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STEERING COMMITTEE FOR HUMAN RIGHTS
(CDDH)

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CDDH Final Report on measures requiring amendment of the European Convention on Human Rights

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74th meeting
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CDDH FINAL REPORT ON MEASURES REQUIRING AMENDMENT OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS

A. INTRODUCTION

I. Interlaken and Izmir Conferences and the CDDH's terms of reference

1. The high-level Conference on the future of the European Court of Human Rights, held by the Swiss Chairmanship of the Committee of Ministers in Interlaken, Switzerland, on 18-19 February 2010, invited the Committee of Ministers to issue terms of reference with a view to preparing specific proposals for measures requiring amendment of the Convention. A second conference was organised by the Turkish Chairmanship in Izmir, Turkey, on 26-27 April 2011. The various decisions taken by the Ministers' Deputies on follow-up to these conferences have since been consolidated into the terms of reference for the CDDH and its subordinate bodies for the biennium 2012-2013.[1]

2. These terms of reference require the CDDH to prepare a report for the Committee of Ministers containing specific proposals, with different options, setting out in each case the main practical arguments for and against, on:

- a filtering mechanism within the European Court of Human Rights;
- a simplified amendment procedure for the Convention's provisions on organisational issues;
- the issue of fees for applicants to the European Court of Human Rights;
- any other possible new procedural rules or practices concerning access to the Court;
- a system allowing the highest national courts to request advisory opinions from the Court concerning the interpretation and application of the Convention.

3. The CDDH has adopted detailed reports covering all but the second of these issues,[2] which can be found in appendix to the present document. It also decided that the aim of the final report would not be to present the CDDH's unanimous conclusions but rather to attempt to sketch the outlines of an eventual package of reforms.

4. The present report was drawn up in time to be considered by the Ministerial Conference organised by the United Kingdom Chairmanship of the Committee of Ministers on 18-20 April 2012. For a comprehensive view of the CDDH's position on the reform of the Court and the Convention mechanism, the present document should

[1] See Appendix I for the CDDH's current terms of reference. It should be recalled that, further to the original decisions on follow-up to the Interlaken Conference, the CDDH submitted an Interim Activity Report on specific proposals for measures requiring amendment of the Convention in April 2011 (see doc. CDDH(2011)R72 Addendum I).

[2] The CDDH intends to present its final report on a simplified amendment procedure for the Convention's provisions on organisational issues following its meeting in June 2012. To this end, the Ministers' Deputies on 7 December 2011 extended the terms of reference of the Committee of Experts on a simplified procedure for amendment of certain provisions of the ECHR (DH-PS) until 31 May 2012.

be read alongside the CDDH's Contribution to this conference, along with its earlier Final Report on measures that result from the Interlaken Declaration that do not require amendment of the Convention.[3]

II. The purpose of the reform proposals

5. The reform proposals set out in the present report aim at ensuring the continuing effectiveness of the European Court of Human Rights. The current situation presents a number of challenges which call for rapid and decisive action in order to maintain the effectiveness of the Court and preserve its authority and credibility. Amongst the various challenges, the following are specifically addressed in the present report:

a. The very large number (64,500 in 2011) of applications made to the Court.

b. The very large, although recently diminished,[4] number (91,900, as of 31 January 2012) of applications pending before the Single Judge formation of the Court.

c. The very large number (60,300, as of 31 January 2012) of applications pending before Committees and Chambers of the Court.

d. Relations between the Court and national authorities, which are characterised by the principle of subsidiarity.

B. THE REFORM PROPOSALS

6. This section of the report presents the CDDH's approach to the various proposals in simplified, summary form. For full details, see the appended issue-specific reports.

I. Measures to regulate access to the Court

7. The following proposals would regulate access to the Court. They all share a principal aim of addressing the problem of the very large number of clearly inadmissible, and even futile or abusive applications.

Fees for applicants to the Court

8. In accordance with its terms of reference, the CDDH has not addressed the question of principle concerning whether or not introduction of a system of fees would represent an unacceptable limitation of the right of individual application. Instead, it has examined the practicality and utility of such a system.

9. Certain aspects of a possible system of fees may depend to some extent on the purpose or vision underlying its introduction. There are at least three possibilities here, which may overlap: a system intended as a deterrent to discourage clearly inadmissible applications; a system intended as a penalty for those introducing clearly

[3] See doc. CDDH(2012)R74 Addendum III and CDDH(2012)R74 Addendum II, respectively.
[4] For further details, see para. 34.

inadmissible applications; and a system intended to reflect the fact that many member States' highest courts themselves require applicants to pay a fee.[5]

10. Whatever the underlying purpose or vision, there is general concern, reflected also in the Izmir and, to similar effect, Interlaken Declarations, that measures taken to regulate access to the Court should not prevent well-founded applications from being examined by it. Certain aspects of a fee system are seen as particularly relevant to this, as explained in the appended report. A related issue is that of possible inequity or even discrimination between applicants; again, this issue is explored in detail in the appended report. In this context, it would be necessary also to consider at what moment payment of the fee should be required.

11. A further issue is how the fee could be paid. Several possibilities exist, including by bank transfer, internet, stamp or a combination of these.

12. The introduction of any system of fees involves reconciling tensions between competing interests.

a. First, between minimising administrative and budgetary consequences, on the one hand, and minimising possible discriminatory effects, on the other.

b. Second, between the competing interests of maximising deterrent effect against clearly inadmissible applications, on the one hand, and avoiding discriminatory deterrence of well-founded applications, on the other.

13. In order to illustrate these dilemmas, two possible models are presented, deliberately situated towards the extremes of a spectrum of possible models: a first, whose implementation would appear to have lesser administrative and budgetary consequences; and a second, more complex, but whose impact would appear to be less discriminatory. The CDDH has not been in a position to undertake a technical evaluation or cost-benefit analysis, which would be required if the proposal were to be implemented.

14. For further details of these models and of the CDDH's analysis of the overall issue, see Appendix III Section 1.

Compulsory legal representation

15. It has been suggested that making representation by a lawyer compulsory from the outset could be an effective and appropriate means of ensuring applicants receive proper legal advice before filing an application and would increase the quality of drafting of applications. It would be consistent with the principle of subsidiarity in so far as it links directly into the national legal system. The suggestion was made on condition that any introduction of compulsory representation should be subject to the setting-up of appropriate legal aid facilities for applicants at national level.

16. The CDDH considers that this proposal, by putting the applicant to a cost, could present disadvantages similar to those for introduction of a fee: without

[5] It has been suggested that a direct comparison between the situation of national courts and that of the Strasbourg Court may be inappropriate.

provision of legal aid for persons of insufficient means, it would impact the right of individual application. It was not certain that lawyers succeeded in dissuading clients from making clearly inadmissible applications, nor did the Court's statistics show that applications brought by legally represented persons were proportionally less likely to be clearly inadmissible than those brought by unrepresented persons. Requiring legal aid in simple cases would unnecessarily add to procedural costs.

17. As to the issue of legal aid, the CDDH notes the substantial budgetary implications for those member States that do not currently provide legal aid to applicants. It could not be granted without an assessment of the merits of the application; should legal aid then be refused, there would be a risk of that decision being challenged before the Court as a violation of Article 34 of the Convention. Should administration of legal aid instead be conferred on the Court, it would create a new burden, contrary to the intended objective.

18. For the above reasons, the CDDH concludes that this proposal would be problematic. For further details, see Appendix III Section 2.

A sanction in futile cases

19. The proposal would be to impose a pecuniary sanction in "futile" cases, where an applicant has repeatedly submitted applications that are clearly inadmissible and lacking in substance. Although the Court would be unable directly to enforce payment of the sanction, the applicant would be informed that no further applications would be processed until the sanction had been paid. There could be a derogation from this where the further application concerned "core rights" guaranteed by the Convention (e.g. Articles 2, 3 and 4). A sanction system would not be an alternative to a system of fees (see above).

20. It has been suggested that such a sanction would seek to reduce the burden of futile cases, which are manifestly not due for adjudication before an international court. It would have an educative effect on the applicant concerned and a disciplining influence on the behaviour of others. It would involve minimal additional administrative cost and would not deter well-founded applications.

21. The following arguments were raised against the proposal. A sanctions system would not be in conformity with the purpose, spirit and even the letter of the Convention. It was not established that many people engaged in abusive litigation before the Court. Those that did, did not necessarily only engage in such litigation. Such applications were in any case already dealt with simply and were not a major case-processing problem: there may be few opportunities when a judicial formation might impose a sanction, all the more given that the Court rarely uses its existing competence to find applications inadmissible for abuse of the right of individual application. There would inevitably be a cost in terms of financial and human resources, along with a heavy discretionary burden on the Court when deciding who or what case to sanction. The sanction would create inequality between applicants of different financial means.

22. It was also suggested that there should be a preliminary estimation of the number of such cases and the extent to which they over-load the role of the Court. Consideration should also be given to introduction of sanctions for legal

representatives who submit futile applications on behalf of their clients, and/ or for States that failed to execute judgments in repetitive cases.

23. For further details, see Appendix III Section 3.

Amendment of the "significant disadvantage" admissibility criterion

24. The proposal would be to amend the "significant disadvantage" admissibility criterion in Article 35(3)(b) of the Convention, by removing the safeguard requiring prior due consideration by a domestic tribunal.

25. In favour of the proposal, it has been argued that the safeguard is unnecessary in the light of Article 35(1), which requires exhaustion of (effective) domestic remedies. Indeed, the requirement for "due consideration" sets a higher standard for cases not involving significant disadvantage to the applicant than for those that do. There would still be a requirement of examination on the merits if respect for human rights so requires. The proposal would give greater effect to the maxim *de minimis no curat praetor*.[6] It would reinforce subsidiarity by further relieving the Court of the obligation to deal with cases in which international judicial adjudication is not warranted. The right of individual petition would remain intact.

26. Arguments against include that the proposal would probably have little effect, given how infrequently the Court has applied the criterion. The Court should be given more time to develop its interpretation of the current criterion, allowing its long-term effects to become clearer. The current text was a carefully drafted compromise. Removing the safeguard would lead to a decrease in judicial protection offered to applicants. The safeguard in fact underlines the importance of subsidiarity, since State Parties are required to provide domestic judicial protection.

27. For further details, see the report at Appendix III Section 4.

Introduction of a new admissibility criterion relating to cases properly considered by national courts

28. The proposal to introduce a new admissibility criterion relating to cases properly considered by national courts is intended to address not only the problem of the very large number of cases pending before Chambers, but also the issue of relations between the Court and national courts, which should respect the principle of subsidiarity. An application would be inadmissible if it were substantially the same as a matter that had already been examined by a domestic tribunal applying Convention rights, unless that tribunal had manifestly erred in its interpretation or application of the Convention rights or the application raised a serious question affecting interpretation or application of the Convention. The proposal could have special relevance with regard to Convention rights such as those contained in Articles 8 to 11.

29. It has been argued that the proposal emphasises the subsidiary nature of the judicial control conducted by the Court and the idea that the Court should not act as a fourth instance. The exceptions would still allow the Court to exercise its supervision. The proposal builds on principles already found in the Court's case-law. Such codification of the existing principle that the Court is not a "fourth instance" would

[6] "The Court does not concern itself with petty affairs."

allow clearer and more transparent guidelines for the Court in applying it. The new criterion could encourage national courts and tribunals further to apply explicitly the Convention and the Court's case-law.

30. Arguments against were that the proposal would place unacceptable restrictions on access to the Court and undermine the right of individual petition, without decreasing the Court's workload. It would limit the jurisdiction of the Court and its ability to address gaps in protection of Convention rights. The substantive application of the Convention by domestic courts is an issue which should be considered at the merits, rather than the admissibility stage. By limiting the scope of review to correction of manifest error, the criterion could jeopardise maintenance of uniform Convention interpretation. The notion of "manifest error" will be difficult to apply in practice. A finding of "manifest error" in a domestic court decision could undermine relations between the Court and the national judiciary concerned. There would be generalised focus on the overall quality of the domestic legal system, instead of on its treatment of the applicant's case.

31. It was also suggested that it might be worthwhile to explore additional ways of conveying the essence of the proposal, notably further elaboration of the doctrine of margin of appreciation.

32. For further details, see the report at Appendix III Section 5.

II. Measures to address the number of applications pending before the Court

33. The following measures would address in various ways the problems of the very large numbers of cases pending before both Single Judges, and Committees and Chambers of the Court.

A filtering mechanism within the European Court of Human Rights/ increasing the Court's capacity to process applications

34. At the 73rd CDDH meeting (6-9 December 2011), the Registry announced important new information concerning filtering. It recalled that on 31 August 2011, the number of cases pending at the Single-Judge level had reached a new high of 101,800. On that same date, the number of applications decided by Single Judges since the beginning of the year was 21,400. By 30 November, however, the number of Single-Judge decisions had reached almost 42,100 and the number of pending Single-Judge cases had, month-by-month, decreased to 94,000. (On 31 December 2011, these figures stood at 46,930 and 92,050, respectively.) The main reason was a great increase in the rate of decision-making, achieved thanks to restructuring of the Registry, reinforcement of the Registry by seconded national judges and continual simplification of procedure and working methods. The Court considers these results to be sustainable. Indeed, it has projected that it will be able not only soon to process all new clearly inadmissible applications within a short period of their arrival, but also, over the period 2012-2015 and, subject to (so far unspecified) reinforcement of the Registry's staff, progressively to resolve all applications currently pending before Single Judges.

35. Over the course of time, there has been growing concern in the CDDH over the Court's increasing backlog of Committee and Chamber cases. While clearly

inadmissible applications subject to filtering are the most numerous, but can be disposed of quickly, the heaviest part of the case-load consists of cases which cannot be declared inadmissible without further examination, require a more in-depth analysis and may lead to a finding of a violation of the Convention. A new filtering mechanism alone thus cannot free sufficient resources to tackle that part of the Court's case-load which is most important from the point of view of both respect for human rights and the time needed to process it. The CDDH's concern has been but heightened by the latest information from the Registry, according to which the time required for the treatment of Committee and Chamber cases had increased in 2011 compared to 2010.

36. The CDDH's analysis reflects these circumstances by shifting the emphasis of its report from possible measures to increase the Court's filtering capacity to possible measures to increase the Court's capacity to process applications generally. In accordance with its terms of reference, it nevertheless presents detailed analysis of and proposals for an alternative new filtering mechanism requiring amendment of the Convention, on the understanding that recent developments appear to many to suggest that such proposals may not need to be given immediate effect. In this connection, the CDDH notes that it is unlikely that any new filtering mechanism, given that its introduction would require entry into force of an amending protocol to the Convention, could come into effect or, at least, have yet had any great impact by the envisaged date of 2015 for resolution of the backlog.

37. The CDDH nevertheless considers that these proposals could be implemented as part of the current round of Court reform but on a contingency basis, in case it transpires that other approaches are required. In this respect, the CDDH foresees two situations in which it might be considered necessary to activate a new filtering mechanism. The first would be if the expected results are not achieved. The second would be if, regardless of the effects of the Single Judge system and associated internal Court reforms, the time taken by the Court to deal with other cases became too long. Some delegations consider that the second situation already prevails.

38. As regards increasing the Court's general case-processing capacity, in particular to address Committee and Chamber cases, two proposals have been made. The first would be to establish a pool of temporary judges, making it possible to reinforce the Court's general decision-making capacity – all the functions of regular judges, other than sitting on the Grand Chamber or Plenary Court – when necessary. The second would be a variant on the "new category of judge" proposal for a new filtering mechanism (see further below); instead of being devoted primarily to filtering and secondarily to work on repetitive cases, judges of the new category, who would be employed for a fixed period of time, would instead be allocated primarily to work on repetitive cases in Committees. In this respect, it was also mentioned that increasing the Court's general case-processing capacity may depend on an increase in the size of the Registry and the reinforcement of the Registry through secondments.

39. "Filtering" is the expression used to mean the process of issuing decisions on clearly inadmissible applications. Under Protocol No. 14, it is done by Single Judges, assisted by experienced members of the Registry known as Non-judicial Rapporteurs.[7]

[7] See Article 27 of the Convention.

Proposals aimed at enhancing filtering are intended to address the problem of the very large backlog of applications pending before Single Judges, and to allow the existing judges to devote all, or at least most of their working time to more important cases.

40. The CDDH proposes three options for a new filtering mechanism, all of which would require amendment of the Convention: (i) authorising experienced Registry lawyers to take final decisions on clearly inadmissible applications; (ii) entrusting filtering to a new category of judge; and (iii) a combined option, with specific members of the Registry given the competence to deal with applications that have been provisionally identified as clearly inadmissible for purely procedural reasons under Article 35(1) and (2) of the Convention and a new category of filtering judge created to deal with cases provisionally identified as inadmissible under Article 35(3).[8] In both options involving a new category of judge, the CDDH considered that such judges could also sit on three-judge Committees to deal with repetitive cases.[9] In this respect, the proposals could be seen as relevant to increasing the Court's general case-processing capacity.

41. Any measure to increase the Court's capacity, whether for filtering or general case-processing, that involves either additional Registry staff, additional judges or both will obviously have budgetary consequences.

42. For further details, see the report at Appendix IV Section 1.

The "sunset clause" for applications not addressed within a reasonable time

43. The proposal is based on the premise that it is not realistic to expect the Court, using current resources and working methods, to be able to give a prompt, reasoned judicial decision to every application. Under the proposal, an application could be automatically struck off the Court's list of cases a set period of time after it was first made, unless during that period the Court had notified the case to the Government and invited it to submit observations.

44. It has been argued that the proposal would work in harmony with the Court's prioritisation policy, which, with a large backlog of applications, would mean that large numbers of applications would remain pending before the Court with no realistic prospect of being resolved either within a reasonable time or at all. The proposal is intended to cover those cases that fall into the lowest priority categories, releasing the Court from having to issue individual decisions on each application and thereby freeing resources to deal with more serious complaints. Applicants would be informed of the outcome of their case more quickly than at present.

45. Arguments raised against the proposal are that an automatic strike-out of cases without any judicial examination would be incompatible with the idea of access to

[8] Article 35(1) of the Convention sets out the admissibility criteria on exhaustion of domestic remedies and the six-month rule; Article 35(2) of the Convention excludes applications that are anonymous, or that have already been examined by the Court or submitted to another international mechanism. Article 35(3) of the Convention excludes applications that are incompatible with the Convention, manifestly ill-founded or an abuse of the right of individual petition, or that do not involve significant disadvantage for the applicant.

[9] "Repetitive cases" in this sense refers to those that are dealt with by three-judge Committees in accordance with well-established case-law of the Court (see Article 28 of the Convention).

justice and the right of individual petition. There would be no guarantee that only lowest priority category cases would be affected; well-founded applications could also be affected. Decisions giving no reason for why an application is ill-founded would fail to deter future ill-founded applications. There would be no relief of the Registry since it would remain responsible for triage.[10] A sunset clause could harm the Court's authority. The proposal could have adverse effects, in that it could induce the Court to devote more of its capacity to adjudicating less important cases. The proposal also fails to take account of recent developments (see paragraph 34 above).

46. For further details, see Appendix IV Section 2.

Conferring on the Court a discretion to decide which cases to consider

47. Under this proposal, an application would not be considered unless the Court made a positive decision to deal with the case.

48. In its favour, it has been argued that it would make the Court's judicial task more manageable and allow all applications to be processed to a conclusion in a reasonable, foreseeable time. By allowing the Court to focus on highest priority cases, it would contribute to ensuring high-quality, consistent case-law. It would formalise the Court's existing prioritisation policy, without necessarily excluding the right of individual petition. It is uncertain that other proposals alone would suffice and unlikely that they would without additional resources.

49. Arguments expressed against include that it would radically change the Convention system and significantly restrict the right of individual application by removing the requirement that decisions be taken by a judge. It offers a solution with respect to new applications, when other solutions might suffice, but none for the existing backlog. It presupposes a high level of national implementation of the Convention that is not so far universally realised. It would not reduce the workload of the Registry, which would still have to analyse applications and provide information to the judges.

50. For further details, see Appendix IV Section 3.

III. Measures to enhance relations between the Court and national courts

Extending the Court's jurisdiction to give advisory opinions[11]

51. A proposal has been made to extend the Court's jurisdiction to give advisory opinions, which would aim at reducing the backlog of applications pending before Committees, enhancing relations between the Court and national courts and reinforcing subsidiarity. The proposal features the following characteristics:

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[10] "Triage" consists of an initial screening of applications and their provisional assignment to the different judicial formations. Under the Court's new working methods, it now also incorporates, wherever possible, the preparation of draft Single Judge decisions on clearly inadmissible applications.

[11] The Court's current jurisdiction to give advisory opinions is governed by Article 47 of the Convention. It is limited to requests from the Committee of Ministers on legal questions concerning the interpretation of the Convention and the Protocols thereto, excluding questions relating to the scope of the rights of freedoms contained therein or any other question which the Committee of Ministers might have to consider in consequence of any proceedings as could be instituted in accordance with the Convention.

a. A request for an advisory opinion could only be made in cases revealing a potential systemic or structural problem (an alternative proposal would limit requests to cases concerning the compatibility of domestic law with the Convention).

b. A request could only be made by a national court against whose decision there is no judicial remedy under national law.

c. It should always be optional for the national court to make a request.

d. The Court should enjoy full discretion to refuse to deal with a request, without giving reasons.

e. All States Parties to the Convention should have the opportunity to submit written submissions to the Court on the relevant legal issues.

f. Requests should be given priority by the Court.

g. An advisory opinion should not be binding for the State Party whose national court has requested it.

h. The fact of the Court having given an advisory opinion on a matter should not in any way restrict the right of an individual to bring the same question before the Court under Art. 34 of the Convention.

i. Extension of the Court's jurisdiction in this respect would be based in the Convention.

52. General arguments in favour of the proposal include that it could contribute to decreasing the Court's work-load in the medium- and long-term; allow the Court to give clear guidance on numerous potential cases bringing forward the same question; allow for a clarification of the law at an earlier stage, increasing the chances of the issue being settled at national level by providing national courts with a solid legal base for deciding the case; and could reinforce the principle of subsidiarity by underlining the primary responsibility of the national court, enhancing the authority of the Court and its case-law in the member States whilst fostering dialogue between the Convention mechanism and domestic legal orders.

53. Arguments against the proposal include that it lacks clarity and may be unsuitable to the specificities of the Convention mechanism; would increase the Court's workload by creating a new group of cases which the Court may have difficulty in absorbing satisfactorily; is unnecessary, since the Court already has many cases revealing potential systemic or structural problems; would cause additional work for national courts and introduce a delay into national proceedings; would put the Court's authority in question if the opinion were not followed; and may create conflicts of competence between national constitutional courts and the Court.

54. As to specific aspects of the proposal, there was broad agreement (assuming the proposal were adopted) on points (i) (either the original proposal or the alternative), (ii) (with the possible addition of the Government), (iii), (vi) and (ix) of

paragraph 51 above. In addition, there was broad agreement that the Government of the State of which a national court or tribunal had requested an advisory opinion should be able to intervene; that the relevant national authority may only request an advisory opinion once the factual circumstances had been sufficiently examined by the national court; that the relevant national authority should provide the Strasbourg Court with an indication of its views on the question; that the competence to deliver advisory opinions should be limited to the Grand Chamber; and that there could be scope for flexibility by making it optional for States Parties to submit to an extension of the Court's jurisdiction to give advisory opinions.

55. If this proposal is retained in principle, some aspects on which there is no broad agreement would have to be clarified further, notably: the extent to which the Court should take account of the factual circumstances giving rise to the request for an advisory opinion; whether the Court should have discretion to refuse requests; whether it should give reasons for any refusal; whether other interested actors, including other States Parties, should be able to intervene; the effects of the advisory opinion in the relationship between the Court and the requesting national authority, including whether or not it be binding on the latter; and whether there should be limitations on the right of an individual to bring the same legal issue before the Court under Article 34 of the Convention.

56. For further details, see Appendix V.

C. FINAL CONSIDERATIONS RELEVANT TO DECISIONS ON THE AMENDMENT PROPOSALS

57. The CDDH considers that the situation outlined in paragraph 5 above calls for rapid and decisive action, some of which will require amendments to the Convention. When preparing any new protocol, past experience should be taken into account: following the 2000 Rome Conference, work leading up to Protocol No. 14 took four years, with a further six between its being opened for signature and entering into force; and work on many of the current proposals began in 2006, with the Report of the Group of Wise Persons, although it should be noted that progress was delayed pending entry into force of Protocol No. 14. Furthermore, while there has not yet been a comprehensive evaluation of the effectiveness of Protocol No. 14, additional reform measures are necessary for both the medium- and long-terms. If it is decided to start negotiating a new amending protocol, a sufficiently forward-looking approach should be adopted to provide effective and enduring solutions.

58. The CDDH notes that budgetary issues must be addressed, notably with respect to certain of the above proposals. Although it has not been in a position to conduct this exercise itself, it has undertaken a preliminary analysis of certain budgetary issues relevant to the proposals to introduce fees for applicants (see Appendix III Section 1) and for a new filtering mechanism/ increasing the Court's capacity to process applications (see Appendix IV Section 1, paras. 46-50). It may be considered necessary to examine these issues further before final decisions are taken. (See also the CDDH's Contribution to the Ministerial Conference organised by the UK Chairmanship of the Committee of Ministers for further consideration of budgetary issues.)

59. The CDDH recalls that certain of the proposals deliberately contain elements of flexibility, which might facilitate their acceptance, implementation, and combination as part of an overall package. These include notably the suggestion that a new filtering mechanism could be introduced on a contingency basis and that extension of the Court's jurisdiction to give advisory opinions need not be accepted by all States Parties but could instead be optional.[12] It also notes that amendment measures could be introduced alongside and in combination with non-amendment measures, recalling its earlier Final Report on these latter issues. Equally, decisions on measures to be implemented immediately could be taken at the same time as initiating preparatory work on reforms that may only be implemented further into the future.

60. The proposals contained in this report are in principle not mutually exclusive. Only that to confer a discretionary power on the Court to decide which cases to consider could make some of the other proposals concerning access to the Court redundant, since the latter are based on the premise that the Court would continue to deliver decisions on all admissible applications. Similarly, a system of fees would make little sense for a Court with such a discretionary power.

61. The CDDH would underline that the present report is essentially intended to respond to the specific terms of reference given to the CDDH by the Committee of Ministers. As noted above, however, the CDDH has also prepared a Contribution to the United Kingdom Conference, which will address broader issues. An overall package of measures to reform the Convention system as a whole could therefore be composed of elements taken from both documents, along with the CDDH's earlier report on measures not requiring amendment of the Convention. Finally, the CDDH considers that with the present report, it has fulfilled the relevant terms of reference given to it by the Committee of Ministers.

[12] This could conceivably take various forms, e.g. an optional part of an amendment protocol or an additional protocol entering into force following a limited number of ratifications.

Appendix I

Terms of reference[13]

Steering Committee for Human Rights (CDDH)[14]

Main tasks
Under the authority of the Committee of Ministers, the CDDH will (i) oversee and coordinate the intergovernmental work of the Council of Europe in the human rights field, including gender equality and bioethics, and (ii) advise the Committee of Ministers on all questions within its field of competence, taking due account of relevant transversal perspectives. For this purpose, the CDDH is instructed to elaborate common standards for the 47 member states and fulfil any other activity which might be assigned to it by the Committee of Ministers. In particular, the CDDH will: (i) contribute to the protection of human rights by improving the effectiveness of the control mechanism of the European Convention on Human Rights and the implementation of the Convention at national level; (ii) contribute to the promotion and development of human rights through awareness raising and further standard-setting activities; (iii) carry out substantive legal analysis of human rights issues and contribute to the development of Council of Europe policies on such issues; (iv) ensure appropriate follow-up to legal instruments prepared by the Steering Committee; (v) ensure oversight from the human rights perspective of work on gender equality and bioethics; (vi) carry out work regarding the rights of persons belonging to national minorities; (vii) follow the human rights activities of other international organisations and institutions, in particular the United Nations and its Human Rights Council, the European Union and the OSCE, with a view to identifying opportunities for Council of Europe input and/or complementary Council of Europe action; (viii) contribute, in co-operation with the CDPC and the CDCJ, to the preparation of the 31st Conference of Ministers of Justice (Vienna, 2012) and ensure, as appropriate, the follow-up of any decision taken by the Committee of Ministers subsequent to the Conference.
Pillar/Sector/Programme
Pillar: Human Rights **Sector:** Ensuring Protection of Human Rights **Programme:** Enhancing the Effectiveness of the ECHR System at national and European level
Expected results
Protection of human rights The long-term effectiveness and relevance of the Convention system at national and European level, notably the reform of the European Court of Human Rights, continues to be secured (see also the terms of reference of the Committee of Experts on the Reform of the Court (DH-

[13] Valid from 1 January 2012 – 31 December 2013.
[14] *Set up by the Committee of Ministers under Article 17 of the Statute of the Council of Europe and in accordance with Resolution CM/Res(2011)24 on intergovernmental committees and subordinate bodies, their terms of reference and working methods.*

GDR)).

Development and promotion of human rights
Human rights are better guaranteed through activities related to the development, promotion of and appropriate follow-up to human rights instruments.
(i) A non-binding instrument is elaborated on the promotion of the rights and dignity of the elderly;
(ii) studies are conducted to examine the feasibility and added value of standard-setting work regarding human rights in culturally diverse societies and corporate social responsibility in the human rights field;
(iii) a study is conducted to identify possible other priority areas for development and promotion of human rights in the Council of Europe and to formulate proposals for specific activities as appropriate.

Gender equality
Supervision is ensured of activities aimed at (i) promoting the mainstreaming of gender equality issues in the work of other Council of Europe bodies and (ii) promoting the exchange of good practices and supporting the implementation of the existing standards in member states (see also the terms of reference of the Gender Equality Commission (GEC)).

Bioethics
Supervision is ensured from the human rights perspective of the intergovernmental work in the field of bioethics (see also the terms of reference of the Committee on Bioethics (DH-BIO)).

Composition

Members :
Governments of member states are invited to designate one or more representatives of the highest possible rank in the field of human rights.

The Council of Europe will bear the travel and subsistence expenses of one representative from each member state (two in the case of the state whose representative has been elected Chair).

Each member of the committee shall have one vote. Where a government designates more than one member, only one of them is entitled to take part in the voting.

Participants :
The following may send representatives without the right to vote and at the charge of their corresponding administrative budgets:

- Parliamentary Assembly of the Council of Europe;
- Congress of Local and Regional Authorities of the Council of Europe;
- European Court of Human Rights;
- Council of Europe Commissioner for Human Rights;
- Conference of INGOs of the Council of Europe;
- committees or other bodies of the Council of Europe engaged in related work, as appropriate.

The following may send representatives without the right to vote and without defrayal of expenses:

- European Union (one or more representatives, including, as appropriate, the European Union Agency for Fundamental Rights (FRA));

- Observer States to the Council of Europe: Canada, Holy See, Japan, Mexico, United States of America;
- representatives of other international organisations (Organisation for Security and Co-operation in Europe (OSCE) / Office for Democratic Institutions and Human Rights (ODIHR), Office of the United Nations High Commissioner for Human Rights).

Observers :
The following may send representatives without the right to vote and without defrayal of expenses:

- Belarus;
- Non-governmental organisations (Amnesty International, International Commission of Jurists (ICJ), International Federation of Human Rights (FIDH), European Roma and Travellers Forum), as well as the European Group for National Human Rights Institutions (NHRIs).

Working methods

Plenary meetings
48 members, 3 meetings in 2012, 4 days
48 members, 3 meetings in 2013, 4 days

Bureau
8 members, 3 meetings in 2012, 2 days
8 members, 3 meetings in 2013, 2 days

The Committee will also appoint a Gender Equality Rapporteur from amongst its members.

The rules of procedure of the Committee are governed by Resolution CM/Res(2011)24 on intergovernmental committees and subordinate bodies, their terms of reference and working methods.

The CDDH may instruct, if necessary, a drafting group (up to 12 members) to fulfil specific tasks for the elaboration of a non-binding instrument on the promotion of the rights and dignity of the elderly, between and during meetings.

Subject to the agenda, the Chairs of the subordinate structures to the CDDH may be invited to attend CDDH Bureau and/or plenary meetings.

Subordinate structure(s) to the CDDH

The CDDH has a coordinating, supervising and monitoring role in the functioning of its subordinate bodies:

Committee of experts on the Reform of the Court (DH-GDR) (see separate terms of reference) and **Drafting Group**

Committee on Bioethics (**DH-BIO**) (see separate terms of reference).

Gender Equality Commission (GEC) (see separate terms of reference).

Committee of Experts on the Reform of the Court (DH-GDR)[15]

Main tasks
Under the supervision of the Steering Committee for Human Rights (CDDH), the DH-GDR will conduct the intergovernmental work on the protection of human rights assigned by the Committee of Ministers to the Steering Committee as an important part of the follow-up to the Interlaken and Izmir Declarations.
Expected results
(i) a draft report is produced for the Committee of Ministers containing specific proposals, with different options, setting out in each case the main practical arguments for and against, on: a. a filtering mechanism within the European Court of Human Rights; b. a simplified amendment procedure for the Convention's provisions on organisational issues; c. the issue of fees for applicants to the European Court of Human Rights; d. any other possible new procedural rules or practices concerning access to the Court; e. a system allowing the highest national courts to request advisory opinions from the Court concerning the interpretation and application of the Convention; (ii) a non-binding Committee of Ministers instrument is drafted concerning the selection of candidates for the post of judge at the European Court of Human Rights and the establishment of lists of ad hoc judges under Article 26(4) of the ECHR, accompanied by additional explanations if appropriate, and a compilation of good practices; (iii) draft legal instruments are prepared to implement decisions to be taken by the Committee of Ministers on the basis of the report in (i) above; (iv) a draft report is prepared for the Committee of Ministers containing (a) an analysis of the responses given by member states in their national reports submitted by 31 December 2011 on measures taken to implement the relevant parts of the Interlaken Declaration, and (b) recommendations for follow-up; (v) a draft report is prepared for the Committee of Ministers containing elements to contribute to the evaluation of the effects of Protocol No. 14 to the Convention and the implementation of the Interlaken and Izmir Declarations on the Court's situation; (vi) a draft interim report for the Committee of Ministers is prepared on possible proposals for long-term reform of the Convention system.
Composition
Members : Governments of member states are invited to designate one or more representatives of the highest possible rank in the field of human rights. The Council of Europe will bear the travel and subsistence expenses of one representative from each member state (two in the case of the state whose representative has been elected Chair).

[15] *Set up by the Committee of Ministers under Article 17 of the Statute of the Council of Europe and in accordance with Resolution CM/Res(2011)24 on intergovernmental committees and subordinate bodies, their terms of reference and working methods.*

Each member of the committee shall have one vote. Where a government designates more than one member, only one of them is entitled to take part in the voting.

Participants :
The following may send representatives without the right to vote and at the charge of their corresponding administrative budgets:

- Parliamentary Assembly of the Council of Europe;
- Congress of Local and Regional Authorities of the Council of Europe;
- European Court of Human Rights;
- Council of Europe Commissioner for Human Rights;
- Conference of INGOs of the Council of Europe;
- committees or other bodies of the Council of Europe engaged in related work, as appropriate.

The following may send representatives without the right to vote and without defrayal of expenses:

- European Union (one or more representatives, including, as appropriate, the European Union Agency for Fundamental Rights – FRA);
- Observer States to the Council of Europe: Canada, Holy See, Japan, Mexico, United States of America;
- Representatives of other International Organisations (Organisation for Security and Co-operation in Europe (OSCE) / Office for Democratic Institutions and Human Rights (ODIHR), Office of the United Nations High Commissioner for Human Rights).

Observers :
The following may send representatives without the right to vote and without defrayal of expenses:

- Belarus;
- non-governmental organisations (Amnesty International, International Commission of Jurists (ICJ), International Federation of Human Rights (FIDH), European Roma and Travellers Forum), as well as the European Group for National Human Rights Institutions (NHRIs).

Working methods

Meetings:
48 members, 2 meetings in 2012, 3 days
48 members, 2 meetings in 2013, 3 days

The Committee will also appoint a Gender Equality Rapporteur from amongst its members.

The rules of procedure of the Committee are governed by Resolution CM/Res(2011)24 on intergovernmental committees and subordinate bodies, their terms of reference and working methods.

The Chair of the DH-GDR may be invited to attend the meetings of the CDDH and its Bureau in order to inform on progress of the work.

The CDDH may instruct, if necessary, a drafting group (up to 12 members) to fulfil specific tasks in this field between and during meetings of the DH-GDR.

Appendix II

List of documents (selected reference texts)

Reference	Title	Origin
DH-GDR(2010)006	Written contributions to the report on access to the Court – fees for applicants	(Secretariat)
DH-GDR(2010)007	Written contributions to the report on proposals for dealing with repetitive applications that would not require amendment of the Convention	(Secretariat)
DH-GDR(2010)009	Written contributions to the report on the issues of filtering – a new filtering mechanism and repetitive applications – judicial treatment	(Secretariat)
DH-GDR(2010)011	Compilation of contributions to the Court's preparation of possible rules of court governing the pilot judgment procedure	(Secretariat)
DH-GDR(2010)014	Creation of a new filtering mechanism for inadmissible applications – the German proposal	Germany
DH-GDR(2010)016	Questions concerning the introduction of fees – position paper of Germany	Germany
DH-GDR(2010)019	Advisory opinions: previous discussions in the DH-S-GDR and CDDH	Secretariat
DH-GDR(2010)020	Compilation of comments submitted by member States on the Court's Jurisconsult's report on the principle of subsidiarity and on the clarity and consistency of the Court's case-law	(Secretariat)
DH-GDR(2011)002 REV.	Study on the possible introduction of a system of fees for applicants to the European Court of Human Rights	Julien Lhuillier, expert-consultant
DH-GDR(2011)006	Compilation of contributions to the draft 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	(Secretariat)
DH-GDR(2011)007	Response of the European Group of National Human Rights Institutions (EGNHRI) on Reform of the European Court of Human Rights – Selected Issues	EGNHRI
DH-GDR(2011)008	Joint NGO Comments on follow-up of the Interlaken Declaration	Amnesty International, AIRE Centre, European Human Rights Advocacy Centre, International Commission of Jurists, Interights, Justice & Liberty
DH-GDR(2011)009	Statement prepared for consultations with representatives of civil society and national human rights institutions	Helsinki Foundation for Human Rights (Warsaw)

DH-GDR(2011)010	Ideas for the consultation with representatives of civil society and national human rights institutions	ILGA-Europe
DH-GDR(2011)012	German proposal to introduce a sanction in futile cases	Germany
DH-GDR(2011)013	German statement as to the assessment of the admissibility criteria	Germany
DH-GDR(2011)014	Non-paper "Filtering: combined options"	
DH-GDR(2011)019	Norway's views on filtering of applications and treatment of repetitive applications	Norway
DH-GDR(2011)020	Note on possible new procedural rules of practices concerning access to the Court	Switzerland/ United Kingdom
DH-GDR(2011)021	Estonian comments on the draft preliminary report on the proposal to extend the Court's jurisdiction to give advisory opinions	Estonia
DH-GDR(2011)022	German proposal – judicial filtering mechanism	Germany
DH-GDR(2011)023	Filtering by whom? Why judges should be vested with the task of filtering and not the registry staff	Germany
DH-GDR(2011)024	German proposal – amendment of Article 35 paragraph 3.b ECHR	Germany
DH-GDR(2011)026	Note on compulsory legal representation	European Court of Human Rights
DH-GDR(2011)027	Registry note on Court fees	Registry of the Court
DH-GDR(2011)028	Concept of a general domestic remedy	Poland
DH-GDR(2011)030	Reform of the European Court of Human Rights – Selected Issues	EGNHRI
DH-GDR(2011)031	Russian Federation's position on the proposal to extend the Court's jurisdiction to give advisory opinions	Russian Federation
DH-GDR(2011)035	Compendium of written contributions to the draft preliminary report on possible new procedural rules of practices concerning access to the Court	(Secretariat)
DH-GDR(2012)001	Report of the Wilton Park Conference "2020 Vision for the European Court of Human Rights"	
DH-GDR(2012)002	Joint NGO Comments on follow-up of the Interlaken and Izmir Declarations on the future of the European Court of Human Rights	Amnesty International, AIRE Centre, European Human Rights Advocacy Centre, International Commission of Jurists, Interights, Justice & Helsinki Foundation for Human Rights (Warsaw)
DH-GDR(2012)003	French views on enhancing the subsidiarity principle	France
DH-GDR(2012)005 & Addendum	Information on cases pending before the European Court of Human Rights	Registry of the Court
DH-GDR(2012)006	Submission to DH-GDR	EGNHRI

Appendix III

CDDH REPORT ON MEASURES TO REGULATE ACCESS TO THE COURT

1. A SYSTEM OF FEES FOR APPLICANTS TO THE COURT

A. Introduction

1. The Declaration adopted at the Izmir Conference of 26-27 April 2011 "invites the Committee of Ministers to continue its reflection on the issue of charging fees to applicants…"[16] Following the subsequent Istanbul ministerial session (11 May 2011), the Ministers' Deputies adopted follow-up decisions in which they *inter alia* "invited the CDDH, in order to facilitate decisions by the Committee of Ministers, … to advise, setting out … the main practical arguments for and against: on the issue of fees for applicants to the European Court of Human Rights…"[17]

2. The paper does not address the question of principle concerning whether or not introduction of a system of fees would represent an unacceptable limitation on or barrier to exercise of the right of individual application to the Court. Instead, it seeks to facilitate further examination of the practicality and utility of such a system.

3. The Registry of the Court made a technical contribution, which was examined during preparation of this report.[18]

B. The main aspects of a system of fees

4. Certain aspects of a possible system of fees may depend to some extent on the purpose or vision underlying its introduction. There are at least three possibilities here, which may overlap: a system intended as a deterrent to discourage clearly inadmissible applications;[19] a system intended as a penalty for those introducing clearly inadmissible applications; and a system intended to reflect the fact that many member States' highest courts themselves require applicants to pay a fee, although it has been suggested that a direct comparison between the situation of national courts and that of the Strasbourg Court may be inappropriate, for reasons including that legal aid is often available for proceedings before the former.

5. Whilst complete elaboration (or, at least, implementation) of a final model would require consideration of additional technical aspects,[20] it is suggested that at this stage, the most relevant to be addressed are the following:

a. at what stage of proceedings payment of the fee would be required;
b. whether the fee would be set at a low level or a more significant one;

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[16] See doc. CDDH(2011)010, para. A.2.
[17] See doc. CM/Dep/Dec(2011)1114/1.5.
[18] See doc. DH-GDR(2011)027.
[19] Including applications considered abusive in the sense of Art. 35(3) ECHR, in application of the principle *de minimis non curat prateor* (see footnote 6 above) (cf. *Bock v. Germany*, App, no. 22051/07, decision of 19/01/10, and *Dudek v. Germany*, App. no. 12977/09, decision of 23/11/10).
[20] For a list of some of these aspects, see section E below.

c. whether the level of fee would vary depending on the applicant's country of residence;
d. whether there would be exemptions based on the applicant's means;
e. whether there would be exemptions for specific categories of applicant;
f. whether the Court would have discretion to waive the fee;
g. whether the fee could be refunded should certain conditions be satisfied;
h. how the fee could be paid.

6. The following are amongst the possible options for these aspects:

a. The stage at which payment would be required
   i. Payment could be required at the **outset**. This should be taken to mean when the completed application form is submitted to the Registry, as opposed to when the first communication is sent (since the application is not registered or subject to triage until a completed form is received). It would involve at least some risk of deterring well-founded applications. On the other hand, it has been suggested that deterrence of clearly inadmissible applications is most effective if the court fee is required from the outset.
   ii. Payment could be required at a **later stage**. This could allow the Registry to advise those making applications preliminarily considered to be inadmissible of this fact and either to withdraw them or, should they wish to proceed to judicial determination, to pay the fee. It would have the advantage of having no deterrent effect on well-founded applications. It could, however, imply administrative and budgetary consequences prior to having any deterrent effect on clearly inadmissible applications. These consequences could be minimised if the Registry were to send the applicant a standard letter stating that after a preliminary examination, the application will probably be declared inadmissible, and inviting the applicant to pay an advance fee if s/he wished to obtain a judicial decision. Should the applicant not pay within the time limit, the application would be struck out of the list (or whatever may be the legal effect that would result from non-payment). It has nevertheless been suggested that such a system would be less effective in achieving the desired result of freeing resources to deal with admissible applications, instead increasing the Registry's work-load and decreasing the Court's case-processing capacity.

b. The level of the fee
   i. The fee could be set at a deliberately **low level**, so as to avoid deterring well-founded applications; figures of up to €50 have been mentioned. In this case, however, it might not be sufficient to deter a significant number of ill-founded applications.
   ii. The fee could be set at a **higher level**, to ensure deterrence of ill-founded applications.[21] In this case, however, it would be necessary to include compensatory mechanisms in the system (e.g. exemptions, waivers or refunds) to avoid or minimise deterrence of well-founded applications and to differentiate according to country of residence (see further below). Such

[21] It has been suggested that applicants pay a fee equal to 10% of the average cost of processing an application, which on 2010 figures would result in a fee of, say, €150 (€1,420 average cost per case).

mechanisms, however, may have administrative and budgetary consequences (see further below).

The expert consultant's study[22] notes that "The amount demanded as a court fee is extremely variable from one State to another and sometimes even within the same State, between different matters. In certain States …, the amounts have been set so as to be quite low, most often so as to be limited to dissuading ill-founded applications or to ensure full or partial financial autonomy for the court. In other States…, the amounts are in some situations deliberately high in order to be really effective or are shortly going to be subject to large increases… Court fees in administrative matters vary considerably."[23]

c. A fee variable according to the applicant's country of residence [24]

i. The fee could be **the same** regardless of an applicant's country of residence. In this case, however, a higher level of fee may be inappropriate, since it could be insufficient to deter a significant number of ill-founded applications from applicants resident in countries with higher per capita income but too high to avoid deterring well-founded applications from applicants resident in countries with lower per capita income. For this reason, a system involving a standard level of fee for applicants wherever resident might be considered discriminatory, the more so if set at a higher level.

ii. The fee could **vary** depending on the applicant's country of residence,[25] being set, for example, according to relative levels of per capita national income. Indeed, the Court already assesses relative levels of national income when fixing levels of just satisfaction in individual cases, with division of member States into four zones on the basis of World Bank figures. Calculation of the different levels of fee may thus in principle have minimal administrative and budgetary consequences, although there may be cases in which the Court would be required to determine the applicant's place of residence; a further difficulty could be the question of what fee should be applied to applicants resident in non-member States. A differentiated system however would enhance the deterrent function of the fee system.

The expert consultant's study notes that "it is possible to imagine a variability [in the fee] based on the disparity in average standard of living… In practice, no State clearly applies this criteria. Certain States make use, however, of a comparable approach…"[26]

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[22] See document DH-GDR(2011)002 REV., "Study on the possible introduction of a system of fees for applicants to the European Court of Human Rights (revised)", prepared by Mr Julien Lhuiller, Institut de Criminologie et de Droit Pénal, University of Lausanne, Switzerland.

[23] Ibid., pp. 10-11.

[24] It should be noted that a variable level of fee would not necessarily exclude the need for other compensatory mechanisms such as exemptions (see below).

[25] See doc. CDDH(2011)R72 Addendum I, Appendix IV, para. 8: it should be noted that the CDDH report refers to "state of origin"; it is suggested that this could be confused with the concept of "country of origin" used in refugee law, in which case it may not be appropriate for current purposes.

[26] See doc. DH-GDR(2010)002 REV., p.10.

The fee may vary according to relative standard of living in up to five of the 25 States on which the expert consultant was able to obtain detailed information.[27]

d. Exemptions based on the applicant's means

i. The fee could be the same regardless of an applicant's means (financial situation), i.e. with **no exemptions** based on means.[28] Again, in this case a higher level of fee may be inappropriate, since it could deter well-founded applications from persons of limited means. On the other hand, a lower level of fee may be less effective, as it would fail to deter ill-founded applications from applicants of greater means. A system without exemptions based on means might thus be considered discriminatory as between applicants from the same country but of different means. It should be noted, however, that the expert consultant's study has not clearly established that all national fee systems include means-based exemptions (although the question of relative means may be addressed otherwise, for example through provision of legal aid for those of lesser means). Consideration could be given to whether it would be open to States to challenge an applicant's eligibility for an exemption, for example by disputing their real personal circumstances or financial status.

ii. Certain applicants could be **exempted** from the fee on account of their means. This could be established, for example, by reference to entitlement to state benefits, free legal representation or remission from court fees in the country of residence. Such an exemption would help avoid deterring well-founded applications from persons of limited means and thereby reduce any discriminatory effect. Determination of whether individual applicants qualified for exemption could, however, have considerable administrative and budgetary consequences. Furthermore, the existence of different grounds for qualification to certain entitlements in different countries could be considered as contributing to a form of discrimination as between applicants from different countries when determining entitlement to exemption from the fee. That said, it should be noted that the Registry has experience of administering a system of means-testing in the context of grants of legal aid. An approach inspired by the Registry's practice in that context may avoid some of the problems that could arise in the current context, although it would still entail some administrative or budgetary consequences.

The expert consultant's study notes that "Numerous States take account … of the personal financial situation of the parties at some point in the fee procedure, for example, in case of a request for exoneration from the fee".[29]

The fee is variable according to the financial situation of the parties in at least eight of the 25 States on which the expert consultant was able to obtain detailed information.[30]

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[27] Ibid, p. 27.
[28] See doc. CDDH(2011)R72 Addendum I, Appendix IV, para. 10.
[29] See doc. DH-GDR(2010)002 REV., p.10.
[30] Ibid, p. 27.

e. Exemptions for specific categories of applicant
   i. There could be **no exemptions** for any applicants.
   ii. Certain categories of applicant could be **exempted** from the fee. This could in particular be the case for persons deprived of their liberty.[31] Depending on the definition of categories and the ease with which proof of qualification could be established, determination of qualification may have only minimal administrative and budgetary consequences. (The option of charging fees only to legal persons would not seem to be sufficient as a response to the overall number of inadmissible applications.)

The expert consultant's study notes that "Exemptions relating to the applicant can arise from a certain vulnerability, but they can also be based on the very nature of the applicant. The applicant who exhibits a certain vulnerability can be exempted from paying procedural fees. Cases in which the exceptions are possible are defined by law and most often correspond to cases of intellectual, material [including persons deprived of their liberty] and financial [including impecuniosity] vulnerability."[32]

f. Court discretion to waive the fee
   i. The Court could have **no discretionary power** to waive the fee in any circumstances.
   ii. The Court could have a **discretion** to waive the fee. This discretion could be either unfettered or limited to specific circumstances.[33] It would give the Court greater flexibility in addressing individual and exceptional circumstances. Introducing such a feature into a system of fees would, however, potentially prolong and complicate the procedure and would thus have administrative and budgetary consequences. Furthermore, it has been suggested that it would be unnecessary to include such a feature in addition to exemptions such as those described above.

The expert consultant's study notes that "in several States, the nature of certain cases allows direct exemption of the applicants. It is often so in family matters…"[34]

The fee may be variable according to the type of case in at least 21 of the 25 States on which the expert consultant was able to obtain detailed information.[35]

g. Refund of the fee
   i. The fee could **not be refundable** under any conditions.
   ii. The fee could be **refunded** should certain conditions be satisfied.[36] This could include refund by the respondent State as part of the award of costs

[31] See doc. CDDH(2011)R72 Addendum I, Appendix IV, para. 11. It has also been suggested that exemptions be given to applicants complaining of violations of certain "core rights" guaranteed by the Convention (e.g. Articles 2, 3 and 4).
[32] See doc. DH-GDR(2010)002 REV., p.12.
[33] See doc. CDDH(2011)R72 Addendum I, Appendix IV, para. 13.
[34] See doc. DH-GDR(2010)002 REV., p.12.
[35] Ibid, p. 27.
[36] See doc. CDDH(2011)R72 Addendum I, Appendix IV, para. 14.

in the event of the Court finding one or more violations. Should the fee be set at a high level so as to maximise the deterrent effect against clearly inadmissible applications, it could be refunded to those whose applications were not dismissed by a single judge as clearly inadmissible. In any case, there would inevitably be certain administrative or budgetary consequences.

(This question is not addressed in the expert consultant's study.)

h. Payment of the fee
   i. The fee could be paid by bank transfer (as in at least 22 of the 25 States on which the expert consultant was able to obtain detailed information.)[37]
   ii. The fee could be paid by internet (as in at least 8 of the 25 States on which the expert consultant was able to obtain detailed information.)[38]
   iii. The fee could be paid by stamp (as in 7 of the 25 States on which the expert consultant was able to obtain detailed information.)[39]
   iv. The fee could be paid by a combination of some or all of the above.[40]

The expert consultant's study notes that "The modalities for the collection of fees differ greatly from one member State to another." The study mentions *inter alia* the following modalities: payment at the court, a bank or a post office; payment by cash, bank transfer, tax stamps, telephone or internet. It also notes that "The collection of fees is sometimes sub-contracted to a private body, most often an accredited bank, [in other cases] to a special private body … or public bodies."[41]

C. Two possible models

7. The above analysis of different possible options for certain aspects of a fee system may be seen as revealing tensions between competing interests.

a. There may be tension between minimising administrative and budgetary consequences, on the one hand, and minimising discriminatory effect, on the other. For example, the risk of discrimination between applicants of different means from the same country may need to be reduced or avoided by allowing for exemptions based on means, which could have administrative and budgetary consequences. Similarly, the risk of discrimination between applicants from countries of different per capita national income may need to be reduced or avoided by having different levels of fee for different countries, which could have administrative or budgetary consequences.
b. There may also be a tension between the competing interests of maximising deterrent effect against clearly inadmissible applications, on the one hand, and discriminatory deterrence of well-founded applications, on the other; and, as described above, there may then be a further tension between measures to

[37] Ibid, p. 27.
[38] Ibid.
[39] Ibid.
[40] It is suggested that other modalities that are mentioned in the expert consultant's study, such as payment by telephone or cheque, would not appear appropriate in the present context.
[41] See doc. DH-GDR(2010)002 REV., pp. 17-19.

reduce or avoid such discrimination, on the one hand, and minimising administrative and budgetary consequences, on the other. For example, a higher fee intended to maximise deterrent effect may need, in order to avoid deterring also well-founded applications, to be accompanied by exemptions and/ or refunds, which could have administrative and budgetary consequences.

8. The following models are deliberately situated towards the extremes of a spectrum of possible models. They do not represent the only possibilities but are rather intended to illustrate certain consequences of various approaches. A cost-benefit analysis of these models is difficult and has not yet been possible; any final choice would require an evaluation and an adaptation of the mechanism.

I. Model I – lesser administrative and budgetary consequences

9. On the basis of the above analysis of the various options for each aspect of a fee system, a model with the following characteristics would appear to have lesser administrative and budgetary consequences.

a. Fee set at a low level
b. Flat rate fee for applicants, regardless of their country of residence
c. No exemptions based on applicants' means
d. Exemptions only for those in detention
e. Court has no discretion to waive the fee
f. Refunds only to successful applicants as part of the award of costs
g. Payment by bank transfer, internet or stamps

10. It has been suggested that Model I exhibits the following advantages:

a. It is practical, simple and uniform in application and entails the least amount of administrative and budgetary burden.
b. It would be sufficient as a form of deterrent to 'futile' or ill-founded applications and would not offend any applicant; its mere introduction and use alone would improve the quality of applications.
c. It would not be punitive in effect or imply a penalty to the applicant and thus would not represent an unacceptable limitation on, or a barrier to, the exercise of the right of individual application to the court.
d. It could be enhanced and/or modified to meet any prevailing caseload in order to be more effective in deterring inadmissible applications.

11. The principal possible disadvantages to such a model may be a lesser deterrent effect against inadmissible applications and discrimination on the basis of applicants' financial situation, as between both persons with average means resident in countries of different per capita national income and persons with different means within the same country of residence.

II. Model II – lesser discriminatory effect

12. On the basis of the above analysis of the various options for each aspect of a fee system, a model with the following characteristics would appear to be less discriminatory.

a. Fee set at a higher level
b. Fee varies according to the applicant's country of residence

c. Exemptions based on applicants' means
d. Exemptions at least for those in detention
e. Court has a discretion to waive fees for cases in specific circumstances
f. Refund where the application is ruled admissible (alternatively, where not ruled clearly inadmissible)
g. Payment by bank transfer, internet or stamps

13. It has been suggested that Model II exhibits the following advantages:
a. It would appear to be more effective in dissuading ill-founded applications.
b. It would be less discriminatory, especially between applicants of different means.
c. Better account would be taken of the special characteristics of applicants and their applications.
d. A greater resulting revenue could cover the costs of administration.

14. The principal possible disadvantage to such a model may be the administrative consequences of exemptions based on applicants' means or circumstances and of determining their country of residence. There would also be administrative consequences attached to refunding the fee where an application is ruled admissible. There would remain some risk of deterrence of well-founded applications.

D. Legal basis of introduction of a system of fees

15. The CDDH has consulted the Legal Advice Department, which gave the following opinion on this issue.

> "It would appear that the only issue at stake that could be examined from a legal and not practical standpoint is the question of whether or not an application to the European Court of Human Rights could be rejected in the case of non-payment of fees.
>
> The existing legal framework provides for two rejection possibilities: an application could be declared inadmissible by the Court or refused by the Registry.
>
> 1. An application is declared inadmissible
>
> It follows from the provisions of Article 35 of the European Convention on Human Rights that an application can only be rejected as being inadmissible if one or more criteria listed in the same Article are not complied with. Therefore, in order to enable the Court to declare an application inadmissible due to non-payment of fees, Article 35 of the Convention would need to be amended.
>
> 2. An application is not examined by the Court
>
> According to Rule 47 of the Rules of Court, adopted by the plenary Court pursuant to Article 25 of the Convention, failure to comply with the requirements set out in paragraphs 1 and 2 of this Rule may result in the application not being examined by the Court. It could be envisaged to

introduce an additional requirement of payment of fees to Rule 47. Thus, a failure to pay the fee would result in the refusal of the application by the Registry. As the Rule provides that failure to comply with any of the requirements **may** (and not shall) result in the application not being examined, this would have the advantage of allowing for fees to be waived in certain cases (for example prisoners). Furthermore, of course, this model would not require any amendment of the European Convention."

16. This opinion will require further examination before the issue can be definitively resolved.[42]

E. Additional technical aspects to be examined at a later stage

17. The following technical aspects, although not essential to taking political decisions on whether or not to introduce a system of fees, would have to be addressed and resolved before any such system could be introduced.

a. Whether the fee would be applied to applications already lodged with the Court. In this case, it may be possible to apply the procedure whereby the Registry advises those making applications preliminarily considered to be inadmissible either to withdraw them or, should they wish to proceed to judicial determination, to pay the fee.[43] The retrospective nature of such an approach, however, may be problematic.

b. Who would be responsible for setting the level of the fee, whether the Committee of Ministers or the Court, and who would be responsible for revising it.

c. Whether the initial general level of fee could be revised in the light of practical experience of operation of the system or a change in circumstances.

d. How relative levels of fee between countries of different per capita income could be revised and whether there would be a mechanism for irregular revision in exceptional circumstances.

e. Whether to establish a mechanism to regularly monitor and periodically evaluate the impact of fees, in order to establish whether and, if so, the extent to which they firstly, meet the objective of deterring clearly inadmissible cases and secondly, deter well-founded cases, the results to be made public.

f. What the consequence would be if an applicant (who had not been exempted from payment) did not pay (the question arises independently of the stage of the procedure at which payment is requested – see above para. 6.a.i. and ii.):

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[42] It can be recalled that, in its Final Report on measures that result from the Interlaken Declaration that do not require amendment of the Convention, the CDDH had previously stated that "one aspect, yet to be resolved, is whether introduction of a fee would require amendment of the Convention or whether it could be done under the current provisions or, for example, by way of amendment of the Rules of Court. The CDDH notes that the answer to this question may vary depending on the model" (see doc. CDDH(2010)013 Addendum I, para. 14).

[43] See para. 6.a.ii. above.

(1) "information" solution, i.e. letter from the Registry informing the applicant that his/her application will not be (further) examined for failure to pay the fee, or else (2) "formal" solution, either (a) decision of inadmissibility (which would require amendment of the Convention to introduce a new admissibility criterion) or (b) application of art. 37(1)(c) of the Convention.

2. COMPULSORY LEGAL REPRESENTATION

A. Introduction

1. In its opinion of 4 April 2011 given with a view to the Izmir Conference, the Court considered *"that compulsory representation by a lawyer could be an effective and appropriate means of ensuring proper legal advice before filing an application and would increase the quality in respect of drafting applications. It would be consistent with the principle of subsidiarity in so far as it links directly into the national legal system. Any introduction of compulsory representation should be subject to the setting-up of appropriate legal aid facilities for applicants at national level."*

2. It should immediately be noted that the Court itself, on further reflection, has since concluded that this proposal would be problematic.[44] The CDDH, following its own examination of the issue, has come to the same conclusion.

B. Arguments in favour

3. The following arguments had been suggested in favour of making legal representation compulsory from the outset:

a. It would enhance the quality of applications brought before the Court, since prospective applicants would be advised professionally, notably on the admissibility conditions the envisaged application would face, which may perhaps reduce the number of applications.
b. Applications would be drafted to a professional standard, which may allow their treatment by the Court's Registry to be accelerated.
c. It would maintain a direct link, through the person of the legal representative, with the preceding domestic proceedings that would be in keeping with the principle of subsidiarity.

C. Arguments against

4. Upon examination, however, the following arguments against have become apparent.

a. Such a measure, which would put the applicant to a financial cost, would make application to the Court less straightforward and therefore could present disadvantages similar to those for introduction of a fee. Without provision of legal aid for persons of insufficient means, the measure would impact on the right of individual application (see further below).

[44] See doc. DH-GDR(2011)026, "Note on compulsory legal representation of applicants," European Court of Human Rights (Court ref. #3709276), 21 October 2011.

b. It is not certain that lawyers succeed in dissuading their clients from making applications, even when they appear manifestly inadmissible. The Court's statistics furthermore do not show that the applications made through legal representatives result in fewer decisions of clear inadmissibility than those presented by an individual alone.[45]
c. Legal representation is already in principle required of applicants whose cases are communicated to the respondent State, other than in simple cases. Imposing it also for simple cases would unnecessarily add to procedural costs.

5. As regards the necessity to extend legal aid to those of insufficient means, the following disadvantages have been mentioned.

a. Should the States finance and manage the provision of legal aid, this would have substantial budgetary implications for those member states that do not currently provide legal aid to pay for legal representation of those making applications to the Court.
b. Such legal aid could not be granted by the States without an assessment of the well-foundedness of the application. As soon as legal aid had been refused on account of the application's lack of well-foundedness, the Court would risk being seized with new applications challenging the failure to grant legal aid by the State concerned on the basis of a violation of Art. 34 of the Convention.
c. Alternatively, should the task of administering legal aid be conferred on the Court, this would in turn create a new administrative and legal burden, which would be clearly contrary to the intended objective of relieving the Court's overload.

3. INTRODUCTION OF A SANCTION IN FUTILE CASES

A. Introduction

1. At the 7th meeting of the DH-GDR (30 May – 1 June 2011), the German expert presented a proposal to introduce a pecuniary sanction in futile cases.[46] This proposal would fall within the Deputies' invitation to the CDDH "to advise, setting out … the main practical arguments for and against, on any other possible new procedural rules of practices concerning access to the Court."[47] The present document represents the CDDH's report on the proposal.[48]

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

3. Other details concerning operation of this sanction system included that:

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

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

B. Arguments in favour

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

a. Such applications place an undue burden upon the Court: the sanction would seek to reduce this burden. It would provide the Court with a case-management tool, similar to what is available within certain national judicial systems, to deal better with those whose numerous applications use resources without contributing to positive development in the field of human rights, whether for individuals (the applicant) or in general.
b. The sanction would have an educative effect on the instant applicant. Even if such a system would not have a massive effect on the number of clearly inadmissible applications, it could nevertheless have a preventive effect on those who make applications without considering whether their applications meet the admissibility criteria. Imposition of the sanction may have a positive effect in any case: applicants who pay will have learnt something about the seriousness of applications; those who do not pay may find that the Court refuses to examine any future applications they may file.
c. Once there was general awareness of the practice, it may also have a disciplining influence on the behaviour of other applicants. The system could thus contribute to consolidating the role of the Court, whose current situation, notably its case-load, is in part due to it being seen by many applicants as a fourth-instance court.
d. The decision on whether to implement the sanction would be taken by the judicial formation seized of the case and so would involve minimal additional administrative cost. Managing the sanction would not imply additional work for the Court disproportionate to the possible effects, because the Court would have discretion to decide whether to impose the sanction: if it felt that to

deliver a quick decision without any sanction would be a better way to manage the case, it could do so.

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

C. Arguments against

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

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

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

c. The Court rarely uses its existing competence to find applications inadmissible for abuse of the right of individual application (Art. 35(3)(a))[49] and therefore would be unlikely to exercise a power to impose a sanction. Consolidation of its case-law for rejecting futile applications could achieve the same goal as this proposal. The development of this case-law, however, could prevent future futile applications without the need for a complex system of sanctions. An accumulation of efforts aimed at the same goal, on the other hand, would tend to burden the Court with additional tasks, rather than to relieve it.

d. Implementation of the proposal could require mobilisation of financial and human resources and place a heavy discretionary burden on the Court when deciding who or what case to 'sanction'. The Court was under the obligation to treat every application in the same way, giving the same weight and consideration to each, and so would be obliged to determine whether and

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

explain why certain applications were lacking in substance; in other words, to distinguish degrees of inadmissibility. It would be obliged to analyse, at least briefly, future applications introduced by the person in question, if only to avoid the situation in which possible violations of "core rights" would remain unexamined.

e. It has been suggested that there would have to be the possibility of appealing against imposition of the sanction, which would increase the Court's workload. Any system of pecuniary sanctions would in principle have to be accompanied by the possibility of requesting the re-examination or reduction of the amount of the fine. This would also involve additional resources.
f. A sanctions system would create inequality between applicants. It would not affect futile applications made by applicants of solid financial status. The envisaged system could thus appear discriminatory on the basis of financial resources.
g. The viability and feasibility of such a system within the Convention, even once amended, would be questionable, difficult and complicated to implement.

D. Other issues raised

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

a. The proposal should not be considered as an alternative to a general fee, although it could be introduced in addition. It cannot take the place of a fees system or even be introduced as an alternative to fees, since unlike sanctions, the purpose of a possible fees system would be to add quality and uniformity to the introduction of applications.
b. Alongside introduction of a sanction for abusive applicants, consideration should also be given to introduction of sanctions for legal representatives who submit futile applications on behalf of their clients, and/ or for States that failed to execute judgments in repetitive cases.
c. The effective impact of this proposal on the prevention of futile applications remains to be analysed, on the basis of a possible relevant report that could perhaps be drawn up by the Court itself. From the outset, therefore, a preliminary estimation of the number of such cases and the extent to which they over-load the role of the Court would be appropriate.
d. There could also be a study of the possibility that the States Parties be responsible for recovering, possibly on behalf of the Court, the sanctions. In this case, it would no longer be necessary to fix as a rule that the Court refuse to process further applications following non-payment of a sanction.

4. AMENDMENT OF THE "SIGNIFICANT DISADVANTAGE" ADMISSIBILITY CRITERION

A. Introduction

1. The German proposal entails amending the "significant disadvantage" admissibility criterion in Article 35(3)(b) of the Convention by removing the safeguard requiring prior due consideration by a domestic tribunal.

2. Article 35(3) of the Convention would then read:

"The Court shall declare inadmissible any individual application submitted under Article 34 if it considers that:
[…]
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~~.

B. Arguments in favour

3. The following arguments have been advanced in favour of the proposal:
   a. The additional safeguard requiring prior due consideration by a domestic tribunal in Article 35(3) is unnecessary in view of the fact that paragraph 1 already mentions that all domestic remedies have to be exhausted.
   b. Article 35(1) of the Convention does not mention the additional safeguard of 'due consideration' by those domestic remedies. It is peculiar that paragraph 3, which concerns cases in which the applicant did not suffer a significant disadvantage, does offer such an additional safeguard.
   c. Even in a case where the applicant's concerns have not been given due consideration on the national level, the applicant does not need to be granted relief by the Court where his case is negligible in its significance. In any case, the provision would still contain the requirement that an application receive an examination on the merits if respect for human rights so requires.
   d. It would render the existing *de minimis non curat praetor* rule more effective and easily applicable. The (already overburdened) Court would be provided with a further instrument to focus on more important questions of human rights protection under the Convention. Amendment of the provision would also provide a clear political signal in this regard.
   e. It would further emphasise the subsidiary nature of the judicial protection offered by the European Court of Human Rights. The reference to 'duly considered' in the current text of Article 35(3) of the Convention may induce the European Court to deal substantively with cases in which judicial supervision by an international human rights court is not warranted.
   f. The right of individual petition remains intact in all cases, unless the case is of negligible importance.

C. Arguments against

4. The following arguments have been advanced against the proposal:
   a. The current text of the provision was the result of a carefully drafted compromise during the negotiations leading up to Protocol No. 14. It remains highly uncertain whether a political agreement could now be reached on deletion of this safeguard.
   b. The current provision has only been in force for a limited period of time (see in this regard also the transitory provision laid down in Article 20(2) of Protocol No. 14). The Court should be given more time for the full development of the interpretation of the safeguard in its case-law. The full

effects of this provision still remain unclear. It would not be timely to amend the text of the provision.

c. Removal of the safeguard would in itself in all probability not contribute significantly to the decrease of the Court's workload, given the fact that the criterion has so far been used by the Court in only a handful of cases. In most cases, the Court would still be able to declare a complaint inadmissible using other provisions of the Convention, even though the case was not duly considered by domestic courts. At the same time, it could also be argued that removal of the safeguard will not result in any substantial change, since the effectiveness of a domestic remedy is still required under Article 13 of the Convention.
d. In the alternative, removal of the safeguard would result in a decrease of judicial protection offered to individual complainants. The current safeguard contributes to offering protection in case of a denial of justice, even though the importance of such a case is minimal.
e. The safeguard underlines the importance of the principle of subsidiarity. High Contracting Parties are obliged to offer primary judicial protection on the domestic level. The safeguard requiring 'due consideration' emphasises this duty.

D. Other issues raised

5. It was also recalled that Article 13 of the Convention requires the existence of an effective remedy before a domestic authority, which need not necessarily be a tribunal. This consideration could be taken to weigh either for or against the proposal, or both.

6. The CDDH noted that the information concerning recent tendencies in the number of pending applications and the Court's forecasts for future treatment of clearly inadmissible cases may have implications for an evaluation of the necessity of this proposal: see further para. 34 of the Final Report.

5. A NEW ADMISSIBILITY CRITERION RELATING TO CASES PROPERLY CONSIDERED BY NATIONAL COURTS

A. Introduction

1. A new admissibility criterion could be introduced with the following elements:
   a. an application would be inadmissible if it were substantially the same as a matter that had already been examined by a domestic tribunal applying the rights guaranteed by the Convention and the Protocols thereto;
   b. an exception would be made where the national tribunal had manifestly erred in its interpretation or application of the Convention rights;
   c. a further exception would apply where the application raises a serious question affecting interpretation or application of the Convention or the Protocols thereto.

B. Arguments in favour

2. The following arguments have been advanced in favour of the proposal:
   a. The proposal emphasises the subsidiary nature of the judicial control conducted by the Court and the idea that the Court should not act as a fourth instance. Where national courts apply the Convention in the light of the Court's case law and consider cases fully and fairly, the circumstances in which the Strasbourg Court should need to reconsider the case and substitute its own view for that of the national court should be relatively limited. The proposal could have special relevance with regard to certain Convention rights, such as those found in articles 8 to 11 of the Convention. When applying those provisions of the Convention, a domestic tribunal balances the applicant's interests against those of another party to proceedings or a general public interest. It is inherent in such a balancing act that it may fall either way. In these circumstances, one could question the added value of further scrutiny by the Court, which might well merely repeat the same balancing act. The proposal could help further clarify the role of the Court in determining such cases.
   b. The Court would be called upon to consider the merits of fewer applications, thus making better use of its finite capacity to deliver reasoned judgments.
   c. The Court would still examine decisions of national courts where they clearly failed to apply the Convention and the Court's case law either properly or at all. Likewise, the Court would also continue to consider cases that raise important points of interpretation and application of the Convention.
   d. Such codification of the existing principle that the Court is not a 'fourth instance' would provide an opportunity to establish clearer and more transparent guidelines for the Court on when to apply the rule.
   e. The proposal builds on principles already found in the Court's case-law as part of the "manifestly ill-founded" admissibility criterion.[50] It would provide a more transparent and principled basis for such decisions to be taken and would encourage a fuller application of these principles.
   f. It has been suggested that such a criterion could encourage national courts and tribunals further to apply (explicitly) the principles underlying the Court's case-law in a more in-depth way. It would also provide an incentive for the creation of general domestic remedies, where they do not already exist.
   g. The examination of a case by the Court would concentrate on whether there has been an in-depth examination at the national level by a tribunal and on whether the outcome of the domestic proceedings requires further examination by the Strasbourg Court. Arguably, that way filtering could be done more speedily.

C. Arguments against

3. The following arguments have been advanced against the proposal:
   a. The proposal limits the right of individual petition, as enshrined in Article 34 of the Convention, and the judicial protection offered by the Court to applicants.

[50] See, for example, the Court's Practical Guide on Admissibility Criteria, Section IIIA(2) and cases such as *Kemmache v. France*, *Garcia Ruiz v Spain* and *Siojeva a.o. v. Latvia*; see also Section IIIA(3) of the Guide on "Clear or apparent absence of a violation", including (a) "No appearance of arbitrariness or unfairness".

b. The proposal limits the substantive jurisdiction of the Court and its competence to address gaps in the effective protection of all Convention rights. It appears to be based on an inaccurate assumption that the Court largely oversteps its role.
c. The proposal would further encourage substantive examination of the complaint at the admissibility, rather than the merits stage. Issues pertaining to the interpretation and application of Convention rights should be dealt with at the merits stage, not at the admissibility stage.
d. Since this substantive examination would have to be conducted by the Court whenever it applied this new admissibility criterion, it would not decrease the Court's workload.
e. The new admissibility criterion puts more emphasis on the judicial protection offered on the domestic level. By limiting the scope of review to correction of manifest error, the criterion could jeopardise maintenance of uniform Convention interpretation, which could in turn threaten legal certainty. The level of implementation of Convention standards in domestic law in the various High Contracting Parties does not currently allow for the introduction of such a measure.
f. The relationship between the Court and the highest domestic courts could be harmed if the Court were to judge that the domestic court had made a 'manifest error'.
g. The proposal would involve generalisations concerning the overall quality of the domestic legal system, instead of a focus on the question of whether the domestic legal system has treated an individual case in a just manner.

D. Other issues raised

4. The question remains whether the aim of the proposal can only be met through introduction of a new admissibility criterion. It might be worthwhile also to explore additional ways of conveying the essence of the proposal, including e.g. further elaboration of the margin of appreciation doctrine or the application of the *de minimis* rule which might lead to similar results, without the above-mentioned disadvantages.

5. The notion of a 'manifest error' and the delimitation between the two exceptions mentioned will undoubtedly lead to many questions of legal interpretation being brought before the Court, due to the inherent ambiguity of its meaning. Introduction of the new admissibility criterion will likewise lead to a new body of case-law on the relationship between this new criterion and the existing rule under the Convention that all (effective) domestic remedies have to be exhausted. The question was also raised how repetitive cases are to be dealt with under the proposed system.

6. Any introduction of the criterion would have to take account of the variety of national legal systems, in order to be applicable to all member States.

7. It has also been suggested that the proposal, combined with the so called *de minimis* rule, might in fact lead to a "pick-and-choose" model (see below).

8. The CDDH noted that the information concerning recent tendencies in the number of pending applications and the Court's forecasts for future treatment of

clearly inadmissible cases may have implications for an evaluation of the necessity of this proposal: see further para. 34 of the Final Report.

Appendix IV

CDDH REPORT ON MEASURES TO ADDRESS THE NUMBER OF APPLICATIONS PENDING BEFORE THE COURT

1. INCREASING THE COURT'S CAPACITY TO PROCESS APPLICATIONS

A. Introduction

I. Interlaken Declaration and the CDDH's ad hoc terms of reference

1. Paragraph 6.c.ii. of the Interlaken Declaration "recommends, with regard to filtering mechanisms, […] to the Committee of Ministers to examine the setting up of a filtering mechanism within the Court going beyond the single judge procedure and the procedure provided for in i." (emphasis added).[51] Furthermore, paragraph 7.c.i. of the Interlaken Declaration "calls upon the Committee of Ministers to consider whether repetitive cases could be handled by judges responsible for filtering…"

2. The Steering Committee for Human Rights subsequently received terms of reference requiring it to "elaborate 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 […].This part of the terms of reference shall be executed through the presentation of a final report to the Committee of Ministers by 15 April 2012; an interim activity report shall be submitted by 15 April 2011"[52] (emphasis added). These terms of reference were subsequently reiterated, following the Izmir Conference, and the deadline for submission of results brought forward to 31 March 2012.[53]

3. At the 73rd CDDH meeting (6-9 December 2011), the Registry provided the CDDH with information on recent tendencies in the number of pending applications and the Court's forecasts for future treatment of clearly inadmissible cases. For the four successive months between 31 August 2011 and 31 December 2011, the total number of cases pending before a judicial formation fell, from 160,200 to 151,600. The predominant cause was a decrease in the number of cases pending before a Single Judge, which fell from 101,800 to 92,050.[54] The Registry considers this tendency to be sustainable in the long-term and now expects, subject to the provision of additional resources, to be able to resolve the backlog of clearly inadmissible cases by the end of 2015. This information, which will be examined in more detail below, clearly has profound implications for the CDDH's response to and interpretation of its terms of reference.

II. Where the emphasis of reforms should be placed

[51] Sub-paragraph i. states that "[The Conference … recommends, with regard to filtering mechanisms,] to the Court to put in place, in the short term, a mechanism within the existing bench likely to ensure effective filtering."
[52] See doc. CDDH(2010)001.
[53] See doc. CM/Del/Dec(2011)1114/1.5.
[54] The number of cases pending before a Chamber also fell but that of those before a Committee rose.

4. At the end of 2005 – the first year for which relevant figures are publicly available – **89,900** applications were pending, 45,500 applications having been lodged during that year and 28,565 decisions taken, of which *27,613* were to declare the application inadmissible or strike it out. Five years later, at the end of 2011 – the latest full year for which figures are available – **151,600**[55] applications were pending before a judicial formation, 64,500 applications having been allocated to a judicial formation during that year and 52,188 decisions taken, *50,677* of which were to declare the application inadmissible or to strike it out.[56]

5. On the assumption that, at present, the 20 judges appointed by the Court President as Single Judges devote approximately 25 % of their time to work on Single Judge cases, it has been suggested that less than 11% of the Court's overall judicial working time is devoted to such cases.[57]

6. As noted above, however, the Court's new structures and working methods for filtering, introduced following entry into force of Protocol No. 14 on 1 June 2010, have recently begun to have a far greater than expected – or hoped for – effect. On 31 August 2011, the number of cases pending before a Single Judge reached a record high of 101,800; 21,400 Single Judge decisions had been taken since the beginning of the year. Over the following four months, however, a further 25,530 Single Judge decisions were taken, and the number of cases pending fell to 92,050.[58] The Court considers that the growth in the number of decisions rendered, being largely within its own control, can be not only sustained but further increased.

7. The Court ascribes the growth in the number of decisions to restructuring the Registry, in particular by efficient cooperation between Single Judges and non-judicial rapporteurs; creating a filtering section dedicated to applications concerning the five countries against which the largest number of inadmissible applications are brought;[59] and improvements in working methods, pioneered in the filtering section. (It should also be noted that the filtering section has benefited from reinforcement by

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[55] For the sake of clarity it should be noted that the number of pending applications cannot be assimilated to the "backlog". Even in a desired state of equilibrium between incoming and disposed-of applications [see the Interlaken Declaration, point i)] there will inevitably be a non-negligible number of pending applications corresponding to a product of a number of incoming applications per year and the average length of proceedings. For illustrative purposes only it can be mentioned that assuming that the number of incoming applications remains more or less at the same level, i.e. 50,000 Single judge cases and 15,000 Committee and Chamber cases per year, and departing from a thesis that a desired reasonable length of proceedings would be one year for Single judge cases and two and a half years for Committee and Chamber cases, in the state of equilibrium there will nevertheless be 50,000 Single judge cases pending and 37,500 Committee and Chamber cases pending. Only the remainder of applications above these figures can be tagged as backlog.

[56] See the Court's Analysis of statistics 2010, available on its website. It should be noted that the basis on which the Court publishes various statistics has changed over time. In particular, the previously used figures for "applications pending before a judicial formation" and "applications allocated to a judicial formation" would be slightly lower than those currently given for "applications pending" and "applications lodged," respectively, for any given year; the figures for 2005 would thus have been lower had the current basis then been in use. The above data are therefore given for broad illustrative purposes only.

[57] See doc. DH-GDR(2010)017, report of the 4th DH-GDR meeting (15-17 September 2011), Appendix III.

[58] 2010 had already seen a record 25% increase in the number of filtering decisions; in 2011, however, there was a 37% increase in such decisions as compared with 2010.

[59] Namely the Russian Federation, Turkey, Romania, Ukraine and Poland.

around forty secondments, including twenty from the Russian Federation.) The aim is to process *prima facie* clearly inadmissible cases quickly, simply and immediately, with as many stages of case-processing – including, for Single Judge cases, drafting of the decision – undertaken immediately upon initial consideration as possible.[60] The combined effect of these developments has far exceeded most expectations of the potential benefits of the Single Judge system: whereas the Court had previously estimated that the single judge system, as first implemented, had the potential to deliver 32,000 decisions per year, it in fact delivered 46,930 in 2011 and expects to deliver even more in 2012 and beyond.

8. On this basis, the Registry has projected the possibility of not only dealing with the majority of newly-arriving clearly inadmissible applications within a few months of receipt but, by extending the new working methods to the Registry as a whole, having the capacity also to resolve progressively, over the course of 2012-2015, all applications now pending before a Single Judge. This projection is posited upon an increase in the resources available to the Court's Registry. According to the Registry, the increase in the number of single judge decisions has been achieved without diverting judicial time from other tasks.

9. The CDDH's discussion of filtering had over the course of time also revealed a growing concern that a more important issue may in fact be the Court's increasing backlog of Committee and Chamber cases. Although it is undoubtedly important to ensure that clearly inadmissible cases receive a quick response, it was pointed out that a reform of the filtering mechanism cannot by itself free sufficient resources to tackle that part of the Court's case-load which is most important from the point of view both of respect for human rights and the time needed to process it. Indeed, while clearly inadmissible applications subject to filtering are the most numerous, but can be disposed of quickly, the heaviest part of the case-load consists of cases which cannot be declared inadmissible without further examination, require a more in-depth analysis and may lead to a finding of a violation of the Convention. It has furthermore been argued that the Court's prioritisation policy has, in effect, left low priority repetitive cases (34,000) and even many non-repetitive medium-priority cases (around 20,000) with little prospect of adjudication within a reasonable time. This concern has been heightened by the latest information from the Registry on filtering. The CDDH also recalls the Interlaken Declaration, in which the States Parties were "convinced … that additional measures are indispensable and urgently required in order to … enable the Court to reduce the backlog of cases and to adjudicate new cases within a reasonable time, particularly those concerning serious violations of human rights", and the Izmir Declaration, which considered that "proposals … should also enable the Court to adjudicate repetitive cases within a reasonable time".

10. The recent decrease in the number of applications pending before a Single Judge and the considerable increase in the number of Single Judge decisions delivered are of course extremely welcome developments. Although it remains to be seen whether the Registry's expectations will be realised, there seems a fair prospect that the Court will within the foreseeable future be able to manage the clearly inadmissible applications, even if the number arriving will probably remain very high. It is also

[60] This approach has benefits also for the processing of Committee and Chamber cases, which upon preliminary identification as such are immediately communicated to the Respondent State.

unlikely that any new filtering mechanism, given that its introduction would require entry into force of an amending protocol to the Convention (see further below), could come into effect or, at least, have yet had any great impact by the envisaged date of 2015 for resolution of the backlog. The CDDH has therefore decided to reflect these circumstances by shifting the emphasis of the present report from possible measures to increase the Court's filtering capacity, to possible measures to increase the Court's capacity to process applications generally.

11. In accordance with the CDDH's terms of reference, the present report nevertheless retains a detailed analysis of and proposals for an alternative, new filtering mechanism, presented on the understanding that recent developments appeared to many to suggest that such proposals may not need to be given immediate effect. The CDDH instead considers that these proposals should be implemented as part of the current round of Court reform but on a contingency basis, in case the Registry's expectations are ultimately not fulfilled and it transpires that other approaches are required. In this respect, the CDDH foresees two situations in which it might be considered necessary to activate a new filtering mechanism: if the expected results are not achieved; or if, regardless of the effects of the Single Judge system and associated internal Court reforms, it is considered opportune to introduce a new system, for instance if the time taken by the Court to deal with other cases became too long. Some delegations consider that the second situation already prevails.

B. Increasing the Court's general decision-making capacity

12. The Court's overall backlog consists of applications pending before either Single Judges (decisions in clearly inadmissible applications), three-judge Committees (mainly judgments in repetitive cases) and Chambers (mainly judgments in non-repetitive cases). If efforts are to be made to increase the Court's capacity to deliver judgments, the question arises as to whether those efforts should be directed at Committees or Chambers, or both. There are three, non-mutually exclusive ways in which this capacity may be increased: increasing the capacity of the Registry; increasing the number of judges; and deploying the existing judges and Registry staff differently.

13. In this respect, the annual statistical data on the number of applications allocated to a Committee and to a Chamber and on the number of applications disposed of by a Committee and by a Chamber would be necessary in order to determine which part of the Court's decision-making capacity should be strengthened and, at least as a rough estimation, what level of growth in productivity would be necessary for achieving the equilibrium between the number of incoming and disposed-of applications.[61]

14. A further question is whether increasing the number of judges or just that of Registry staff alone would be an effective way of increasing the Court's general decision-making capacity. As noted above, the Court's expectations for dealing with the backlog of clearly inadmissible cases depend upon an increase in the size of the Registry, just as the recent falls in the numbers of cases pending before Single Judges

[61] According to information recently provided by the Registry, in 2011, 9,250 applications were allocated to a Chamber and 7,950 to a Committee; during the same period, 3,000 were decided by a Chamber and 2,150 by a Committee (see doc. DH-GDR(2012)005 Addendum).

are, at least in part, due to reinforcement of the Registry through secondment of national judges. It should also be noted that the Court does not expect that the improved working methods pioneered in the Registry's filtering section could liberate judicial resources for other tasks at the same time as allowing resolution of all pending Single Judge cases by 2015.

15. Even before the Court's announcement, therefore, it had been suggested that a pool of temporary judges could be established, making it possible to strengthen the Court's general decision-making capacity when necessary. Such judges would:

a. have to satisfy the criteria for office of Article 21 of the Convention;
b. be nominated by the High Contracting Parties and, possibly, approved or elected to the pool by the Parliamentary Assembly;
c. be appointed from the pool by the President of the Court for limited periods of time as and when needed to achieve a balance between incoming applications and disposal decisions (subject to the Court's budgetary envelope);
d. when appointed, discharge most of the functions of regular judges, other than sitting on the Grand Chamber or Plenary Court;
e. when appointed, be considered as elected in respect of the High Contracting Party that had nominated them.

16. An alternative proposal is to introduce a new category of judge (originally proposed as a new filtering mechanism, see paras. 34-36 below), which would deal exclusively with repetitive cases and – unless a new filtering mechanism is introduced – with single judge cases. This would enable the regular judges to devote more time to chamber cases. As with the proposal above, the number of judges would vary according to the Court's needs and their term of office would be considerably shorter than that of the regular judges. These judges would have to possess the qualifications required for appointment to judicial office and be subject to the same requirements as the regular judges with regard to independence and impartiality. However, since the essential nature of their work would not require that they "possess the qualifications required for appointment to high judicial office or be jurisconsults of recognised competence," as is required of regular judges by Article 21(1) of the Convention, they could be at an earlier stage in their career and their remuneration could be lower. The judges could be elected by the Parliamentary Assembly or by the Court itself from a list of candidates submitted by the Member States. Some States have argued that proportional representation of Member States would not be necessary for this category of judge, although others disagree. Besides, it was suggested that the Court should be involved in the process of selecting appropriate candidates. It would be in the Court's discretion how the three-judge committees will be composed, e.g. two regular judges sitting with one new judge or one regular judge sitting with two new judges.

17. It has been argued that both of these proposals may have the following advantages:

a. they might make it possible to achieve a general balance between input and output of cases, enabling the Court to reduce the backlog and adjudicate new cases within a reasonable time;
b. they would be flexible, as any additional judges would only be engaged if, when and to the extent necessary;

c. they would have budgetary consequences only as and when activated and would only be activated if and to the extent that the Committee of Ministers provided necessary resources;
d. additional judges, being employed for a fixed period of time, would constitute a valuable connection between the Convention and national legal systems.

18. In favour of the first proposal, it is argued that regular judges would probably still have far too little time to deal with lower-category Chamber cases, given the size of the backlog and the rate of arrival of new, prima facie admissible Chamber cases and even with responsibility for filtering being given to the Registry and/or to additional judges with competence to deal with filtering and repetitive cases. Furthermore, it has been suggested that it might prove difficult to recruit judges to deal solely with repetitive and possibly clearly inadmissible cases.

19. In favour of the second proposal, others have suggested that an increase in the Court's general decision-making capacity can be achieved through a new filtering mechanism (see further below) and/or the second proposal, and that it is thus not necessary to have temporary judges with general decision-making capacity. Furthermore, additional judges with a status comparable to that of the regular judges would be more costly.

20. Against both proposals, it has been argued that they would not correspond to the existing principle in the Convention of one judge per State party. Furthermore, were the proposals implemented, it could not be guaranteed that all applications heard by Chambers would involve adjudication by the judge elected with respect to the Respondent State.

21. The CDDH has not been able also to consider whether the Court's judicial and Registry resources could be deployed differently so as to allow an increase in its general decision-making capacity. This question may reward further examination in future, including, of course, by the Court itself.

22. One might also ask whether the increase in efficiency of working methods for filtering could not, at least in part, allow resources currently employed for filtering to be liberated for work on Committee and Chamber cases, rather than continuing to devote all of those resources to clearly inadmissible cases.

23. The CDDH reiterates that the issue of the Court's general decision-making capacity has only recently been given a primary emphasis in its work, due to the recency of the information concerning the Court's output of Single Judge decisions and the possibility of eliminating the backlog of clearly inadmissible applications. In this new context, certain important aspects of the proposals have not been resolved and would need further clarification. Equally, the proposals made do not necessarily exclude the possibility of alternative approaches, which may also merit examination.

C. A new filtering mechanism

24. As noted above, the CDDH has decided to maintain its proposals for a new filtering mechanism, on the understanding that whilst they no longer appear necessary

in the immediate term, it may in future become necessary to reactivate them should the impact of the Court's new working methods fail to meet the Court's expectations.

I. What is filtering and why is it important?

25. Filtering is the task of finally disposing of applications that are clearly inadmissible, thereby eliminating them from the Court's docket and leaving only those applications that raise substantive issues. Filtering has traditionally been distinct from the task of triage, which is performed by the Registry and consists of an initial screening of applications and their provisional assignment to the different judicial formations (chamber, committee, single judge).

26. Filtering is an unavoidable part of the Court's work. It must be done in any system. Filtering is important because all applicants, also those whose applications are clearly inadmissible, have a legitimate expectation to have their case decided by the Court within a reasonable time. To receive a decision from the Court is an important element of the right of individual petition. For a large number of applicants, however, this expectation is not met, and the right of individual application is thus being undermined.

27. The aim of a new filtering mechanism, as proposed in this Section, would be to increase the Court's case-processing capacity, so as to allow it to deal more efficiently with its case-load; bearing in mind that inadmissible applications represent around 90% of applications decided by the Court and around 65% of pending applications.[62]

28. For further information on how filtering is done in the present framework, see the earlier DH-GDR report at Appendix IV to the CDDH Interim Activity Report on measures requiring amendment of the Convention.[63]

II. Filtering by whom – different models for a possible future new mechanism

29. Various models have been proposed to deal with the problem of filtering. It can be noted from the outset that all of the options proposed are intended to present the following basic advantages:

a. They would enhance the Court's capability to deal efficiently with clearly inadmissible applications and thus enable equilibrium between the rates of receipt and disposal of such applications to be achieved for all member States and the backlog to be reduced, whilst perhaps also allowing the regular judges to devote more attention to admissible cases.
b. The existing, "regular" judges would be able to concentrate on more complex and substantive cases, notably *prima facie* admissible applications and development of the case-law.
c. More time allocated by the judge to working on a case would significantly reduce the risk of divergent case-law.

[62] The former figure derives from the Court's statistics for recent years; the latter is the proportion of pending cases that have been provisionally identified by the Registry as inadmissible.
[63] See doc. CDDH(2011)R72 Addendum I. It should be noted that the estimate of the potential output of decisions contained in this document is now superseded.

d. It has been suggested that freeing regular judges from work on inadmissible applications would make the post of judge more attractive, with a beneficial effect on the quality of candidates.
e. Each model would allow some degree of flexibility in responding to the Court's needs at a given moment in time.

30. The following proposals on who should be responsible for filtering have been made.

a. The Registry

31. It has been suggested that experienced Registry lawyers should be authorised to take final decisions with regard to clearly inadmissible cases. More specifically, the existing non-judicial rapporteurs would be given the competence now held by single judges, that is to "*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. The decision shall be final. 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 consideration"* (cf. Article 27). According to the explanatory report to Protocol No. 14, *"(t)his means that the judge will take such decisions only in clear-cut cases, where the inadmissibility of the application is manifest from the outset.*"[64]

32. The President of the Court would appoint such "filtering officials" in the same way that non-judicial rapporteurs are appointed today. The role would usually be short-term and not necessarily full-time. They would function under the authority of the President of the Court and form part of the Registry, as set out in Article 24(2) of the Convention with regard to (non-judicial) rapporteurs. It would seem appropriate that these "filtering officials", when sitting as such, should not examine any application against his or her home state,[65] as is the case currently for single judges (see Article 26(3) of the Convention).

33. The following advantages to this system have been suggested:
a. Experienced Registry lawyers are impartial and independent of the parties and have the qualifications and experience necessary to take final decisions in clearly inadmissible cases, including a thorough knowledge of the Court's case-law, since they already oversee the preparation of inadmissibility decisions for submission to a single judge.
b. Registry lawyers would be expected to be entirely operational straight away, which would not be the case for other options.
c. Removing the extra decision-making level (the single judge) would reduce time and resources spent on clearly inadmissible cases. Single judges disagree with the non-judicial rapporteurs in less than 1% of the cases.[66]
d. There would not be any additional cost involved in the new filtering mechanism, for constant output (unless it is considered that "filtering officials" should be paid more than non-judicial rapporteurs). However, regardless of the filtering mechanism chosen, in order to increase the Court's overall output, the

[64] Cf. para. 67 of the Explanatory Report.
[65] Which state is to be considered the home state, would have to be defined.
[66] This figure has been confirmed by the Registry.

Court's Registry (i.e. the Court's preparatory capacity) will also have to be further strengthened (see also Section D.I. below).

e. A minimal part of the Court's resources would be spent on clearly inadmissible cases.
f. In short, this approach would be the most flexible and cost-effective one.

34. It has been suggested that it would be a disadvantage that decisions on inadmissibility would no longer be taken by judges, which would represent a step backwards from the systematic judicialisation of decision-making by the Convention's control mechanism, as instituted by Protocol No. 11. With this option, the final decision on whether or not a particular case would receive judicial treatment would rest with the Registry.

b. A new type of judge

35. It has been suggested that filtering should be entrusted to a new category of judge (whose main function, however, would be to deal with repetitive cases, see para. 16 above).

36. The following advantages to this system have been suggested:

a. The Court's decisions should be taken by judges; non-judicial staff should only do preparatory work.
b. As the inadmissibility decision taken by any filtering mechanism would be final and the last decision in the applicant's case, it is important for the applicant to have a judicial decision, which has higher external impact and would be far more acceptable than a decision by an administrative office responsible to a hierarchical superior.
c. The introduction of a judicial filtering body would allow every applicant exercising his/ her right under art. 34 of the Convention to receive a judicial decision. The Convention system would thus demonstrate an equal approach to every application lodged.
d. The Applicants, whose rights the system is supposed to serve, have a right to a certain degree of equal treatment with the High Contracting Parties. The final decision against a High Contracting Party in a case is judicial; Applicants should therefore be entitled to judicial decisions of inadmissibility.
e. Nearly two-thirds of inadmissible applications – currently left to committees and single judges – are manifestly ill-founded; insofar as this may touch upon difficult, substantive issues of Convention rights, such applications would more appropriately be determined by a judicial mechanism.
f. Maximum efficiency would be obtained by having persons with judicial experience undertaking filtering work, whereas Registry staff may have no, or no recent, experience of working in a national judicial system.
g. Additional filtering judges, being employed as such for a fixed period of time, would subsequently constitute a valuable connection between the Convention system and national legal systems.
h. The current system includes an element of dual control involving the Single Judge and the Non-judicial Rapporteur, which the proposed new system would preserve.

37. The following disadvantages have been suggested:

a. A new category of judge would not be immediately operational.
b. There may be a risk of diverging practice between the filtering judges and the regular judges.
c. Concerns have been expressed about the budgetary consequences of this approach.
d. It might prove difficult to recruit judges to deal solely with *prima facie* clearly inadmissible (and possibly repetitive) cases.
e. The case files would not necessarily be in a language understood by the judge.

c. A combined option

38. This proposal would combine the options involving the Registry and a new category of judge. Specific members of the Registry would be given the competence to deal with applications that have been provisionally identified as clearly inadmissible for purely procedural reasons under Article 35(1) and (2) of the Convention. Only specifically designated members of the Registry would be allowed to deal with such cases and should be able to refer them to a judicial body at any time, should they consider it necessary. In addition, a new category of filtering judge would be created to deal with cases provisionally identified as inadmissible under Article 35(3) of the Convention, along with repetitive cases.

39. Arguments in favour of such a system include that it would preserve the principle of judicial decision-making for cases where some kind of opinion is needed on the substance of the application, but not for those which clearly do not fulfil even the most basic formal requirements for admissibility.

40. Possible disadvantages include those mentioned in paras. 33 and 36 above, with regard to the options involving either the Registry or a new category of judge outside the Registry. Some experts considered that clearly inadmissible cases should be dealt with in the same way regardless of the relevant admissibility criterion, the decisive factor being that these are "*clear-cut cases, where the inadmissibility of the application is manifest from the outset.*"[67]

III. Other relevant issues

41. The competence of any new filtering mechanism would include at least that of single judges to declare applications inadmissible or strike them out of the Court's list of cases, where such decision can be taken without further examination.

42. It is common ground that Registry staff should not decide on repetitive applications and issue judgements on the merits and that decisions on repetitive cases should continue to be taken by three-judge committees. Certain delegations felt that only judges with status equivalent to that of regular judges of the Court should be able to issue judgments, including in repetitive cases, whose underlying issues should not be wrongly allowed to appear relatively unimportant. There were differences of opinion on whether any reform was necessary: some feeling that the existing three-judge Committee procedure may suffice; others noting the substantial and growing backlog of repetitive cases.

[67] Cf. para. 67 of the Explanatory Report for Protocol No. 14.

43. The Registry would retain primary responsibility for the triage of applications and preparation of draft decisions.

44. To ensure efficiency, decisions of any new filtering mechanism should be final, as is the case now for those of Single Judges.

45. There should not be a return to the former two-tier system (Court/ Commission):the new filtering mechanism would be part of the Court.

D. Final remarks

I. Budget

46. Any measure to increase the Court's capacity, whether for filtering or general case-processing, that involves either additional Registry staff, additional judges or both will obviously have budgetary consequences. The fact that the Court has recently been able to increase the number of decisions reached by Single Judges may be due to a (relatively) cost-free combination of internal reforms and reinforcement of the Registry by seconded staff. This does not mean, however, that such means will remain available in future, nor that they would necessarily be appropriate to increase the Court's general case-processing capacity. It should also be recalled that the Registry has already indicated that some additional resources would be required for the Court to be able to meet the target of 2015 for dealing with all cases currently pending before Single Judges.

47. It has been pointed out that if experienced Registry lawyers are given the competence to reject clearly inadmissible cases, as described in option a. under Section C.II. above, that would not necessarily have any budgetary consequences. Unless the Registry were simultaneously reinforced (or resources shifted from other work, which would clearly be undesirable), however, it is unlikely that this approach would generate any significant increase in the number of Single Judge decisions.

48. As noted above, concerns have been expressed at the budgetary consequences of creating a new category of judge. It has been suggested, however, that if option b. or c. in Section C.II. were chosen, the number of such filtering judges would be low compared to that of regular judges and as their remuneration would correspond to that of experienced Registry staff rather than to that of regular judges, the budgetary consequences of this approach would be limited.

49. In either case, there would be interest in exploring, on the basis of an analysis of the overall current resources, working methods and output of the Court, whether an increase in the staff of the Registry would contribute to alleviating the problem, since the Registry is already responsible for triage of applications and the preparation of draft decisions for single judges.

50. A proper assessment of the cost-effectiveness of each option, whether for increasing the Court's general case-processing capacity or for a new filtering mechanism, will be necessary at the appropriate time. This cannot, however, be undertaken at present, until the various options have been more clearly defined, but

should form a precondition to any final decisions on which option or options to choose.

II. Legal basis

51. All the above proposals, whether for increasing the Court's general case-processing capacity or for a new filtering mechanism, would require amendment of the Convention.

2. INTRODUCTION OF A "SUNSET CLAUSE"

A. Introduction

1. Large numbers of applications spend many years pending before the Court without a substantive response. Following the introduction of the Court's priority policy this is particularly the case in respect of applications which have the lowest priority.[68] A new procedural rule could be introduced to clarify the fate of such applications more quickly. In particular, an application would be automatically struck off the Court's list of cases a set period of time after it was first made, unless during that period the Court had notified the case to the Government and invited it to submit observations. The period in question might, for example, be 12 months, 18 months or 2 years; although it was suggested that this may be too short, given that the average length of time taken for *prima facie* admissible cases to be communicated is currently 37 months. It has additionally been suggested, in the interests of a certain flexibility, that this deadline could be periodically reviewed and adapted to the prevailing situation.

B. Arguments in favour

2. The following arguments have been advanced in favour of the proposal:
   a. Such a procedural rule would work in harmony with the prioritisation policy introduced by the Court. It would address the problem that, against the background of the backlog of cases, a prioritisation policy of the kind currently in place will inevitably mean that significant numbers of applications will remain pending indefinitely before the Court with no realistic prospect of being resolved either within a reasonable time or at all. This would provide a fairer and more open way of dealing with such cases.
   b. The applications affected would include some of those that fall into the lowest priority categories of the Court's priority policy, having been positively allocated to such categories as part of an initial consideration within the Court. The proposal would free the Court's time to deal with more serious complaints.

[68] The Court's categories of priority are as follows: I, urgent applications; II, applications raising questions capable of having an impact on the effectiveness of the Convention system or an important question of general interest; III, applications raising "core rights" (Articles 2, 3, 4 or 5(1) of the Convention); IV, potentially well-founded applications raising other rights; V, repetitive cases; VI, applications giving rise to problems of admissibility; and VII, manifestly inadmissibly applications. See further at http://www.echr.coe.int/NR/rdonlyres/AA56DA0F-DEE5-4FB6-BDD3-A5B34123FFAE/0/2010__Priority_policy__Public_communication.pdf

c. Applicants would be informed of the outcome much more quickly than is the case at present. This would avoid an applicant whose case has no prospect of success being given the false hope that protracted inactivity at the Court tends to create. The proposal would thereby guarantee that all applications – even those in the lowest categories in the priority policy – are dealt with within a reasonable time.
d. Given the finite resources available to the Court, a reinforcement of the prioritisation policy in this way would optimise the use of the Court's resources.
e. Such a system could serve as a 'laboratory' for the future introduction of a "pick-and-choose" model, should that be considered desirable.

C. Arguments against

3. The following arguments have been advanced against the proposal:
a. The proposal entails that certain applications will automatically be struck off the Court's list of cases without any judicial examination of the complaint, which is arguably at odds with the rule of law and the right of individual petition as enshrined in Article 34 of the Convention. With the introduction of a sunset clause, the Registry will in fact determine which cases will be examined by the Court. Triage will sometimes be performed by more junior members of the Registry. There is no guarantee that the sunset clause will only apply to cases in the lowest categories of the priority policy; even well-founded repetitive cases may be affected. Introduction of a sunset clause means in fact that certain applicants are not entitled to a decision of a judge for reasons for which they are not responsible (i.e. a general lack in the Court's capacity to deal with all complaints lodged).
b. Applicants would not all receive a reasoned decision of the Court. Informing, even succinctly, applicants of the reasons why their case is declared manifestly ill-founded can help deter other applications, and puts pressure on legal representatives to explain to their clients why they lodged a complaint with the Court when they ought to have known that the case would have very little chance of success.
c. The proposal would not help to alleviate the Registry's workload, since it would still be responsible for triage, which under current working methods incorporates preparation of draft Single Judge decisions. Indeed, it has been suggested that should the proposal be implemented, the Court may consider it necessary to give responsibility for triage to the judges themselves, which would divert their attention from matters that in other circumstances would be considered more important.
d. Under this proposal, the final decision on the priority of a case would need to be taken by a judge. That being so, it is hard to see how preparation by the Registry of such decisions would require less work than preparation of single judge decisions under the current system.
e. Application of a sunset clause could harm the authority of the Court, especially if the public suspects that the Court uses the mechanism to avoid having to deal with certain politically or legally sensitive cases.
f. Introduction of a sunset clause could have adverse effects, in that it could induce the Court to devote more of its capacity to adjudicating less important cases, in order to ensure that the sunset clause is used as infrequently as

possible. The proposal could thus have undesirable effects, leading the Court to communicate a greater number of cases, less well prepared.

g. The proposal does not seem to take into account that the introduction of single judges has led to substantial changes in the Court's handling of applications falling in the lowest priority categories. With the introduction of Single Judges, applications of this kind will not remain pending indefinitely before the Court with no realistic prospect of being resolved. They will be disposed of by the Court within a couple of months.
h. Were the period of time before striking out under the sunset clause to be variable, this would be contrary to the principle of legal certainty. This could be mitigated, however, were such variations to be introduced following a certain notice period.
i. The sunset clause would not only be a laboratory for a form of "pick-and-choose" system, it would in effect constitute such a system.

D. Other issues raised

4. The proposal is linked to the way in which clearly inadmissible applications are dealt with and thus to the debate on a new filtering mechanism. In fact, the current proposal puts a lot of emphasis on the triage of applications by the Registry, although it remains to be determined whether the Registry or the Single Judge would decide whether a particular application will remain inactive until the sunset clause strikes the case automatically from the list of cases. It has been suggested that the sunset clause would be primarily relevant for cases that the Registry qualified as low priority. There is therefore an intrinsic link between this proposal and the proposal put forward in the paper on a new filtering mechanism to empower certain members of the Registry to dispose of certain clearly inadmissible complaints, which could also inform applicants more quickly of the outcome of their case than is the case at present.

5. Furthermore, before such a sunset clause were to be applied, it should first be clearly defined who selects the cases that will be automatically struck out, and upon what criteria.

6. The impact of the proposal seems to depend largely on the length of the period chosen for a sunset clause. Should the period be sufficiently long (for example three years), the chances that an admissible case will be automatically struck off because of the sunset clause may be negligible. On the other hand, a longer period would mean that the arguments advanced in support of the proposal would become less convincing.

7. It remains unclear whether application of a sunset clause will result in a 'decision' for the purposes of the (non-)applicability of relevant UN human rights treaties. The proposal could therefore increase the workload of the Human Rights Committee and other UN treaty bodies.

8. The CDDH noted that the information concerning recent tendencies in the number of pending applications and the Court's forecasts for future treatment of clearly inadmissible cases may have implications for an evaluation of the necessity of this proposal: see further para. 34 of the Final Report.

3. CONFERRING ON THE COURT A DISCRETION TO DECIDE WHICH CASES TO CONSIDER

A. Introduction

1. The proposal entails conferring on the Court a discretion to decide which cases to consider, mirroring similar provisions in the highest national courts in certain Contracting Parties. Under such an approach, an application would not be considered unless the Court made a positive decision to deal with the case.

B. Arguments in favour

2. The following arguments have been advanced in favour of the proposal:
   a. The introduction of a 'pick and choose' model would make the Court's judicial decision-making capacity more manageable. It would allow all applications to be processed to a conclusion in a reasonable, foreseeable time.
   b. Such an approach would allow the Court to focus its work only on the highest priority cases. It would contribute to ensuring consistent case-law of the highest quality.
   c. To a certain extent, the proposal formalises the existing practice of the Court's priority policy. It is thus not as far reaching as it sounds. A 'pick and choose' model, therefore, does not necessarily exclude the right of individual petition.
   d. It is uncertain if other proposals will suffice to reach an equilibrium between applications received and those determined, and unlikely that they will suffice without substantial increases in the Court's budget.

C. Arguments against

3. The following arguments have been advanced against the proposal:
   a. The proposal would entail a radical change of the existing Convention mechanism, including a significant restriction of the right of individual petition.
   b. The proposal primarily focuses on offering a solution for new applications, whereas it seems that other practices might suffice to reach an equilibrium between applications received and those determined. Instead, the proposal does not offer a solution for the existing backlog of cases that still need to be examined.
   c. The proposal presupposes a high level of implementation at the national level, which is not currently achieved in all instances.
   d. The proposal will not help to alleviate the Registry's workload, since it will still be responsible for making a first analysis of the application. Since the judges will have the right to pick and choose their cases, they will still have to take note of all the information provided by the Registry.

D. Other issues raised

4. If the Court were given larger discretion to choose which cases to examine, the view was expressed that the criteria on which such decisions were based should be clearly stipulated (as it is regulated domestically for some highest national courts). It

is important to guarantee that the selection of applications is done objectively and independently by the Court, in order to avoid any kind of politicising of the decisions.

5. The introduction of a pick and choose model could be accompanied by the elaboration of a mechanism, which would allow the Court to return cases to the domestic legal order for further examination in conformity with Convention standards if those cases were not chosen for examination by the Strasbourg Court.

6. Although possibly for implementation in the long-term, this proposal could be examined alongside others that imply significant amendments.

7. The CDDH noted that the information concerning recent tendencies in the number of pending applications and the Court's forecasts for future treatment of clearly inadmissible cases may have implications for an evaluation of the necessity of this proposal: see further para. 34 of the Final Report.

Appendix V

CDDH REPORT ON MEASURES TO ENHANCE RELATIONS BETWEEN THE COURT AND NATIONAL COURTS

EXTENDING THE COURT'S JURISDICTION TO GIVE ADVISORY OPINIONS

A. Introduction

1. At the 4th meeting of the DH-S-GDR (28-30 January 2009), the Norwegian and Dutch experts submitted a proposal to extend the Court's jurisdiction to give advisory opinions.[69] This proposal was taken up in the CDDH's Opinion on the issues to be covered at the Interlaken Conference [70] but not subsequently mentioned in the Interlaken Declaration. It was, however, included in the Izmir Declaration, as a result of which the Deputies have invited the CDDH "to advise, setting out … the main practical arguments for and against, on a system allowing the highest national courts to request advisory opinions from the Court concerning the interpretation and application of the Convention, already being considered."[71] It has been suggested that this proposal is also connected with the long-term strategic approach formulated in the Izmir Declaration and referred to in the Deputies' decisions on follow-up thereto.

2. The Norwegian/ Dutch proposal featured the following characteristics:
   a. A request for an advisory opinion could only be made in cases revealing a potential systemic or structural problem.
   b. A request could only be made by a national court against whose decision there is no judicial remedy under national law.
   c. It should always be optional for the national court to make a request.
   d. The Court should enjoy full discretion to refuse to deal with a request, without giving reasons.
   e. All States Parties to the Convention should have the opportunity to submit written submissions to the Court on the relevant legal issues.
   f. Requests should be given priority by the Court.
   g. An advisory opinion should not be binding for the State Party whose national court has requested it.
   h. The fact of the Court having given an advisory opinion on a matter should not in any way restrict the right of an individual to bring the same question before the Court under Art. 34 of the Convention.
   i. Extension of the Court's jurisdiction in this respect would be based in the Convention.

B. Arguments in favour of the proposal in general

3. The following general arguments have been advanced in favour of the proposal to extend the Court's jurisdiction to give advisory opinions:

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[69] See doc. DH-S-GDR(2009)004.
[70] See doc. CDDH(2009)019 Add. I.
[71] See doc. CM/Del/Dec(2011)1114/1.5, "other" in this context meaning 'other than a system of fees for applicants to the Court' (see doc. DH-GDR(2011)011 REV.)

a. It could contribute to decreasing, in the medium- to long-term, the Court's workload, thereby increasing its effectiveness.
b. The Court would be provided with the possibility to give clear guidance on numerous potential cases bringing forward the same question, thus constituting an additional procedural tool in cases revealing potential systemic or structural problems and thereby contributing to the efficiency of the Court.
c. The procedure would allow for a clarification of the law at an earlier stage, increasing the chances of the issue being settling at national level and avoiding a large number of individual complaints arriving at the Court, thereby reducing the burden on the Court.
d. An advisory opinion would provide national courts with a solid base for deciding the case, especially where interpretation of the Convention appeared unclear, and would thus increase the likelihood of the decision being accepted by the parties; it may therefore enhance the authority of national courts and authorities in applying the Convention.
e. The potential to resolve a number of pending or potential applications raising the same issue, whether at national or European level, could justify the delay in the individual case
f. The continuing primary responsibility of the national court (the case remaining within the national system) to act on the Court's advisory opinion, in accordance with the legal, social and political context of the country concerned, may have the effect of enhancing the authority of the Court and its case-law in the member States whilst fostering dialogue between the Convention mechanism and domestic legal orders, thereby reinforcing the principle of subsidiarity.
g. The proposal could be pursued in parallel to and not instead of or in competition with work on, for example, filtering or fees. As with work on a simplified amendment procedure, it would be a case of planning for the long-term.
h. Implementation of the proposal should not imply excessive costs or administrative burdens and therefore would not in that sense cause any "harm."

C. Arguments against the proposal in general

4. The following general arguments have been advanced against the proposal to extend the Court's jurisdiction to give advisory opinions:

a. The purpose of the proposal is unclear and may not be suitable to the current state of the Convention system, which is in several ways distinct from other judicial systems that allow for the possibility of requesting advisory opinions.
b. It could increase, rather than decrease, the Court's case-load by creating a new group of cases that would otherwise not be presented.
c. The Court is already over-loaded and could have difficulty in absorbing this new competence satisfactorily.
d. The Court is already able to deal with many cases revealing potential systemic or structural problems and regularly does so.
e. Implementing the proposal could also lead to additional work for national courts.
f. It would introduce a delay into national proceedings whilst the national court awaited the Court's advisory opinion. This would be inevitable and would

have to be taken into account by the national court when considering whether to make a request.

g. The authority of the Court could be put in question if the national court did not follow the advisory opinion, if non-biding (see further para. 18 below).
h. Implementation of a new system may create a risk of conflict of competence between national constitutional courts and the European Court of Human Rights, depending on the characteristics of the model chosen.

D. Main aspects of the proposal – options and arguments for and against

5. The following are main aspects of a possible system extending the Court's jurisdiction to give advisory opinions, deriving from the Norwegian/ Dutch proposal. Presented first are those aspects on which there is broad agreement (assuming the proposal were adopted), followed by those on which views differ, with various options (which may be alternative or cumulative) for each and arguments that have been advanced in favour of and against them.[72]

Aspects on which there is broad agreement

6. There was broad agreement that requests for advisory opinions should be limited by reference to the nature of the related case, in order to avoid a proliferation of requests overburdening the Court. Two main options have been suggested: cases revealing a potential systemic or structural problem (the original Norwegian/ Dutch proposal) and those concerning the compatibility with the Convention of legislation, a rule or an established interpretation of legislation by a court. These options may in fact not be mutually exclusive: indeed, the former may be simply a more restrictive version of the latter, or even the same basic idea expressed in different words.

7. On the question of which domestic authority/ies could request an advisory opinion, there was broad agreement that a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law should be able to, for the following reasons. Advisory opinions are of a legal nature and should only be requested by courts. Limiting the procedure to the highest national courts would introduce a form of exhaustion of domestic remedies. This would help avoid a proliferation of requests overburdening the Court. Allowing lower courts to request advisory opinions may interfere with the dialogue between national jurisdictions, which should be resolved before a case is brought to Strasbourg. It was also suggested that Governments be able to request advisory opinions, since they may wish to be assured of the conformity of a draft law with the Convention (cf. the consultative competence under the American Convention on Human Rights)[73]; on the other hand, it was argued that this would augment the risk of increasing the burden on the Court and may risk the transfer of legal disputes to Strasbourg for political reasons.

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[72] It should be observed that some experts expressed views on these issues whilst remaining opposed to or having reservations over any extension of the Court's jurisdiction to give advisory opinions, at least at this stage.

[73] Under Article 64 of the American Convention on Human Rights, "The member states of the Organization may consult the [Inter-American Court of Human Rights] regarding the interpretation of this Convention or of other treaties concerning the protection of human rights in the American states. Within their spheres of competence, the organs listed in Chapter X of the Charter of the Organization of American States, as amended by the Protocol of Buenos Aires, may in like manner consult the Court."

8. It was suggested that at least the Government of the State of which a national court or tribunal had requested an advisory opinion should be able to intervene in the proceedings, as that Government should be able to present its own position on the subject-matter of the request. (See also para. 18 below.) The position of the parties to the domestic proceedings may also need consideration.

9. The relevant national authority may only request the Court's advisory opinion once the factual circumstances have been sufficiently examined by the national court (see further para. 15 below).

10. It was suggested that the relevant national authority should also provide the Strasbourg Court with an indication of its views on the question on which it has requested an advisory opinion.

11. It should be optional for the relevant national authority to request an advisory opinion. It would only be appropriate for relevant national authorities to request an advisory opinion when they have serious doubts about the compatibility of national law or case-law with the Convention. An individual concerned always has the possibility of bringing the case before the Court (see further para. 20 below), which would thus retain the possibility of pronouncing on the legal issue.

12. The Court could give priority to requests for advisory opinions, whether accepted or refused. This could ensure cases were promptly settled at national level and thereby avoid both delays in the national proceedings and large numbers of complaints being presented to the Court. Only if requests for advisory opinions did not relate to systemic or structural problems or essential cases relating to the interpretation or application of the Convention could they not be given priority; prioritisation would then depend upon the nature of the case.

13. The competence to deliver advisory opinions should be limited to the Grand Chamber, as is the case for advisory opinions given to the Committee of Ministers under Article 47 of the Convention. The authority of the advisory opinions would thus be reinforced.

14. Finally, it could be optional for States Parties to submit to an extension of the Court's jurisdiction to give advisory opinions. This would allow other States to see how the system operated and developed.

15. It was also noted that there would be a need to introduce procedural guarantees in line with the principle of legal certainty.

Aspects on which different options have been proposed

16. There are differences over how far rendering advisory opinions would require the Court to take into account the factual circumstances which have given rise to the request for an advisory opinion. It is understood that, in any event, the Court itself should not undertake a factual assessment in place of a national court.

a. On the one hand, it is desirable to avoid advisory opinions that are too abstract in nature and which might have unintended consequences and be difficult to apply effectively at national level.

b. On the other hand, some degree of generality is implied by the concept of advisory opinions, and the authority of the advisory opinion would only be undermined if the Court drafted it in too general terms.

17. Different views were put forward on whether the Court should have discretion to refuse requests for advisory opinions.

a. Arguments expressed in favour were that the Court should have a full discretion to refuse, making the system as flexible as possible and helping to ensure that the Court did not become over-burdened with the preparation of advisory opinions. The requirement that only cases revealing a potential systemic or structural problem may be subject of a request for an advisory opinion, along with the procedure for dealing with them, however, should ensure that, above all in the medium- to long-term, there should be no increase in the net work-load of the Court.
b. Arguments against included that where a superior national court had duly considered it appropriate to request an advisory opinion, the Court should not have a discretion to refuse, as this would undermine dialogue between the two jurisdictions. Furthermore, in the delicate situation of divergent case-law between Court sections, a request for an advisory opinion would allow harmonisation of the Court's case-law (this argument also being of potential general relevance). The existence of a pending application relating to the same issue would not be an obstacle to the Court giving an advisory opinion, and could indeed accelerate resolution of the pending case.

18. Views also differed on whether the Court should be required to give reasons for a refusal to accept a request for an advisory opinion.

a. On the one hand, it was argued that the relevant national authority has a right to know why an advisory opinion is not being given. Some explanation of the refusal would help foster judicial dialogue. Reasons for refusals would guide national courts when considering whether to make a request, in particular the national court whose request has been refused; this could decrease the number of requests likely to be refused. Even the Court of Justice of the European Union gives brief reasons for not formally responding to a request for a preliminary ruling.
b. On the other hand, requiring the Court to give reasons for refusals would increase its work-load; it should at most be optional for the Court to give reasons: this should be especially the case for a flexible, optional system. The Court is not required to give reasons for refusals to refer to the Grand Chamber and so should not be so for refusals to give advisory opinions.

19. There were also differing views on whether other interested actors, including other States Parties to the Convention, should be able to intervene in advisory opinion proceedings.

a. In favour, it was argued that Advisory opinions relate to the interpretation of an international treaty and so potentially affect all States Parties, although an underlying systemic problem may be based on specific national circumstances. Interventions by States would enhance knowledge of the Court's case-law in the States Parties generally and would widen the impact of the Court's guidance on a specific legal issue. They would help the Court frame the legal question and provide broader understanding of the situation in the States

Parties. They would enhance the authority of the opinion and the case-law in general, by having it preceded by a sufficiently wide legal debate. Non-state entities should also be able request leave to intervene. (As a practical matter, the Court would have to notify national governments of pending advisory opinion cases or, alternatively, publish such cases on its web-site. Also, interventions in this context should be subject to short time-limits so as to avoid delaying proceedings.)

b. Against the idea, it was noted that allowing other States Parties to intervene could risk creating a certain asymmetry, since requests for advisory opinions would come from national courts, whereas any interventions would not. Allowing for such interventions would delay the procedure, thus further delaying proceedings at national level.

20. A particular point of difference concerned the question of the effects the advisory opinion should have in the relationship between the European Court of Human Rights, rendering the advisory opinion, and the national authority requesting it.

a. Arguments in favour of opinions being binding included that the Court is the central authority for ensuring uniform application of the Convention. Should the request come from a court and the opinion be merely optional, this would lead to loss of the potential gain expected from the procedure, since the applicant would probably subsequently apply to the Court, which would have acknowledged his rights in the context of the advisory opinion procedure: a binding advisory opinion would offer finality. The extent to which the advisory opinion would be binding could depend on the nature of the case: if in relation to a specific systemic/ structural problem, then the advisory opinion would be binding for the requesting authority; if on interpretation of the Convention, then a general binding effect for all States Parties. It is difficult to envisage a non-binding advisory opinion when it is optional to make the request: this would imply that the domestic authority could apply a solution contrary to that indicated by the Court, following which the individual would almost certainly make an application to Strasbourg; this would run contrary to the purpose of the system. The non-binding nature of advisory opinions under the existing procedure may be justified by the political nature of the final decision, taken by the Committee of Ministers, in which legal issues were only one consideration.

b. It may be unnecessary to make the advisory opinion formally binding, since the authority of the advisory opinion within the domestic legal order would derive from the legal status of the consequent decision of the body that had requested it. Should the advisory opinion concern application of the Convention to the specific facts of the case before the national court, it may perhaps not automatically be applicable to other cases. The Court would be advising on a Convention issue, not deciding on the case before the national court. The "sanction" for non-compliance with an advisory opinion would be the finding of a violation in a subsequent individual application. Since it would be optional for the national court to request an advisory opinion, however, it seems unlikely that a national court would delay proceedings in order to request one and then not follow it. Advisory opinions of most international courts are not legally binding.

21. There were also differences over whether there should be restrictions on the right of individuals to bring the same legal issue before the Court under Article 34 ECHR.

a. Arguments in favour included that the Court's advisory opinion should not be challenged in substance by individual applications concerning the same question. The right of individual petition could be restricted where the advisory opinion is followed by the requesting authority. Maintaining an unrestricted right of individual petition following an advisory opinion relating to the same case would undermine the purpose of the system, namely to reduce the number of future individual applications.
b. Those against included that the right of individual petition should not be restricted as it was at the core of the Convention system. If its advisory opinion concerns interpretation of the Convention, the Court should not be prevented from assessing individual applications concerning concrete situations. If the advisory opinion is not followed by the requesting authority, the individual must retain the right to bring the case to Strasbourg.