



# Preparatory contributions

High Level Conference on the Future  
of the European Court of Human Rights

Interlaken, Switzerland, 18-19 February 2010



**Council of Europe**  
Switzerland 2009–2010





High-level conference on

# **The future of the European Court of Human Rights**

organised in Interlaken, Switzerland,  
on 18 and 19 February 2010 by the Swiss chairmanship  
of the Committee of Ministers of the Council of Europe

## **Preparatory contributions**



**Council of Europe**  
Switzerland 2009–2010

Directorate General  
of Human Rights and Legal Affairs  
Council of Europe

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# **Memorandum of the President of the European Court of Human Rights (3 July 2009)**

**to the states with a view to preparing the Interlaken conference**

Switzerland has agreed to organise on 18 and 19 February 2010 in Interlaken, during its Chairmanship of the Committee of Ministers of the Council of Europe, a conference on the future of the European Court of Human Rights. This initiative is both unprecedented and important and it is to be welcomed.

The purpose of the conference, which will bring together state actors capable of engaging the responsibility of their country at the political level, is to reaffirm the commitment of the states to the protection of human rights in Europe. At the same time it should aim to build for the future and to establish a roadmap for the evolution of the European Court of Human Rights, an essential component of this international protection mechanism.

**The achievements of the European Convention and Court of Human Rights** The European Convention on Human Rights which was opened for signature in 1950 was the Council of Europe's first major act. It was also the first successful attempt to give binding legal effect to the ideals embodied in the Universal Declaration of Human Rights. The Convention is an international treaty which sovereign states have freely accepted. They have agreed, as expressed in Article 1 of the Convention, to guarantee the fundamental rights defined in the treaty to all those within their jurisdiction.

The Convention also sets up an international mechanism to ensure that states respect the commitments they have entered into. Since 1998 this function has been

performed by a fully independent judicial body, the European Court of Human Rights.

The right of individual petition, proclaimed in 1950, became compulsory and general in 1998. It is the cornerstone of a mechanism of collective guarantee whose reach extends to 800 million persons within the jurisdiction of the Contracting States.

The independence and impartiality of the Court and its Judges (and of its Registry) are the absolutely necessary conditions for an effective review of compliance with Convention obligations. The Court's independence and impartiality must therefore be maintained and indeed reinforced by concrete guarantees.

The Convention system and the Court have achieved remarkable success. They exert considerable influence on the rights and freedoms in the forty-seven states. As a source of inspiration their impact extends even beyond the frontiers of Europe. They have, through the process of protecting and developing rights, contributed to establishing peace and stability and to strengthening democracy, especially in countries where authoritarian regimes had given way to democracy and during the period of transition which followed the fall of the Berlin Wall.

The Court's judgments have far-reaching effects on national legal systems. At the same time the sheer number of its judicial decisions is striking. Since 1 November 1998 alone (when Protocol No. 11 entered into force), the Court has pronounced no fewer than 188 000 inadmissibility decisions and some 10 000 judgments on the merits. In 2008 it disposed of a total of over 32 000 applications, nearly 1 900 by judgment delivered and approximately 30 000 by inadmissibility decision.

<b>Current situation of the Convention and the Court</b>	Ratified by forty-seven states, the Convention, with its several additional Protocols, occupies a prominent rank in the hierarchy of legal norms applicable in those states, even if the precise level of the rank varies from state to state. While judges, lawyers, academics and the actors of civil society are now much more familiar with it, there is still room for progress.
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The Court's situation presents a somewhat mixed picture, however its case load is too heavy.

Firstly, the number of new applications has increased substantially over the last ten years (8 400 in 1999, compared with almost 50 000 in 2008), as has the number of cases pending (almost 100 000 at the end of 2008). In ten years the number of pending cases has been multiplied by ten! However, the figures vary considerably

from country to country, and not necessarily in proportion to their respective populations: 57% of the cases pending concern only four countries, and about 80% concern only 12 out of 47 states. The consequence of the volume of cases is that the length of proceedings before the Court can be excessive.

Yet applications vary enormously in nature. Broadly speaking three categories can be identified:

- The very numerous applications dismissed as inadmissible even without being communicated to the respondent state. The causes of this phenomenon need to be analysed. One of the reasons lies in the fact that many applicants are not familiar with either the substantive limits of the Convention or the procedural conditions for admissibility.
- Repetitive applications, usually well founded and reflecting a structural problem already diagnosed by the Court and found to be incompatible with the Convention.
- More isolated applications raising new questions, whose level of importance and gravity can be very different.

The Court is constantly striving to modernise and improve its methods to be able to adjudicate more cases. In recent years it has created a Fifth Section, opted in most cases to decide on admissibility and the merits at the same time, encouraged friendly settlements and accepted unilateral declarations of violations, developed the “pilot judgment” procedure, simplified the drafting of judgments and drawn up a new order for processing applications based on well-defined criteria. It is also giving thought to the just satisfaction awarded to applicants. Just satisfaction constitutes an important feature of its judgments and their effects. It has substantially improved its data processing tools and developed its Research Division.

In spite of all these efforts, the continuing increase in the volume of new cases means that there is still a large and even widening gap between the number of decisions it delivers and the number of incoming applications.

Over the last few years the member states of the Council of Europe have increased the Court’s budget significantly. However, the Court has still had to seek additional reinforcement of the Registry involving the recruitment of 225 staff over three years. Further recruitment, beyond this three-year programme, would create a situation in which the current number of Judges would be insufficient to cope with the work produced by the Registry.

Lastly, this Court is bound by numerous regulatory and bureaucratic constraints (as has often been pointed out, for example in the Wise Persons' Report to the Committee of Ministers in 2006), which hamper its efficacy, be it in the recruitment and management of its staff, its budget or even its internal organisation. One aspect of this is its lack of administrative autonomy within the Council of Europe. Another relates to the organisation of its judicial work. As amended by Protocol No. 11, the Convention makes detailed provision for the Court's judicial formations and the number of judges that compose them, which explains why another Protocol (No. 14) is necessary to change these purely judicial mechanisms. The fact that Protocol No. 14 has not been able to enter into force in its entirety has fortunately to some extent been compensated for by the decisions taken at the ministerial meeting in Madrid on 12 May 2009 (Protocol No. 14 *bis* and provisional application of certain provisions of Protocol No. 14). It is nevertheless an anomaly that such provisions appear in the Convention and not in an instrument which is easier to amend, for example the Rules of Court, adopted and amended by the Court itself.

## **What should the aims and results of the conference be?**

A conference such as is planned for Interlaken should aim to leave its mark in three different areas:

- on the political level;
- in relation to long-term goals (eight or nine years after the conference);
- with regard to short- to medium-term goals.

### **The political level**

After fifty years' existence, we now need to look to the future of the Court. To do this the relationship between the Court and the national authorities has to be defined with maximum clarity. In carrying out that exercise it is necessary to identify and respect the roles that both the national authorities and the Court must play within the Convention system. States and the Court have the same objective, namely securing the rights guaranteed under the Convention and its Protocols.

Interlaken should not be perceived merely as an opportunity to provide assistance to the Court unilaterally. It must acknowledge the sharing of responsibility between the states and the Court.

At the Conference the states will be expected to outline how they see the Convention machinery in 2020, with the amendments to the Convention which that would require. They should also indicate what alterations should be made to the system in the short- to medium-term without amending the Convention.

The states should ask themselves the following questions: what sort of Court of Human Rights do they want for the future? What sort of machinery are they prepared to finance? What should it deal with? There can be no question of modifying the substantive rights and freedoms guaranteed by the Convention; the aim is to reaffirm the principle of the right of individual application, while being fully aware that the Court cannot deal with everything in the way that it deals with it today. Yet how can that basic principle be preserved while ensuring that it remains effective, in other words that the Court can process and adjudicate with sufficient speed well-founded and in particular serious allegations of human rights abuses? At the same time it is necessary to ensure that the Court maintains the quality and the coherence of its case-law.

## The aims of the conference

### Longer term goals

**Process** It will obviously not be possible to decide on the detail of such developments at Interlaken, in particular because they are complex and require sophisticated technical studies. However, at the conclusion of the Conference it would be possible:

- to initiate the necessary studies;
- to set a deadline for bringing the changes into force, it being understood that they will almost certainly require a revision of the Convention; the deadline could be set as 2019 (the 60th anniversary of the Court, which began to function in 1959);
- to give terms of reference to the competent bodies instructing them to engage in the process of amendment of the European Convention of Human Rights.

**What Court for 2019?** The right of individual petition lies at the heart of the Convention mechanism and the Court is of the firm opinion that it must be preserved in principle. The first question to address is whether this right should be maintained in its current form or whether certain modalities should be attached to its exercise.

A second set of issues relates to what is often called subsidiarity. It is perhaps more appropriate to refer to the sharing of responsibility for the protection of human rights between national authorities and the Court.

The basic principle is that it is for the states to guarantee the Convention rights at national level and for the Court to ensure, through the examination of individual applications (or exceptionally inter-state cases), that states do indeed respect their engagements. This means that it is in the first place for the national authorities and courts to prevent or, when they fail do so, examine and put right any violation of the Convention. It also means that states must comply with the Court's case-law and make sure that judgments of the Court are adequately executed, notably by adopting the appropriate general measures and by taking remedial action in respect of cases which could give rise to similar issues. As regards the Court's role in this context, it must reject applications where the applicants have not properly exhausted domestic remedies and it should apply Article 13 of the Convention so as to ensure that states establish adequate remedies. The Court must pursue a proactive interpretation of Article 13 so as to encourage the introduction of domestic remedies. The high number of repetitive applications before the Court is an indication that the subsidiarity principle does not operate adequately.

**Developing the idea of filtering applications, as suggested in the Wise Persons' Report**

### **Long-term evolution**

No matter how much progress is made on subsidiarity, the proportion of inadmissible or manifestly ill-founded applications is unlikely to decrease. It could even increase if action to prevent violations becomes more effective and the states themselves remedy any violations found, in accordance with well-established case-law.

It is possible, therefore, that the single-judge system will not be sufficiently effective, and that it will be necessary to set up special sections, an applications division (whose role and impact would have to be studied), or another filtering body, all within the Court and under its control, the Court proper ruling only on those cases found admissible. In this respect one choice that has to be made is whether all types of cases should be examined judicially, or whether the decision in certain types of case can be delegated to legal secretaries (*référéndaires*).

**Drawing inspiration from the Court of Justice of the European Communities**

This would be a different approach to filtering, based more on a distribution of competence.

In the European Union, the Court of First Instance was added to the Court of Justice (more recently the Civil Service Tribunal has taken over some of the areas of competence of the Court of First Instance). By analogy, one could imagine a Human Rights Tribunal subordinate to the Court. For instance it could be envisaged that – without of course reverting to the pre-1998 system with the Commission and the Committee of Ministers – the Tribunal would deal with admissibility and the Court would rule on the merits.

Since reference has been made to the European Union, it should be recalled that the Union's accession to the European Convention on Human Rights may have far-reaching consequences.

**Reinforcing co-operation between national courts and the Strasbourg Court**

There is nothing to preclude studying a preliminary reference mechanism or possibly an extension of the Court's advisory competence (which is currently very limited). This could enhance the Court's constitutional role, without restricting the right of individual application.

These are just some avenues. It is expected that preparations for the Conference could throw up others.

**Short-term goals**

**Measures that can be taken immediately without amending the Convention**

What is crucial in this context is that the states acquire ownership of the Convention for the benefit of the persons within their jurisdiction. The Convention is now part of the domestic law of the states. Citizens must be able to assert their Convention rights before the national authorities. Beyond the need to establish effective remedies, which must be introduced where they do not exist, states must, with the help of the Council of Europe, take initiatives in the fields of training, translation of Strasbourg judgments, preventive action etc.

Many of the problems will be resolved if the states take the necessary preventive and corrective measures at national level (appropriate legislation, domestic remedies, execution of national judgments, solutions for the excessive length of proceedings, reopening of proceedings following Strasbourg judgments), and if they execute the Court's judgments promptly. The Court can and must help them by:

- providing human rights training, including by institutions that may be attached to the Court;
- ensuring better dissemination of the Court's case-law;
- adopting a judicial policy giving more extensive effect to Article 13, which is one of the key elements of subsidiarity and in respect of which Article 35 (the obligation to exhaust domestic remedies before bringing a case to Strasbourg) is the opposite side of the coin.

States should be encouraged to participate in certain methods or procedures initiated by the Court:

- friendly settlements and unilateral declarations;
- pilot judgments and "freezing" of cases of the same type pending a general solution.

More effective implementation at national level and application by the national courts not only have the potential to reduce the case-load. They also make it easier for the Court to maintain an appropriate distance from national proceedings in full compliance with the principle of subsidiarity.

At the conference, in addition to defining the relationship with states, it will be necessary to take steps to ensure that the Court is able to enjoy autonomy with regard to administrative and budgetary management. Steps must also be taken to meet the Court's resource needs.

It is moreover clear that other protagonists have a legitimate role to play in protecting human rights and preventing violations, including Bar associations, NGOs, academia and the media.

**Other medium-term changes**

The Report of the Group of Wise Persons to the Committee of Ministers in 2006 recommended a Statute for the Court which would extract certain provisions from the Convention and could itself be amended by a "simplified" procedure. That idea could perhaps be taken up again and given further thought. The Statute should also include provisions strengthening the independence of the judges, including their social protection. It would also be desirable to reflect upon the processes for the selection of candidates for the post of judge and for their election by the Parliamentary Assembly.

In addition, consensus could make it possible to give binding effect to the Court's judgments in respect of their interpretation of the Convention. This would strengthen the states' obligation to prevent Convention violations. It is no longer acceptable that states fail to draw the consequences as early as possible of a judgment finding a violation by another state when the same problem exists in their own legal system. The binding effect of interpretation by the Court goes beyond *res judicata* in the strict sense. Such a development would go hand in hand with the possibility for citizens to invoke the Convention directly in domestic law ("direct effect") and the notion of ownership of the Convention by the states. It will constitute a new step in the evolution of Convention law, whose effectiveness and positive consequences for all concerned should not be underestimated.

**New ideas which can be explored immediately** "Class actions" or collective applications; the Court will study the way in which such applications could operate and their possible impact.

The possibility of referral by the Court of purely repetitive cases to the Committee of Ministers and/or to the states concerned where the cases can be dealt with on the basis of well-established case-law. This is one application of the principle of a better sharing of responsibility between the Court and the states.

## Conclusions of the conference

The Conference could conclude by the following:

- by a political Declaration of commitment to the Convention system expressing a willingness to give it its second wind; this Declaration would stress the need for states to acquire the necessary ownership of the Convention (notably by establishing effective remedies, execution of the Court's judgments and recognising their interpretative authority);
- by a recommendation to the Committee of Ministers to instruct the competent intergovernmental bodies to carry out within a time-frame of one year to eighteen months a study on the long term (8-9 years) modification of the protection machinery (see above, "Longer term goals", page 9);
- by a recommendation to the Committee of Ministers on the budgetary and administrative issues.

Overall the conference would thus lay down a clear roadmap for both the immediate and the more distant future. This goal is indispensable and it is achievable.

# **Opinion of the Steering Committee for Human Rights (1 December 2009)**

## **Issues to be covered at the high-level conference on the future of the European Court of Human Rights**

**Introduction** The Ministers' Deputies have asked the Steering Committee for Human Rights (CDDH) to prepare an opinion on the issues to be discussed at the High-Level Conference on the Future of the European Court of Human Rights being organised by the Swiss Presidency of the Committee of Ministers at Interlaken, Switzerland on 18-19 February 2010.\*

The CDDH notes that it will be the only inter-governmental contribution to preparations for the Interlaken Conference. In order to allow all perspectives to be considered, it urges member states also to take active steps to consult civil society and other Court stake-holders on the issues to be addressed at the Conference.

The CDDH views its mandate as requiring it to propose a list of issues for discussion at the Interlaken Conference on the basis of a vision of how the shared responsibilities of those charged by the Convention with protecting human rights – not only the Court, but also the member states, including when sitting on the Committee of Ministers to supervise execution of Court judgments – should better be discharged in 2019 and beyond, in accordance with the principle of subsidiarity. This opinion therefore sets out (i) the background to the current situation and (ii) the CDDH's medium- and long-term vision for the Convention system, along with short-term steps to improve the situation in the interim.† When analysing the following pro-

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\* See doc. CM/Del/Dec (2009) 1064/4.3.

posals, the future accession of the European Union to the Convention must also be borne in mind.

It is important that the Interlaken Conference propose ambitious but realistic time-frames for the completion of any subsequent work, to be set by the Committee of Ministers, and that continuous evaluation of the results of measures taken be carried out. The CDDH draws attention to the need to consider these matters in combination with the human and financial resources required for such work, including to commission independent studies and/or obtain detailed information from the Court on relevant issues, as necessary.

**Background** The Court has for many years now been faced with constantly accelerating growth in the number of applications, of which there are now over 100,000 pending, and with which it has struggled to cope despite very considerable increases in resources and its own continuing efforts to streamline procedures and increase productivity. The result is that **applications to the Court are taking too long to resolve** and the **Court faces increasing difficulty** in fulfilling of its core responsibility to issue clear and coherent judgments and decisions containing authoritative interpretative guidance to the States Parties. If no decisive action is taken to solve the problem, the entire system is in danger of collapsing.

Around 90% of new applications are **clearly inadmissible**. The Court is nevertheless obliged to give a judicial response to every single one of them. Even with the new single judge formation, introduced by Protocol No. 14 and already applied with respect to certain states parties through Protocol No. 14*bis* and the Madrid Agreement on provisional application of certain provisions of Protocol No. 14, the Court will be able neither to process applications currently pending nor to respond to every new application within a reasonable time.

Around 50% of those cases that are admissible are **“repetitive applications”** raising issues that have already been the subject of Court judgments in the past but which may not yet have been resolved by the respective respondent state. They are often determined by what are little more than summary judgments, simply recalling

† Certain of the proposals contained in this Opinion derive from the earlier CDDH Activity Report on “Guaranteeing the long-term effectiveness of the control system of the European Convention on Human Rights” (doc. CDDH (2009) 007 Addendum I, 30 March 2009), which has not yet been discussed by the Ministers’ Deputies. The CDDH recalls and reiterates those proposals that are not explicitly repeated herein.

earlier judgments and awarding just satisfaction. This is neither appropriate for an international human rights tribunal nor consistent with its essential role in interpreting the Convention and ensuring subsidiary protection for violations that have not been remedied at national level.

In response to the growing number of pending applications, the Court has considerably increased the rate at which it issues judgments. The increasing complexity of many judgments, notably pilot judgments, requires enhanced dialogue and technical co-operation with national authorities, often encompassing a group of states faced with similar problems. Such developments present **new challenges for the Committee of Ministers** in discharging its responsibility to supervise the execution of judgments. The Committee now has some 8 600 judgments on its agenda, over 80% of which concern repetitive cases, yet is assisted in its task by only 27 lawyers.

This **global situation is untenable and requires urgent action**, not only to save the Court but also to reinforce the Convention system as a whole – which would have the result of relieving the burden on the Court and enhancing the effectiveness of the protection of individual rights.

**The CDDH's  
medium-  
and long-  
term vision  
for the  
Convention  
system**

The CDDH remains profoundly attached to **the right of individual application** to the Court, as contained in Article 34 of the Convention. This should remain the cornerstone of any reform, so that alleged violations that are unresolved at national level can be brought before the Court. Decisions taken at the Interlaken Conference should be consistent with effective maintenance of this right.

In order to ensure the long-term effectiveness of the Convention system, **the principle of subsidiarity must be made fully operational**. This should be the central aim of the Interlaken Conference. It implies a shared responsibility for all those charged with protecting Convention rights.

- It requires national authorities to assume their primary responsibilities under the Convention to provide effective protection for human rights and remedies for any violations, in particular those arising from situations that have already been the subject of repeated judgments of the Court.\*

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\* Notably those concerning excessive length of proceedings.

- It also requires the Court to discharge consistently its responsibility to issue clear and coherent judgments and decisions that provide authoritative guidance to national courts and other authorities on interpretation and application of the Convention, whilst acting as a safety net for cases where individual's rights were not effectively protected at home. The Court should continue to develop the way it implements the principle of subsidiarity at all stages of its consideration of an application.
- Finally, it requires member states to execute the Court's judgments fully and diligently and the Committee of Ministers to supervise the execution of Court judgments promptly and efficiently.

The present situation in many member states means that particular emphasis at European level is still needed on the protection of rights through judicial determination of individual applications to the Court. It is important, however, that the functioning of the Convention contain more incentives for full protection of rights at national level, thereby decreasing the aforementioned need for subsidiary protection by the Court.

The achievement of **equilibrium between the rates of receipt and disposal of applications** by the Court, at the lowest possible level, is also necessary to ensure the long-term effectiveness of the Convention protection system. Such an equilibrium should be pursued by both reducing the number of inadmissible and repetitive applications, including by effective application of the Convention at national level, and increasing the efficiency with which each category is processed by the Court. Whether or not equilibrium can be achieved in the long-term could prove indicative of the sufficiency of current and future reforms, whether concerning the national level or the Court, or suggest an eventual need for yet further reform. The Interlaken Conference should fix the pursuit of such stable equilibrium as one of the goals of the reform process, if possible by 2019.

In this respect, whilst entry into force of Protocol No. 14 remains indispensable to securing the Court's future, it is probably not sufficient. There is an urgent need to build upon Protocol No. 14 with further measures at all levels. As regards the Court's case-processing capacity, these include **exceptional short-term measures for dealing with currently pending cases**. The Interlaken Conference should promote such measures.

Prompt and effective **supervision by the Committee of Ministers of the execution of judgments** is important to enhancing the interpretative authority and

impact of the Court's case law. The Court's authority and the system's credibility both depend to a large extent on the effectiveness of this process. The Interlaken Conference should therefore consider how to encourage full execution of judgments by respondent states and efficient supervision by the Committee of Ministers.

In the longer term, there lies the possibility that the Court might one day develop to have some degree of power to choose from amongst the applications it receives those that would receive judicial determination. The time is not yet ripe, however, to make specific proposals to this end.

**The shared responsibility to strengthen subsidiarity** should be the **central, cross-cutting theme for the Interlaken Conference** and has been taken as the underlying theme of this opinion. The CDDH thus proposes that the Interlaken Conference should address all aspects of the Convention system, namely implementation at national level, the situation of the Court and execution of judgments and the supervision of execution, with a view to further, detailed work on them being undertaken thereafter.

<b>Implementation of the Convention at national level</b>	The Interlaken Conference should decide that further action be taken to improve implementation of the Convention at national level in the following areas.
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**Enhancing national authorities' knowledge and understanding of the Court's case law**, notably through the following measures:

- exploring the need to enhance, through legislative and practical measures, the capacity of national legal systems to give effect, as appropriate, to the Court's case law and improve the interaction between national and European levels;
- recognising the interpretative authority of the Court's case law as having potential effects on the national legal order of states other than the Respondent in the case;
- ensuring review of implementation of the recommendations to member states adopted by the Committee of Ministers as part of the 2004 reform package.\*

**Expanding the forms of collaboration with the Court**, including by:

- considering the introduction of a system whereby national courts may apply to the Court for advisory opinions on legal questions relating to the interpretation of the Convention and its Protocols;
- making greater use of third-party interventions.

**Improving domestic remedies**, by:

- introducing a general human rights application/ remedy; and/ or
- ensuring a comprehensive system of remedies for violations in all different types of situations.

**Strengthening the Council of Europe's accompanying mechanisms**, by recommending:

- improved targeting and co-ordination of the activities of existing mechanisms, including the Committee of Ministers, the Venice Commission, the Secretary General's powers under Article 52 of the Convention, which could be more actively used, and the Commissioner for Human Rights;
- in the light of the potential for enhancing existing mechanisms, consideration of the possible need for a new mechanism to assist member states in better applying the Convention.

**The situation  
of the Euro-  
pean Court of  
Human Rights**

The Interlaken Conference should decide that further action be taken to improve the functioning of the Court in the following areas.

Encouraging the Court to increase the **clarity and consistency of its case law**, notably in relation to:

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\* Namely Recommendation No. R (2000) 2 on the re-examination or reopening of certain cases at domestic level following judgments of the Court, Recommendation Rec (2002) 13 on the publication and dissemination in the member states of the text of the ECHR and of the case-law of the Court, Recommendation Rec (2004) 4 on the ECHR in university education and professional training, Recommendation Rec (2004) 5 on the verification of the compatibility of draft laws, existing laws and administrative practice with the standards laid down in the ECHR and Recommendation Rec (2004) 6 on the improvement of domestic remedies.

- uniform and rigorous application of the criteria concerning admissibility and the Court's jurisdiction, in order to ensure legal certainty;
- consistent application and interpretation of substantive Convention provisions;
- giving sufficient legal reasoning and detail in judgments, in particular to allow resolution of underlying systemic problems;
- just satisfaction, at the same time evaluating the extent to which the levels of just satisfaction act as an incentive to applicants.

Encouraging the Court to **take full account of its subsidiary role** in the application of its procedures and interpretation of substantive Convention provisions.

Examining the possibility of a **simplified procedure for amendment** of certain provisions of the Convention relating to the operating procedures of the Court on the basis of a decision of the Committee of Ministers, initially established by way of a Protocol, which may, for example, be achieved through:

- a Statute for the Court, established at a legal level between the Convention and the existing Rules of Court; and/ or
- a new provision in the Convention similar to that found in Article 41 (d) of the Statute of the Council of Europe setting out a simplified procedure for amendments of certain articles.\*

Assessing the need for a new mechanism to **filter applications**, going beyond the single judge procedure, with possible alternatives including:

- a new, separate body of judges within the Court, responsible for filtering;
- additional judges appointed to the existing bench;
- the discharge of certain judicial powers by members of the Registry;
- at least in the short-term, until other solutions can be implemented, a rotating pool of judges taken from the existing bench.

More effective handling of **repetitive cases**, through measures such as:

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\* See also Article 26 (2) of the Convention on the size of Chambers of the Court, as it would be amended by Article 6 of Protocol No. 14.

- setting out clear and predictable standards for the pilot judgment procedure as regards selection of applications, the procedure to be followed and the treatment of adjourned cases;
- evaluating the effects of application of the pilot judgment and similar procedures;
- considering whether repetitive cases should be handled by a new body, whilst noting that the Committee of Ministers would in many respects not be equipped to take on such a role;
- should it be set up, consider conferring the task on the new, separate body of judges within the Court responsible for filtering (see above, "A new separate body of judges", page 21).

Encouraging measures allowing **rapid disposal of certain types of case**, such as:

- where there has been no friendly settlement, respondent states making greater use of unilateral declarations, thereby allowing the Court, in view of the concessions or undertakings given by the state, to strike the application out of its list under Article 37 (1) of the Convention;
- full effect being given by the Court to the new admissibility criterion contained in Protocol No. 14, once in force;

in addition to the paragraph above, the Court developing its interpretation *à droit constant*\* of certain procedural provisions of the Convention, for example of Article 37 (1) (c) in such a way as to give effect to the rule *de minimis non curat praetor*.†

Consider introducing **incentives to reduce the number of clearly inadmissible applications**, for example by:

- providing objective information to potential applicants on the Convention and the Court's case law, in particular on the admissibility criteria and application procedures;
- introducing a system of fees for applicants to the Court, without deterring well-founded applications.

Measures to maximise the **functional capacity of the Court's judicial and Registry personnel**, notably through:

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\* I.e. without amendment of the Convention.

† The judge is not concerned by trivial matters.

- ensuring full satisfaction of the Convention's criteria for office as a judge of the Court, along with transparent and rigorous selection procedures at national and European levels, so that, as well as knowledge of public international law and the national legal systems and proficiency in at least one official language, the Court's composition comprises the necessary practical legal experience;
- secondment of national judges and, where appropriate, other high-level independent lawyers to the Registry of the Court, which would also contribute to interaction between the national and European levels.

**Execution of judgments and supervision of execution**

The Interlaken Conference should decide whether to undertake a review of the system of **execution of Court judgments and its supervision by the Committee of Ministers**, including in the following areas:

- reflecting on the key question of whether the current system for supervision of execution of judgments is the best possible;
- adapting the Committee of Ministers' working methods and rules for supervising execution to present-day realities, so as to enable it to focus in plenary on cases requiring its collective involvement;
- assessing the adequacy of resources devoted to the Committee of Ministers' work on supervising execution in the light of its workload;
- enhancing dialogue and technical co-operation activities between national authorities and the Execution Department in support of the Committee of Ministers' work;
- developing the emerging practice of interaction between the Committee of Ministers and the Court in relation to the pilot judgment procedure;
- considering whether and how to extend the Committee of Ministers' role to include also supervision of unilateral declarations, notably those containing general measures;
- ensuring full implementation of Committee of Ministers' Recommendation CM/Rec (2008) 2 to member states on efficient

domestic capacity for rapid execution of judgments of the Court.

**Final  
comments**

The CDDH also underlines that work following the Interlaken Conference should be informed by a thorough **examination of the results of introduction by the Court of the two new procedures** found in Protocol No. 14*bis* and the Madrid Agreement on provisional application of certain provisions of Protocol No. 14. It expresses the hope that there will be certainty about entry into force of Protocol No. 14 by the time the Interlaken Conference takes place, so that the first effects of the package as a whole can be assessed as part of the post-Interlaken process.

## **Memorandum of the Commissioner for Human Rights (7 December 2009)**

in view of the high-level conference on the future of the European Court of Human Rights (Interlaken, Switzerland, 18-19 February 2010)

### **Prevention of human rights violations is necessary through systematic implementation of existing standards at national level**

The Commissioner wants to contribute to a successful outcome of the Interlaken Conference. It is essential that the 47 member states of the Council of Europe reaffirm their commitment to the protection of human rights and that a roadmap for the evolution of the European Court of Human Rights (the Court) is established.

The Commissioner has been following closely the impressive casework of the Court which has been accompanied by mounting pressure on this institution, whose annual judgments between the years 2000 and 2008 increased from 695 to 1 543. Despite the invaluable guidance that the Court, through its judgments and decisions, has been providing to member states for half a century, this has not led to a decrease of applications before this institution which is regarded by all people in Europe as their *ultimum remedium*. The Court's rising caseload, with the number of pending cases in October 2009 amounting to around 115 000, is of deep concern to the Commissioner. Moreover, in over 81% of the judgments delivered since 1959, the Court has found at least one violation of the Convention by the respondent state.

At the same time, the Commissioner has noted with concern that approximately 50% of the admissible cases are "repetitive applications", i.e. cases raising issues that

have already been the subject of Court judgments in the past, and which normally should have been resolved by the respondent member states.

The fact that 90% of new applications before the Court are clearly inadmissible or manifestly ill-founded appears to indicate serious deficiencies in the provision of information on the European Convention on Human Rights (the Convention) and the Court's procedures.

The above situation confirms that there is a serious gap of systematic implementation by states of their undertakings under the Convention, as interpreted by the Court's judgments which, in turn, require a prompt, full and effective execution by member states so that recurrence of similar violations is prevented. Despite the significant progress made, effective embeddedness of the Convention's standards in European states' domestic law and practice is far from being attained.

The Commissioner wishes to stress that the credibility of the Council of Europe human rights standards ultimately depends on whether they are made effective in practice by the member states. This requires a systematic approach at national level for the prevention of violations and implementation of the agreed-upon standards. This is the focus of the present memorandum.

The fundamental importance of prevention of violations at national level has been stressed by the Steering Committee for Human Rights (CDDH) in its Final Activity Report on Guaranteeing the long-term effectiveness of the European Court of Human Rights, adopted on 8 April 2004. In this Report, the CDDH noted, *inter alia*, the need of reviewing in a regular and transparent manner the implementation of the five relevant Committee of Ministers Recommendations which the Commissioner considers to be of utmost importance.\*

The Commissioner recommends that member states give effect to and supervise systematically the implementation of these five CM Recommendations which are complemented, in fact, by the CM Recommendation (2008) 2 on efficient domestic capacity for rapid execution of the Court's judgments.

In this context, the Commissioner considers imperative the translation by member states of all leading judgments of the Court into their national language so that domestic courts understand important Convention principles when they apply the

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\* Rec (2000) 2 on the re-examination or the reopening of certain cases at domestic level following judgments by the Court, Rec (2002) 13 on the publication and dissemination in the member states of the Convention and of the Court's case law, Rec (2004) 4 on the Convention in university education and professional training, Rec (2004) 5 on the verification of the compatibility of draft and existing laws and administrative practice with the Convention standards, Rec (2004) 6 on the improvement of domestic remedies.

law. This practice would also facilitate and enhance the effective verification of the compatibility of draft and existing domestic laws and administrative practice with the Court's evolving case-law and standards.

There is no doubt that much more energy has to be directed towards the implementation of the European human rights standards, given the inherently subsidiary nature of the European human rights protection system which can in no way act as a long-term substitute for the national systems.

In order to bridge the implementation gap, governments need to work out promptly a systematic and holistic strategy that would ensure within their jurisdiction the full realisation of the European human rights treaties, starting of course with the Convention and the Court's case-law.

In this context the Commissioner notes that the Convention (through the Court) is not a solo player. Rather, it is complemented by other major European human rights treaties, such as the Revised European Social Charter, the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, and the Framework Convention for the Protection of National Minorities. The effective implementation of these treaties should also be given priority since they are in effect complementary to the Convention. They all belong to the European human rights protection system.

Any exercise of systematic implementation by member states of the Convention standards should be holistic. This implies systematically taking measures for the domestication of the standards contained in the other major Council of Europe human rights treaties as well. Reinforcement of the valuable work of the existing independent monitoring bodies of the Council of Europe should also be seriously considered. The idea of systematic human rights work by states is not novel. However, it has been underestimated and insufficiently explored. The Commissioner believes that the High-Level Conference in Interlaken is the right moment and place to re-launch and reinvigorate this idea in co-operation with all Council of Europe member states.

Already in 1993, the World Conference on Human Rights had expressed concern about the gap between the agreed norms and the reality in a number of countries. It recommended that all governments should produce a national plan for the implementation of their human rights obligations. Sixteen years have passed since that conference in Vienna, but only few countries have produced national plans. Several member states, however, are now in the process of developing such plans.

Even though there is no universal formula to be given to states in order to systematise their work of effective implementation of human rights standards, the Commissioner has laid down a number of practical guidelines\* addressed to member states which he deems useful to reiterate on the present occasion.

It is advisable to start systematic human rights work with a national baseline study giving a broad and accurate picture of the current human rights situation in a particular country. A thorough evaluation of existing policies and practices and recognition of problematic areas is key to effective human rights implementation. The status of domestic implementation of the core international and European human rights treaties, such as the Convention, should form a necessary part of the national baseline studies. In this regard, the Commissioner highlights the need that the Court's leading judgments, irrespective of the country in respect of which they have been rendered, form part and parcel of all national baseline studies.

The second major step should be the development of a national human rights action plan to address the human rights challenges identified in the baseline study. Such plans should contain concrete activities and indicate the authorities responsible for their implementation. The activities should be coupled with time-frames and benchmarks for follow-up and evaluation. International reporting obligations should be integrated into the process.

During all these processes states should involve all stakeholders, including National Human Rights Structures (NHRs), civil society and representatives of disadvantaged groups of people. Such an inclusive and participatory approach will contribute to the legitimacy of the plan, create shared ownership and make implementation effective. All communication with NHRs and civil society representatives must be conducted with full respect for their integrity and independence.

The implementation of action plans should be reviewed in a regular way and there should be independent evaluation of results upon their completion. It is equally important to assess the process, in terms of participation, inclusiveness and transparency, as it is to evaluate the end result.

States should ensure high-level and long-term support for the action plans through the active involvement of politicians and the leadership of the authorities and agencies responsible for the plan's implementation. Action plans stretching over national

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\* See also Commissioner's Recommendation on systematic work for implementing human rights at the national level, CommDH (2009) 3, 18/02/2009.

and local elections should be discussed and/or adopted by the parliament to ensure continuity.

Equally important is that the human rights work planning is co-ordinated with the budgetary process to secure proper funding for human rights work. It is necessary to review budget proposals from a human rights perspective to inform politicians of the consequences of their decisions and to hold them accountable.

It is also a significant part of this policy to integrate human rights into the ordinary work of the public administration and to ensure effective co-ordination and co-operation between the authorities at all levels by setting up networks or other fora for the exchange of experiences and information, discussions and planning.

Fostering a human rights culture through the full integration of human rights in education and training as well as through awareness-raising is another major building block. It is essential that concrete and accessible language is used in all human rights education. Curricula and teaching materials should be reviewed and participatory learning methods should be applied to this effect. The needs of public officials and other professionals who deal with the human rights of others should be assessed, systematically and on a permanent basis, to ensure that they have a thorough and up-to-date knowledge of the international standards relevant to their field of competence.

It is also necessary to set up adequate systems for data collection and analysis, including data on disadvantaged groups of people. Collection of sensitive data should be voluntary and accompanied by proper safeguards to prevent the identification of individuals belonging to a particular group. Official data should be complemented with relevant information from NHRs and NGOs.

Local authorities should be encouraged to develop comprehensive local baseline studies, action plans or similar documents ensuring regular review of the local situation and co-ordinated efforts to address human rights challenges. Adequate systems should be established for monitoring the provision of health care, education or social services, whether provided by private or public actors, using the rights-based approach. The experience of the Council of Europe Congress of Local and Regional Authorities may be of great value in this context.

Last but not least, states should review the mandates of NHRs to make sure that they comply with the Paris Principles.\* States should ensure that NHRs have adequate resources to fulfil their role in systematising human rights work. Consideration should be given to establishing such institutions at the regional or local level to facilitate easy access for those whose rights may have been violated. NHRs, if adequately

resourced, may also facilitate the establishment of national systems of information on the Convention and the Court's procedures and make this information easily accessible for every interested individual.

The above is certainly not an easy task. For the implementation of the systematic human rights work there is one basic prerequisite: the member states' determination to work much harder to invest in the maintenance and further realisation of the effectiveness of human rights and fundamental freedoms on this continent. The Commissioner invites all member states to do so urgently.

During its more than ten years of work, the Office of the Commissioner, as an independent and impartial institution of the Council of Europe, has proven that it can play a catalytic role in the prevention of human rights violations by acting flexibly and rapidly, promoting awareness of the Council of Europe human rights standards as well as their implementation, especially the standards enshrined in the Convention, as interpreted by the Court.

One of the Commissioner's major objectives under his mandate is to identify possible shortcomings in the law and practice of member states concerning the compliance with human rights as embodied in the instruments of the Council of Europe, starting with the Convention, as well as to promote the effective implementation of these standards by member states and to assist them, with their agreement, in their efforts to remedy such shortcomings.

The Commissioner acts in fact as a bridge between the Council of Europe and its member states. He always stands ready to provide his good services and engage national authorities in discussions concerning, for example, legal and other reforms that may be necessary in order to give full effect to the Convention standards, i.e. the Court's case-law. Certainly much more work is necessary in order to bridge the gap of implementation by member states of these standards.

Over the past decade the Commissioner has established a fluid, constructive dialogue with all member states. His continuous efforts and input in all major human rights issues have been appreciated by the member states. The effective implementation of the Convention and other major treaty standards by all states in Europe remains on top of the agenda for the Commissioner's numerous country visits every year.

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\* The "Paris Principles" on national institutions tasked to promote human rights were endorsed by the UN General Assembly already in 1993. These principles apply to the different human rights structures which may coexist in various countries: ombudsmen, human rights commissions or institutions, equality bodies and other more specialised structures.

While the Commissioner has continued to provide his guidance and input to member states it is beyond doubt that the very limited resources available to his Office have stretched far beyond their capacity. The Commissioner's achievements up until now have created new expectations which he strives to meet. This will be feasible on condition that his Office and staff are properly reinforced.

The times ahead of all institutions involved in the European system of human rights protection will not be easy. Human rights are not a quick fix. Decisive steps towards a rights-based Europe require a lot of investment by all parties concerned.

Prevention of human rights violations is the keyword and systematic human rights work by states may indeed bridge the gap between human rights standards and reality. The Commissioner calls upon all member states present at the Interlaken Conference to commit themselves to initiating and/or implementing systematic work for implementing human rights at national level. Protection of human rights in Europe should, one day soon, start and finish at home.

## **Joint NGO appeal (7 December 2009)**

### **Human rights in Europe: decision time on the European Court of Human Rights\***

The system for the protection of human rights in Europe is under scrutiny. States are examining the European Court of Human Rights. At a conference in February 2010 they will take decisions which could bring welcome reform to relieve the Court's backlog of cases. Conversely, the decisions taken could undermine a body that has provided redress for the victims of human rights violations in Europe for 50 years.

People in Europe (future applicants to the Court) have an interest at least equal to that of the states in ensuring the long-term effectiveness of the Court. States should therefore inform the public about the debates and consult civil society in the lead-up to the Conference and throughout the reform process which follows it.

47 states in Europe have agreed to be bound by the European Convention on Human Rights. States' respect for the Convention rights of some 800 million people is monitored primarily by the European Court of Human Rights, based in Strasbourg. The Court makes binding judgments in cases where individuals claim that their Convention rights have been violated and that the state has not granted redress. The implementation of the Court's judgments is supervised by the Committee of Ministers, representing all 47 Council of Europe states.

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\* Document produced by Amnesty International, the Aire Centre, European Human Rights Advocacy Centre, Human Rights Watch, Interights, the International Commission of Jurists, Justice, Liberty and Redress.

## What we want

Enhanced respect for human rights by the 47 Council of Europe member states must remain the priority – in more than 80 per cent of its judgments, the Court has ruled that the European Convention on Human Rights had been violated. If states complied with their clearly established obligations under the Convention, the number of applications to the Court would be significantly reduced.

The Court faces difficult challenges in light of its resources, as a result of the enormous number of individual applications being lodged (nearly 50 000 application forms in 2008), coupled with the backlog of cases pending before it (more than 110 000).

The European Court of Human Rights must be a strong Court, accessible to individuals claiming violations of their Convention rights when they have had no effective redress domestically. It should be a Court which will give a reasoned decision on whether a case is admissible, or a reasoned judgment on the merits of a case, without undue delay. The Court should be given the resources by states to function properly, and not at the expense of other Council of Europe human rights mechanisms.

## What changes are needed?

**National human rights protection** States must take concerted action to ensure greater respect for human rights and must provide effective domestic remedies when rights are violated.

Better implementation of the Convention at national level would mean greater respect for human rights throughout Europe and would reduce the need for individuals to apply to the Court for redress. Fewer cases would be sent to the Court if states implemented the Court's judgments by providing effective remedy and reparation and by taking steps aimed at ensuring the violation is not repeated, and if states implemented not only judgments against them, but also standards developed in all relevant judgments against other states. There would also be fewer cases brought about issues on which the Court has already clarified how the Convention should be applied (half of the Court's judgments in the past 50 years are on "repetitive" cases).

**Reform of the Court** Any reforms to the European Court of Human Rights should ensure that:

- the fundamental right of individual petition is preserved and not further curtailed;
- there is an efficient, fair, consistent, transparent and effective screening of applications received, to weed out the very high proportion (around 90 per cent) of applications that are inadmissible under the current criteria;
- judgments are given within a reasonable time, particularly in cases where time is of the essence, or that raise repetitive issues where the Court's case law is clear and those that arise from systemic problems;
- the Court is given adequate financial and human resources, without adversely impacting the budgets of other Council of Europe human rights mechanisms and bodies;
- solutions to the problems faced by the Court, including the varied reasons for inadmissible applications, are devised on the basis of informed analysis, transparent evaluation of both the root of the problems and recent and future reforms.

**The Committee of Ministers** The role of the Committee of Ministers in supervising states' implementation of the Court's judgments needs to be strengthened, not weakened.

Its methods should be further developed and, when needed, the political pressure of the Committee must be brought to bear. The Department for the Execution of Judgments, which assists with this task, urgently needs reinforcement.

What is needed is political will. Political will by the 47 Council of Europe states to respect the European Convention on Human Rights, to ensure effective domestic remedies for violations of Convention rights, to implement and ensure the implementation of the Court's judgments and to adequately resource the European Court of Human Rights and the Department of Execution of Judgments. We note the recent Opinion by the Committee of Ministers' Steering Committee for Human Rights, the reflections of the Court's President and earlier proposals by the Group of Wise Persons and Lord Woolf.

<p>We support proposals:</p> <ul style="list-style-type: none"> <li>• to help potential applicants to the Court to be better informed about admissibility criteria;</li> <li>• aimed at ensuring better implementation of the European Convention on Human Rights by states, such as improving domestic remedies or establishing effective ones where none exist; ensuring translation and dissemination of the Court's case law and the screening of legislation for compliance with the Convention; and involvement of both national Parliaments and human rights institutions in this endeavour;</li> <li>• guaranteeing a high standard of expertise and independence of the Court's judges, selected in inclusive, comprehensive and transparent processes;</li> <li>• to address the case backlog effectively through short-term measures;</li> <li>• to enhance resources and methods related to the Committee of Ministers supervision of implementation of judgments</li> </ul>	<p>We oppose proposals:</p> <ul style="list-style-type: none"> <li>• that would undermine the accessibility of the Court such as charging applicants fees, or adding new, more restrictive admissibility criteria. Lack of funds should never be an obstacle for bringing an application before the Court;</li> <li>• that would give the Court discretion to decide on which admissible cases it renders judgment;</li> <li>• that would lessen the powers of the Committee of Ministers and the Department of Execution of Judgments to supervise the implementation of Court judgments.</li> </ul> <p>Further reflection is needed to address concerns about proposals:</p> <ul style="list-style-type: none"> <li>• to permit national courts to request Advisory Opinions from the European Court of Human Rights;</li> <li>• to simplify the procedures for amending Convention provisions relating to the Court's operating rules and procedures.</li> </ul>
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## **Contribution of the Secretary General of the Council of Europe (18 December 2009)**

to the preparation of the Interlaken conference

### **The importance of the Convention and the Court**

The European Convention on Human Rights will celebrate its 60th anniversary next year. The European Court of Human Rights has already passed 50 and in 2019 – a date recognised as significant by the Swiss authorities when organising this Conference – will celebrate the 20th anniversary of the single court created by Protocol No. 11, which ensured a judicial decision for every application. These are **milestones** in the history of European human rights protection and the creation of a common European legal space.

But the Convention and Court are not only of historical importance. They remain **cornerstones** of our democratic societies and of vital importance to the 800 million Europeans for whose benefit they exist. They are a **unique achievement**, of which our member states can rightly be proud, and a beacon to the rest of the world. They give substance to Europe's moral authority.

The Convention has now been **incorporated** into the legal orders of every member state – and also, in due course, will be incorporated into that of the European Union, which has undertaken to accede to it – and represents an essential thread running through the fabric of our common values. But the Convention is not merely of symbolic significance. Every year, the Court issues thousands of judgments and decisions on admissibility. The great majority of judgments find **violations** of the fundamental rights that the states Parties to the Convention have undertaken to respect. In 2008, these included violations of the right to life and of the prohibition

of inhuman and degrading treatment and punishment. Such extremely serious abuses affect disproportionately the most vulnerable, such as minorities, migrants, military conscripts and prisoners. The Court is not only addressing “headline” violations, however; it is also identifying and helping all states Parties to resolve serious structural problems that affect the functioning of their basic public institutions, for example the failure of judicial systems to determine cases in good time or see their decisions executed promptly. These are not only matters of principle and individual concern – they are fundamental to the economic and social life of our member states.

The Court, as the key organ of the Convention's control mechanism, is also an essential part of the Council of Europe. The relationship between the Court and other Council of Europe bodies is **symbiotic, interdependent and mutually reinforcing**: they all need each other. When it comes to human rights protection in Europe, one cannot separate the importance of the Court from that of the Council of Europe as a whole.

**How the  
Convention  
system  
should  
function**

There is an important collective dimension to the Convention system. It is reflected in the common and objective legal norms contained in the Convention and in its collective enforcement machinery, referred to in the preamble, which includes the Committee of Ministers' role in supervising execution of judgments.

There is therefore a **collective responsibility** to solve the problem facing the system. The States Parties, the Court, the Committee of Ministers and I myself as Secretary General must all play our part, on the basis of our respective roles under the Convention and, when it comes to the allocation of resources and the co-ordination of activities within the Council of Europe, the Statute. In doing so, however, we must remember the *raison d'être* of the Convention: enforcement of states' obligation to secure individual human rights. The right of individual petition remains essential to the Convention system.

The Convention system is built around the **principle of subsidiarity**. This means that the **States Parties have the primary responsibility** to respect human rights, to prevent violations and to remedy them when they occur. Ideally, the number of violations would be minimal and domestic remedies would exist for those that occurred. The Court could then concentrate on ensuring correct and consistent interpretation of the Convention, with applications made only for challenging domestic authorities' interpretations. We have not yet reached this situation, how-

ever; in many states, application of the Convention is insufficiently entrenched to avoid large numbers of well-founded applications being made to Strasbourg. Whether because of unresolved systemic problems of incompatibility with Convention provisions or a lack or inadequacy of domestic remedies, the Court is still needed to ensure effective protection of the basic human rights enshrined in the Convention.

The principle of subsidiarity, however, also concerns the **role of the Court**. The force of the interpretative guidance it gives to states depends on the clarity and consistency of its decisions, whether on admissibility and jurisdiction, substantive provisions, awards of just satisfaction or identification of the need for general measures to prevent continuing or future violations. It is also a necessary prerequisite for fair, quick and full execution of judgments by respondent states. This does not imply a static approach to interpretation. The Convention is a living instrument and its standards have to develop with time in a transparent and predictable way, along with the evolving needs and realities of our societies.

Subsidiarity also means that the Court should not be acting as a fourth instance appellate jurisdiction for decisions of domestic courts. Nor should it be acting as a small claims court for violations of relatively minor consequence for individuals arising from persistent systemic problems.

That said, we must be realistic: for as long as the Court is burdened with such an impossible case load and under such pressure to maximise its judicial output, it will have difficulty in ensuring that all cases are processed quickly, that every decision is fully reasoned or that jurisprudence between sections is perfectly harmonised. As long as domestic authorities fail to apply the Convention correctly, to resolve systemic problems or to provide effective remedies, the Court will find itself obliged to intervene. An international, independent judicial control mechanism simply cannot disappoint the victims of violations or abandon them to their fate. States should consider the extent to which persistent systemic weaknesses at national level contribute to the number of inadmissible applications: for as long as individuals lack faith generally in domestic decision-making processes, they will continue to have hopes, even if misguided, of a better result from the Court.

Together with the States Parties and the Court, the third element of the protection system is the **Committee of Ministers'** role under Article 46 of the Convention in supervising execution of judgments. Of course, the main responsibility is on states to execute the judgments against them under Committee of Ministers' supervision. It is therefore important that they engage with the Committee of Ministers from the outset to ensure that the final result will meet their execution obligations. The sys-

tematic use of action plans and action reports, setting out for the Committee of Ministers the measures states intend to take to execute judgments fully or those measures already taken, respectively, is of great help. The more the judgments themselves are clear in their legal reasoning and explicit as to whether general measures are needed in order to achieve the obligation of result to resolve the violation, the easier the execution process will be.

There is, in fact, a fourth element, which is sometimes overlooked in discussion of the Convention's control mechanism. I refer to the **Secretary General's** power under Article 52 of the Convention to conduct enquiries concerning States Parties' implementation of Convention provisions. As Secretary General, I have taken good note of the calls to make greater use of this power and to focus it on priorities identified by the case law of the Court, the Committee of Ministers' supervision of execution, the Parliamentary Assembly and our other monitoring and co-operation activities. I will examine this further, including the question of human resources necessary for this function. I would also observe that member states should respond in good faith to requests for information made under Article 52 and give effective follow-up to any recommendations the Secretary General may subsequently make.

The Council of Europe expressly appears in the Preamble of the Convention. Our **standard-setting, monitoring and co-operation activities** are essential accompaniments to the work of the Court, helping states to understand and implement the practical consequences of Convention standards and thereby prevent violations, which in turn reduces the need to make applications to the Court. In addition, both soft-law instruments and new conventions are inspired and guided by the Convention and the case law. This relationship is two-way – the Court, in turn, makes frequent reference to the standards and findings of other human rights mechanisms and to the common positions of member states as expressed in legal and political instruments. The Commissioner for Human Rights also plays an important role in promoting human rights and advising national authorities on how better to respect and protect them at national level; under Protocol No. 14, he will have an enhanced possibility to intervene in Court proceedings.

Human rights protection is not only about the Court, it comprises also wider human rights issues and the rule of law. Transferring resources within the Council of Europe budget to the Court may have given some short-term respite to the Court but in the long-term, it is slowly sapping the strength of the Council of Europe in providing systemic, general preventive measures which are vital for a long-term solution to the problems the Court faces today. Severe budgetary constraints have seriously undermined important work on human rights monitoring and bilateral and inter-

governmental co-operation. More generally, there is a clear need for **better resource allocation** within the Council of Europe, to focus much more strongly on promoting and protecting democracy, human rights and the rule of law.

Protecting human rights at the Council of Europe is not just about the Court condemning states for violations, it is about anticipating problems and co-operating in their solution – preferably without the need for the Court’s involvement. This too is a question of subsidiarity, since it is better for states to co-operate with the Council of Europe in resolving their problems than to wait for condemnation – or worse, repeated condemnation – by the Court. Waiting for Court judgments on new issues may not be the best way of addressing new challenges, such as issues arising from the massive development of the Internet. Rather than weakening the Council of Europe, we need to identify how to **reinforce our monitoring and co-operation mechanisms**, and how best to co-ordinate their activities in order to maximise their impact. And beyond the Council of Europe, we need to recognise fully the potential of **co-operation with other actors**, governmental and non-governmental.

**Specific proposals for reform**

It is clear that **profound and wide-ranging reforms** are needed at all levels of the Convention system: a long, difficult and laborious task lies ahead of us. The importance of the Convention system to human rights protection in Europe and the potential consequences of its failure, however, must spur us all to determined, ambitious action.

The Court is now in a **desperate situation**. Its backlog of pending cases has broken the 100 000 barrier. As a result, the Court is no longer able to function as it should, despite its laudable efforts to improve efficiency and internal procedures and the considerable increase in its output of decisions and judgments. Applications are taking much too long to process. The Court is now forced to prioritise its treatment of applications, with repetitive cases – even if manifestly well-founded – being given the lowest priority since the respondent state is, or should be, already well aware of what it must do to resolve them. Judgments in repetitive cases have long been reduced to a few lines, citing previous judgments and determining the award of just satisfaction – little more than an accounting exercise. Most inadmissibility decisions contain less than a bare minimum of reasoning. As a result many applicants or their legal representatives do not understand the decision taken. Moreover, with an output of 30,164 decisions and 1,881 judgments in 2008, it is not surprising that there is increasing difficulty in ensuring consistent interpretation of Convention provisions between the sections of the Court. This situation of massive overload is

intolerable and unworthy of our member states' repeatedly reaffirmed commitment to human rights.

The Convention system needs to be reinvigorated by far **stronger application of subsidiarity** at all levels. To begin with, the Convention should be directly applicable in the practice of national legal systems. The Convention itself may have been incorporated into the legal orders of all our member states but this does not mean that it is fully applied in each of them; in some, incorporation seems largely confined to constitutional theory. Strengthening the structural integration of the Convention into national legal systems and stronger implementation at national level are essential to give proper effect to the principle of subsidiarity and would reinvigorate the entire system. We need to enhance the status of the Court's judgments in the national legal orders; prevent or at least settle repetitive cases at national level; ensure that national courts duly examine Convention arguments; and reinforce co-operation between them and the Strasbourg Court.

Subsidiarity thus requires that the **authority of the Court's case law** should also be reinforced. National authorities should recognise that the Court, when scrutinising whether they have discharged their obligations under the Convention, provides final authoritative interpretation of the rights and freedoms defined in Section I of the Convention and will consider whether they have sufficiently taken into account the principles flowing from its judgments on similar issues, even when they concern other states.\* States should therefore have in place, if possible, an effective structure or mechanism for receiving judgments against them and ensuring that they are fully and promptly executed. They should also ensure as far as possible that systematic consideration is given to the possible effects for their own national legal orders of the interpretative parts of judgments made in relation to other states to avoid being in violation themselves in the future. We need stronger, more systematic and direct co-operation between national and European levels, especially between courts. For this reason I support the idea of allowing the Court to receive requests for advisory opinions and/or preliminary rulings from national courts, especially if it can promote resolution of systemic problems. Domestic laws and practice should be systematically screened for compatibility with the Convention and the Court's case law, including on interpretation, as the Committee of Ministers recommended in 2004.† There is one Convention and one European Court ultimately responsible

\* See *Opuz v. Turkey*, App. No. 33401/02, judgment of 9 June 2009, §163.

† Recommendation Rec (2004) 5 on the verification of the compatibility of draft laws, existing laws and administrative practices with the standards laid down in the ECHR, part of the 2004 reform package that included also Protocol No. 14.

for its interpretation; by giving the greatest possible effect in domestic law and practice to the authority of the Court's case law, states can – and should – anticipate problems and solve them even before the Court is required to act.

The authority of the Court's case law depends in part on the **standing and credibility of the Court** itself, including in the eyes of the judges of the highest national courts whose own decisions may be subject to its scrutiny. Along with independence and impartiality, therefore, it is important also to ensure the highest levels of expertise and relevant experience on the part of the Court's judiciary. Bearing in mind the various Parliamentary Assembly proposals, as well as the 2003 Interights report,\* states should ensure that they have transparent national selection procedures for candidates for election as judge. The criteria for office and election procedures could also be reviewed. In this context, we should examine the idea of a mixed screening panel composed of prominent former high level national or international judges before transmitting the list of candidates to the Parliamentary Assembly for election.

Subsidiarity also requires states to provide **effective domestic remedies** for any arguable complaint of violation. Remedies may come second to the prevention of violations in the order of events, but as a Convention obligation they are no less important. Whether through a general human rights remedy, for instance in the form of a special application procedure, or a system of remedies covering all situations, states still have much to do in this area to help stem the flow of cases to Strasbourg. We already have a Committee of Ministers' recommendation to member states on the improvement of domestic remedies† and will soon have another on effective remedies for excessive length of proceedings (an especially wide-spread and serious problem),‡ but, as the Committee of Ministers recognised after the 2008 Stockholm Colloquy, there is a clear need for more to be done. It should also always be possible to remedy violations at national level by reopening or re-examining cases following Court judgments, as the Committee of Ministers recommended in 2001.\*\*

I am aware that some states claim legal problems with this, but we should all recognise that it represents an excellent way both of restoring the applicant to their orig-

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\* See "Law and Practice of Appointments to the European Court of Human Rights," Interights, May 2003.

† Recommendation Rec (2004) 6 (also part of the 2004 reform package).

‡ See the draft Recommendation and Guide to Good Practice in doc. CDDH (2009) 019 Addendum I.

\*\* Recommendation Rec (2000) 2 on the re-examination or reopening of certain cases at domestic level following judgments of the Court (also part of the 2004 reform package).

inal position (*restitutio in integrum*) and of integrating Court judgments and the principles they contain directly into national legal systems.

As everybody knows, **repetitive cases** arising from **systemic problems** represent a very – excessively – large part of the case load of the Court (and, for that matter, of the Committee of Ministers when it comes to supervising execution). We urgently need new responses to this problem: at national and European levels, in the co-operation between the two and in the co-operation between Council of Europe bodies. One cannot blithely blame the Court if systemic problems remain unresolved for years and years. The Court's innovative pilot judgment and similar procedures represent a very welcome development and should, if at all possible, now be made more transparent and systematic, if necessary by codification in the Convention, or in a future Statute of the Court, the better to ensure their effective operation in future. A system of legally binding preliminary rulings may also have potential to decrease the Court's long-term case load, whether in addition to or instead of advisory opinions to national courts.

We should also investigate other possibilities, however, even such controversial proposals such as those by which the Court would transmit, without any further judicial decision, repetitive applications to the Committee of Ministers to be addressed in the context of supervision of execution of the preceding judgments. I cannot overemphasise the seriousness of the problem of repetitive applications, not only for the Court and the Committee of Ministers but also for the national authorities and individuals affected; we should not turn away, without careful study and reflection, from any response that might prove effective.

Repetitive cases may make up a large part of the admissible applications but perhaps the biggest problem facing the Court is how to deal with the 90% or so of applications that are clearly **inadmissible**, for one reason or another. Many solutions have been suggested to this problem, and much further discussion will be necessary to decide on the best one. But whatever the system, someone, somewhere, will eventually have to rule on the admissibility of each application. Since at present this falls to the Court's judges, they have a duty to ensure that it is done as efficiently as possible – however that may be, so long as it respects the generally accepted minimum procedural standards. I would strongly encourage the Court to consider, as a short-term measure, possibilities for introducing a system of rotation amongst judges for filtering tasks, which may also represent part of the long-term solution. I would also like to suggest pursuing the idea that in certain types of cases decisions are delegated to legal secretaries under the control of the judges.

As regards future solutions, we recognise that there will be **budgetary constraints**. This may pose problems for a system involving additional judges. It may also have implications for the future role of the current judges. What will be the division of tasks between the current judges and those dealing with the 90% of inadmissible applications and/or the repetitive cases that make up over 50% of judgments? What will be the resource implications?

Part of the problem in finding long-term solutions to the problem, however, is that there is no clear **information on its causes**, on the reasons why people make inadmissible applications. Are they ignorant of the admissibility criteria or ill-advised? Have they seen news of high awards to successful applicants and decided to try their luck? Does the lack of an application fee make them think they have nothing to lose, even if their chances are slim? Or are they simply desperate for a fair hearing, to see justice be done? Another question concerns the Court: is there a perfect balance between the relative capacities of the Registry and the judges, or is there a bottle-neck somewhere? Do we need more decision-makers to keep up with the preparatory work done by lawyers, or more lawyers to allow the judges to fulfil their potential? As Secretary General, I will play my part in seeking clear answers to such questions.

As regards the reasons for inadmissible applications and measures that may help to reduce them, I note with interest the positive results of the Warsaw Pilot Project, whereby a part-time lawyer, trained and financed by the Registry and based at the Council of Europe Information Office in Warsaw, provided information to potential applicants. Providing objective **information to potential applicants** about what the Convention system can and cannot offer them may indeed reduce the proportion of "hopeless" applications introduced before the Court. I propose to investigate ways to continue this project and extend it to other countries, whether through Council of Europe Information Offices or independent national human rights structures such as Ombudsmen, or both.

We should soon have information on the first results of the **new single judge and three-judge committee procedures** for manifestly ill-founded and repetitive cases, as foreseen by Protocol No. 14 and already introduced with respect to a rapidly growing number of states under the Madrid Agreement on provisional application of certain provisions of Protocol No. 14 and under Protocol No. 14*bis*. These new procedures will do much to improve the Court's case-processing capacity, and are essential now to keep the Court's head above water, but it was never expected that they would be enough by themselves in the long run, and they may need to be supplemented by other approaches as component parts of a new mechanism. Of

course, we all hope to know by the time of the Interlaken Conference exactly when Protocol No. 14 as a whole will be entering into force. The delay in this happening, however, means that we cannot wait longer before reflecting on additional measures.

I have mentioned several **Committee of Ministers' Recommendations** to member states. These instruments exist and we do not necessarily need to repeat or supplement them all. As part of the post-Interlaken process, therefore, we must decide how best to review, whether at national level or in co-operation with the Council of Europe, member states' implementation of the various recommendations adopted.

In recent years, there has been undefined talk of the Court becoming a "Constitutional Court." Although this has not yet led to any sort of agreement, let alone results, it has not been helpful. The Convention is not intended to be a "European constitution" and it is difficult to see how the Court could become like any existing national constitutional court. At the same time, I would like to recall that, ten years ago, the Declaration adopted by the European Ministerial Conference on Human Rights held in Rome to mark the 50<sup>th</sup> anniversary of the Convention already reaffirmed that "the Convention must continue to play a central role as a **constitutional instrument of European public order** on which the democratic stability of the Continent depends."

There is no reason, however, why – as part of the Court's ongoing development and consistent with the principle of subsidiarity – its procedures should not begin to reflect the high levels of domestic protection available in some member states. The **Convention's procedures should become more flexible**: in some situations, it will be essential that the Court continue to deliver individual justice; in others, the Court's role may be to give guidance to national courts and authorities. Such an approach is already reflected in Protocol No. 14's new admissibility criterion, by which cases of insignificant disadvantage may be rejected *only on the condition* that they have been duly considered by a domestic tribunal. We need to create an upward dynamic: if states have "got their house in order," either generally or in the specific field at issue, there should be the possibility for the Court and the Committee of Ministers to interact with them differently than were this not to be the case.

At present, the Court's basic operating procedures are contained in the Convention itself, meaning that any reform of them requires an amending protocol, with the years of negotiation and drafting within the Council of Europe and ratification by national authorities that a protocol implies before a reform can enter into force. This seems unnecessarily onerous, never mind horrendously inefficient, for matters that have little if any direct bearing on the situation of applicants. We should con-

sider whether it might be possible to **simplify the amendment procedure** for the provisions relating to Court procedure that are now found in the Convention, so that in future they could be revised by a decision of the Committee of Ministers on the proposal of the Court. One suggested approach would involve a Statute for the Court, which is certainly a possibility, but there are others which should also be considered.

Any future strategy for reforming the Court and the Convention system must also address the **execution mechanism** established by Article 46, a key provision of the Convention. In this respect, I would recall paragraph 16 of the explanatory report of Protocol No. 14: "Execution of the Court's judgments is an integral part of the Convention system. [...] The Court's authority and the system's credibility both depend to a large extent on the effectiveness of this process."

We would all agree that the Committee of Ministers' supervision must lead to the adoption and implementation of concrete measures aimed at ensuring that the Courts judgments do not become void but rather remain effective. My hope is that the Interlaken Conference will seize the opportunity for a thorough and constructive **reflection** on the execution process, based on the day-to-day experience of the Committee of Ministers and comprehending the roles of all actors involved.

We should design a specific **road map** dedicated to the execution process, with enhanced roles for all concerned, reflecting the need for:

- The Court to support the execution process with judgments that are clear as to their content, their scope and the origins of violations. There should be no room for ambiguity regarding the need to adopt measures to remedy the violations.
- The Committee of Ministers to continue to act as the political body by which the Parties collectively exercise supervision over the enforcement of judgments, in particular in order to overcome any reluctance by member states to abide by the Court's findings.
- The respondent states to abide by their obligations under Article 46 and consider that the Court's judgments constitute not only an obligation but above all an opportunity to improve their domestic system and to prevent similar violations. The existence of an efficient domestic capacity for rapid execution of the Court's judgments, in accordance with the relevant Recommendation (2008)2, is crucial in that respect.

As already noted, repetitive applications resulting from major **systemic problems** continue to overburden the Court and the Committee of Ministers and are thus putting the whole control mechanism at risk. Despite these bodies' efforts to address the problem, urgent additional measures are needed.

The "pilot judgment," "quasi pilot judgment" and "Article 46 judgment" procedures have certainly been the most innovative methods of handling repetitive applications, due to an interaction between the Court and the Committee of Ministers that introduced a new dynamic to the entire process. A **systemisation** of this experience prior to and further to the pronouncing of a judgment would probably offer the most efficient solution to the handling of those cases.

The Committee of Ministers has amassed an impressive body of experience and practice in promptly identifying systemic problems. In this connection, the replies given by respondent states at the execution stage can be indicative of a systemic problem that the Committee of Ministers may then signal to the Court. The Court could then very rapidly decide whether it would be appropriate to implement the pilot judgment procedure in support of the execution process. Should it then initiate the procedure, the Court would have the benefit from the outset of a comprehensive overview of the extent of the problem and of the real progress or obstacles existing at national level.

In such circumstances and in order to allow the Committee of Ministers to react promptly, the Court could systematically signal the judgment to the Committee of Ministers, in accordance with Resolution (2004) 3. The early or even immediate adoption by the latter of an interim resolution would call the attention of the national decision makers and other national instances to the priority that should be given to resolution of the systemic problem. Furthermore, the Committee of Ministers would be able to offer early advice and support for taking the appropriate action. Technical co-operation activities *in situ* – targeted on execution of the pilot judgment – could quickly be launched to assist the state concerned in the elaboration of a specific action plan.

The time is also ripe for the Committee of Ministers to adjust its **working methods and rules for supervision** to the present realities and challenges, without, however, reducing the effectiveness of its supervisory function. Cumbersome administrative procedures should be replaced by more flexible methods, enabling it to focus its precious meeting time on cases requiring collective input. Unless specific problems arise, it could then leave more aspects of the execution process to the respondent states, with the assistance of the Department for the Execution, in the framework of the current practice concerning action plans and reports.

The execution process must be connected to the real world: it cannot function effectively in an ivory tower. **Synergies** with all national and international actors concerned are crucial and should be regulated in the Committee of Ministers' rules and working methods.

We must also bear in mind that the **resources** available to the Department for the Execution of Judgments must be adequate for the Committee of Ministers' effective exercise of its functions under Article 46.

Finally, I must also mention one major development which should soon present itself regardless of the Interlaken Conference but which adds a further dimension to our efforts to strengthen the Convention system: the **accession of the European Union** to the Convention. The legal basis established by the Lisbon Treaty and, when it comes into force, Protocol No. 14, will need to be supplemented by more detailed arrangements. Intergovernmental discussion has recently started within the Council of Europe's Steering Committee for Human Rights, which is preparing itself to proceed with this work, together with the EU and in co-operation with the Court. I will ensure that the necessary services and resources are available to complete this important task as quickly as possible, once the necessary preconditions are met.

## **Parliamentary Assembly (21 January 2010)\***

**Committee on Legal Affairs and Human Rights, Parliamentary Assembly of the Council of Europe: “The future of the Strasbourg Court and enforcement of ECHR standards: reflections on the Interlaken process”**

**Conclusions of the Chairperson, Mrs Herta Däubler-Gmelin,  
of the hearing held in Paris on 16 December 2009**

These conclusions are presented under four distinct headings, to reflect the manner in which the hearing was organised, even though such a sub-division is somewhat artificial. The conclusions are not a *verbatim record* or a detailed overview of all issues raised at the hearing. Instead, I have decided to focus on what I perceive to be the most important points raised in discussions (and in documents made available to Committee members).

## **The context: Interlaken conference to be held on 18-19 February 2010**

Why did I propose to the Committee a hearing on this subject? There were two reasons for this. It struck me as rather odd that the Assembly had not been involved in any of the substantive discussions or in meetings leading up to the conference. Also, it appeared to me that the title of the conference – *The future of the European Court of Human Rights* – was too narrowly circumscribed, suggesting that

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\* Date of publication of the English version. The French version is dated 20 January 2010.

problems facing the Court should be our primary concern. Our hearing dispelled this misunderstanding: the conference must also urgently address domestic (non-)implementation of Convention standards and determine how best to ensure prompt and full compliance with Strasbourg Court judgments – as our best hope to help stem the flood of applications submerging the Court.

When circulating the draft Interlaken Declaration, the Swiss authorities specified that the declaration should pursue three objectives: (i) reaffirm a commitment to the ECHR system (including the right of individual application), (ii) express support for the Strasbourg Court to act autonomously in its initiatives to increase its own efficiency, and (iii) put on track in-depth reform to guarantee the long-term efficiency of the system of individual complaint. This Declaration, together with an eight-point Action Plan, is presently the object of consultations with member states.\* But how, and exactly upon whose authority, and in whose name, have these priorities been established and would they be implemented? I note, in this connection that – as yet – the potentially key role of national legislative organs and of the Assembly is not alluded to.

The Swiss authorities must be commended for their initiative. But do member states, at ministerial level, have the courage to “bite the bullet” to confront the real human rights issues and problems facing member states and the Council of Europe? We are all fully aware that:

- the Strasbourg Court is not equipped to deal with large scale abuses of human rights (why has the Committee of Ministers not made vigorous use of its 1994 Declaration on Compliance with Commitments?; *ditto* the Assembly, in refocusing its monitoring priorities?);
- a number of the Court's main “clients” have made no serious effort to put into effect the 2000- 2004 reform package (will ministers take upon themselves the responsibility to ‘name and shame’ states that have put into jeopardy the existence of the ECHR system?), and
- considering that the Court is financed through the Council of Europe's budget, state contributions are totally inadequate, not to say pathetic (several states' contributions to the Council

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\* Draft text available on the Committee of Ministers' Chairmanship website, <http://www.interlakenconf.admin.ch/>.

of Europe's budget do not even cover – or only barely – the salary of a single judge on the Court!)

## **The authority and effectiveness of the ECHR: need for a renewed impetus**

The authority of the Strasbourg Court is contingent on the stature of judges and the quality and coherence of the Court's case-law, which certain states have put into question. The most eminent jurists in member states with relevant experience should be encouraged to leave flourishing national careers, preferably in their late 40s, 50s and early 60s, to serve in Strasbourg. When national selection procedures are inadequate, the Assembly's hands are tied; often candidates are good, but not outstanding. If the findings of the Strasbourg Court are to be recognised as authoritative by their peers at the domestic level, the Assembly must be in a position to elect top quality judges.

The sheer volume of applications needing attention in Strasbourg has led to unacceptable delays which prevent judges from concentrating on their principal judicial task in dealing with cases that merit priority consideration. In this sense, quality and effectiveness are jeopardised by workload. The Strasbourg Court's Registrar provided us with alarming statistics. By the end of 2009, the Court will have received almost 57 000 new applications, an increase of 14%. On the side of output, the Court will have rendered judgment in more than 2 000 cases, an increase of more than 20% compared to 2008. But the backlog has reached almost 120 000, with a deficit of 1 800 applications every month. When analysing the Court's problems, we were informed that a small number of states dominate the Strasbourg Court's backlog: Russia represents nearly 28%, Turkey 11%, Ukraine 8.6% and Romania 8.3%. These four states together represent roughly 57% of the backlog. If one takes the ten high case-count states, the backlog comes to 77% (adding Italy, Poland, Georgia, Moldova, Slovenia and Serbia). Indeed, in 2008, 86% of the Court's judgments (1 543 in total) concerned just 12 states.

Another factor to be taken into account is the very high number of repetitive applications before the Court, deriving from the same structural problems at the domestic level, some of which have remained unresolved for many years. Over half of the judgments concern repetitive applications. The registrar estimated that there are probably about 20 000 such cases in the Court's backlog. In 2008 70% of the Court's judgments concerned breaches of the Convention in repetitive or clone cases.

To these statistics can be added information about late (and non-) execution of Strasbourg Court judgments. The number of cases pending before the Committee of Ministers at the end of 2000 was 2 298, while the equivalent figure for 2009 was 8 614, of which 80% concern repetitive cases. This too, is unacceptable.

Simply put, the Convention system in Strasbourg is in danger of asphyxiation:

- it is impossible for the Court to render justice to all individuals (as recognised by the existence of committee and single-judge procedures, a “fig-leaf” that maintains the legal fiction of a judicial determination of all applications);
- it is totally absurd for the Court and its staff to waste time and effort in dealing with repetitive applications (surely old democracies, like Italy, not to mention more recent “persistent defaulters” such as Moldova, Poland, Romania, Russia and Ukraine, ought to be subjected to “aggravated”, if not “punitive” or “exemplary”, damages);
- failure of many states to provide appropriate effect to their Convention obligations, haphazard implementation of the 2000-2004 reform package and unacceptable delays in full execution of Strasbourg Court judgments (what prevents national parliaments and the Assembly from summoning ministers to account for this at “hearings” in full view of the media, and for the Committee of Ministers to bring “infringement proceedings” against recalcitrant states with respect to non-execution?)

The root causes of the Court’s workload and increasing backlog have to be eliminated. All meritorious cases, even if mostly repetitive, must be dealt with by the Strasbourg Court. There are no easy solutions, and in this respect reference can be made to ideas mooted, in particular, in the CDDH Opinion and by the Secretary General in their contributions to the Interlaken Conference. But should we embark, already now, on yet another major (internal) reform of the Strasbourg Court? Is there an imperative necessity to create within the Court an additional judicial filtering body, as advocated by the German authorities and others? Why cannot this be done by a “*chambre des requêtes*” composed of (a rotating pool of) existing judges? Could not such work be undertaken by *ad litem* judges taken from within the Court’s registry and/or states’ judicial *corps*? Should we not wait to see how the “pilot judgment” procedure develops? And what about the introduction of the system of “*astreintes*” (a fine for delay in performance of a legal obligation) to be

imposed on states that persistently fail to comply with Court judgments (see Assembly Opinion No. 251 (2004), paragraph 5)? Could one not consider, for example, the utility of imposing a small court fee to discourage potentially hopeless applications being addressed to Strasbourg?

There exist no miracle solutions to the difficulties confronting the Strasbourg Court if we are to maintain its dual role of ensuring common European human rights standards and individual supervision and adjudication. Tinkering with such controversial issues as the compulsory use of the Court's official languages or compulsory representation by a lawyer might simply divert precious time and energy from other essential work.

## **The authority and effectiveness of the ECHR: need for prompt and full implementation of the Court's judgments; the authority and effectiveness of the ECHR at the national level: stemming the flood of applications**

These two subjects were dealt with together at the hearing; both touch upon issues in relation to which we parliamentarians – in our dual capacity as national legislators and members of the Assembly – have a crucial role to play. They also concern the “principle of subsidiarity”, in that states have primary responsibility to prevent human rights violations and to remedy them when they occur.

National parliaments can and should ensure the compatibility of draft laws, existing legislation and administrative practice with Convention standards, and in particular possess “specific mechanisms and procedures for effective parliamentary oversight of the implementation of the Court's judgments on the basis of regular reports by the responsible ministries” (Assembly Resolution 1516 (2006), paragraph 22.1). For present purposes suffice to recall work we have been undertaking on this subject since 2000, the hearing we had in November 2009 on “parliamentary scrutiny of ECHR standards” (highlighting the effectiveness of parliamentary procedures in the United Kingdom and in the Netherlands), and the fact that too few parliaments have, to date, set up appropriate oversight mechanisms to ensure the rapid and effective implementation of Strasbourg Court judgments.

The Strasbourg supervisory mechanism is “subsidiary” in nature. States are responsible for the effective implementation of the Convention and it is the shared duty of all state organs (the executive, the courts and the legislature) to prevent or remedy human rights violations at the national level. This is principally, but not exclu-

sively, the responsibility of the judiciary. Hence the logic of putting into place an effective human rights complaints mechanism at the national level, which would diminish the risk of the Strasbourg Court acting as a fourth instance appellate jurisdiction. Witness the small amount of complaints, comparatively speaking, that reach the Strasbourg Court from Spain and Germany. Appropriate domestic remedies, intensive training of lawyers, prosecutors and judges, the creation of a human rights culture and the impregnation of the Strasbourg *acquis* within national state structures – especially with respect to the “big sinners” (see above, page 51 *ff*) – would help stem the flood of applications to the Court. Thus, well-functioning national human rights protection mechanisms might make superfluous the idea of creating a separate filtering body within the Strasbourg Court and shift back primary responsibility to national legal systems, where it belongs.

One subject of particular significance, discussed at the hearing, was the need to enhance the authority and direct application of the Strasbourg Court’s findings in domestic law. Rather than refer to the *erga omnes* effect of Grand Chamber judgments of principle, it is probably more accurate to refer to its interpretative authority (*res interpretata*) within the legal orders of states other than the respondent state in a given case. Here, I have in mind the United Kingdom’s 1998 Human Rights Act, Section 2 §1 of which specifies that national courts “must take into account” Strasbourg Court judgments, and Article 17 of Ukrainian Law No.3477-IV of 2006, which reads: “Courts shall apply the Convention [ECHR] and the case-law of the [Strasbourg] Court as a source of law”. This subject merits special attention in Interlaken.

The Council of Europe and its member states must do their utmost to solve a number of – often very serious – human rights problems in a handful of recalcitrant states. Rather than concentrate time, energy and money on reform (primarily) within the Court, is it not better to await, as proposed by the Group of Wise Persons in 2006, the effects of Protocol No. 14 (which is to improve the Court’s efficiency by 25%), and place greater emphasis on the implementation of the 2000-2004 reform package? I believe that I reflect the majority view of the Committee when citing the CDDH position on this subject:

In order to ensure the long-term effectiveness of the Convention system, **the principle of subsidiarity must be fully operational**. This should be the central aim of the Interlaken Conference (CDDH Opinion, §9, my emphasis).

As this is my last contribution to the work of the Parliamentary Assembly, I allow myself one final observation, namely the need for the rapid accession of the Euro-

pean Union to the European Convention on Human Rights. This would guarantee a coherent Europe-wide system of human-rights protection, reinforce legal certainty and provide greater protection of individuals' rights. The Treaty of Lisbon assures a legal basis for EU accession, and the imminent entry into force of Protocol No. 14 to the Convention will provide the legal basis on the Strasbourg side.

Then, rather than enter into an institutional agreement – entailing many years of negotiation –, a “memorandum of understanding” could be quite quickly agreed between the EU and ECHR states parties by mid-2010, and accession foreseen soon afterwards (with practical details as to the participation of the EU in the Convention system being settled separately in parallel). If we are not inventive in deciding how best to deal with EU accession to the Convention, we will be confronted with the prospect of a long, protracted process of 47 individual ratifications on the Council of Europe side.





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