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STEERING COMMITTEE FOR HUMAN RIGHTS
(CDDH)

Draft executive summary

of the draft CDDH Report on the place of the European Convention on Human Rights in the European and international legal order

Note:

1. The present draft executive summary of the draft CDDH Report on the place of the European Convention on Human Rights in the European and international legal order in English (document CDDH(2019)37) has been elaborated by the informal *ad-hoc* group composed of interested delegations in the DH-SYSC (see document DH-SYSC(2019)R5, § 11).

2. The translation into French of this draft executive summary will be distributed as soon as possible.

3. The participants in the CDDH meetings are invited to send comments, if any, on the present Draft executive summary in the form of drafting proposals to the Secretariat (DGI-CDDH@coe.int) by **Friday 8 November 2019**.

4. The draft executive summary is submitted to the Bureau of the CDDH for consideration at its 102th meeting (13-15 November 2019) and to the CDDH for consideration and possible adoption at its 92nd meeting, together with the final CDDH Report on the place of the European Convention on Human Rights in the European and international legal order.

Draft executive summary

of the draft CDDH Report on the place of the European Convention on Human Rights in the European and international legal order

1. The “CDDH report on the place of the European Convention on Human Rights in the European and international legal order” is a response to the proposal of the CDDH that a more in-depth analysis be conducted into the subject matter. [?FN reference to Chapter V of the 2015 Report *The longer-term future of the system of the European Convention on Human Rights*]. In that respect the CDDH identified three key areas in which States could potentially find themselves facing conflicting obligations or diverging standards, with attendant risks for the credibility and coherence of the system of the Convention. These were:

(a) The challenge of the interaction between the Convention and other branches of international law;
(b) The challenge of the interaction of between the Convention and other international human rights instruments; and
(c) The challenge of the interaction between the Convention and the legal order of the European Union and other regional organisations.

The report consists of three sections, sequentially devoted to each of these challenges.

2. The report contains a careful study of the relevant caselaw of the European Court of Human Rights (“the Court”) and its development, and identifies a number of challenges and, where possible, potential solutions. However, throughout the preparation of the Report all those involved have paid careful attention to the fact that ultimately, in any given case, it will be a matter for the Court to decide on how to meet these challenges, in the independent exercise of its judicial function. The report therefore sets out in broad terms the views of States Parties (who drafted and have subsequently consented to be bound by the Convention) on these questions concerning the relationship of Convention obligations with obligations that they owe under other bodies of law. The key motivation of the report has been importance of avoiding the dangers of conflicting obligations and the fragmentation of international law in particular with a view to strengthen legal certainty for the State Parties. It is in this way intended to strengthen the Convention system.

(a) The challenge of the interaction between the Convention and other branches of international law

3. The breadth of this topic is potentially vast, but it has been broken down into four key issues.

(i) The methodology of interpretation by the Court and its approach to international law

4. This sub-section takes as its starting point the rules on treaty interpretation contained in Articles 31-33 of the Vienna Convention on the Law of Treaties (VCLT), which are broadly regarded as reflecting the rules of customary international law. The report considers how the Court has applied the VCLT rules, but also methods of interpretation which it has developed beyond the provisions of the VCLT.

(ii) State responsibility and extraterritorial application of the Convention

5. This sub-section reviews the caselaw of the Court under Article 1 of the Convention in two respects. Firstly questions of the application of the Convention to actions of State beyond its own territory. Secondly questions of when a State can be held responsible under the Convention for the acts of another actor. The sub-section reviews the relevant caselaw, bearing in mind the complexity and the sensitivity of the issues raised. Given that in these cases Article 1 serves as a threshold provision determining whether the Convention should apply or not to a given case the importance of clarity, consistency and predictability in the developing caselaw is emphasised.

(iii) Interaction between resolutions of the UN Security Council and the Convention

6. This sub-section reviews the caselaw which has raised the interaction of the Convention with decisions of the UN Security Council (UNSC) under Chapter VII of the UN Charter either to impose non-forcible measures e.g. sanctions or to authorise the use of force. The centrality of the UNSC to the system of international peace and security is also reflected in Article 103 of the UN Charter (which gives priority to obligations under the UN Charter over other treaty obligations). Thus far the Court has avoided having to uphold Article 103 over Convention obligations, by reading relevant decisions of the UNSC in such a way as to avoid finding a conflict of obligations. However, such findings should not be at the expense of the effectiveness of action taken by the UNSC in the exercise of its responsibilities under the UN Charter.

(iv) Interaction between international humanitarian law and the Convention

7. This sub-section considers the caselaw of the Court on the complex and sensitive topic of the relationship between international humanitarian law (IHL) and the Convention. The Court – notably in its decision in *Hassan* – has sought to reconcile differing provisions of these two bodies of law. The report considers whether a similar methodology is feasible in other situations, for example situations of non-international

armed conflict. It also considers the potential use of derogation under Article 15 of the Convention in this regard.

(b) The challenge of the interaction of between the Convention and other international human rights instruments

8. This section deals with the challenge of parallel obligations for Council of Europe States under the Convention and under other international mechanisms for the protection of human rights, notably the UN treaty bodies. The report seeks to illustrate the difficulties by consideration of both a number of substantive divergences and also a number of divergences on procedural questions (e.g. admissibility and interim measures). The substantive divergences considered are approaches to (i) the wearing of religious symbols and clothing (ii) the involuntary placement or treatment of persons with mental disorder; and (iii) the use of diplomatic assurances in the case of non-refoulement and the prevention of torture. Among the potential challenges identified are legal uncertainty, forum-shopping and threats to the authority of relevant human rights institutions. However, the section closes by identifying a number of possible ways of containing divergences emphasising the potential for enrichment of the law.

(c) The challenge of the interaction between the Convention and the legal order of the European Union and other regional organisations.

9. This section starts with a consideration of the relevant characteristics of the EU legal order, before tracking the history of the interaction between the Convention and EU law. There follows an analysis of the development of fundamental rights protection in EU law, and the doctrines developed by the Strasbourg Court when considering cases concerning the application of EU law. A final descriptive sub-section considers the Opinion of the CJEU in its Opinion 2/13 on the draft Accession Agreement of the EU to the ECHR. The sub-section on analysis of challenges considers a number of categories of challenge arising from the fact of two complex and parallel bodies of law under EU law and the Convention which both aim to protect individual rights. Possible solutions identified include a co-operation and dialogue between the two European Courts. The question of EU accession to the ECHR remains a treaty commitment, but further work is required to address the concerns of all parties concerned. The final sub-section of the report considers the developing interaction between the Convention and the Eurasian Economic Union.

Conclusions

10. Europe's architecture of human rights protection has been described as a "crowded house". The existence of parallel protection mechanisms may normally be a source of enrichment and enhancement of the universal protection of human rights. However, where the interpretation of the provisions in the different human rights instruments is perceived either as unclear or as inconsistent, these mechanisms also have the potential of becoming a source of uncertainty for States Parties on how to

best fulfil their human rights commitments and for individuals as regards the exact scope of their rights. This may lead to fragmentation of the international law of human rights and pose a threat both to the coherence of human rights law and the credibility of human rights institutions.

11. Legal certainty as regards the applicable rules concerning the interpretation of the ECHR, and its relationship with other rules of international law, for example on State responsibility or international humanitarian law, is of great importance for the States Parties. As the Court itself found on many occasions, as follows from Article 31 § 3 (c) of the 1969 Vienna Convention on the Law of Treaties, the ECHR cannot be interpreted in a vacuum and should as far as possible be interpreted in harmony with other rules of international law of which it forms part, including those relating to the international protection of human rights.[1]

12. In the light of significant differences between the regional and the universal systems of human rights protection, achieving absolute harmony in international human rights law is not a probability. In order to avoid a risk of fragmentation of the international legal order, the Court, just as all other systems making up the European architecture of human rights protection, should, however, strive to develop its practice while being aware of the other systems. It would be desirable if the international and regional human rights organs, be they judicial or monitoring, proceed, to the extent possible, in the direction of a harmonisation of their practice. To that end, dialogue between the different organs is one of the most powerful tools to enhance consistency in the caselaw and practice of these different organs and should be further encouraged.

13. As regards, in particular, the risk that two diverging bodies of case-law develop under the EU Charter of Fundamental Rights and under the ECHR, it is desirable that the negotiations regarding the EU's accession to the ECHR will be resumed and concluded soon.

[1] The Russian delegation regrets that the conclusions of the report do not properly reflect the challenges and solutions identified, and proposes to highlight that clarity and consistency in the application by the Court of general rules of international law on state responsibility, is of great importance for the States Parties (the full comment is reproduced in document DH-SYSC-II(2019)R7).