COUNCIL OF EUROPE CONSEIL DE L'EUROPE

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Addendum I

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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Draft elements for the CDDH Interim Activity Report

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2nd meeting
Strasbourg, 9-11 March 2011

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Draft elements for the CDDH Interim Activity Report

A. Introduction

The CDDH's ad hoc terms of reference require it to submit an interim activity report on specific proposals for measures requiring amendment of the Convention to the Committee of Ministers by 15 April 2011. These should include proposals, with different options, for a filtering mechanism within the European Court of Human Rights and proposals for making it possible to simplify amendment of the Convention's provisions on organisational issues.[1]

The present document contains some of the elements already adopted by the DH-GDR at its 6th meeting (9-11 March 2011) for transmission to the CDDH. These elements are included to provide context for the elements that refer specifically to the work of the DH-PS. The DH-PS adopted only elements relevant to its work, which have been highlighted for convenience.

[1] See doc. CDDH(2010)002, "Decisions of the Committee of Ministers on the action to be taken following the Interlaken Declaration and Terms of Reference of the CDDH and subordinate bodies involved in follow-up work to the Declaration."

B. Draft elements for the CDDH Interim Activity Report

"I. INTRODUCTION

1. The Committee of Ministers has asked the CDDH to submit to it by 15 April 2011 an interim activity report on specific proposals for measures requiring amendment of the Convention, including proposals, with different options, for a filtering mechanism within the European Court of Human Rights and proposals for making it possible to simplify amendment of the Convention's provisions on organisational issues.[2]

2. The CDDH has been working on reform of the Convention system since 1999, before the Rome Conference of 2000. This work can be divided into three phases: the first, from 2000-2004, culminated in the reform package that included Protocol No. 14; the second, from 2004-2009, involved review of implementation of the reform package Recommendations and follow-up to the Report of the Group of Wise Persons and culminated in the CDDH's Activity Report and its Opinion on the issues to be addressed at the Interlaken Conference; and the third, current phase concerns follow-up to and implementation of the Interlaken Declaration.

3. The Interlaken Conference and Declaration have had a significant, positive impact on the CDDH's work, which has also been facilitated by the entry into force of Protocol No. 14. Certain issues currently under examination had arisen in the past but for various reasons, including uncertainty as to timeliness and political will, were not examined in detail, with debate limited to preliminary statements of position.

4. Whilst the main issues on the CDDH's agenda remain often complex and sensitive, the new, post-Interlaken environment has allowed the CDDH to make progress. It is thus able, in the present report, to describe how its work has advanced since the Interlaken Conference, to present the broad outlines of the possible measures under examination and to describe how it intends to proceed to fulfilment of its terms of reference by presentation of a Final Report by 15 April 2012.

5. The present report is the third that the CDDH has presented since the Interlaken Conference of 18-19 February 2010, following its First Report (presented in June 2010) and Final Report (presented in November 2010) on proposals for measures that result from the Interlaken Conference and that do not require amendment of the Convention. As these two earlier reports made clear, the CDDH has, in accordance with its mandate, been examining since the outset proposals for measures requiring amendment of the Convention in parallel with those that do not.

6. Work has in the first place taken place in two subordinate committees of experts, the DH-PS (on a simplified procedure for amendment of certain provisions of the Convention) and the DH-GDR (on the reform of the Court, in practice dealing with all other relevant issues).[3] The CDDH has received extensive, detailed

[2] See doc. CDDH(2010)002, "Decisions of the Committee of Ministers on the action to be taken following the Interlaken Declaration and Terms of Reference of the CDDH and subordinate bodies involved in follow-up work to the Declaration." The CDDH's ad hoc terms of reference can be found at Appendix I.

[3] The meeting schedule can be found at Appendix II.

information from the Registry concerning, in particular, the Court's implementation of Protocol No. 14, notably the new single judge and three-judge committee procedures. Further to both the call made in the Interlaken Declaration and the CDDH's ad hoc terms of reference, the DH-GDR held a consultation with representatives of civil society and national human rights institutions in Strasbourg on 9 February 2011, at which the issues contained in the present report, amongst others, were discussed.[4]

7. The CDDH notes that this report will in practice be submitted shortly before the Interlaken Follow-up Conference being organised by the Turkish Chairmanship of the Committee of Ministers in Izmir, Turkey on 26-27 April 2011.

II. CONTEXT

8. Whilst it is hoped that the entry into force of Protocol No. 14 on 1 July 2010 will offer some respite, it remains the case that, on account of its caseload, the situation of the European Court of Human Rights has continued to deteriorate since the Interlaken Conference. As of 31 December 2010, a total of 139,650 applications were pending before a judicial formation, an increase of 17% over the course of the year. Despite constant resources, the Court had again increased its output of decisions and judgments, thereby resolving a total of 41,183 cases, 16% more than during the previous year. The growth in the number of applications pending thus once again outstripped that in the Court's output, in both number and rate. The ratio of inadmissibility decisions to judgments stood at almost 15:1, as against almost 14:1 in 2009. At current rates of output (and assuming, artificially, that no new applications were to arrive), it would take almost 20 years for the Court to dispose of all the applications currently pending before Chambers and Committees and just under two-and-a-half years for those before single judges, *ceteris paribus*.[5]

9. Recalling that the Court was established by the High Contracting Parties to ensure the observance of their engagements thereunder, the Convention system as currently established enshrines two fundamental principles to be respected in the search for solutions to the problem of the Court's case-load. The first is the right of individual petition, which is a unique characteristic of the Convention system as an international human rights protection mechanism and to which the States Parties reaffirmed their commitment in the Interlaken Declaration. The second is the judicialisation of the complaint resolution mechanism, as instituted by Protocol No. 11. Together, they give every individual who duly submits a complaint the right to determination of their case by an international judge.

[4] The programme and list of participants for this event can be found at Appendix III.

[5] This calculation is based on the Court's figures for 2010. At the end of this period, there were 51,250 cases pending before chambers and committees and 88,400 before single judges; during this period, 2,607 judgments and 38,576 decisions were delivered. Given that the – presumably more efficient – single judge system has been fully in force for only half of this period, one can presume that the output of inadmissibility decisions will to some extent increase yet further for the year 2011; and that as a result, the time needed to dispose of cases currently pending before single judges will decrease (again, artificially assuming that no new manifestly inadmissible applications arrive).

10. The CDDH is currently examining three main proposals, which can broadly be described as follows:

- a new filtering mechanism within the Court going beyond the existing single judge procedure;
- the introduction of a system of fees for applicants to the Court;
- the introduction of a simplified procedure for amendment of certain provisions of the Convention, one of the possible modalities for which could be a Statute for the Court.[6]

III. PROPOSALS

i. A new filtering mechanism within the Court[7]

[…]

ii. A simplified procedure for amendment of certain Convention provisions

a.[8] The Interlaken Declaration called upon the Committee of Ministers

> "to examine the possibility of introducing by means of an amending Protocol a simplified procedure for any future amendment of certain provisions of the Convention relating to organisational issues. This simplified procedure may be introduced through, for example,
>
> a. a Statute for the Court;
>
> b. a new provision in the Convention similar to that found in Article 41.d of the Statute of the Council of Europe."

b. This wording was closely reflected in the CDDH's initial ad hoc terms of reference (see Appendix I).

c. Upon subsequent request of the CDDH in its First Report, however, the GT-SUIVI.Interlaken clarified that the issue could be approached from a wider perspective. This is reflected in the terms of reference of the DH-PS, which instruct it to, *inter alia*:

> "i. examine in depth proposals for making it possible to simplify amendment of the Convention's provisions, with such a procedure to be introduced by means of an amending Protocol to the Convention;
>
> ii. consider in particular including the following elements within a possible Statute and/or new Convention provisions:

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[6] The exact scope of the CDDH's work on this issue is defined in the terms of reference of the DH-PS: see doc. CM/Del/Dec(2010)1090/1.10/appendix8.

[7] It should be noted that this section of the present report is based on the information available to the DH-GDR when it adopted a draft report on the issue at its 5th meeting (1-3 December 2010). This section of the present report is based on a summary of the earlier draft report, which can be found in full at Appendix IV.

[8] *Provisional paragraph numbering used for only the purposes of this provisional draft in order to allow ease of reference.]*

- certain provisions contained in Section II of the European Convention on Human Rights, with revision where necessary;
- certain provisions found in the Rules of the Court, with modification where necessary;
- other matters, including certain provisions found in other relevant treaties;"

d. On the basis of these terms of reference, the CDDH has identified the priorities in its work as being (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. It also considered that the substantive rights and freedoms contained in the Convention and its additional Protocols should not be addressed.

e. In pursuit of these objectives, the CDDH has provisionally identified provisions of Section II of the Convention that could be subject to a simplified amendment procedure. These are:

- art. 24(2), concerning [non-judicial] rapporteurs assisting single judges
- art 26(1), insofar as it concerns the size of non-singular judicial formations, but excluding their type
- art. 26(2), concerning reduction in the size of Chambers
- art. 26(5), concerning the composition of the Grand Chamber
- art. 27, insofar as it concerns the competence of single judges but excluding the principle of judicial decision-making
- art. 28, insofar as it concerns the competence of Committees but excluding the principle of judicial decision-making
- art. 29, insofar as it concerns decisions by Chambers on admissibility and merits but excluding the principle of judicial decision-making
- art. 30 concerning relinquishment of jurisdiction to the Grand Chamber
- art. 31 concerning powers of the Grand Chamber
- art. 39(2)-(4) concerning friendly settlements but excluding the essential principle
- art. 42 concerning finality of Chamber judgments
- art 43(2) & (3) concerning referral to the Grand Chamber but excluding the grounds on which the panel of five judges shall accept requests for referral
- art. 44(2) concerning finality of Chamber judgments
- art. 47(3) concerning Committee of Ministers' procedure for requesting advisory opinions
- art. 48 concerning the Court's advisory jurisdiction.

e.bis All other provisions of Section II were provisionally identified as not being suitable to a simplified amendment procedure.

f. The CDDH has also concluded that the following issues currently found outside the Convention (i.e. in the Rules of Court or the Court's case law) may be suitable for "upgrading": Rule 39 of the Rules of Court on interim measures; the pilot judgment procedure; and unilateral declarations. In each case, this could be done by inclusion of relevant text in the Convention itself, with more detailed, supplementary provisions appearing also in a Statute, should that be the preferred method of

introducing the new amendment procedure, or in the Rules of Court. The CDDH received specific proposals for inclusion of certain additional provisions of the Rules of Court in a Statute. Bearing in mind its prioritisation of objectives and the severe time constraints under which it was working, however, it concluded that further consideration of possible inclusion of additional provisions of the Rules of Court could not feasibly be undertaken at present.

g. The CDDH has also begun considering the various possible modalities for introducing a simplified amendment procedure, by examining illustrative models showing the following approaches: (i) a new provision in the Convention introducing a simplified procedure for amendment of Section II of the Convention, with the exception of certain specific provisions; (ii) the same approach, along with addition of new provisions into the Convention concerning other issues (namely interim measures, the pilot judgment procedure and unilateral declarations); (iii) a Statute, contained in a Protocol to the Convention, including certain provisions from Section II and possibly provisions relating to the aforementioned other issues, accompanied by new provisions in the Convention establishing the Statute and defining the procedure for its amendment; and (iv) a comprehensive approach with proposals for revising the Convention, establishing a Statute and revising the Rules of Court, as proposed by Professor Helen Keller et al. The possibility of a fifth model, similar to model (iii) but with the Statute contained in a resolution that the Committee of Ministers would be empowered by the Convention to adopt and amend by a simplified procedure, has also been suggested.

h. One question that must be resolved in the course of this work is whether or not national laws, in particular at constitutional level, might prohibit a State from ratifying a Protocol to the Convention that introduced a simplified amendment procedure, or from accepting proposed amendments without first submitting them to parliamentary approval. It is clear that the situation in this respect varies significantly from State to State. On the basis of preliminary information received from 26 member States, it appears that certain States could have constitutional difficulties with a simplified amendment procedure for provisions either of the Convention or of a Protocol containing a Statute. A procedure involving a period for objection between adoption of amendments by the Committee of Ministers and their entry into force might resolve these difficulties. Alternatively, the fifth model mentioned above might resolve them, although it may itself be problematic for some States.

h.bis. As to the procedure itself, which should be transparent, the CDDH has reached the following preliminary conclusions:

- amendments could be proposed by States Parties or the Court;
- the Committee of Ministers would decide on whether to act on such proposals;
- the plenary Court, for proposals by States Parties, and possibly also the Parliamentary Assembly should be consulted; the Commissioner for Human Rights and civil society were also suggested;
- the Committee of Ministers or possibly a Conference of the Parties to the Convention should adopt amendments;
- adoption by the Committee of Ministers should be by consensus (i.e. unanimity within the meaning of Article 20(a) of the Statute of the Council of Europe).

h.ter. The CDDH is aware that certain other issues being addressed primarily in the DH-GDR and CDDH-UE[9] may need to be taken into account in the work being led by the DH-PS.

iii. Introduction of a system of fees for applicants to the Court

[…]

iv. Other issues

i. *[To be completed by the CDDH, notably in relation to the question of advisory opinions.]*

III. CONCLUSIONS

j. The CDDH has made significant progress on several major issues since the Interlaken Conference. It anticipates that, once it has concluded its detailed technical examination of these issues and received expected further information from other sources, it will be able to arrive at consensus on proposals to be submitted to the Committee of Ministers in its Final Report by 15 April 2012.

k. As regards the issue of a new filtering mechanism, […]

l. Concerning the issue of introducing a system of fees for applicants, […]

m. As regards the issue of a simplified amendment procedure, the CDDH has provisionally identified provisions of Section II of the Convention that could be subject to a simplified amendment procedure and concluded that the following issues currently found outside the Convention may be suitable for "upgrading," namely Rule 39 of the Rules of Court on interim measures, the pilot judgment procedure and unilateral declarations. The main point yet to be resolved concerns the choice of modality for implementing a simplified amendment procedure. [Although the CDDH expects to be able to resolve this issue on technical grounds, a timely political decision could prove useful to future work.] The CDDH also notes that it has been unable to exploit its terms of reference to their full potential on account of the limited time available for its work and the time-consuming complexity of its primary task. It has therefore not examined in detail whether other provisions from the Rules of Court may be suitable for "upgrading." It notes the proposal that such examination could take place in future in a separate body with appropriate terms of reference.

n. The CDDH looks forward to the forthcoming Izmir Conference and the contribution that it will make to further progress in its work on implementation of the Interlaken Declaration, including any possible subsequent further modification of its terms of reference.

[9] I.e. the CDDH Informal Working Group on the accession of the European Union to the European Convention on Human Rights with the European Commission.