COUNCIL OF EUROPE CONSEIL DE L'EUROPE

Strasbourg, 27 January 2012

DH-GDR(2012)R1

STEERING COMMITTEE FOR HUMAN RIGHTS
(CDDH)

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COMMITTEE OF EXPERTS ON THE REFORM OF THE COURT (DH-GDR)

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REPORT

1st meeting

17-20 January 2012

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Summary

The DH-GDR, at its 1st meeting (Strasbourg, 17-20 January 2012), decided as follows:

- to elect Ms Inga REINE (Latvia) as its Vice-chairperson;
- to adopt a draft CDDH report on increasing the Court's capacity to process applications, for transmission to the CDDH at its next meeting (see Appendix III);
- to adopt a draft CDDH report on possible new procedural rules of practices concerning access to the Court, for transmission to the CDDH at its next meeting (see Appendix IV);
- to adopt a draft CDDH Final Report on measures requiring amendment of the Convention, for transmission to the CDDH at its next meeting (see Appendix V);
- to adopt a draft CDDH Contribution to the Ministerial Conference organised by the UK Chairmanship of the Committee of Ministers, for transmission to the CDDH at its next meeting (see Appendix VI);
- to elect the following member States to appoint experts to its drafting group GT-GDR-A: Austria, Georgia, Hungary, Poland, Romania, Serbia and Ukraine;
- to elect the following member States to appoint experts to its drafting group GT-GDR-B: France, Germany, Latvia, Russian Federation, The Netherlands, Turkey and the United Kingdom;
- that both drafting groups should elect their Chairpersons at their first meetings;
- to appoint Mr Jakub WOLASIEWICZ (Poland) as its rapporteur on gender equality.

Item 1: Opening of the meeting, adoption of the agenda and order of business and election of a Vice-chairperson

1. The Committee of experts on the reform of the Court (DH-GDR) held its 1st meeting, in plenary composition, in Strasbourg from 17-20 January 2012 with Mr Vit SCHORM (Czech Republic) in the chair. The list of participants appears at Appendix I. The agenda, as adopted, appears at Appendix II. The Committee elected Ms Inga REINE (Latvia) as its Vice-chairperson.

Item 2: New terms of reference of the DH-GDR

2. The Committee exchanged views on its terms of reference for the biennium 2012-2013, in the light notably of discussions at the 73rd CDDH meeting (6-9 December 2011).

Item 3: Increasing the Court's capacity to process applications

3. The Committee examined, revised and adopted a draft CDDH report on increasing the Court's capacity to process applications, as it appears at Appendix III, for transmission to the CDDH at its 74th meeting (7-10 February 2012).

Item 4: Possible new procedural rules or practices concerning access to the Court

4. The Committee examined, revised and adopted a draft CDDH report on possible new procedural rules of practices concerning access to the Court, as it appears at Appendix IV, for transmission to the CDDH at its 74th meeting (7-10 February 2012).

Item 5: Draft CDDH Final Report on measures requiring amendment of the Convention

5. The Committee examined, revised and adopted a draft CDDH Final Report on measures requiring amendment of the Convention, as it appears at Appendix V, for transmission to the CDDH at its 74th meeting (7-10 February 2012).

Item 6: Draft CDDH Contribution to the High-level Conference to be organised by the United Kingdom Chairmanship of the Committee of Ministers

6. The Committee examined, revised and adopted a draft CDDH Contribution to the Ministerial Conference organised by the UK Chairmanship of the Committee of Ministers, as it appears at Appendix VI, for transmission to the CDDH at its 74th meeting (7-10 February 2012). It decided that any further comments on the draft CDDH Contribution may be sent to the Secretariat (david.milner@coe.int) by Wednesday 25 January 2012. Comments received by that date would, insofar as

possible, be incorporated into a revised draft, to be distributed on Friday 27 January 2012; if not, they would be distributed in a separate document.

Item 7: Organisation of future work

7. The Committee elected experts from the following seven member States to the drafting group GT-GDR-A: Austria, Georgia, Hungary, Poland, Romania, Serbia and Ukraine. It recalled that the group was open-ended and that other member States were therefore welcome to send experts at the expense of their authorities. In accordance with the decisions taken by the CDDH at its 73rd meeting on implementation of its terms of reference for the biennium 2012-2013, the group GT-GDR-A would meet twice in 2012, during which it would conduct preparatory work on (i) a draft report 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, and (ii) a draft report for the Committee of Ministers containing an analysis of the responses given by member States in their national reports on measures taken to implement the relevant parts of the Interlaken Declaration and recommendations for follow-up.

8. The Committee elected experts from the following seven member States to the drafting group GT-GDR-B: France, Germany, Latvia, Russian Federation, The Netherlands, Turkey and the United Kingdom. It recalled that the group was open-ended and that other member States were therefore welcome to send experts at the expense of their authorities. In accordance with the decisions taken by the CDDH at its 73rd meeting on implementation of its terms of reference for the biennium 2012-2013, the group GT-GDR-B would meet twice in 2012, during which it would conduct preparatory work on draft legal instruments to implement decisions to be taken by the Committee of Ministers on the basis of the CDDH's Final Report on measures requiring amendment of the Convention.

9. The Committee decided that both drafting groups should elect their Chairpersons at their first meetings.

10. The Committee noted, in accordance with the calendar of meetings adopted by the CDDH at its 73rd meeting, the following meetings:

- GT-GDR-A: 14-16 March 2012
- GT-GDR-B: 23-25 May 2012
- 75th CDDH meeting: 19-22 June 2012
- GT-GDR-A: 12-14 September 2012
- GT-GDR-B: 10-12 October 2012
- 2nd DH-GDR meeting: 29-31 October 2012
- 76th CDDH meeting: 27-30 November 2012

Item 8: Other business

10. The Committee appointed Mr Jakub WOLASIEWICZ (Poland) as its rapporteur on gender equality.

Appendix I

List of participants / liste des participants

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INTERPRETERS/INTERPRÈTES
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Mr Luke TILDEN
Ms Chloé CHENETIER

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Appendix II

Agenda

Item 1: Opening of the meeting, adoption of the agenda and order of business, and election of a Vice-chairperson

General background documents (* documents already distributed at previous meetings)

-	Draft annotated agenda	DH-GDR(2012)OJ001
-	Report of the 73rd meeting of the CDDH (6-9 December 2011)	CDDH(2011)R73
-	Report of the 8th meeting of the DH-GDR (2-4 November 2011)	DH-GDR(2010)R8 + Appendices
-	Committee of Ministers' Resolution on intergovernmental committees and subordinate bodies, their terms of reference and working methods	CDDH(2011)012
-	CDDH Interim Activity Report on specific proposals for measures requiring amendment of the ECHR	CDDH(2011)R72 Add. I*
-	CDDH Final Report on measures that result from the Interlaken Declaration that do not require amendment of the ECHR	CDDH(2010)013 Add. I *
-	Decisions of the Committee of Ministers on the action to be taken following the Interlaken Conference & Terms of reference of the CDDH and subordinate bodies involved in follow-up work to Interlaken	CDDH(2010)002 *
-	Ministers' Deputies' Decisions on Follow-up to the 121st Session of the Committee of Ministers (Istanbul, 10-11 May 2011)	CM/Del/Dec(2011)1114/1.5*
-	Interlaken Declaration	CDDH(2010)001 *
-	Izmir Declaration	CDDH(2011)010 *
-	"Preparatory contributions" for the Interlaken Conference	H/Inf (2010) 3 *
-	"Background documents" for the Interlaken Conference	H/Inf (2010) 2 *
-	Opinion of the Court for the Izmir Conference	#3484768 *
-	CDDH Activity Report on guaranteeing the long-term effectiveness of the control system of the European Convention on Human Rights	CDDH(2009)007 Add. I *

Item 2: New terms of reference of the DH-GDR

Background documents

-	Terms of reference of the CDDH and bodies subordinate to it for the biennium 2012-2013	CDDH(2011)R73, Appendix VIII

Item 3: Increasing the Court's capacity to process applications

Working document

- Draft CDDH report on increasing the Court's capacity to process applications — DH-GDR(2011)033

Background documents

- Draft CDDH report on filtering of applications and treatment of repetitive applications — DH(2011)R8 Appendix III
- Report of the 73rd meeting of the CDDH (6-9 December 2011) — CDDH(2011)R73
- Czech proposals for modifications of the draft report — DH-GDR(2012)004
- Information on cases pending before the European Court of Human Rights (Note prepared by the Registry) — DH-GDR(2012)005

Item 4: Possible new procedural rules or practices concerning access to the Court

Working document

- Preliminary report on possible new procedural rules or practices concerning access to the Court — DH-GDR(2011)034

Background documents

- Note submitted by Switzerland and the UK on possible new procedural rules or practices concerning access to the Court — DH-GDR(2011)020
- German proposal – Amendment of Article 35(3)(b) ECHR — DH-GDR(2011)024
- Compendium of written contributions to the draft preliminary report on possible new procedural rules of practices concerning access to the Court — DH-GDR(2011)035
- Report of the 73rd meeting of the CDDH (6-9 December 2011) — CDDH(2011)R73

Item 5: Draft CDDH Final Report on measures requiring amendment of the Convention

Working document

- Draft CDDH Final Report on measures requiring amendment of the Convention — DH-GDR(2011)036

Background document

- Report of the 73rd meeting of the CDDH (6-9 December 2011) — CDDH(2011)R73

Item 6: Draft CDDH Contribution to the High-level Conference to be organised by the United Kingdom Chairmanship of the Committee of Ministers

Working document

- Draft CDDH Contribution to the High-level Conference to be organised by the United Kingdom Chairmanship of the Committee of Ministers (prepared by the Secretariat)	DH-GDR(2011)037

Background document

- Report of the 73rd meeting of the CDDH (6-9 December 2011)	CDDH(2011)R73
- Report of the Conference "2020 Vision for the European Court of Human Rights," (Wilton Park, United Kingdom, 17-19 November 2011)	DH-GDR(2012)001
- Joint NGO Comments on follow-up to the Interlaken and Izmir Declarations on the future of the European Court of Human Rights	DH-GDR(2012)002
- French views on enhancing the subsidiarity principle	DH-GDR(2012)003
- European Group of Human Rights Institutions' Submission to the DH-GDR	DH-GDR(2012)006

Item 7: Organisation of future work

Background document

- Report of the 73rd meeting of the CDDH (6-9 December 2011)	CDDH(2011)R73
- Committee of Ministers' Resolution on intergovernmental committees and subordinate bodies, their terms of reference and working methods	CDDH(2011)012

Item 8: Other business

Appendix III

DRAFT CDDH Report on
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).[1] 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"[2] (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.[3]

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 three successive months between 31 August 2011 and 30 November 2011, the total number of cases pending before a judicial formation fell, from 160,200 to 152,800. The predominant cause was a decrease in the number of cases pending before a Single Judge, which fell from 101,800 to 94,000.[4] The Registry considers this tendency to be sustainable in the long-term and now expects 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

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

[1] 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."
[2] See doc. CDDH(2010)001.
[3] See doc. CM/Del/Dec(2011)1114/1.5.
[4] The number of cases pending before a Chamber also fell but that of those before a Committee rose. *(Relevant figures etc. to be updated for the CDDH meeting in February 2012.)*

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 2010 – the latest full year for which figures are available – **139,650**[5] applications were pending before a judicial formation, 61,300 applications having been allocated to a judicial formation during that year and 41,183 decisions taken, *38,576* of which were to declare the application inadmissible or to strike it out.[6]

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.[7]

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 three months, however, a further 20,700 Single Judge decisions were taken, and the number of cases pending fell to 94,000.[8] 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;[9] and improvements in working methods, pioneered in the filtering section. (It should also be noted that the filtering section has benefited from reinforcement by around forty secondments, including twenty from the Russian Federation.) The aim is

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[5] 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.

[6] 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.

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

[8] 2010 had already seen a record 25% increase in the number of filtering decisions; in the first eleven months of 2011 alone, however, there was a 41% increase in such decisions as compared with the whole of 2010.

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

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.[10] 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 now expects to deliver 47,000 in 2011 and 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 some 20,000 of the 47,000 plus [11] prima facie admissible Chamber cases [and … Committee cases] 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 unlikely that any new filtering mechanism, given that its introduction would require

[10] 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.
[11] On 1 January 2011, there were 47,150 applications pending before Chambers.

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 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.

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 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:

(i) have to satisfy the criteria for office of Article 21 of the Convention;
(ii) be nominated by the High Contracting Parties and, possibly, approved or elected to the pool by the Parliamentary Assembly;
(iii) 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);
(iv) when appointed, discharge most of the functions of regular judges, other than sitting on the Grand Chamber or Plenary Court;
(v) 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 – 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. Proportional representation of Member States would not be necessary for this category of judge. 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:

(i) 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;
(ii) they would be flexible, as any additional judges would only be engaged if, when and to the extent necessary;
(iii) 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;
(iv) 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. 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.

21. 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.

22. 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

23. 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?

24. 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).

25. 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 and number of applicants, however, this expectation is not met, and the right of individual application is thus being undermined.

26. 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.[12]

27. 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.[13]

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

28. 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:

- 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 their attention to admissible cases.
- 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.
- More time allocated by the judge to working on a case would significantly reduce the risk of divergent case-law.
- 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.
- Each model would allow some degree of flexibility in responding to the Court's needs at a given moment in time.

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

a. The Registry

30. It has been suggested that experienced Registry lawyers should be authorised to take final decisions with regard to clearly inadmissible cases. More specifically, the

[12] 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.

[13] 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.

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.*"[14]

31. 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,[15] as is the case currently for single judges (see Article 26(3) of the Convention).

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

(i) 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.

(ii) Registry lawyers would be expected to be entirely operational straight away, which would not be the case for other options.

(iii) 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.[16]

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

(v) A minimal part of the Court's resources would be spent on clearly inadmissible cases.

(vi) In short, this approach would be the most flexible and cost-effective one.

33. 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.

[14] Cf. para. 67 of the Explanatory report.
[15] Which state is to be considered the home state, would have to be defined.
[16] This figure has been confirmed by the Registry.

b. A new type of judge

34. 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).

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

(i) The Court's decisions should be taken by judges; non-judicial staff should only do preparatory work.

(ii) 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.

(iii) 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.

(iv) 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.

(v) 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.

(vi) 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.

(vii) 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.

(viii) 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.

36. The following disadvantages have been suggested:

(i) A new category of judge would not be immediately operational.

(ii) There may be a risk of diverging practice between the filtering judges and the regular judges.

(iii) Concerns have been expressed about the budgetary consequences of this approach.

(iv) It might prove difficult to recruit judges to deal solely with *prima facie* clearly inadmissible (and possibly repetitive) cases.

(v) The case files would not necessarily be in a language understood by the judge.

c. A combined option

37. 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.

38. 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.

39. 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.*"[17]

III. Other relevant issues

40. 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.

41. 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.

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

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

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

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

D. FINAL REMARKS

I. Budget

45. 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.

46. 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.

47. 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.

48. 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.

49. 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

50. 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.

Appendix IV

DRAFT CDDH report on possible new procedural rules or practices concerning access to the Court[18]

A. Introduction

1. At the 8th meeting of the DH-GDR (2 – 4 November 2011), the German expert presented a proposal to amend the "significant disadvantage" admissibility criterion in Article 35 (3)(b) ECHR.[19] At the same meeting, the experts from the United Kingdom and Switzerland presented their joint proposals on possible new procedural rules or practices concerning access to the Court.[20] These proposals 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 or practices concerning access to the Court."[21] The Izmir Declaration makes clear that consideration should be given *inter alia* to the advisability of introducing new admissibility criteria.[22]

2. 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 three successive months between 31 August 2011 and 30 November 2011, the total number of cases pending before a judicial formation fell, from 160,200 to 152,800. The predominant cause was a decrease in the number of cases pending before a Single Judge, which fell from 101,800 to 94,000. The Registry considers this tendency to be sustainable in the long-term and now expects to be able to resolve the backlog of clearly inadmissible cases by the end of 2015. Although it remains to be seen whether the Registry's expectations will be realised, this information clearly has implications for an evaluation of the necessity of some of the proposals mentioned in this report.

B. Proposal to amend the "significant disadvantage" admissibility criterion in Article 35 (3)(b) ECHR

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

4. Article 35 (3) ECHR would then read:

> "The Court shall declare inadmissible any individual application submitted under Article 34 if it considers that:

[18] Adopted by the DH-GDR at its 1st meeting (17-20 January 2012).
[19] DH-GDR(2011)024.
[20] DH-GDR(2011)020.
[21] 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).
[22] The Izmir Declaration invited the Committee of Ministers "to initiate work to reflect on possible ways of rendering the admissibility criteria more effective and on whether it would be advisable to introduce new criteria, with a view to furthering the effectiveness of the Convention mechanism."

[…]
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~~.

Arguments in favour

5. The following arguments have been advanced in favour of the proposal:
   a. The additional safeguard requiring prior due consideration by a domestic tribunal in paragraph 3 of Article 35 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.

Arguments against

6. 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.

Other issues raised

7. 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.

C. Proposal to introduce a sunset clause for applications not addressed within a reasonable time

8. 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.[23] 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.

[23] 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.

Arguments in favour

9. 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.
   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.

Arguments against the proposal

10. 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. Final decisions should always be taken by judges, which would not be the case under this proposal. That being so, it is hard to see how preparing the judicial decisions not to deal with an application would require less work than preparing 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.

Other issues raised

11. 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.

12. 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.

13. 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.

14. 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.

D. Proposal to introduce a new admissibility criterion relating to cases properly considered by national courts

15. 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.

Arguments in favour

16. 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.[24] 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.

Arguments against

17. 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.
    b. The proposal limits the substantive jurisdiction of the Court and its competence to address gaps in 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.
    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'.

[24] 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".

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.

Other issues raised

18. 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.

19. 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.

20. 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.

21. 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).

E. Proposal to confer on the Court a discretion to decide which cases to consider

22. 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.

Arguments in favour

23. 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.

Arguments against

24. 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.

Other issues raised

25. 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.

26. 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.

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

Appendix V

DRAFT 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.[25]

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,[26] 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.

[25] See Appendix … 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).

[26] 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.

4. The present report was drawn up in time to be considered by the high-level conference on the future of the European Court of Human Rights which is being 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 be read alongside the CDDH's Contribution to this conference.[27]

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 if the Court is to remain effective and retain its authority and credibility. Amongst the various challenges, the following are specifically addressed in the present report:[28]

(i) The very large number (… in 2011) of applications made to the Court.

(ii) The very large, although recently diminished,[29] number (…, as of 31 January 2012) of applications pending before the Single Judge formation of the Court.

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

(iv) 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, please 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.

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[27] See doc. CDDH(2012)R74 Addendum II.

[28] For the overall picture of the CDDH's approach to the Convention system as a whole and the other challenges it faces, see also the CDDH Final Report on measures that result from the Interlaken Declaration that do not require amendment of the Convention (doc. CDDH(2010)013 Addendum I) and its Contribution to the Ministerial Conference organised by the UK Chairmanship of the Committee of Ministers (doc. CDDH(2012)R74 Addendum …).

[29] For further details, see para. 15.

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 inadmissible applications; and a system intended to reflect the fact that many member States' highest courts themselves require applicants to pay a fee.[30]

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.

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

(ii) 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; with (as noted above) measures to reduce or avoid such discrimination potentially involving administrative and budgetary consequences.

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, please see Appendix ….

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

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

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 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, please see Appendix ….

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. Against the proposal, it has been suggested that a sanctions system would not be in conformity with the purpose, spirit and even the letter of the Convention. Very few people engaged in abusive litigation before the Court and did not necessarily submit only "futile" applications. Such application 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, please see Appendix ….

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*.[31] 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, please see the report at Appendix ….

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.

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

29. It is 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 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, please see the report at Appendix ….

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. 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 a new filtering mechanism requiring amendment of the Convention, on the understanding that recent developments appear to suggest that such proposals need not 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. 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.

38. "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.[32] 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.

[32] See article 27 of the Convention.

39. 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).[33] 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.[34] In this respect, the proposals could be seen as relevant to increasing the Court's general case-processing capacity.

40. 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.

41. For further details, please see the report at Appendix ….

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

42. 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.

43. 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.

44. 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 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

[33] 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.

[34] "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).

fail to deter future ill-founded applications. There would be no relief of the Registry since it would remain responsible for triage.[35] 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 para. 34 above).

45. For further details, please see Appendix ….

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

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

47. In its favour, it is 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; this proposal would then provide an alternative.

48. Arguments expressed against include that it would radically change the Convention system and restrict the right of individual application by removing the right to a judicial decision. It offers a solution with respect to new application, 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.

49. For further details, please see Appendix ….

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

Extending the Court's jurisdiction to give advisory opinions[36]

50. 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:

(i) A request for an advisory opinion could only be made in cases revealing a potential systemic or structural problem (an alternative proposal would

[35] "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.

[36] 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.

limit requests to cases concerning the compatibility of domestic law with the Convention).

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

(iii) It should always be optional for the national court to make a request.

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

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

(vi) Requests should be given priority by the Court.

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

(viii) 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.

(ix) Extension of the Court's jurisdiction in this respect would be based in the Convention.

51. 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.

52. 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.

53. 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 50 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.

54. 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.

55. For further details, please see Appendix ….

C. FINAL CONSIDERATIONS RELEVANT TO DECISIONS ON THE AMENDMENT PROPOSALS

56. 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.

57. 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 …, paras …) and for a new filtering mechanism/ increasing the Court's capacity to process applications (see Appendix …, paras …). 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.)

58. 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.[37] 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.

59. 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.

60. 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.

[37] 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 VI

DRAFT CDDH Contribution
to the Ministerial Conference organised by
the United Kingdom Chairmanship of the Committee of Ministers[38]

A. INTRODUCTION

I. The role of the Steering Committee for Human Rights

1. The United Kingdom Chairmanship of the Committee of Ministers is organising a Ministerial Conference on reform of the European Court of Human Rights ("the Court"). The conference is expected to agree on a package of reform measures by means of a Declaration. The Declaration will provide the basis for decisions of the Committee of Ministers, to be adopted at its Ministerial Session on 14 May 2012. These measures are expected to include proposals for reform which will require amendments of the Convention.

2. The Steering Committee for Human Rights ("the CDDH") has been asked to provide a written contribution to this Ministerial Conference.

3. The CDDH has been closely involved in the process of reform of the European Convention on Human Rights ("the Convention") and the Court for many years, notably since the 2000 Rome Conference. In December 2009, it gave an Opinion on the issues to be covered by the Interlaken Conference.[39] Subsequently, it has contributed to the Interlaken Process by adopting a series of reports on reform issues, including a Final Report on measures that do not require amendment of the Convention.[40] Most recently and alongside the present document, it has adopted a Final Report on specific proposals for measures requiring amendment of the Convention. For the overall picture of the CDDH's position on reform of the Court and Convention system, the present document should be read alongside these two Final Reports.

II. The structure and content of the CDDH's Contribution

4. This Contribution should be understood in the context of the CDDH's vision of the purpose of the Convention system. The Convention exists to protect human rights. This is best achieved when States fulfil their legal obligations to respect the rights set out in the Convention or, where a violation has occurred, quickly and effectively resolve it at a national level. The function of the Court is to provide a binding interpretation of the Convention, and to act as a safeguard for violations that have not been remedied at the national level. For every application that it receives, however, the Court should be able to respond to it efficiently, effectively and within a reasonable time; where the Court does find a violation, the judgment should be

[38] The present document contains the text as adopted by the DH-GDR at its 1st meeting (17-20 January 2012), along with written proposals for further revision (struck out for deletions, bold for additions) received subsequently, in accordance with decisions taken at the meeting.
[39] See doc. CDDH(2009)019 Addendum I.
[40] See doc. CDDH(2010)013 Addendum I.

implemented fully and rapidly. States should ensure that the Court is needed to resolve as few applications as possible.

5. The Contribution focuses on the following five themes, which the United Kingdom intends to address in the draft Declaration that should be adopted at the Conference:

- national implementation of the Convention, including execution of Court judgments;
- the clarity and consistency of Court judgments and the nomination of candidates for judge at the Court;
- the role of the Court and its relations with national authorities, to strengthen subsidiarity;
- the efficiency and effectiveness of the Court;
- long-term thinking on the Court and the Convention.

In addition, the UK Chairmanship intends to provide the Court with political support from the Committee of Ministers for the measures it is already taking to prioritise and better manage its workload, and to provide a wide margin of appreciation to member states' authorities in its judgments.[41]

6. This contribution also deals with general issues affecting the scope of reform proposals, such as the right of individual petition and budgetary issues. In addition to the earlier CDDH reports mentioned in paragraph 3 above and the documents and sources cited therein,[42] the contents of this Contribution take account of the report of the Wilton Park Conference "2020 Vision for the European Court of Human Rights", held under the UK Chairmanship on 17-19 November 2011.[43] They also reflect a desire to seek coherence between short- and medium-term proposals, on the one hand, and a long-term vision for the Court and Convention system, on the other.

B. PROPOSALS RELATING TO THE CONFERENCE THEMES

7. The CDDH's Final Report on specific proposals for measures requiring amendment of the Convention ("the Final Report") sets out proposals for reform

[41] See the "Priorities of the UK Chairmanship" at https://wcd.coe.int/com.instranet.InstraServlet?Index=no&command=com.instranet.CmdBlobGet&InstranetImage=1955617&SecMode=1&DocId=1809496&Usage=2

[42] The CDDH recalls in particular the various relevant events held by successive Committee of Ministers Chairmanships, including the High-level Seminar on reform of the European human rights system (Norwegian Chairmanship, 18 October 2004); the Workshop on improvement of domestic remedies with particular emphasis on cases of unreasonable length of proceedings (Polish Chairmanship, 28 April 2005), along with the subsequent seminars organised by the Polish authorities in Warsaw; the Colloquy on future developments of the Court in the light of the Wise Persons' Report (San Marinese Chairmanship, 22-23 March 2007; the Regional Conference on the role of Supreme Courts in the domestic implementation of the Convention (Serbian Chairmanship, 20-21 September 2007); the Seminar on the role of government agenda in ensuring effective human rights protection (Slovak Chairmanship, 3-4 April 2008); the Colloquy "Towards stronger implementation of the Convention at national level" (Swedish Chairmanship, 9-10 June 2008); the Round Table on the right to trial within a reasonable time and short-term reform of the European Court of Human Rights (Slovenian Chairmanship, 21-22 September 2009); the Conference on strengthening subsidiarity: integrating the Court's case-law into national law and judicial practice (Chairmanship of The former Yugoslav Republic of Macedonia, 1-2 October 2010); and the International Conference on the role of prevention in encouragement and protection of human rights (Ukrainian Chairmanship, 20-21 September 2011).

[43] http://www.wiltonpark.org.uk/en/reports/?view=Report&id=712127982

measures requiring amendment of the Convention. This section of the Contribution presents those measures, along with other proposals, in relation to the five themes identified for the Ministerial Conference. The UK Ministerial Conference should further examine and, as appropriate, endorse those proposals, along with additional elements from amongst the other measures outlined below.

I. National implementation of the Convention and execution of Court judgments

8. The Interlaken Process has focused primarily on the Convention's Strasbourg-based control mechanism, with relatively little attention given to national implementation of the Convention. Effective implementation of the Convention at national level is, however, the biggest challenge the system faces today. Apart from being a legal obligation incumbent on all States Parties to the Convention and fundamental to the principle of subsidiarity, stronger national implementation would contribute greatly to relieving the Court's case-load, including notably of repetitive cases. Between 2000 and 2010, the Committee of Ministers addressed seven recommendations to member States on national implementation.[44] These recommendations are also sources of inspiration for the execution of Court's judgments.

9. The following proposals requiring action primarily by member States – some of which appeared also in the Interlaken and Izmir Declarations, whose implementation is currently under preliminary review, but all of which remain relevant and urgent – should be further considered:

(i) increasing national authorities' awareness of Convention standards and ensuring their application;

(ii) ensuring that training for public officials involved in the judicial system and law enforcement includes relevant information on the Convention and the Court's case-law;

(iii) ensuring the existence of national human rights institutions,[45] which can play a role in legal education and public information campaigns – also a responsibility of governments – as well as monitoring and reporting on national compliance with Court judgments;

(iv) improving the provision of information on the Convention – notably the scope of its protection, the jurisdiction of the Court and the admissibility criteria – to

[44] Namely Recommendations No. R (2000) 2 on the re-examination or reopening of certain cases at domestic level following judgments of the European Court of Human Rights, Rec (2002) 13 on the publication and dissemination in the member states of the text of the European Convention on Human Rights and of the case-law of the European Court of Human Rights, Rec (2004) 4 on the European Convention on Human Rights in university education and professional training, Rec (2004) 5 on the verification of the compatibility of draft laws, existing laws and administrative practice with the standards laid down in the European Convention on Human Rights, Rec (2004) 6 on the improvement of domestic remedies, CM/Rec (2008) 2 on efficient domestic capacity for rapid execution of judgments of the European Court of Human Rights and CM/Rec (2010) 3 on effective remedies for excessive length of proceedings.

[45] Such institutions should satisfy the Paris Principles relating to the Status of National Institutions: see United Nations General Assembly Resolution 48/134 of 20 December 1993.

potential applicants (see also the Secretary General's report, doc. SG/Inf(2010)23final);

(v) introducing systematic review of the Convention-compatibility of draft legislation, with reasoned government certification subject to detailed scrutiny by parliament;

(vi) introducing new domestic legal remedies, whether of specific or a general nature. The recent proposal for a general domestic remedy[46] as well as the possibility of drawing up non-binding Committee of Ministers' instruments in relation to specific areas in which existing domestic remedies are ineffective, as mentioned in the Final Report on non-amendment measures, should be further examined in the near future, notably on the basis of the CDDH's forthcoming review of national implementation of relevant parts of the Interlaken and Izmir Declarations;

(vii) ensuring review of the implementation of recommendations adopted by the Committee of Ministers to help States Parties to fulfil their obligations;

(viii) ensuring full and rapid execution of Court judgments (see further below);

(ix) taking into account the Court's developing case-law with minimal formality, with a view to considering the conclusions to be drawn from judgments finding violations of the Convention by another State;

(x) contributing to translation into national language(s) of the Court's judgments and Practical Guide on Admissibility Criteria;

(xi) contributing to the Human Rights Trust Fund.[47]

10. The Council of Europe should continue in its crucial role of assisting and encouraging improved national implementation of the Convention, in accordance with the principle of subsidiarity, as well as through the process of supervision of execution of Court judgments.

11. The Council of Europe's technical cooperation programmes should be strengthened, in particular through:

(i) increased funding;

(ii) improved targeting and co-ordination of other existing Council of Europe mechanisms, activities and programmes;

(iii) closer co-operation between the Council of Europe and the European Union in defining priorities for and implementing joint programmes;

[46] See doc. DH-GDR(2011)028. The DH-GDR decided that the proposal did not fall to be examined in detail in the context of its Final Report, since it did not imply amendment of the Convention.
[47] For further details of the Human Rights Trust Fund, see http://www.coe.int/t/dghl/humanrightstrustfund/default_en.asp.

(iv) a more country-specific approach, linking specific programmes to the execution of Court judgments (including notably pilot or other judgments revealing structural or systemic problems);

(v) considering making co-operation programmes obligatory in certain circumstances (e.g. in connection with the execution of specific Court judgments).

12. Under Articles 46 and 39 of the Convention respectively, the Committee of Ministers supervises the execution of judgments and friendly settlements, in accordance with the principle of subsidiarity. The Committee of Ministers has recently reformed its procedures through introduction of a new "twin-track" approach, in order to improve the prioritisation of cases subject to its supervision.[48] Further developments in the Committee of Ministers' supervision activities relate to introduction of effective domestic remedies; the prompt presentation, where required, of action plans on the execution of specific judgments; and targeted assistance activities including legal advice, training and information sharing.

13. The Conference could invite the Committee of Ministers to consider the following proposals that have been made in different contexts to enhance further its authority and competence, including:

(i) more discussion of strategic/ systemic issues;

(ii) accelerate the execution of pilot judgments;

(iii) inviting the relevant minister to participate in the Committee of Ministers when supervising the execution of specific judgments;

(iv) greater application of pressure~~, including in the form of sanctions,~~ ***[TURKEY]*** on States that do not execute judgments, including notably those relating to repetitive cases and serious violations of the Convention;

(v) a co-operative approach involving all relevant parts of the Council of Europe in order to present possible options to a State Party required to remedy a structural problem revealed by a Court judgment;

(vi) continuing to increase transparency of the process, to facilitate exchange of information with national human rights institutions and civil society in relation to structural problems and general measures aimed at ensuring non-repetition of violations~~;~~

(vii) ~~providing the Committee of Ministers with the assistance of an independent expert body~~. ***[TURKEY]***

14. Other proposals relating to execution of Court judgments which the Conference could consider addressing include:

[48] According to the "twin-track" approach, all cases are examined under the standard procedure unless, because of its specific nature, a case warrants consideration under an enhanced procedure. See further docs. CM/Inf/DH(2010)37 and CM/Inf/DH(2010)45 final.

(i) rigorous parliamentary scrutiny of execution of judgments;

(ii) closer involvement of the Parliamentary Assembly, including notably through its direct relations with the Committee of Ministers, its immediate contacts with national parliaments responsible for passing relevant legislation and, on its own account or through its relations with national parliaments, in calling specific governments to account on fulfilment of their responsibilities concerning execution of Court judgments;

(iii) closer involvement of the Commissioner for Human Rights;

(iv) greater involvement of other Council of Europe monitoring mechanisms (e.g. Commission for the Prevention of Torture, possibly amongst others) in supporting the Committee of Ministers' supervisory activities;

(v) governments consulting of national human rights institutions and civil society in relation to action plans on general measures.

15. Certain proposals made, notably at the Wilton Park Conference, would require the setting up of (a) new Council of Europe mechanism(s). These include the following:

(i) setting up a body or office to assist member States in implementing the Convention and finding relevant technical assistance, including in relation to execution of judgments;

(ii) introducing a system analogous to the United Nations Human Rights Council's universal periodic review, possibly in relation to execution of judgments.[49]

16. Finally, the CDDH's terms of reference for the biennium 2012-2013 require it to prepare a draft report for the Committee of Ministers containing (a) an analysis of the responses given by member States in their national reports on measures taken to implement relevant parts of the Interlaken Declaration, and (b) recommendations for follow-up. Work pursuant to these terms of reference will also contribute to enhancing implementation of the Convention at national level.

II. The clarity and consistency of judgments and nomination of candidates for judge

17. The Interlaken Declaration "stress[ed] the importance of ensuring the clarity and consistency of the Court's case-law" and invited the Court to "apply uniformly and rigorously the criteria concerning admissibility and jurisdiction". In response, the Jurisconsult of the Court, with the approval of the Court itself, issued a Note on Clarity and Consistency of the Court's Case-law.[50] The CDDH has adopted a Collective Response to the Jurisconsult's Note, which was sent to the Court's

[49] For further details, see http://www.ohchr.org/en/hrbodies/upr/pages/BasicFacts.aspx.
[50] See doc. # 3197955, 8 July 2010.

Registrar. This Collective Response may also usefully inform preparations for the UK Ministerial Conference and is therefore appended to the present Contribution.[51]

18. The clarity and consistency of judgments ~~was~~ **is *[GREECE]*** of primary importance also for their efficient execution, in particular in cases relating to important structural problems.

19. The authority and credibility of the Court depend in large part on the quality of its judges, which in turn depends primarily on the quality of the candidates that are presented by States Parties to the Parliamentary Assembly for election. The CDDH has prepared a draft non-binding Committee of Ministers' instrument on national procedures for the selection of candidates for the post of judge at the Court, accompanied by additional explanations and a guide to good practice.[52] This draft now falls to be examined and, if appropriate, adopted by the Committee of Ministers. **The CDDH invites the Conference to call upon member States to implement fully the Guidelines on the selection of candidates for the post of judge at the Court, once these are adopted by the Committee of Ministers.** *[LIECHTENSTEIN]*

20. The CDDH notes that the Committee of Ministers has already decided to review the functioning of the Advisory Panel after an initial three-year period.[53] It might also invite the Parliamentary Assembly to discuss how the work of the Panel can best interact with the Parliamentary Assembly's procedures.

III. The role of the Court and its relations with national authorities

21. The Interlaken Declaration invited the Court to "take fully into account its subsidiary role in the interpretation and application of the Convention". In response, the Jurisconsult of the Court, with the approval of the Court itself, issued a Note on Clarity and Consistency of the Court's Case-law,[54] which also addressed the issue of subsidiarity. The CDDH's Collective Response, mentioned in paragraph **17**~~26~~ above, may usefully inform preparations for the UK Ministerial Conference and is therefore appended to the present Contribution.[55]

22. As reflected in both the Interlaken and Izmir Declarations, the role of the Court and its relations with national authorities have become important issues in discussions of the future of the Court and the Convention system. This has led to various proposals:

(i) allowing the Court to give advisory opinions on request by the highest national courts in cases revealing potential systemic or structural problems, or concerning the compatibility of domestic law with the Convention. For further details of this proposal and the CDDH's position thereon, see the Final Report and its appendices;

[51] See Appendix ….
[52] See doc. CDDH(2012)R74 Addendum ….
[53] See doc. CM/Del/Dec(2010)1097bis/1.2bE.
[54] See doc. # 3188076, 8 July 2010.
[55] See Appendix ….

(ii) introducing a new admissibility criterion, relating to cases properly considered by national courts. Again, for further details of this proposal and the CDDH's analysis thereof, see the Final Report and its appendices;

(iii) introducing a procedure whereby the Court would send back to the relevant national court cases that were well-founded but had not been properly examined by national courts. The CDDH has not examined this proposal in detail;

(iv) introducing provisions into the Court's rules that would allow respondent Governments to ask for a separate decision on admissibility whenever they can demonstrate a particular interest in having the Court rule on the effectiveness of a given domestic remedy, especially in order to avoid the risk of repetitive cases;

(v) the Court developing its case-law to require that Convention rights have been raised formally in domestic proceedings, particularly when the applicant was at that stage legally represented;

(vi) that the Court in principle should not take into account subsequent developments that were not within the subject matter of the national proceedings.

23. Another issue raised in the Izmir Declaration was that of indications of interim measures made by the Court to States under Rule 39 of the Rules of Court. The Izmir Declaration recalled that the Court was "not an immigration appeals tribunal or a court of fourth instance" and emphasised that "the treatment of requests for interim measures must take place in full conformity with the principle of subsidiarity". It went on to stress "the importance of States Parties providing national remedies, where necessary with suspensive effect, which operate effectively and fairly and provide a proper and timely examination of the issue of risk in accordance with the Convention and in light of the Court's case-law". The CDDH expects to examine this latter aspect further on the basis of the national reports on implementation of relevant parts of the Interlaken and Izmir Declarations.

24. The Izmir Declaration also expressed the "expectation that the implementation of the approach outlined [therein] would lead to a significant reduction in the number of interim measures granted by the Court, and to the speedy resolution of those applications in which they are, exceptionally, applied, with progress achieved within one year [i.e. by April 2012]. The Committee of Ministers is invited to revert to the question in one year's time". The latest figures from the Court show that between 2010 and 2011, there was a very large decrease in the number of requests granted, from 1,440 to 326. Information has not been available, however, concerning the length of proceedings in cases in which the Court applied interim measures, although the Court Registrar has recently provided information that the number of applications pending in which Rule 39 has been applied had fallen from 1,553 in August 2011 to 702 in January 2012.[56]

[56] See doc. DD(2012)21, speaking notes of the Registrar at the meeting of the GT-SUIVI.Interlaken, 10/01/12.

25. The CDDH notes with interest the Court's recent development of setting clear time limits for the introduction of any effective remedies to prevent repetitive applications, which also assists the ongoing execution process.

[26. The CDDH considers that the Government Agents are a very important element in the Convention system. They not only participate in proceedings before the Court but also, in ~~the majority of~~ **some *[UNITED KINGDOM]*** States, are responsible for coordinating the process of implementation of the Court's judgments~~. They~~ **or *[UNITED KINGDOM]*** play a central role in transferring and adapting Convention standards into domestic law and practice**. They are also key interlocutors**~~, as well as~~ ***[UNITED KINGDOM]*** in the dialogue between the Court and national authorities. In this respect, the CDDH welcomes the Court's recent involvement of Government Agents in the process of drafting new Rules of Court.

27. The CDDH therefore invites the Conference to consider strengthening the status of Government Agents by creating a committee of Agents and facilitating its meetings. The situation of applicants and their legal representatives could also be considered in this perspective.]

IV. The efficiency and effectiveness of the Court

28. The Court is, and has for several years been, confronted with an enormous workload. This has resulted in very large numbers of cases pending before all of the Court's primary judicial formations[57] and, for certain categories of case, very long periods of time spent waiting for final determination *[statistics to be added on the basis of the Court's 2011 report]*. This is mainly due, on the one hand, to the very large number of applications made, and on the other, to budgetary, structural and procedural factors affecting the Court's handling of those applications, as well as to its working methods. The Final Report proposes measures both to obtain a reduction in the number of clearly inadmissible applications and to improve the effectiveness of the Court's treatment of applications.

29. The CDDH notes from the outset that the potential scope of proposals concerning the efficiency and effectiveness of the Court is closely linked to the right of individual petition. It further notes that many of these proposals also appear to have budgetary consequences, which would require examination. For further consideration of these issues, see especially Section C below.

30. The Final Report considers various proposals intended to regulate access to the Court and thereby reduce the number of clearly inadmissible applications. These include:

(i) introducing a system of fees for applicants to the Court;

(ii) making legal representation compulsory for applicants from the outset of proceedings;

[57] In other words Single Judges, Committees and Chambers, the Grand Chamber having jurisdiction only on relinquishment of a case by a Chamber or its referral following a Chamber judgment.

(iii) introducing a sanction in futile, abusive cases.

31. The Final Report also considers various proposals intended to increase the Court's case-processing capacity or to re-evaluate the requirements relating to the admissibility of applications, as well as to define further the relationship between the Court and national authorities. These include:

(i) introducing a new filtering mechanism which would increase the Court's case-processing capacity, either by giving certain Registry lawyers competence to make decisions in clearly inadmissible cases or recruiting a new category of judge within the Court to deal with them, or a combination of both; with, in the case of the options involving a new category of judge, such judges also being competent to sit on Committees;

(ii) establishing a pool of temporary judges who could be appointed for relatively short periods and would help discharge most of the functions of regular judges;

(iii) amending the "significant disadvantage" admissibility criterion, which would increase the number of cases to be declared inadmissible under Article 35 (3) (b) of the Convention;

(iv) introducing a new admissibility criterion relating to cases properly considered by national courts;[58] ***[UNITED KINGDOM]***

(v) introducing a "sunset clause" for applications not addressed within a reasonable time;

(vi) conferring on the Court a discretion to decide which cases to consider.

32. For details of all these proposals and the CDDH's analysis thereof, see the Final Report and its appendices.

33. An important contributing factor to the relative period of time a case may spend pending before a judicial formation is the priority category to which it is allocated by the Registry under the Court's recently introduced priority policy.[59] The priority policy has done much to allow the Court to focus on the most important and serious cases (i.e. categories I, II and III), but with the effect of increasing numbers of cases pending in categories IV (lowest category Chamber cases: potentially well-founded applications based on Articles other than 2, 3, 4 or 5 (1) of the Convention) and, especially, V (repetitive, Committee cases). The proposals mentioned in the preceding paragraph would seek to redress this effect.

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[58] ~~Proposals (iv) and, perhaps to a lesser extent, (v), if implemented, could be taken as amounting to first steps along the path to reforming more fundamentally the nature and role of the Court: see further at section V below.~~ ***[UNITED KINGDOM]***

[59] For further details of the Court's Priority Policy, see http://www.echr.coe.int/NR/rdonlyres/DB6EDF5E-6661-4EF6-992E-F8C4ACC62F31/0/Priority_policyPublic_communication_EN.pdf

34. The question of collective complaints or class actions has been mentioned in the past, notably at the 2009 Bled Round Table,[60] but also more recently at the Wilton Park Conference, where it was suggested that the Commissioner for Human Rights could play a role in such proceedings. The issue has not, however, since been examined by the CDDH, even to the extent of being clearly defined. The CDDH also notes that the Court seems to be developing, in addition to the pilot judgment procedure, a practice of collecting related complaints together for the purpose of treating them all in a single judgment.[61] It considers that this practice may merit further study.

35. It is necessary to distinguish between, on the one hand, measures intended to achieve a balance between the number of new, incoming applications and the numbers of judgments and decisions delivered by the Court and, on the other, measures to deal with the existing backlog of cases, that is cases which have not been decided upon within a reasonable time.

36. As far as the existing backlog is concerned, exceptional measures should be adopted as soon as possible. In this context, the Committee of Ministers could engage with the Court on how to deal with this situation, including by examining whether and, if so, to what extent this could be achieved through additional resources.

V. Long-term thinking on the Court and the Convention

37. Even if there is no clear vision at this stage of the future nature and role of the Court, it should be dealing with a far smaller case-load and delivering fewer judgments. One proposal for achieving this would be for the Court in future to focus its efforts on serious or widespread violations, systemic and structural problems and important questions of interpretation and application of the Convention. The term "constitutional" has in the past been used to describe such a court, but may not be appropriate and would in any case need further clarification in this context; however that may be, the term clearly points towards something whose functioning would be radically different from that of the current Court.

38. The recent Wilton Park Conference was intended as an opportunity to reflect in greater detail on the future nature and role of the Court. Amongst ideas that have arisen, both there and in other contexts, are the following:

(i) **filtering of applications at national level;** *[GREECE – REVERSE ORDER OF SUB-PARAGRAPHS (i) & (ii)]*

(ii) giving the Court discretion to choose which cases to consider, with the result that an application would not be considered unless the Court made a positive decision to do so (see further in the Final Report): although possibly for

[60] "The right to trial within a reasonable time and short-term reform of the European Court of Human Rights", Round table organised by the Slovenian chairmanship of the Committee of Ministers, Bled, Slovenia, 21-22 September 2009.

[61] E.g. *Gaglione a.o. v. Italy*, App. nos. 45867/07 a.o., judgment of 21 December 2010, in which 475 cases concerning excessive length of domestic judicial proceedings were determined in a single judgment; *Lopatyuk a.o. v. Ukraine*, App. nos. 903/05 a.o., judgment of 17 January 2008, in which 121 cases concerning non-enforcement of domestic court judgments were determined in a single judgment.

implementation in the long**er**-term, ***[UNITED KINGDOM]*** this idea could also be examined alongside others that imply significant amendments;

~~filtering of applications at national level;~~

(iii) the Court no longer awarding just satisfaction, particularly if it were no longer required to adjudicate on all applications made to it;

(iv) a Court with fewer judges than High Contracting Parties, elected not on behalf of a certain State, but exclusively on the basis of their professional competencies, perhaps with officials from Parties not represented on the Court performing the function of Advocates General;

(v) embedding the Court more firmly in the institutional framework of the Council of Europe.

39. The Court's existing priority policy and the "significant disadvantage" admissibility criterion introduced by Protocol No. 14 already have the effect of focussing the Court's attention towards certain types of case and away from others. However that may be, it is broadly agreed that any fundamental change of the Court's role first requires effective national implementation of the Convention.

40. Nevertheless, whilst fundamental reform of the Court may be for the long**er**-term, ***[UNITED KINGDOM]*** it is important to begin reflecting already now upon how to undertake the process of gradually achieving it. The Ministerial Conference could take decisions to this effect.

41bis. The long-term vision of the control system should include a reflection on how to allow for a more efficient and flexible process of amending the Convention in organizational matters (cf. Interlaken Declaration, para. G). It is to be noted that this reflection has been pursued by an expert committee (DH-PS) which is about to complete its terms of reference in 2012. Having regard to the modalities and difficulties already indentified in the works of the DH-PS, it seems essential to ensure that the conclusions achieved by the committee correspond with the views and preferences of State parties on this issue.

41ter. In particular, it might be necessary to adopt a new approach to the normative architecture of the system, and notably assuming that a Statute of the Court adopted by the Committee of Ministers would include organizational matters, whereas at the same time the State Parties acquire more influence on procedural solutions as stipulated in the Rules of Court.

41quar. In view of the above, the CDDH invites the Conference to take position on the modalities of introducing the simplified amendment procedure and an expected direction of further developments in this area. *[POLAND]*

C. GENERAL ISSUES AFFECTING THE SCOPE OF REFORM PROPOSALS

I. The right of individual petition and requirement that all decisions be ~~of~~ made by *[UNITED KINGDOM]* a judge

41. During its examination of the various proposals requiring amendment of the Convention, the CDDH has repeatedly been confronted with certain principles that appear to set limits to their scope, notably the right of individual petition (or application) and the requirement that all decisions be of a judge.[62]

42. The right of individual petition, as enshrined in Article 34 of the Convention gives the right to bring an application before the Court to every person, non-governmental organization or group of individuals claiming to be a victim of a violation of the Convention, regardless of the substantive merits or procedural propriety of that application.[63] The Court has described the right of individual petition as "a key component of the machinery for protecting the rights" set forth in the Convention,[64] which was recognised also in the Interlaken and Izmir Declarations. It has been suggested that extreme caution should be exercised in proposing limitations to the right of individual petition.

43. The requirement that all decisions be ~~given of~~**made by *[UNITED KINGDOM]*** a judge is often considered an integral part of the right of individual petition. Whether this requirement is in itself a right under the Convention or not, it is a feature of the current Convention system, deriving from Articles 27 to 29 of the Convention, which foresee the decision of a judge for every application. **It is generally acknowledged that the requirement for all decisions be given by a judge is essential to the effectiveness of the protection provided by the Convention system and distinguish it from every other international human rights protection mechanism.** ***[GREECE]***

43bis. ***[GREECE – SEPARATE PARAGRAPH]*** However that may be, the Convention's requirement that such a decision be given is not in practice always realised. It has been argued that the right of individual petition could be effectively maintained without the requirement to a decision of a judge in every case.

44. At the same time, they are relevant to the Court's case-load and to its capacity to deal with incoming cases within a reasonable time. Beyond a minimum of practical requirements (essentially, completion of an application form and its submission, along with supporting documents), there is no impediment to making an application, which must in turn lead to determination by a judge of the Court. This has the effect that the Court can be made aware of and given the opportunity, in accordance with its subsidiary role, to remedy human rights violations suffered by the largest possible number of victims. The other side of the coin is that it has resulted in a very large number of applications being made, the majority of which prove clearly inadmissible, whilst at the same time the number of non-urgent, potentially well-founded cases that have been awaiting a decision for many years continues to increase.

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[62] These considerations were raised, for example, in connection with the introduction of a system of fees for applicants, compulsory legal representation, a sanction in futile, abusive cases, giving certain Registry lawyers competence to issue decisions in clearly inadmissible cases or introducing a "sunset clause".

[63] The figure of 800 million, being the combined population of all States Parties to the Convention, is often cited as representing the number of individuals who could bring applications. ~~In fact, one could – at least in tenuous theory – extend this to the population of the entire world.~~ ***[UNITED KINGDOM]***

[64] *Mamatkulov & Askarov v Turkey*, app. nos. 46827/99 & 46951/99, Grand Chamber judgment of 04/02/05.

45. Moreover, the Court is obliged to render a decision of a judge on each and every one of these applications, even those with no substantive connection to Convention rights or which fail to satisfy the basic admissibility requirements of timeliness and exhaustion of domestic remedies. Whilst the Single Judge procedure introduced by Protocol No. 14 has allowed considerable increases in the Court's capacity to issue decisions on clearly inadmissible applications, the number of such applications pending has nevertheless recently exceeded 100,000. Although this figure has since fallen, both the in-flow and backlog of such applications remain excessively high.

46. The requirement for a judicial decision in every case is also relevant to repetitive cases, which fall to be decided by three-judge Committees applying well-established case-law of the Court. In most such cases, the cause of the violation is well-known and the requirements for resolving or remedying it well understood, on the basis of earlier judgments. With the Court consequently giving low priority to such cases, there are currently over 13,000 (an increase of 6,000 since 31 January 2010) of them pending before it.

47. It must be underlined that deficient national implementation of the Convention continues to contribute to the Court's case-load. Indeed, in the case of repetitive cases, it is axiomatic that the existence of such cases reflects a national failure to protect rights, remedy violations and, sometimes, execute Court judgments. Provision of effective domestic remedies, which could include general remedies, would thus help reduce the burden on the Court. It has also been suggested that a lack of confidence in domestic human rights protection mechanisms may contribute to applications being inappropriately made to the Court.

48. A key aim of the Convention is to create conditions in which the great majority of complaints are never made to Strasbourg, having been satisfactorily addressed at national level. By having to provide relief in a large number of isolated, individual cases, the system may be hindered in affording redress in cases where whole groups of persons are affected by **an** ~~the~~ ***[AUSTRIA]*** underlying structural problem. The Court's priority should be to deal rapidly and efficiently with admissible cases that raise new or serious Convention issues. Inadmissible and repetitive cases should be handled in a way that has minimum impact on the Court's time and resources. On the other hand, it has been argued that the correct response to the Court's case-load is not to introduce restrictions on the right of individual petition and/ or the ~~right to a judicial~~ **requirement that all** decision**s be made by a judge**, ***[UNITED KINGDOM]*** but to increase the Court's case-processing capacity, including through the provision of additional resources, which has inevitable budgetary consequences (see paragraphs **50-53**~~49-51~~ below).

49. In the light of the foregoing analysis, the CDDH invites the Ministerial Conference to consider the role of the right of individual petition and the requirement for a decision of a judge in the context of reflections about the long-term future of the Court.

II. Budgetary issues

50. As noted above, certain proposals have unavoidable budgetary consequences, in particular those involving recruitment of additional judges (whether for filtering or general case-processing) and/ or Registry staff (including as necessary to achieve the Court's projection of eliminating the backlog of clearly inadmissible cases by 2015). Indeed, it is unclear whether or to what extent the backlog of pending cases, before whatever judicial formation, can be resolved without additional resources.

51. Should additional judges be introduced, it would be necessary then either to decide to which of the Court's judicial formations they be allocated, or to leave that decision to the Court, according to its own assessment of its needs. This choice may have consequences for the potential competences given to such additional judges, and their competences may in turn be relevant to the appropriate level of remuneration and thus the budgetary consequences.

52. The Court's decisions and judgments are, to a greater or lesser extent, prepared by and thus dependent on the work of its Registry. It is generally accepted that the Registry is currently operating to its maximum capacity, at least under current working methods. Whether or not additional judges are introduced, it would be difficult, therefore, to achieve any significant increase in the Court's case-processing capacity without increasing the staff of the Registry. This would, of course, have budgetary consequences, unless all such reinforcements came in the form of secondments – which may not be feasible or even desirable. That said, the experience of the filtering section, even if in part due to its reinforcement by seconded national judges, shows that there may be scope for further improvements in efficiency. The Court can only be encouraged to continue to show creativity and determination in its ongoing efforts to identify and implement such improvements.

53. It is clear that the developments in the capacity of the Court and the Registry would necessarily have effects on the Committee of Ministers' capacity to supervise adequately execution. That could, as a result, imply reinforcement of the Execution Department.

III. Conclusions on the right of individual petition and budgetary issues

54. Taking sections I and II above together, it has been argued that either the Court is given additional resources; or its jurisdiction must be amended, including through introducing restrictions on the right to individual petition or the ~~right to a judicial~~ **requirement that all** decision**s be made by a judge**; ***[UNITED KINGDOM]*** or both. It is simply not sustainable, under current circumstances, for the Court to do everything that the Convention requires it to do. Whilst measures such as, for example, improved implementation of the Convention at national level or more efficient Court procedures and working methods may partially alleviate the problem, it is uncertain – or, at least, there is disagreement on – whether alone, they could ever be enough.

D. ACCESSION OF THE EUROPEAN UNION TO THE CONVENTION

55. The future role of the Court cannot be considered in isolation. Following the entry into force of the European Union ("EU") Charter of Fundamental Rights and the rapidly developing fundamental rights case-law of the Court of Justice of the

European Union, there exists a plurality of sources of human rights law in Europe, at least for the 27 EU member states. Since the Rome Conference in 2000, the CDDH has consistently called for coherent application of human rights all over Europe. Accession by the EU to the Convention will enhance such coherence, ensure full legal protection for all individuals and foster a harmonious development of the case-law of the Courts in Luxembourg and Strasbourg.

56. At its extraordinary meeting on 12-14 October 2011, the CDDH transmitted a report on the elaboration of legal instruments for the accession of the EU to the Convention, including revised draft instruments elaborated by an informal group of experts in co-operation with the EU, to the Committee of Ministers for consideration and further guidance.

57. The CDDH invites the Conference to call for a swift and successful conclusion to the work on EU accession.

E. GENERAL CONCLUSIONS

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