39 reads as follows:

1. The Chamber or, where appropriate, its President may, at the request of a party or of any other person concerned, or of its own motion, indicate to the parties any interim measure which it considers should be adopted in the interests of the parties or of the proper conduct of the proceedings before it.
2. Notice of these measures shall be given to the Committee of Ministers.
3. The Chamber may request information from the parties on any matter connected with the implementation of any interim measure it has indicated.

unilateral declarations appearing in the Rules of Court, perhaps at a later stage.

- **The pilot judgment procedure:** the Committee first recalled that the Court was itself already engaged in drafting a Rule governing the pilot judgment procedure, responding to the comments made in the Interlaken Declaration. This did not, however, exclude the possibility of enhancing the visibility and transparency of the "principle" of the pilot judgment procedure by "upgrading" it through reference in a text explicitly endorsed by the States parties. Mr Darcy of the Registry noted the difficulty of defining the "principle" of the pilot judgment procedure, although it was suggested that this may lie in the exceptional way in which it differed from the normal procedure for adjudicating on applications. The Committee decided to return to the issue in the light of the outcome of the Court's rule-drafting exercise.

- **Other provisions of the Rules of Court:** the Committee began considering proposals made by the Estonian expert for upgrading certain other provisions of the Rules of Court, in particular those concerning ad hoc judges.[4] It recalled its preferred approach to this part of its work, namely whether or not there was any need to "upgrade" certain matters in order to clarify the legal basis of the Court's competence to act in the relevant areas. Since these other provisions of the Rules of Court would not easily fit into the Convention itself and any need to "upgrade" was less pressing for them, the Committee decided to postpone its consideration of the Estonian expert's proposals until it had determined whether or not introduction of a simplified amendment procedure would best be achieved by way of a Statute. If so, the provisions covered by the Estonian expert's proposals could be considered for inclusion in such a Statute, depending on the form and scope it was felt appropriate to give to it. It also left entirely open the question of whether or not yet further provisions of the Rules of Court should be "upgraded" to a Statute.

Item 4: The modality for the introduction of a new amendment procedure

12. Taking into account the outcome of the discussion under item 3, the Committee held a first exchange of views on which modality for the introduction of a simplified amendment procedure should be preferred. The Committee recalled that its terms of reference envisaged the following options (rearranged in order of ease):

- (a) new provision(s) in the Convention allowing certain other provisions of the Convention to be amended by a simplified procedure, i.e. a provision similar to that found in Article 41(d) of the Statute of the Council of Europe;[5]

[4] See doc. DH-PS(2010)002, pp. 6-7.

[5] Article 41 reads as follows:

a. Proposals for the amendment of this Statute may be made in the Committee of Ministers or, in the conditions provided for in Article 23, in the Consultative Assembly.

b. The Committee shall recommend and cause to be embodied in a protocol those amendments which it considers to be desirable.

- inclusion of relevant issues in a Statute of the Court, with a new provision in the Convention establishing the Statute and its amendment procedure.

13. Most participants supported creation of a three-tier system comprising the Convention, a Statute (whose content remained to be defined) and the Rules of Court (whose content may be subject to revision). Some considered that this would strike a better balance between the Court and the member States, who should remain "the masters of the Convention." Others felt that such a system would introduce greater legitimacy and rationalisation.

14. A few participants considered that given the available time and the main purpose of the exercise, i.e. simplification of the amendment procedure for certain Convention provisions with the aim of achieving more flexibility, it was preferable to introduce a new provision into the Convention similar to that found in Article 41(d) of the Statute of the Council of Europe.

15. It was also observed that the two modalities above were not the only options; for example, the first option mentioned in paragraph 12 above could be combined with a requirement that changes to the Rules of Court be approved by the member States, as was the case for the Court of Justice of the European Union.[6]

16. The great majority of preliminary views held a Statute of the Court to be the preferred modality. Not all provisions included in such a Statute, however, need necessarily be subject to a simplified amendment procedure. With this in mind, the Committee preliminarily felt that some or all of the following elements, in various combinations, could be considered for inclusion:

- certain provisions of Section II of the Convention, all of which would be subject to a simplified amendment procedure;
- the remaining provisions of Section II of the Convention, these not being subject to a simplified amendment procedure;[7]
- Rule 39 of the Rules of Court;
- unilateral declarations and/ or the pilot judgment procedure;
- some other provisions of the Rules of Court whose legal status needs to be enhanced;

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c. An amending protocol shall come into force when it has been signed and ratified on behalf of two-thirds of the members.
d. Notwithstanding the provisions of the preceding paragraphs of this article, amendments to Articles 23 to 35, 38 and 39 which have been approved by the Committee and by the Assembly shall come into force on the date of the certificate of the Secretary General, transmitted to the governments of members, certifying that they have been so approved. This paragraph shall not operate until the conclusion of the second ordinary session of the Assembly."

[6] The CJEU and its jurisdiction are established by the treaties, which also establish its Statute (contained in Protocol (No 3) annexed to the Treaty on the Functioning of the EU) and, under art.253 of the Treaty on the functioning of the EU, the requirement for Council approval of the Rules of Procedure.

[7] These first two elements combined would correspond to the structure proposed by the Group of Wise Persons.

- certain other provisions of the Rules of Court which do not directly regulate the internal functioning of the Court;
- the Practice Directions issued by the Court's President;
- relevant provisions found in other treaties, e.g. the General Agreement on Privileges and Immunities of the Council of Europe and its Protocols and the European Agreement relating to Persons participating in proceedings of the European Court of Human Rights.

17. In this respect, the Committee noted that it had not yet completed its work on identifying which provisions of Section II of the Convention should be subject to a simplified amendment procedure (or more specifically in the present context, included in a possible Statute). The outcome of this work would be relevant to final determination of what should be the respective content of the different texts and therefore of the most appropriate model for a possible Statute. Consideration of the simplified procedure for amendment of a possible Statute would also depend on conclusive determination of its content.

Item 5: Organisation of future work and calendar of meetings

18. The Committee agreed to address the following matters at its next meeting:

(i) the exhaustive determination of which provisions of Section II of the Convention should be subject to a simplified amendment procedure and which should not;

(ii) in the light of this, further consideration of the preferable modality for introduction of a simplified amendment procedure;

(iii) should the preferred modality be a Statute, which elements (see paragraph 16 above) it should include;

(iv) depending on how different matters might provisionally be distributed between the various texts, begin its consideration of the simplified amendment procedure itself, including which bodies should be involved.

19. It also noted that consideration will need to be given to the question of the legal status of a possible future Statute. In response to a detailed question to be sent by the Secretariat, experts are asked to obtain information for the next meeting on whether their domestic law, notably constitutional provisions, would allow a Statute with the status of international treaty to be amended by a simplified procedure, in particular one not involving ratification by national parliaments. Such information should be sent to the Secretariat (petr.hnatik@coe.int) by 28 February 2011 for inclusion in a compilation.

20. Finally, it took note of the fact that Committee was intended to meet three more times before its terms of reference would expire in April 2012, with the next meeting currently scheduled for 14-16 March 2011. It also recalled that the CDDH's ad hoc terms of reference to consider the relevant parts of the Interlaken Declaration require it to present an interim activity report on specific proposals requiring amendment of the Convention, including proposals for a simplified amendment procedure, by 15 April 2011.

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Appendix I

List of participants / liste de participants

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Appendix II

Agenda (as adopted)

Item 1: Opening of the meeting, adoption of the agenda and order of business

Background documents

- Draft Annotated Agenda of the 1st meeting of the DH-PS (6-8 October 2010) DH-PS(2010)OJ001
- Report of the 70th meeting of the CDDH (15-18 June 2010) CDDH(2010)010

Item 2: Terms of reference

Background document

- Initial ad hoc terms of reference for the CDDH to consider the relevant parts of the Interlaken Declaration CM/Del/Dec(2010)1079/1.6/appendix2E
- Terms of reference for the DH-PS CM/Del/Dec(2010)1090/1.10/appendix8E
- Synopsis of the GT-SUIVI.Interlaken meeting of 29 June 2010 GT-SUIVI.Interlaken(2010)CB5E / 05 July 2010

Item 3: The scope of provisions which should be subject to a new amendment procedure

Background documents

- Compilation of documents relevant to the discussion of a simplified procedure for amendment of certain provisions of the Convention (Document prepared by the Secretariat) DH-PS(2010)001
- Court's document: Interlaken Follow-up: Simplified Procedure for Amending the Convention (Idea of a Court Statute)
- Compilation of participants' written contributions to discussions at the first meeting (Document prepared by the Secretariat) DH-PS(2010)002

Item 4: The modality for the introduction of a new amendment procedure

Item 5: Organisation of future work and calendar of meetings

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Appendix III

The scope of provisions that could be subject to a simplified amendment procedure – outcome of the Committee's discussions

Introduction

The following tables reflect the Committee's preliminary discussions of the scope of provisions that should be subject to a simplified amendment procedure. They merely reflect views expressed at the first meeting, which did not seek to reach any final conclusions.

The tables should be read and understood subject to the following provisos:

- They are intended as (i) a schematic presentation of preliminary points made at the first meeting and (ii) an aide memoire for reference at future meetings;
- They do not seek to express arguments for or against or other comments in full but instead only to record their essence;
- They do not record who made each argument/ comment;
- They do not seek to indicate the balance of arguments within the Committee on the various provisions on which there is as yet no consensus.

PART I

Provisions on which there is provisional consensus that they <u>should</u> be subject to amendment by a simplified procedure

Provision	Content	Position of the Group of Wise Persons [8]	Preliminary arguments in favour	Preliminary arguments against	Other comments
<u>Article 24(2)</u> – Registry and rapporteurs	2. When sitting in a single-judge formation, the Court shall be assisted by rapporteurs who shall function under the authority of the President of the Court. They shall form part of the Court's Registry.	Subject to a SAP [9]	This provision is not fundamental to the institution of the Court.		It could also be transferred to the Rules of Court.
<u>Article 25 (a)-(c) & (e)-(f)</u> – Plenary Court	The plenary Court shall (a) elect its President and one or two Vice-Presidents for a period of three years; they may be re-elected; (b) set up Chambers, constituted for a fixed period of time; (c) elect the Presidents of the Chambers of the Court; they may be re-elected; […] (e) elect the Registrar and one or more Deputy Registrars; (f) make any request under Article 26 § 2.	Subject to a SAP	These provisions are too self-evident to require inclusion in the Convention.		The provisions of Article 25 could be revised but should remain in the Convention.

[8] The criterion governing the Group of Wise Persons' approach was "the removal from the "simplified" amendment procedure of provisions defining key institutional, structural and organisational elements of the judicial system of the Convention, namely the establishment of the Court, its jurisdiction and the status of its judges" (see doc. CM(2006)203, "Report of the Group of Wise Persons to the Committee of Ministers," 15 November 2006).

[9] "SAP" = <u>s</u>implified <u>a</u>mendment <u>p</u>rocedure.

Article 26(2) & (5) – Single-judge formation, Committees, Chambers and Grand Chamber	2. At the request of the plenary Court, the Committee of Ministers may, by a unanimous decision and for a fixed period, reduce to five the number of judges of the Chambers. […] 5. The Grand Chamber shall also include the President of the Court, the Vice-Presidents, the Presidents of the Chambers and other judges chosen in accordance with the rules of the Court. When a case is referred to the Grand Chamber under Article 43, no judge from the Chamber which rendered the judgment shall sit in the Grand Chamber, with the exception of the President of the Chamber and the judge who sat in respect of the High Contracting Party concerned.	Subject to a SAP	Paragraph (2) already reflects a SAP. Paragraph (5) is not fundamental to the institution of the Court		
Article 27 – Competence of single judges	1. A single judge may declare inadmissible or strike out of the Court's list of cases an application submitted under Article 34, where such a decision can be taken without further examination. 2. The decision shall be final. 3. If the single judge does not declare an application inadmissible or strike it out, that judge shall forward it to a Committee or to a Chamber for further examination.	Subject to a SAP	This article contains essentially organisational/ procedural matters.	Application of the principle of judicial decision-making should not be subject to a SAP.	The principle of judicial decision-making could be not subject to a SAP; other elements of Article 27 could be subject to it. The DH-GDR is discussing the possibility of giving non-judicial officials (e.g. senior

					registry staff) the authority to exercise powers currently exercised by single judges
Article 28 – Competence of Committees	1. In respect of an application submitted under Article 34, a Committee may, by a unanimous vote, (a) declare it inadmissible or strike it out of its list of cases, where such decision can be taken without further examination; or (b) declare it admissible and render at the same time a judgment on the merits, if the underlying question in the case, concerning the interpretation or the application of the Convention or the Protocols thereto, is already the subject of well-established case-law of the Court. 2. Decisions and judgments under paragraph 1 shall be final. 3. If the judge elected in respect of the High Contracting Party concerned is not a member of the Committee, the Committee may at any stage of the proceedings invite that judge to take the place of one of the members of the Committee, having regard to all relevant factors, including whether that Party has contested the application of the procedure under paragraph 1 (b).	Subject to a SAP	This article contains essentially organisational/ procedural matters.	Application of the principle of judicial decision-making should not be subject to a SAP.	The principle of judicial decision-making could be not subject to a SAP; other elements of Article 28 could be subject to it.

Article 29 – Decisions by Chambers on admissibility and merits	1. If no decision is taken under Article 27 or 28, or no judgment rendered under Article 28, a Chamber shall decide on the admissibility and merits of individual applications submitted under Article 34. The decision on admissibility may be taken separately. 2. A Chamber shall decide on the admissibility and merits of inter-State applications submitted under Article 33. The decision on admissibility shall be taken separately unless the Court, in exceptional cases, decides otherwise.	Subject to a SAP	This article is essentially procedural.	The principle of judicial decision-making should not be subject to a SAP; it should be contained in a treaty.	The principle of judicial decision-making could be not subject to a SAP; other elements of Article 28 could be subject to it. A Statute could provide a treaty basis for the principle.
Article 30 – Relinquishment of jurisdiction to the Grand Chamber	Where a case pending before a Chamber raises a serious question affecting the interpretation of the Convention or the Protocols thereto, or where the resolution of a question before the Chamber might have a result inconsistent with a judgment previously delivered by the Court, the Chamber may, at any time before it has rendered its judgment, relinquish jurisdiction in favour of the Grand Chamber, unless one of the parties to the case objects.	Subject to a SAP	This article is essentially procedural.		
Article 31 – Powers of the Grand Chamber	The Grand Chamber shall (a) determine applications submitted either under Article 33 or Article 34 when a Chamber has relinquished jurisdiction under Article 30 or when the case has been referred to it under Article 43;	Subject to a SAP	Article 31 relates to Article 30.		

	(b) decide on issues referred to the Court by the Committee of Ministers in accordance with Article 46 § 4; and (c) consider requests for advisory opinions submitted under Article 47.				
Article 39 – Friendly settlements	1. At any stage of the proceedings, the Court may place itself at the disposal of the parties concerned with a view to securing a friendly settlement of the matter on the basis of respect for human rights as defined in the Convention and the Protocols thereto. 2. Proceedings conducted under para-graph 1 shall be confidential. 3. If a friendly settlement is effected, the Court shall strike the case out of its list by means of a decision which shall be confined to a brief statement of the facts and of the solution reached. 4. This decision shall be transmitted to the Committee of Ministers, which shall supervise the execution of the terms of the friendly settlement as set out in the decision.	Subject to a SAP	Article 39 is a non-fundamental procedural/ organisational provision. Friendly settlements are an important tool but could be developed and more widely used.		
Article 42 – Judgments of Chambers	Judgments of Chambers shall become final in accordance with the provisions of Article 44 § 2.	Subject to a SAP			Article 42 serves no apparent purpose in the light of Article 44(2).
Article 43(2) & (3) – Referral to the Grand Chamber	2. A panel of five judges of the Grand Chamber shall accept the request if the case raises a serious question affecting the interpretation	Subject to a SAP	Paragraphs (2) and (3) are organisational/ procedural.		

	or application of the Convention or the Protocols thereto, or a serious issue of general importance. 3. If the panel accepts the request, the Grand Chamber shall decide the case by means of a judgment.		A SAP would be useful were it considered desirable to change the Grand Chamber's jurisdiction or its relations with the Chambers.		
Article 44(2) – Final judgments	2. The judgment of a Chamber shall become final (a) when the parties declare that they will not request that the case be referred to the Grand Chamber; or (b) three months after the date of the judgment, if reference of the case to the Grand Chamber has not been requested; or (c) when the panel of the Grand Chamber rejects the request to refer under Article 43.	Subject to a SAP	The role of the Grand Chamber could in future be changed by a SAP (see under Article 43 above). Article 44(2) contains procedural provisions.		
Article 46(3), (4) & (5) – Binding force and execution of judgments	3. If the Committee of Ministers considers that the supervision of the execution of a final judgment is hindered by a problem of interpretation of the judgment, it may refer the matter to the Court for a ruling on the question of interpretation. A referral decision shall require a majority vote of two thirds of the representatives entitled to sit on the Committee. 4. If the Committee of Ministers considers that a High Contracting Party refuses to abide by a final judgment in a case to which it is a party, it may, after serving formal notice on that Party and by decision adopted by a majority vote of two-	Not subject to a SAP	Paragraphs (3)-(5) are essentially procedural, creating *lex specialis* for paragraphs (1)-(2). They were added relatively recently by Protocol No. 14 and there is little if any experience of their operation in practice; they may need to be adapted in future in the light of experience.	Paragraphs (3) and (4) were added recently in order to create flexibility in ascertaining the correct interpretation of judgments and responding to refusal to abide by a final judgment respectively. Discussions on paragraphs (3)-(5) were a very difficult part of the negotiation of Protocol No. 14.	If transferred to a Statute, paragraphs (3)-(5) could be accompanied by relevant Committee of Ministers' rules of procedure for the supervision of the execution of judgments, since both the Committee if Ministers and the Court now play certain roles with

	thirds of the representatives entitled to sit on the Committee, refer to the Court the question whether that Party has failed to fulfil its obligation under paragraph 1. 5. If the Court finds a violation of paragraph 1, it shall refer the case to the Committee of Ministers for consideration of the measures to be taken. If the Court finds no violation of paragraph 1, it shall refer the case to the Committee of Ministers, which shall close its examination of the case.				respect to execution and its supervision.
Article 47(3) – Advisory opinions	3. Decisions of the Committee of Ministers to request an advisory opinion of the Court shall require a majority vote of the representatives entitled to sit on the Committee.	Not subject to a SAP	Paragraph (3) is essential procedural.		
Article 48 – Advisory jurisdiction of the Court	The Court shall decide whether a request for an advisory opinion submitted by the Committee of Ministers is within its competence as defined in Article 47.	Subject to a SAP	This article contains procedural elaboration of Article 47.		
Article 49 – Reasons for advisory opinions	1. Reasons shall be given for advisory opinions of the Court. 2. If the advisory opinion does not represent, in whole or in part, the unanimous opinion of the judges, any judge shall be entitled to deliver a separate opinion. 3. Advisory opinions of the Court shall be communicated to the Committee of Ministers.	Subject to a SAP	This article contains procedural elaboration of Article 47.	Article 49 is the equivalent for advisory opinions of Article 45 for judgments and decisions (see under Part II below).	

PART II

Provisions on which there is no consensus on whether they should be subject to amendment by a simplified procedure

Provision	Content	Position of the Group of Wise Persons	Preliminary arguments in favour	Preliminary arguments against	Other comments
Article 26(1) – Single-judge formation, Committees, Chambers and Grand Chamber	1. To consider cases brought before it, the Court shall sit in a single-judge formation, in Committees of three judges, in Chambers of seven judges and in a Grand Chamber of seventeen judges. The Court's Chambers shall set up Committees for a fixed period of time.	Subject to a SAP	Flexible reform of the judicial formations would facilitate future enhancement of the Court's productivity. The size of certain judicial formations should be subject to a SAP.	The various judicial formations define the Court's functioning.	Article 26(1) could be divided into parts, some subject to a SAP, others not.
Article 26(3) – Single-judge formation, Committees, Chambers and Grand Chamber	When sitting as a single judge, a judge shall not examine any application against the High Contracting Party in respect of which that judge has been elected.	Subject to a SAP	There is a need for flexible amendment should in the future the single-judge formation be considered no longer necessary.	This reflects the important consideration of actual and apparent impartiality underlying the introduction of the single-judge procedure.	
Article 36 – Third party intervention	1. In all cases before a Chamber or the Grand Chamber, a High Contracting Party one of whose nationals is an applicant shall have the right to submit written comments and to take part in hearings. 2. The President of the Court may, in the interest of the proper	Subject to a SAP	Third party interventions are not fundamental to the Court as an institution. Any possible amendment would not be so radical as to exclude a SAP.	This is not a provision concerning organisation and is not a purely procedural provision. Paragraph (1) contains a right; paragraph (2)	Some situations are not adequately covered by existing provisions, e.g. third party interventions by

	administration of justice, invite any High Contracting Party which is not a party to the proceedings or any person concerned who is not the applicant to submit written comments or take part in hearings. 3. In all cases before a Chamber or the Grand Chamber, the Council of Europe Commissioner for Human Rights may submit written comments and take part in hearings.			contains a prerogative. Third party interventions play an important role in the Court's proceedings. Certain conceivable amendments could have significant effects. There is no obvious need to increase the flexibility of the current provision; the Rules of Court and the Court's practice allow for all reasonable requirements.	non-States parties.
Article 38 – Examination of the case	The Court shall examine the case together with the representatives of the parties and, if need be, undertake an investigation, for the effective conduct of which the High Contracting Parties concerned shall furnish all necessary facilities.	Subject to a SAP	Article 38 is not fundamental to the Court as an institution.	This is a fundamental provision for the Court's functioning. Its second part is neither organisational nor procedural. The Court has referred to States' non-compliance with Article 38 in its judgments; amendment by ratified protocol would therefore be preferable to that by the Committee of Ministers.	

				It already allows for all necessary flexibility.	
Article 45 – Reasons for judgments and decisions	1. Reasons shall be given for judgments as well as for decisions declaring applications admissible or inadmissible. 2. If a judgment does not represent, in whole or in part, the unanimous opinion of the judges, any judge shall be entitled to deliver a separate opinion.	Subject to a SAP	The Court does not in practice give reasons for decisions that are accessible to applicants, paragraph (1) should therefore be clarified.	Paragraph (1) is fundamental to open justice. Paragraph (2) contributes to the development of the case-law and understanding of the Convention and is very highly valued by the Court as providing for judicial freedom of expression.	
Article 47(2) – Advisory opinions	2. Such opinions [on legal questions concerning the interpretation of the Convention and the Protocols thereto – para. (1)] shall not deal with any question relating to the content or scope of the rights or freedoms defined in Section I of the Convention and the Protocols thereto, or with any other question which the Court or the Committee of Ministers might have to consider in consequence of any such proceedings as could be instituted in accordance with the Convention.	Not subject to a SAP	Paragraph (2) may need to be amended in response to developments concerning advisory opinions, e.g. allowing superior national courts to request them.	Paragraph (2) is closely related to paragraph (1) (see under Part III below) and contributes to defining the Court's jurisdiction.	

PART III

Provisions on which there is provisional consensus that they should not be subject to amendment by a simplified procedure

Provision	Content	Position of the Group of Wise Persons	Preliminary arguments in favour	Preliminary arguments against	Other comments
Article 19 – Establishment of the Court	To ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols thereto, there shall be set up a European Court of Human Rights, hereinafter referred to as "the Court". It shall function on a permanent basis.	Not subject to a SAP	This is a fundamental provision which establishes the very existence of the Court.	The Court's essential role should be clarified.	
Article 20 – Number of judges	The Court shall consist of a number of judges equal to that of the High Contracting Parties.	Not subject to a SAP	This contains the fundamental principle that a judge is elected in respect of each High Contracting Party (see also Article 22).		This provision may be reconsidered depending on the outcome of DH-GDR consideration of the suggestion that a new filtering mechanism be composed of ad hoc judges.
Article 21 – Criteria for office	1. The judges shall be of high moral character and must either possess the qualifications required for	Not subject to a SAP	This contains a fundamental principle ensuring the quality of		There may in future be a need to add to the criteria

	appointment to high judicial office or be jurisconsults of recognised competence. 2. The judges shall sit on the Court in their individual capacity. 3. During their term of office the judges shall not engage in any activity which is incompatible with their independence, impartiality or with the demands of a full-time office; all questions arising from the application of this paragraph shall be decided by the Court.		judges and the standing of the Court.		for office to include e.g. gender balance and linguistic competence.
Article 22 – Election of judges	The judges shall be elected by the Parliamentary Assembly with respect to each High Contracting Party by a majority of votes cast from a list of three candidates nominated by the High Contracting Party.	Not subject to a SAP	This is a fundamental provision contributing to judicial independence.		
Article 23 – Terms of office and dismissal	1. The judges shall be elected for a period of nine years. They may not be re-elected. 2. The terms of office of judges shall expire when they reach the age of 70. 3. The judges shall hold office until replaced. They shall, however, continue to deal with such cases as they already have under consideration. 4. No judge may be dismissed from office unless the other judges decide by a majority of two-thirds that that judge has ceased to fulfil the required conditions.	Not subject to a SAP	This is a fundamental principle contributing to judicial independence.		
Article 24(1) –	1. The Court shall have a Registry,	Not subject			

Registry and rapporteurs	the functions and organisation of which shall be laid down in the rules of the Court.	to a SAP			
Article 25(d) – Plenary Court	The plenary Court shall […] (d) adopt the rules of the Court;	Subject to a SAP		The Court's power to adopt its own Rule of Court is fundamental to its operational independence.	
Article 26(4) – Single-judge formation, Committees, Chambers and Grand Chamber	4. There shall sit as an *ex officio* member of the Chamber and the Grand Chamber the judge elected in respect of the High Contracting Party concerned. If there is none or if that judge is unable to sit, a person chosen by the President of the Court from a list submitted in advance by that Party shall sit in the capacity of judge.	Subject to a SAP	The presence of the "national judge" is important to the judicial functioning of the Court.	Underlying related provisions may be subject to a SAP.	
Article 32 – Jurisdiction of the Court	1. The jurisdiction of the Court shall extend to all matters concerning the interpretation and application of the Convention and the Protocols thereto which are referred to it as provided in Articles 33, 34, 46 and 47. 2. In the event of dispute as to whether the Court has jurisdiction, the Court shall decide.	Not subject to a SAP			
Article 33 – Inter-State cases	Any High Contracting Party may refer to the Court any alleged breach of the provisions of the Convention and the Protocols thereto by another High Contracting Party.	Not subject to a SAP			
Article 34 – Individual applications	The Court may receive applications from any person, non-governmental organisation or group of individuals	Not subject to a SAP			

	claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right.				
Article 35 – Admissibility criteria	1. The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of inter-national law, and within a period of six months from the date on which the final decision was taken. 2. The Court shall not deal with any application submitted under Article 34 that (a) is anonymous; or (b) is substantially the same as a matter that has already been examined by the Court or has already been submitted to another procedure of international investigation or settlement and contains no relevant new information. 3. The Court shall declare inadmissible any individual application submitted under Article 34 if it considers that: (a) the application is incompatible with the provisions of the Convention or the Protocols thereto, manifestly ill-founded, or an abuse of the right of individual	Not subject to a SAP	The Court does not apply any hierarchy to the admissibility criteria, all are fundamental to the right of individual petition. The admissibility criteria are very sensitive issues; to make them subject to a SAP would greatly complicate later discussions on modalities of adoption and the simplified procedure itself.	Paragraphs (2) & (3) are less fundamental than (1) and could be subject to a SAP, allowing greater flexibility in future.	

	application; or (b) the applicant has not suffered a significant disadvantage, unless respect for human rights as defined in the Convention and the Protocols thereto requires an examination of the application on the merits and provided that no case may be rejected on this ground which has not been duly considered by a domestic tribunal. 4. The Court shall reject any application which it considers inadmissible under this Article. It may do so at any stage of the proceedings.				
Article 37 – Striking out applications	1. The Court may at any stage of the proceedings decide to strike an application out of its list of cases where the circumstances lead to the conclusion that (a) the applicant does not intend to pursue his application; or (b) the matter has been resolved; or (c) for any other reason established by the Court, it is no longer justified to continue the examination of the application. However, the Court shall continue the examination of the application if respect for human rights as defined in the Convention and the Protocols thereto so requires. 2. The Court may decide to restore an application to its list of cases if it considers that the circumstances justify such a course.	Subject to a SAP	Striking out is an important part of the Court's exercise of judicial authority; it is linked to Article 19. Power to strike out is of crucial significance to the right of individual petition, it is linked to Articles 34 & 35. The "respect for human rights" and restoration clauses are necessary to preserving the Court's essential role and protecting the situation of applicants.		Article 37 is not clear, e.g. the term "for any other reason" gives the Court too much interpretative margin. The Court should give clearer reasons for strike-out decisions.

			Article 37 already allows the Court sufficient flexibility.		
Article 40 – Public hearings and access to documents	1. Hearings shall be in public unless the Court in exceptional circumstances decides otherwise. 2. Documents deposited with the Registrar shall be accessible to the public unless the President of the Court decides otherwise.	Subject to a SAP	Open justice is a fundamental principle. There is no conceivable need for change and no need for greater flexibility.		This is related to Article 45 (reasons for decisions and judgments). The Rules of Court do not fully reflect the principle of public access to documents.
Article 41 – Just satisfaction	If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.	Subject to a SAP	The Court's competence to award just satisfaction is fundamental to its essential role in protecting human rights. Article 41 is not an operational or procedural provision. Article 41 already allows the Court all necessary flexibility.		The Court's interpretation of Article 41, in particular the term "if necessary," is too wide. The Court's practice of awarding just satisfaction lacks transparency and contributes to unrealistic expectations on the part of applicants.
Article 43(1) –	1. Within a period of three months from the date of the judgment of the	Subject to a	The existence of the	Article 43(1) has	

Referral to the Grand Chamber	Chamber, any party to the case may, in exceptional cases, request that the case be referred to the Grand Chamber.	SAP	Grand Chamber is a vestige of the pre-Protocol No. 11 system and is not fundamental to the Court's functioning.	connections to the right of individual petition.	
Article 44(1) & (3) – Final judgments	1. The judgment of the Grand Chamber shall be final. […] 3. The final judgment shall be published.	Subject to a SAP	Paragraph (1) reflects the principle of legal certainty (finality of judgments). Paragraph (3) is fundamental to the principle of open justice.		
Article 46(1) & (2) – Binding force and execution of judgments	1. The High Contracting Parties under-take to abide by the final judgment of the Court in any case to which they are parties. 2. The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution.	Not subject to a SAP	Paragraphs (1) and (2) contain fundamental principles governing the status of the Court and the institutional role of the Committee of Ministers. They have existed since the inception of the Convention system and there has never been any need to increase their flexibility or otherwise amend them.		
Article 47(1) – Advisory opinions	1. The Court may, at the request of the Committee of Ministers, give advisory opinions on legal questions concerning the interpretation of the Convention and the Protocols thereto.	Not subject to a SAP	Paragraph (1) is an important part of the definition of the Court's jurisdiction.		
Article 50 – Expenditure on	The expenditure on the Court shall be borne by the Council of Europe.	Subject to a SAP	The Court's budget is a very important and	This is not a key, fundamental provision.	It should be recalled that the

the Court			politically sensitive matter.	It could be subject to a SAP involving unanimity on the part of the Committee of Ministers.	forthcoming accession of the EU (not a CE member State) to the ECHR and the possible introduction of fees for applicants may be relevant considerations in future.
Article 51 – Privileges and immunities of judges	The judges shall be entitled, during the exercise of their functions, to the privileges and immunities provided for in Article 40 of the Statute of the Council of Europe and in the agreements made thereunder.	Subject to a SAP	The privileges and immunities of international functionaries are a core principle of international law.		This provision could also be included in a possible Statute.