COUNCIL OF EUROPE CONSEIL DE L'EUROPE

Strasbourg, 25 October 2011

DH-PS(2011)R3

STEERING COMMITTEE FOR HUMAN RIGHTS
(CDDH)

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

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Meeting Report

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3rd meeting
19 – 21 October 2011
Strasbourg

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Summary:

At its 3rd meeting, the Committee, in particular:

- examined the possible national and/ or international legal problems affecting the feasibility of certain possible modalities for the introduction of a simplified amendment procedure, took note of the opinion of the Committee of legal advisers on public international law (CAHDI) on this issue and decided to ask the CDDH to examine the issue in detail at its next meeting;
- examined the different modalities for introducing a simplified amendment procedure, namely the choice between a Statute and a new provision in the Convention and, should a Statute be chosen, the disposition of the provisions of Section II of the Convention and the choice of legal instrument, indicating the arguments for and against each modality;
- examined the issues or matters not found in the Convention, notably interim measures, the pilot judgment procedure and unilateral declarations;
- continued its study of the possible modalities of the simplified amendment procedure itself;
- organized its future work.

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

1. The Committee of experts on a simplified procedure for amendment of certain provisions of the European Convention of Human Rights (DH-PS) held its third meeting in Strasbourg from 19-21 October 2011 with Mrs Björg THORARENSEN (Iceland) in the chair. The list of participants appears at Appendix I. The agenda, as adopted, appears at Appendix II. The Head of the Human Rights Policy and Development Department, Mr Jörg POLAKIEWICZ, informed the Committee of recent changes in the structure of the Secretariat. The Division responsible for the CDDH and its subordinate bodies would still form part of his (now renamed) department, but that department would be contained within a new Directorate on Human Rights, whose Director was Mr Christos GIAKOMOPOULOS.

Item 2: Possible national and/ or international legal problems affecting the feasibility of certain possible modalities for the introduction of a simplified amendment procedure

2. The Committee took note of the opinion given by the Committee of Legal Advisers on Public International Law (CAHDI) on the question put to it by the CDDH at the DH-PS' request. It noted that the CAHDI opinion was not conclusive on the specific questions put concerning possible international and national legal problems. The opinion did, however, confirm some of the views of the DH-PS concerning the nature of the provisions that could be amended by a simplified procedure – i.e. only those "relating to organisational questions and without any impact on the rights and obligations of States and applicants" – and that such provisions should be "presented in a clear and exhaustive list."[1] The Committee noted with interest the CAHDI's potential willingness to address these questions in future, on the basis of more detailed models, and decided to consider the possible need to seek further advice at a later stage.

3. The Committee recalled that introduction of a simplified amendment procedure in whatever form would have to be based on a Protocol to the Convention. It then exchanged views on possible national legal problems affecting the feasibility of certain possible modalities for the use of a simplified amendment procedure. It noted that none of its members had insuperable problems with all and any of the possible models of simplified amendment procedure currently under consideration, providing, notably, that the scope of provisions that could be subject to such a procedure were clearly and exhaustively determined in advance and that only those of strictly organisational or procedural nature, and not those touching upon rights or obligations of States or applicants, be included. The Committee noted that a final determination of this issue could only be made on the basis of final draft text concerning provisions subject to a simplified amendment procedure. In particular, it noted that:

- Armenia's national law would require parliamentary approval of amendments to a Statute if the latter were contained in a treaty but not if it were contained

[1] See doc. DH-PS(2011)006, para. 5.

in a resolution of the Committee of Ministers, since amendments to treaties of any character are subject to parliamentary ratification as a matter of national law. A six-month period to submit the amendments for parliamentary ratification and, if as a consequence necessary, to object to proposed amendments would probably not, for practical reasons, be long enough;
- Austria's national law would not require parliamentary approval of amendment of a Statute, depending on the nature of the provisions it contained and subject to prior approval of future use of the procedure given by parliament in a Constitutional Law when ratifying the Protocol to introduce the procedure;
- France's national law would not require parliamentary approval for amendment of provisions of a Statute of purely procedural nature, although it was difficult to give a definitive general answer in advance;
- Sweden's national law would require parliamentary approval of amendment of Convention provisions, since the Convention was part of national law, but probably not of provisions of a Statute were they of purely procedural nature, although it was difficult to give a definitive general answer in advance.

4. The Committee then recalled that certain other member States, not members of the Committee, had indicated possible problems. It therefore decided to ask the CDDH to enquire further into the issue at the latter's next meeting.

Item 3: Modality for introduction of a simplified amendment procedure

Choice between a Statute and a new provision in the Convention

5. A majority of experts expressed a preference for a model involving introduction of a simplified amendment procedure by way of establishment of a **Statute for the Court**, containing provisions taken from the Convention and other issues not currently found in the Convention.

6. Arguments in favour of introducing a simplified amendment procedure by way of a Statute included the following:
- The clarity and simplicity of the Convention would be improved by removing procedural and organisational issues, leaving only fundamental rights and freedoms.
- The simplified amendment procedure would be clearer in a separate Statute.
- It would introduce a third level of text between the Convention and the Rules of Court, similarly to the situation for other international courts.

7. Arguments against included the following:
- There was no legal or practical reason why the Court should be like other international courts and have a Statute.
- Establishment of a Statute would be complex and time-consuming to realise in practice.

8. Some experts expressed a preference for a model involving introduction of a simplified amendment procedure by way of a **provision in the Convention**.

9. Arguments in favour of introducing a simplified amendment procedure by way of the Convention included the following:

- It would be the simplest, easiest and quickest approach to achieving the Committee's main objective, namely to simplify the amendment procedure for certain provisions currently found in the Convention.[2]
- It would be more accessible than a system involving three texts.

10. Arguments against included the following:

- The Convention had already over the years become very complicated and should not now be made more so.
- Some States may be unable to accept that Convention provisions be subject to a simplified amendment procedure

Statute – disposition of provisions from Section II of the Convention

11. Should there be a Statute, some experts would prefer that it contain **all of Section II** of the Convention, in which case not all of its provisions would be subject to the simplified amendment procedure. Opinions differed on the suggestion that such a Statute should not have the legal form of a Resolution of the Committee of Ministers but, since it would contain provisions binding on States, instead have treaty status.

12. Arguments in favour of including all of Section II included the following:

- The structure of both the Convention and the Statute would be immediately clear and coherent, with the various sections of text remaining largely intact.
- There would be a clear distinction between the Convention (establishing protected rights and freedoms), the Statute (establishing the Court) and the Rules of Court (regulating details of procedure).
- Drafting such a Statute would be relatively easy.

13. Arguments against included the following:

- Such a Statute would offer no advantages over introduction of a simplified amendment procedure by way of a new provision in the Convention, other than creating a separate legal instrument called "a Statute."
- Since such a Statute would have the status of a treaty, some States may be unable to accept that any of its provisions be subject to a simplified amendment procedure.

14. Other experts would prefer **dividing Section II**, by selecting provisions of a purely procedural/ organisational nature and moving them to the Statute, with provisions that contained principles or affected the rights and obligations of States and applicants remaining in the Convention.

15. Arguments in favour of dividing Section II included the following:

- The Statute would represent a "middle level" of text devoted solely to purely organisation/ procedural issues, all subject to the simplified amendment procedure.
- It may allow the Statute to have the legal status of a Resolution of the Committee of Ministers, which may avoid that some States have possible problems of amendment of the Statute through a simplified procedure.

[2] See the report of the 1st meeting, doc. DH-PS(2010)003, para. 3.

16. Arguments against included the following:
- Such a Statute would be very difficult to understand without extensive redrafting, which would be a difficult, uncertain and excessively time-consuming exercise.
- It would not allow for a clear distinction between the purpose of the three texts (Convention, Statute and Rules of Court).

Statute – choice of legal instrument

17. Most experts were in favour of a Statute contained in a **treaty**. This would allow inclusion of all of Section II of the Convention, including those provisions that concerned rights and obligations of States and applicants, or only part of Section II.

18. Arguments in favour of a Statute with treaty status included the following:
- It would give the highest normative status to provisions concerning the rights and obligations of States and applicants.
- It appeared to present no difficulties from the perspective of public international law.

19. Arguments against included the following:
- Some States may not be able to accept amendment by a simplified procedure of provisions of a Statute contained in a legal instrument with treaty status.

20. Some experts were in favour of a Statute contained in a legal instrument with the status of a **resolution of the Committee of Ministers**. This would be possible only if Section II of the Convention were divided between the Convention and the Statute, since for some States, legal obligations could only be contained in an instrument with treaty status. It was suggested that were the Statute to have such status, the simplified amendment procedure for it should be laid down in the Convention.

21. Arguments in favour of a Statute with the status of a resolution included the following:
- It may solve certain States' domestic legal problems.
- It would represent a third level of text, between the Convention and the Rules of Court.

22. Arguments against included the following:
- Provisions currently found in the Convention should and, for some States, could not be transferred to an instrument with a lower legal status.
- It was uncertain whether this approach was consistent with all member States' domestic legal orders.

Item 4: Treatment of provisions or matters not found in the Convention

23. The Committee took note of the CDDH's conclusion that Rule 39 of the Rules of Court on interim measures, the pilot judgment procedure and unilateral declaration may be suitable for "upgrading" to a Statute or the Convention but that further

consideration of possible inclusion of additional provisions of the Rules of Court could not feasibly be undertaken at present.[3] Many experts expressed their interest in also considering other Rules of Court under future terms of reference.[4]

24. The Committee noted the CDDH's suggestion that provisions on interim measures, the pilot judgment procedure and unilateral declarations could be "upgraded" directly into the Convention.[5] Most experts were in favour of including such provisions in a Statute. Almost all experts considered that the essential principles should not be subject to a simplified amendment procedure.

25. In the context of its consideration of the illustrative Model III,[6] the Committee further addressed the following issues:

(i) **Interim measures.** The great majority agreed that the Statute should contain the essential principle underpinning the Court's competence to indicate interim measures and States' obligation to abide by them and that all aspects of the issue should be addressed in a single, separate article, for clarity and visibility. Such an article should be placed in proximity to Article 16 of Statute Model III on individual applications. Many experts felt that the relevant Statute provision should also clarify the circumstances in which the Court could exercise its competence. It was suggested that the American Convention on Human Rights could provide inspiration,[7] although some felt that this might be overly restrictive and that the Court's freedom to respond to different situations should not be restricted. It was also suggested that a reasonableness criterion be included, referring notably to situations where action was interdicted when already underway. It was observed that the Court's current practice and revised Practice Direction should already avoid most such situations. Some felt that any attempt at regulating the Court's ability to exercise this competence would run contrary to the aim of increasing its ability to react flexibly.

(ii) **Pilot judgment procedure.** Again, the great majority agreed that the Statue should contain the essential principle underpinning the Court's competence to operate the pilot judgment procedure and deliver a pilot judgment and that all aspects should be addressed in a single, separate article, for clarity and visibility. Such an article should be placed in proximity to Article 29 of Statute Model III on the binding force and execution of judgments. Many felt that more than just the text of Rule 61(1) was needed, although to include all of Rule 61 would be excessive, unbalanced and inappropriate; paragraphs (2) (in its first sentence), (3) and (4) could be considered for inclusion. Others

[3] See the CDDH's Interim Activity Report to the Committee of Ministers, doc. CDDH(2011)R72 Addendum I, para. 29.
[4] See also the report of the 2nd DH-PS meeting, doc. DH-PS(2011)R2, para. 17.
[5] See doc. CDDH(2011)R72 Add. I, para. 29.
[6] Model III sets out a Statute containing the provisions currently found in Section II of the Convention and other issues not currently found in the Convention (namely interim measures, the pilot judgment procedure and unilateral declarations). See further paras. 11-14 above and doc. DH-PS(2011)002Rev.**2**.
[7] Article 63(2) of the ACHR states that "In cases of extreme gravity and urgency, and when necessary to avoid irreparable damage to persons, the Court shall adopt such provisional measures as it deems pertinent in matters it has under consideration." The suggestion made in the DH-PS would replace the word "and" with "or."

observed that the more of Rule 61 were transferred to a Statute, the greater would be the reduction in simplicity and flexibility, notably in the future evolution of the pilot judgment procedure.

(iii) **Unilateral declarations.** Again, the great majority agreed that the Statue should contain the essential principle underpinning the use of unilateral declarations and that all aspects should be addressed in a single, separate article, for clarity and visibility. Many felt that the relevant article should refer to the need for a prior attempt to resolve the case through a friendly settlement, which should generally be preferred due to the greater involvement of the applicant. It was noted, however, that unilateral declarations were preferable in some situations, such as where a State wished to resolve a large number of similar applications at once. Most were against unilateral declarations being transmitted to the Committee of Ministers for supervision of execution, since this would further over-load the latter. Many felt that reference to the Court's ability to restore a case to its list was unnecessary, since such a competence would already exist under Article 19(2) of the Statute.[8] It was suggested that a Statute provision should stipulate that unilateral declarations be confidential so that the Court, if having found them unacceptable, might not subsequently refer to them in any judgment on the merits of the case.

Item 5: The procedure for simplified amendment

26. The Committee further considered the procedure for simplified amendment itself, recalling its earlier discussions and the position of the CDDH.[9]

(i) Proposals to amend the Convention should come from High Contracting Parties or from the Court.

(ii) The decision to pursue such proposals should be taken by the Committee of Ministers by qualified majority vote in the sense of Article 20(d) of the Statute of the Council of Europe.[10]

(iii) There should be formal provision for consultation of the Parliamentary Assembly, the Court (on proposals made by High Contracting Parties) and, possibly, the Commissioner for Human Rights.

(iv) Civil society should be given an opportunity to express its views effectively, without formal provision to that effect.

(v) Draft amendments should be adopted by the Committee of Ministers by unanimity in the sense of Article 20(a) of the Statute of the Council of Europe.[11]

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[8] I.e. Article 37(2) ECHR.
[9] See docs. DH-PS(2011)R2, para. 20 and CDDH(2011)R72 Add. I, para 32 respectively.
[10] "[A] two-thirds majority of the representatives casting a vote and of a majority of the representatives entitled to sit on the Committee."
[11] "[T]he unanimous vote of the representatives casting a vote, and of a majority of the representatives entitled to sit on the Committee."

(vi) If any national law problems of certain member States remained insurmountable, there could be a period between adoption and entry-into-force during which parliamentary approval could be sought and any consequent objection raised. This approach, however, should be avoided if at all possible, since it would delay and complicate the simplified amendment procedure. In this context, it was noted that any such period should not be too short, otherwise it might incite the government to refuse to adopt an amendment, for fear that there would be insufficient time to consult the national parliament effectively.

Item 6: Organisation of future work

27. The Committee:

(i) Recalled that it would have only one further meeting at which to fulfil its terms of reference and took note that this meeting was foreseen to take place in May 2012 (precise dates to be fixed by the CDDH).

(ii) Noted that, in the light of the CDDH's Interim Activity Report,[12] it would have to review its provisional determination of which provisions of Section II of the Convention should be subject to a simplified amendment procedure and which not.

(iii) Decided to ask the CDDH, at its next meeting, to enquire further into possible problems arising from member States' domestic legal orders with the introduction and, in particular, use of a simplified amendment procedure.

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[12] See doc. CDDH(2011)R72 Add. I, para. 27.

Appendix I

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Apologies /excusé

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Apologies / excusé

Council of Europe Commissioner for Human Rights / Commissaire aux Droits de l'Homme du Conseil de l'Europe
Apologies /excusé

Conference of INGOs of the Council of Europe / Conférence des OING du Conseil de l'Europe
Apologies /excusé

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International Commission of Jurists (ICJ) / Commission internationale de Juristes (CIJ)
Apologised /excuse

International Federation of Human Rights (FIDH) / Fédération internationale des droits de l'homme (FIDH)
Apologies / excusé

European Roma and Travellers Forum / Forum européen des Roms et des Gens du voyage
Apologies / excusé

European Group of National Institutions for the Promotion and Protection of Human Rights / Groupe européen des institutions nationales de promotion et de protection des droits de l'homme
Apologies / excusé

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INTERPRETERS / INTERPRÈTES
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Appendix II

Agenda (as adopted)

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

Background documents

- Draft Annotated Agenda of the 3rd meeting of the DH-PS (19-21 October 2011)	DH-PS(2011)OJ002
- Report of the 72nd meeting of the CDDH (29 March – 1 April 2011)	CDDH(2011)R72
- CDDH Interim Activity Report	CDDH(2011)R72 Addendum I
- Report of the 2nd meeting of the DH-PS (9-11 March 2011)	DH-PS(2011)R2
- Report of the 1st meeting of the DH-PS (6-8 October 2010)	DH-PS(2010)003

Item 2: Possible national and/ or international legal problems affecting the feasibility of certain possible modalities for the introduction of a simplified amendment procedure

Background documents

- Compatibility of a possible simplified amendment procedure with domestic law: Compilation of information provided by member States (document prepared by the Secretariat)	DH-PS(2011)001
- Modalities for the introduction of a simplified amendment procedure: Possible illustrative models (document prepared by the Secretariat)	DH-PS(2011)002 REV.
- Internal Council of Europe procedure for preparation and adoption of international treaties (document prepared by the Secretariat)	DH-PS(2011)003
- Compatibility of a possible simplified amendment procedure with domestic law: Limitations of the scope of a possible simplified amendment procedure – Extract from the information provided by member States (prepared by the Secretariat)	DH-PS(2011)005
- Opinion of the Committee of legal advisers on public international law (CAHDI)	DH-PS(2011)006

Item 3: Modality for introduction of a simplified amendment procedure

Working document

- Report of the 1st meeting of DH-PS (6-8 October 2010)	DH-PS(2010)003

- Report of the 2nd meeting of DH-PS (9-11 March 2011) DH-PS(2011)R2

Item 4: Treatment of provisions or matters not found in the Convention

Background document

- Report of the 1st meeting of DH-PS (6-8 October 2010) DH-PS(2010)003
- Report of the 2nd meeting of DH-PS (9-11 March 2011) DH-PS(2011)R2

Item 5: The procedure for simplified amendment

Background document

- Report of the 1st meeting of DH-PS (6-8 October 2010) DH-PS(2010)003
- Report of the 2nd meeting of DH-PS (9-11 March 2011) DH-PS(2011)R2
- Modalities for the simplified amendment procedure itself – document submitted by Estonia

Item 6: Organisation of future work

Item 7: Other business

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